Irene Gomez-Bethke Papers.

Version 3
August 20, 2018

STATE OF MINNESOTA
SPANISH SPEAKING AFFAIRS COUNCIL
504 Rice Street
ST. PAUL, MN 55103
296-9587

May 19, 1980

Greetings:

Good evening, buenas noches, My name is Irene Gomez de Bethke and I'm the vice-chairperson of the Spanish Speaking Affairs Council, which advises the governor and the legislature on the nature of the issues and disabilities confronting Spanish-speaking people in this state, including the unique problems encountered by Spanish-speaking migrant agricultural workers.

The Council also advises the Governor and the legislature on statutes or rules necessary to insure Spanish-speaking people access to benefits and services provided to people in this state and recommends legislation designed to improve the economic and social conditions of this community.

The Council believes that a bilingual education program is critical to the needs of the Hispanic community because:

- it is a demonstrated method of successfully permitting a student to become proficient in English,
- permits the student to develop a positive self-image about himself/herself, and
- allows non-minority children to better understand the uniqueness of being bilingual.

Because of our strong belief in the need for bilingual education the Council played a key role in obtaining $3,450,000 (three million four hundred and fifty thousand dollars) from the state legislature this year. This allocation was based on a proven need for bilingual education. The Department of Education's Needs Assessment Survey clearly indicates that bilingual education programs are not only necessary, but also extremely beneficial. Since funds are now available, we believe that districts have an obligation to develop and or continue programs so that Limited English Proficiency Students have an adequate and viable education. Please rest assured that Minnesota's Hispanic community has played a leadership role in the development of these bilingual/ESL programs and because of our interest and concern, we do not expect to sit in the sidelines and allow you to neglect or ignore our needs. We will continue demanding that this school district meet its obligation of properly educating our students.

Thank you.

Today's Education : Journal of the NEA, Jan-Feb '75

The Court Speaks Out

In the *Lau* v. *Nichols* decision, a year ago this month, the U.S. Supreme Court unanimously held the failure of the San Francisco school district to provide for the special educational needs of nearly 1,800 non-English-speaking students of Chinese descent to be a violation of Title VI of the Civil Rights Act of 1964.

The Court ruled that San Francisco must either overcome language barriers for students not receiving compensatory help or be threatened with the loss of its federal financial assistance. It based its determination on the provisions of the 1964 Civil Rights Act, which bans discrimination because of color, race, or national origin in any activity receiving federal funds and on regulations promulgated by HEW, the agency authorized to conduct compliance reviews of federally aided school systems.

"It seems obvious," the Court emphasized, "that the Chinese-speaking minority receives less benefits than the English-speaking majority from . . . [the] school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the Regulations."

Federal courts have been more receptive to ruling on violations of federal statutes such as the 1964 Civil Rights Act than to dealing with the constitutional question of denial of "equal protection of the laws." In a "friend of the court" brief, NEA and the California Teachers Association, arguing on the equal protection issue, had urged the Court to compel provision of compensatory English language training.

The HEW Office of Civil Rights, which conducts reviews of school districts for compliance with Title VI, found in 1970 that students from other cultures who have English-language deficiencies were often denied equal access to educational programs.

In a 1970 memorandum, the OCR stated: "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

The *Lau* decision, however, did not mandate a specific program or plan; in fact, the Court remanded the question of how barriers are to be overcome to the federal court and to the San Francisco school system. Possible plans might include teaching English to non-English-speaking students and holding classes in Chinese, Spanish, and Tagalog (the national language of some Filipinos).

Last spring the San Francisco school board hired a consulting firm to develop a plan that would be consistent with the *Lau* decision and with the views of a task force consisting of members of the community, including those of Spanish-speaking, Japanese, Chinese, and Filipino ancestry. The plan had to deal with such issues as employment of teachers who speak languages of the community, instruction in Japanese culture and heritage for Japanese students who already speak English, and the teaching of English as a second language.

While the school board in San Francisco was deliberating on implementing the *Lau* decision, other favorable court rulings on the bilingual/bicultural issue were handed down in a school desegregation suit in Denver and in cases similar to *Lau* in Portales, New Mexico, and New York City.

Last spring, in the Denver school desegregation case, *Keyes* v. *School District No. 1*, a federal court called for instituting a bilingual/bicultural program in elementary and secondary schools with large Chicano populations.

The court urged adoption of a plan prepared by José Cárdenas for the Denver public schools. His plan encourages the use of bilingual and bicultural programs to enable children from other cultures to make an effective transition to use of the English language. Cárdenas has identified characteristics of minority students—poverty; mobility; and alien culture, language, and societal perceptions—which impede their success in instructional programs designed for white, middle-class, English-speaking students and has suggested that the school program and the characteristics of such a child be made more compatible.

Thus, in the context of ordering school desegregation as a tool for availing all children of the

"opportunity" for an education, the court emphasized that Denver's schools "be responsive to the educational needs of minority Black and Chicano students as well as those of the majority Anglos."

During the summer, the U.S. Court of Appeals for the Tenth Circuit (Denver) upheld a trial court's ruling that Spanish-surnamed students in the Portales, New Mexico, school system have a right under Title VI of the 1964 Civil Rights Act to bilingual education.

The appeal court thus buttressed the lower court's finding of discrimination in the system's failure (a) to provide bilingual instruction that recognizes the special needs of Mexican American students; (b) to employ Spanish-surnamed teachers, including those teaching the Spanish language until 1970, or any administrators of Mexican American origin; (c) to structure a curriculum reflective of the historical contributions of persons of Mexican and Spanish descent to New Mexico or the United States or otherwise reflective of the special language needs of Portales' Spanish-surnamed children.

The remedial plan originally proposed by the lower court called for a bilingual program for some 40 preschool children and 30 minutes of Spanish instruction daily for some 150 students in grades 1-4; Spanish-surnamed personnel in these programs; a Spanish-surnamed teacher to help junior high students experiencing difficulties in the language arts; a course in ethnic studies in the high school; and an effort to obtain state bilingual education funds.

Evidence at the trial court level revealed that Portales' Spanish-surnamed students do not reach the achievement levels attained by their Anglo peers and that as the disparities increase, so do attendance and school drop-out rates. One expert witness testified that children who find their culture, language, or ethnic group rejected in school become withdrawn; another told the court that students who are not achieving often demonstrate both academic and emotional disorders.

Last August, in *Aspira of New York, Inc.* v. *Board of Education of the City of New York, et al.*, the Board signed a consent decree in federal court whereby it agreed to work with Puerto Rican groups to implement a bilingual education program. The decision in this case echoes the concern of *Lau* that non-English-speaking children be provided with educational programs in which they can effectively participate and learn. Bilingual programs are being offered in pilot schools this winter, and a full program must be implemented by September 1975 for students who need such programs.

The consent decree calls for (a) systematic identification and classification of Spanish-speaking and Spanish-surnamed children who can learn more effectively in Spanish in terms of their reading, speaking, writing, and comprehension ability in English and Spanish; (b) provision of bilingual educational programs including intensive instruction in English; instruction in mathematics, science, and social studies in Spanish; and reading instruction in Spanish.

The decree, however, stresses that "students receiving instruction will spend maximum time with other children so as to avoid isolation and segregation from their peers." Additionally, the program "shall avoid negative stereotypes of members of any ethnic or racial group and shall positively reflect, where appropriate, the culture of the children within the Program." Furthermore, training programs for staff must be sensitive to the cultural diversity of the students.

The question of adequate staffing is also addressed in *Aspira.* Faculty in the bilingual program "shall be" fluent in written and spoken Spanish and English, as well as in educational techniques. To meet these staffing needs, the board must retrain teachers to become fluent in a second language and also implement an affirmative action program to recruit bilingual personnel from within the City and elsewhere.

In recent years, the courts have frequently been used to advance the quality of education provided for linguistically and culturally distinct students. In 1970, for example, a federal court in California challenged placement of such children in classes for the educable mentally retarded and required the state to test all children whose native language is not English and to retest all children currently in classes for the retarded.

Now that the courts have spoken out so emphatically on schools' obligations under Title VI, it is up to administrators, teachers, parents, students, and community groups to ensure that bilingual/bicultural programs are effectively implemented.

—**Betty E. Sinowitz,** *special assistant, DuShane Emergency Fund, NEA Teacher Rights.*

"The principal wants to rap with ya."

WHY CHICANOS DROP OUT:

(Reproduced from a series of articles on bilingual bicultural education published by the San Francisco EXAMINER the last week in May, 1974.)

By Dexter Waugh

Providing basic English skills to San Francisco students who don't speak English is not only necessary in light of the U.S. Supreme Court's Lau (vs. Nichols) decision--it is vital to the Spanish-speaking students, who have had the highest drop-out rate in The City over the past three years.

Manuel Ramirez III, a child psychologist at the University of California at Riverside, suggests that the drop-out rate is so high because the school system has viewed Chicano culture as inferior.

"Institutional practices based on the assimilationist melting pot philosophy disregard the individual's experience in his home and in his barrio," Ramirez wrote in the March, 1973, issue of Social Science Quarterly.

"Instead of reinforcing and utilizing the culturally unique learning and communication styles of members of minority groups, educational institutions have chosen to ignore them and have attempted to impose styles of their own choosing."

Most Chicano students have different ways of learning than most white students, says Ramirez. And since white teachers were once students, they tend to teach the way they learned. This works well for white students, badly for Chicanos. Ramirez points to the drop-out rate as proof.

Students from the traditional Chicano culture, for example, learn quickest and easiest when a subject is presented within a familiar context.

Non-Chicanos are much more adept at grasping a subject when it is presented objectively---divorced from everything else around it. They do better on tests.

Surveys involving 53 teachers and 711 students in the Los Angeles area supported this view.

Further differences, Ramirez noted, are that "the Chicano child is encouraged to be responsible and independent, aggressive and assertive, as long as he is achieving for the family and/or protecting it.

"While the middle class Anglo is typically encouraged to establish and identify independent of the family, the Chicano from a traditional community is encouraged to always view himself as an integral part of the family. He is reared in an atmosphere which emphasizes the importance of interpersonal relationships."

The Chicano child is "more sensitive to the human element in the environment," precisely because of his Chicano upbringing, Ramirez said.

"The primary reason for failure of educational institutions to fulfill the needs of the majority of Mexican-Americans," he said, "is that they are not sensitive to the cognitive learning styles of these peoples."

Elmer Gallegos, supervisor of the Spanish Bilingual Program in the San Francisco school district, gave a graphic example of this.

Gallegos said a teacher at Marshall School here "made an interesting observation while testing new pupils from regular and bilingual classes in other schools. Latino children from regular classes were seen as serious, less confident, and hesitant to approach the teacher to ask questions. On the other hand, Latino children from bilingual bicultural classes appeared confident, happy, and felt free to ask questions during the test in both languages."

Ironically enough, the greatest push for bilingual bicultural education has come from Chicanos outside of San Francisco, although the nation is eagerly awaiting to see how San Francisco implements the Lau decision, because it will presumably set a precedent.

The Spanish bilingual bicultural classes here, however, have done well, according to reports from independent evaluators. Last year, bilingual fourth graders in the ESEA Title VII federally funded program outperformed other students who speak only English or only Spanish. Further, all of the fourth graders in the bilingual program including those with Spanish surnames performed better in English than in Spanish.

This year's crop of fourth graders in the bilingual program have performed even better.

Nationally, the story is the same. Here are just a few evaluation reports of other

REFERENCE PAPER - HILL SPONSORED
BILINGUAL-BICULTURAL DISCUSSION

PROVIDED BY
SAM HERNANDEZ
URBAN AFFAIRS OFFICE
ST. PAUL PUBLIC SCHOOLS

IRENE GOMEZ-BETHKE
4649 DECATUR AVE NO
NEW HOPE MN 55428

RECORDED BENEFITS GAINED FROM SOME ON-GOING BILINGUAL PROGRAMS

Attached is a list of the bilingual programs and affiliated research literature. The following are some of the recorded benefits these programs and research personnel feel are natural outcomes of bilingual education. Some concerns are also recorded.

TESTING

31, 32

1. Without adequate culture-fair tests, the IQ of the bilingual child cannot be accurately determined.
2. Most tests currently used for measures of bilingual acheivement are measures of environmental factors rather than mental abilities. (George Sanchez; Raymond Cottrell)
3. All phases of the individual (psychologically, academically, and socially) are interdependent.
   a. Academic learning abilities are hard to further if a poor psychological outlook is present
   b. These variables can influence the sense of security of a child
   c. These variables can hinder the social outlook to the child's peers and student-teacher relationships.

ACADEMIC GROWTH

4. By the 5th grade level (since academic knowledge was already learned and proven to be equal if not greater than English-speaking children) language was not a handicap and bilingual background become an asset. (Jack Kittell)
5. By the end of the 5th grade, both English dominant and non-English dominant 5th grade students had equal language skills and academic achievement. All indicators pointed toward a non-dropping future for the students. And, OVER AND ABOVE ALL THIS: They all had the added advantage of being able to speak in two languages and think well of and respect more than one culture.

BRIDGE-TRANS-FER OF EXPERIENCE

2, 13, 27, 28

29, 36, 45

6. If the child has mastered the basic concepts in his first language, he can then apply this knowledge to thesecond language as he matures. (Uriel Weinreich)

SELF-CONCEPT
SELF-IDENTITY
PRIDE

9, 10, 11, 35

36 (part of)

37, 38b, 40

41, 42, 43

7. Self-concept for the bilingual child improves. (Rosa Inclan)
   a. The child is not faced with just a set of unknowns (new language, culture, environment, ambient, etc.) but is asked to look at them along with his set of "knowns." His "set" is looked as equal.
   b. Self-concept is imperative for success in any instructional program.
   c. When a child's own language and culture are superseded, his sense of security is invaded and every following adverse incident reinforces his feeling that it is detrimental to be different since those differences makes him not as good as those in the greater society. A deterioration of self-concept is inevitable.
   d. The earlier a child is exposed to positive language experiences, positive self-concepts, and pride in one's culture and respect for other cultures; the better the chance for a successful school and learning experience.
8. Bilingual bicultural education is best when it is sequential and constant.
   a. Sporadic classes in native language and culture can be just as bad as no classes of this type at all.
   b. Sporadicness of any type tends to reinforce the sensitivity that tokenism is something he is destined to.

9. The self-concept of a child must be constantly supported, encouraged and kept alive. Bilingual bicultural education does this.
10. Children who participate in one of these programs are more likely to exhibit positive attitudes towards Spanish (their first or second language) and other Spanish-speaking individuals. Bilingual bicultural education is an asset and a tool to/for desegration/integration.
11. The children end up having more pride in their culture and heritage. (Robert Polizer and Arnolfo Ramirez)
12. Spanish properly used can be a gridge to the learning of English instead of an obstacle. (NEA Tucson Survey, 1966)
13. Using the native language as a bridge can also mean the success of a teaching method.
14. The student who is given the ambient to speak his own native language as well as English also comes to accept and appreciate two or more cultures equally as well as the people who promote those cultures.

ROLE OF TEACHER 19, 34

15. It seems that it is the educators who need the education in how a bilingual bicultural student can contribute to a more open and varied society. (Theodore Anderrson)

ACADEMIC ASSETS 20, 21

16. A non-English dominant child, in trying to deal with English and the culture therin, has to muster all of his resources. He tends to become more keen and more alert than the monolingual child. By the same token, if he backs off from the challenge, for whatever reason he does, he tends to become more docile and beaten than the monolingual English-speaking child.
17. Too often, a child who is trying to deal with his own language and culture as well as English and its culture is called "culturally deprived." A greater truism is that he is probably bilingually bi culturally blessed - and that the system is depraved of a method and attitude to deal with his assets. (Sam Hernandez)

HUMAN, ECONOMIC RESOURCES 44

18. Language and culture, regardless of its origin, are human resources whose extinction are not to be taken lightly. (Sam Hernandez)
19. The most important part of any bilingual bicultural program is the attitude of the educators. It is not enough for one to merely know what cross cultural understanding is. One must feel it in order to know what it is. (Theodore Anderrson)
20. Each program, no matter how consistant and flawless the design, must consider a small degree or large degree of variability due to individual teacher differences - or indifferences. (Sam Hernandez)
21. It is the attitude of the educator which sets the tone for the children, the parents and all others involved.

STATISTICS 25

22. The 1970 Census reveals that between the ages of 3 and 18 (Public school attending age), there are over 7 million children who speak a language other than English in the home.
23. Current statistics show that of our total 200-plus million U.S. population, 10% of that population - or over 20 million - are native speakers of a language other than English. (US Dept of Justice, Immigration & Naturalization Svs, Annual Rpt. 1967).
24. Spanish is the second most common language in the United States. The U.S. has the 5th largest Spanish-speaking population in the American (Western) Hemisphere. There are probably up to 17 million Latino-heritage people in the U.S. 42,000 Mexicans enter legally into the U.S. annually. 800,000 Mexicans are caught for illegal entry annually. Up to 3 times that amount (or 2,400,000) are not caught! (NBC Report, 1975)

25. There are over 27 other-than-English major languages spoken in the United States (Spanish, German, French, Portuguese, Italian, Chinese, Japanese, Filipino, Navajo, Ojibwa, etc.). (Office of Bilingual Ed, DHEW, 1974)

CULTURAL PLURALISM 39,45

26. A Bilingual bicultural approach to education contributes to a more open and varied society, with full and equal participation for all groups. (Vera P. John & Vivian M. Horner).

27. The child's native language (if he knows it) should be used as a medium of learning and problem solving. If a second thus weaker language is introduced as the only medium of learning,
   a. the ordering cognitive process is confused
   b. deteriation in reading, arithmetic problem solving and general school achievement results (John & Horner)

28. Once the child has learned to master concepts in his first language he can apply this knowledge to a second language.

29. The understanding and acquisition of a second language can further extend intellectual skills (John & Horner)

INVOLVEMENT 33

30. Parental and community involvement and support is imperative to the success of a bilingual bicultural program. Ethnic minority parents who never before involved themselves with the school now do so with a greater purpose.

31. By 3rd grade, students learning bilingually and students learning unilingually in a controlled study were testing equally (scoring alike); but by 5th grade, bilinguals were testing higher than the unilinguals. (Jack Kittel).
   a. Children who came from a bilingual environment apparently had verbal intelligence and potential reading abilities that were superior to those of unilingual children.
   b. Bilingual home and school environments seemed to become an asset instead of a handicap at fifth grade level.
   c. In the primary grades handicaps of bilingual environments might affect performance on verbal intelligence and reading tests, but that same bilingual environment becomes an asset in the intermediate grades.

32. Bilingual programs are not only as effective as a regular traditional school curriculum in achieving progress for English-speaking and non-English speaking children, but more importantly, the children participating make impressive gains in learning a second language and academic achievement within that language. (Rosa Inclan, Dade County, Maimi, Florida, 1964).

33. Positive school and community attitude and outlook towards the non-English-speaking population will accelerate assimiliation.

34. A key variable in bilingual education is the role of the teacher. Willingness, knowledge, attitude and teacher-pupil interactions can mean success or failure to any program, no matter what the other variables. (Peter D'Arrigo, Bilingual Program, Haverstraw, New York).

35. Minority parents responded that their children had greater pride in their culture and greater self-esteem as a result of the program. Barbara Bortin, Bilingual Education, Milwaukee Public Schools).

36. The theory and design of these programs encompasses academic skills, self-concept, pride in the mother tongue, and the acquisition of a new language. (NEA Tucson Survey).

37. Up to now, the biggest problem facing these Latino children had been that of developing a favorable self-concept and an outlook of self-esteem. These programs changed that. (Thomas Horn).

a. Spanish had been considered a symbol of low social status.
b. Schools totally ignoring the first language of the non-English dominant child reject much of what the child is.
c. A program that effectively integrates language acquisition, academic learning experiences and development of a satisfying self-concept is one that would not only account for success in school but possibly success in later life as well.

CRITICISM: ANTI-MELTING POT

(38) Education is misdirected when it strives for perfection solely through competition and when it strives towards a false ideal of sameness among American school students. (Anthony Pasquariello).
a. Bilingual programs maintain a student's heritage and culture to not strip him of his self-image.
b. A child cannot learn academic subjects unless he first has respect for himself. Respect cannot come from forced sameness.
c. Linguistic and cultural differences, given free reign, will eventually enrich our lives.

39. Bilingual education "orchestrates" two languages and cultures rather than assimilate and integrate them. (Rogers and Rangel).
a. Children need to know about their own culture and heritage as well as those of their adopted country and how these two cultures harmonize. (Rogers & Rangel. The Juan Morel Campos Bilingual Center in Chicago).
b. Cultural exchanges are of utmost importance.

40. The earlier a child is exposed to positive mother tongue and English language experiences, positive self-concept, pride in one's culture and respect for other cultures the better the chances are for successful school and learning background; and the smaller will be his range of racism, prejudice and biases. (Theodore Anderrson).

41. Language and culture are intimately bound together and can be separated only at the cost of loss of self identity (Anderrson).

42. Living with the culture of the family within a strange new culture can cause retardation in social security and language development. As such problems intensify, the child's propensity toward disiplinary problems increase and his ability to get along with peers and teachers decreases. He comes to be ashame of his family for the language and culture they gave him. (Sister M. Timothy).

43. Bilingual children need to have instilled in them a sense of prestige and accomplishment in knowing more than one language. (Sister Timothy).

44. Bilingualism can be a definite asset in later years and students should be made aware of it.

45. Bilingual bicultural education develops basic language skills, creates direct contact among children of different cultural backgrounds and creates positive behavioral changes due to positive self-concepts of both groups involved: (Martha Acosta, the Bilingual Readiness Program, New York City Public Schools).

- S. J. Hernandez

SELECTED BIBLIOGRAPHY

1. Acosta, Martha. " Materials Developed by the Bilingual Project." 1967 Yearbook. New York Society for the Experimental Study of Education. 1967. pp. 30-32

2. Anderrson, Theodore. "Teaching Cross-Cultural Understanding." St. Louis Missouri.: ERIC Document Service Reproduction, ED 067-956, April 22, 1972

3. Anderrson, Theodore, and Boyer, Mildred. Bilingual Schooling in the United States. 2 vols. Washington, D. C. U.S. Government Printing Office. 1970

4. Arsenian, Seth. Bilingualism and Mental Development. New York: 1937

5. Bortin, Barbara E. Evaluation Report. 1969-1970. Milwaukee Public Schools: Wisconsin. Milwaukee, Wisconsin: ERIC Document Reproduction Service, ED 043-708, August, 1970.

6. Broman, Betty L. " The Spanish Speaking Five Year Old." Childhood Education, 48 (April, 1972) pp.362-364

7. Caplan, Stanley W., and Ruble, Ronald E. " A Study of Culturally Imposed Factors on School Achievement in a Metropolitan Area." The Journal of Educational Research 58 (September, 1964) pp. 16-23

8. Cattrell, Raymond. " A Culture Free Intelligince Test." Journal of Educational Psychology 31 (March, 1940) pp. 161-179

9. Ching, Doris C." Methods for the Bilingual Child." Elementary English 42 (January, 1965) pp. 22-25

10. Cottrell, Mildred C. Bilingual Education in San Juan County, Utah. A Cross Cultural Emphasis. New York: ERIC Document Reproduction Service,ED 047-855, February, 1971

11. D'Arrigo, Peter." Variables and Instructional Arrangements for the Non-English Speaking Child in the School Program." Elementary English44 (March;1972) pp. 405-409

12. Decker, Mary. " From Si to Yes." Elementary English 42 (January, 1965) pp.35-37

12. Finocchiaro, Mary. " Experiment in Teaching of Spanish in theFirst Grade." 1967 Yearbook. New York Society for the Study of Education 1967 pp.27-32

13. Fishman, Joshua. " Attitudes and Beliefs about Spanish and English among Puerto Ricans." Viewpoints 47 (March 1971) pp. 51-73

14. Goodman, Lillian. " Juan's Right to Read." American Education 6 (1970) pp. 30-34

15. Guerra, Manuel H. " Educating Chicano Youths and Children." Phi Delta Kappan 53 (January 1972) pp. 313-314

16. Heath, Louis G. Red, Brown and Black Demands for a Better Education. Philadelphia: Westminster Press, 1972

17. Horn, Thomas. " Three Methods of Developing Reading Readiness in Spanish Speaking Children in First Grade." Reading Teacher 20 (October 1966) pp. 38-43

18. Inclan, Rosa G. "Can Bilingual Bicultural Education be the Answer?" Educational Horizons 50 (Summer 1972) pp. 172-176

19. The National Education Association- Tucson Survey on the Teaching of Spanish to the Spanish Speaking. The Invisible Minority. Deptartment of Rural Education, National Education Association, 1966

20. John, Vera P, and Horner, Vivian M. Early Childhood Bilingual Education. New York: The Modern Language ASsociation of America, 1971

21. Kittell, Jack. " Intelligence Test Performance of Children from Bilingual Environments." Elementary School Journal 64 (November 1963) pp. 76-83

22. McNamara, John, and Kellaghan, T.P. " Reading in a Second Language." in Improving Reading Throughout the World, ed: Marion D. Jenkinson pp. 108-119 Newark, Delaware.: International Reading Ass. 1969

23. Pasquariello, Anthony. A Cause in Search of Understanding and Leadership: Bilingual and Bicultural Education. New York: ERIC Document Reproduction Service, ED073-730, December 30, 1972

24. Peal, Elizabeth, and Lambert, Wallace E. The Relationship of Bilingualism to Mental Development. Washington D.C: American Psychological Association, 1962

25. Pitner, Rudolf, and Arsenian, Seth. " The Relations of Bilingualism to Verbal Intelligence and School Achievement." Journal of Educational Psychology 31 (1937) pp. 255-263

26. Polizer, Robert L., and Ramirez, Arnolfo. Judging Personality from Speech: A Pilot Study of the Effects of Bilingual Education on Attitudes Towards Ethnic Groups. California: ERIC Document Reproduction Service, ED 078-878, February 1973

27. Postman Neil, and Weingartner, Charles. Teaching as a Subversive Activity. Delacorte Publishers, 1969 pp. 5

28. Rodgers, Ron, and Rangel, Diego. " Learning for Two Worlds." American EDucation November, 1972 pp. 28-33

29. Rothfarb, Sylvia H. Second Language Learning in Bilingual Communities. California: ERIC Document Reproduction Service, ED 046-309, December 1970

30. Saer, D.J. " The Effect of Bilingualism on Intelligence." British Journal of Psychology 14 (1923) pp. 28-38

31. Sanchez, George. " Group Differences in Spanish Speaking Children." Journal of Applied Psychology 16 (October 1932) pp. 549-558

32. Sepulveda, Betty. " The Language Barrier and its Effect on Learning." Elementary Ehlish 50 (February 1973) pp. 209-217

33. Severo, Gomez. " Bilingual Education in Texas." Educational Leadership. 28 (April 1971) pp.757-763

34. Tireman L.S. Teaching Spanish Speaking Children New Mexico: University of New Mexico Press, 1948

35. Tucker, G.R., and D'Anglejan, Alison. "-Some Thoughts Concerning Bilingual Education Programs." Modern Language Journal 55 (May 1971) pp. 491-493

36. United States Department of Justice, Immigration and Naturalization Service. Annual Report 1967 p. 61

37. United States Office of Civil Rights. The Directory of Public Elementary and Secondary Schools. Fall 1968-1970

38. Weinreich, Uriel. Languages in Contact. The Hague: Mouton and Co. 1968

39. Wasserman, Paul and Susan. " No Hablo Ingles." Elementary English October 1972 pp. 832-836

40. Yarborough, Ralph Senator . Hearings Before the Special Senate Subcommittee on Bilingual Education . Washington D.C: May, 1967

41. Zirkel, Perry Alan. " Two Languages Spoken Here." Grade Teacher April, 1971 . pp. 36-39

BILINGUAL

QUALITY BILINGUAL EDUCATION THROUGH LAU?

The Supreme Court's decision in *Lau* v. *Nichols*, _____ *U.S.* _____, *94 S. Ct. 786 (1974)* has been widely greeted by advocates of bilingual-bicultural education as a landmark in the effort to secure equal educational opportunity for non-English speaking minority children. However, as indicated in the note on *Lau* in *Inequality in Education*, #16, March 1974 (p.58), the Court's opinion was narrowly drawn. It left unanswered some practical questions which are essential if quality bilingual-bicultural education is to become a reality.

The *Lau* decision rested on section 601 and section 602 of the Civil Rights Act of 1964 and the HEW regulations promulgated under that section. Thus, on the narrowest construction, the decision stands simply for the proposition that the HEW guidelines involved were "entitled to great weight" as the consistent and reasonable interpretation of the department charged with administering Title VI. And while Title VI does provide a weapon for plaintiff-litigants, the limitations on relief through the statute could have been avoided had the Court ruled on the Equal Protection claim.

Administration and interpretation of the Civil Rights Act of 1964 has, from its inception, been subject to the bureaucratic and political winds which blow at HEW. Actual enforcement of Title VI through hearings and cut-offs has been the exception, negotiation seemingly endless. *See,* for instance, *Adams v. Richardson,* 480 F.2d 1159 (D.C. Cir. 1973). *Lau* v. *Nichols* does make clear at the Supreme Court level that individual plaintiffs may sue to enforce the provisions of Title VI without waiting for HEW to act. On the other hand, to the extent that the definition of discrimination for Title VI purposes is whatever HEW says

it is, then one must always be looking over its shoulder to make certain that standards are not changing. In view of its strong support for the regulations involved in *Lau* (the United States advanced the Title VI argument in the Supreme Court), it seems very unlikely that HEW could or would backtrack on the position that school districts must "take affirmative steps to rectify [the] language deficiency," 35 Fed. Reg. 11595 (1970). However, lawyers who seek to apply Title VI to new situations, extending the current interpretations of the regulations, or who desire a friendly court appearance by HEW may be disappointed by the difficulty of obtaining swift and progressive decision-making by the agency.

One reading of *Lau* may provide help in dealing with some aspects of this problem. The HEW regulations upheld by the Court were of two varieties: broadly worded regulations which amplified the ban on discrimination in the use of federal funds found in Title VI, and an interpretive guideline specifically requiring affirmative steps to correct language deficiencies of non-English speaking students. The Court first quoted from the more general language of 45 C.F.R. sec. 80.3(b)(1), 80.5(b) and 80.3(b)(2). For instance, sec. 80.3(b)(1) says that recipients of federal aid may not "restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program," nor may it "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination," 80.3(b)(2). The Court concluded that it " . . . seems obvious that the Chinese-speaking minority receives less benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the Regulations." The court then describes the 1970 HEW guidelines which specifically require affirmative language programs, 35 Fed. Reg. 11595. The opinion can be read as applying the broad anti-discrimination language of sec. 80.3 ff. directly to the fact situation of a large number of non-English speaking children being functionally excluded from educational benefits. On this reading the more specific 1970 clarifying guideline material would not be essential to the decision and thus it may be possible to press claims of discrimination which are as yet uncovered by specific HEW guidelines. Support for this reading can be found in the separate opinion of Mr. Justice Stewart, concurring in the result, who views the 1970 guidelines as central to a finding of discrimination.

Beyond the question of what kinds of discriminatory activity are reached by Title VI lies the harder issue of relief. Title VI prohibits discrimination in federally assisted programs. It does not, of course, require a local school district to participate in these programs. Some districts, particularly small rural districts which have a large number of non-English speaking children and receive a small amount of federal funds, may decide (on cost or ideological grounds) to forego federal funds rather than institute a language program. Since the most likely source of federal money in such districts is the Elementary and Secondary Education Act's Title I or Title I Migrant programs, the effect of a decision to give up federal funding would be to deprive poor children of whatever meager benefits they are already getting from these programs. A second possibility is that such districts will simply rewrite their Title I applications to make correction of language problems a goal of their Title I programs. This would raise the critical and difficult question of the quality of programs required by *Lau*.

In larger districts (such as the San Francisco district), the threat of a loss of federal funds is likely to be a greater inducement for the initiation of programs. Even here one should be careful to argue that poor and minority students are not the only ones to suffer the loss of federal funds when a school district is found to be practicing discrimination in its school program. In *Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969), the Court seemed to limit the cut-off power of HEW to specific federal grants infected with prohibited discrimination rather than to all federal funds received by the offending school district. Although the issue of *which* federal funds may be cut-off was never presented in *Lau*, it would seem that the exclusion of non-English speaking children from basic educational benefits must necessarily limit the ability of such children to participate in all phases of public school life in their district. The Fifth Circuit in *Taylor County* did indicate that "[t]o say that a program in a school is free from discrimination

because everyone in the school is at liberty to partake of its benefits may or may not be a tenable position," *supra,* 1079. The burden should be on school districts to show that the discrimination found in one federal program could have no effect on the participation of minority students in other federally assisted programs.

The problem of relief is not confined to the cut-off issue. Hopefully most school districts will comply with *Lau* rather than lose federal funding. The real question is what kinds of language programs will be required under *Lau.* Unfortunately the decision itself is of little help. The Court specifically eschews requiring any particular type of program, stating that "[p]etitioner asks only that the Board of Education be directed to apply its expertise to the problem and rectify the situation." For many minority students the application of such "expertise" will yield programs which have little to do with *quality* bilingual-bicultural education. Since decades of discrimination (including failure to provide language instruction) have resulted in a disproportionately low number of available minority teachers, many districts will not be in a position to institute meaningful programs. Furthermore, unrealistic certification qualifications also operate to exclude potential minority teachers. The result, if districts are to rely on their existing teaching staffs to provide special language programs, may be a giant hoax on non-English speaking children. From the lawyer's perspective, however, that hoax may be virtually unassailable in court.

For example, suppose a district adopts a program entitled "Language Difficulty Correction Program" which centers on a few of its Anglo teachers receiving some extra training at a local teachers' college. Suppose further that the district is able to write a program description in suitable educational jargon and obtain the services of some "educators" who will testify that this is a bona fide program to help non-English speaking children. It is not certain that such a program would fall short of the *Lau* requirements and it is highly likely that most judges will not want to rule on what constitutes the best method of teaching non-English speaking children. Indeed the question of teaching methodology is one which courts have always sought to avoid. Thus advocates of bilingual-bicultural education may want to have a firm idea as to what kinds of programs they can secure from a local district before they move forward and demand relief under *Lau.* (It is possible, of course, that HEW may issue further interpretative guidelines which specifically require teaching of all courses in the child's home language. Interested persons might do well to write the Office for Civil Rights and urge the adoption of strong requlations on this question.)

Finally, *Lau* may provide some direction for other kinds of education cases in its use of state education statutes and policies as relevant to a finding of unequal treatment. The Court reviewed the California statutes which mandated proficiency in English as state policy and concluded that: "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." Undoubtedly other acts of discrimination may be cast in terms of effective foreclosure from the purposes of the state's education statutes and policies and use of such state materials may be helpful in obtaining relief under Title VI.

S. J. Hernandez

B-I L I N G U A L B I C U L T U R A L E D U C A T I O N

Multilingualism and multiculturalism as a living reality is as old as time. But, as an educational program to serve special needs to those expecting to gain more effective participation in school - it is as new as now. The fact that Minnesota is about to enter into this educational service area with the St.Paul Public Schools as the entry district brings about the need for this report on the topic.

Bilingual education is the teaching of all or part of general curriculum in two languages, one of them being English. History and the times have confirmed that speaking a language different than English is an individual difference and that therein lies a responsibility in public education to incorporate special services to meet and deal with that difference so that eventually the individual can "effectively participate" in the total educational process. The natural rights of man, the Constitution and the civil rights of man affirm that though it may be of circumstance for a person to be speaking a language other than English or live by a culture different than the Anglicized one -- it is his right to do so, be it by circumstance or choice. It is his right to choose to maintain a different-than-English language or culture so long as he also tries to learn English and respect its commensurate culture. Educational services for this need are yet to be equal.

Culture is looked at as being an equal part of bilingualism. Culture cannot be separated from language for culture is the base and essence of an individual's native identity and language is the means by which it is promoted.

Following are some historical rational and legal support for bilingual and bicultural education. Part of the dilemma of the historical exclusion of Third World People from mainstream society due to racism and the ramifications of such a practice is presented. Some of the governmental and legal acts, decisions and titles embracing, assisting and/or funding bilingual bicultural education are generally clarified. Finally, bilingual bicultural education is defined as to what is and what is not.

Rational and Legal Support for Bilingual Bicultural Education

Individual Differences

From its very inception, American education took the charge and obligation of teaching in such a way as to take into account the individual differences of each individual.

All individual differences are respected. A child may be different because he is a genius, physically handicapped, emotionally disturbed, slow learner, fast learner, hyper-active, etc. He may also be different because he is monolingual in a language other than English, alingual in that he may not be able to deal academically in any language although he may speak one or more of them, or he may be non-English dominant in that he may speak, read and/or write or "effectively participate" in a language other than English.

Cultural difference is also generally part and parcel in the life style of a child who is non-English dominant. We must come to look at a non-English dominant student as a person with a special "individual difference" calling for special services in order to equalize his educational opportunities.

Freedom and Right of Choice

People came to America from across the seas to escape religious, racial, social and economic persecution. One of the inalienable rights promoted and held dearly by these people was their right and freedom to chose a lifestyle with living ingredients as they saw fit so long as those choices did not infringe on, hinder or threaten the life, limb and liberty of others. Thus, many chose to maintain their own language and culture. The 1970 Census shows that there are over 7 million people between the ages of 3 and 18 who speak a language other than English in the home. The millions beyond age 18 are not recorded, but they are a substantial by-passed population. In regards to the Native American and the Mexican American, their choice of maintaining their language and culture is a natural outcome of their "Americanism" of the highest order. The Native Americans of North America were here in the part of America that is now the United States for thousands of years before the Virginia colony and the landing at Plymouth Rock. It is a travesty that in our seeking for a place for our freedoms we took away theirs. The Aztec peoples lived in parts of the land that is now part of the U.S. Southwest hundreds of years before they went south into what is now Mexico City - the city of Tenochtitlan that eventually was taken over by Cortes and the Spanish Conquest. They spoke Nahuatl, the first language of the Mexican people. Spanish came to their second language as English came to be to most of the U.S. population. In 1521, Ponce de Leon came in with the Spanish language to Florida, 86 years before the English beachhead in Virginia (1607). By 1540, 67 years before the Virginia colony and 80 years before the Plymouth Colony (1620), Coronado brought Spanish into the area that is now the U.S. Southwest. It was not until about 1820 that Anglos began to settle in Tejas (Texas), later to surge further West in following the Gold Rush of the 1840's. This means that Spanish was the dominant language of what is now close to half of the U.S. for about 300 years before the coming of English. In other words, the Southwest spoke Spanish for 300 years and has spoken English for only about 134 years!

There is no way that we are a melted pot, monolingual monocultural society. To endorse this reality thus means for education to gear toward the mulitlingual multicultural needs of our dynamic society.

Any group has the right to retain its language and culture, so long as it also takes opportunities to learn English. This means that time should be made available in school for the monolingual child to become bilingual and that the educational program content take into account his/her special needs so that he/she may "effectively participate" through equal opportunity in education; that to do otherwise would be discrimination in that by intent or oversight he/she would be excluded from equal protection rights of the Constitution. How open and equal have all opportunities been available to all ethnic groups?

The Dilemma of Historical Exclusion of Third World People

Racism and prejudice have played a major role in excluding Third World People from mainstream society.* Historical acts and attempts to deal with them like the following are but few of the many actions and reactions which confirm the presence of this cloud:

- The elimination practices of the Spanish Inquisition on the Aztecs
- The breaking of the many of the Indian and Mexican treaties
- The internment of the Native Americans into reservations (concentration camps)
- Slavery and the Jim Crow laws
- The Emmancipation Proclamation
- The KKK (Ku Klux Klan)
- Periodic Civil Rights Acts
- The Chinese Exclusion Act
- Voting laws
- World War II internment of the Japanese Americans in concentration camps
- The 1954 Court decision making segregation illegal: Brown vs Board of Education, (II) 349 U.S. 294 (1955)
- Title VI from the Office of Civil Rights on equal educational opportuniti
- Title IV of the Civil Rights Act on desegregation
- A Watergate lawyer calling a U.S. senator a "Jap"
- Joint Chiefs of Staff General George S. Brown inferring that the "Jewish influence" in Congress and elsewhere is detrimental to mainstream America
- Etc.

These social, educational and economic barriers which create a monumental disparity toward equitable entry into mainstream society forces those pressured by it to "revert onto themselves"; to close their own ranks and find solace in ethnic enclaves which too often become ghettos and barrios. Once isolated, they logically strengthen their own mother langauge and culture and become less prepared to compete in English. Hate growing from wars and rigid quotas on immigration of some of the Third World People were factors that caused their main flow to the U.S. to occur after the Industrial Revolution; after the main brunt of Continental Europeans of white stock melted into the pot. Thus, historically, they are now, in many cases, just processing toward assimilation. Bilingual bicultural education would greatly assist them.

Governmental and Legal Acts, Titles and Decisions Embracing, Assisting, and/or Funding Bilingual Bicultural Education

Following are some of the major change agents in this category promoting and bringing about the support and implementation of bilingual bicultural education:

---

*Because of special inequities to certain ethnic minorities, the Civil Rights Office determined that said minorities would be the Black, Asian-American, Native-American and the Spanish-Speaking. This is what Third World People means in this report.

BREAKING THE LANGUAGE BARRIER: THE RIGHT TO BILINGUAL EDUCATION*

*Erica Black Grubb***

> These . . . children are not separated from their English-speaking classmates by . . . walls of brick and mortar, but [by] the language barrier . . . .[1]

Decisions in the field of education have frequently paced the expansion of judicial protection for human rights through this century. The rights of blacks under the equal protection clause, for example, had long been governed by an 1896 case concerning segregated public transportation. In that case the Supreme Court rejected the proposition that "the enforced separation of the two races stamps the colored race with a badge of inferiority,"[2] and declined to rule that de jure segregation denied equal protection of the law. Cases broadening the concept of equal educational opportunity reversed this failure to recognize social and economic realities in equal protection decisions.[3] In addition, application of the due process clause has grown increasingly sensitive to societal barriers confronting the individual, and here too the Court has paid special attention to the impact of educational institutions on children.[4] As early as 1923, it struck down a restriction on the teaching of modern foreign languages as an infringement of the liberty "to acquire useful knowledge."[5] The Court's sensitivity to social conditions in the schoolhouse has been followed and reinforced by concern over the consequences of state activities for disadvantaged citizens in other areas.[6]

---

*As this Article went to press, the appellate decision in the *Lau v. Nichols* case—discussed at pp. 58–60 *infra*—was reversed by the Supreme Court and the case was remanded for the fashioning of appropriate relief. 42 U.S.L.W. 4165 (U.S. Jan. 22, 1974). The Court relied solely on the statutory grounds discussed at pp. 62–63 *infra*, and it gave no indication of what remedy is required or how it is to be enforced—by termination of funding or otherwise.

**Trial Attorney, Equal Employment Opportunity Commission—Regional Litigation Center in San Francisco; A.B. Radcliffe College, 1969; J.D. Harvard Law School, 1973.

[1] Lau v. Nichols, 483 F.2d 805, 806 (9th Cir. 1973) (Hufstedler, J., dissenting from denial of rehearing en banc).

[2] Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

[3] *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (racially separate schools are inherently unequal); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (required separation by race within classroom, library, and cafeteria is impermissible).

[4] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (religion); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (speech); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (liberty to direct the upbringing and education of children).

[5] Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *see* p. 88 *infra*.

[6] *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (due process requires waiving court fees for indigent plaintiffs seeking divorce); Miranda v. Arizona, 384 U.S. 436 (1966)

This Article will advance the view that as a result of these developments constitutional doctrine now requires schools to provide instruction in the native tongue of non-English speaking children until they have learned English. It will be argued that equality of educational opportunity—and hence equal protection—does not exist when the instruction provided by the state is incomprehensible to identifiable groups of children, and that to compel attendance under these conditions is a deprivation of liberty without due process of law. Before these two constitutional issues are dealt with in Parts IV and V, the factual and legal background of the problem will be discussed in Part I, and the statutory and state constitutional provisions lending support for affirmative judicial action will be reviewed in Parts II and III.

I. FACTUAL AND LEGAL BACKGROUND

A. The Consequences of English-only Education

Over five million school-age children in this country come from non-English speaking homes.[7] Yet according to the United States Office of Education, only 112,000 (2.2 percent) of them are receiving assistance in learning English through bilingual programs.[8] The rest are thrust into

(a person held in custody must be effectively advised of the privilege against self-incrimination); Griffin v. Illinois, 351 U.S. 12 (1956) (equal protection requires waiving fee for trial transcript necessary to appeal). *But see* United States v. Kras, 409 U.S. 434 (1973) (bankruptcy fee provisions deny indigents neither due process nor equal protection).

[7] Office of Education, U.S. Dep't of HEW, Draft: Five Year Plan 1972–77: Bilingual Education Programs, App. B, Aug. 24, 1971. *See also* Wall St. J., Dec. 15, 1972, at 1, col. 1.

[8] Only 217 bilingual projects were funded for fiscal year 1972 under Title VII of the Elementary and Secondary Education Act of 1965 (ESEA). 20 U.S.C. §§ 880b—880b-4 (1970), *as amended,* 20 U.S.C.A. §§ 880b-1, 880b-3a, 880b-4 (Pocket Part 1973). They reached about one out of every forty pupils needing such instruction and meeting the legislative criteria. Office of Education, U.S. Dep't of HEW, ESEA Title VII Project Summary, at 1, Sept. 1972 (by state and project location, giving 1972 grant award and cumulative total) (unpublished report, made available by Margaret Van Naersson, Program Officer, Division of Bilingual Education, U.S. Office of Education). Title VII grants to local school systems amounted to $33.1 million in 1972 and the cumulative funding from 1969 through 1972 was $86.3 million. Twenty-nine states and four territories conduct bilingual classes under the aegis of Title VII. *Id. passim.*

Despite the apparent generosity of legislative appropriations, it should be noted that most bilingual instruction is offered in small, scattered pilot programs. In three states—Arizona, Colorado, and New Mexico—less than one percent of the Mexican-American student population participate in bilingual programs; in neighboring California and Texas, the figures are 1.7 percent and 5.0 percent respectively. U.S. Comm'n on Civil Rights, *The*

classrooms where they cannot absorb the lessons or assimilate the most basic of skills.[9]

That non-English speaking children cannot derive educational benefits from incomprehensible instruction is apparent from the statistical results of a study made in the Southwest. Almost 16 percent of the Mexican-American pupils surveyed repeated first grade in 1969. The same study revealed that only 6 percent of Anglo students and 8.9 percent of blacks repeated this grade. Grade repetition figures for fourth grade were 3.4 percent for Mexican-Americans, 1.6 percent for Anglos, and 1.8 percent for blacks.[10] Predictably, a much greater proportion of Chicano pupils were two or more years overage for their grades than were Anglos or blacks. Of the total number of Chicanos, 3.5 percent were overage in first grade, 6.9 percent in fourth, 9.4 percent in eighth, and 5.5 percent in twelfth. The comparable figures for black students were 1.2 percent in the first grade, 1.8 percent in fourth, 2.1 percent in eighth, and 4.4 percent in twelfth; and for Anglo students the statistics were 0.8 percent in first grade, 1.0 percent in fourth, 1.2 percent in eighth, and 1.4 percent in twelfth.[11] Dropout rates demonstrate that public schools

---

Excluded Student, REPORT III, MEXICAN AMERICAN EDUCATION STUDY 22 (May 1972) [hereinafter cited as REPORT III]. Some money from Title I (ESEA), 20 U.S.C. § 241a (1970), *as amended*, 20 U.S.C.A. § 241a (Pocket Part 1973), state appropriations, and the Bureau of Indian Affairs also reaches bilingual programs. Telephone interview with Ronald Hall, Specialist in the Dep't of Compensatory Education, Office of Education, U.S. Dep't of HEW, Jan. 4, 1973. However, as a result of decentralized decision-making, the United States Office of Education has no overall data on the amount of funding from these sources. The one exception is Title I funding of projects for migrant children, since that program is administered from Washington, D.C. For an overview and evaluation of the Title I Migrant Program with a suggested statute for reform, see Comment, *Strengthening the Title I Migrant Education Program*, 10 HARV. J. LEGIS. 41 (1972). Although $1.6 billion in Title I appropriations go to over 14,000 school districts each year, Title I officials concede that the "true" bilingual projects are funded under Title VII. Title I funds either supplement Title VII projects or facilitate programs of lesser scope. Telephone interview with Ronald Hall, *supra*.

[9] Despite legislative encouragement of programs for non-English speaking students, a recent survey by the United States Commission on Civil Rights showed that unenlightened attitudes persist among school officials in the Southwest. REPORT III, *supra* note 8. It provided evidence, for example, that the use of Spanish in class or on school premises is substantially discouraged and sometimes officially prohibited. *Id.* at 14–16. *See also* Kobrick, *A Model Act Providing for Transitional Bilingual Education Programs in Public Schools*, 9 HARV. J. LEGIS. 260, 264 (1972) [hereinafter cited as Kobrick]. As recently as October of 1970, a Texas high school teacher was indicted for conducting his class in Spanish. REPORT III, *supra* note 8, at 82. Most districts rely on less stringent means to enforce "No-Spanish" rules. *Id.* at 18.

[10] U.S. Comm'n on Civil Rights, *The Unfinished Education*, REPORT II, MEXICAN AMERICAN EDUCATION STUDY 35 (Oct. 1971).

[11] *Id.* at 37.

have less holding power for Chicanos than for the other two groups. Of all Mexican-American pupils, 9 percent dropped out by eighth grade, and 40 percent by twelfth grade; the figures for blacks were 1.5 percent and 33 percent respectively.[12] Similar patterns exist for non-English speaking ethnic groups outside the Southwest.[13]

These problems of poor performance and non-attendance[14] are not attributable solely to the language barrier, but there is an interrelationship between that hurdle and other disadvantages faced by non-English speaking children. A uniform characteristic of such children is "self-derogation," and its correlation with low school achievement makes it difficult to distinguish between causes and effects.[15] The conventional wisdom has been summed up as follows:

> Growing up in a family that has inherited the cycles of poverty, living in an environment that includes failure, being rejected by society, and being confronted with his

[12] *Id.* at 11.

[13] In New York City, 170,000 Spanish-speaking children—predominantly Puerto Rican—attend public schools. Nine out of ten possess reading skills well below their grade level, and six out of ten who enter high school drop out before graduation. Yet only 4,000 currently participate in bilingual programs. Wall St. J., Dec. 15, 1972, at 1, col. 1. *See also* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 2, Aspira, Inc. v. Board of Educ., No. 72 Civ. 4002 MEF (S.D.N.Y., filed Sept. 20, 1972), *motion to dismiss denied*, 58 F.R.D. 62 (S.D.N.Y. 1973). Other estimates of the number of Puerto Rican children in New York City public schools are larger. For example, Kobrick estimated the number at 250,000. Kobrick, *supra* note 9, at 261.

Similar statistics obtain for San Francisco's Chinese-speaking population. Lau v. Nichols, Civil No. C-70, 627 LHB (N.D. Cal., May 26, 1970), *aff'd*, 483 F.2d 791 (9th Cir.), *rehearing en banc denied*, 483 F.2d 805, *cert. granted*, 93 S. Ct. 2786 (1973). Although a 1969 survey by school officials estimated that 2,856 Chinese-speaking pupils needed special instruction in English, defendants admitted that two-thirds of them did not receive it. The others—supposedly getting "bilingual" instruction—either received "English as a Second Language" instruction, *see* pp. 56–57 *infra*, or instruction by untrained classroom teachers, parents, or volunteers for an hour a day. Plaintiffs' Memorandum of Law in Support of a Preliminary Injunction at 3, 15, Lau v. Nichols, Civil No. C-70, 627 LHB (N.D. Cal., May 26, 1970).

For an article on all phases of Indian education, see Rosenfelt, *Indian School and Community Control*, 25 STAN. L. REV. 489 (1973) [hereinafter cited as Rosenfelt].

[14] It is important to realize that thousands of non-English speaking youngsters never attend school. The figures are extremely difficult to collect. Door-to-door canvassing of individual households is necessary, and this method is feasible only for small samples. In one such survey it was discovered that sixty-five percent of the Spanish-speaking children in a ten-block area of Boston had never even registered. Kobrick, *supra* note 9, at 261. The situation is particularly serious in areas with large numbers of migrant workers, where local school officials, parents, and employers have an interest in putting children to work. The Title I Migrant Education Program has alleviated some problems. *See* note 8 *supra*.

[15] T. Carter, MEXICAN AMERICANS IN SCHOOL: A HISTORY OF EDUCATIONAL NEGLECT 53 (1970) [hereinafter cited as Carter].

> own inadequacies in the school—in other words, possessing all the "bad things" of our society—the disadvantaged pupil learns to look upon himself with contempt. Furthermore, his negative attitude of himself is continually reinforced.[16]

The language barrier in school is one strong reinforcing element, for "[i]f . . . the all-powerful school . . . rejects the mother-tongue of an entire group of children, it can be expected to affect seriously and adversely those children's concept of their parents, their homes, and of themselves."[17]

"Bilingual" education programs are a response to this dismal record. In this approach, a child who speaks little or no English starts learning in the language he knows best. Instruction in English gradually increases until the child masters both languages.[18]

The rationale of bilingual education is threefold. Its minimum contribution is ensuring that the children learn the subject matter being taught. More importantly, it facilitates the teaching of *English* so that instruction may ultimately proceed in that language. Linguistic anthropologists have known for many years that children reared in one linguistic environment who learn to read in their native tongue first subsequently do better work in a second language than those who must cope with it immediately upon entering school.[19] Finally, bilingual teaching is considered by educational theorists as "a means toward the development of a harmonious and positive self-image."[20] It thus helps to preserve the children's sense of self-worth and prevent destruction of their interest in schooling at the outset.

It is important to emphasize the inadequacy of the most frequently posed alternative to bilingual education: English as a Second Language (ESL). ESL relies on instruction in English for all but a few hours per week and is ineffective because it fails to utilize ability or conceptual

---

[16] *Id.* at 54, *quoting* K. Johnson, TEACHING THE CULTURALLY DISADVANTAGED PUPIL (1966).

[17] *Hearings on S. 428 Before the Special Subcomm. on Bilingual Education of the Senate Comm. of Labor and Public Welfare*, 90th Cong., 1st Sess., at 52 (1967) (statement of A. Bruce Gaarder) [hereinafter cited as *Bilingual Hearings*].

[18] This definition is adapted from an article in the Wall Street Journal. Dec. 15, 1972, at 1, col. 1.

[19] *See generally* testimony of A. Bruce Gaarder, Chief, Modern Foreign Language Section, United States Office of Education, in *Bilingual Hearings, supra* note 17, at 46–59.

[20] John, Horner, & Socolov, *American Voices*, 4 THE CENTER FORUM 3 (1969) (published by Center for Urban Education, a Regional Education Lab of the Office of Education). *See also* Kobrick, *supra* note 9.

development in a native language.[21] It is nonetheless attractive to school administrators because it requires little change in curricula and less teacher-training than is needed for bilingual teaching. Stated differently, ESL programs are less effective for non-English speaking children, but cheaper and easier to develop. Furthermore, the consensus of linguistic specialists is that a second language should be learned in the same sequence as the first one: hearing, understanding, and speaking first; *then* reading and writing.[22] Some ESL programs therefore actually exacerbate the students' problems. The logical sequence of assimilating the children's own tongue is disrupted—since most ESL curricula practically exclude native languages—and at the same time the children are thrust into the English sequence without ever assimilating *its* earlier stages. The most pernicious effect is that they are often illiterate in both languages.[23]

While other compensatory educational programs have been criticized in such studies as the Coleman Report,[24] there is little dissent from the proposition that bilingual programs work and that participating students learn more effectively than those in English-only classes.[25]

Disregard for the affirmative role that bilingualism can play in learning is ironic in light of the country's otherwise grand commitment to foreign language instruction.[26] It is inconsistent to devote so much attention to developing the language skills of English-speaking students while dismissing the native competence of non-English speaking children.

The policies in favor of bilingual education are clear. Over the past decade they have been recognized in cogent legislative and administrative pronouncements,[27] and they are now being called to the attention of courts.

---

[21] ESL therefore fails to tap an existing educational resource. Educators "have come to agree that the best medium, especially for the initial stages of a child's learning, is his dominant language." T. Andersson & M. Boyer, 1 BILINGUAL SCHOOLING IN THE UNITED STATES 44 (1970) [hereinafter cited as Andersson & Boyer].

[22] Kobrick, *supra* note 9, at 266.

[23] *See Bilingual Hearings*, *supra* note 17, at 54–55 (statement of A. Bruce Gaarder). *See also* Andersson & Boyer, *supra* note 21, at 3.

[24] J. Coleman, *et al.*, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966).

[25] While teachers in previous eras often viewed bilingualism as a "source of mental confusion," Carter, *supra* note 15, at 51, this notion has been effectively repudiated by a number of recent studies. One of them, with careful controls for sociocultural factors, found that "bilinguals perform significantly better than monolinguals on both verbal and non-verbal intelligence tests. Several explanations are suggested as to why bilinguals have the general intellectual advantage. It is argued that they have a language asset, are more facile at concept formation, and have a greater mental flexibility." Peal & Lampert, *The Relation of Bilingualism to Intelligence*, 76 PSYCHOLOGICAL MONOGRAPHS: GENERAL AND APPLIED 1 (1962).

[26] *Bilingual Hearings*, *supra* note 17, at 54 (statement of A. Bruce Gaarder).

[27] *See* pp. 62–64 *infra*.

B. Recent Case Law

Both the recognition of language ability as a basis of discrimination and the use of bilingual instruction as a remedy appear to be accepted. In *United States v. Texas*[28] a federal district court found that "it is largely" the "ethnically-linked traits" of "cultural incompatibilities" and "English language deficiencies"— "albeit combined with other factors such as poverty, malnutrition and the effects of past educational deprivation—which account for the identifiability of Mexican-American students as a group . . . ."[29] To remedy the unequal treatment of this group, the court ordered an extensive and detailed plan including bilingual instruction.[30]

What remains unsettled is whether courts will grant this relief where the state has provided such a group with the same instruction other children receive but the *results* are unequal. Two recent cases on this question have reached opposite conclusions.

The plaintiffs in *Lau v. Nichols*[31] were Chinese-speaking children attending public school in San Francisco. Seeking injunctive and declaratory relief against school and city officials, they alleged[32] that the failure to provide bilingual instruction to all non-English speaking children who needed it violated their rights to an education and to equal educational opportunity under the equal protection, due process, and "unenumerated rights" provisions of the Federal Constitution and under the California constitution's provision for a system of common schools.[33] They also claimed statutory rights under Title VI of the 1964 Civil Rights Act[34] and under the California Education Code. A federal district court in northern California sympathized with the plaintiffs, but concluded that they were entitled only to "the same education made available on the same terms and conditions to the other . . . students in the San Francisco Unified School District."[35]

Lau v. Nichols

[28]342 F. Supp. 24 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972).

[29]342 F. Supp. at 26.

[30]*Id.* at 28–38. The discriminatory impact of a uniform language requirement was also recognized in Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926), in which the Supreme Court struck down a Philippine statute requiring all account books to be kept in English, Spanish, or a local dialect. It found that the provision discriminated against Chinese businessmen. *Id.* at 528.

[31]Lau v. Nichols, Civil No. C-70, 627 LHB (N.D. Cal., May 26, 1970), *aff'd*, 483 F.2d 791 (9th Cir.), *rehearing en banc denied*, 483 F.2d 805, *cert. granted*, 93 S. Ct. 2786 (1973).

[32]Complaint, Lau v. Nichols, Civil No. C-70, 627 LHB (N.D. Cal., May 26, 1970).

[33]CALIF. CONST. art IX, § 5.

[34]42 U.S.C. §§ 2000d—2000d-4 (1970). For a more detailed discussion of the statute, see pp. 62–63 *infra*.

[35]Order, Lau v. Nichols, Civil No. C-70, 627 LHB (N.D. Cal., May 26, 1970).

On appeal, the plaintiffs emphasized their equal protection claim, but the Ninth Circuit panel, in an opinion written by Judge Trask, affirmed the district court's dismissal of the complaint.[36] The court first distinguished *Brown v. Board of Education*[37] and its progeny as cases concerning illegitimate "affirmative state action" and "de jure discrimination."[38] It therefore rejected the argument that *Brown* applied to a claim that "the school has an affirmative duty to provide [the disadvantaged student] special assistance to overcome his disabilities, whatever the origin of those disabilities may be."[39] The opinion then noted cases in which intentional discrimination had been effected through apparently neutral policies[40] and found no "such discriminatory actions" in the case at hand.[41] Nor did the court find a third set of decisions, dealing with state activities which "perpetuated the ill effects of past de jure segregation,"[42] to be relevant. Judge Trask then stated what he saw as the underlying problem with the claim:

> Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a "denial" by the Board of educational opportunities within the meaning of the Fourteenth Amendment should the Board fail to give them special attention, this even though they are characteristic of a particular ethnic group.[43]

The court recognized that "special attention" to the economic circumstances of indigent criminal defendants was required to ensure their access to the judicial system;[44] but it distinguished the case at hand on the basis that "the State's use of English as the language of instruction

---

[36] 483 F.2d 791 (9th Cir.), *rehearing en banc denied*, 483 F.2d 805, *cert. granted*, 93 S. Ct. 2786 (1973).

[37] 347 U.S. 483 (1954).

[38] 483 F.2d at 794.

[39] *Id.*

[40] *Id.* at 795–96, *citing, inter alia*, Cisneros v. Corpus Christi Indep. School Dist., 324 F. Supp. 599 (S.D. Tex. 1970), *aff'd in part, modified in part, and remanded*, 467 F.2d 142 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 3052 (1973).

[41] 483 F.2d at 796.

[42] *Id.* at 797, *citing, inter alia*, Gaston Co. v. United States, 395 U.S. 285 (1969); Guinn v. United States, 238 U.S. 347 (1915). *Id.* at 796.

[43] 483 F.2d at 797.

[44] *Id.* at 798, *citing, inter alia*, Mayer v. Chicago, 404 U.S. 189 (1971); Griffin v. Illinois, 351 U.S. 12 (1956).

in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established," while "the ability of a convict to pay a fine or a fee imposed by the state, or to pay a lawyer, has no relationship to the purposes for which the criminal judicial system exists."[45] Finally, Judge Trask felt that the determination of the need for a program of remedial language instruction was of such a complex nature and required such policy judgements that judicial deference was in order.[46]

In dissent, Judge Hill declared that he would recognize a denial of equal educational opportunity and "remand the case to the trial court for the taking of further evidence on defendants' justification, if any, for their failure to provide the bilingual teaching which plaintiffs seek."[47] Arguing that the equal protection clause did apply to the deprivation at issue, he stated that "the essence of education is communication" and that "when [a small child] cannot understand the language employed in the school, he cannot be said to have an educational opportunity in any sense."[48] Because the plaintiffs sought bilingual instruction only in order to learn English, he characterized the majority's assertion that English-language instruction was reasonable as a "straw man."[49] Noting that the effected classification of an ethnic minority was suspect and "presumptively illegal,"[50] Judge Hill stressed that

> [o]ne can deal with an apparently neutral and non-discriminatory statute or scheme which is applied or enforced without any intent to discriminate (or even without knowledge that the effect is a discriminatory one) and still run afoul of the Equal Protection Clause if illegal discrimination in fact results.[51]

Turning to the burden of justification placed on the state, he said that the "showing would necessarily be required to be persuasive in the extreme."[52] The dissent concluded with a rebuttal of the view that state action causing the language deficiency was necessary to support the claim, and an assertion that "[t]o ascribe some fault to a grade school child because of his 'failing to learn the English language' seems both callous and inaccurate."[53]

---

[45] 483 F.2d at 798.
[46] *Id.* at 799-800.
[47] *Id.* at 801.
[48] *Id.*
[49] *Id.* at 802.
[50] *Id.* at 803.
[51] *Id.*
[52] *Id.* at 804.
[53] *Id.* at 805.

The other major bilingual case to date, *Serna v. Portales Municipal Schools*,[54] was brought on behalf of Spanish-speaking children in a New Mexico school district. The facts in *Serna* indicated that school officials had made significant commitments to compensatory and bilingual instruction—more extensive than those of the *Lau* defendants.[55] Yet unlike the Ninth Circuit, the district court in *Serna* found that the Spanish-speaking plaintiffs did "not in fact have equal educational opportunity and that a violation of their constitutional right to equal protection exists."[56] The court based its holding on evidence of disproportionately low I.Q. scores and general performance in the one school in the system composed primarily of Spanish-surnamed pupils,[57] and on "testimony of educational experts regarding the negative impact upon Spanish-surnamed children when they are placed in a school atmosphere which does not adequately reflect the educational needs of this minority."[58] "State action" was found in "[t]he promulgation and institution of a program . . . which ignores the needs of" minority students.[59]

Both the seriousness of the need for bilingual education and the current judicial division over the constitutionality of English-only instruction suggest that the issues should be analyzed further.[60] Before proceeding to this analysis, however, it is important to note the statutory and state constitutional provisions from which the judicial branch may draw guidance.

---

[54]351 F. Supp. 1279 (D.N.M. 1972).

[55]*Id.* at 1281.

[56]*Id.* at 1282.

[57]*Id.* at 1281–82.

[58]*Id.* at 1282.

[59]*Id.* at 1283. Support for this proposition was found in the Tenth Circuit's opinion in Keyes v. School Dist. No. 1, 445 F.2d 990, 1004 (1971), *modified*, 93 S. Ct. 2686 (1973), although *Serna*'s explanation of the relevance of *Keyes* is questionable. In the course of arguing that neither an imbalance in assignment nor the fact of segregation per se necessarily results in low scholastic achievement, the Tenth Circuit stated that even a completely integrated setting does not resolve the problem if the schooling is not directed to the specialized needs of children coming from low socio-economic and minority racial and ethnic backgrounds. 445 F.2d at 1004. The court did not say that a curriculum "not tailored to their educational and social needs," 351 F. Supp. at 1282, *quoting* 445 F.2d at 1004, was a violation of the equal protection clause.

[60]In addition to the imminence of a Supreme Court decision in *Lau* as this Article goes to press, a class action which would extend the *Serna* result to New York City's Puerto Rican students is also pending. Aspira, Inc. v. Board of Educ., No. 72 Civ. 4002 MEP, (S.D.N.Y., filed Sept. 20, 1972), *motion to dismiss denied*, 58 F.R.D. 62 (S.D.N.Y. 1973). A bilingual claim was made in Morales v. Shannon, 41 U.S.L.W. 2451 (W.D. Tex., Feb. 13, 1973), but the court simply followed *Lau* without elaboration.

II. STATUTORY BASES FOR BILINGUAL EDUCATION CLAIMS

There are two ways in which courts can employ the relevant federal and state statutes: first, as bases for finding rights and duties established by the legislature, and second, as legislative interpretation of the Constitution's demands.

A. Statutory Construction

Two federal statutes are of principal importance in this area. The first is Title VII of the Elementary and Secondary Education Act of 1965 (ESEA).[61] This act gives financial assistance to local educational agencies to develop bilingual curricula, programs designed to familiarize students with their history and culture, and plans for closer cooperation between school and home.[62] The implementing provisions of the ESEA depend upon voluntary action by state governments,[63] however; and unless a state legislature requires an official to apply for these funds, litigants cannot rely on this statute.

The second federal provision of significance is Title VI of the Civil Rights Act of 1964.[64] In broad terms, it proscribes discrimination in federally-assisted programs and activities, and the Department of Health, Education, and Welfare (HEW) has issued detailed regulations to implement this mandate.[65] Under these provisions, no school system administering a federally-funded program may employ criteria or methods of administration which have the *effect* of defeating the objectives of the program with respect to individuals of a particular national origin.[66] In 1970, HEW issued a memorandum applying this

---

[61] 20 U.S.C. §§ 880b—880b-5 (1970), *as amended*, 20 U.S.C.A. §§ 880b-1, 880b-3a, 880b-4, 880b-5 (Pocket Part 1973). This Act was the subject of extensive legislative hearings. *Bilingual Hearings*, *supra* note 17.

[62] Some monies for bilingual programs have also been allocated through Title I of the ESEA—the general provision for compensatory education. 20 U.S.C. § 241a (1970), *as amended*, 20 U.S.C.A. § 241a (Pocket Part 1973).

[63] Appropriations are authorized for federal matching of state funds for specified types of programs if proper application is made to the Commissioner of Education. The Commissioner may also give funds to the Secretary of the Interior for bilingual education for Indian children. *See* 20 U.S.C. §§ 880b-1—880b-4 (1970), *as amended*, 20 U.S.C.A. §§ 880b-1, 880b-3a, 880b-4 (Pocket Part 1973).

Plaintiffs in the *Aspira* case expressly disclaimed a *right* to receive federal funds. Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 11, Aspira, Inc. v. Board of Educ., No. 72 Civ. 4002 MEF. (S.D.N.Y., filed Sept. 20, 1972), *motion to dismiss denied*, 58 F.R.D. 62 (S.D.N.Y. 1973).

[64] 42 U.S.C. §§ 2000d—2000d-4 (1970).

[65] 45 C.F.R. Pt. 80 (1972).

[66] 45 C.F.R. § 80.3(b)(2) (1972).

standard to the problem of providing equal educational opportunity for national-origin minority group children deficient in English language skills.[67] The memorandum directed: (1) that affirmative steps be taken by state schools to include such children in normal educational processes; (2) that no classification of such children as mentally retarded, nor any exclusion of them from college preparatory courses, be effected on any basis directly related to language skills; (3) that remedial "tracking" of such children be permitted on a temporary basis only; and (4) that, where necessary, notices be issued to their parents in the parents' native language. This legislatively based mandate may make it unnecessary to reach constitutional questions where special language instruction for a national-origin minority group is denied in a federally-assisted educational institution.

The Act provides that "[c]ompliance with any requirement adopted" to carry out Title VI "may be effected" by termination of funding or other means authorized by law, provided that an attempt to secure voluntary compliance is made first.[68] In the recent case of *Adams v. Richardson*,[69] the Court of Appeals for the District of Columbia Circuit held that such an attempt does not relieve HEW of responsibility to enforce the statute if voluntary acquiescence is not forthcoming, and "[a] consistent failure to do so is a dereliction of duty reviewable in the courts."[70] This decision therefore allows private litigants to enforce Title VI and regulations thereunder by suing the Department; previous attempts to sue HEW or the offending school districts have met only limited success.[71]

---

[67] 35 Fed. Reg. 11595 (1970).

[68] 42 U.S.C. § 2000d-1 (1970).

[69] 480 F.2d 1159 (D.C. Cir. 1973) (en banc), *modifying in part and aff'g per curiam* 351 F. Supp. 636 (D.D.C. 1972) *and* 356 F. Supp. 92 (D.D.C. 1973).

[70] 480 F.2d at 1163. Distinguishing this case from decisions on prosecutorial discretion, the court stated: "It is one thing to say the Justice Department lacks the resources necessary to locate and prosecute every civil rights violator; it is quite another to say HEW may affirmatively continue to channel federal funds to defaulting schools." *Id.* at 1162.

[71] Prior to *Adams*, it had been held that private litigants might challenge the decision of HEW to continue or terminate funding, but only when a decision had been made following a hearing. *Compare* Hicks v. Weaver, 302 F. Supp. 619, 620–21 (E.D. La. 1969) (HUD public housing case allowing private challenge to agency action), *with* Taylor v. Cohen, 405 F.2d 277, 281 (4th Cir. 1968), *and* Linker v. Unified School Dist. No. 259, 344 F. Supp. 1187, 1201–02 (D. Kan. 1972) (HEW educational funding cases refusing to allow white plaintiffs to interrupt agency negotiations with school board). *Taylor* and *Linker* may be distinguished from *Adams* and *Hicks* as attempts to impede agency enforcement of anti-discrimination provisions, as opposed to attempts to compel agency enforcement of such provisions.

Several cases support the proposition that private litigants have standing as "third party beneficiaries" to sue the recipients of HEW funding. *E.g.*, Lemon v. Bossier Parish School Bd., 240 F. Supp. 709, 713–15 (W.D. La.), *motion for rehearing denied*, 240 F.

In addition to federal statutes, there is a wealth of material in every state code on state obligations with respect to public education. Several state legislatures have initiated comprehensive programs for handicapped, disabled, mentally disturbed, or otherwise disadvantaged children.[72] Since 1968, eleven states have passed laws specifically permitting school districts to provide bilingual instruction,[73] and one state—Massachusetts—has required school districts to do so.[74] In some states, moreover, statutory provisions should be viewed against the backdrop of affirmative obligations in the state constitutions, which are discussed below in Part III of this Article.[75]

B. Statutes As Sources of Constitutional Rights

Since *Katzenbach v. Morgan*[76] was decided in 1966, there has been speculation about the extent to which branches of the government other than the judiciary may interpret the Constitution in ways which are binding on, or at least highly persuasive to, the courts. In particular, interest has focused on whether Congress or the executive may enforce the equal protection clause by placing tighter restrictions on the states than judicial interpretations have demanded.[77] The *Morgan* Court upheld congressional power to pass a statute intended to secure fourteenth amendment rights as construed by Congress. The legislation in question prohibited application of an English literacy requirement for voting to persons educated in an American school using a classroom

---

Supp. 743 (1965), *aff'd*, 370 F.2d 847, 850, 851–52 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); *see* Coleman v. Humphreys County Memorial Hosp., 55 F.R.D. 507, 510–11 (N.D. Miss. 1972). *Contra*, Green St. Ass'n v. Daley, 373 F.2d 1, 8–9 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967).

In Lau v. Nichols, 483 F.2d 791 (9th Cir.), *rehearing en banc denied*, 483 F.2d 805, *cert. granted*, 93 S. Ct. 2786 (1973), a private claim under Title VI was rejected because plaintiffs had not shown the *affirmative denial* of a benefit. 483 F.2d at 794 n.6. The standing of plaintiffs to raise the issue as "third party beneficiaries" was not questioned.

[72] *See generally* State-Federal Clearinghouse for Exceptional Children, TRENDS IN STATE LEGISLATION FOR THE EDUCATION OF HANDICAPPED CHILDREN (1972); Abeson, *Movement and Momentum: Government and the Education of Handicapped Children*, 39 EXCEPTIONAL CHILDREN 63 (1972); Weintraub & Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1051 (1972).

[73] Kobrick, *supra* note 9, at 269.

[74] MASS. GEN. LAWS ANN. ch. 71A (Supp. 1973). This chapter provides that wherever twenty or more children of limited English-speaking ability, who speak a common native language, reside in a local school district, that district must provide full-time bilingual programs for each such language group.

[75] *See* pp. 66–71 *infra*.

[76] 384 U.S. 641 (1966).

[77] *See, e.g.*, Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

language other than English.[78] Although the majority declined to state whether or not the Court itself would find such application of a literacy requirement a denial of equal protection, the opinion suggests that courts should respect a legislative determination of this nature.[79]

The federal statutory provisions for bilingual education are not expressly intended to carry out the fourteenth amendment, but their enactment demonstrates Congress' determination that lack of necessary language instruction is a crippling problem for children of certain ethnic and cultural backgrounds. This finding, and the congressional and HEW actions pursuant thereto, may suggest that bilingual instruction is a sufficiently important ingredient of equal opportunity that the Constitution requires it.[80]

One commentator has suggested that if a court utilizes congressional and administrative actions in this manner, the "process may be interpreted as the judiciary's seizing upon a legislative initiative which it could not, within separation-of-powers constraints, have compelled in spite of felt claims of right, for the purpose of thenceforth securing and expanding the fulfillment of such claims."[81] As one example of such interaction, the treatment of statutory entitlements as "mere privileges" has been rejected by recent cases recognizing significant property interests in benefits voted by the legislature.[82] Thus, in applying the due process clause in *Goldberg v. Kelly*,[83] the Supreme Court held that welfare benefits could not be terminated without a prior hearing.[84] Legislative action such as that at issue in *Goldberg* may not only create interests requiring due process protection but also strengthen the argument that a court should find the benefit to be among those minimum rights which the Constitution secures. At the least, judges should not feel politically adventuresome in declaring such interests to be of constitutional stature if other departments of government have thought it wise and practicable as a matter of *policy* to foster them.[85]

---

[78] 42 U.S.C. § 1973b(e) (1970).

[79] 384 U.S. at 652–56. *But see* Oregon v. Mitchell, 400 U.S. 112 (1970).

[80] *See* Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 1013 (1973) [hereinafter cited as *Welfare Rights*].

[81] *Id.* at 1014.

[82] *E.g.*, Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

[83] 397 U.S. 254 (1970).

[84] *Id.* at 264.

[85] There are at least two reasons why legislative and executive enactments deserve attention and deference from courts. First, although the judiciary may be charged with a special duty to interpret the Constitution, all the branches have a coequal duty to uphold it; even on questions of law, the considered judgment of the other branches carries great intellectual—and, as a pragmatic matter, political—weight. Second, deference should be

It may be argued that such reliance by the courts would deter legislators from acting for fear that their enactments will be mistaken for constitutional interpretations. The legislature is, however, always free to qualify its actions in order to limit their effect, and it is not expected that courts will be overzealous in weaving constitutional requirements out of legislative and executive actions.

III. THE RIGHT UNDER STATE CONSTITUTIONS

In addition to the uses of statutory provisions discussed in Part II, other grounds for bilingual education claims—short of federal constitutional interpretations yet potentially supporting them—may be found in state constitutions. Indeed, as stated by the Supreme Court of New Jersey in a recent school financing case, "a State Constitution could be more demanding" than federal provisions.[86] A stricter standard of equal educational opportunity could result, for example, from interpretation of the state's version of the equal protection clause.[87] More likely, as in the New Jersey case, it would stem from a specific state constitutional provision for public education.[88] Many of the state provisions are similarly phrased, and they may be categorized into four groups.

---

accorded the peculiar institutional competences of the legislature and executive to analyze and digest a wide range of data and reach broad-based conclusions of *fact* not attainable through the ordinary judicial case-and-controversy process. Where those branches have clearly determined that educational deprivation suffered by non-English speaking school children as a result of language barriers is a widespread and serious threat to citizen development, and have determined as a matter of fact that present state school programs are inadequate in this respect, there is less need for a court to rest its own decisions on what might be a "possible" or "rational" system under the Constitution.

The opinion has been expressed that taking advantage of federal assistance should increase a state's affirmative duty to ensure the protection of constitutional rights. *See* United States v. Texas, 330 F. Supp. 235, 250 (E.D. Tex.), *remedy modified*, 447 F.2d 441 (5th Cir. 1971). There have been some excellent analyses of statutory claims—and the appropriate judicial responses—in cases where plaintiffs' standing was challenged. *E.g.*, Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

[86] Robinson v. Cahill, 62 N.J. 473, 490, 303 A.2d 273, 282 (1973), *cert. denied*, Dickey v. Robinson, 42 U.S.L.W. 3237, 3246 (U.S. Oct. 23, 1973).

[87] In Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), decided before the Supreme Court upheld Texas's system of school finance against an equal protection challenge in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), the California Supreme Court held that the state's system of educational funding violated the equal protection guarantees of both the federal and state constitutions. *See also* Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972), *rehearing granted*, 41 U.S.L.W. 2424 (Mich. Sup. Ct., Feb. 13, 1973).

[88] *See* Robinson v. Cahill, 62 N.J. 473, 513–21, 303 A.2d 273, 294–98 (1973), *cert. denied*, Dickey v. Robinson, 42 U.S.L.W. 3237, 3246 (U.S. Oct. 23, 1973).

A. "Weak" Provisions

The first group consists of state constitutions with "weak" provisions: those with an explicit but unelaborated commitment. New York's clause fits in this category, providing simply that "[t]he Legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this State may be educated."[89] The Connecticut constitution states, similarly, that "[t]here shall always be free public elementary and secondary schools in the state. The General Assembly shall implement this principle by appropriate legislation."[90] The education clauses in the Alabama, Kansas, and Oklahoma constitutions are almost identical to Connecticut's.[91] Those of Alaska, Hawaii, and Utah have only added a proscription against "sectarian control."[92] North Carolina's provision speaks in terms of forever encouraging the means of education, and Vermont's is similar.[93] South Carolina's constitution apparently lacks an explicit mandate, although it establishes a Board of Education and Superintendency of Public Instruction.[94]

Despite the simplicity of these provisions, they are substantive state obligations written in the most fundamental body of state law. A Connecticut court recently held that the state's constitutional commitment to education provided the basis for a suit on behalf of children deprived of the "full benefits" of state schooling.[95] And a federal court has held that New York's constitution guaranteed all children a "valuable right to a public school education" which should not be "invaded or denied . . . without the proper safeguards of procedural fairness."[96]

B. "Thorough and Efficient Systems"

The next category includes at least a dozen state constitutions which require the "maintenance and support of a thorough and efficient system

---

[89] N.Y. CONST. art. XI, § 1.

[90] CONN. CONST. art. VIII, § 1.

[91] ALA. CONST. art. 14, § 256; KAN. CONST. art. 6, § 1; OKLA. CONST. art. XIII, § 1. The Alabama constitution does, however, retain a reference to state aid for racially segregated schools.

[92] ALAS. CONST. art. VII, § 1; HAWAII CONST. art. 9, § 1; UTAH CONST. art. X, § 1.

[93] N.C. CONST. art. 9, § 1; VT. CONST. ch. 2, § 64.

[94] S.C. CONST. art. XI, § 1.

[95] Sherman v. Kemish, 29 Conn. Sup. 198, 279 A.2d 571 (Super. Ct.), *application for expedited appeal denied*, 161 Conn. 564, 287 A.2d 739 (1971).

[96] Madera v. Board of Educ., 267 F. Supp. 356, 371 (S.D.N.Y.), *rev'd on other grounds*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968). *But see* Serrano v. Priest,

of free public schools."[97] Some contain such additional words as "general, uniform, and thorough."[98] The utility of such provisions for equal education litigants was demonstrated by the New Jersey Supreme Court's reliance on a like clause in that state's constitution to invalidate an uneven system of school financing.[99] "[I]t may be doubted that the thorough and efficient system of schools required by the 1875 amendment can realistically be met by reliance on local taxation," the court concluded, for "[t]he discordant correlations between the educational needs of the school districts and their respective tax bases suggest any such effort would likely fail . . . ."[100]

C. "All Suitable Means" and Purposive Preambles

The third group of state constitutional provisions is quite close to the second, but two characteristics make the textual commitment to education stronger. One feature is the appendage of additional mandates to the "thorough and efficient" language. For example, in South Dakota the legislature is required "to adopt all suitable means to secure to the people the advantages and opportunities of education."[101] California, Indiana, and Nevada also append "all suitable means" clauses to their provisions for a program of public schools,[102] and the constitutions of Rhode Island and Wyoming contain comparable phrases.[103]

Preambles in this third group of constitutions further strengthen claims for equal educational opportunities. Some emphasize the relationship between education and the exercise of basic rights,[104] lending

---

5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (provision for "a system of common schools" held not to require uniform educational expenditures).

[97]N.J. CONST. art. VIII, § 4. The following contain similar provisions: COLO. CONST. art. IX, § 2; FLA. CONST. art. 9, § 1 (in addition to requiring a "uniform system" of schools, this section calls for "other . . . programs that the needs of the people may require"); IDAHO CONST. art. IX, § 1; MD. CONST. art. VIII, § 1; MINN. CONST. art. VIII, § 1 ("general and uniform"); MONT. CONST. art. XI, §1 ("general, uniform, and thorough"); OHIO CONST. art. VI, § 2 ("thorough and efficient"); PA. CONST. art. III, § 14; TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1; W. VA. CONST. art. XII, § 1.

[98]IDAHO CONST. art. IX, § 1; *see* note 97 *supra.*

[99]Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied,* Dickey v. Robinson, 42 U.S.L.W. 3237, 3246 (U.S. Oct. 23, 1973).

[100]62 N.J. at 520, 303 A.2d at 297.

[101]S.D. CONST. art. VIII, § 1.

[102]CAL. CONST. art. IX, § 1; IND. CONST. art. 8, § 1; NEV. CONST. art. XI, § 1.

[103]R.I. CONST. art. XII, § 1; WYO. CONST. art. VII, § 1.

[104]*See, e.g.,* ARK. CONST. art. XIV, § 1: "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools . . . ." *See also* CAL. CONST. art. IX, § 1: "A general diffusion of knowledge and intelligence being essential to the

support to an argument that school programs may be subjected to close judicial scrutiny in order to safeguard fundamental liberties.[105] Preambles of other constitutions make direct commitments to the equalization of educational opportunity.[106]

D. "Paramount" and Specific Duties

Provisions in a fourth category declare such obligations more forcefully and explicitly. They include mandates at least as strong as the following from the Washington state constitution: "It is the *paramount duty* of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste or sex."[107] Others that read in terms of a "paramount," "fundamental," or "primary" duty are Georgia, Illinois, and Michigan.[108] Some constitutions in this category include more specific language. New Mexico's provision, for example, requires that the legislature

> shall provide for the training of teachers . . . so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils and students in the public schools and educational institutions of the state, and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students.[109]

A subsequent section prohibits the segregation of children of Spanish ancestry and calls for "perfect equality."[110]

Some states which did not make such explicit commitments in their former provisions for a school system have recently added them. Thus, Illinois has provided that "[a] fundamental goal of the State is the educational development of all persons *to the limit of their capacities.*

---

preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means, the promotion of intellectual . . . improvement."

[105] *See* p. 85 *infra.*

[106] MASS. CONST., ch. 5, § 2: "Wisdom and knowledge, as well as virtue . . . depend on spreading the opportunities and advantages of education . . . among the different orders of the people . . . ." *See also* TENN. CONST. art. XI, § 12, for a similar preamble, with the exception that it authorizes racially segregated schools.

[107] WASH. CONST. art. IX, § 1 (emphasis added).

[108] GA. CONST. art. VIII, § I ; ILL. CONST. art. X, § 1; MICH. CONST. art. VIII, §§ 1, 2. Georgia, however, still retains a racial separation clause.

[109] N.M. CONST. art. XII, § 8.

[110] *Id.* § 10.

The State shall provide for an efficient system of high quality public educational institutions and services."[111] And Michigan now requires that "[i]nstitutions, programs, and services for the care, treatment, education, or rehabilitation of those inhabitants who are physically, mentally or otherwise seriously handicapped shall always be fostered and supported."[112]

E. General Issues in the Utilization of State Constitutional Provisions

It is possible that the constitutional provisions in all four categories were drafted not to create any "rights to education," but rather to declare the enlightened self-interest of the polity as a whole in a well-trained or well-socialized citizenry.[113] The individual beneficiaries could not then claim any state duty to educate them.

In fact, however, such provisions have been read to permit such claims by private individuals. A century ago, the California Supreme Court noted the state constitution's provision for a system of common schools and declared that

> [t]he advantage or benefit thereby vouchsafed to each child, of attending a public school is, therefore, one derived and secured to it under the highest sanction of positive law. It is . . . a right, a legal right . . . and as such it is protected . . . by all the guarantees by which other legal rights are protected. . . .[114]

More recently, a group of citizens including residents, taxpayers, and municipal officers brought the suit in which the New Jersey Supreme Court relied upon the "thorough and efficient" clause of the New Jersey constitution as the ground for invalidating the state's school financing

---

[111]ILL. CONST. art. X, § 1 (emphasis added). The Committee on Education explained the purposes of the new wording as follows: "The educational enterprise greatly benefits the individuals whose vocational skills are enhanced, whose cultural levels are lifted, and whose abilities for useful service are enlarged . . . . Further, the objective that all persons be educated to the limits of their capacities would require expansion beyond traditional public school programs." Comment following ILL. CONST. art. X, § 1 (Smith-Hurd 1971), *quoting* Committee on Education.

[112]MICH. CONST. art. VIII, § 8. Michigan's clause represents a change from an earlier version which referred only to "deaf, dumb, blind, and feeble-minded or insane." The revision was needed because the previous clause was "too restrictive in scope." Comment following MICH. CONST. art. VIII, § 8 (J. Rice ed. 1965).

[113]Conversation with Prof. Frank Michelman in his constitutional law seminar at Harvard Law School, May 2, 1973.

[114]Ward v. Flood, 48 Cal. 36, 50 (1874). *See also* Miller v. Dailey, 136 Cal. 212, 68 P. 1029 (1902); Tape v. Hurley, 66 Cal. 473, 6 P. 129 (1885).

system.[115] It thus appears that litigants may point to state constitutional provisions in arguing that the state has an affirmative obligation to educate its citizens.

In the absence of express commitments, however, it may be argued that claims based on state constitutions alone will not induce the courts to order "effective" education for all disadvantaged groups.[116] In this view, the normal reading of state clauses will be that the majority of citizens must be satisfied and that all children must have a right of access. However, the fact that a substantial number of states have raised some form of affirmative obligation to constitutional status should make courts more receptive to federal constitutional claims than they would be without such mandates for guidance. Unlike the Supreme Court's abortion decision,[117] for example, a court need not overturn the basic policies of the other tier of the federal system in the process of upholding a claim for bilingual education under the relevant federal provisions. Whether the courts should in fact uphold such a claim depends upon the applicability of the equal protection and due process clauses.

IV. FEDERAL CONSTITUTIONAL RIGHTS: EQUAL PROTECTION

A. Establishing Discrimination

The first major problem in building the equal protection argument for bilingual education is to trigger application of a theory of equality that focuses on the consequences rather than on the intent or structure of governmental activity. For the inequality of an English-only educational program is in the consequence of offering identical instruction to children with differing linguistic ability to absorb it. The effect is to give something useful to those who can speak English while giving little or nothing of worth to those who cannot. Traditionally, the courts have found a denial of equal protection of the laws only where the state has made *different* provisions for similarly situated citizens without adequate justification.[118] The doctrine has been applied to covert

---

[115] Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, Dickey v. Robinson, 42 U.S.L.W. 3237, 3246 (U.S. Oct. 23, 1973).

[116] *Welfare Rights*, *supra* note 80, at 1013.

[117] Roe v. Wade, 410 U.S. 113 (1973).

[118] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972)(voter registration open only to citizens meeting durational residency requirement); Levy v. Louisiana, 391 U.S. 68 (1968) (wrongful death damages available only to legitimate children of deceased); Yick Wo v. Hopkins, 118 U.S. 356 (1886)(laundry licenses denied to Chinese but not non-Chinese applicants). *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1170–77 (1969) [hereinafter cited as *Developments—Equal Protection*].

as well as explicit line-drawing.[119] But only in relatively recent decisions has attention been directed to the different consequences of state activity where no differentiation in provisions is made and there is no evidence of wrongful discriminatory intent. It is not questioned that the government *can* discriminate among citizens according to individual characteristics, such as language ability, when it has a rational justification for doing so.[120] But the circumstances in which the equal protection clause *compels* it to do so remain to be precisely defined.[121] The first stage of an equal protection case for bilingual education thus requires (1) the articulation of a particular theory of equality, (2) a demonstration that this theory has been recognized by the Supreme Court, and (3) an explanation of this recognition which supports extending it to the case at issue. The argument can then proceed to the second principal hurdle, determining and applying appropriate standards of judicial review.

1. The Proportional or Consequential Theory of Equality[122]

It is important to delineate the concept of equality that underlies traditional applications of equal protection doctrine. The implication in this body of case law is that the equal protection guarantee is satisfied if everyone receives an identical quantity of some benefit or suffers a quantitatively identical burden.[123] Thus if the state were to give each citizen five dollars a year, it would be said that the law was protecting all citizens equally. A similar conclusion would be reached if the legislature were to charge each applicant a fee of five dollars to obtain a governmental service.[124]

From this perspective, none of the children in a classroom where all receive one course of instruction from one teacher could suffer a

---

[119] *See* Hill v. Texas, 316 U.S. 400 (1942) (juror selection); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (laundry licenses).

[120] *See Developments—Equal Protection, supra* note 118, at 1177.

[121] *See* pp. 74–78 *infra*. "The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford." Douglas v. California, 372 U.S. 353, 362 (1963) (Harlan, J., dissenting).

[122] This section is adapted directly from *Developments—Equal Protection, supra* note 118, at 1159–92.

[123] "Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses." Douglas v. California, 372 U.S. 353, 361–62 (1963) (Harlan, J., dissenting).

[124] *See Developments—Equal Protection, supra* note 118, at 1165–66, 1171–72.

denial of equal protection. The governmental output for each student is not only similar to that for all the others; it is the very same. An equal protection claim here is susceptible to the same criticism articulated by Justice Harlan in his dissent in *Griffin v. Illinois.*[125] That case held that the cost of trial transcripts required for an appeal must be waived for indigent criminal defendants. In Justice Harlan's view,

> [t]he Court thus holds that . . . the Equal Protection Clause imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic [linguistic] circumstances. That holding produces the anomalous result that a constitutional admonition to the States to treat all persons equally means in this instance that Illinois must give to some what it requires others to pay for [learn themselves]. Granting that such a classification would be reasonable, it does not follow that a State's failure to make it can be regarded as discrimination. It may as accurately be said that the real issue in this case is not whether Illinois *has* discriminated but whether it has a duty *to* discriminate.[126]

There is, however, a coherent alternative theory of equal protection according to which Illinois had indeed discriminated.[127] This theory recognizes that as long as human characteristics are infinitely variable, no course of action or process can affect all men equally *in all respects.* The "numerical"[128] theory set out above tests for equality by focusing upon the structure of the government's distribution of benefits or burdens. This test is appropriate if all men are to be regarded as identical units. The alternative— "proportional" equality[129]—focuses upon the consequences of a governmental program or procedure in light of its goal. Thus a program for distributing tickets to entertainment events that achieved the *consequence* of satisfying everyone's interests equally would necessarily treat citizens unequally with respect to monetary value conferred, size of the event offered, and indeed all other characteristics. On the other hand, a program that yielded the structural *output* of one ballet ticket for each citizen would not equally satisfy individual interests, but would be equal otherwise. The formal theory thus essentially disregards differences among individuals, while the consequential theory takes differences relevant to a program's goal into account.

---

[125] 351 U.S. 12 (1956).
[126] *Id.* at 34–35 (Harlan, J., dissenting).
[127] *Developments—Equal Protection, supra* note 118, at 1166–69.
[128] *Id.* at 1165.
[129] *Id.* at 1166.

There is nothing inherent in the phrasing of the fourteenth amendment that compels adoption of one or the other theory.[130] Equal "protection" would seem to imply more than equal "application" or a wooden "uniformity" in the administration of the laws. It is true that the clause does not guarantee equal protection absolutely, but only equal treatment at the hands of the law. But it is not implausible to suggest that this requirement may sometimes extend to the consequences of government activity, and thus in effect guarantee "equal impact of the law." To meet this standard of equality the state may indeed have to adjust its program of burdens and benefits to the differing needs of individuals.

2. Adoption of the Proportional Theory

The Supreme Court has adopted the proportional or consequential theory in four kinds of cases.[131] Beginning with *Griffin v. Illinois*[132] in 1956, certain structurally neutral procedures for obtaining appellate review of criminal convictions have been held unconstitutional because of the unequal consequences they produced. In *Griffin,* for example, presentation of a bill of exceptions or a report of the trial proceedings was necessary in order to take an appeal, and all but those convicted

---

[130] *Id.* at 1068–69. "Discriminatory treatment is not constitutionally impermissible, they say, because all children are offered the same educational fare, *i.e.*, equal treatment of unequals satisfies the demands of equal protection. The Equal Protection Clause is not so feeble. Invidious discrimination is not washed away because the able bodied and the paraplegic are given the same state command to walk. . . . The great equal protection cases cannot be shrivelled to the size the majority opinion has prescribed." Lau v. Nichols, 483 F.2d 805, 806–07 (9th Cir. 1973) (Hufstedler, J., dissenting from denial of rehearing en banc). *But see* Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7 (1969) [hereinafter cited as *Protecting the Poor*]. "*[I]n shaping the statement of our claim so as to fit it to the locutions of the equal protection clause, we must find an 'inequality' to complain about; and the only inequality turns out to be that some persons, less than all, are suffering from inability to satisfy certain 'basic' wants which presumably are felt by all alike.* But if we define the inequality that way, we can hardly avoid admitting that the injury consists more essentially of deprivation than of discrimination, that the cure accordingly lies more in provision than in equalization, and that the reality of injury and the need for cure are to be determined largely without reference to whether the complainant's predicament is somehow visibly related to past or current governmental activity." *Id.* at 13 (emphasis in original).

[131] This grouping is based on convenience for the present discussion; the cases have been grouped in different ways by other commentators. The grounds of decision tend to overlap from one area to the other, and the Court has been less than clear in its reasoning in all four areas. *See generally* Goodman, *De Facto Segregation: A Constitutional and Empirical Analysis,* 60 CALIF. L. REV. 275 (1972) [hereinafter cited as *De Facto Segregation*]; *Protecting the Poor, supra* note 130.

[132] 351 U.S. 12 (1956).

of murder had to bear the cost of transcripts necessary to prepare these documents.[133] There is no question that the procedure was formally equal; the state required the same "input" from all defendants seeking review. But the Court found equality in this sense insufficient and looked directly to the relative capacity of different individuals to benefit in fact from the opportunity offered by the government. It declared that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[134] The effect of Illinois' arrangement was to give more opportunity for an appeal to those who had money than to those who were indigent, and the Court found no adequate justification for the state to "allow"[135] this distinction to result from its procedure. In response to the argument that "by its terms" the law applied "to rich and poor alike," Justice Black noted that "a law nondiscriminatory on its face may be grossly discriminatory in its operation."[136]

Justice Harlan in dissent asserted that "[a]ll that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action."[137] Justice Frankfurter, however, focused on the "ruthless *consequence*, inevitably resulting from a money hurdle erected by a State."[138] From his perspective, "[l]aw addresses itself to actualities. It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances."[139]

Voting rights is the second area in which the Court has ruled that "[the] equality demanded by the Fourteenth Amendment"[140] is an equality in consequences. For only upon this theory could a majority of the Justices in *Harper v. Virginia Board of Elections*[141] "conclude that a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard."[142] The reference was to Virginia's poll tax, which was accordingly held unconstitutional. More recently, in a challenge to a Texas statute

---

[133] *Id.* at 13–15.
[134] *Id.* at 19.
[135] *Id.* at 17.
[136] *Id.* at 17 n.11.
[137] *Id.* at 34 (Harlan, J., dissenting).
[138] *Id.* at 23 (emphasis added)(concurring opinion).
[139] *Id. Griffin* has been reaffirmed several times. *See, e.g.*, Mayer v. Chicago, 404 U.S. 189 (1971).
[140] Douglas v. California, 372 U.S. 353, 358 (1963).
[141] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
[142] *Id.* at 666.

requiring the payment of a fee in order to enter a primary election as a candidate, the Court unanimously[143] struck down the law because "this system falls with unequal weight on voters, as well as candidates, according to their economic status."[144]

The third area in which the Supreme Court has looked to the consequences of a state program neutrally structured and neutrally administered is defined less by the interest involved than by the classification resulting.[145] In at least two cases where the impact of a state process has divided along racial lines, the Court has taken cognizance of the pattern effected.[146] As early as 1940, it noted that the exclusion of blacks from jury service would be unconstitutional even if it resulted from neutral application of the criterion of personal acquaintance with the selectors.[147] More recently, in *Wright v. Council of the City of Emporia,*[148] the Court "focused upon the effect—not the purpose or motivation"[149] of a school board's decision to separate the city's schools from the county system. It should be noted, however, that the issue was not whether the action constituted a violation of the fourteenth amendment, but rather whether "its effect would be to impede the process of dismantling a dual [segregated] system."[150] The use of result-oriented analysis in gauging the effect of a program on the implementation of a federal court order does not necessarily imply that

---

[143]Justices Powell and Rehnquist took no part in the consideration or decision of the case.

[144]Bullock v. Carter, 405 U.S. 134, 144 (1972).

[145]The Court stressed the consequential classification in *Griffin* and *Harper* also, but primary concern appears to have been directed at the fundamental interests at stake. Certainly impact differentiated according to ability to pay is not generally a matter for judicial cognizance. *See Developments—Equal Protection, supra* note 118, at 1121.

[146]"There may be relevant differences between a process of screening *intended* to be selective—for example, employment tests—and a process of distribution intended to treat everyone identically. This stage in the argument, however, is simply a demonstration of instances in which the Court has recognized discriminatory patterns—unnecessary to the state's purpose—which have resulted unintentionally from government activities because certain individuals' pre-existing deficiencies prevented them from deriving as much value from the governmental program or opportunity as others derived. It is thus unnecessary here to distinguish between cases of intentional screening for nonracial, noncultural purposes and cases of intended uniform distribution.

[147]Smith v. Texas, 311 U.S. 128, 132 (1940). There was a strong suggestion, however, that intentional discrimination was the cause of the exclusion. Moreover, later decisions suggest that a discriminatory effect alone is not ground for invalidating juror selection processes if the criteria utilized are legitimate. *See* Swain v. Alabama, 380 U.S. 202 (1965); Akins v. Texas, 325 U.S. 398 (1945). But even in cases in which this view has been implied, the Court has *recognized* the unequal effect without any additional showing and required the state to justify it. *See* Hill v. Texas, 316 U.S. 400 (1942).

[148]407 U.S. 451 (1972).

[149]*Id.* at 462.

[150]*Id.* at 470.

the Court would take this approach in determining the existence of a constitutional violation.[151]

One must, therefore, turn to lower federal court decisions for a demonstration of the extent to which the consequential theory of equal protection has been applied in cases where structurally neutral state activity has effected racially discriminatory consequences. In *Chance v. Board of Examiners,*[152] a case in which the use of certain employment examinations was challenged, the Second Circuit noted that "[c]oncededly, this case does not involve intentionally discriminatory legislation, or even a neutral legislative scheme applied in an intentionally discriminatory manner."[153] "Nonetheless," the court continued, "we do not believe that the protection afforded racial minorities by the fourteenth amendment is exhausted by those two possibilities. . . . [T]he Board's examinations have a significant and substantial discriminatory impact on black and Puerto Rican applicants. That harsh racial impact, even if unintended, amounts to an invidious *de facto* classification . . . ."[154] Other cases have recognized the racially divided consequences of a government housing program,[155] intelligence and aptitude tests for school children,[156] and qualifying examinations for jury service.[157]

The lower federal court opinion most directly relevant to a bilingual claim was written in a District of Columbia desegregation case, *Hobson v. Hansen.*[158] After finding that the city schools' track system resulted in groupings correlating with income and race,[159] the district court stated:

> The evidence shows that the method by which track assignments are made depends essentially on standardized aptitude tests which, *although given on a system-wide basis, are completely inappropriate for use with a large segment of the student body. Because these tests are standardized primarily on and are relevant to a white*

---

[151] Application of consequential analysis in the former case is more manageable because impeding implementation of a court order is easier to detect than a denial of equal protection.

[152] 458 F.2d 1167 (2d Cir. 1972).

[153] *Id.* at 1175 (citations omitted).

[154] *Id.* For a similar ruling in another employment examination case, see Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). *See also* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971).

[155] Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

[156] Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972).

[157] Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971), *cert. denied,* 409 U.S. 929 (1972).

[158] 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[159] 269 F. Supp. at 513.

> *middle class group of students, they produce inaccurate and misleading test scores when given to lower class and Negro students.* As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socio-economic or racial status, or—more precisely—according to environmental and psychological factors which have nothing to do with innate ability.[160]

By invalidating this use of the tests, the court required the school system to take account of the different backgrounds pupils bring to the starting line of public education.

A fourth kind of case in which the Supreme Court has required a state to recognize and remedy the non-neutral consequences of a law neutral by its terms and motivation involves interference with the exercise of a religion.[161] In *Wisconsin v. Yoder*[162] Amish parents challenged a state law requiring children to attend school until they reached the age of sixteen. They argued that meeting this requirement would destroy their culture, and that the forced change in their life style would interfere with the practice of their religion.[163] The Court agreed, noting that

> this case [cannot] be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality . . . .[164]

The parents relied solely on the first amendment, but under the "consequential" analysis underlying the case, the result could have been reached on equal protection grounds as well.[165]

---

[160] *Id.* at 514 (emphasis added).

[161] These cases might simply be grouped with those in which the Court did indeed focus on an unconstitutional effect of state action undertaken with a constitutional design, but in which the Court's objection was interference with a constitutional concern other than equal protection. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (first amendment); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (fifteenth amendment). However, the religion decisions present a particularly clear example of the dangers of treating unlike individuals "equally" in all government programs.

[162] 406 U.S. 205 (1972).

[163] *Id.* at 208–13.

[164] *Id.* at 220.

[165] *Yoder* is not the first such case. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (compulsory flag salute).

3. Equality of Consequences and the Claim for Bilingual Education

The discriminatory consequences of unilingual education in certain bilingual communities have been amply demonstrated.[166] What remains to be established is that equality of consequences is required in this context, either because of the type of governmental activity involved or because of the nature of the resulting classification. Caution in reaching such a conclusion is called for, because a government could not operate if it could not regard citizens as identical for the purposes of most programs. And courts must be wary of extending themselves into areas requiring them to formulate standards of actual equality.[167]

By analogy to the four areas defined above, however, a program of unilingual education should be tested within the conceptual framework of consequential equality. The first two areas—criminal procedure and voting rights—involve interrelationships between the citizen and the state essential to individual liberty. Allowing the state to assume that its citizens are uniformly able to participate in these relations would contradict society's broad commitment to the liberty of the individual. There is a similar contradiction when children are compelled to attend an institution for the purpose of acquiring the skills necessary to function effectively under the societal rules prescribed by the state, and are nevertheless treated by the state as equally receptive to that instruction despite the fact that they are not. Many of the reasons for requiring recognition of consequences in the third area, too, are present in the context of unilingual education. It is true that the impact of the system falls harshly along lines of national origin rather than of race, and the impetus for according special judicial attention to programs affecting blacks and whites differently may be traced to the origins of the fourteenth amendment.[168] But the broader rationale is that politically and economically weak minority groups in general may logically depend more on the judicial than on the representative branch of government.[169] Further similarities, as noted in the leading Note on the subject, are that both race and lineage are unalterable[170] and that distinctions along both lines are "usually . . . perceived as a stigma of inferiority and a badge of opprobrium."[171] Most significantly, this view accords with established legal doctrine, for two of the cases noted in this area involved

---

[166] *See* pp. 54–56 *supra*.

[167] For a consideration of the policies underlying adherence to the numerical theory of equality, see *Developments—Equal Protection, supra* note 118, at 1165–66.

[168] *See id.* at 1068–69.

[169] *Id.* at 1125–26.

[170] *Id.* at 1126–27.

[171] *Id.* at 1127.

discriminatory impact on Puerto Ricans.[172] The religious element in the fourth area is missing here, but the concern in *Yoder* over the unequal impact of law on a deeply rooted culture is present.[173]

One additional theme—common to most of these cases but not universal[174]—deserves special attention, for it may ultimately be the Court's touchstone for recognition of consequential impact. This nearly common denominator is the presence of a consequence that is not merely discriminatory but totally exclusionary. In *Griffin,* for example, the indigent defendant did not simply receive less benefit from the provision for appeal than would one with the money to afford a transcript—he received no benefit at all.[175] This factor may operate independently of, or in conjunction with, one or both of the criteria discussed above—the nature of the interest involved and the character of the discrimination effected. It is, in any event, arguably present in the situations giving rise to a claim for bilingual education.[176]

Some of these suggested determinants of when consequential inequality should be recognized are similar to the factors considered in determining the appropriate standards for scrutiny of discriminatory laws. The reasoning pursued to arrive at these considerations resembles that undertaken to decide if a "fundamental interest" is being infringed by the distinctions drawn, or whether the classification is "suspect."[177] But the factors weighed for the purpose of setting standards of review are not necessarily the same as those relevant to deciding the preliminary question of what *theory* of equality to employ. Indeed, there is good cause to argue that the court should allow a wider variety of considerations to trigger recognition of consequential inequality than it allows to call forth strict scrutiny. The former judgment simply decides whether or not there is any *judicially cognizable* discrimination at all. If the court concludes that neither the interests involved nor the resulting pattern of consequences requires abandoning the convenience of formal equality, then the analysis would cease at that point. If it decides that the discriminatory impact calls for recognition, the decision still leaves open the question of what burden of justification the state will bear.[178]

---

[172] *See* Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968). The precise basis of discrimination in a bilingual case is language ability rather than national origin, but this fact does not alter the analysis. *See* p. 84 *infra.*

[173] An English-only school system in a linguistically divided community implicitly denigrates the non-English speaking child's language and cultural background. *See* pp. 55–56 *supra.*

[174] *See* p. 86 *infra.*

[175] *See* pp. 74–75 *supra.*

[176] *See* p. 85 *infra.*

[177] *See* pp. 83–87 *infra.*

[178] *See* pp. 81–83 *infra.*

It is true that inequality in the consequences of an educational program may result from inequalities in housing, clothing, and nutrition as well as language ability. But these other deficiencies are not ethnically-linked, they are unrelated to the structure of an educational program, and they do not result in a total denial of educational opportunity. The classroom cannot compensate for a lack of receptivity and motivation that stems from the many sources of social and economic deprivation in society, but courses of instruction can be so designed that children can *choose* whether or not to apply themselves. Teaching only in English, without special instruction for non-English speaking children, denies them any opportunity to make this choice.

It should also be noted that the consequential inequality supporting a claim for bilingual education differs from that in de facto segregation in at least two ways. First, there is no question that the pattern effected by English-only schools is in fact unequal. Whether all-black schools, on the other hand, are inherently unequal is highly debatable.[179] More fundamentally, even if the discriminatory pattern in de facto segregation is detrimental, this effect may not stem from the government's failure to account for individual deficiencies but from societal attitudes to which the government lends no support.

The first stage in the equal protection argument for bilingual education may be restated as follows: consequential inequality is rooted in a coherent theory which has been recognized by the courts in special circumstances, and similar, narrowly definable conditions exist in the case of unilingual education in a linguistically divided community. Establishing this much, however, only carries the claim to the threshold of traditional equal protection analysis: determining and applying the appropriate standard of review.

B. Standards of Review and Their Application

1. Restrained Review

Normally, judicial scrutiny of a classificatory scheme begins with a determination of the state's purpose for the classification, and proceeds to consider the relationship between the purpose and the line of discrimination.[180] The traditional doctrine of judicial restraint suggests upholding a formally neutral program, even though it has a discriminatory impact, if there is no discriminatory intent and there is

---

[179] *See De Facto Segregation, supra* note 131, at 307–10.

[180] *See Developments—Equal Protection, supra* note 118, at 1076. Of course determination of purpose is itself a complex process. Discussion of this problem is beyond the scope of this Article. *See id.* at 1077–81.

a rational relationship between the result—apart from the discriminatory by-product—and the purpose of the activity. Thus in the Second Circuit employment examination case noted above,[181] the court asserted that "the proposition to be proved was only that the Board's examinations were job-related."[182] The courts' readiness to engage in their own search for plausible legislative purposes rationally related to a law's effect has varied.[183] But in cases where they have recognized consequential inequality and adopted a restrained standard of review, they have required the *government* to articulate and demonstrate a rational relationship to purpose.[184]

In a bilingual case, the state would probably assert that current means of instruction are related to the needs of most children and that resources would have to be diverted from other purposes in order to develop a bilingual teaching capacity. This justification may be defeated, however, if it could be shown that a substantial percentage of pupils are not benefitting from their courses, and that federal funds available specifically for the needed changes would be adequate without the transfer of resources from other parts of the school system.[185]

The state might also take a different tack and argue that unilingual education is preferable for reasons of educational policy. It could point out the successful assimilation of prior generations of non-English speaking children through unilingual public schools. Overwhelming evidence, however, indicates that absorption of the culture and dominant language of this country proceeds in spite of, rather than because of,

---

[181] Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972), discussed at p. 77 *supra*.

[182] 458 F.2d at 1177.

[183] *See* Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972); *Developments—Equal Protection*, *supra* note 118, at 1082–87.

[184] "[O]nce such a *prima facie* case was made, it was appropriate for the district court to shift to the Board a heavy burden of justifying its contested examinations by at least demonstrating that they were job-related. First, since the Board is specifically charged with the responsibility of designing those examinations, it certainly is in the better position to demonstrate their validity. Second, once discrimination has been found it would be anomalous at best if a public employer could stand back and require racial minorities to prove that its employment tests were inadequate at a time when this nation is demanding that private employers in the same situation come forward and affirmatively demonstrate the validity of such tests." Chance v. Board of Examiners, 458 F.2d 1167, 1176 (2d Cir. 1972) (citations omitted). In Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972), Judge Coffin stated the requirement as follows: "The public employer must . . . demonstrate that the means [of selection] is in fact substantially related to job performance." *Id.* at 732. Other cases in this group have also adopted a standard of review between relaxed and strict scrutiny. *See* Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971), *cert. denied*, 409 U.S. 929 (1972), Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972).

[185] *See* p. 62 *supra*.

unilingual schooling.[186] If the court requires a genuine justification for the school programs in question, it may thus find a violation of the equal protection clause even upon a restrained review of an all-English system.

2. Active Review

In cases of discrimination involving a suspect classification or a fundamental interest, the courts have placed a heavier burden of justification on the government, requiring it to show that a "compelling state interest" is at stake.[187] In such instances, a merely rational relationship between purpose and classification has been insufficient to uphold the measure in question, and decision has been based on a balancing of societal benefit against individual harm.[188]

As noted in *Chance*,[189] however, it would be improper automatically to apply this approach to cases involving unintentional discrimination.[190] Much government action affects disadvantaged groups differently than it affects other classes of citizens, and strict scrutiny could not—as a practical matter—be applied to all the cases of such differential results.[191] Moreover, discrimination is less offensive when it is not intended by the state. But in cases of consequential inequality along suspect lines *and* related to a fundamental interest, strict scrutiny should be the rule.[192] The question, then, is whether there is a suspect classification and a fundamental interest involved in a claim for bilingual education.

The most recent Supreme Court pronouncement on both elements in the context of public education is *San Antonio Independent School District v. Rodriguez*.[193] At issue was a system of school financing which yielded a smaller sum per student in some school districts than in others, depending on the yield of property taxes.[194] The Court declined to review the system with strict scrutiny because it found neither a suspect classification[195] nor a fundamental interest[196] involved. By applying the

---

[186] *See* pp. 56–57 *supra*.

[187] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[188] *See* Note, *Equal Protection and the Indigent Defendant:* Griffin *and Its Progeny*, 16 STAN. L. REV. 394 (1964). *But see* Mayer v. Chicago, 404 U.S. 189, 196 (1971) ("*Griffin* does not represent a balance between the needs of the accused and the interests of society").

[189] 458 F.2d 1167 (2d Cir. 1972).

[190] *Id.* at 1177.

[191] *Cf.* Dandridge v. Williams, 397 U.S. 471 (1970).

[192] This view is supported by the Court's approach in the indigent defendant and voting rights cases discussed above at pp. 74–75.

[193] 411 U.S. 1 (1973).

[194] *Id.* at 6–17.

[195] *Id.* at 18–28.

[196] *Id.* at 29–39.

Court's analysis to the consequential inequality involved in a unilingual school system, it can be shown that active review is appropriate here because both factors are present.

Concerning the suspect classification doctrine, Justice Powell stated for the majority that

> [t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[197]

He even found it difficult to define the class.[198] The group disadvantaged by an English-only educational program, on the other hand, is clear. It consists of children of certain national origins who have never learned English. Such a class in the Southwest or the ghettos of a large city does carry the indicia of suspectness articulated by Justice Powell and derived from prior case law.[199]

It may be argued, however, that because the class is not defined by national origin alone but rather—to be more precise—by language ability, these precedents do not apply. Admittedly, language skills, unlike national origin and race, can be altered, and a class defined by its spoken tongue is therefore not indelibly tagged. However, such a class may still bear the indicia of suspectness delineated in *Rodriguez*. And more broadly, the interrelationship between national origin and language in some regions is so close that separation is meaningless in practice.[200]

---

[197] *Id.* at 28.

[198] *Id.*

[199] Chinese- and Japanese-Americans have long been recognized as racial minorities deserving protection under the due process and equal protection clauses. *E.g.*, Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Yick Wo v. Hopkins, 118 U.S. 356 (1886). Discrimination against Puerto Ricans in unemployment insurance was found to violate equal protection in Galvan v. Levine, 345 F. Supp. 67 (S.D.N.Y. 1972). And Puerto Ricans as well as Mexican-Americans have received judicial recognition as ethnic minorities both for purposes of equal educational opportunity, *e.g.*, Cisneros v. Corpus Christi Indep. School Dist., 467 F.2d 142 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 3052 (1973); Alvarado v. El Paso Indep. School Dist., 445 F.2d 1011 (5th Cir. 1971); United States v. Texas, 342 F. Supp. 24 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972), and for purposes of jury selection, *e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954) (holding that persons of Mexican descent constituted a distinct class to which the equal protection guaranty was applicable). *But see* Tijerina v. Henry, 48 F.R.D. 274 (D.N.M. 1969), *appeal dismissed*, 398 U.S. 922 (1971) (district court held, in part, that class of "Mexican Americans" undefinable and therefore unsuitable for class action). A long tradition of governmental relations also gives "official" minority status to American Indians. *See* Rosenfelt, *supra* note 13.

[200] *Cf.* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969): "Defendants have not, and indeed could not have,

With respect to fundamental interests, *Rodriguez* held that education itself does not fall within this rubric because it is not "explicitly or implicitly guaranteed by the Constitution."[201] The Court did, however, take note of the argument that there is a nexus between education and effective exercise of the fundamental interests in free speech and the franchise.[202] Justice Powell disposed of the contention by ruling that

> [w]hatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.[203]

Instruction in a language which children cannot understand must, at the very least, approach the absolute denial referred to in *Rodriguez*. The reports and studies discussed above show that non-English speaking children have little if anything to show for the years they spend in English-only schools.[204] Even if these children acquire some minimal quantum of knowledge and skills, the enduring negative attitudes fostered under these circumstances may reduce the sum total of what the school imparts to zero, or even worse than nothing.

To some extent this line of reasoning is pure speculation because Justice Powell did not elaborate upon his use of the phrase "absolute

---

denied that the pattern of grouping correlates remarkably with a student's status, although defendants would have it that the equation is to be stated in terms of income, not race. However, as discussed elsewhere, to focus solely on economics is to oversimplify the matter in the District of Columbia where so many of the poor are in fact the Negroes." *Id.* at 513. The court then stated that race cannot "be ruled out." *Id.*

[201] 411 U.S. at 33–34.

[202] *Id.* at 35–36.

[203] *Id.* at 38.

[204] *See* pp. 54–55 *supra*.

"Access to education offered by the public schools is completely foreclosed to these children who cannot comprehend any of it. They are functionally deaf and mute.

. . . .

". . . [T]he language barrier . . . insulates the children from their classmates as effectively as any physical bulwarks. Indeed, these children are more isolated from equal educational opportunity than were those physically segregated blacks in *Brown;* these children cannot communicate at all with their classmates or their teachers." Lau v. Nichols, 483 F.2d 805, 805–06 (9th Cir. 1973) (Hufstedler, J., dissenting from denial of rehearing en banc).

denial of educational opportunities." At one extreme, it may be asserted that there is no such denial as long as the state does not take steps to prevent children from learning English. On the other hand, it could be argued that a showing of the egregious statistics on underachievement, over-ageness, and dropout rates demonstrates total "failure" of the educational system, and hence absolute "denial" because no other formal educational opportunities are realistically available.[205] Some indication of Justice Powell's meaning may be drawn from his use of the phrase "absolute deprivation" as the standard for determining when discrimination according to wealth triggers strict scrutiny:

> The individuals, or groups . . . who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute benefit.[206]

Examination of prior cases concerning access to appellate review for indigent defendants reveals that denial of the opportunity to appeal was "absolute" only in the mildest sense of the word. Thus where a system was held to discriminate unconstitutionally on account of wealth because it left appointment of counsel to represent an indigent defendant within the discretion of the appellate court, a dissenting opinion pointed out that the procedure "denies to no one the right to appeal."[207] It merely made the quality of the appeal dependent upon the ability to hire an attorney in cases where the appellate court declined to appoint one.[208] If this arrangement constitutes such an absolute denial of opportunity that it reduces the right of appeal "to a meaningless ritual,"[209] surely the educational opportunity for a non-English speaking child in an English-only school must qualify for the same characterization.

Thus on the ground of its effective classification along ethnic lines *and* absolute denial of opportunities requisite to the exercise of fundamental interests, the discriminatory impact of an English-only

---

[205]Private schools are unlikely to be an alternative for children coming from low-income homes.

[206]411 U.S. at 20.

[207]Douglas v. California, 372 U.S. 353, 363 (1963).

[208]Other indigent defendant cases similarly emphasize equality in the *effectiveness* of the appeal. *See* Mayer v. Chicago, 404 U.S. 189 (1971); Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958). In these cases the quality of the appeal was dependent upon the defendants' ability to pay for a trial transcript if the appellate court refused to supply one.

[209]Douglas v. California, 372 U.S. 353, 358 (1963).

educational system should be subject to active judicial review—and hence a balancing of individual and state interests. Under the rational relationship test, a court might not inquire into the monetary and policy justifications which the state would assert in support of an English-only school system. But under active review it would inquire into the validity of these assertions and require more substantial state interests to outweigh the harsh consequences suffered by non-English speaking children. Even if the imbalance might be tolerated on a short-term basis, it is not likely to be upheld where the inequality is maintained for years.[210] And when the end result of the system is to place those discriminated against at a disadvantage for the remainder of their lives, the court will be hard pressed to sustain the state's position. If it nonetheless concludes that such a school system does not deny equal protection of the law, it may yet find a deprivation of liberty without due process.[211]

V. FEDERAL CONSTITUTIONAL RIGHTS: DUE PROCESS

As in the equal protection analysis, there are two stages in applying the due process clause to the problem of unilingual schools in linguistically divided communities. The first involves establishing an infringement of liberty, and the second entails a consideration of what consequences flow from such a showing.

A. Deprivations of Liberty

Two due process liberties are denied by educational systems which compel a student to attend classes and yet fail to provide him with the linguistic skills necessary to benefit from the instruction: the intangible liberty to acquire useful knowledge, and the tangible liberty from physical confinement. Such infringements can be justified only by the showing of a substantial legitimate state interest in continuing them, and such a demonstration is unlikely in view of the uniformly detrimental effects of English-only programs.

1. Liberty to Acquire Useful Knowledge

The first of these liberties—the right to learn—has long been recognized. In 1923, the Supreme Court held in *Meyer v. Nebraska*[212]

---

[210] *See Developments—Equal Protection, supra* note 118, at 1104.

[211] Only the equal protection and statutory issues are before the Supreme Court in Lau v. Nichols, Civil No. C-70, 627 LHB (N.D. Cal., May 26, 1970), *aff'd*, 483 F.2d 791 (9th Cir.), *rehearing en banc denied*, 483 F.2d 805, *cert. granted*, 93 S. Ct. 2786 (1973). Therefore, even an adverse decision will not preclude future bilingual claims based on other clauses of the Federal Constitution.

[212] 262 U.S. 390 (1923).

that a state law prohibiting the teaching of modern foreign languages to children below the eighth grade in public or private schools violated the fourteenth amendment. The Court stated the following:

> While this Court has not attempted to define with exactness the liberty thus guaranteed [by the due process clause], the term ["liberty"] has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, *to acquire useful knowledge* . . . and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[213]

But while courts have recognized that education ranks among the most important functions of government,[214] the holdings fall short of providing a *right* to be educated by the state.[215] *Meyer* construed due process liberty to encompass the liberty to acquire knowledge, but it did not rule that the states had to provide the wherewithal.

No such broad holding is necessary, however, to support a due process right to bilingual education; *Meyer v. Nebraska* is sufficient. For where no such special instruction is provided, but the student is nonetheless compelled to attend classes, the state has not only failed to educate him. It has also prevented him from using that time "to acquire useful knowledge" elsewhere. In the typical situation, private formal schooling is not the foregone opportunity, for it is not an available option. However, the opportunity for informal education at home, at work, or in the neighborhood is curtailed by compulsory school attendance.

2. Freedom from Physical Restraint

A unilingual educational system also deprives students whose presence in school is compulsory of freedom from physical confinement.

---

[213] *Id.* at 399–400 (emphasis added).

[214] *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30 (1973); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

[215] Despite some strong dicta in lower federal court decisions—favoring entitlements to education—and despite an increased reliance upon due process doctrine in school litigation, we are far from an outright constitutional entitlement to education. In the very recent *Rodriguez* opinion the Court not only refused to label education a fundamental interest, but reserved the question of whether "an absolute denial of educational opportunities" would be constitutionally impermissible. 411 U.S. at 37.

It is clear that a state's interest in educating its citizens is sufficient justification for compelling children to attend school.[216] But when the education justifying compulsory attendance is not provided, school is simply reduced to confinement. Individuals are required to remain in an enclosed place for substantial lengths of time over a period of years, and they may be bodily restrained from leaving without permission. The confinement is not only real but also debilitating. Liberal and radical critics of American education have argued that today's school experience bears a grim resemblance to punitive imprisonment.[217] And if that is true for white, middle-class English-speaking children, it is true *a fortiori* for children facing a frustrating and humiliating language barrier.

Similar "physical liberty" arguments have been made on behalf of mentally ill individuals confined in hospitals and unruly juveniles placed in reformatories, both of which groups have sought judicial assistance to obtain either release or the care and treatment which would justify their confinement. One federal court has recognized that a person involuntarily committed to a mental hospital has a constitutional due process right to treatment. In *Wyatt v. Stickney*,[218] the plaintiffs brought a class action against state officials involved in the administration of an institution for voluntarily and involuntarily confined mental patients. It appeared that the hospital budget had been cut and that programs of treatment were inadequate. The court held that the involuntary inmates

> unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. Adequate and effective treatment is

---

[216]State supreme courts have uniformly upheld statutes compelling school attendance, *e.g.*, State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901), and the United States Supreme Court has indicated it considers such laws constitutional. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1924). Both of these Supreme Court cases, however, placed limitations on the power of the state to compel attendance.

[217]*See, e.g.*, I. Illich, DESCHOOLING SOCIETY (1971); C. Silberman, CRISIS IN THE SCHOOLROOM (1971); Gintis, *Towards a Political Economy of Education: A Radical Critique of Ivan Illich's DESCHOOLING SOCIETY*, 42 HARV. ED. REV. 70 (1972).

[218]Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala.), *further orders*, 334 F. Supp. 1341 (1971), 344 F. Supp. 373, 344 F. Supp. 387 (1972), *appeal docketed sub nom.* Wyatt v. Aderholt, No. 72-2634, 5th Cir., Aug. 1, 1972. *Contra*, New York Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) (mem.); Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972), *appeal docketed*, No. 72-3110, 5th Cir., Aug. 1, 1972. For a note on the subject, see 86 HARV. L. REV. 1282 (1973).

The argument accepted in *Wyatt* had been advanced for years but never decided. *See* Humphrey v. Cady, 405 U.S. 504, 514 (1972); Rouse v. Cameron, 373 F.2d 451, 453 (D.C.

> constitutionally required because, absent treatment, the hospital is transformed "into a penitentiary where one could be held indefinitely for no convicted offense."[219]

Wyatt is being appealed, and other courts have rejected its rationale.[220] But if *Wyatt* is correct, it is logical to substitute "education" for the word "treatment" in the language quoted. Adequate education is as important for preventing the transformation of schools into penitentiaries as adequate treatment is in mental hospitals.

Two recent cases have found that juveniles detained on non-criminal grounds in state institutions have a similar right to treatment.[221] *Martarella v. Kelly*[222] involved a challenge to New York's detention of "Persons In Need of Supervision" (PINS)—a class of juveniles who were neither delinquent nor "neglected," but rather confined for such problems as uncontrollable behavior and truancy. The court canvassed recent Supreme Court cases that "indicated markedly increased solicitude for the rights of children,"[223] and held that "[w]here the state, as *parens patriae*, imposes such detention, it can meet the Constitution's requirement of due process and prohibition of cruel and unusual punishment if, and only if, it furnishes adequate treatment to the detainee."[224] Similarly, *Inmates of Boys' Training School v. Affleck*[225] granted injunctive relief against certain practices of a juvenile corrections institution and ordered an increase in remedial services. The court stated: "Rehabilitation, then, is the interest which the state has defined as being the purpose of confinement of juveniles. . . . Thus, due process in the juvenile justice system requires that the post-adjudicative stage of institutionalization *further* this goal of rehabilitation."[226]

Cir. 1966); Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960) (Fahy, J., concurring).

[219] 325 F. Supp. at 784 (citations omitted), *quoting* Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960) (Fahy, J., concurring).

[220] *See* note 218 *supra*.

[221] These decisions were foreshadowed by statements in several prior cases. *See, e.g., In re* Gault, 387 U.S. 1, 22 n.30 (1967); Haziel v. United States, 404 F.2d 1275, 1280 (D.C. Cir. 1968); Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967); Clayton v. Stone, 358 F.2d 548 (D.C. Cir. 1966) (separate opinion of Bazelon, C.J.); Elmore v. Stone, 355 F.2d 841 (D.C. Cir. 1966) (separate opinion of Bazelon, C.J.); Sas v. Maryland, 334 F.2d 506, 517 (4th Cir. 1964), *cert. dismissed as improvidently granted,* Murel v. Baltimore City Crim. Ct., 407 U.S. 355 (1972); Kautter v. Reid, 183 F. Supp. 352, 354–55 (D.D.C. 1960); White v. Reid, 125 F. Supp. 647, 650 (D.D.C. 1954); *cf.* Jones v. Wittenberg, 323 F. Supp. 93, 100 (N.D. Ohio 1971).

[222] 349 F. Supp. 575 (S.D.N.Y. 1972).

[223] *Id.* at 599, *citing In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966).

[224] 349 F. Supp. at 585.

[225] 346 F. Supp. 1354 (D.R.I. 1972).

[226] *Id.* at 1364. In discussing the institutions' educational offerings, the court noted that "there is a bitterly cruel irony in removing a boy from his parents because he is truant

Children in schools are deprived of physical liberty in much the same way that mental patients and unruly juveniles are confined in other institutions. It is true that their confinement is of less sustained and more defined duration, but due process should still demand that they be given the education which justifies their compelled attendance. To paraphrase *Wyatt v. Stickney*, "[t]o deprive any person of his or her liberty upon the altruistic theory that the confinement is for humane [educational] reasons and then fail to provide adequate [education] violates the very fundamentals of due process."[227] Non-English speaking children in schools which do not offer bilingual education are not receiving an education which justifies their confinement.[228]

B. The State's Options

The conclusion reached in the preceding section leaves the state two options: provide bilingual education, or exempt non-English speaking children from compulsory attendance laws. It may appear that the latter alternative would be less expensive and therefore more attractive to state legislators. But this option could be more burdensome and costly than the former because procedural due process would require that any such exemption from compulsory school attendance laws be implemented through an expensive and time-consuming process of individual hearings.

Two recent cases indicate that, before a state can exclude handicapped children from regular classes, it must afford each child a hearing on the propriety of the initial exclusion, and subsequent hearings to review periodically the continued validity of the exclusion. In *Mills v. Board of Education*,[229] a federal district court enjoined the exclusion of retarded or disturbed children from regular classes unless alternative education was provided at public expense. The right to alternative education was a statutory one; but due process was held to require a hearing before the classification of a child as either retarded or disturbed, and periodic hearings to review that classification.[230] In the similar case of *Pennsylvania Association for Retarded Children v. Pennsylvania (PARC)*,[231] a three-judge federal panel permanently enjoined analogous

---

from school, and then confining him to a small room, without exercise, where he gets no education. . . . Whether education is a fundamental right . . . or not, I find that denying education to inmates of Annex C does not serve any permissible interest." *Id.* at 1369.

[227] In the opinion the bracketed words are "therapeutic" and "treatment," respectively. 325 F. Supp. at 785.

[228] *See* pp. 53–57 *supra*.

[229] 348 F. Supp. 866 (D.D.C. 1972). *See* Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 995, 996 (1972).

[230] 348 F. Supp. at 875–76.

[231] 343 F. Supp. 279 (E.D. Pa. 1972) (three-judge court).

stigmatizing classifications, pursuant to a stipulated consent agreement including a provision for notice and hearing prior to a change in educational status.[232]

The exclusion of non-English speaking children from compulsory attendance laws is not, of course, the full equivalent of excluding them from regular classes. Such a distinction is a technical one at best, however, for it overlooks the fact that children who cannot benefit from classes are unlikely to attend voluntarily. Moreover, the *PARC* opinion suggests that the primary factor which would have triggered a right to a hearing in that case, had there not been a consent decree, was the fact that—by using the derogatory adjective, "retarded"—the state stigmatized the excluded children.[233] A waiver of compulsory attendance laws for non-English speaking children is similarly derogatory, because each such child would be set apart as unsuitable for ordinary education. Educators might argue that inability to speak English is neither a permanent nor a demeaning disability; but the Supreme Court has recently held that a hearing is required by the due process clause prior to the application of a label which might be interpreted, however incorrectly, as a stigma.[234] Thus, in order to meet the requirements of the fourteenth amendment, educators must either provide bilingual education to non-English speaking children or exempt these children from compulsory school attendance laws, providing individual hearings to determine which children belong in the "non-English speaking" category.[235]

VI. CONCLUSION: A READY AND ACCEPTABLE REMEDY

Reluctance to recognize a deprivation of equal protection and due process when a state fails to structure its educational program to ensure accessibility for different linguistic groups may stem in the end from concern that other consequential deprivations cannot be distinguished.[236] The preceding sections have attempted to sketch doctrinal parameters which the courts could employ to prevent the gate for claims based on social and economic disadvantages from opening too wide. The first

---

[232] *Id.* at 303.

[233] *Id.* at 294–95.

[234] Wisconsin v. Constantineau, 400 U.S. 433, 436 (1972) (regardless of whether label of "excessive drinking" denotes fault or merely illness, some will interpret it as the former and a prior hearing is therefore required).

[235] The issue of what procedural safeguards must be afforded at such a hearing is a major one, but is beyond the scope of this Article. *See* Note, *Due Process in Placement Hearings for the Mentally Retarded,* 41 GEO. WASH. L. REV. 1033 (1973). For present purposes it is sufficient to note that such requirements will increase the cost of this option.

[236] *See* pp. 58, 80 *supra.*

section revealed the peculiar severity and clarity of the injuries caused by lack of effective language instruction for non-English speaking children. In conclusion it should also be noted that the remedy is unusually ready and acceptable.[237]

The two most important concerns that arise when formulating a remedy in a case of this nature are entanglement in local policy decisions, and imposition of unreasonable demands on limited financial resources. A directive to provide bilingual instruction in order to improve language skills is, however, a remedy easily defined and widely recommended by experts.[238] By way of comparison, it does not entail the difficult judgments in redrawing lines for school attendance zones[239] or voting districts[240] or evaluating such value-laden school policies as the daily flag salute.[241] With respect to financial limitations, it has been held that the state's

> interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the [school system] whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.[242]

The cost of providing improved language instruction, moreover, would probably be less than the costs entailed in the far-reaching desegregation orders of recent years.

The traditional concerns over involvement in policy judgments and problems of financing should also be alleviated by the existence of the HEW guidelines[243] and a growing body of experience with bilingual programs. Referring to standards of court-supervised desegregation, the Fifth Circuit has declared that "the HEW [Title VI] Guidelines are

---

[237] A full analysis of the issues involved in remedies requiring affirmative action is beyond the scope of this Article. The purpose of this section is merely to demonstrate the relative simplicity of the remedy in a bilingual case. For a treatment of judicial remedies in equal protection cases generally, see *Developments—Equal Protection, supra* note 118, at 1133–59.

[238] *See* p. 57 *supra*.

[239] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[240] *See* Baker v. Carr, 369 U.S. 186 (1962).

[241] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[242] Mills v. District of Columbia Bd. of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972).

[243] *See* pp. 62–63 *supra*.

belated but invaluable helps in arriving at a neutral, principled decision consistent with the dimensions of the problem, traditional judicial functions, and the United States Constitution."[244] Existing bilingual projects have demonstrated that the problems of implementation can be overcome. Affirmative recruitment and training programs have expanded the pool of qualified bilingual teachers.[245] Voluntary admissions policies respect the prerogative of parents not to enroll their children in the bilingual classes, and the option of withdrawing children from the programs has been made available as well.[246] These arrangements have attracted some avid Anglo participants.[247] Focusing on the early primary grades, moreover, alleviates the need for an extensive separate program in the later elementary school years.[248]

Thought and concrete planning have been devoted to the bilingual education movement. The judicial role would thus not be to evaluate alternative proposals, but rather to recognize a right and a deprivation, and require school officials to take the appropriate remedial action. Courts should retain jurisdiction so that school authorities remain accountable; but continuing involvement in the administration of school affairs should not be necessary. Bilingual programs are not abstract proposals for use in the best of all possible worlds. They are necessary and practicable concomitants of equal educational opportunity in this frequently inadequate world.

---

[244]United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 849 (5th Cir. 1966), *aff'd on rehearing*, 380 F.2d 385 (en banc), *cert. denied*, Caddo Parish v. United States, 389 U.S. 840 (1967).

[245]Northern California has launched a major effort under the Bay Area Bilingual Education League (BABEL), and numerous bilingual teachers, psychologists, administrators, etc., are being trained. Interview with Olivia Martinez, June 20, 1972. *See also* Note, *Beyond the Law to Equal Educational Opportunities for Chicanos and Indians*, 1 N.M.L. REV. 335 (1971).

[246]V. John & V. Horner, EARLY CHILDHOOD BILINGUAL EDUCATION 28–29 (1971). *See also* Gaarder, *Teaching the Bilingual Child: Research, Development and Policy*, in EDUCATING THE MEXICAN AMERICAN 262 (H. Johnson & W. Hernandez eds. 1971).

[247]*Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 307, 387 (1972) [hereinafter cited as *Chicano School Segregation*]; Wall St. J., Dec. 15, 1972, at 1, col. 1.

[248]One prescriptive version of a bilingual program is the following: "The curriculum at the elementary level would begin with basic instruction in the child's native tongue for all participating children. Morning sessions in language arts, social studies, math, and science would be taught in the student's primary language. Knowledge in these areas would then be reinforced in the second language during the afternoon. Music, art, and physical education would be required integrated activities from first to sixth grade. After the third grade, classes would be increasingly integrated. Subject matter would be presented in either language, depending on which best suits the lesson plan. . . .

"The ultimate goal of such a program would be to equip each child by the sixth grade, with sufficient linguistic knowledge of both [languages] to succeed in either language. . . ." *Chicano School Segregation*, *supra* note 247, at 390.

About 10 years ago, U.S. educators came to the realization that there are native-born American children for whom the English language and the American way of life are virtually foreign.

These children, they found, therefore experience a number of educational and psychological set-backs in school. Many of the children never overcome these obstacles, and eventually fail or drop out. This repeated failure has helped to assure that certain ethnic groups are kept among the lowest socio-economic levels in the United States.

The most startling discovery for the educators, however, was that children from linguistic and ethnic minorities are not linguistically and culturally deprived.

By the time they are five years old, these children have mastered the basic sound and grammer structures of their own language, they have learned about themselves and their world, and they are ready to begin acquiring the concepts and skills the educational system deems necessary; but these concepts and skills are being learned in a language other than English, and through learning techniques based on other than the Anglo-American cultural model.

This discovery--that by using the native language for classroom instruction, the child is allowed to continue uninterrupted learning from home to school, thus permitting immediate progress in concept building instead of postponing development until a new language is learned--is bilingual bicultural education.

Margarita Mendoza De Sayagoni

Maria Balliera

MINNESOTA BILINGUAL VOCATIONAL TRAINING PROJECT
ST. PAUL TVI
235 MARSHALL AVENUE
ST. PAUL, MINNESOTA 55104

Irene Bethke
4649 Decatur Avn N
New Hope MN 55428

NON-PROFIT ORG.
U. S. POSTAGE
PAID
St. Paul, Minn.
Permit No. 4044

LA RAZA

* Estudios básicos para entrar a un programa vocacional
* Oportunidades para entrar a un entrenamiento vocacional
* Asistencia en planes para su carrera
* Basic skills needed for vocational programs
* Opportunities to enter vocational training programs
* Help in planning your career

LLAME: CALL:

227-9121

MINNESOTA BILINGUAL VOCATIONAL TRAINING PROJECT

The Minnesota Bilingual Vocational Training Project is designed to assist persons of Latino Heritage into Vocational Education.

The Bilingual Project offers:

a) Basic Skills Programs for people who must improve their English and Mathematical abilities to enter a course.

b) Bilingual Clerical/Bilingual Accounting Clerk Training programs which are taught in both Spanish and English.

c) Assistance in selecting the appropriate Vocational Training Program based on your abilities and interests.

d) The Bilingual Project staff can also assist you in securing financial support for tuition, books and other educational expenses.

Contact the project representative in your area:

St.Paul - Francisco Rivera
227-9121 Roberto Acosta
Helen Boddy

Austin/Albert Lea - Zeferino Perez
507-437-6681

Project Director - Francisco Trejo

PROYECTO BILINGUE DE ENTRENAMIENTO VOCACIONAL DE MINNESOTA

El Proposito del Proyecto Bilingue es de asistir a personas de ascendencia Latina a entrar al Sistema de Educacion Vocacional.

El Proyecto Bilingue ofrece:

a) Programas Basicos para personas que requieren mejoramiento de Ingles y Matematicas para entrar a un curso vocacional.

b) Oficinista Bilingue, Auxiliar de Contabilidad, los cuales son ensenados en Espanol e Ingles.

c) Asistencia para seleccionar un programa Vocacional apropiado a las habilidades e intereses de la persona.

d) El Grupo del Proyecto Bilingue tambien le ayudan a asegurar ayuda economica para colegiatura, libros y otros gastos educacionales.

Pongase en contacto con el representativo del proyecto en su area:

St.Paul - Francisco Rivera
Roberto Acosta
Helen Boddy

Austin/Albert Lea - Zeferino Perez
507-437-6681

Director del Proyecto - Francisco Trejo

PROYECTO BILINGUE DE ENTRENAMIENTO VOCACIONAL DE MINNESOTA
MINNESOTA BILINGUAL VOCATIONAL TRAINING PROJECT

EL PROYECTO BILINGUE EN SU SEGUNDO AÑO DE EXISTENCIA

El Proyecto Bilingue de Entrenamiento Vocacional de Minnesota se encuentra en su segundo año de existencia en el Instituto Vocacional de St. Paul.

El propósito del Proyecto Bilingue es de matricular Latinos en cursos técnico-vocacionales a través del estado.
El Proyecto Bilingue tiene su oficina central en St. Paul y otra en Austin Minnesota.

En los ultimos 18 meses mas de 500 personas han aplicado en nuestras oficinas. Se han graduado estudiantes de una variedad de cursos incluyendo: Comercio Internacional, Laboratorios Médicos, Mecánico de Aviación, y Control de Trafico Aereo.

El Proyecto Bilingue ofrece cursos preparatorios en Inglés, y matemáticas para estudiantes que requieren mas practica en estas áreas. Ademas El Proyecto ofrece un curso de Oficinista Bilingue y otro de Auxiliar de Contabilidad.

Para mas información favor de llamar al 227-9121 ext. 238 pregunte por Francisco Rivera, Roberto Acosta, o Helen Boddy.

****

El Proyecto Bilingue de Entrenamiento Vocacional ofrece cursos para personas de habla Hispana preparandoles para entrar a un programa de Entrenamiento Vocacional en St. Paul Technical Vocational Institute.

++++++++++++++++++++ Ingles I ++++++++++++++++++++

Para estudiantes de habla Hispana que necesiten aprender Inglés. Tambien practicaran el alfabeto y la pronunciación en Ingles, oraciones simples, y desarrollar el vocabulario.

++++++++++++++++++++ Ingles II ++++++++++++++++++++

Para estudiantes que necesiten mejorar la conversación y la comprención en Ingles.Practicaran la sintaxis del Ingles y empezarán a leer y escribirlo.

++++++++++++++++ Leer y escribir I ++++++++++++++++++++

Un curso Bilingue para estudiantes que ya pueden entender y hablar Inglés bastante bien. Aprenderan a leer practicando los sonidos de las letras y las sílabas, así como la formación de palabras y frases.

Este curso se ofrece completamente en Inglés para los estudiantes que pueden comunicarse bien y entender bien. Practicaran los sonidos y la formación de palabras y frases.Los estudiantes trabajaran independientemente.

++++++++++++++++++++ Leer y escribir II ++++++++++++++++++++

Un curso bilingue para los estudiantes que esten para entrar en un curso vocacional. (Entienden el Ingles y pueden leer lo escrito bastante bien). En esta clase pueden mejorar la comprención, la gramática y desarrollar el vocabulario.

++++++++++++ Introducción a la ciencia Bilingue ++++++++++++++++

Para los estudiantes que entienden bastante el Inglés, y que pueden leer textos a un nivel intermedio y avanzado. Ofreceran una introducción alos conceptos básicos de la ciencia, para preparar a los estudiantes que entraran en un curso técnico-vocacional. La materia se presentara a todos los estudiantes juntos, y cada estudiante sera responsable para cumplir el trabajo a tiempo.

++++++++++++ GED Prep. Mr. Cerello ++++++++++++++++++++++++++

Para los estudiantes que entienden Inglés y pueden leer y comprender bastante bien y que quieren obtener el GED diploma (high school-general equivalency diploma) Tendran que estudiar para tomar los 5 exámenes que constituyen el GED, y tengo sacar nota que califique para el diploma. Deberan de tener 19 años para el GED.

++++++++++++++++ Matemática y bilingue ++++++++++++++++++++++++

Para los estudiantes que necesiten practica para sumar, restar, dividir, quebrados, y decimales. Se ofrece en Inglés y en Español.

++++++++++++++++ Matemática Bilingue II ++++++++++++++++++++++++

Para los estudiantes que necesiten practicar la matemática que incluye el porcentaje, gráficas y empezar la geometría.

Este curso se ofrece completamente en Inglés. El estudiante práctica la matemática independientemente, usando libros a su nivel. El estudiante trabajara independientemente.

++++++++++++++++ Matemática Bilingue III ++++++++++++++++++++++

Este curso se ofrece para preparar a los estudiantes que entraran a un programa vocacional que requiere el uso de la matemática avanzada. Se tratara de una introducción a la matemática y la geometría, etc....
La materia se presentara a todos los estudiantes juntos, y cada estudiante sera responsable de cumplir el trabajo a tiempo y hacer la tarea en casa. Solamente se admitiran estudiantes nuevos cada 3 semanas.

++++++++++++ Exploración de carreras Bilingues ++++++++++++++

Este curso se ofrece para ayudar al estudiante a escoger un plan para una carrera. Se trata de todas las oportunidades que hay, y las consideraciones que entran en la desición, tal como las experiencias y los talentos que tiene cada persona y sus necesidades particulares. También se trata de como buscar un empleo. Este curso se ofrece en Español e Inglés los estudiantes deberan leer un poco.

****

El Proyecto Bilingue de Entrenamiento Vocacionalde Minnesota le ofrece oportunidad para recibir este entrenamiento.
El Proyecto esta localizado en St..Paul Technical Vocational Institute 235 Marshall.

La introducción se ofrece en Español e Inglés. El contenido de los cursos incluye el estudio de Inglés, contabilidad, mecanografía, matemática, administración de negocios y otros.
Al terminar el curso tendra habilidades de Oficinista Bilingue o Auxiliar de Contabilidad .

Si usted desea recibir este tipo de entrenamiento llame al 227-9121 y pregunte por Francisco Rivera, Roberto Acosta o Helen Toddy.

El Proyecto Bilingue tambien le ofrece otros tipos de entrenamiento técnico-vocacional.

Todos los materiales son gratuitos.

THE BILINGUAL PROJECT IN ITS SECOND YEAR

The Minnesota Bilingual Vocational Training Project in presently in its second year of existence at St. Paul Technical Vocational Institute.

The Bilingual Project's objective is to enroll Latinos in Technical-Vocational courses throughout Minnesota. The Bilingual Project has its main office in St. Paul and a branch office in Austin Minnesota.

Over the last 18 months over 500 Latinos have applied at our offices. We have graduated students from a variety of courses including International Trades, Air Controller, Air Frame Maintenance, Medical Laboratory and Accounting.

The Bilingual Project offers preparatory courses in English and Math for those students who need to upgrade these areas. In addition, the Project also offers Bilingual Clerical, Bilingual Accounting Clerk courses.

For further information feel free to call Francisco Rivera, Roberto Acosta o Helen Boddy at 227-9121 ext 238.

****

The Minnesota Bilingual Vocational Training Project offers classes for spanish speaking persons, that prepare them to enter a vocational training program in St. Paul Technical Vocational Institute.

++++++++++++ English 1 ++++++++++++++++++++

For Latino students who need to learn spoken English. Work on alphabet and phonetics, simple sentence structure and subs titution and building vocabulary is emphasized.

++++++++++++ English 11 ++++++++++++++++++++

For Latino students who need work in intermediate conversational skills; practice English syntax and structure, begin reading comprehencion and wrtten sentence structure.

++++++++ Reading Bilingual 1 ++++++++++++++++++

For Latino students that have learned English sufficiently but need work on reading comprehension and word attack skills.

This class is offered completely in English, for students who can communicate and understand oral English well. Students will practice sounds and formation of words. Students work indepen dently each day.

+++++++ Reading Bilingual 11 ++++++++++++++++++

For English speaking students who are basically ready to enter a Vocational area. (Good command of oral English and sufficient reading comprehension skills). Work expanding vocabulary, improve comprehension, syntax and speed etc...

++++++++ Bilingual Introduction to Science +++++++

For students that have learned English and can read intermediate and advanced text books. The course offers an introduction to basic science concepts, that prepare students to enter technical-vocational programs. The material will be presented to the class as a whole, and each student will be responsable for completing the work on time, and doing some work at home.

++++++++++ G E D Prep. Fr. Cerello ++++++++++++

For students who speak English and can read on an advanced level who wish to receive their GED diploma(high school equivalency diploma). The student will prepare to take the 5 exams that make up the GED. A diploma will be given after the exams are passed, students must be 19 years old to receive their GED.

++++++++++ Bilingual Math 1 ++++++++++++++++

For students who need work on math concepts including adding, subtracting, dividing, fractions and decimals. The course is taught in English and Spanish.

The course is offered completely in English. The student practices math independently, using books at his/her particular level. Students work independently.

++++++++++ Math 11 Bilingual ++++++++++++

For students who need work on math concepts including percents, graphs and beginning geometry. The class is taught in English and Spanish.

++++++++++ Bilingual Math 111 +++++++++++++

This course is intended to prepare students to enter vocational programs requiring knowledge of beginning algebra and geometry, etc., and each student will be responsible for completing the work on time, and doing some work at home. New students will be admitted only once every three weeks.

++++++++++ Career Exploration Bilingual ++++++++

This class is intended to help the student choose a career plan form the many opportunities available. The class will explore the students skills and experiences, and help him/her consider his own needs and opportunities in preparing for work. The class is offerd in English and Spanish, it will also cover job seeking skills. The class is offerd and some reading skills are necesary.

***** BILINGUAL CLERICAL and ACCOUNTING CLERK. *****

The Minnesota Bilingual Vocational Training Project is now offering an opportunity for you to receive this type of training today. The Bilingual Project is located at St. Paul TVI, 235 Marshall in St. Paul.

The instruction is offered in English and Spanish. The course content includes Business English, Accounting, Typing, Business Principles, Management and much more. Upon graduation you will be qualified Bilingual Clerk or Bilingual Accounting Clerk.

If you would like this type of training call 227-9121 and ask for Francisco Rivera, Roberto Acosta, o Helen Boddy. The Bilingual Project can also help you to obtain other types of Technical vocational training. All books and materials are provided by the bilingual project.

****

The Bilingual Project will make arrangements for you to receive financial assistance to cover the cost of tuition, books and other course materials needed for your vocational program.

If you need to improve your knowledge of English or Math we have courses to help you. We provide the books and materials needed for these courses.

We also provide the books and kits required for the Bilingual Clerical/Bilingual Accounting Courses.

Some Work/Study and allowances are available for those applicants that qualify.

AGAINST BILINGUAL EDUCATION

Why Johnny can't speak English

by Tom Bethell

THIS YEAR the United States government, which I am beginning to think is afflicted with a death wish, is spending $150 million on "bilingual education" programs in American classrooms. There is nothing "bi" about it, however. The languages in which instruction is conducted now include: Central Yup'ik, Aleut, Yup'ik, Gwich'in, Athabascan (the foregoing in Alaska), Navajo, Tagalog, Pima, Plaute (I promise I'm not making this up), Ilocano, Cambodian, Yiddish, Chinese, Vietnamese, Punjabi, Greek, Italian, Korean, Polish, French, Haitian, Haitian-French, Portuguese, Arabic, Crow (yes, Virginia...), Cree, Keresian, Tewa, Apache, Mohawk, Japanese, Lakota, Choctaw, Samoan, Chamorro, Carolinian, Creek-Seminole, and Russian.

And there are more, such as Trukese, Palauna, Ulithian, Woleian, Marshallese, Kusaian, Ponapean, and, not least, Yapese. And Spanish—how could I have so nearly forgotten it? The bilingual education program is more or less the Hispanic equivalent of affirmative action, creating jobs for thousands of Spanish teachers; by which I mean teachers who speak Spanish, although not necessarily English, it has turned out. One observer has described the HEW-sponsored program as "affirmative ethnicity." Although Spanish is only one of seventy languages in which instruction is carried on (I seem to have missed a good many of them), it accounts for 80 percent of the program.

Bilingual education is an idea that appeals to teachers of Spanish and other tongues, but also to those who never did think that another idea, the United States of America, was a particularly good one to begin with, and that the sooner it is restored to its component "ethnic" parts the better off we shall all be. Such people have been welcomed with open arms into the upper reaches of the federal government in recent years, giving rise to the suspicion of a death wish.

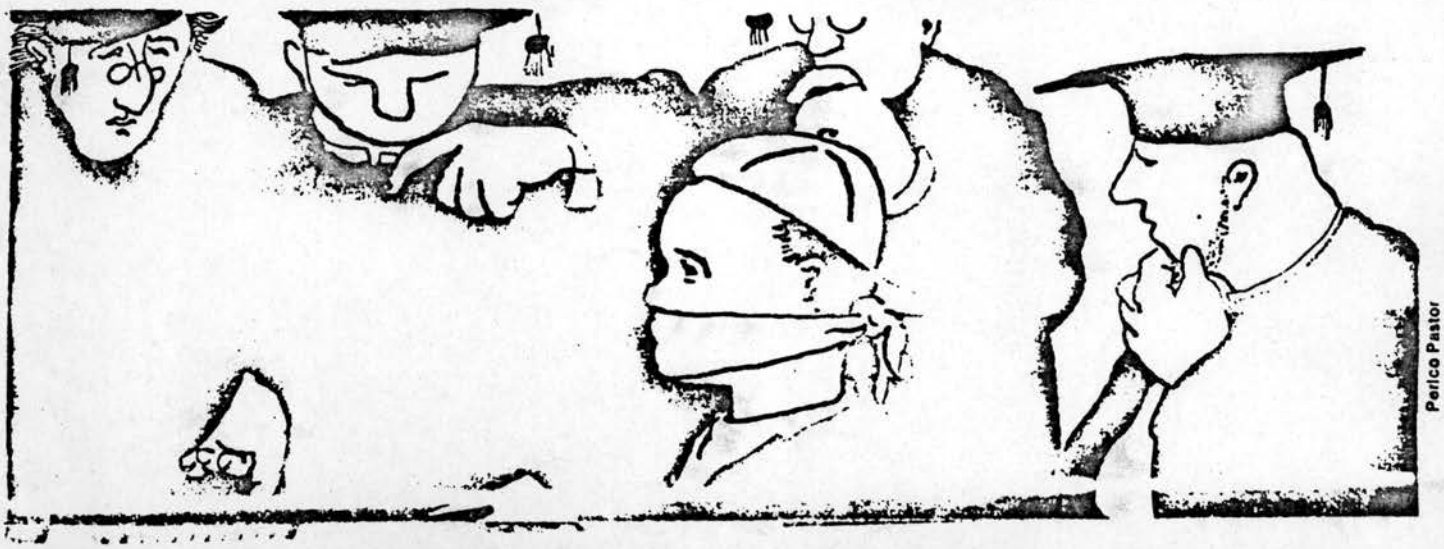
THE BILINGUAL EDUCATION program began in a small way (the way such programs always begin) in 1968, when the Elementary and Secondary Education Act of 1965 was amended (by what is always referred to as "Title VII") to permit the development of "pilot projects" to help *poor* children who were "educationally disadvantaged because of their inability to speak English," and whose parents were either on welfare or earning less than $3,000 a year. At this germinal stage the program cost a mere $7.5 million, and as its sponsors (among them Sen. Alan Cranston of California) later boasted, it was enacted without any public challenge whatever.

"With practically no one paying heed," Stephen Rosenfeld wrote in the *Washington Post* in 1974 (i.e., six years after the program began),

> *Congress has radically altered the traditional way by which immigrants become Americanized. No longer will the public schools be expected to serve largely as a "melting pot," assimilating foreigners to a common culture. Rather, under a substantial new program for "bilingual" education, the schools—in addition to teaching English—are to teach the "home" language and culture to children who speak English poorly.*

Rosenfeld raised the important point that "it is not clear how educating children in the language and culture of their ancestral homeland will better equip them for the rigors of contemporary life in the United States." But in response, a withering blast of disapproval was directed at the *Post*'s

Tom Bethell is a Washington editor of Harper's.



Perico Pastor

"Letters" column. Hadn't he heard? The melting pot had been removed from the stove.

Bureaucratic imperative (and, I would argue, a surreptitious death wish) dictated that the $7.5 million "pilot program" of 1968 grow into something more luxuriant and permanent. As it happened, the U.S. Supreme Court decision *Lau* v. *Nichols*, handed down in 1974, provided the stimulus.

In this case, Legal Services attorneys in Chinatown sued a San Francisco school district on behalf of 1,800 Chinese-speaking students, claiming that they had been denied special instruction in English. The contention that these pupils had a *constitutional* right to such instruction (as was implied by filing the suit in federal court) was denied both by the federal district court and the appeals court. The Justice Department entered the case when it was heard before the Supreme Court, arguing that the school district was in violation of a 1970 memorandum issued by HEW's Office for Civil Rights. This memorandum in turn was based on the 1964 Civil Rights Act, which decreed (among other things) that the recipients of federal funds cannot be discriminated against on the basis of national origin. The 1970 memorandum defined language as basic to national origin and required schools to take "affirmative steps" to correct English-language deficiencies.

Evidently intimidated by this rhetorical flourishing of "rights," the Supreme Court unanimously affirmed that federally funded schools must "rectify the language deficiency in order to open instruction to students who had 'linguistic deficiencies.'" In effect, the Office for Civil Rights had taken the position that the immigrant's tongue was to be regarded as a right, not an impediment, and the Supreme Court had meekly gone along with the argument.

Armed now with this judicial mandate, HEW's civil-rights militants went on the offensive, threatening widespread funding cutoffs. No longer would the old method of teaching immigrants be countenanced (throwing them into the English language and allowing them to sink or swim). No longer! Now the righteous activists within government had exactly what they are forever searching for: a huddled mass of yearning... victims! Discriminated against the moment they arrive at *these* teeming, wretched, racist, ethnocentric shores!

America the Bad... One Nation, Full of Victims... Divisible. (I have in my hands an odious document, the "Third Annual Report of the National Council on Bilingual Education," which remarks that "Cubans admitted after Castro; and more recently Vietnamese refugees... became citizens unintentionally." No doubt they are yearning to be free to return to Ho Chi Minh City and Havana.) That's about the size of it in the 1970s, and so it came to pass that the Office for Civil Rights "targeted" 334 school districts, which would have to start "bilingual-bicultural" classes promptly or risk having their federal funds cut off.

"The OCR [Office for Civil Rights] policy is difficult to explain," Noel Epstein remarked in a thoughtful survey of bilingual education titled "Language, Ethnicity and the Schools" and published recently by the Institute for Educational Leadership. "There is no federal legal requirement for schools to provide bilingual or bicultural education." The Supreme Court had merely said that *some* remedy was needed—not necessarily bilingual education. For example, the Chinese children in the *Lau* case could have been given extra instruction in English, to bring them up to par. But the Office for Civil Rights took the position that they would have to be taught school subjects—mathematics, geography, history, et cetera—in Chinese. And the Court's ruling had said nothing at all about bi*cultural* instruction. (This turns out to mean teaching that in any transaction with the "home" country, America tends to be in the wrong.)

In any event, the bilingual education program was duly expanded by Congress in 1974. It would no longer be just for poor children; all limited-English speakers would qualify; the experimental nature of the program was played down, and there was the important addition of biculturalism, which is summarized in a revealing paragraph in Epstein's booklet:

> *Bicultural instruction was elevated to a* required *component of Title VII programs. The definition of "bilingual" education now meant such instruction had to be given "with appreciation for the cultural heritage of such children...." This underlined the fact that language and culture were not merely being used as vehicles for the transmission of information but as the central sources of ethnic identity. The U.S. Civil Rights Commission had in fact urged the name of the law be changed to "The Bilingual Bicultural Education Act," but key Senate staff members blocked this idea. They feared it would "flag a potentially dangerous issue that might defeat the overall measure," Dr. Susan Gilbert Schneider reports in a valuable dissertation on the making of the 1974 act. Some lobby groups had expressed discomfort about federally sponsored biculturalism. The National Association of School Boards suggested that the legislation could be read as promoting a divisive, Canadian-style biculturalism.*

It certainly could. Notice, however, the strong suggestion here that the objection was not so much to the possibility of cutting up the country, as to being *seen* to promote this possibility, which of course might defeat it. As I say, these things are best kept surreptitious—at the level of anonymous "Senate staff members."

AT THIS STAGE the bilingual seed had indeed taken root. Congressional appropriations had increased from the beggarly $7.5 million to $85 million in fiscal year 1975. The Office for Civil Rights was on the alert. A potential 3.6 million "victimized" children of "limited English-speaking ability" had been identified, and they would furnish the raw material for an almost endless number of bureaucratic experiments. Militant Chicanos, suddenly sought out to fill ethnic teaching quotas, stood on the sidelines, ready to pour a bucket of guilt over any old-fashioned, demurring Yankee who might raise a voice in protest.

Even so, there was a cloud on the horizon—perhaps only a conceptual cloud, but nevertheless an important one, as follows: the idea behind bilingual education was that children would begin to learn school subjects in their native tongue while they were learning English elsewhere—in special English classes, on the playground, through exposure to American society generally. But while they were in this "stage of transition"—learning English

—instruction in the home tongue would ensure that they were not needlessly held back academically. Then, when they had a sufficient grasp of English, they could be removed from the bilingual classes and instructed in the normal way. That, at least, was the idea behind bilingual education originally.

But you see the problem, no doubt. At bottom, this is the same old imperialism. It is a "melting pot" solution. The children learn English after all—perhaps fairly rapidly. And at that point there is no reason to keep them in bilingual programs. Moreover, from the point of view of HEW's civil-rights militants, there is rapid improvement by the "victims"—another unfortunate outcome.

The riposte has been predictable—namely, to keep the children in programs of bilingual instruction long after they know English. This has been justified by redefining the problem in the schools as one of "maintenance" of the home tongue, rather than "transition" to the English tongue. You will hear a lot of talk in and around HEW's numerous office buildings in Washington about the relative merits of maintenance versus transition. Of course, Congress originally had "transition" in mind, but "maintenance" is slowly but steadily winning the day.

The issue was debated this year in Congress when Title VII came up for renewal. Some Congressmen, alerted to the fact that children were still being instructed in Spanish, Aleut, or Yapese in the twelfth grade, tried to argue that bilingual instruction should not last for more than two years. But this proposal was roundly criticized by Messrs. Edward Roybal of California, Baltasar Corrada of Puerto Rico, Phillip Burton of California, Paul Simon of Illinois, and others. In the end the language was left vague, giving school boards the discretion to continue "bilingual maintenance" as long as they desired. Currently, fewer than one-third of the 290,000 students enrolled in various bilingual programs are significantly limited in their English-speaking ability.

Then a new cloud appeared on the horizon. If you put a group of children, let's say children from China, in a classroom together in order to teach them English, that's segregation, right? Watch out, then. Here come the civil-rights militants on the rampage once again, ready to demolish the very program that they had done so much to encourage. But there was a simple remedy that would send them trotting tamely homeward. As follows: Put the "Anglos" in with the ethnics. In case you hadn't heard, "Anglo" is the name given these days to Americans who haven't got a drop of ethnicity to their names—the ones who have already been melted down, so to speak.

Putting Anglos into the bilingual program killed two birds with one stone. It circumvented the "segregation" difficulty, and—far more to the point—it meant that the Anglos (just the ones who needed it!) would be exposed to the kind of cultural revisionism that is the covert purpose behind so much of the bilingual program. Put more simply, Mary Beth and Sue Anne would at last learn the new truth: the Indians, not the cowboys, were the good guys, Texas was an ill-gotten gain, and so on.

As Congressman Simon of Illinois put it so delicately, so *surreptitiously*: "I hope that in the conference committee we can get this thing modified as we had it in subcommittee, to make clear that we ought to encourage our English-language students to be in those classes so that you can have the interplay."

As things worked out, up to 40 percent of the classes may permissibly be "Anglo," Congress decreed. And this year there has been another important change: an expanded definition of students who will be eligible for bilingual instruction. No longer will it be confined to those with limited English-*speaking* ability. Now the program will be open to those with "limited English proficiency in understanding, speaking, reading, and writing." This, of course, could be construed as applying to almost anyone in elementary or high school these days.

To accommodate this expansion, future Congressional appropriations for bilingual education will increase in leaps and bounds: $200 million next year, $250 million the year after, and so on in $50 million jumps, until $400 million is spent in 1983, when the program will once again be reviewed by Congress.

Meanwhile, HEW's Office of Education (that is, the *E* of HEW) appears to be getting alarmed at this runaway program. It commissioned a study by the American Institutes for Research in Palo Alto, and this study turned out to be highly critical of bilingual education. The Office of Education then drew attention to this by announcing the findings at a press conference. ("They've got it in for us," someone at the Bilingual Office told me. "Whenever there's an unfavorable study, they call a press conference. Whenever there's a favorable study, they keep quiet about it.")

In any event, the Palo Alto study claimed that children in bilingual classes were doing no better academically, and perhaps were doing slightly worse, than children from similar backgrounds in regular English classes. The study also reported that 85 percent of the students were being kept in bilingual classes after they were capable of learning in English.

THERE HAS BEEN very little Congressional opposition to the bilingual programs, thus bearing out what the Washington writer Fred Reed has called the Guppy Law: "When outrageous expenditures are divided finely enough, the public will not have enough stake in any one expenditure to squelch it." (Reed adds, in a brilliant analysis of the problem: "A tactic of the politically crafty is to pose questions in terms of rightful virtue. 'What? You oppose a mere $40 milllion subsidy of codpiece manufacture by the Nez Percé? So! You are against Indians....' The thudding opprobrium of anti-Indianism outweighs the $40 million guppy bite in the legislators' eyes.")

Risking that opprobrium, John Ashbrook of Ohio tried to cut out the bilingual program altogether. Referring to the evidence that the program wasn't working, but the budget for it was increasing annually, Ashbrook said that "when one rewards failure, one buys failure." On the House floor he added: "The program is actually preventing children from learning English. Someday somebody is going to have to teach those young people to speak English or else they are going to become public charges. Our educational system is finding it increasingly difficult today to teach English-speaking children to read their own language. When chil-

dren come out of the Spanish-language schools or Choctaw-language schools which call themselves bilingual, how is our educational system going to make them literate in what will still be a completely alien tongue . . .?"

THE ANSWER, of course, is that there will be demands not for literacy in English but for public signs in Spanish (or Choctaw, et cetera), laws promulgated in Spanish, courtroom proceedings in Spanish, and so on. These demands are already being felt—and met, in part. As so often happens, the ill effects of one government program result in the demand for another government program, rather than the abolition of the original one.

This was borne out by what happened next. When the amendment abolishing bilingual education was proposed by Ashbrook (who is usually regarded in Washington as one of those curmudgeons who can be safely ignored), *not one* Congressman rose to support it, which says something about the efficacy of the Guppy Law. Instead, the House was treated to some pusillanimous remarks by Congressman Claude Pepper of Florida—a state in which it is, of course, politically unwise to resist the expenditure of federal money "targeted" for Hispanics. Pepper said: "Now there is something like parity between the population of the United States and Latin America. My information is that by the year 2000 there probably will be 600 million people living in Latin America, and about 300 million people living in the United States."

Perhaps, then, it would be in order for the "Anglos" to retreat even further, before they are entirely overwhelmed. This brings to mind a most interesting remark made by Dr. Josue Gonzalez, the director-designate of the Office of Bilingual Education (the head of the program, in other words), in the course of an interview that he granted me. Actually, Dr. Gonzalez said many interesting things. He suggested a possible cause of the rift with the Office of Education. "Bilingual education was hatched in Congress, not in the bureaucracy," he said. "The constituents [i.e., Hispanics, mostly] talked directly to Congress. Most government programs are generated by so-called administrative proposal—that is, from within the bureaucracies themselves."

He said of regular public education in America: "I've plotted it on a graph: by the year 2010, most college graduates will be mutes!" (No *wonder* the Office of Education isn't too wildly enthusiastic.) And he said that, contrary to what one might imagine, many "Anglo" parents are in fact only too anxious for their children to enroll in a bilingual course. (If Johnny doesn't learn anything else, at least he might as well learn Spanish—that at least is my interpretation.)

The melting-pot idea is dead, Dr. Gonzalez kept reassuring me. Why? I asked him. What was his proof of this? He then made what I felt was a revealing observation, and one that is not normally raised at all, although it exists at the subliminal level. "We must allow for diversity . . .," he began, then, suddenly veering off: "The counterculture of the 1960s showed that. Even the WASP middle-American showed that the monolithic culture doesn't exist. Within the group, even, they were rejecting their own values."

I imagine that Attila or Alaric, in an expansive and explanatory mood, might have said much the same thing to some sodden Roman senators who were trying to figure out how it was that Rome fell, exactly.

Dr. Gonzalez had me there and he knew it, so he promptly resumed the offensive. "There are those who say that to speak whatever language you speak is a human right," he went on. "The Helsinki Agreements and the President's Commission on Foreign Language Study commit us to the study of foreign languages. Why not our own—domestic—languages?"

Later on I decided to repeat this last comment to George Weber, the associate director of the Council for Basic Education, a somewhat lonely group in Washington. The grandson of German immigrants, Mr. Weber speaks perfect English. "Only in America," he said. "Only in America would someone say a stupid thing like that. Can you imagine a Turk arriving in France and complaining that he was being denied his human rights because he was taught at school in French, not Turkish? What do you think the French would say to that?" □

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
WASHINGTON, D.C. 20202

JAN 11 1979

Mr. Lewis H. Lapham
Editor
Harper's Magazine Company
Two Park Avenue
New York, New York 10016

Dear Mr. Lapham:

I can hardly believe the venom in Mr. Tom Bethell's recent article on bilingual education. It practically bursts with vituperative sarcasm and misrepresentations. This man is totally and irredeemably opinionated, and his story is a cheap appeal to the baser instincts of social darwinists.

Your writer has chosen to do the very same thing that he accuses supporters of bilingual education of doing: fomenting social mistrust, discord and tribalization. His innuendoes about those of us who are supposed to be creating a "death wish" for U.S. society are sadly reminiscent of the McCarthy era. If it weren't so painfully obvious that he is serious, one might assume that he was simply needling the federal government again.

Had Mr. Bethell taken the time to investigate his topic in earnest, he might have had a credible story. He didn't. Instead of substantive research, he relied on a five-year old Washington Post editorial and a highly controversial monograph by a non-specialist in the field. This second-hand reporting might explain the multiplicity of errors and falsehoods that he presented; e.g.,

1. that the U.S. Supreme Court regards an immigrant's language as a right and not an impediment,

2. that bicultural education supporters uniformly condemn all American cultural values,

3. that "almost anyone" is eligible for bilingual education,

4. that in Congress the term authorization is synonimous with appropriation, (your Washington Editor surely knows better!),

5. that "85% of the students are kept in bilingual classes after they are capable of learning in English."

I must stress that these are not mere differences of opinion or editorial viewpoints. They are pure distortions and leaps of logic that defy explanation.

Bilingual education has a proud and worthy goal: to help children learn more effectively. It is a logical and humane approach to educating children who do not have sufficient English skills to function in English-only school environments. It came about because the "old ways" that Mr. Bethell seems to admire were failing miserably. How pathetic it is that a successful journalist should feel so threatened by children speaking their home languages as they struggle to adapt to their school settings.

President Carter has recently appointed a commission to make recommendations to improve the teaching of foreign languages. Our ethnic and linguistic minorities already possess resources in this area. Why should these advantages be denied? Any why should this fact conflict with the process of teaching English? It shouldn't and it doesn't. The only explanation for Mr. Bethell's acrimony is either perverse ethnocentrism or paranoia. In either case no amount of explanation will help. It should be noted however that bilingual instruction is neither new nor unique to the U.S. Other progressive nations use it. West Germany is setting up bilingual classes for the children of its guest workers, and in France many Breton and Corsican children receive bilingual instruction. There are many other examples.

In the U.S., bilingual education is a concept supported by educators, parents and most communities that have tried it. It is unfortunate that Mr. Bethell has done nothing to help your readers understand its beauty, virtue and merit.

Sincerely yours,

Josué M. González

Josué M. González
Director Designate
Office of Bilingual Education

Reprinted from the
1979 Annual Report
Carnegie Corporation of New York
437 Madison Avenue
New York 10022

Bilingual education and the Hispanic challenge

by Alan Pifer

Carnegie Corporation of New York is a philanthropic foundation created by Andrew Carnegie in 1911 for the advancement and diffusion of knowledge and understanding. Its total assets, at market value, were about $294.5 million as of September 30, 1979. Approximately 7½ percent of the income may be used in certain British Overseas Commonwealth areas; all other income must be spent in the United States.

The Corporation is primarily interested in education and in certain aspects of public affairs. Grants for specific programs are made to colleges and universities, professional associations, and other educational organizations.

Bilingual education and the Hispanic challenge

In retrospect, the 1970's will certainly be seen as a period of reassessment of the great federal social programs of the previous decade. While a review of the achievements of these programs was not in itself inappropriate, many of the specific evaluations that comprised it are now known to have been poorly conceived or politically inspired. Among the programs reviewed, the experiments designed to help ensure equality of educational opportunity for disadvantaged children came in for particularly heavy attack. Most have managed to survive, but the broad public base of support for them has largely eroded, and those who advocate continuation of such programs face a constant uphill battle to maintain funding levels.

The latest federally supported educational program to come under public scrutiny is bilingual education.

Bilingual education is an instructional tool that has developed quietly over the past decade and a half to help students whose first language is not English overcome their linguistic and academic difficulties and, it is hoped, perform as well as their English-speaking peers in school. While the particular approaches used vary widely, the term usually refers to programs that employ a child's native tongue as a medium of instruction while he or she is being helped to learn English. The theory is that, by enabling students to master cognitive skills in the language they know best before making the transition to English, bilingual classes will prevent academic retardation. Often, a secondary aim is to enhance and maintain a child's proficiency in the home language. Classes also frequently draw on a child's heritage and culture as a means of building self-esteem and increasing comprehension and motivation to learn.

This essay is the president's annual statement on an issue of current interest. It represents his personal views and, although broadly related to the foundation's interests, does not directly reflect its specific programs.

There are an estimated 3.6 million pupils in the country judged to be in need of some form of special language assistance to enable them to cope with the regular school curriculum.

The federal government began funding demonstration programs in bilingual education in the late 1960's and has steadily expanded its support since then, from $7.5 million in 1969, affecting some 76 projects reaching about 26,000 children, to $107 million in 1980, for about 575 projects reaching roughly 315,000 children. Meanwhile, under the stimulus of federal and court action, state and local governments have expanded their support for bilingual education, too, so that together they now more than match annual federal funding.

It is safe to say that the total amount of money spent in the field, although not insignificant, would scarcely make a dent in the national budget for compensatory education programs. Over $3 billion, for example, was appropriated in 1980 just for Title I, the largest of such federally supported programs of special assistance to "educationally deprived children in low-income areas."

Nonetheless, despite the fact that expenditures for bilingual education are comparatively low and that it reaches only a fraction of eligible pupils, the program has become highly controversial. Indeed, few other educational experiments in recent years have managed to arouse such passionate debate—so much so, in fact, that the future of this promising pedagogical tool is uncertain.

The reasons for this are complex and probably only a matter of speculation. One source of the controversy, surely, is to be found in public perceptions about the record of accomplishment in bilingual education thus far. Generalizations are unwise at this stage: the few evaluation studies that have been done are not considered a fair assessment of bilingual education's potential. But indications are that many bilingual programs were launched hastily, with little empirical evidence of "what works," without adequate diagnosis of children's varying linguistic needs, without properly trained teachers or appropriate curricular materials, and often without the strong support of school administrators. Today, evidence of many good programs, according to such measures as improved academic performance, higher school retention rates, and enhanced self-concept among affected children, is beginning to emerge, the results of basic and operational research are at last being fed into the design of programs, and enough time has passed to begin producing a new cadre of qualified teachers. But the widespread impression has already been given that bilingual education has not been very effective, leading critics to conclude that the concept itself, as opposed to its implementation, is unsound.

Another source of controversy lies in the apparent departure of bilingual education from the traditional language policy of the schools. Immigrant groups have always been free to keep alive their native languages and

heritage through private efforts, but this has not, by and large, been considered the responsibility of the schools. On the contrary, public education in the 20th century has been employed as the chief means of assimilating children of foreign-language backgrounds into the English-speaking mainstream. Since the First World War, English has been the sole medium of instruction in the early grades. To many Americans, a belief in the appropriateness of such a policy, in which they cooperated, often at the price of the cultural heritage they brought with them, has formed a deep and abiding part of their national identity and consciousness. With the introduction of native languages in the classroom, however, this policy seems to have been reversed, and many people wonder what it all means. Some see it as but the first step on the road to official recognition of multilingualism, extending from the schools to other public institutions in the society. Already the concept of language *rights* has been established, the Voting Rights Act mandates bilingual election materials, interpreters are now required in courts of law, and languages other than English are increasingly being used in the delivery of social services in areas where there are large concentrations of nonEnglish speakers. Bilingual education therefore seems to be challenging some of our traditional assumptions and practices regarding cultural assimilation.

But perhaps no one of these concerns would be as great if bilingual education were not associated in the minds of large segments of society with Hispanic Americans. Currently, although the federal government funds programs using 74 languages, more than 65 percent of the money goes for Spanish-English bilingual education. The programs have been strongly promoted by Hispanic organizations, and the educational, political, and administrative leadership for bilingual education has been mainly Hispanic. Indeed, bilingual education, as a vehicle for heightening respect and recognition of native languages and culture, for fighting discrimination against nonEnglish-speaking groups, and for obtaining jobs and political leverage, has become the preeminent civil rights issue within Hispanic communities. This development, coupled with the fact that Hispanics, through natural increase and immigration, are growing rapidly in numbers, has made the issue more visible and politicized than it might otherwise have been. Bilingual education is no longer regarded strictly as an educational measure but also as a strategy for realizing the social, political, and economic aspirations of Hispanic peoples.

These three sets of concerns interlock, so that it is virtually impossible to discuss bilingual education without reference to the broader context in which it has evolved. At the same time, its very vulnerability to criticism on political grounds makes it especially incumbent upon this experiment to justify itself educationally. Nothing less will do justice to the needs of children from linguistic minorities and to the meaning of equal educational opportunity. This will be the major challenge of its supporters over the next few years.

Contrary to popular belief, instruction in two languages is not new in American education. Its use began in the 19th century within private schools and some public schools in communities settled by German, Scandinavian, and French immigrants. Between 1840 and 1917, schools in Cincinnati offered classes in German to pupils who understood no English, and from time to time New York City schools resorted to Yiddish, German, Italian, and Chinese to educate new waves of foreign-born children. Then, around the First World War, when anti-German sentiment swept the country and speaking English became a kind of index of political loyalty and "adequacy" as a citizen, bilingual education was stamped out. In many states all use of foreign languages below the eighth grade was forbidden in the schools. The policy of Americanization, the cornerstone of which was instruction solely in English, then began in earnest.

A few educators at that time argued that submersion in the English-language curriculum was an unnecessarily harsh approach and that a gentler transition from the mother tongue was better for the children and their families. They also called for schools to respect and help keep alive the heritage these children brought with them. Their protests went unheeded, however, and the English-only policy remained throughout the succeeding decades (although many private or community-supported schools continued to offer dual-language instruction).

The modern revival of public bilingual education began in the early 1960's when schools in the Miami area, faced with a sudden influx of refugee Cuban students, responded by offering instruction in Spanish until the children were able to learn in English. The technique also began to be employed elsewhere—in New Mexico and in Texas, for example.

The concept received fresh impetus in the wake of the civil rights movement and a new national interest in ethnicity and cultural pluralism, which allowed minority groups to take a more outspoken pride in their heritage and their contributions to American life.

Federal attention to the educational problems of "linguistically different" children began in 1968 with the signing of the Bilingual Education Act, added as Title VII to the Elementary and Secondary Education Act of 1965, and brought about by a coalition of community leaders, educators, and legislators as well as some senior federal officials. It was clear to them that masses of children whose first language was not English were failing academically and that dropout rates for them were inordinately high. If they were receiving any special assistance in learning English, it was usually in the form of ESL (English as a Second Language) courses, requiring them to be taken out of regular classes for periods of the day, so that while they did indeed learn English, they lost the content and fell behind in their schoolwork.

The original aim of Title VII was modest enough: to give seed money to

local educational agencies for new and innovative elementary and secondary programs designed to meet the "special educational needs of children of limited English-speaking ability in schools having a high concentration of such children from families . . . with incomes below $3,000 per year."

Then, in 1974, the U. S. Supreme Court handed down a unanimous decision on a lawsuit that changed the way in which bilingual education has been regarded ever since. The case, called *Lau vs. Nichols*, involved non-English-speaking Chinese students, who had accused the San Francisco Unified School District in 1970 of language discrimination because they were receiving instruction only in English, a language they could not understand and were not being helped to learn. They claimed that the absence of programs designed to meet their special needs violated both Title VI of the 1964 Civil Rights Act, which contained a provision forbidding discrimination on the basis of national origin, and the equal protection clause of the 14th Amendment to the Constitution.

The Court agreed on the charge of language discrimination, basing its decision not on the Constitution but on Title VI as interpreted by existing Department of Health, Education, and Welfare (HEW) guidelines to the schools. These guidelines stated that, "Where inability to speak and understand the English language excludes national-origin minority-group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

The import of *Lau* was enormous. The Bilingual Education Act had already given federal validation to the voluntary use of native languages in the classroom. Now, for the first time, language rights were recognized as a civil right. Federally aided schools henceforth were legally obligated to provide special assistance to students with limited English-speaking ability in overcoming their language difficulties. Furthermore, schools were told that children must not be denied full participation in the educational process while they were learning English. The Court left it to the states and the educators to decide how this should be done, but because its decision relied on existing federal legislation and administrative intent, it left the way open for federal determination of what "affirmative steps" were acceptable under Title VI.

Following the *Lau* ruling the Office of Civil Rights of HEW issued informal guidelines, called "*Lau* remedies," which schools might take to provide equal educational opportunity for students of limited English-speaking ability. While the remedies did not mandate bilingual education, they specifically rejected the sole use of ESL at the elementary level as an instructional technique for students who spoke either little or no English. This was tantamount to requiring that bilingual programs be established, with ESL as a component, unless the schools could produce an equally acceptable alternative.

The Court's decision and the *Lau* remedies provided the underpinning for

lawsuits brought by organizations speaking for the rights of children from linguistic minorities, resulting in a number of court-mandated bilingual programs. In addition, under the influence of *Lau*, the Bilingual Education Act, when it was reauthorized in 1974, minimized the compensatory aspects of the program and stated that the aim of the Act was to "establish equal educational opportunity for all children."

In other ways *Lau* had far-reaching effects. It spurred the passage of many state bilingual education laws, overturning the prohibition against foreign-language teaching in the lower grades that had been in effect since World War I. And it stimulated, along with the federal Bilingual Education Act, activity around the country in linguistic, educational, social science, and legal research, in curriculum and materials development, and in teacher training, in the process giving rise to a whole new educational movement.

The Hispanic involvement in bilingual education

Of all linguistic minority groups, Hispanic Americans, by virtue of their numbers in the population if for no other reason, would seem to have the most at stake in the survival of bilingual education. Most of the advocacy work in the field has been conducted by Hispanic parent groups and by organizations such as the National Association of Bilingual Education, the Mexican American Legal Defense and Educational Fund, the Puerto Rican Legal Defense and Education Fund, the Chicano Education Project, and Aspira of New York. Many see bilingual education as the single most effective mechanism at their disposal for focusing public attention on the educational plight of Hispanic children, for seeking redress for decades of discrimination against them by the schools, and for preparing them to succeed in the mainstream while promoting respect for their native language and cultural identity.

Estimates of the population of Hispanics in the United States are various. Difficulties stem from the failure of earlier censuses to make a full count of Spanish-surnamed residents and the impossibility of knowing how many undocumented workers of Hispanic origin are in the country at any given time. Nevertheless, assuming that there are possibly 3-to-6 million of the latter, the total number of persons of Hispanic background on the mainland is probably not less than 16 million, making up approximately 7 percent of the total population. A recent Congressional study of immigration has noted that more than one-third of all legal immigrants entering the country since 1965 have been Hispanic; the highest rate of unauthorized entry is also among this group. These and other demographic trends suggest that Hispanics may well be the nation's largest minority group by the end of the decade.

The term Hispanic applies, of course, to several distinct subgroups within the larger community. Nearly 60 percent, or some 7.3 million persons, are Mexican American. While perhaps as much as a third of the Mexican-American population is descended from citizens living in Mexican territory annexed in 1848, the majority appears to stem from later immigration, especially that which took place after 1920, following the Mexican revolution. The latest wave of immigration began in the late 1950's. Traditionally resident in the border states and other parts of the Southwest, Mexican Americans are also found in increasing numbers in the Midwest and Northwest.

The second largest subgroup is composed of people whose origins lie on the island of Puerto Rico. Some 1.7 million Puerto Ricans now reside on the mainland. Concentrated in the Northeast, more than a million live in New York City alone, although Chicago and Miami have growing Puerto Rican communities as well.

A third subgroup is the Cubans, most of whom came here in the early 1960's following the Communist revolution in their country. Living mainly in the Miami area, they now number close to 800,000.

A fourth subgroup, in addition to those descended from older stock originating in Spain, includes a rapidly growing new community of immigrants from the Caribbean and now Central and South American countries (other than Cuba and Mexico) such as the Dominican Republic, Ecuador, and Colombia. This group is believed to number around 2.2 million and, like the Puerto Rican community, is largely resident in the Northeast.

Hispanics, then, are an exceedingly heterogeneous population. What they have in common, however, far outweighs the differences among them, and this is a broad sense of ethnic identity based on allegiance to a shared mother language and culture. This sense of Hispanic identity is constantly being reinvigorated with persistent high rates of immigration and by the continual circulation of Hispanic peoples, especially Puerto Ricans and those of Mexican descent, to their home lands and back.

The very size and dominance of one linguistic and cultural group stands to have profound implications for educational policy in the United States. School enrollments of Hispanic children in some of our major cities alone tell a vivid story: In New York City, they currently comprise 30 percent of the school population; in Los Angeles 45 percent; in San Antonio 52 percent; in Miami 32 percent; in Denver 31 percent; in Hartford 35 percent. In the face of these figures, the question of how best to meet the educational needs of the children, a large proportion of whom speak only Spanish or are not sufficiently proficient in either English or Spanish, becomes one of paramount importance for the country in the years ahead.

Unfortunately, Hispanic children as a whole have not fared well in the public education system. Typically they are two to three grade levels behind other students. A mere 30 percent manage to complete high school. Nationwide, in urban ghetto areas, the school dropout rate for Hispanics reaches as high as 85 percent. Less than 7 percent have completed college. In 1975–76, Hispanics received only 2.8 percent of the B.A. degrees awarded, 2 percent

of the masters degrees, 2.6 percent of the law degrees, 2.3 percent of the medical degrees, and 1.2 percent of all doctorates.

Not surprisingly, the income figures for Hispanics are very low. In 1978, Hispanic Americans in general had a median annual family income of $12,600, compared with $17,600 for the nation as a whole. Puerto Ricans were the worst off, with a median family income of only $8,300 and 30 percent living in poverty. At the next level were Mexican Americans, with a median family income of $12,800 and 12 percent in poverty. Even the Cubans, who brought with them a professional class and benefited from substantial aid by the U. S. government, had a median family income of only $15,300 with 10 percent in poverty. Only 8 percent of Hispanics held professional and technical positions, compared with 16 percent of nonHispanics. Most were found in low-paying jobs in the service and manufacturing industries and in agriculture.

To be sure, the schools cannot alone be blamed for the dismal record of academic and economic achievement among Hispanics. Many Hispanic newcomers have tended to be poor, uneducated, and untrained for skilled jobs when they came here. They have been hindered in economic advancement by the language barrier, by their congregation into rural, suburban, and urban barrios, and by the cultural differences that have served to isolate them from the American mainstream and perpetuate their low social status.

But whatever weight may properly be given to the background of Hispanics themselves, the factor of discrimination must surely assume a major share of the responsibility for the academic problems of Hispanic students. Schools, as transmitters of society's values, in a variety of ways have made a signal contribution to the school performance rates of Hispanics—by shunting Spanish-speaking children from poor families into educational tracks designed for low achievers, by classifying them as mentally retarded or emotionally disturbed, by denigrating their Hispanic heritage, by giving them the message that they cannot, or are not expected to, succeed. In short, the public education system as a whole has neither welcomed Hispanic children nor been willing to deal with their learning problems in any effective way.

Since, however, there is a clear correlation in this country between educational achievement and socioeconomic status, and since a high percentage of the Hispanic population is young—42 percent are under age 25—Hispanic parents and leaders, despite the past record of the public schools, place great hopes for the future of their communities on the schools' ability to educate their children. A principal tool they have chosen in order to achieve this is bilingual education.

The record to date

How, then, has bilingual education served Hispanic children under the impact of federal legislative, judicial, and administrative action?

The answer is a mixed one. The bilingual education movement has unquestionably shown remarkable growth and energy over the past 12 years, propelled along by Hispanic leaders and some educators and policy makers. But its proponents have had reason to despair over the many problems of implementing it effectively on a broad scale. In this regard the recent history of bilingual education is probably not too different from that of Head Start, Follow-Through, and other educational inventions of the Great Society intended to help disadvantaged children. Similarly, bilingual education now finds itself on the defensive. Three years remain before the Bilingual Education Act comes up for reauthorization, and in that time, all those who believe in it will be under obligation to prove its worth to an increasingly skeptical public.

The federal effort in bilingual education was originally seen by its sponsors almost exclusively as a means of correcting English-language deficiencies in primary-school children, with the rationale that it could help them make the transition from the mother tongue to English and promote assimilation into mainstream education. It has therefore been viewed largely as a compensatory measure for students who have fallen behind or who are likely to do so. It has *not* had as its central aim the fostering and maintaining of competence in two languages, although some federal monies have in fact been used for what have turned out to be "maintenance" programs, and school districts are free to implement two-language instruction through all grade levels if they choose.

Little, however, has been known about the exact nature of such programs and their progress in achieving their academic and linguistic goals, and much of the fault, it appears, can be laid to laxity in federal planning and supervision. As one researcher pointed out, before 1978 less than .25 percent of Title VII funds were spent for basic and operational research on bilingual education; a good deal of the existing evaluation research, moreover, has been judged worthless. The first Bilingual Education Act included no funds for research at all. The emphasis, it seems, was on immediate action, without much prior understanding of what measures should be taken with children showing varying degrees of proficiency in speaking, reading, writing, and comprehending English.

In fact funding for research has greatly expanded recently. The federal government spent $2 million for research in 1979; $4.6 million is being spent in 1980; and appropriations total $6 million for 1981. Additionally, evidence is mounting that, in favorable circumstances, programs of high quality do meet the goal of providing equal educational opportunity for students of non-English-speaking backgrounds. A 1978 review of program evaluations by the Center for Applied Linguistics found at least 12 programs in which bilingual education students performed as well (or better) on tests of reading, writing, math concepts, and social science, and other measures as comparable groups in regular classes. Attendance figures for bilingual students were in general

higher than would otherwise have been the case, and there were indications that many students showed a positive attitude toward the programs and their academic capabilities.

A study of evaluation reports of bilingual programs in Colorado showed that such programs had been generally effective in improving the English reading skills of students as well as improving school attendance and dropout rates. They also helped bring about greater parental involvement in school programs.

Other long-term studies suggest that bilingual instruction may have a cumulative effect, with results that may not show up in short-term, one-year-at-a-time evaluations. This is a critical point, which suggests that bilingual education, as with other special programs for educationally disadvantaged students, must be given a longer time to work than had been thought.

Perhaps the most interesting research, which may have a bearing on the American experience, is a study of Finnish immigrant children in Sweden. These children were more likely to approach the norms of Swedish students when they emigrated to Sweden around the age of 10 or 12, *after* they had five or six years of education in their native language in Finland. There is much anecdotal evidence to suggest, too, that Mexican children who emigrate to the United States after the sixth grade out-perform Mexican-American children who have been in the country since the first grade. Apparently, submersion in a second language before these children reach the age of 10 can exert a "destabilizing" effect on the development of their native language as a tool for mastering cognitive concepts, with the result that they become semi-lingual—not fully competent in either language. Since this condition applies to a large number of Hispanic children, who like the Finnish are members of a dominated minority group, such findings indicate that the students would fare better if they received instruction entirely in their native language for the first few grades before shifting into English.

Another serious problem has been the lack of adequately trained teachers. Teaching in two languages needs special preparation: a teacher who happens to be bilingual is not automatically qualified to undertake bilingual instruction; nor is a monolingual teacher who has taken a few courses in a second language up to the job. Yet, before 1974, no federal monies were appropriated for preservice teacher training, and only in 1978 were Title VII funds allocated for fellowship programs at the doctoral level.

In addition, determination of *Lau* violations by HEW and enforcement of remedies to comply with the law have proceeded slowly. Schools have been required to meet the needs of linguistically different children whether or not they receive federal assistance for the purpose. Thus, schools blame budgetary constraints for their failure to comply, and HEW, leery of applying the extreme measure of withholding funds, has allowed investigations to languish. Lack of government monitoring has also apparently permitted infractions in some schools that ostensibly have complied.

Practically speaking, then, the *Lau* remedies have not thus far had much direct effect; the leverage has consisted mainly in the implicit threat of sanctions. This may change in the future, however: monitoring and enforcement efforts have stepped up, and proposals to revise and formalize the *Lau* guidelines are under consideration. If approved, the new regulations would specifically mandate bilingual programs at both the elementary and secondary education levels, and children who have comparatively limited proficiency in either their home language or English would be covered—a measure that could vastly increase the numbers receiving bilingual instruction.

An influential study of Title VII projects begun in 1976 and sponsored by the Office of Education (OE) produced striking indications of many poor programs in the country—programs that were producing no academic gains for students or, in some cases, were actually allowing them to fall behind. This study was justifiably criticized for flaws in the research design, but it nonetheless dealt a blow to bilingual education's reputation.

Under the impact of the OE study, and in consultation with organizations working in the field of bilingual education, the guidelines for the 1978 Amendments to the Bilingual Education Act were strengthened. In addition to committing substantial funds for research and teacher preparation, the Act now covers linguistically different children who not only have difficulty speaking and understanding the English language but who need help reading and writing it. At the same time, it limits funding largely to programs aimed at helping children achieve competence in the English language, rather than, as in the 1974 Amendments, helping them "progress effectively through the school system." They affirm the desirability of parent involvement in decision making. They also allow for up to 40 percent of the participants to be children whose first language is English, and they authorize more money for curriculum development. Finally, the guidelines require that applicants demonstrate that federal grants would gradually be replaced by local or state funds to help achieve a regularly funded program.

The prospects for bilingual education

Whether measures to bring about needed reforms in the implementation of bilingual programs succeed or fail, the *Lau* ruling will of course remain in effect. Schools will still have to meet the needs of linguistically different children and provide them with a meaningful education that meets the requirements of Title VI of the Civil Rights Act. On these grounds alone, it seems likely that some form of bilingual education will continue to be included among the methods chosen to deal with the language difficulties of these children—unless there is another major court decision that reverses or modifies the earlier ruling.

Whatever happens, the fact remains that at least 1.75 million Hispanic children have limited proficiency in English and need some form of special

language assistance before they can fully participate in the educational system. Since neither quick submersion in regular classes nor ESL alone has worked well with children from low-income, nonEnglish-speaking backgrounds, teaching such youngsters in their first language while they are learning English would appear to be a sensible alternative.

There is also the reality that many Hispanic organizations and parents want bilingual programs for their children, not only to help them master English-language skills but to help them maintain their first language. They have built an effective national constituency for it, with a leadership that has played a significant part in the formation of bilingual education policy. The growing Hispanic population and its increasing voting strength make this a group that all levels of government must reckon with. If Hispanic citizens press for bilingual programs, then educators and policy makers cannot avoid listening.

Furthermore, bilingual education has afforded Hispanic adults a significant route to social mobility and economic security. It has created bilingual teachers, administrators, bureaucrats at all government levels, curriculum developers, and researchers—the whole range of bilingual personnel needed to run this important new educational movement. In the process, it has established positive role models for young people, holding out for them new types of satisfying career prospects.

Additionally, bilingual education has served as a stimulus for Hispanic parents to begin playing an active role in the schools, for the first time taking part in decisions affecting the quality of education their children receive. Whatever the results in the strictest terms of academic performance, bilingual education, they believe, has already helped to improve the way in which the educational system deals with their children. Schools have been less quick to shunt youngsters into low educational tracks or treat them with disrespect. Many parents are convinced that without bilingual education, the schools will go back to their former behavior, so they will continue to fight for it.

Then, since the concept of language rights has gained a recognized legal status, and since Hispanics are enjoying a more visible pride in their heritage, the use of Spanish in the schools has acquired great symbolic value. Hispanics can look forward to the day when their native language is no longer regarded as inferior, when it no longer offers the excuse for an ethnic slur and a means of destroying the self-confidence and self-esteem of a child.

Altogether, bilingual education has served as a vehicle to enable Hispanic people to press for their language rights at the same time giving them a major point of entry into all other issues having to do with opportunities and rights for Hispanics, and providing an avenue for their participation in the political process through election to school boards and other offices.

Beyond these current trends there is, however, a broader context for thinking about bilingual education as an appropriate response to the educational needs of Hispanic children. One aspect of this concerns our special relationship with Puerto Rico and Mexico—a relationship established through two wars.

The United States annexed Puerto Rico in 1898 following its war with Spain. In 1917 the inhabitants became American citizens, albeit second-class citizens by virtue of Puerto Rico's status first as a U. S. territory and then as a commonwealth. Subsequently, the United States vacillated in its attitudes toward an English-language policy in Puerto Rican schools, causing a great deal of hardship for children and their families. Then, in 1947, it finally and officially declared the island Spanish-speaking in recognition of the reality and the desire of the people. Economic distress on the island after the Second World War brought millions of Puerto Ricans to New York City and elsewhere in search of jobs. Since 1970, however, there has been a consistent trend of net return migration. This two-way migratory flow has allowed mainland Puerto Ricans to sustain their ties to the island, but in doing so it has slowed the process of adaptation to American life and exposed Puerto Rican children to learning problems and discriminatory treatment in the schools. On the island, the so-called Neo-Rican children returning from the mainland are facing similar learning problems and discrimination.

Bilingual education would seem to be one obvious answer for dealing with these children. The argument for it can be made on practical grounds alone, but the claim for special treatment also gains emotional and political force because Puerto Rico is simply part of this nation. Following the Supreme Court's decision on *Lau*, a case brought by Aspira of New York against the New York City Board of Education was resolved by a consent decree mandating the implementation of bilingual education in city schools. Unfortunately, the law has proved difficult to enforce, and it covers only those students who are dominant in Spanish; it does not apply to children who are semilingual. Only in 1978 were federal funds finally authorized to help such children in Puerto Rican schools. Bilingual education for Puerto Rican children is obviously still more a goal than a reality.

The United States acquired half of Mexico's territory at the close of the Mexican-American War in 1848. At that time approximately 75,000 Mexicans living in what became U. S. territory were given the choice of becoming Americans or leaving the country. Most chose to stay. Although the treaty arrangements did not expressly guarantee the rights of the new citizens to retain their customs and language, the governments of the territories (later the states) of New Mexico, California, and Colorado acknowledged their constitutional obligations to Spanish-speaking citizens. Early legislative ses-

sions were conducted in both English and Spanish. The 1891 constitution of the New Mexico territory mandated public bilingual education.

Subsequently, however, Mexican Americans came to be mistreated by their adopted country. In Texas, after the Civil War, no provision whatsoever was made for the education of Mexican-American children. When they were eventually allowed into the schools, they were segregated from Anglo children because of their "language handicap." Considered by school authorities to be children of an inferior race, they were often punished for speaking Spanish, heard their names involuntarily Anglicized, and saw their cultural background systematically ignored in textbooks. Indeed, with the exception of blacks and Native Americans, no other ethnic group has been subjected to quite the same combination of racial and cultural insult as the Hispanics of the Southwest. Prior to 1940 it is estimated that only 1 percent of Mexican-American children of school age was actually enrolled in school.

This history is deeply etched in the minds of the present generation of Mexican-American leaders and encourages them to regard bilingual education as an instrument for redressing the wrongs of the past. Their attitude stems not only from the experience of the last century but from the knowledge that Spanish speakers were among the first immigrants to this country. The chronicles of the Spanish explorers of the 1500's predate those of the British. The names of important cities, towns, and states are a constant reminder of early Spanish settlements and governance in what is today the United States, reinforcing the feeling that Mexican Americans have a right to public recognition of their language.

Another aspect of our relationship with Mexico which has a bearing on bilingual policy concerns the influx of undocumented workers from there into the United States. The current wave began in the late 1950's and accelerated in the mid-1960's with the cancellation of a series of bilateral agreements which had allowed Mexican workers to come to this country for short periods of time and protected their rights to some extent while they were here. Since then, millions of Mexicans, attracted by the promise of jobs, have entered this country illegally, settling mainly in urban areas where they are vulnerable to abuse and exploitation. On the one hand, they are accused of taking jobs which rightfully belong to American citizens, including Hispanic Americans; on the other, they are said to fill jobs that no one else will take. To some extent their hidden presence places a burden on public services, such as the educational and health systems, because they are not counted in the formulas that determine eligibility for funding under federal and state aid programs. At the same time, they may be contributing more to the economy than they take from it: a U. S. Department of Labor study estimated that 77 percent pay social security taxes, the benefits of which they are unlikely to collect, 72 percent have federal income taxes deducted from their wages, all pay local

and state sales taxes on consumer purchases, less than 1 percent are on welfare, and less than 8 percent appear to have their children in school.

Any solution to this situation will have to be worked out between Mexico and the United States and necessarily will be long in coming; it will not diminish migration to the north in the near future. In the meantime, something must be done to educate the children of illegal immigrants. Those who are born in this country are of course American citizens and entitled to a public education. That scarcely 8 percent of children of undocumented workers here are in school, however, should be no cause for satisfaction, for many of them will remain in this country permanently and grow up unprepared to compete in our increasingly technological society. The state policy in Texas of excluding children of illegal aliens from public schools has been challenged by Mexican parents, and the case is currently being reviewed in a federal district court. The state argues that any requirement to educate these children would siphon off resources from American citizens and that the schools, at least in the border area, cannot afford it. Just how much effect any liberalization in the state law would have on the actual enrollment of Mexican children remains to be seen, but the implications for educational policy seem clear and point toward forms of special language assistance that involve the use of Spanish, the only language most of these children speak.

Another perspective that bears on the schools' use of bilingual education has to do with the radically changed economic and social conditions of today as against those of the past and the circumstances in which Hispanics find themselves competing with other groups for jobs and a decent life.

Prior to the First World War the country needed large amounts of cheap labor, and it encouraged immigrants to come here by the millions. Jobs existed not only for them but for their children. Compulsory education existed in name only, and the school-leaving age was 12. If foreign-born students could not succeed in school, there was an immediate place for them in the factories or on farms. No one was surplus; everyone was needed.

It was only later, after the First World War, after there was a glut in the labor market of unskilled workers and immigration was restricted, that our rapidly advancing technological society began to need a better educated labor force. Then the schools took on a new importance, opposition to the new child labor laws and to compulsory education declined and disappeared, the school-leaving age was raised to 16, and immigrant families began to make the sacrifices necessary to see that their children got the high school credentials that would ensure their future success. The phenomenon of rising educational levels entered a wholly new phase after the Second World War, when an enormous demand developed for higher education, and a college degree came to be recognized as the minimum qualification for many jobs. Millions of young people whose parents had not attended college or even finished high school, including many who were the children or grandchildren of immi-

grants, flocked into higher education as it changed rapidly from an elitist institution to a vast democratic enterprise.

Poor people of Hispanic background, however, have come to this country late in the day, into a highly developed, mature society, offering less of the opportunity to build a nation enjoyed by new arrivals at the turn of the century. Their difficulties have been compounded by racial prejudice, by the language barrier, and by their isolation into segregated neighborhoods and schools, locking many of them into low-level, marginal jobs. Thus, even though the economic rewards are still great enough to encourage continued heavy migration, the promise of social mobility for the less educated has greatly diminished.

Bilingual education is certainly not a total panacea, but if it proves an effective measure for helping Hispanic children to develop the self-confidence and ability to perform well in school and stay there until they gain the needed credentials, then its implementation on the widest possible scale may be justified, for the alternatives are bleak indeed.

Working in favor of such special efforts to see that Hispanic students succeed are demographic trends. Hispanics, with their relatively high fertility and immigration rates, are producing a significant and growing part of today's relatively small cohort of children on whom the burden later of an aging American society is going to be exceedingly heavy. It may be asked whether in these circumstances the country can continue to afford treating any proportion of its youth as expendable. If not, we should not deceive ourselves into thinking that in furthering the education of Hispanic children we would be doing it out of the goodness of our hearts; we would be doing it for ourselves as well.

In at least one other respect conditions have changed from earlier days. A large proportion of the 13 million people who came here between 1900 and 1914 to meet the demand for cheap labor were from southern and eastern Europe. Growing fears that they would dilute the "basic strain of the population" and turn the United States into a "collection of foreign colonies" to some extent overlapped the anti-German sentiment already referred to and helped foster the Americanization program in the schools.

Perhaps such a policy, with the sacrifices exacted in human welfare and cultural enrichment to the nation, were necessary when a sense of nationhood had to be forged out of a multilingual, multicultural population. But the question can certainly be posed as to whether today's circumstances do not warrant a more humane approach to the education and acculturation of linguistic minorities. Are we not secure enough in our national identity to risk some relaxation of our earlier prohibitions and tolerate the kind of cultural and linguistic pluralism Hispanics are seeking without feeling that the cohesiveness of the nation is threatened? Should we not accept the assurances of Hispanic leaders that their goal is not separatism but simply the right to

become active participants in the nation's economic, social, and political institutions without abandoning the language and culture that mean so much to them? If bilingual education offers adults and their children an opportunity for achieving this kind of participation, should this opportunity be denied them?

Looking into the future, there is another way of assessing the value of instruction in two languages in schools at the elementary level. One consequence of the elimination of bilingual education during the First World War was to create our national bias against foreign-language acquisition and to make respectable our ignorance of other societies. In its late 1979 report, the President's Commission on Foreign Language and International Studies stated that, "America's incompetence in foreign languages is nothing short of scandalous, and it is becoming worse . . . ." To Commission members and many other observers of international affairs, the decline of foreign-language facility and teaching generally in the country is symptomatic of a short-sighted and dangerous ethnocentrism that has infected the nation. Pitifully few Americans can converse in a foreign tongue or read a foreign newspaper even where the language is one used by their parents or by themselves in childhood. Members of bilingual as well as monolingual groups in the United States are often surprised to learn that there are many nations where bilingual education is normal for all students and where the ability to speak more than one language well is a *sine qua non* for entry into the business, professional, and administrative elite of the society.

The most obvious corrective for the woeful situation in this country, of course, would be greatly increased foreign-language instruction for all children, starting at the elementary level and continuing through high school, and the most obvious choice of language in many regions would be Spanish. Today, the United States has the fourth largest Spanish-speaking population of any country in the western hemisphere. New York has the fifth largest Spanish-speaking population of any city. It is projected that by the 21st century two out of three inhabitants in the western hemisphere will be of Latin American extraction. More persons will speak Spanish than any other language of the Americas, including English. Spanish-language fluency in New York City and elsewhere has already become an advantage in employment opportunities. In all, a favorable environment is being created for the acquisition and maintenance of Spanish-speaking skills among members of the Spanish *and* Anglo communities, regardless of whether the Spanish language is taught in the schools.

The growing recognition of the importance of foreign-language acquisition is not inconsistent with the opinion of many Hispanic proponents of bilingual education, who believe that it should not be for their community alone, with the sole objective of assimilation into mainstream America, but should be for *all* children, English-speaking as well as Spanish-speaking, to help prepare them for the world of the future. Only when bilingual education becomes a

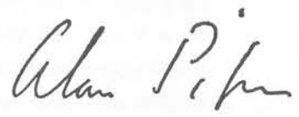
desirable choice to English speakers, they add, will the movement be relieved of its stigma of being a compensatory program to help the disadvantaged and be protected from funding cutbacks and threats of extinction.

Final thoughts

These pragmatic and broad historical and philosophical arguments, however, are not alone sufficient to justify the continuation of the bilingual education experiment as it is now conceived. Such a justification can only come from solid evidence that this new technique is succeeding—directly by improving the capacity of Hispanic children to learn *in English* and indirectly by stimulating parents and schools to give more serious attention to the educational needs of these youngsters. What is needed, now, is a determined effort by all concerned to improve bilingual education programs in the schools through more sympathetic administration and community support, more and better trained teachers, and a sustained, sophisticated, and well-financed research effort to find out where these programs are succeeding and where they are failing and why.

It goes without saying, therefore, that advocates of bilingual education should be wary of advancing rationales for it that go beyond its strictly educational purpose of helping children acquire the intellectual skills they will need to compete successfully in the American mainstream. Such arguments, surely, will simply exacerbate the considerable hostility that already exists toward bilingual education and heighten the resistance evident today among more affluent white Americans to any public expenditure aimed at improving the schooling of poor children of minority background. That trend, which has economic, racial, linguistic, and geographic dimensions, is already cause for deep concern, since its chief victims are children.

As for Hispanic children, their education is far too important a matter to be left to chance, vague hopes, rhetoric, or politics. All of us have an undeniable stake in their induction into the larger American society and their preparation to be effective, productive citizens. They are an inescapable part of the nation's future and therefore of all our futures.



President