

BILINGUALISM, NATIONAL IDENTITY AND DIVERSITY IN THE UNITED STATES

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The abstract can be found at the end of the article.
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I

Language alongside culture, religion and ethnic origin usually lies at the core of national identity. In some settings, such as in Canada, language seems to predominate and cleavages among different language groups threaten the continuing survival of the nation. In other settings such as in Switzerland, language differences play an important role in carving out the political landscape, but cannot be said to be predominant as they overlap with other equally politically significant differences, such as those relating to religion. In yet other settings, such as in the case of France, a single language plays a fundamental role on cementing the unity and identity of the nation, to the exclusion of all other languages.

In the United States, however, the relationship between language and national identity seems in flux and far from settled. The United States Constitution is silent on the issue of language, and therefore there is no official national language. On the other hand, in recent years more than twenty of the nation's fifty states have instituted—either through constitutional amendment² or through enactment of a new law—English as their official language.³ Moreover, this recent trend towards polarization in relation to language has not been confined to English. Indeed, Puerto Rico,

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2. That is constitutional amendment of the relevant states' own constitution.

3. See Peter W. Schroth, «Language and Law», 46 Am J. Comp. L. 17 (1998).

which has the status of a commonwealth (*estado libre asociado*), and which used to be officially bilingual, declared Spanish its official language in 1991.⁴ Yet, notwithstanding these dramatic changes, the trend to monolingualism has by no means been universal, as Hawaii remains officially bilingual and as some states, such as Rhode Island, have explicitly reacted against the trend in question by embracing multilingualism.⁵

The recent American trend toward monolingualism, or «English-only»,⁶ seems highly paradoxical. Indeed, why, at a time when the United States enjoys the status of the only remaining super-power and when English has triumphed worldwide as the *lingua franca*, do so many Americans feel that their language is threatened at home? In part, this may be due to recent increase in non-English speaking immigrants, and in particular to the great influx of Spanish speaking immigrants from Latin America who seem especially resistant to assimilation when it comes to language. As a matter of fact, political efforts to establish restrictive language policies are not new in the United States as they have recurred periodically since the mid-nineteenth century when significant segments of the non-English speaking population have been perceived as threatening assimilation into the American melting pot.⁷ This started with the mid-nineteenth century surge in Chinese immigration, continued with the large wave of Southern and Eastern European immigration at the end of that century and culminated in the most recent developments fueled primarily, as noted above, by Spanish speaking immigration.⁸

Although there is a significant correlation between the influx of large waves of non-English speaking immigrants and the push for restrictive language policies, America's recurring wavering between tolerance and intolerance of multilingualism has deeper roots. In essence, The United States' struggle to find a comfortable and enduring language policy mirrors the larger and more pervasive conflict over its national identity. Accordingly,

4. P.R. Laws Ann. tit. ch 5, 56.

5. See Peter W. Schroth, «Language and Law», *supra* at 19 n. 5.

6. The origins of the contemporary «English-only» movement can be traced back to the formation in 1983 of a national lobbying organization named U.S. English dedicated to promote the adoption of English as the only official language throughout the United States at both the federal and state level. See Chris Boehler, «Yniguez v. Arizonans For Official English: The Struggle to Make English the Official Language», 34 Hous. L. Rev. 1637, 1640-41 (1998).

7. See Gi Hyun An, «The Right to Bilingual Education: Providing Equal Educational Opportunity for Limited English Proficient Children in a Pluralist, Multicultural Society», 11 Geo. Immigr. L.J. 133, 157-59 (1996).

8. *Id.*

before turning to the legal and constitutional issues surrounding bilingualism and English-only, it is necessary to briefly look into the unusual relationship between language and national identity in the United States.

II

Not only is the latter relationship unusual, but also is the American conception of national identity. In the broadest terms, there are basically two traditional conceptions of national identity: one, associated with Germany is inextricably linked to *ethnos*; the other, modeled on France, relies primarily on the *demos*.⁹ Consistent with the German model, national identity is inextricably linked to ethnic identity and hence to the language and culture of the relevant ethnic group. In other words, strictly speaking, the German model leaves no room for multiethnic or multilingual states. In contrast, under the French model rooted in the 1789 Revolution, national identity is shaped by the democratic state and it requires subordination, if not downright suppression, of ethnic group identity in order to make room for a universal individualism that leaves no political room between the individual as citizen and the people as a whole. Like the German model, the French one also legitimates monolingualism, but for an entirely different reason. Whereas the German language is indispensable to the viability of the German nation as an essential attribute of the German *ethnos*, on a purely logical plan the French language is no more tied to democratic national identity prevalent in France than any other language. Indeed, what is crucial to the French model is not any particular language, but a single common language in order to bind together all the individual citizen into a unified democratic people. Accordingly, from a rigorously logical standpoint, French monolingualism is not parochial, but rather stems from the need to promote a single language as universal.¹⁰

9. See Ulrich Preuss, «Constitutional Power Making of the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution», in Michel Rosenfeld, ed., *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* 143 (1994).

10. Critics may object that French monolingualism is ultimately as riddled by exhalation of particularity as its German counterpart. Nonetheless, important differences remain. Thus, under the French model, national identity would not be threatened by multiethnic immigration provided every immigrant became fluent in French and adapted to French political culture. Under strict adherence to the German model (which seems to be increasingly weakening in Germany itself), however, acquisition of linguistic skills and adhesion to the

While neither the French nor the German model is in itself compatible with a multiethnic state—as the French would require political repression of ethnicity as such and the German is predicated on the existence of a common ethnicity—a hybrid model combining elements of the two might well be. Under such a hybrid model, ideally, a sufficient degree of ethnic identity would allow for the requisite diversity while a workable democratic culture cutting across all ethnic divides would supply the requisite unity needed to hold the multiethnic state together.

Unlike in the cases of the French and German models, in that of the hybrid model the issue of language is likely to be difficult and contentious. Indeed, assuming that each ethnic group within a multiethnic state possesses its own language, in as much as ethnic identity is supposed to be bolstered, multilingualism would clearly be called for. In contrast, in the realms reserved for state wide democratic interaction, a common language would appear to be essential. Conceivably, in a bilingual polity in which the overwhelming majority of citizens are fluent in both of the relevant languages, official bilingualism would provide a workable as well as legitimate means to uphold the necessary equilibrium between *ethnos* and *demos*. However, in any polity in which discrete linguistic groups are by and large unfamiliar or uncomfortable with the languages of other groups, or in which even though most citizens possess fluency in all the relevant languages, the conduct of official business in any language but one's own is widely regarded as an affront to one's ethnic identity and group autonomy; there seems to be no satisfactory or universally acceptable way of reconciling the need to promote a common language and to preserve linguistic diversity without subordinating some language groups to others.

National identity and the nation state as conceived in the United States differ in essential respects from their counterparts under the French or German model or any hybrid model incorporating elements from both. America's conception of itself as a «melting pot» based on the assimilation of various waves of immigrants coming from a wide range of different ethnic backgrounds stands in sharp contrast to all the basic tenets of the German model. Moreover, although America is multiethnic, its ideal is one of assimilation in which in the political arena all ethnic differences have been relegated to the background even if not completely ignored. And accordingly, America's conception of its national identity is as far removed from the multiethnic hybrid model as it is from the German model.

relevant political culture would be completely insufficient as they would not constitute an acceptable alternative to ethnic belonging.

The contrast between American self-identity and the French model may not be as obvious, but is nonetheless quite significant. On the surface, American national identity may seem quite similar to its French counterpart inasmuch as both place *demos* far above *ethnos*. Upon closer scrutiny, however, crucial differences emerge. And chief among these, for our purposes at least, are those regarding the relationship between the state, the nation and the people, and those relating to the respective French and American conceptions of democracy.

On a theoretical plane, the French nation-state is the product of a social contract concluded between free and equal men who become united as citizens in a nationwide democracy designed to advance the general will of the people as a whole. In this vision, derived above all from the political philosophy of Jean-Jacques Rousseau,¹¹ the people in their dual capacity as the rulers of, and the ruled within, the nation-state both delimit the bounds of the latter and define its collective destiny through democratic shaping of its general will. This vision, however, leaves little room for any legitimate recognizable groupings between the individual citizen and the people as a whole. And this raises the question of why the French nation-state should have been delimited the way it was rather than in any other way. In other words, since the conception of the French nation-state is built upon universalistic principles, why restrict French democracy to the French rather than extending it to all mankind? Or, if it has to be restricted, why to the French rather to any larger or smaller group?

From a purely theoretical standpoint, limiting the French nation-state to the French seems ultimately purely contingent. From a historical standpoint, in contrast, the French nation and the French model based on *demos* seem inextricably linked together.¹² Moreover, although the modern French nation's political foundation dates back to the 1789 Revolution,¹³ the seeds of its unity were already present in the Ancien Régime as a consequence of the absolute monarchy's triumph over feudal loyalties and particularisms.¹⁴ Thus, although the subjects of the French monarchy for the most part lacked any political power, the very fact that they belonged to the realm made them eligible for French citizenship — and hence to the bun-

11. See J. J. Rousseau, *The Social Contract* (1762).

12. See Emmanuel Joseph Sieyès, *What is the Third Estate?* 124-28 (S.E. Finer ed. & M. Blondel trans., 1963).

13. See Preuss, *supra*, at 151.

14. See François Furet & Ran Halévi, *La monarchie républicaine: La Constitution de 1791*, ch V (1996).

dle of political rights it conferred — once the Revolution supplanted the Ancien Régime.

In spite of its distinct political unity, the realm ruled by the king of France was by no means monolingual. As a matter of fact, as revealed in a 1794 survey, only in approximately twenty percent of the regions of France was French the exclusive language.¹⁵ Moreover, a majority of French citizens either spoke no French at all or spoke it with great difficulty.¹⁶ Accordingly, not only would the French Revolution extend its newly minted democratic order to a population already brought together under the absolute monarch, but also it would have to embark upon universal imposition of the King's language in order to enable the entire citizenry of the French nation-state to fulfill its newly instituted democratic mission.

In contrast to the French Revolution, the American Revolution—which strictly speaking was a war of independence rather than a revolution—did not produce as radical and violent a rupture with the social and political past. Indeed, the thirteen colonies that broke free from English rule were intent on continuing their established social and political practices free from the dictates of their distant colonial oppressor.¹⁷ To be sure, both the French Revolution and the American can be viewed as leading to a social contract institutionalizing constitutional democracy. However, whereas the French Revolution introduced a radical new political order for an already existing nation, its American counterpart consolidated a largely already existing political order for a nation that had yet to be formed. In other words, the thirteen original states and their inhabitants in 1787, the year of the American Constitution, were but a small part of what was to become over the next two hundred years a nation of immigrants which would occupy an immense territory cutting across the entire continent. Thus, whereas in France the nation — albeit implicitly — preceded the (modern) state, in the United States it was the (constitutional) state which provided it with a framework for the eventual unification of its separate and largely heterogeneous parts.

The other major difference between France and the United States concerns, as noted above, their respective conceptions of democracy. In the French conception, democracy is singular, centralized and the product of the people as a whole. Following Rousseau, for the French there is only one

15. See E.K. Francis, *Interethnic Relation: An Essay in Sociological Theory*, 73-74 (1976).

16. *Id.*

17. See François Furet & Ran Halévi, *La monarchie républicaine*, *supra*, at 184-85.

people, one general will and one national legislature as the only legitimate seat of democratic sovereignty. In the United States, on the other hand, democracy has always been plural, a matter of «checks and balances» between competing and overlapping centers of democratic power.¹⁸ Consistent with this, the American Constitution institutes a vertical division of powers between the federal government and those of the various states¹⁹ as well as a horizontal division of powers among the legislative, executive and judicial branches of the federal government inspired by the political philosophy of Montesquieu.²⁰

As both a nation in the making dependent on immigration from different parts of the world and as a plural democracy with overlapping constituencies, the United States would not *prima facie* seem to have a need for monolingualism akin to that associated with the French model. As we shall see, however, America's attitude towards language has been ambivalent over the years. On the one hand, America's need to build a nation out of a varied population issued from different peoples has been prone to boost a positive inclination towards multilingualism. On the other, the paramount interest in promoting the national objective of achieving «E Pluribus Unum» has often been seen as militating in favor of commitment to monolingualism.

III

Although attempts to institute English as the official language in the United States go back to the early days of the American republic,²¹ these had virtually no effect till well into the nineteenth century. The native American population spoke several hundred languages at the time European immigration began to settle in the United States.²² European settlers also spoke several languages besides English, including German, Dutch,

18. The best known American proponent of divided democracy in order to avert the dangers of a «Tyranny of the Majority» was James Madison. See *The Federalist Papers*, nos. 10, 47, 48 and 51.

19. See U.S. Const. Act I, see 8 and Amendment X (1791).

20. See U.S. Const., Acts I, II and III.

21. See Gy Hyum An, *supra*, at 157.

22. «Linguists estimate that 1,500 native languages existed in America when Europeans arrived on America's shores». Scott E. Ferris, «Reasserting Language Rights of Native American Students in the Face of Proposition 227 and other Language-Based referenda», 28 J. L. & Educ. 1, 13 (1999).

French, Spanish and Swedish.²³ Furthermore, in the early days of the American republic, several official government documents were published in several languages. For example, the Articles of Confederation, America's first charter of government established in 1781, was published in English, German and French.²⁴ Moreover, through its decision to publish these Articles in several languages, the Continental Congress «explicitly recognized the linguistic and cultural pluralism within the new American realm and the need to communicate with linguistically different populations in the languages they understood».²⁵

America's early multilingualism operated not only at the national level, but also at that of individual states. Thus, for example, during the nineteenth century, Pennsylvania officially published its laws in both English and German, and provided state financing for German schools.²⁶ Louisiana, for its part, officially published its laws in French and English and provided public education in both these languages.²⁷ Finally, in states like California and New Mexico —which prior to the mid-nineteenth century were part of the territory of Mexico— where a large proportion of the population was Spanish speaking, state laws were officially published in Spanish as well as English.²⁸

As already noted, the first serious challenge to multilingualism was launched in the context of the wave of new Chinese immigrants, who arrived on American shores in the middle of the nineteenth century. Significantly, that challenge was not motivated by monolingual chauvinism, but rather by economic self-interest. Fearing that cheaper Chinese labor would cost them their jobs, white laborers in some Western states organized to promote laws predicating certain rights on proficiency in English.²⁹ Consistent with this, the embrace of English against America's Chinese speaking population was much less an assertion of national identity than an opportunistic recourse to language in order to score a victory in the labor market.

Despite the successful campaign against the Chinese, which resulted in

23. See Bill Ong Hing, «Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separation and Conflict in an Immigration-Driven Multiracial Society», 81 Cal. L. Rev. 863, 876 (1993).

24. See Juan F. Perea, «Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English», 77 Minn. L. Rev. 269, 286 (1992).

25. *Id.*, at 286-287.

26. *Id.*, at 310, 314.

27. *Id.*, at 234-35.

28. *Id.*, at 232 ff. In New Mexico, official bilingualism continued until 1953. *Id.*, at 232.

29. See Bil Ong Hill, *Making and Remaking Asian America Through Immigration Policy 1850-1900*, 51 (1993).

adoption of the Chinese Exclusion Act 1882 which barred almost all Chinese from entry into the United States,³⁰ massive foreign immigration from non-English speaking countries such as those in Southern and Eastern Europe continued throughout the end of the nineteenth century and the beginning of the twentieth century.³¹ Around the turn of the twentieth century, a campaign linking American patriotism and loyalty to the ability to speak English was launched in reaction to the rapid inflow of non-English speaking immigrants.³² This campaign culminated in Congress's enactment in 1906 of legislation which for the first time made acquisition of U.S. citizenship contingent on the ability to speak English.³³ Since the beginning of the twentieth century, therefore, American citizenship and national identity have been formally tied to English but not necessarily to monolingualism. Indeed, although every new citizen had to acquire a certain level of proficiency in English, he or she did not have to abandon his or her mother tongue in order to obtain American citizenship.

World War I, which propelled the United States on the world stage much more than ever before, reinforced the push towards English and lent prominence to a policy of combined xenophobia and the pursuit of monolingualism. The prevailing sentiment of the times — which prompted many states to enact English-only laws regarding education — was perhaps best expressed in 1919 by then former President Theodore Roosevelt. Playing on strong anti-German sentiments, Roosevelt asserted that «we have room but for one language in this country and that is the English language, for we intend to see that the crucible turns our people out as American, of American Nationality, and not as dwellers in a polyglot boarding house».³⁴

To the extent that this call to monolingualism was prompted by xenophobia, it can be viewed as tying language to the self-image of the nation through negative means rather than positive ones. In other words, under the circumstances prevailing in the aftermath of World War I, it seemed important to contrast American identity to German identity and to the Germans. Accordingly, English became important above all as being non-

30. *Id.*, at 23-24.

31. See Bill Ong Hing, «Beyond the Rhetoric of Assimilation and Cultural Pluralism», *supra*, at 916.

32. *Id.*

33. Law of June 29, 1906, 34 Stat. 596, 599. This law was repealed in 1940. Under current law, however, English literacy is a prerequisite for citizenship. See The Immigration Reform and Control Act of 1986.

34. This statement is cited in Bill Ong Hing, «Beyond the Rhetoric of Assimilation and Cultural Pluralism», *supra*, at 917.

German. This interpretation, moreover, seems buttressed by the historical prominence of German immigrants and the German language ever since the beginnings of the American nation.

The wave of anti-German patriotism ironically led to the erection of a powerful constitutional barrier against overzealous imposition of English-only on unwilling segments of the American citizenry. Thus, in a 1923 case, *Meyer v. Nebraska*,³⁵ the U.S. Supreme Court held a Nebraska law prohibiting the use of any language other than English in the classroom to be unconstitutional. *Meyer* involved a teacher who taught his students in German in defiance of the Nebraska law. The Supreme Court found that Nebraska law unconstitutional because it impinged on fundamental liberties by «materially» interfering «with the calling of modern language teachers, with the opportunity of students to acquire knowledge, and with the power of parents to control the education of their own».³⁶ In reaching this conclusion, the Court noted that the Nebraska Law's aim «to foster a homogeneous people with American ideals» was understandable particularly in light of the «unfortunate experience during the late war». Nonetheless, the Court went on to emphasize that 1923 was a «time of peace and domestic tranquility» which provided «no adequate justification» for the restraints on liberty imposed by the Nebraska law.

The events that led to the *Meyer* decision illustrate the tension that surround construction of national identity in the United States. On the one hand, the outcome of *Meyer* can be viewed as signaling a victory for individual liberty and privacy, thus reinforcing individualism which has always figured as a prominent component of American identity. Also, through its affirmation of individual choice, the decision in *Meyer* provides a boost to diversity which remains crucial so long as the nation needs to keep its doors open to foreign immigration. On the other hand, America's need for unity and cohesion — which becomes particularly urgent in times of war — calls for sufficient assimilation and homogenization to sustain the working of the melting pot. Consistent with this, and in order to maintain an equilibrium between individualism, diversity and assimilation, there seems to be a need to promote a common language without giving way to the temptations of monolingualism.

With this in mind, let us now turn to the legal and constitutional developments which surround America's contemporary experience and preoccupations with biligualism and English-only.

35. 262 U.S. 390.

36. *Id.*

IV

The contemporary law and politics of language in the United States are framed above all by the ongoing struggle between proponents of bilingualism and those of English-only. This struggle, moreover, bears the distinctive imprint of two key developments that have profoundly marked post World-War II America: new patterns of immigration, and dramatic expansion of constitutional equality and civil rights legislation.

Not only has immigration to the United States been quite high in recent decades,³⁷ but since the 1960's the large majority of immigrants have been Spanish speaking Latin Americans and Asians rather than Europeans as was the case at the beginning of the century. Also, Spanish speaking Latin Americans, or Latinos, have been perceived as resisting assimilation into the «melting pot» and as largely maintaining linguistic separatism rather than immersing themselves into the English language as their various European predecessors had systematically done.³⁸

Although it is clear that Latinos have been much less willing abandon Spanish or to subordinate it to English than have immigrants possessing other native tongues, the nature and legitimacy of their claims to hold on to Spanish are hardly uniform. Indeed, Latinos in the United States are a very diverse group which may be ultimately united by very little beyond language. For example, Puerto Rico immigration from the island to the continental USA involves but an internal migration which would hardly seem to justify sacrificing one's native language in order to espouse another one. Similarly, Spanish speaking descendants of those who lived in California or New Mexico at a time when these were part of the territory of Mexico may well feel entitled to maintain deeply rooted ancestral bonds extending both to the language and the land. On the other hand, Cuban immigrants who came to the United States as political refugees escaping from Castro's regime may have no more legitimate claim to preserve their language than other such similarly situated groups such as Hungarian immigrants who were welcomed to the United States in the aftermath of the 1956 Hunga-

37. In the 1980's the United States absorbed approximately 600,000 new legal immigrants per year, a figure that climbed to approximately 800,000 in the 1990's and that peaked at 900,00 in 1994. See Gi Hyun An, «The Right to Bilingual Education,» *supra*, at n. 5.

38. See John J. Louizos, «Que ya no hablan inglés en este país?: A Look at the Constitutionality of English-only Provisions Under the Free Speech Clause of First Amendment», 3 *Race & Ethnic Ancestry L. Dig.* 14, 16 (citing the views of Senator S.I. Hayakawa, a founder of English-only and the proponent of a —never adopted— federal constitutional amendment which would have made English the official language of the USA).

rian Revolution.³⁹ In any event, because Cuban immigration besides being viewed as victims of Communism has been largely educated and middle class as well as enterprising, productive and self-sufficient, it has, by and large, enjoyed acceptance and respect from large segments of the population. In contrast, poor uneducated and in part illegal immigration from Mexico and several Central and South American countries has been much less well received. The latter immigration, moreover, has had to confront such hostility, in part for economic reasons, as they constitute a reservoir of cheap labor that competes and worsens labor conditions for English speaking persons; and, in part, because their chronic poverty, lack of education and lack of assimilation loom as threats to the social fabric within the communities in which they reside in large numbers.

Whereas the differences among the various Spanish speaking groups in the United States may lend greater legitimacy to certain claims to bilingualism or to recognition of Spanish as an official language over others,⁴⁰ from a practical standpoint the most important facts about Latinos in the United States are that they are numerous, concentrated in certain areas and significantly resistant to linguistic assimilation. Accordingly, official government policy towards Spanish is bound to take these facts into account while remaining mindful of the liberty rights upheld in *Meyer* and of the increasing equality rights that are about to be briefly described.

The United States Constitution did not guarantee any equality rights until the abolition of slavery at the end of the Civil War.⁴¹ Moreover, even after the adoption of equality rights, these were interpreted narrowly. This changed with the unanimous landmark 1954 U.S. Supreme Court decision

39. While there may be no difference between those two groups from the standpoint of legitimacy, there are important social and cultural differences among them. By virtue of the uniqueness of their language and of the smallness of their numbers, Hungarians have had to be multilingual at home and could not expect to survive in the United States without acquiring decent English skills. In contrast, Cubans not only speak a language which is the first language of more than ten percent of the population of the United States and the predominant language throughout most of the territory of the hemisphere, but have also concentrated in certain areas where they predominate, such as the section of Miami known as «Little Havana».

40. See Will Kymlicka, *Multicultural Citizenship* 11-33 (1995) (arguing that national minorities such as Native-Americans and Puerto Ricans have a stronger claim to collective self-determination and cultural rights, including language rights, than ethnic groups, such as Italians or Eastern Europeans assembled in the United States through voluntary immigration with full knowledge that they were to join an alien culture). Consistent with this, someone who left Cuba or modern Mexico for political or economic reasons would seem less justified in resisting immersion into the American melting pot than a Puerto Rican.

41. Equality rights are protected by the Constitution under the «equal protection» clause of the Fourteenth Amendment which was adopted in 1868.

on the case of *Brown v. Board of Education*,⁴² in which racial apartheid in public education was outlawed. Although in the American context, racial discrimination was the principal target of constitutional equality, other related kinds of discrimination such as those based on national origin were also outlawed.⁴³ Furthermore, one's language being often inextricably linked to one's national origin, discrimination based on language is presumably in violation of constitutional equality.⁴⁴ In any event, such discrimination is in clear violation of the civil rights laws enacted by the Congress in the aftermath of the *Brown* decision.⁴⁵

In view of the preceding brief summary, it becomes clear, as we zero in on the recent squirmishes surrounding bilingualism and English-only, that proponents of the latter face as their greater legal obstacle the broad constitutional protection of individual liberty. For their part, partisans of bilingualism seem to possess as their most formidable legal weapon, the expanded constitutional right to equality and the array of civil rights legislation enacted by Congress in the course of the past three decades.

V

Official promotion of bilingualism has originated in both federal and state laws. The most relevant federal statutes are the Civil Rights Act of 1964, the Bilingual Education Act of 1968 and the Equal Education Opportunity Act of 1974. On the other hand, the first state to enact a comprehensive bilingual education law was Massachusetts in 1972.⁴⁶ California also became committed to bilingual education through enactment in 1976 of the Bilingual/Bicultural Education Act.⁴⁷

42. 347 U.S. 483.

43. See *Trimble v. Gordon*, 430 U.S. 763 (1977) (Rehnquist, J. dissenting) (even under a narrow interpretation of constitutional equality, discrimination based on national origin, «the first cousin of race», was meant to be outlawed).

44. See *Lau v. Nicholas*, 414 U.S. 563 (1974) (while refusing to rule on the constitutional question, the Supreme Court held that a school district's refusal to remedy the lack of equal educational opportunities of Chinese students who spoke no English amounted to discrimination on the basis of national origin in violation of the Civil Rights Act of 1964).

45. *Id.*

46. Mass. Gen. Laws. Ann. ch 71A § 1.

47. California Education Code §§ 52160, *et seq.* The California law continued until 1987 though funding for programs created pursuant to it continued thereafter, see Ronald Wenkart, «The Battle over Bilingual Education in California», 123 Ed. Law Rep. 459 (1998), until the approval by referendum of Proposition 227 in June, 1998.

The purpose of all three federal laws mentioned above was to promote equal education opportunities for all, and particularly children with limited English proficiency by requiring affirmative government intervention to remedy handicaps experienced by non-English speaking students and by those with limited proficiency in it. Accordingly, these laws are meant to promote assimilation and to remove cultural and linguistic barriers preventing equal access to benefits,⁴⁸ rather than to foster cultural and linguistic diversity. Moreover, in this context not only is bilingualism invoked to facilitate assimilation rather than preserving linguistic diversity, but also the Bilingual Education Act⁴⁹ encourages setting bilingual programs without making them in any way mandatory. In addition, the Act makes available funding to local educational organizations and agencies wishing to implement bilingual programs. In short, the federal laws relevant to bilingualism are geared to removal of handicaps due to poor mastery of English, thus only promoting bilingualism to the extent that no other policy can be legitimately supported as likely to be equally efficient.⁵⁰ Finally, since education is primarily a state rather than a federal concern in the United States,⁵¹ federal law is largely limited to fostering equal education opportunity and to making funds available for states choosing to pursue educational policies favored by federal policy objectives.

State regulations relating to bilingual education, in contrast, have in some cases gone farther than federal regulation, both in terms of making such education mandatory rather than purely voluntary, and in terms of promoting such education for purposes of cultural diversity as well as for those linked to assimilation. Thus, the Massachusetts law mentioned above is assimilationist and concerned with the achievement of equal educational opportunities, but it imposes an obligation on state schools to provide bilingual education rather than merely providing for such education as an option among many.⁵² The California 1976 law referred to above, for its part, not only made bilingualism mandatory, but also promoted it as a means to foster cultural diversity.⁵³ Indeed, as envisioned by the California Attorney General in 1988, the goal of the state's bilingual education pro-

48. See *Lau v. Nicholas*, *supra*.

49. 20 U.S.C.A. § 3281-3291.

50. See *Castaneda v. Pickard*, 648 F. 2d 989 (5th Cir. 1981) (deficiencies in English proficiency require school authorities to take «appropriate» remedial action, but that need not necessarily involve bilingual education).

51. The federal constitution neither addresses education nor provides any right to it.

52. See Mass. Ann. Laws ch. 71A§2 (1999).

53. See Ronald Wenkart, «The Battle of Bilingual Education in California», *supra*.

gram was twofold: «to as effectively and efficiently as possible develop in each child fluency in English and to provide positive reinforcement of the self-image of participating students, promote cross-cultural understanding, and provide equal opportunity for academic achievement».⁵⁴ Consistent with this, the California bilingual education program prevalent until the adoption of Proposition 227 was designed to reinforce at once both the possibilities of assimilation and those of maintaining cultural diversity. The first of these was important in terms of equality as well as in terms of integration. Indeed, without adequate English proficiency skills all but the least desirable employment opportunities tend to remain beyond reach throughout most of the United States. On the other hand, positive emphasis on cultural diversity not only benefits members of non-English speaking cultures by boosting their self-image, but also presumably promotes greater understanding and tolerance among native English speakers thus enhancing America's rich multicultural heritage.

VI

The retreat from bilingual education and the move towards English-only since the late 1980's is fueled by the same factor — namely, a dramatic increase in non-English speaking immigration — but by two very different reasons. The retreat of bilingualism is sought to be justified in terms of practical reasons relating to the efficiency of bilingual education as a means to produce equal educational opportunities for English deficient individuals. The ascent of English-only laws and policies, on the other hand, seems primarily pursued out of ideological concerns and fears that America's identity as an English speaking and English language thinking polity will be eventually engulfed by alien cultures and mentalities such as those of Latinos or Asians.

The greatest retreat regarding bilingualism is undoubtedly that which culminated in the adoption by California of Proposition 227 in 1998. Significantly, at the time that California embraced bilingual education in 1976, there were 375,000 students with limited English proficiency in the state's primary and secondary schools. By 1996, that figure had increased to 1,323,000 and the California Department of Education indicated that there was a shortage of approximately 20,000 bilingual teachers.⁵⁵

54. *Id.*

55. *Id.*

Coupled with these demographic changes, a vehement and often politicized debate had erupted over the efficiency of bilingual education — and specifically of the enrolment of non-English speakers in intensive English classes while at the same time being instructed in other subjects in their native language rather than in English so as to avoid for them to fall behind in school because of their limited English skills — as a means toward educational opportunity parity.⁵⁶

Proposition 227, which was approved by 61 % of the California electorate⁵⁷ represents a very important shift in language education and policy, not only because California is the largest American state, but because the U.S. Congress is currently considering similar legislation for the nation as a whole.⁵⁸ Proposition 227 rejects bilingual education programs on the grounds that they are costly and inefficient. Stressing that English is «the language of economic opportunity» and that «immigrant parents are eager to have their children acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream of economic and social advancement», Proposition 227 (as codified) requires that children who are not proficient in English be educated through «sheltered English immersion». That approach provides that children «shall be taught English by being taught in English», that is through an intense English immersion technique. Moreover, after having thus acquired sufficient English skills, the children involved are to be placed in regular classrooms where they are to be taught in English alongside their native speaking classmates. Proposition 227 does not prohibit additional instruction in a foreign language,⁵⁹ but essentially supplants bilingual education with additional English instruction.

Proposition 227 was immediately attacked in the courts as violative of federal laws guaranteeing equal educational opportunities regardless of national origin. Because of the federal law's and Proposition 227's emphasis

56. See Scott Ellis Ferrin, «Reasserting Language Rights of Native American Students in the Face of Proposition 227 and other Language Based Referenda», 28 L. & Educ. 1, 21 (1999). Also, compare, e.g., C.H. Rossell & M.J. Ross, «The Social Science Evidence on Bilingual Education», 30 Research in The Teaching of English 7 (1986) (research does not support conclusion that bilingual education is superior to other means of teaching English to non-English speakers) with A.C. Willig, «A Meta-analysis of Selected Studies on the Effectiveness of Bilingual Education», 55 Review of Educational Research 269 (1985) (research widely supports bilingual education's positive contribution).

57. See *Valeria G. v. Wilson*, 12 F.Supp.2d 1007 (N.D. Cal. 1998).

58. See Scott Ellis Ferrin, *supra*, at 8.

59. See *Valeria G. v. Wilson*, *supra*.

on achieving equality, it is highly unlikely that such attacks will eventually prove successful. Although the U.S. Supreme Court has not yet spoken on the issue, a lower federal court has already indicated that Proposition 227 is consistent with federal objectives, and that given the debate concerning which means may be more efficient than others, it appears to advance reasonable means towards commonly agreed ends.⁶⁰

As already mentioned, the English-only movement —having thus far resulted in nearly half the states adopting English as their official language— is fueled above all by ideology and by a need to assert the centrality of English in the make-up of American identity. Accordingly, it is not surprising that the majority of the English-only provisions enacted by various states are primarily symbolic.⁶¹ Typically, they declare English the official state language but do not prohibit the use of other languages even in the context of the functioning of government.⁶² Moreover, to the extent that they are thus limited, they amount to declarations of loyalty to English which underscore the nation's aspirations to unity without thereby threatening its diversity.

There is one state that stands out, however, as a glaring exception to this trend towards a largely symbolic commitment to English-only. That state is Arizona, which through a constitutional amendment approved in a referendum by a mere 50.5 % of the voters, institutionalized an English-only policy which, with few exceptions, prohibits the state government and bureaucracy from using any language other than English.⁶³ This sweeping provision applies to all state branches and agencies and to all state employees while engaged in government business.⁶⁴ It also applies to public schools, the ballot, and local governments and municipalities.⁶⁵ Furthermore, this provision imposes an affirmative duty on the state and all its political subdivisions to «take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the state of Arizona».⁶⁶ Finally, the provision authorizes all residents and all others who do business in the state to bring lawsuits in the state courts in order to enforce the requirements it imposes.⁶⁷

60. *Id.*

61. See John Louizos, «Que ya no hablan inglés en este país?», *supra*, 3 Race & Ethnic Ancestry L. Dig at 21.

62. *Id.* n.74.

63. Arizona Const. art. XXVIII.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

The provision does allow for five exceptions, but those are rather narrow and limited. Thus, the state can use a language other than English in order to: 1) assist students who are not proficient in English to overcome that handicap as required by federal law; 2) to comply with other federal laws; 3) to teach a student a foreign language as part of a school's regular curriculum; 4) to protect public health or safety; and 5) to protect the rights of criminal defendants or of crime victims.⁶⁸

To appreciate how sweeping the Arizona law is consider the following two examples which mirror very common occurrences in real life given the large Spanish speaking population that lives in the state. First, suppose a Mexican immigrant who speaks no English goes to a state office to apply for a benefit to which he is entitled as someone who works and pays taxes. He approaches a perfectly bilingual state employee whose job it is to help those who wish to apply for any available benefit, and asks that employee a number of relevant questions in Spanish. Under the above Arizona law, the state employee can only answer in English notwithstanding that the person seeking a legitimate benefit only speaks Spanish.

Second, imagine a political campaign for a seat in the state legislature in a largely Latino community between an incumbent and a challenger. As a state legislator, the incumbent cannot address the voters in Spanish, while his or her opponent not being a state official is free to do so. As these two examples clearly indicate, the Arizona law leads to both extreme and arbitrary situations.

Not surprisingly, this law has been challenged in both the federal and state courts, and has been held unconstitutional by both. The federal case, *Yniguez v. Arizonans for official English* led to a 6-5 decision by a Circuit Court of Appeals (one of the Courts just below the U.S. Supreme Court) holding the Arizona law unconstitutional as violative of free speech rights.⁶⁹ In deciding that the Arizona law violated the federal constitution's first amendment which protects freedom of expression, the court observed:

«This case raises troubling questions regarding the constitutional status of language rights and conversely, the state's power to restrict such rights. There are valid concerns on both sides. In our diverse and pluralistic society, the importance of establishing common bonds and a common language between citizens is clear. Equally important, however, is the American tradition of tolerance, a tradition that

68. *Id.*

69. 69 F. 3d 920 (9th Cir. 1995) vacated by the Supreme Court as moot 117 S. Ct. 1055 (1997).

recognizes the difference between encouraging the use of English and repressing the use of other languages.»⁷⁰

Furthermore, observing that the law was so extreme as to make it illegal for a state university to issue a diploma written (in whole or part) in Latin, the Court concluded that it amounted to a constitutionally prohibited means of promoting English.

The Court's reliance on freedom of expression rather than on equality rights to invalidate Arizona's English-only law is somewhat surprising. Indeed, to the extent that the law prevents non-English persons from obtaining benefits to which they are entitled, it constitutes discrimination on the basis of national origin which is prohibited by the fourteenth amendment's equal protection clause. On the other hand, the freedom of expression violation found by the Court is not as obvious in light of the customary distinction drawn between the content of expression and the means of expression used to convey an idea. Arguably, as the dissenting judges in *Yniguez* pointed out, Arizona's English-only law does not restrict ideas on the basis of their content but only limits the means of expression in a content neutral manner. Moreover, these dissenting judges went on to observe, it is legitimate for government to somewhat restrict even the content of the expression of its employees in the course of the latter's conduct of official business. Thus, for example, no one contests that government can prohibit its employees who officially interact with the public from uttering misogynist statements while on the job even if these statements happen to be otherwise constitutionally protected.

These last concerns could well have been fatal to constitutional attacks against the Arizona law based on freedom of expression had the law been less extreme. But because the law prohibited any use of a language other than English under virtually all circumstances by all government employees while on the job, it ultimately unreasonably forced the latter to refrain from any affirmation of their cultural identity, thus arbitrarily offending central values embodied in freedom of expression.

Subsequent to the U.S. Supreme Court's refusal to consider *Yniguez* on appeal, the Arizona Supreme Court held Arizona's English-only law unconstitutional as violative of both the free expression and equality rights protected by the federal constitution.⁷¹ Moreover, on the equality front, the Court made it clear that:

70. 69 F. 3d at 923.

71. See *Ruiz v. Hull*, 957 P. 2d 984 (1998).

«By denying persons who are limited in English proficiency or entirely lacking in it, the right to participate in the political process, the Amendment violates the right to participate in and have access to government, a right which is one of the «fundamental principles of representative government in this country.»⁷²

While the Arizona Supreme Court's rejection of the state's English-only law was both complete and unequivocal, it is important not to lose sight that it only invalidated the drastic prohibition against all forms of multilingualism without recognizing any state obligation to actively promote or facilitate multilingualism. In the Court's own words:

«Significantly, in finding the Amendment unconstitutional, we do not hold or even suggest, that any governmental entity in Arizona has a constitutional obligation to provide services in languages other than English except, of course, to the extent required by federal law.»⁷³

VII

In the last analysis, the picture that emerges concerning the relationship between language policies and national identity in the United States is both complex and dynamic. Because the language issue is caught between the ongoing need to pursue national integration while not forsaking tolerance for diversity, the construction and maintenance of America's national identity calls for some kind of official monolingualism —though one that is more flexible and open than those respectively legitimated by the German and French models of national identity discussed above—. For cultural, political and economic reasons, it is in the interests of all citizens to acquire a reasonable command of English. Moreover, compelling official multilingualism may in many cases be wasteful and itself oppressive. On the other hand, even where justified, monolingualism ought to be as little oppressive and intrusive as possible —or, in other words, a tool of inclusion rather than of exclusion as it clearly was in Arizona—. Finally, even where it does not promote multilingualism, government —at all levels— ought to at least tolerate it. In short, while ignorance of English ought to be sensibly and humanely combatted, it ought to be done in ways that do not harm or discourage the continued use and pursuit of other languages. It is hard to imagine America without some convergence towards a melting pot.

72. 997 F. 2d 997.

73. 997 F. 2d at 1002-03.

However, assimilation should not be unlimited, for without preservation of its rich multicultural and multilingual heritage America would eventually lose its very soul.

— abstract / resum —

BILINGUALISM, NATIONAL IDENTITY
AND DIVERSITY IN THE UNITED STATES

Michel ROSENFELD

Language is one of the factors that contributes to the formation of national identity. In the case of the United States, it is not a decisive element (English is not the official national language). Its importance has, however, changed throughout the course of history.

The United States, as a nation of immigrants, has been, from the beginning, a multiethnic and multilingual society. Although English has always been the main language, languages from all over the world have been very visible since the time the country was founded (Spanish especially so, since it is the second most important language).

National identity as related to language has been an evolving phenomenon. Each ethnic group brings with it a language it is free to use, but a common language that can be used on all levels becomes necessary. National integration seems to lead to monolingualism. The first measures in this regard date from the end of the 19th century (the great waves of immigration), when English began to be associated with patriotism and being American.

In the 20th century, the language in-

BILINGÜISME, IDENTITAT NACIONAL
I DIVERSITAT ALS ESTATS UNITS
D'AMÈRICA

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La llengua és un dels factors que contribueix a la formació de la identitat nacional. En el cas dels EUA no és un element decisiu (l'anglès no és llengua nacional), però d'importància canviant en la història del país.

Els EUA, com a país d'immigració, constitueixen des dels seus inicis una societat multiètnica i multilingüe. Tot i que l'anglès ha estat sempre la llengua principal, des de la fundació del país llengües de tot el món hi han tingut molta presència (l'espanyol de forma molt especial perquè és la segona llengua més important).

La identitat nacional en relació amb la llengua ha anat evolucionant. D'entrada cada grup ètnic aporta una llengua que pot utilitzar lliurement, però es fa necessària l'existència d'una llengua comuna a tots nivells. La integració nacional sembla portar al monolingüisme. Les primeres mesures en aquest sentit són de finals del XIX (grans onades migratòries), quan es comença associar l'anglès a patriotisme i americanisme.

Al segle XX, les noves onades migratòries costen més d'integrar lingüísticament. La por de la pèrdua d'identitat americana dona més força a l'anglès

tegration of the new waves of immigrants became harder to accomplish. The fear of a loss of American identity lent further strength to the English-only movement. Starting with World War II, two opposing positions took shape: the bilingualists and the English-only supporters. The former based their arguments on the legislation on constitutional equality — an unfamiliarity with English could lead to a lack of equal opportunity. On the other hand, English is the path to success; knowledge of English must be ensured. Both arguments, depending on the legal reading one accords them, can be interpreted as being in favor of bilingual education or English-only education. In short, a constant debate that oscillates between national identity and tolerance for diversity.

com a llengua única. A partir de la Segona Guerra Mundial, es defineixen dues posicions enfrontades: els bilingüistes i els de l'*English-only* (només l'anglès). El bilingüisme es recolza en la legislació sobre igualtat constitucional: el desconeixement de l'anglès pot portar a desigualtat d'oportunitats. D'altra banda, l'anglès és el camí de l'èxit, se n'ha d'assegurar el coneixement. Ambdós arguments, segons la lectura legal que se'n faci, poden ser a favor de l'educació bilingüe o només en anglès. En definitiva: un debat permanent a cavall entre la identitat nacional i la tolerància envers la diversitat.