

ARIZONA STATE UNIVERSITY
COLLEGE OF LAW

SELECTIONS FROM

"OFFICIAL ENGLISH AND THE BORDER STATES"

AN INTERNATIONAL SYMPOSIUM HELD AT
ARIZONA STATE UNIVERSITY ON MARCH 27 AND 28, 1987

SPONSORED BY:

GRADUATE COLLEGE
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INTERDISCIPLINARY LINGUISTICS COMMITTEE
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On March 27 and 28, 1987, an international symposium on Official English and the Border States was held at Arizona State University. Sponsored by the Graduate College, the College of Law, the Interdisciplinary Linguistics Committee, and Antonio Zuniga, Esq., the conference produced a substantial number of original papers and discussion proceedings, all of which will appear in a volume bearing the conference title.

As this volume will not be available for another year, ASU College of Law, with the generous financial assistance of Mr. Zuniga, is responding to many requests from the legislative, legal, and social service communities in Arizona to make available those portions of the conference touching on legislative and legal issues arising from efforts to make English the official language of Arizona. We also include the paper of Elizabeth A. Brandt, as many of the original conference participants found valuable her discussion of Arizona-specific studies in the language area.

In making these materials available, the College of Law does not take an official position in this matter. We, and the rest of our colleagues in this project, seek to be of service to those seeking information and assistance. For further information about the larger publication or these materials, please contact Professors Karen Adams or Daniel Brink at 965-3810 or Dean Paul Bender at 965-6188.

OFFICIAL ENGLISH AND THE BORDER STATES
(PARTIAL TRANSCRIPT)

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Is Language Choice a Fundamental Right?

Dean Bender: I am the Dean of the Law School here at ASU. Let me start by welcoming you to the Law School. This Conference was originally planned by Professors Karen Adams and Daniel Brink of the ASU English Department. Just at the time we were talking about the Conference an alumnus of ours, Antonio Zuniga, gave a very generous grant to the Law School to support a conference on this very topic. The two efforts merged, and what you have here today and tomorrow is the result of that merger. Another result is that we are going to be able to publish the proceedings of the entire Conference.

The subject of this panel is language rights as a potential fundamental right under the United States Constitution. To what extent does our Constitution presently protect, to what extent should it protect, the right to use the language of your choice as a highly protected, substantially protected, or not protected constitutional right? We have a very distinguished panel to discuss this question. I will introduce them in the order in which they are going to speak.

First there will be Professor James Weinstein, who is a Professor of Law at this Law School. He will be talking about the general framework under the U.S. Constitution that is relevant to whether or not there are highly protected language rights.

Professor Rachel Moran is a professor at the University of California at Berkeley Law School, Boalt Hall. She has published several pieces on language rights issues and has a forthcoming essay in the California Law Review on the same subject. She will be talking about bilingual education.

John Trasvina will be speaking third. He is counsel to the United States Senate Judiciary Subcommittee on the Constitution. Previous to that, for two years, between 1985 and 1987, he was legislative attorney for MALDEV in Washington. He's a graduate of Stanford Law School and got his A.B. at Harvard, where his thesis was in the area of voting rights, and that is what he will be talking about today.

Professor Joseph Magnet is a Professor of Law at the University of Ottawa Law School in Canada. Canada, as I'm sure most or all of you know, has explicit protections for language rights in its constitution, and Professor Magnet, who is the leading expert in both Canada and the United States on language rights, will be giving a comparative perspective on what other countries do in looking at language rights as compared to the analysis he will have heard about the United States.

Judge Noel Fidel is a judge on the Arizona Court of Appeals and a graduate of the Harvard Law School. He is a wonderful judge as well as a wonderful person, and will comment, as judges do, and take no position whatsoever, on what has been said by the other presenters.

I introduce Professor James Weinstein, our first speaker.

Professor Weinstein: The question that I will address is whether language choice is a constitutional right guaranteed by the United States Constitution. It's a simple question. But I think you know better than to expect simple answers from lawyers, even in response to simple questions. Take, for instance, the person who asked a group of professionals, "What's 2 plus 2?" The accountant said, "4," the mathematician said, "It depends what base you want it in," the linguist said, "It depends on the social context." But the lawyer said, "What do you want it to be?"

The answer to the question I just posed is similar. The answer is "yes" and "no." Yes, there is a constitutional language use right and no, there is not. No, in the sense that there is no right as such: there is no freestanding right to use or to receive communications in a particular language. Yes, in the sense that there is a constitutional right to communicate, and under some circumstances to receive communications, in languages other than English. But this right exists solely by virtue of other constitutional rights. Thus this language right is not a right, so to speak. It is made up of bits and pieces of other constitutional rights. It is the Frankenstein monster of constitutional rights.

I will give you an example of how language rights are, in fact, protected indirectly under our Constitution. What if we wanted to conduct this meeting in Spanish or Old Norse? Could

the government punish us or prohibit us from doing so? The answer is clearly no. The government could not do that because of the First Amendment right of free speech.¹

This is as good a time as any to explain something about rights under the United States Constitution. For the most part, constitutional rights in our system are rights against government, be it federal, state, or local government; they are not rights against individuals. If one of you wanted to shut me up and keep me from speaking, that would not be a constitutional violation. It might be illegal, it might violate a statute or common law, but it would not raise a constitutional issue. It is only when the government acts, for the most part, that the constitution becomes involved.

Coming back to the First Amendment protection, more than 60 years ago the Supreme Court of the United States recognized that a law prohibiting the teaching of a foreign language to children who had not passed the eighth grade was unconstitutional.² A few years later, the Court said that a law that prohibited merchants from keeping their books of account in Chinese was unconstitutional.³ Technically, these cases were not decided under the First Amendment; they were decided under a type of

¹ "Congress shall make no law . . . abridging the freedom of speech," U.S. Constitution, Amendment I. This provision applies as well to state and local government by virtue of the Fourteenth Amendment. See *Gitlow v. New York*, 268 U.S. 652 (1925).

² *Meyer v. Nebraska*, 262 U.S. 390 (1923).

³ *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926).

jurisprudence that has been discredited.⁴ But these cases are still good law and they've been reinterpreted recently by the Supreme Court as First Amendment cases.⁵

There are other parts of the Constitution that indirectly protect language rights. For instance, the provisions of the Constitution that prohibit the deprivation of life, liberty, or property without due process of law⁶ can come into play where language issues are involved. Thus, due process demands that a criminal defendant who does not understand English be supplied by the government with a translator.⁷ On the other hand, it has also been held that the failure to provide Spanish translation of social security forms, even social security forms that are essential to obtain benefits, is not a deprivation of property

⁴ Meyer was decided under a constitutional theory which held that the due process clause of the Fourteenth Amendment created certain substantive rights which the states could not infringe. The rights found by the court in this area were primarily economic and property rights, which the court invoked to strike down legislation that the court thought inimical to laissez-faire capitalism. (See, e.g., Lochner v. New York, 198 U.S. 45 (1905), after which this constitutional area is named). Occasionally, however, as the Meyer decision shows, the court would use the due process clause to protect personal liberties as well as economic ones.

⁵ See Griswold v. Connecticut, 381 U.S. 475, 482 (1965).

⁶ U.S. Const. Amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law.") (with respect to federal government); U.S. Const. Amend. XIV ("Nor shall any state deprive any person of life, liberty, or property without due process of law.") (with respect to state and local government).

⁷ See United States ex rel. Negron v. New York, 434 F.20 386 (2d Cir. 1970).

without due process.⁸ So although there is some protection of language rights under the due process clauses, there is not a world of protection.

A very important provision of the Constitution that has the effect of creating language rights is the equal protection clause.⁹ This is the part of the Constitution that forbids such things as racial and ethnic discrimination. Given the intimate connection between language and culture, laws aimed at language can oftentimes be just hidden ways of trying to discriminate against people on the basis of race or ethnicity. Thus if laws are motivated by racial or ethnic discrimination, they can be struck down. Back in the 1920s, the Official English movement was quite open about its racial and ethnic biases. In Meyer v. Nebraska, for instance, the state tried to defend the law prohibiting language instruction to children as follows:

"the legislature has seen the baneful effects of permitting foreigners, who have taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who have emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country."¹⁰

⁸ Soberal-Perez v. Heckler, 717 F.2d 34 (2d Cir. 1983).

⁹ U.S. Const. Amend. XIV. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

¹⁰ 262 U.S. at 39-98.

So the purpose of that law was clear. Unfortunately some who support modern day English movements share this motivation, but are much more adept at disguising their discriminatory intent. And sometimes courts are not sensitive to the real animus behind laws that prohibit the use of languages other than English. A good example is a case in which a Hispanic person was fired for violating an English-only regulation by speaking Spanish on the job. He said one sentence in Spanish and was fired for doing so. The court held that was not discrimination on the basis of national origin under Title VII of the Civil Rights Act.¹¹

Other courts have been more sensitive. In one case, a tavern had a rule that customers could only speak English at the bar; if a customer wanted to speak Spanish he had to sit at the back of the tavern. The tavern owner tried to justify this rule on the grounds that some customers did not like to hear people speaking Spanish at the bar. Fortunately, the court saw this English-only policy for the blatant discrimination against Hispanics that it was.¹² Similarly, courts have ruled that discrimination by employers on the basis of accent, although the employee speaks perfectly good English, is national origin discrimination.¹³

¹¹ Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980).

¹² Hernandez v. Erlenbusch, 368 F. Supp. 752 (D. Ore. 19).

¹³ See, e.g., Berke v. Ohio Dept. of Welfare, 628 F.2d 980 (1980).

The cases I just mentioned are not technically constitutional cases because they involve private actions, the actions of employers or tavern owners; but they do show the intimate connection between discrimination against language and discrimination on the basis of national origin or ethnicity. There is, however, a recent case decided by the United States Court of Appeals for the Ninth Circuit squarely on constitutional grounds. This case held that an investigation of voter fraud by the United States Attorney aimed solely at foreign-born voters who requested bilingual ballots might be unconstitutional racial and ethnic discrimination.¹⁴

That finishes my survey of how use of languages other than English can be constitutionally protected, not as such, but indirectly by other constitutional guarantees. The question then becomes: what would be the difference if we had, like Canada, an express guarantee of language rights, or if the courts were to find a free-standing constitutional right to language use? I think the difference would be considerable. It would be far different from the indirect protection we have now. It would be different for the following reasons: As we have seen, laws which single out non-English are not per se unconstitutional; they are only bad if they can be seen as part of a scheme of racial or ethnic discrimination, or if they impinge on some other fundamental liberty such as freedom of speech. Thus under the

¹⁴ Olagues v. Russoniello, 797 F.20 1511 (9th Cir. 1986) (en banc).

present state of the law there is no constitutional right to general bilingual education in the public schools.¹⁵ There is, as Professor Moran states in her paper (this volume), a statutory right to a bilingual education under certain circumstances.¹⁶ Perhaps there's a limited constitutional right, too, under very limited circumstances.¹⁷ But there is no general right to a bilingual education. Schools are conducted in English, there are English courses, but there is no general right to have courses or instruction in other languages. If a free-standing constitutional right to language use were recognized, there would be a very good, if not compelling, argument that government has to treat other languages equally in the school context. At minimum, government would have to treat other languages equally unless there was a good reason for not doing so.

In addition, if important government services were provided in English, there would be a very good claim that these services must be provided in other languages as well. Under the current state of the law, there is no requirement that languages be treated equally; only that people not be discriminated against because of their ethnic origin. For instance, we saw that there is no requirement that social security forms be printed in

¹⁵ See, e.g., *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, 587 F.2d 1022 (9th cir. 1978).

¹⁶ See *Lau v. Nichols*, 414 U.S. 562 (1974) (relying on Title VI of the Civil Rights Act of 1964).

¹⁷ See *id.*, at 566. ("We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 of the Civil Rights Act of 1964 . . .")

Spanish. In another case a federal appellate court held that the Constitution does not require that a city that gives a test for a carpenter job in English must give a Spanish version of the test.¹⁸ A free-standing constitutional language right would probably change the results of these cases.

The last thing I want to address, but just briefly, is: Should there be a free-standing language right rather than this indirectly protected language right that I have just described? I have some reservations in saying that there should be. I think it preferable to continue to protect language use indirectly, through other constitutional and statutory provisions, but with much more vigor and many more teeth in ferreting out racial or ethnic discrimination. To give you an indication of some of the problems that would be created by reading into our constitution a fundamental language right, consider the following: If such a right means that Spanish-speaking persons can demand general bilingual education in public schools, or can demand Spanish versions of social security forms, do members of smaller language groups, such as Greeks or Koreans, have a similar constitutional right to forms in their language or to bilingual education? If the Constitution requires government services in Spanish, I am hard pressed to see why other linguistic groups are not entitled to the government services in their languages as well. If, on the other hand, the language rights area is not completely constitutionalized, but the legislatures and administrative

¹⁸ Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975).

agencies are left some flexibility, then there could be bilingual education in the certain languages where needed. Similarly, local communities could decide to provide government services in several languages besides English without having to do so in every conceivable language found in the community. It seems to me that such flexibility is desirable.

Where, then, does this leave us with regard to the constitutionality of Official English amendments to state constitutions? If the right to use and receive communications in a language of one's choice on an equal basis with English were a free-standing federal constitutional right, then any such provision in a state constitution would be unconstitutional. But as we have seen, the courts have never recognized such a free-standing language right. Does this mean that Official English amendments are therefore constitutional? Not necessarily.

Looking at it now from the other way around, denying flexibility to legislatures or to administrators dealing with language could create constitutional problems. There may be a constitutional difference between 1) an agency, after looking at a problem, concluding that it will not give forms in a particular language, and 2) that same agency being prevented by an across-the-board rule from even considering the problem. That kind of lack of flexibility could be unconstitutional. It might take an extension of present constitutional doctrine to reach that result, but I think the underpinnings are there. There is precedent in the race discrimination area that lends support to

such a theory. For instance, in Hunter v. Erickson,¹⁹ a city charter amendment required any fair housing ordinance passed by the city council to be subjected to a popular referendum, while all other city ordinances become effective without such a referendum. The Supreme Court held that the city charter amendment was a violation of the Equal Protection Clause. Similarly, in Reitman v. Mulkey²⁰ the Supreme Court found unconstitutional an amendment to the California Constitution which prohibited the state legislature and all state agencies from enacting laws or ordinances prohibiting racial discrimination in the housing market.²¹

To answer the question whether an Official English provision is constitutional, the specific provision would have to be examined. If it is merely a "cheerleading" provision, making English the official language like the robin is the state bird, then there is no federal constitutional problem. But if it disempowers the state legislature and all state agencies from responding to the needs of linguistic minorities, then I think there is a fair presumption that what has motivated that provision is a desire to disempower the minority groups

19 393 U.S. 385 (1969).

20 387 U.S. 369 (1967).

21 A similar theory is discussed in note, Official English: Federal Limits of Efforts to Curtail Bilingual Services in the States, 100 Harv. L. Rev. 1345 (1987). The soundness of the extension of the Mulkey/Hunter approach to Official English amendments is a question that requires further investigation and analysis.

themselves. In that case the amendment may well be unconstitutional.

Dean Bender: Thank you, Professor Weinstein. Professor Moran will now talk about bilingual education.

Professor Rachel Moran: I want to begin by saying that there has been a tendency in this area to try to constitutionalize language issues, but in the field of bilingual education most of the debate has been over the statutory protections that will be afforded to linguistic minority children. In my talk today I will focus on the history of these statutes and try to put the current push for English-Only in this historical context. Let me begin with a brief anecdote.

Picasso once remarked about his portrait of Gertrude Stein, "Everybody thinks she is not at all like her picture. But never mind; in the end she will manage to look just like it." Today, I want to argue that the architects of language policy have, in many ways, behaved like legislative Picassos, assuming that reality will inevitably come to resemble the regulatory frameworks that they have painted. These decision makers have assumed that by controlling curriculum choice they can reconstruct social realities.

These efforts began in 1968, when Congress enacted the Bilingual Education Act -- the first major piece of federal legislation to address the needs of non-English proficient and

limited-English-proficient children. Witnesses attempted to justify the Act on a number of grounds. Some focused primarily on the educational process, arguing that bilingual education would rectify the low achievement levels and high dropout rates among Hispanic students. Others attempted to justify the Act on broader grounds. They contended that in the long term, by improving educational outcomes, bilingual education would improve the participation of Hispanics in the economic, political, and social life of the nation. Some even went further and contended that bilingual education would improve this country's relations with Latin American countries.

Despite this broad-ranging rhetoric, the Bilingual Education Act was a rather modest grant-in-aid program. It contained no clear statement of purpose and did not even define what a bilingual education program was. Moreover, the Act was consistently under-funded. During the first two years after its passage, no funds were allocated for use under the Act. Thereafter, from 1970 to 1973, appropriations always fell well below authorized expenditure levels. Because the Act did not contain a clear statement of purpose, and because so few resources were appropriated under the Act, its initial effect on local educational practices was probably quite small.

Because of this rather limited impact, bilingual education advocates continued to press for additional federal protections. These efforts culminated in the decision in Lau v. Nichols in 1974. In Lau, the Court concluded that English-only instruction

effectively excluded Chinese-speaking children in the San Francisco Unified School District from any meaningful participation in the educational curriculum. Relying heavily on a 1970 memorandum in which the Office for Civil Rights extended Title VI's protection to linguistic minority students, the Court concluded that English-only instruction was a violation of Title VI: the civil rights of Chinese-speaking children in San Francisco had been violated. While the Court found that Title VI required more than English-only instruction, it refrained from ordering a specific remedy. Instead, it remanded the case to the district court to give the school board an opportunity to apply its expertise in designing programs for non-English-proficient and limited-English-proficient children.

Lau was an extremely significant case because it had a number of repercussions elsewhere. First of all, Congress enacted the Equal Educational Opportunity Act that same year, 1974, and in essence reiterated the approach that the Court had taken in Lau. More immediately for the school districts, they began to pressure Congress to allocate more funds under the Bilingual Education Act, and they pressured state legislatures to pass their own bilingual education acts. These efforts succeeded. Various states enacted their own bilingual education acts, and funds were allocated under these provisions. In addition, Congress increased the authorized spending levels under the Bilingual Education Act. More importantly, the amounts

actually appropriated began to approximate authorized spending levels.

As the federal commitment to bilingual education increased fiscally, Congress became concerned about monitoring programs more carefully -- about exercising more control over this outflow of money. Several things happened. First of all, in the 1974 amendments to the Bilingual Education Act Congress more explicitly endorsed programs that relied heavily on native language instruction, in particular, transitional bilingual education and bilingual-bicultural education. Even more significantly, the Office of Civil Rights, fresh from its victory in the Lau case, issued the Lau guidelines to give guidance to local districts in complying with the decision. These guidelines were the most comprehensive federal effort to give instruction to school districts about how to meet the needs of linguistic minority children. They covered everything from identification and language assessment to how to give parents notice about activities in the school. Most significantly for our purposes, the guidelines contained an express preference for bilingual-bicultural education and transitional bilingual education, and expressly indicated that English as Second Language programs, which relied relatively little on native language, were unacceptable for elementary school children, although they might be acceptable for secondary students who were more mature and were under a considerable amount of time pressure to learn English before graduating.

In addition to greater efforts for centralized federal control over curriculum, there was also an effort by the federal government to begin to monitor and evaluate the expenditures on bilingual education programs. These efforts culminated in the American Institute for Research evaluation of bilingual education programs, which had been commissioned by the United States Office of Education. This study received considerable publicity, in part because it was extremely comprehensive, at least in terms of the number of programs examined, and because it was done under the official auspices of the United States government. The AIR evaluation was quite a devastating blow to advocates of bilingual education because the study concluded that the programs that had been funded by the Federal Government had no significant effect on achievement in English and mathematics for linguistic minority children, although these programs did improve their native language proficiency. The study further indicated that because children were being retained in bilingual education programs after they were sufficiently proficient in English to participate in regular classes, the programs had significant segregative effects. In fact, one witness at the hearings indicated that by some measures Hispanics were more segregated than Blacks in the American school system. Congress was quite disturbed by these findings, and it immediately amended the Bilingual Education Act to give greater emphasis to English acquisition and to include measures that would minimize the segregative effects of the program.

In essence, the AIR study, by creating pedagogical chaos, was a harbinger of the demise of the Lau enforcement regime. In essence, today the Lau enforcement regime is virtually moribund, although the Lau case itself is still valid. The Lau guidelines have been withdrawn, and there is very little in the way of administrative guidance for schools who want to know what Lau means today.

Rather than focus on the details of the Lau regime's collapse, I would like to discuss at greater length how federal intervention in bilingual education was challenged after the AIR study. Despite challenges to the methodology of this study, after the AIR study there was a strong sense that there was no substantial empirical evidence to justify exclusive use of programs that rely heavily on native language. Once there was a sense that the empirical evidence simply wasn't there, there were two ways to attack federal bilingual education policy. One focused on whether the federal government was an appropriate locus of decisionmaking; the other sought to revise curricular choices for linguistic minority students.

The first type of argument emphasized the need for greater local control and flexibility and called for decentralized decisionmaking, or a new federalism. According to this perspective, in the absence of conclusive evidence to support the use of transitional bilingual education and bilingual-bicultural education programs, the federal government could not justify its centralized control over the curriculum. If the federal

government could not legitimately exercise such control, local schools should be allowed to use their discretion in making educational choices for linguistic minority children.

The second type of challenge generated demands for English-only reforms at the federal, state, and local levels. Under this view, if the federal government continued to endorse bilingual education in the absence of any substantial empirical support, it must be motivated by a political, rather than a pedagogical, agenda. According to these critics, this agenda was maintenance of the Spanish language and Hispanic culture. Because this policy purportedly threatened national unity, a renewed commitment to English as a common bond among Americans was required. In keeping with this commitment, schools should use techniques that rely heavily on English, such as English-as-a-Second-Language or structured immersion programs, in educating linguistic minority students.

Both the demands for a new federalism and for English-only reforms are seriously flawed. Supporters of the new federalism claim that decentralized decisionmaking is an appropriate response to pedagogical uncertainty; as an article of faith, they assume that local schools will do a better job of resolving uncertainty than will a centralized federal program. There are good reasons to question this assumption. After all, local schools typically have fewer resources with which to promote experimentation. They may also be more reluctant to shoulder the political risks of innovation in the schools. Despite these

potential difficulties, proponents of the new federalism do not specify any safeguards to ensure that local schools respond effectively to linguistic minority students' needs.

The new federalists also have adopted a somewhat a historical political perspective. They have completely disregarded past disputes between the schools and minority communities, turning a deaf ear to community members' claims that the schools have been traditionally indifferent, if not hostile, to their concerns. The new federalists therefore have not analyzed in any detail whether a wholesale return to local control will heighten community tensions.

The English-only movement's suggested reforms also suffer from troubling defects. The English-only movement has contended that because there is no strong evidence for transitional bilingual education or bilingual-bicultural education, a new form of curricular control should be substituted. That is, local, state, and federal decision makers should endorse English-as-a-Second-Language or structured immersion programs. However, a careful examination of the evidence reveals that empirical data are equally equivocal as to these programs' efficacy.

Because findings on English-as-a-Second-Language and structured immersion programs are mixed, a political, rather than a pedagogical, agenda must again be motivating the call for English-only reforms. If local schools face communities that

disagree vehemently with the English-Only movement's political viewpoint, school-community relations may become highly polarized. Schools will be less able to modify the curriculum in light of these hostilities. The education of linguistic minority children is likely to suffer as a consequence.

The challenge for decision makers addressing the needs of linguistic minority students is not how best to constitutionalize language choices. The challenge is to promote an educational process that permits schools to select programs they believe are pedagogically sound, implement them as effectively as possible, and respond flexibly to feedback on student performance. The educational process must also promote relationships of trust between schools and their communities. Community representatives and parents should feel comfortable dealing with school personnel because teachers and administrators share their interests, hopes, and aspirations for their children. To develop such a process, decisionmakers must cease behaving like legislative Picassos who use curricular choice to redefine social and educational realities. Instead, teachers, administrators, community representatives, and families must be given sufficient leeway to collaborate on workable pedagogical strategies. Through this ongoing process, school personnel will be free to produce a work of professional integrity, while parents, children, and community members will look upon this work and say it does them justice.

Dean Bender: Thank you very much, Professor Moran. Our next speaker is John Trasvina, who is counsel to the Subcommittee on the Constitution for the U. S. Senate Judiciary Committee. He is going to be talking about issues related to voting.

John Trasvina: Thank you, Dean Bender. One of the benefits of getting out of Washington, D. C. is to be able to see what the rest of the country is doing and thinking. As we look around the country on this issue, the message we get is that there are second thoughts as to California's Proposition 63 and the English Language Amendment generally. We look around the country to Texas, with its strong opposition, and it looks like there are enough votes to defeat the bill in the State House; or to Colorado, where the bill was withdrawn; or to Montana, where the Montana House defeated a bill to make English the official language of that state by a vote of 51 to 48. The Education Committee of the Nebraska legislature recently defeated a bill. The State Senate Minerals Committee of Wyoming (for some reason it got the bill to make English the official language of Wyoming) defeated it there, 3 to 2. The City of Elizabeth, New Jersey, which was the first to try to mirror California, defeated a bill. In Maryland, a bill to make English the official language of Maryland was introduced by a delegate by the name of America Joe Miedulewski; two bills were defeated in Maryland. The Oklahoma State Senate defeated a bill to make English its official language. Your neighbors to the East, New Mexico, defeated a

bill 69 to 0 in the State Senate. And now, in Arizona, it's not clear to me whether the bill is dead or whether it's been tabled, but I'm sure that by the end of this session today or tomorrow, we'll hear what's going to happen in Arizona. The State of Arkansas, the Land of the Ozarks, now has English as its official language. I spoke with Governor Clinton's office right after the bill passed, right after he signed it, and asked what would be the impact of English as the official language of Arkansas. In that bill, not only did it say in Section One that English is the official language of Arkansas; the second section said, "All laws or parts of laws that are contrary to this law are hereby repealed." And the word I got from the Governor's Office was, "Well, we put that in all of our bills." Even though the governor had signed it, they were not sure what that section meant. I think as we look at the English-only movement evolving in different states, the general trend is either that we don't know what it means, or that we think we know what it means but we're pulling back and waiting to see what happens in the Golden State.

I want to mention your two senators, John McCain and Dennis DeConcini. Senator DeConcini happens to be a member of the Judiciary Committee with Senator Simon, my boss from Illinois, and both have been taking a very thoughtful approach to language issues generally. Both Arizona Senators, along with Senator Simon and Senator Bingaman from New Mexico, are original sponsors of the English Proficiency Act, which is more of a positive

approach to language issues and provides, for the first time, real federal support for adult English programs for limited-English-proficient Americans.

Addressing the question of whether language is a fundamental right, and I want to look at it in the area of voting, I conclude that language is not a fundamental right. Bilingualism and bilingual services are a means by which fundamental rights are protected and a means by which fundamental rights are enforced. It's not bilingualism for bilingualism's sake; it's bilingualism to make sure all rights are extended to Americans and that language is not a barrier to the equal protection of the laws.

Historically, language has been used to bar access. I go back to the 19th century: literacy tests were used in the Jim Crow South against Blacks. They were devised to keep Blacks from utilizing their newly-won constitutional rights. The Congress has, over the years, looked at the literacy test question. And when the Congress voted in the '60s to end the literacy test, and in 1970, with the Voting Rights Act of that year, to extend the ban against literacy tests nationwide, it was with the understanding that the right to vote is the most fundamental right because it preserves all the other rights. It brings people into the political process and to a democratic government forum.

So the use of language as a bar to the exercise of those rights goes back to the 19th century. Also, in 1906, came the first literacy requirements for naturalization, and that, of

course, was geared against Eastern Europeans and Southern Europeans. At the turn of the century, also, was the rise of the Americanizer movement and the Anglo Conformity movement. In the 1920s, right after World War I, twenty-one states in the Midwest passed laws either making English the official language of the state, as occurred in Nebraska, or barring the teaching of German in the classroom. And in the Meyer v. Nebraska case (262 U.S. 390), which was mentioned earlier, Justice McReynolds was eloquent. He said, "The protection of the Constitution extends to all -- to those who speak other languages as well as to those born with English on the tongue." The case following that, Nebraska District v. McKelvic, dealt specifically with the Nebraska Act of 1921 which said, much like the bills today, that English is the official language of Nebraska, and all official state proceedings must be in the English language. That bill was popular, as some of the bills are today; it passed the Nebraska legislature, and it was upheld by the Nebraska courts. It went up to the United States Supreme Court, and the Supreme Court barred it from being enforced. It's interesting to note that Nebraska did not repeal the law. The Supreme Court said it violated the Constitution, but only barred it from being enforced.

Today, I think, the situation is that language does not reach the status of fundamental right -- it protects the fundamental rights, but it is not a fundamental right in and of itself. For example, there is no constitutional right to native

language instruction. When Kinney Lau's attorney, Ed Steinman, went to the Supreme Court, he didn't ask for bilingual education per se, and the U. S. Supreme Court decision specifically notes that no one single method of instruction was urged upon the Court by the plaintiffs. Some students need no native language instruction whatsoever because their native language may be English. And to provide it to others may be administratively burdensome or impossible. So you have a situation where the Congress has had to look at the circumstances, and the Congress, in passing the Voting Rights Act of 1975, looked at the circumstances of Hispanics, Asian Americans, American Indians, and Aleuts in this country, and recognized the long history of the use of English-only provisions, of the prohibition of Spanish in the schools, even the outright punishment for a child who spoke Spanish on the playground, and looked at the long history of educational discrimination and other types of discrimination. So the Congress, in 1975, passed the federal Voting Rights Act and the bilingual provisions and the bilingual amendments to them. The bilingual ballots were meant to incorporate people into the political process. It's a matter of inclusion, and is important because a person who can vote may get involved in the political process. People who are not English-proficient can vote on election day, but the other 364 days having a bilingual ballot doesn't help them. The other 364 days they still want to learn English; they still want to become proficient. The argument that we've heard from the English-Only advocates and

that was brought to the Congress was that, for some reason, bilingual ballots would discourage people from learning English. The analogy to that would be that if you could get a ride to the polls on election day, then you're not going to want to buy a car for the rest of the year. Congress looked at the testimony about the need for bilingual ballots in 1975 and it looked in 1982 to see whether the law should be extended. The Congress was very clear about what law and what services were being extended. The record of bilingual ballots indicated they were cost-effective. In Los Angeles, it cost 1.9 percent of all election costs, and bilingual ballots were available to an Hispanic population which at that time numbered between 20 and 25 percent in Los Angeles. In San Francisco, where I'm from and where I served on the Elections Commission for four years, the bilingual election provisions cost sixteen ten-thousandths of one percent of the city budget. The tax bill for the average homeowner allocated just three cents every year to provide bilingual ballots. And the record on bilingual election services demonstrated that they increased participation. New Mexico, which has had a long history of bilingual election services, has the best record of Hispanics in statewide office, state legislative offices, and of Hispanics in both of the major parties.

The best rates of participation come when you have this means of access, but the Voting Rights Act has appropriate limits. The Congress did not extend bilingual ballots everywhere. If it had done so, and for the same reasons that the

protections for Black voters did not extend everywhere, that would have been unconstitutional. The U. S. Supreme Court in Katzenbach v. Morgan made the distinction between the federal role in elections and the state role in elections. States traditionally control the election process, but where there is a clear record of electoral discrimination and other types of discrimination, then there is a need for a federal role; it's a national responsibility for all voters to have an equal vote. That is why the congressional role in providing bilingual services does not extend everywhere, but extends here because the history of electoral discrimination against Hispanics and Asians, and naturalization discrimination against those groups, rises to a higher degree than the types of discrimination against other language groups. That is why the federal Voting Rights Act protects Hispanics, Asians, and American Indians, and not other language groups.

The states really are the ones who control elections. For example, Massachusetts has French, Italian, and Greek bilingual services. The State of Maine has French bilingual services. That's because the state officials there have made a decision that it is appropriate for their state and for their voters to have those types of services. So bilingualism is not an end; it's a means.

Unfortunately, that is not a message that the English-Only advocates understand. And even the President doesn't understand it. Just yesterday in Columbia, Missouri, the President spoke on

bilingual education and he said, "If they're going to be in the United States, they have to learn our language. Teach them English." This was described in USA Today this morning as an indication of the President opposing bilingual education. For some reason he does not understand that bilingual education is the means by which students learn English. In terms of the English-Only effort today, because supporters are pushing for a federal Constitutional amendment and state constitutional amendments, I see an implicit admission that the English-Only doctrine violates the Constitution. That is why advocates need an amendment to advance the cause. And this is what the Supreme Court made clear in 1923 in the Meyer v. Nebraska case and Nebraska District v. McKelvic.

Because language is not a fundamental right, the English-Only proposals which state that the bills are not intended to take away rights protected under the Constitution leave very little protection. For example, as was earlier mentioned about court interpreters, there is a constitutional right for a court interpreter for a criminal defendant, but that same constitutional right does not extend to a witness to a crime or a victim of a crime. So you have a situation where the English-Only constitutional amendments will call into question the further availability of court interpreters as well as the further availability of bilingual 911 emergency services, because those are provided by the state in a statutory method. There is not a constitutional right to a 911 bilingual operator, but states have

recognized the need and provided them by statute. These are the kinds of issues that are going to be in conflict as the English-Only debate develops.

Dean Bender: Thank you, Mr. Trasvina. Our fourth speaker is Professor Joe Magnet of the University of Ottawa Law School, who is going to be speaking about language rights from a comparative perspective. Professor Magnet.

Professor Magnet: Merci, Monsieur le Presidente. J'ai choisi commencer en français soulignant mon point principale, c'est à dire qu'un droit d'utilisée un langue est absolument vide sauf qu'il implique un communauté linguistique qu'on peut comprendre. Thank you very much, Dean Bender. I wanted to begin in French to underline my principal point, which is this: The right to utilize a language is absolutely empty of content unless it implies a linguistic community which understands the speaker and to whom that speaker can communicate. Language implies a sense of community, a mode of being in the world. In this sense language rights are not individual rights, nor can they be enjoyed by individuals simpliciter. Language rights are collective rights. They are exercised by individuals only as part of a collectivity or a group. Legal protection of language rights, therefore, means protection of that linguistic community, that community of speakers and hearers, vis-a-vis the larger

community which would impinge upon it or restrict its right as a group to exist.

Language rights have a double aspect. They protect an individual's right with respect to the linguistic community and can be seen in some sense as a right of the individual exercisable in respect of the linguistic community. But language rights also, in a much more profound sense, protect the ability of that community as a community to participate within the larger mainstream society. That is the primary lesson that we learn from the successful multilingual countries around the world, particularly those states which have built strong nations out of diverse linguistic communities.

There's also a very important temporal aspect to language rights. Language rights must insure that linguistic communities are maintained as they evolve over time. To accomplish this, linguistic communities must have a sufficient concentration and develop an institutional infrastructure capable of blunting the grosser forms of discrimination against the community. Maintenance of a separate institutional structure is essential for linguistic minorities to resist assimilation. We know from the current body of research concerning languages in contact that linguistic minorities tend to be assimilated at certain critical points -- as members of the minority language group begin school, marry, enter the work force, or interact with government.

If we consider these propositions from the point of American constitutional doctrine, we begin to have some insight into the

very interesting and difficult points raised by Professor Weinstein. American Constitutionalism is inspired by the great ideal of the 18th century philosophers. Essentially, American Constitutionalism is founded upon ideas of the dignity of the person, of individual freedom to think, to express, to act; to develop an individual personality. American constitutional law accepts that the individual has freedom to accept new ways of being and to reject old truisms -- to join new communities and to reject old communities. Implicit in this theory of liberal individualism and democratic values which inspires American Constitutionalism is the theory that speech is an individual right, a mode of self-expression, a mode of individual autonomy.

This First Amendment doctrine, which Professor Weinstein referred to, is insecure as a foundation for language rights because language rights are not individual rights. Language rights do not protect the individual's capacity to express his or her ideas in his or her own way. Language rights are collective rights. They are intended to protect, not the right to speak or the content of speech, but the institutional forms, structures, and processes through which speech occurs. As such, language rights are designed to protect the participation of linguistic minorities in the machinery of government, in broadcasting in the media, in schools, in the public and private workplaces.

The American ideal of dignity of the person, which I mentioned, is also manifested in the anti-discrimination principle. Briefly, the anti-discrimination principle holds that

it is illicit for government to single out, segregate or attack the status of individuals because of group characteristics, like race, sex, age, national origin, or perhaps, as Professor Weinstein mentioned, language. One important remedy for segregation in violation of this principle is forced integration. Courts have fashioned integrative remedies like busing, affirmative action in employment, and the like, with which American constitutionalists are quite familiar. Because of the tilt of the anti-discrimination principle, American constitutional doctrine totally rejects concepts of separate but equal.

It is useful to consider this doctrine from the point of view of research on languages in contact. That research is conclusive that total integration means total assimilation of weaker language groups. Linguistic minorities are viable only to the degree that there is territorial separation of linguistic communities and, to some extent, administrative segregation of bureaucratic entities serving those linguistic communities. Language groups have to be concentrated demographically in order to be viable. They have to be supported by an institutional network that gives their language significance and that endows it with an economic value.

This implies, for example, segregated schools. Bilingual schools have been found by legislatures, courts, and executive instrumentalities in the multilingual countries of the world, including Canada, to be cauldrons of assimilation. Ultimately,

linguistically integrated schools assimilate minorities and thereby extinguish linguistic minority rights.

Linguistic minorities also require a degree of segregation in administrative entities and in the bureaucracy. Languages can be maintained only to the extent that they are endowed with an economic value. This means that linguistic minorities would require, as a condition of viability, economic development initiatives in the minority language. We can thus see from this discussion that the rights that have been referred to earlier, such as the right to use a particular language in the criminal process, are not language rights. They are rights which are emanations of the grand 18th century ideals of human dignity. They have nothing at all to do with the preservation of linguistic minorities or with group development. We must conclude from this that American constitutional doctrine, as it has been very competently and exhaustively explained by the preceding panelists, cannot accomplish these purposes.

The collective rights ideal operates in countries that eschew majoritarian principles. In fundamentals, the individual rights idea operating in majoritarian countries is to blunt the power of the state to interfere with individual autonomy. But in pluralist states, and in multilingual states, the individual rights thesis must be harmonized with group security. Pluralist states employ the collective rights thesis to protect the security and autonomy of cultural communities. In Canada, for example, the newly enshrined Charter of Rights builds on Canadian

traditions of cultural pluralism and linguistic duality. Fully one-third of the provisions of Canada's new charter deal with the collective rights of semi-autonomous Canadian communities. The thrust of these provisions is to devolve power on groups to greater or lesser forms of local self-government -- of autonomy.

In New Brunswick, for example, the French community is entitled to homogeneous linguistic schools -- segregated schools, to homogeneous linguistic school boards, segregated administrative structures to govern the schools, the right to communicate with the administration in either language, and segregated entities in the higher bureaucracy. In other words, New Brunswick is, to some extent, a dual state with separate English and French bureaucratic structures which impact upon the linguistic communities. An Act of New Brunswick recognizes, declares and implements the equality of the English and French linguistic communities, considered as groups.

The theory of these kinds of provisions -- of collective rights -- is that groups require a degree of autonomy and segregation in order to develop in their own particular way, and in order to avoid assimilation. The groups share state power in order to protect communal security. This is a consensus model of government. It characterizes the plurilingual and pluricultural states of the world like Belgium, Switzerland, and, to some extent, Canada. The theory underlying all of this is that consensus forms of government can regulate ethnic and linguistic conflict successfully. Regulation of inter-group conflict is

essential to the success and continuance of the pluralist countries.

I would like to ask this question: what is the goal of American bilingualism efforts? Is the goal of American bilingualism efforts language maintenance? Is American bilingualism policy directed to maintaining Hispanic communities of sufficient size, capable of functioning as monolingual enclaves within the larger English community? Or is the goal of American bilingualism policy to ease the pain of the Hispanic and other linguistic minorities as they are assimilated, as they disappear? Should the mission of American law be to strive to maintain Spanish language enclaves within America? Is this un-American? Or should the mission of American law be to palliate the Hispanic community as it abandons the Spanish language and the cultural forms that go with it and assimilate to mainstream English? What is American bilingualism policy trying to accomplish?

I think this question is very urgent. It is the first question that has to be asked about all of the language debate. But I don't think that the question can be seriously mooted until the Hispanic community itself sets the terms of debate by offering a vision of its place in the American mosaic. I've read through the literature coming from SALAD and LULAC in vain trying to discover this self-image. That this image is not coherently articulated is hardly surprising, given the defensive posture that the Hispanic community has had to assume because of the

Official English movement. If the goal of American policy were to maintain Spanish language enclaves, then American constitutional doctrine would be irrelevant, although very interestingly and competently explained by Professor Weinstein and my other colleagues on this panel. American constitutional doctrine can prevent grosser violations of human dignity, such as being found guilty and punished by a criminal process that one doesn't understand, but American constitutionalism has no means to establish, maintain, and protect the institutional network or the economic development initiatives which are the essential preconditions of survival for linguistic communities.

If the goal of American bilingualism policy is maintenance of linguistic communities, then the key would be building the institutional network -- schools, school boards, media, bureaucratic structures, and the like -- that are the lifeblood of linguistic communities. And, of course, economic development in the minority language would be crucial to this effort. Spanish would have to be imbued with an economic value. Children would have to think: "I can do that in Spanish; Spanish offers me opportunities," before the Spanish language would be secure.

If the goal of American bilingualism efforts is not maintenance, but palliation while Hispanics abandon their language and assimilate, then American constitutional doctrine is relevant. Bilingualism programs, bilingual education programs particularly, ought to be sharpened to eradicate the grosser forms of discrimination that have been found in a number of

school districts. Voting rights need to be protected. The community, the linguistic minorities, need to be serviced to some extent in their own language as they interact with the administration in order to ensure that integration and assimilation is done in a fair, democratic, and painless manner. Official English, or constitutionalizing English as the official language of the United States or of a State thereof, in any of the forms that it's been offered before the U. S. Congress and state legislatures, is not terribly helpful to this process. The Official English movement would sterilize many of the bilingualism programs which ease the pain of transition.

A last question I'd like to pose is this: is language maintenance worth it? Is it an appropriate objective of American language policy? The international community of nations seems to think so. Article 27 of the International Covenant on Civil and Political Rights, which President Carter signed but Congress never ratified, provides that in those States in which linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to use their own language. Article 27 has been considered by international tribunals, particularly the permanent Court of International Justice, and it has been held that the characteristics which make a minority, given its special peculiarity and particularity, must be maintained without disadvantaging that minority vis-a-vis the majority. In short, international human rights pays very high regard to the right of

linguistic minorities to maintain themselves and to use their own language. This, I think, is just an efflorescence of human rights principles to which, not only the international community, but Canada and the United States also pay high respect. In my view, dealing with the problems of linguistic difference in the Southwest, and in America generally, challenges Americans to deal with difference of a new kind. Linguistic difference cannot be dealt with in the same manner in which Americans have come to terms with racial or religious differences. Linguistic difference is a new phenomenon that Americans have to learn about because it requires a certain reformulation of concepts of integration, which flow from the equal protection clause, and a certain reformulation of American constitutionalism's rejection of the separate-but-equal doctrine.

Americans would be much admired in the world community if they could demonstrate an ability, not only to deal fairly with linguistic difference, but to profit from it. It would be a great achievement for Americans to instill in the Hispanic community a sense of belonging, of being able to make it in America without sacrificing that sense of community, that sense of belonging, which ultimately makes life so fulfilling.

Dean Bender: I knew I had an ingrained sense of masochism, but I've just realized, while I'm listening to Professor Magnet, another indication of that. Every time I go to Canada, which is fairly often, I am made to feel enormously inferior when people

do what Professor Magnet started doing. In Canada, addresses like this are in both languages: not in English and then translated into French or the other way around, but a paragraph or sentence or a couple of paragraphs here and there in English and in French, switching back and forth. Everybody else understands both languages. That makes me feel low in the first place. On top of that, he then has to rub it in by saying that although Americans have thought of our Constitution as clearly the best constitution in the world, no questions about it, there's a whole range of rights that we haven't been dealing with at all and that Canada has dealt with in its Charter. Thanks a lot, Professor Magnet.

Our final speaker is Judge Noel Fidel, who has been listening to all of this as I have and, I'm sure, has found it as interesting as I have. He is going to comment on it from his perspective as a judge of the Arizona Court of Appeals and as a legal scholar. Judge Fidel.

Judge Noel Fidel: This is a very stimulating topic to think about, and it's been incredibly stimulating for me to sit and listen to the other panelists. I have all of these ideas to try to react to and share with you, but I want to start by sharing with you one of the first thoughts I had when I was asked to speak this afternoon, and then also to give you the source of it, though I think many of you will recognize it. Out of somewhere in memory a shard of poetry popped into my mind, and it was this:

"If I were asked to build a wall, I'd ask to know what I was walling in and walling out, and to whom I was like to give offense." That's about the way I remembered it, and I tried to find the complete poem and see what more the poem had to say. Of course, it was "Mending Wall" of Robert Frost, and if you don't mind, I'd like to take a minute to read through it for you. I suspect that while much of it is familiar to most of us, and perhaps all of it is familiar to some of us, as you listen to it again, you may hear that there is an awful lot about this poem that speaks to this debate and to some of the dilemmas that it causes us. If you'll indulge me for a minute, I'll go through the whole poem.

Mending Wall

Something there is that doesn't love a wall,
That sends the frozen-ground-swell under it,
And spills the upper boulders in the sun;
And makes gaps even two can pass abreast.
The work of hunters is another thing:
I have come after them and made repair
Where they have left not one stone on a stone.
But they would have the rabbit out of hiding,
To please the yelping dogs. The gaps I mean,
No one has seen them made or heard them made,
But at spring mending-time we find them there.
I let my neighbor know beyond the hill;
And on a day we meet to walk the line
And set the wall between us once again.
We keep the wall between us as we go,
To each the boulders that have fallen to each.
And some are loaves and some so nearly balls
We have to use a spell to make them balance:
'Stay where you are until our backs are turned!'
We wear our fingers rough with handling them.
Oh, just another kind of outdoor game,
One on a side. It comes to little more.
There where it is we do not need the wall:
He is all pine and I am apple orchard.
My apple trees will never get across
And eat the cones under his pines, I tell him.

He only says, 'Good fences make good neighbors.'
Spring is the mischief in me, and I wonder
If I could put a notion in his head:
'Why do they make good neighbors? Isn't it
Where there are cows? But here there are no cows.
Before I built a wall, I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offense.
Something there is that doesn't love a wall,
That wants it down.' I could say 'Elves' to him,
But it's not elves exactly, and I'd rather
He said it for himself. I see him there
Bringing a stone grasped firmly by the top
In each hand like an old stone savage armed.
He moves in darkness as it seems to me,
Not of woods only and the shade of trees.
He will not go behind his father's saying,
And he likes having thought of it so well
He says again, 'Good fences make good neighbors.'

The last line is the line that most people remember from the poem, "good fences make good neighbors," but the thrust of the poem is different. "Before I'd build a wall, I'd ask to know what I was walling in or walling out, and to whom I was like to give offense." That's the question that we struggle with here. It's Professor Magnet's question: what is the goal -- what are we walling in; what are we walling out? And it is, though poetically put by Frost, a practical question that courts have to face.

When people come to court, they come in what we call cases and controversies; both sides want to win, somebody's going to win, somebody's going to lose, and what the judges have to decide is who wins and who loses and why. So when we begin to talk about language rights or about Official English from a judge's point of view, I start to think how would we work with a right to a separate language or how would we work with Official English;

what would it mean in terms of who wins and who loses cases? What are people trying to wall in or wall out with these conflicting positions? It's very difficult to know, and one reason is that it's so frustrating to see a political fight develop over symbols. Symbols have enormous political importance, and yet cloudy and difficult legal significance.

There are orthodoxies in the way, particularly over bilingualism. So it's difficult, often, to find people with positions to advance or to defend being really candid about what they believe practically concerning the effects of their positions. Bilingualism is a particularly good example of this, because we get into what Professor Moran described as the segregationist theory on the one hand, and, on the other hand, the theory of inclusion. We have people who, on the one hand, defend the value of the culture that they come from as a matter of cultural pride and, on the other hand, assert their right to be included in a majority culture in which English is a functional and practical necessity. So it depends on what orthodoxy is being espoused at a particular time, which side of the debate a person might take. You could easily imagine someone of a doctrinaire liberal political bent, who wanted to be in tune with people of the same bent, going into a Rip Van Winkle-like sleep at the time of Adlai Stevenson and waking up today and hearing about bilingualism and being able to make a perfectly good argument for either side of the debate. The first question he might want to ask, if he was the doctrinaire person that I'm

imagining, is, "Who are the proponents and who are the opponents, so that I can know which side to ally myself with?" You could imagine the same thing on the other side. When all of the different orthodoxies get in the way, it's very difficult to get down to the real practical facts of what works and what doesn't, and we're left with the question of what the goal is and with no good answer to it.

If the goal is to maintain a sense of cultural pride and the value of a linguistic heritage, while at the same time gaining access and having assurance that access is open to the majority culture that is English-based, you can start to examine the practicalities of what programs work and what programs don't work. But then a lot of political posturing and defensiveness gets in the way, and right now we seem to have a political debate, particularly that generated by the Official English amendments, that gets us nowhere in terms of asking what works and what doesn't work, and simply focuses us on inflammatory symbols. As a judge I worry about it because I wonder what is going to become part of the law and what it is I'll have to interpret and on what basis I will have to figure what's been walled in and what's been walled out.

Let's talk about Official English for a moment. The proposal for the Arizona Constitution says that the English language is the official language of the state, and the state or any subdivision shall not make or enforce a law requiring use of another language. But then it goes on to say that except as

necessary to ensure a fair hearing, a court shall not issue an order or decree requiring another language. How far does that take us? Apparently, if we have this kind of law passed, we can still use translators, interpreters, in the courtroom. As a matter of fact, we have a U. S. Constitutional requirement to do it, so people understand what jeopardy they're in and the proceedings that might result in their imprisonment. But can we go further? Right now we have people getting court documents like subpoenas and summonses that require action within a certain time. Would we be violating this kind of a law if we established the practice of printing up those standard forms in English and Spanish, recognizing the fact that a large number of people who receive them are Spanish-speaking and won't understand what they mean otherwise? What about the Industrial Commission notices that someone's benefits are being cut off and they have 60 days in which to request a hearing? Will it become contrary to state law, if this amendment is passed, to send those notices out in Spanish? We have the social security case that indicates that there is no right to have them sent out in Spanish, but if this becomes law, would it, in fact, become illegal to send out such notices in Spanish? We have the practical problem of what this symbolic sort of gesture would mean and how the courts will deal with it.

On the other side, if we enshrine as a Constitutional right the right to maintain an autonomous, homogeneous status as a separate linguistic culture, what does that entail? Do we then

have to send out all such notices in Spanish and, as Professor Weinstein suggested, in Italian, in French, in Serbo-Croatian, and whatever other languages or dialects may be spoken, so that people will have equal protection for their own linguistic group? Do we have to go farther and assure that gas bills are sent out in both languages, or utility bills, or any sort of notification that could result in the loss of a significant property right? Lawyers are very fluid at analogy. One case leads to another, and a right in one clear setting can be asserted in more and more attenuated settings. The work of the courts could become quite difficult if we constitutionalize either side of this issue.

So we come back to the question, why? What's behind the effort? Why do we want this constitutionalized? What's the goal? Right now, is our culture working adequately without constitutionalizing either side of the issue? We have this notion of a melting-pot culture that has worked over many generations for a variety of groups, including such groups as the Italians, the Irish, the Eastern European Jews, who were all described at the peak of their waves of immigration as inassimilable. We have different histories for the Native Americans, for the Spanish-speaking people of the Southwest, and for the Blacks who have, in varying degrees, faced different problems of assimilation and maintenance of culture. But we have, nonetheless, this impetus that comes from all of these groups themselves, and from the primary culture as a whole, to learn English -- to learn it as a means of entry into the larger

cultural unit. We see the process at work over generations. If this process is not working, why isn't it working, and what do we want to do about it politically? What's the goal? I think Professor Magnet stated a question we can't answer, and that it really is the question that lies behind the debate.

What I want to say from the standpoint of a judge is that if the political culture cannot resolve the goal, if it doesn't understand the goal, if it doesn't know itself what it's trying to wall in or wall out, and if instead it simply conducts a battle in a very emotionally-charged way over symbols, and if it does it by posturing over orthodoxies, then don't expect the legal system to sort it all out in a consistent, coherent, and cohesive way.

Dean Bender: Thank you very much, Judge. We will now take questions from the audience.

Question: Several times the Meyer v. Nebraska case has been mentioned. It appears that that decision may apply to "English-Only," should it become law. Would someone in the panel give us a very brief synopsis of the case and let us infer whatever we may on the Meyer v. Nebraska decision?

Dean Bender: I assign Professor Weinstein to that, since it seems to fall mostly within his area.

Professor Weinstein: The case held that it is unconstitutional to outlaw the teaching of a foreign language to children, which would imply it would be even worse to make it broader than that and to outlaw a language generally. A companion case did involve an Official English provision as one part of it. But the Court did not strike down the law because it declared English to be the official language of the state. The Court struck down the law because it prevented children in private schools from being taught foreign languages. I think that an Official English law might be unconstitutional, not for Meyer v. Nebraska reasons, although that would be part of it, but because of the animus behind it and because, as I said, now looking at it the other way, if you deny flexibility to legislatures or administrators in the language area, I think that could create constitutional problems. There may be a constitutional difference between an agency, after looking at a problem, saying they will not give forms in more than one language and having an across-the-board rule that says you cannot even consider doing so. That kind of lack of flexibility might be unconstitutional. It might take an extension of present constitutional doctrine to do it, but I think the underpinnings are there. For instance, case precedent is there. There are some cases in the race discrimination area that lend some support for such a theory.

Professor Moran: In the Meyer case, the Court essentially held that you could not restrict the teaching of a foreign language,

German, in a private school. The Court did not reach the issue of whether you can restrict the teaching of foreign languages in public school. My own view is that Meyer affirmed the principle of family autonomy or family choice; that is, the family can, as a private matter, decide to promote its particular language or culture by sending a child to private school. The current debate over bilingual education is quite different, because it addresses whether the state can properly subsidize the maintenance of a foreign language or culture in the public schools. While present-day concerns turn on the degree to which the state should promote multilingualism and multiculturalism, Meyer examined the extent to which private choices about language and culture should be tolerated.

John Trasvina: The only case that has ever interpreted an official language statute has been Puerto Rican Organization for Political Action v. Kusper. Briefly, Illinois made American its official language in the 1800s, updated in the 1960s to say English is the official language. The registrar of voters in Chicago, not wanting to provide bilingual ballots to Puerto Ricans in the 1972 presidential elections, said, great, English is our official language; we don't have to provide bilingual ballots. The Federal District Court and the Seventh Circuit Court of Appeals both rejected that argument and said that the requirement for bilingual ballots outweighed the Illinois

statute, and the state still had to provide bilingual services to its residents.

Professor Moran: Actually, that case was decided under section 4(e) of the Voting Rights Act of 1965. Section 4(e) prohibited states from discriminating against persons educated in Puerto Rican schools by conditioning their right to vote on the ability to read, write, understand, or interpret English. This provision was originally designed to aid the Puerto Rican population of New York, but its coverage certainly extended to Puerto Ricans who had migrated to other states. Although Illinois had no literacy requirement and did not require knowledge of English to vote, the Board of Election Commissioners in Chicago refused to provide any assistance to Spanish-speaking voters. The district court concluded that the Board's conduct violated section 4(e). [For those who wish to read the opinion, the case citation is Puerto Rican Organization for Political Action v. Kusper, 350 F. Supp. 606 (N.D. Ill. 1972), aff'd and remanded, 490 F.2d 575 (7th Cir. 1973).]

Question: One of the provisions in the proposition in California that's been discussed a great deal has been the whole issue of a private right of action to sue. I want to find out if it is common to see that in a proposition, and what the implications of that would be.

Professor Moran: Before California enacted its official language amendment, other states had typically enacted legislative declarations that made English the official language in the same way that the bluebird is the state bird and the wildflower is the state flower. There really wasn't any enforcement language. California was the first state to pass an initiative that contained enforcement provisions. These provisions raise a number of questions, including the propriety of giving every resident of California standing to challenge the state's use of languages other than English. I believe the drafter of Proposition 63, Stanley Diamond, is here in the audience. He may want to address this issue to some extent.

Stanley Diamond: We did want that right of action in there and planned, with a great deal of thought, so that every resident in the state of California should be able to do so.

Professor Moran: To date I don't know of any lawsuits that have been brought to test the limits of that particular provision.

Question: What are the implications for that in the court system?

Judge Fidel: Chaos.

Dean Bender: They always say that.

Question: Is that a common thing to have passed as part of the law? Aren't there usually administrative entities that are charged with enforcement, not private citizens?

Professor Weinstein: It's not uncommon, though, particularly in California, to have a private right of action for a lot of things.

From the audience: The fact of the matter is that, in entitlement issues, it is generally very difficult even to get the courts to concede that there is a private right of action, and so it is unusual in the sense that usually civil rights advocates are trying to get the court to recognize a private right of action because it's not written into the law. So I think it's unusual in that sense.

Question: John Trasvina, since the focus of your presentation was bilingual ballots, you may recall that on June 25, 1984, the Department of Justice issued regulations on the bilingual requirements for certain jurisdictions. I believe they exempted about 269 of those jurisdictions. Do you have an update as to what the impact was of exempting those jurisdictions, however many there were? Can you see a dilution of Hispanic voters or people who utilize bilingual ballots to exercise their right to vote?

John Trasvina: If I could just apprise the audience of who the questioner is, that's Joe Trevino, who is National Executive Director of LULAC. He has been a very strong advocate of these issues in Washington. The question relates to the '82 Voting Rights Act, which would exempt some of the counties providing bilingual ballots. Again, getting back to making it more cost-effective and streamlining it, the impact has been that even though the federal government no longer requires, for example, bilingual ballots in San Francisco, Los Angeles, and other counties, the counties on their own volition have provided bilingual services, sometimes not as effectively. They have decided that they have their own responsibility to the residents and do provide bilingual services. A lot of the other counties cut it out. But that is the next level of the debate in California, because the argument, now that the supremacy clause issue is taken out, then would become, "Can a county in California provide bilingual ballots on its own, given the existence of Proposition 63?" The English-Only advocates in California promised lawsuits. So far there has been one special election in Los Angeles which provided a bilingual ballot and there was no suit; there's going to be a special election in San Francisco in a couple of weeks where the ballots are in Chinese, Spanish, and English, and as yet there has been no lawsuit. But time will tell.

Question: How did the English-Only group manage to manipulate California voters to support Proposition 63, to get it on the ballot and then to pass it in overwhelming numbers? Some of Proposition 63's proponents have claimed that the Hispanic community supports this initiative. Is this true? How did Proposition 63's supporters win over so many voters, especially Hispanic voters?

Professor Moran: According to the California Poll conducted by Mervin Field, of those who favored the English language initiative, most did so because "everyone living here should speak English," it is "important for immigrants to learn English," and it is "important to society to speak the same language." However, an earlier survey by the Los Angeles Times suggested that a number of voters were confused about the initiative's effect on bilingual services. For example, some voters expressed support not only for the English language initiative but also bilingual education and bilingual ballots. Stanley Diamond, who drafted the initiative, suggested that it would take at least five years of litigation and legislation to determine its practical impact. Apparently, then, a number of voters supported the objective of promoting English acquisition, although they did not necessarily pass judgment on the most effective way to achieve this goal.

While 68% of the general electorate supported the English language initiative, only 41% of the Hispanic voters favored it.

Of those Hispanic voters who opposed the initiative, 72% did so on the ground that "it's racist [and] discriminates against new immigrants." Among the general electorate who voted against the measure, only 46% cited its racist tendencies as a reason, while 52% simply concluded that "there is no need for an official state language." Certainly, then, there were important differences between Hispanic voters and the general voting population. While there were clearly differences of opinion among Hispanics, it seems extremely divisive to enact a measure that 42% of all Hispanic voters considered racist.

The results of the California poll also suggest that Hispanics are not a homogeneous group. The tendency to equate the Hispanic population and the Spanish-speaking population is especially troubling. Most Hispanics in this country speak English well enough to participate in regular classrooms. This is particularly true of upwardly mobile, middle-class Hispanics. Bilingual education programs therefore have little immediate impact on their lives. These programs are instead directed at the Spanish-speaking, who tend to be recent arrivals from more disadvantaged backgrounds. This group is far less likely to be fully represented in the voting population. Unless political analysts more carefully distinguish among the effects of ethnicity, language, culture, and class, they are unlikely to grasp the complexity of these problems. This oversimplification could defeat meaningful reform efforts.

In this regard, I would like to express my deep concern about Professor Magnet's suggestion that the United States rethink the doctrine of "separate but equal" to promote language maintenance. The two major language groups in Canada, the English-speaking and the French-speaking, are predominantly white, and language differences have not necessarily coincided with racial or ethnic discrimination. Historically, language differences in the United States have often served as the basis for discrimination on the basis of race or ethnicity. For example, in the 1930's, some Texas school districts assigned all Spanish-surnamed students to "Mexican schools" on the ground that their language differences necessitated distinctive instructional approaches. However, Hispanic students were not given any language proficiency tests; rather, they were assigned to inferior, segregated schools solely on the basis of their surnames. Later, in the 1960's, the Office for Civil Rights charged Texas school districts with allowing otherwise capable Hispanic schoolchildren to vegetate in classes for the mentally retarded simply because they did not speak English. Because of this history, federal civil rights laws have mandated close scrutiny of language policies to ensure that they are not a vehicle for racial or ethnic discrimination. These efforts have met with mixed success. At least one observer has noted that when schools are legally required to include English-speaking pupils in bilingual education classes to reduce classroom segregation, they typically place low-achieving minority students

(usually Blacks) in the programs. This evidence reinforces my concern that serious risks attend any proposed return to a "separate but equal" doctrine.

John Trasvina: If I could add a couple of footnotes to the answer -- in my old job as the legislative attorney for MALDEF, I spent three months out in California during the Proposition 63 debate, and I've been debating Stanley Diamond for about four or five years on this now. It turns out we live in the same neighborhood; we do our shopping in the same neighborhood in San Francisco. In any case, in terms of Proposition 63, I don't know about that Field Poll, but Field Polls consistently showed that Hispanics were going to vote for 63. However, the exit polls on Election Day indicated Hispanics voted against 63 by a percentage of 71 to 29, and beyond that, every other poll, whether it's the New York Times or CBS poll, of Hispanics nationwide indicated strong support for bilingual education. Other California-based polls of Asian Americans and Hispanics indicate strong support for bilingual education and bilingual ballots. So in light of that, it gets back to the point of whether there was some deception. Was there some misunderstanding by the voters? I ask this because if you support bilingual education, it would seem inconsistent to support a proposition that would throw the legality of, or at least bring the continued viability of, bilingual education into question. I think the exit polls showing opposition percentages of 71 to 29, and the other

demographic surveys, might be better evidence than polls asking how individuals are going to vote in the election or how people feel about English as the official language, because particularly for Hispanics, but among other people as well, it takes courage to say you're against a proposition that makes English the official language. It makes you feel as if you're saying you're against English and therefore you're against America. And when you say you're against English as the official language, that doesn't mean you're against English, but it means you're against the Proposition. The part about whether it was a deceptive proposition and how it got on the ballot and who funded it, I think those are issues that might be more fully addressed tomorrow when we'll be able to hear from both sides.

Professor Magnet: I wonder, Mr. Chairman, if I could just add a word to the comments that have been made, because I wouldn't want it to be thought for a moment that I was suggesting that what's required from the Hispanic community is some Picasso portrait to which then individual members of that community would have to respond. But the Hispanic community is politically organized and it does exert a political lobby. Its self-image does need to be articulated in a clear and forceful way. That self-image doesn't have to be a monolithic image; in the same way as other communities are diverse and have subcleavages within them, so too with the Hispanic community. I think that's your point, and I completely agree with it. I think that's right -- it's not a

monolithic community. Also, the point about Canada being two white homogeneous communities which have to get together...

Professor Moran: I didn't say homogeneous; I said that both the English-speaking and French-speaking communities are predominantly white.

Professor Magnet: That is a point which needs to be addressed as well, because the original French speaking community in the West was Metis -- they are brown -- and there are aboriginal populations that have official language rights in the Northern Territories that are brown. Canada is not homogenous, either in color or in the makeup of linguistic minorities. The linguistic minority in St. Boniface is totally different from the linguistic minority in P.E.I., although both are white. You would find more identity between the white and the brown linguistic minorities in Winnipeg, even though they differ in color. So this idea of homogeneity in Canada, in either color or cultural makeup, I think is something that needs a little bit of modification. The significance of it isn't that the comment needs to be corrected; the significance of the difference between the official language minorities in Canada, as I believe in the Hispanic communities in the United States, is that regional solutions need to be found. Particular solutions need to be found, and those need to be articulated by the communities themselves. The separate-but-equal point, I think, is a difficult one and I

certainly hope, and I'm sure you didn't mean to put words in my mouth, you don't think that I was suggesting that Hispanics should go in one door and others should go in another door. But separate-but-equal is a concept which is totally rejected by American constitutional doctrine. It is a concept which is the foundation of constitutional regimes in the consensus systems of governments around the world. For Americans to even think seriously about this they would need to reevaluate their total rejection of separate-but-equal. There is a tendency to treat the concept as a dirty word in the way, I think, in which you did. Of course the way in which you treated it, that image, is something that, of course, everyone rejects.

Professor Moran: Perhaps a term with such pejorative connotations should not be used in policy discussions.

Antonio Zuniga: Mr. Magnet, you being a Canadian, I'd like to direct this question to you, sir. As an Hispanic and a third generation American -- let me preface everything else that I say by saying that -- and a third generation Arizonan, I've been attuned to some of the political activity within the country, and one thing that is clear is that last year President Reagan signed into law an immigration bill. We now also have a movement that has identified Hispanics regionally, as you have pointed out. In Miami we've got the Cubans; in the Southwest we've got Mexicans. Is all that happenstance? Would it appear to you, as an outsider

and not an American, that all of this is happenstance -- that we've got an immigration bill coming out and we have this push to make Official English a Constitutional amendment? Is there a perception, from a foreign point of view, that perhaps we've got a very strong movement singling out Hispanics perhaps not unlike the way Jews were singled out in Germany? I'm not saying, necessarily, that the results would be the same, but clearly the effort is to identify a minority.

Professor Magnet: Maybe I could reply to that in French. Or Yiddish. I think that there is a problem when communities reach a certain size and have a certain concentration and become viable as communities. They do this, as immigrant minorities, without the accompanying political rights that would go with them if they were part of the founding nation and part of the bargain which set the terms of the Constitution. To some extent this has happened with Hispanic communities in America. To some extent this happened with immigrant communities in Canada. The very interesting thing is that linguistic minorities exert forms of difference that Americans haven't really attuned themselves to before, or at least not in an enlightened age when all forms of discrimination are, or ought to be, prohibited. And so Americans have to deal with a new problem. I don't think that singling out the Hispanic community as a means of academic attention is akin to Nazi Germany. I am curious myself as to what motivates the Official English movement in singling out the Hispanic community.

I've looked at the literature exhaustively. I'm on the mailing list and I read the little bits of propaganda that come around from it, and I do not see the motives behind it clearly. This morning I went through the arguments given by the proponents of an Official English amendment and I think that they hold no water whatsoever; they're easily refutable. So if there's a hidden agenda or some sort of hidden motive, I suppose that others are as competent at judging that as I am.

Judge Fidel: I just want to share with you something that I found in an article that Professor Weinstein recommended that I read called "Paths to Belonging: The Constitution and Cultural Identity," and it's a quote from Ben Franklin, who had many things to his credit, but not this. He said about the German community in Pennsylvania, "Why should the Palatine boars be suffered to swarm into our settlements and, by herding together, establish their language and manners to the exclusion of ours? Why should Pennsylvania, founded by the English, become a colony of aliens who will shortly be so numerous as to Germanize us instead of our Anglifying them?" And what I'd like to say to Mr. Zuniga is, it's all happened before, it'll all happen again, and this will just be one chapter in a long history of failed efforts to react against those with foreign language cultures.

Question: In recent legal history there have been some gains for linguistic minorities. One was the Court Interpreter's Act of

1978, and there was a proposed extension that had one section that would send court interpreters to Grand Jury proceedings. The Texas Employment Commission recently set up a structure where they developed bilingual positions because they were sued from the public side, because they were not offering their services to Hispanic persons in their areas. Who serves the public? Who serves the vast needs? There is one case in Tucson where Tucson police officers have been forced, through covert policies, to serve Hispanics bilingually and yet not receive any compensation. They just won the first part of a class action suit, and it looks pretty good for them. If an English-only amendment were to pass in the State of Arizona or the United States, how do you think those efforts would withstand attack? Or would they? Would we have to worry about different agencies who have enough consciousness to serve a need having their whole structures taken away, or even employees on the individual level? If you speak to anyone who serves the Hispanic public or any linguistic public, if you have that ability, you will naturally, whether asked or forced to, want to serve someone in their own and primary language, and I've heard that people would even be restricted in the workplace from offering that service voluntarily. I'm not sure whether that's an exaggeration or whether all of those legal problems would come about.

Professor Weinstein: If it did -- it depends on the wording of the bill -- I think that kind of sweeping prohibition against

agency response is unconstitutional. Of course, if the Federal Constitution is amended, you have another problem. But if it's in the state constitution, if it were state law, I think for the reasons that you just eloquently said, it's unconstitutional.

Dean Bender: A final question.

Question: I would like to respond to Professor Magnet's question, which I think was characterized as maybe unanswerable. I think it may be unanswerable, and I think that might be because it's the wrong question. It might even be a bad question -- it might even be a harmful question in the sense that it could be that we're trying to characterize the extreme ends of the possibilities. I don't see that there are only two goals that bilingual education programs in the U.S. can have. It seems to me that in specifying the question that way we may, in fact, be inflaming the debate. If the only alternative to an assimilationist kind of policy is the maintenance kind of policy, you're already picking sides, and I think the maintenance people are going to lose badly. I think the answer to the question about the goal of bilingual education is that the goal is a good education, but your conceptualization of good education or effective education doesn't need to eradicate a first language. In other words, good education maintains language, or at least gives the opportunity to maintain a language, or at least doesn't create conditions which would eradicate a first language. It's

not so much a question of whether this or that as much as it's a question of whether or not it's good education.

Professor Magnet: I'm well aware that phrasing the question in the way I did would cause some unease, because, as I understand it, the opponents of Official English feel themselves on the defensive against a proposition that would significantly alter the status quo and the status quo, of course, is something that my question takes as a minimum and then poses the thought, "Ought the Hispanic community be asking for more?" I can well appreciate that that is a difficult, perhaps novel and frightening, way to put it. I think you're right that there are gradations between the two extremes. And I hope that debate will be joined in this country, because I think it's something that linguistic minorities need to think about. My own perception of it comes from a little different climate. It's really from representing many of the official language communities in Canada as counsel, and being engaged in political struggle and watching communities at different levels of development respond in different ways. I have seen French-speaking minorities in Nova Scotia on the eve of extinction, with virtually no hope, despondent, introverted, unable to maintain themselves, ashamed of their language, and the French-speaking community in Ontario and New Brunswick, which is "we can do it, we need more, we need more institutions, and this is the kind of vision we have of ourselves." Now that debate, or those two poles, have tremendous

gradations between, and it's a question of community development and linguistic development. I think that in order to do that, to have development, it's necessary to have a self-image and to have a debate. I don't think that my question is a bad question; I think it's a question meant to stimulate that debate, which I think is so far absent in the language discussions in this country.

John Trasvina: There is a third position on the spectrum, and that is that bilingualism may not be an Hispanic issue. Bilingualism need not be considered a burden. It should be considered an asset. Look at countries in Asia like Singapore, which has bilingual ballots and is still surviving, and it's surviving as an economically strong and stable country. You can look at Luxembourg. Even though it's very tiny, it's able to attract lots of foreign capital and serve as the crossroads between countries because it is officially bilingual. In the United States, in our State Department, you can be a foreign service officer without knowing a foreign language. One of the reasons why Japan does so well in trade is because they know the language of the customer. Bilingualism in this country ought to be considered an asset. If you went into the classroom and said, "I want every student to be bilingual," the first answer would be no. But then if you said, I want them bilingual in COBOL, with FORTRAN or another computer language, then every parent would say yes, they ought to be literate in that other language, be able to

talk to machines. We ought to be equally concerned about being able to talk to other people in other countries. If the word is not out, or if the Hispanic community is thought of as defensive, then maybe it's time to take the positive approach and really lay out bilingualism as an asset and not as something to be ashamed of.

Dean Bender: I am not so sorry to end on this note of continued very interesting controversy. These issues will continue to be discussed tomorrow morning in a setting in which the audience will be asked to play a role and participate.

Roundtable: Official English and the Border States

The participants in the "Official English and the Border States" Roundtable included Jose Trevino from the national office of LULAC, the League of United Latin American Citizens; Tom Espinoza, past-president of the Arizona Board of Education and the Director of Espinoza Development; JoAnn Garcia, an ASU law student and President of the Chicano Law Students Assn.; Willy Velasquez, Director of the Texas-Southwest Voter Registration Education League; Stanley Diamond, U.S.-English, Western States Director and organizer of the California English campaign; Professor Leslie Limage, Visiting Professor of Education at ASU, on leave from UNESCO; Jose Ronstadt, Arizona Bank, an Hispanic journalist who has a program on Channel 33; Bev Hermon, Arizona House, the state legislator for District 27; Nancy Mendoza, Director of the Bilingual Education Office of the State Board of Education; John Trasvina from the U.S. Senate Judiciary Committee, Counsel to the Subcommittee on the U.S. Constitution; Professor Joe Magnet, University of Ottawa Law School; Professor Rachel Moran, Boalt Hall School of Law, U.C. Berkeley; Ofelia Zepeda, Director of American Indian Studies at the University of Arizona; and Ancita Benally, ASU College of Education, where she serves on the Mountain States Multifunctional Resource Committee. The moderator was Paul Bender, Dean of the ASU College of Law.

Déan Bender: Let me state what we're doing here this morning and something of what the ground rules are. The first part of the session is going to be conducted somewhat like a law school class. The students are the panelists you see arrayed before you. I am the professor, and you are the judges of their performance, not mine. We are going to be talking about a proposed language amendment to the Arizona State Constitution. There have been several proposed amendments, both to the Arizona Constitution and the U.S. Constitution. This proposed amendment has six subsections. The first subsection says that the English language is the official language of Arizona. The second subsection says that the State or any subdivision of the State (that would mean any city or county) shall not make or enforce a law which requires the use of any language other than English. The third subsection says that the article applies to statutes, ordinances, rules, orders, programs, and policies. The fourth section says that, except as necessary to provide a fair hearing, a court of Arizona shall not issue an order or decree requiring that any proceedings or matters in which the article applies be conducted or written in any language other than English. The fifth subsection says that the article does not prohibit educational instruction in a language other than English in two situations: if it is required as a transition method of making students who use a language other than English proficient in English, or for the purpose of teaching that language as an academic subject. Except for those two exceptions, educational

instruction has to be in English. Finally, it says that the legislature of Arizona may enforce this article by appropriate legislation.

Mr. Diamond, do you think this proposal ought to be added to the Arizona Constitution?

Stanley Diamond: If you will forgive me, Dean Bender, there are a couple of things that have been on my mind and if I may, I have a short answer. . .

Dean Bender: No, I am afraid you may not. This is a law school class and we are going to run it by addressing you to specific topics, as that is the purpose of it. I am sure you are clever enough to work in all of the things you want to say in answering this and future questions. So why don't we start by talking about whether you think that this is a good idea, to add this to the Arizona Constitution?

Stanley Diamond: I want to relate this to what I wanted to say anyway. Everyone that I heard, all 22, 23 people yesterday -- and you as a Dean in this school are used to grading people -- every one, every one would have gotten an F from me, the lowest possible grade, for lack of understanding of this whole issue. Do you want to give me your question again?

Dean Bender: You have before you a proposed amendment to the Arizona Constitution. Do you believe that this language should be added to the Arizona Constitution?

Stanley Diamond: Yes I do. It is very similar to our California constitutional amendment. It was accepted by 73 percent of the people in the state. I think the same percentage, more or less, would accept this language in Arizona.

Dean Bender: Why should they? This country has been going on for about 200 years relatively successfully, especially in the area of individual rights and related things. Why, after all that time, is it necessary to put something in a state constitution dealing with English as the official language?

Stanley Diamond: Because for the first time in our 200 year history, English, our common language of discourse, has been eroding. The best examples are in such things as bilingual ballots and bilingual education, which in California has turned into a five hundred million dollar scam. Our people in the country generally, and certainly in California, and I'm sure it's true in the southwestern states, are concerned about the fragmentation of our country, and a common language is one way of restoring that unity.

Dean Bender: In your view, how would this proposal restore unity? What would it change in this country?

Stanley Diamond: It would be a powerful message that we needed a common language of discourse, a language that we all know, a language in which we can talk to each other, we can understand each other. If we disagree, we can explore our areas of disagreement, resolve them, compromise them, agree to disagree. So in that sense a constitutional provision establishing English as the official language provides that common language of discourse.

Dean Bender: So you would intend by this to require everybody to speak English?

Stanley Diamond: Let's be very, very clear about this. All languages, all cultures, all heritages are precious in the history of our country. We are all immigrants. A common language of discourse means a language that we can all understand at that level. The languages, customs, and cultures are to be preserved as they have been throughout our history. But where and how? In the home, the church, synagogues, private schools, in ethnic celebrations, as they have been throughout our history.

Dean Bender: As I understand it, that's the situation now, without this amendment. What, specifically, would the amendment

change? People today can speak languages other than English in their homes and in their churches. After this amendment would be adopted the same thing would be true. Correct? What would be changed?

Stanley Diamond: Certainly some things will be changed. For example, our position is a very strong one -- we want bilingual ballots, trilingual ballots, eliminated.

Dean Bender: All ballots would have to be in English? Someone who didn't speak English would be practically unable to vote.

Stanley Diamond: No. If you know the laws on voting -- in order to vote, one must be a citizen. If one is a citizen, one is what? Either born here, and in most cases would have had ten, twelve years of education, or, if one is an immigrant and is an applicant for citizenship, one must live here for five years. One would hope that in those five years, as a matter of personal responsibility, personal obligation, one would want to learn or at least be exposed to the language of the country, which is English. Then there is an examination for proficiency and literacy in English before an examiner of the Immigration and Naturalization Service. Given that immigrant living here five years, passing an examination for fluency and literacy in English, it's absurd . . .

Dean Bender: I'm a little confused. If a child is born in the United States, I was under the impression that that child was a citizen of the United States.

Stanley Diamond: Am I denying that?

Dean Bender: That child doesn't have to pass an examination before becoming a citizen, does he?

Stanley Diamond: No; you didn't hear me, obviously. What I said was, if you're born here, you're an American citizen. But you also have ten or twelve years of education.

Dean Bender: But you have to vote in English, and if you didn't speak English you would be practically disabled from voting. You couldn't understand the ballot.

Stanley Diamond: You lose me when you say you don't speak English.

Dean Bender: There are some people in the United States who don't speak English.

Stanley Diamond: That's terribly sad.

Dean Bender: So you want to say that one thing this would change is that those people would not be able to vote in any language other than English.

Stanley Diamond: What I'm saying is it's terribly sad that child doesn't know English. Since I don't know who you're talking about, I hope there aren't very many of them.

Dean Bender: But if there are, they would be disabled from voting.

Stanley Diamond: I am saying they should learn the language.

Dean Bender: And as a way of enforcing that you would not let them vote until they learned the language. Are there practical consequences of this other than voting?

Stanley Diamond: Let me add this. For one who doesn't speak English and yet is a citizen, or who doesn't speak it very well -- if they're concerned about it -- there are radio stations, press, and other areas where one can at least be exposed to whatever that language might be.

Dean Bender: I'm just trying to get a description of what the effects of this are so we can talk about whether we think it's a

good idea or not. Other than voting, do you see any tangible effects that this amendment would have?

Stanley Diamond: Yes, if you want to call it tangible.

Certainly having English enshrined in the Constitution, as an official language, is a powerful, powerful message to our people. If they want to function and move along in this society, you had just better know the language, in our case, of the city, the state or the country that language is in. That's a powerful, powerful message.

Dean Bender: Mr. Trevino, do you think that this language ought to be added to the Arizona Constitution?

Jose Trevino: No, sir. It doesn't strike me as having the stature of any of the amendments that have been attached to the Constitution in terms of protecting civil and human and property rights. So it doesn't rise to the level, at least in my opinion, of having to be included in the state constitution or the national constitution. I think that constitutional amendments, whether they be at the state level or at the national level, need to be looked at quite carefully and thoughtfully. It doesn't appear to me that the thought and care that we would hope went into the 13th amendment, the 14th amendment, and those that followed, has been applied to this particular case.

Dean Bender: What's wrong with it?

Jose Trevino: It sounds good. The proponents of U.S. English have suggested that it is a symbolic effort. I haven't heard Mr. Diamond say anything other than that -- that it is a symbolic effort and that it's meant to encourage people to be proficient in English; but it doesn't address the root causes of why people are not proficient in English, why people are not learning and speaking English. There's a great demand by many people to become proficient in English, and we've got plenty of examples from coast to coast, from the north to the south, where people are attempting to learn English but the requisite infrastructure in the educational system does not allow them to do that at present. If you were saying that we're proposing a constitutional amendment that said, "We want everyone to speak English, and we're going to put the money behind our thoughts and our notions," then certainly we'd have to look at it a little more closely. But it doesn't appear at this point that they're interested in working on and promoting the educational programs that are needed by people who are not English proficient. On your point as to the franchise, the vote: I think it's important that we recognize that in the United States we have a somewhat generous policy with respect to refugees and immigrants. As a Vietnam veteran, I was very pleased when our country, in keeping with tradition, opened its doors to 750,000 Indochinese after Vietnam. I thought that was very important and very generous and

consistent. However, we do recognize that we admit people to the United States as refugees, political asylees or legal immigrants who are, either because of age or mental capacity, not to be expected to become proficient in English. And when they do become citizens, Mr. Diamond admitted, they will be disenfranchised; disabled from exercising their very precious vote. While he says that is sad, I don't hear him saying anything that would certainly provide some remedy for those people.

Dean Bender: Do you believe that people should be entitled to exercise the full rights of citizenship in the United States even though they don't speak English?

Jose Trevino: Citizenship is not based on proficiency in one language or another. Citizenship is based on whether or not you spent the requisite period of time in the United States; whether you've gone through the hoops that the INS establishes as necessary hoops to becoming a citizen.

Dean Bender: And it doesn't bother you if there would be a substantial group of citizens of the United States who did not speak English?

Jose Trevino: It does bother me that there are individuals in the United States that are not proficient in English. LULAC,

from the 1940s to the 1950s, conducted a program operated solely on a volunteer basis, teaching persons 400 basic words in English to help promote literacy in the English language. We recognize that there are those amongst us, particularly in our own community, who will never become proficient. We believe that becoming English proficient allows us to enrich our own respective contributions to the society.

Dean Bender: But you would leave that as a matter of individual choice and not put the pressure on people that this bill would put on them -- to learn English or else they can't vote.

Jose Trevino: We would leave it as a matter of choice, in part, because we know it's impractical to try to regulate it.

Dean Bender: Is that the thing about this that bothers you the most?

Jose Trevino: No.

Dean Bender: What is the thing that bothers you the most?

Jose Trevino: What bothers me is that there seems to be some hidden agenda, some underlying assumption. The underlying assumption, at least in theory, from what I've been able to tell from the U.S. English perspectives, is that the primacy of

English as a language is threatened. And I just don't agree with that. I think, if anything, we find that most Americans, and I would note here that over 70 percent of Hispanic Americans are natives and have been here for generations, so we're not all immigrants, speak English.

Dean Bender: So if Ms. Hermon moved to amend this bill by putting in, as an introductory subsection, "We do not believe, in Arizona, that the primacy of English is threatened, but nevertheless we think, . . ." and then go on, then you'd have no objections to the legislation?

Jose Trevino: No, some of my other objections would remain.

Dean Bender: Ms. Hermon, you've heard both sides. From the legislative perspective, who convinces you?

Bev Hermon: Based only on those particular arguments -- generally we have a lot more testimony than that -- I can agree that bilingual ballots are, for the most part, probably a waste of money in terms of the numbers of people who would actually request them. I'm amused by the fact that people would be insulted that people don't understand English because we don't translate the English on the ballot. The legalese that you find on the ballot is very often not the information that you need in order to cast your vote on that issue, and names are the same in

English as in Spanish. However, I do not see that this would happen as a result of U.S. English, because the people who actually put the election process together at all levels would probably continue with the dual ballot because they do not want to have their election declared invalid by the National Voting Rights Act people who have to sign off on literally every election that happens in this country.

Dean Bender: The federal government may tell Arizona what it can and cannot do, but as a state legislator, I take it, your initial obligation is to think about what's good for the State of Arizona. Do you agree that this provision would prohibit bilingual ballots?

Bev Hermon: I did not assume so when I signed as a sponsor on the House version of the HCR, nor did I assume it would do away with bilingual education.

Dean Bender: Mr. Diamond, I'm confused. Do you think this would prohibit bilingual ballots?

Stanley Diamond: We certainly take that position in California, and I've asked the Attorney General to take steps . . .

Dean Bender: What part of this proposed amendment prohibits bilingual ballots?

Stanley Diamond: Section (A) states that "the English language is the official language of this state."

Dean Bender: That means to you that all official business has to be in English?

Stanley Diamond: And section (B) says this, too: "This State or any subdivision of this State shall not make or enforce a law which requires the use of any language other than English."

Dean Bender: That troubles Ms. Hermon in a way other than voting. If I am a person who is a recent immigrant to Arizona from another country, and I don't speak English at all or very well, my understanding is that there are many programs in the State of Arizona, such as welfare programs, medical emergency aid programs, and things like that, under which I am entitled to benefits. Yet if Mr. Diamond is right, that all official documents have to be in English, then when I go to apply for welfare, let's say, the form that I get may be something I cannot understand, and the person who gives it to me may be somebody who doesn't speak my language. If that's going to be the situation under this amendment, doesn't that trouble you?

Stanley Diamond: You didn't ask me if there are any exceptions,
Dean Bender.

Dean Bender: I was asking Ms. Hermon whether that would trouble her.

Stanley Diamond: Your statement isn't correct.

Dean Bender: Under this legislation, the state could have forms for application for public assistance in Spanish?

Stanley Diamond: Whatever fits under the terms of public health, public safety, or justice.

Dean Bender: I don't see the words "public health" or "public safety" in there.

Stanley Diamond: No, but you will see them in my ballot argument.

Dean Bender: I don't understand. If we are going to adopt this, and it says, as I thought you were saying, that all official documents have to be in English because it says English is the official language, how could a welfare application be in a language other than English? If you would agree that it should have to be, the state should have the opportunity and the obligation to make application forms for public benefits available in all the languages that people speak.

Stanley Diamond: Whatever fits under the terms of public health, public safety, or justice, and where there is a need.

Dean Bender: Do you suppose an application for public assistance by an indigent who doesn't have enough food or shelter would fall under that? And the public servant who runs that office, the welfare office, would have to speak Spanish as well as English if a number of clients spoke only Spanish?

Stanley Diamond: If there is that need, yes.

Dean Bender: You're still opposed to this legislation, Mr. Trevino?

Jose Trevino: I still oppose the legislation. It seems to me that the states in the Southwest are unique. I mean, we share a common border of 1990 miles with the country of Mexico, so it seems to me it's impractical in terms of economic investment, in terms of commerce, that we would want to declare English the official language of the states of Arizona, New Mexico, Texas, and California. In the city of Atlanta, two weeks after the state legislature passed a resolution declaring English the official language of the state, the city council by a unanimous vote decided to declare themselves in favor of English Plus, a program proposed by LULAC which emphasizes improving students'

skills in English without declaring English the official language. Why? The argument that most persuaded them is that they had been attracting Japanese investors and Middle Eastern investors to come to Atlanta to set up plants. They felt that it would be a slap in the face to these investors, and not in the interest of commerce and the economic well-being of the city of Atlanta, to declare themselves in agreement with the state.

Dean Bender: So even if we remedied some of these practical problems, like ballots being in more than one language and applications for public benefits being in more than one language, you still would oppose the idea of having a constitutional amendment that says English is the official language?

Jose Trevino: In part, because I would consider it a first step and because of what the second and third steps might be in relation to it.

Dean Bender: Professor Magnet comes from Canada where, as I understand it, there are fairly substantial numbers of ethnic minorities who have languages other than English as the language that they use in everyday speech. How does Canada handle these problems?

Professor Magnet: Canada, where the language minorities are significant, grants them rights in the provincial state, and all

official language minorities have rights in the central state: the government services, the civil administration, minority language education, and things like that.

Dean Bender: Does the Constitution of Canada say that English is the official language of Canada?

Professor Magnet: It says that English and French are the official languages of Canada.

Dean Bender: I heard Mr. Diamond saying that one of the reasons for saying that English is the official language of the United States or the State of Arizona is that, if you don't do that, the country will pull apart and we won't have the same quality of country that we have had. Has that proved true in Canada?

Professor Magnet: If there had not been a recognition of some sort of equality between the linguistic communities, Canada would have had great difficulty in maintaining the seams which knit it together.

Dean Bender: What are you suggesting the United States do with the problem? Would you be in favor of Arizona adopting this constitutional amendment?

Professor Magnet: No, I wouldn't be.

Dean Bender: Would you be in favor of Arizona or the United States changing their constitutional structures with regard to languages from the way they are today?

Professor Magnet: I would be in favor of Arizona changing, at least, its legislative structure to make sure that governmental services and educational services are provided to linguistic minorities where those linguistic minorities are significant in number. These minorities pay taxes and they are entitled to governmental services. I grew up in Fall River, Massachusetts; there was a 40 percent Portuguese minority there, many of the elderly of whom did not speak the English language. These people are entitled to vote; these people are entitled to municipal services in that city. They pay taxes; they're entitled to the full range of benefits that accrue to any citizen or resident of that jurisdiction. And I think it's nondemocratic and unfair to deny them that where the community is of such size that it warrants it. I don't think bilingual ballots are terribly expensive. We find that in Canada we can maintain these things with relatively minimal expense. I don't see why you couldn't do this on a regional level in the United States.

Dean Bender: So you would have laws in a state like Arizona saying that voting, other public services, education, should be

available to people in their native language or the language of their choice?

Professor Magnet: If the minorities want these things and make significant demands for them, and the community is of such size that economies of scale merit it, then I think it's a democratic and fair thing to do.

Dean Bender: There's a proposal from the Federation of American Cultural and Language Communities, a proposed amendment to the United States Constitution, which would govern life in Arizona as well. The proposed amendment is: "The right of the people to preserve, foster, and promote their respective historical, linguistic, and cultural origins is recognized. No person shall be denied the equal protection of the laws because of culture or language." That, as I read it, is doing what you were suggesting -- assuring that no person should be denied equal protection of the laws because of culture or language; that is, they should be able to have equal access to governmental services, education, voting, and things like that. Do you think it would be a good idea for the United States of America to adopt an amendment to the United States Constitution that's more or less the same as this proposal?

Professor Magnet: Yes, I would, although I'm not certain such a proposal has the same legal effect that you're suggesting. It

seems to me it would require implementation by legislation. But I do think it's a good idea because it sends a signal that, in addition to Mom's apple pie, pizza, wonton soup, and kreplach are also America fare. This, I think, is a good message to send in a diverse, plural country like the United States.

Dean Bender: So you would like to see the law of the United States (as is true in Canada, at least with regard to the French and English groups) provide that those separate groups -- separate cultural, ethnic, language groups -- should be able to preserve their separate language identity and have relationships with the government in their own language, rather than trying to get everybody -- coercing, influencing, encouraging, however you want to put it -- to get everybody to speak English?

Professor Magnet: I agree with the thrust of what you said, but I think it needs to be qualified. I don't think that this is exactly like Canada's situation, because in Canada the linguistic communities are different in that either the French or English linguistic community has the power to break the country, and it's therefore necessary to endow each community with that sense of strong dedication to the country so that power will not be exercised. That is not the phenomenon that holds in the United States, and therefore the kinds of political compromises that may be uneconomic and non-majoritarian do not have to be made in the United States. But still, basic equal protection considerations,

basic fairness, basic justice, do have to be extended to all people who participate in the governmental system and support it with their labor and taxes.

Dean Bender: So we forget the melting pot, which is the American tradition. Instead of putting everyone into the same pot and having them come out more or less the same, we would, through a constitutional amendment, encourage them to remain separate and to teach their own identity.

Professor Magnet: I'm unaware that there ever has been a melting pot in America. Many people have been put into a pot and they have come out a little boiled from it, but I'm unaware that they've ever been melted down into the same thing. As I look around this room, I'm buttressed in that view.

Dean Bender: Professor Moran, do you agree with Professor Magnet's approach to this?

Professor Moran: In my view, we should not focus on constitutionalizing one side of this debate or the other; rather, we should focus on nonconstitutional approaches that afford more flexibility in dealing with these problems. These statutory or administrative approaches will give us a chance to experiment with different ways of dealing with these issues by coming

together as communities to deliberate about the values we wish to inculcate in the public schools.

Dean Bender: So you'd forget the idea of a constitutional amendment -- either Professor Magnet's constitutional amendment or Mr. Diamond's constitutional amendment?

Professor Moran: Yes, because I think that this entire constitutional debate has rigidified approaches to language in a most unfortunate and emotionally charged way. What we have forgotten is that the real American tradition is one of tolerance and respect, in which we come together as local communities to determine what shared values we have and how best to implement them.

It may be of some historical interest that the Founders expressly decided not to include an official language in the Constitution. They feared that making English the official language would only crystallize opposition to any imposed language choice. They concluded that the best approach to language diversity was to allow people to exercise their individual autonomy in making language choices. In the Founders' view, so many incentives existed to learn English that coercion was unnecessary. My sense is that the Founders adopted a wise course of action, and we should continue it.

Dean Bender: I don't find the argument that the Framers did or did not do something extremely persuasive. . Remember, those are the same Framers who did not put an equal protection clause in either the original Constitution or the original Bill of Rights, and who recognized slavery in those documents. So just the fact that the Framers did it does not strike me as persuasive. If you think it's wise, leave it out -- no constitutional provision. Are there any issues in this area that you think need legislative attention today in a state like Arizona?

Professor Moran: Certainly we have come to a regrettable impasse if we continue to engage in highly emotional debates that degenerate into constitutional free-for-alls. In the field of bilingual education, there have been too many attempts to impose external controls on curricular choices for linguistic minority children. Schools have been crippled in their ability to experiment with different pedagogical approaches. We need to give schools leeway to try different instructional techniques when there is uncertainty about what is the best method of teaching linguistic minority children. At the same time, disadvantaged groups historically excluded from the decision-making process quite understandably want some protection should the schools prove indifferent to their concerns. For this reason, civil rights provisions remain an important component of the federal role in ensuring equal educational opportunity for linguistic minority children. But I think it's unfortunate that

we automatically tend to deal with these matters in an adversarial mode, rather than exploring the mutual advantages of cooperating in deliberations about these issues.

Dean Bender: Would you describe, for those of us who may not be as familiar with this as you are, exactly what these civil rights protections in education are?

Professor Moran: The primary sources of civil rights protection have been Title VI of the Civil Rights Act of 1964 and section 1703(f) of the Equal Education Opportunity Act of 1974. Although the equal protection clause could potentially provide some constitutional protection, the courts have not carefully addressed its scope because they have generally been able to resolve disputes on statutory grounds. Because English-Only instruction effectively excludes linguistic minority students from meaningful participation in the curriculum, Title VI and Section 1703(f) prohibit this approach where the children are members of a national-origin minority group. Under these circumstances, language differences may serve as a basis for unlawful racial or ethnic discrimination. Any program that denies minority group children an equal educational opportunity on the basis of language therefore violates their civil rights.

Dean Bender: So current federal law requires that if children do

not know English they must be instructed in the language they do know?

Professor Moran: Under Title VI of the Civil Rights Act and Section 1703(f) of the Equal Educational Opportunity Act, English-only instruction is not an acceptable way to meet the problems of these children because of the high dropout rates and low achievement that such instruction has engendered. However, in my view, neither Title VI nor Section 1703(f) necessarily requires bilingual-bicultural education or transitional bilingual education. I think a school district could, in good faith, experiment with English-as-a-Second-Language or Structured Immersion, but it would have to monitor and evaluate the results. If the programs did not work, the district would have to try different approaches that could prove more responsive to the students' needs.

Dean Bender: And what's the test of whether it works or not?

Professor Moran: That's a very complicated question. Traditionally, researchers have at a minimum examined scores on objective achievement tests in English and other academic subjects, such as mathematics. Some have also studied achievement in the child's native language. Others have additionally tried to measure self-esteem and attitudes toward school.

Dean Bender: What are we after here? Under the federal law, what are we after? Does the federal law permit a state educational system to require that every child learn English within a relatively short period of time after they enter the system?

Professor Moran: Certainly one goal of all programs has been English acquisition. But the programs have diverged in terms of the importance that they have given to native language proficiency and cultural heritage.

Dean Bender: If a state wants to require everyone to learn English, and only teaches them in their own language until they have a chance to learn English, does the federal law permit the state to put as much pressure on the children to do that as it can, within the limits of possibility?

Professor Moran: It will permit them to use a program that relies heavily on English language instruction, but there has to be at least some accommodation of the native language. A child cannot be subjected to total immersion -- you know, a sort of sink-or-swim instruction.

Dean Bender: If swimming is speaking English, the school

systems, as far as federal law is concerned, are entitled to try to make sure that they swim as soon as possible?

Professor Moran: They can do that, but if they use a technique that does not result in satisfactory academic progress or creates highly segregated classrooms, they may face serious legal challenges.

Dean Bender: That's a permissible objective? After the children learn to speak English, then you could teach them entirely in English and don't have to teach them in any other language or about any other language?

Professor Moran: In fact, most programs have eventually mainstreamed linguistic minority children, because long-term bilingual/bicultural programs designed to maintain the native language and heritage are extremely expensive.

Dean Bender: And do you find that legislation adequate on this subject? Does Arizona need any additional legislation?

Professor Moran: Constitutionalizing these issues will in no way advance our understanding of how children learn. By passing an English-Only amendment, decision makers will simply straight-jacket educators in making curricular choices, forcing them to prefer approaches that rely heavily on English even if they have

serious doubts about these methods. That seems to me a very unfortunate result.

Dean Bender: Then the answer to my question is no.

Professor Moran: That's right. I hope that Arizona will continue to employ a full range of programs for linguistic minority students. There is someone here from the State Board of Education who might be able to address these issues and describe the monitoring and evaluation of the current programs.

Dean Bender: I was just going to ask him. Mr. Espinoza, do you agree with that? All we need do by way of accommodation to other languages than English in the school system is take the fact that children speak other languages into account in teaching them English? If we do that effectively, teach them English, then that's the end of anything we need to worry about?

Tom Espinoza: First of all, I think that the State of Arizona has a very dynamic bilingual program throughout the State. In fact, Secretary of Education Bennett visited Tucson and a couple of school districts here in Phoenix because the fact was that the bilingual programs were working very, very effectively, and we presently, in the State of Arizona, do not need a constitutional amendment or any legislation that would strengthen the bilingual programs.

Dean Bender: Would this constitutional amendment, Mr. Diamond's proposal, harm the State of Arizona's ability to deal with bilingual problems, in your view?

Tom Espinoza: I think it would definitely harm the whole concept of our country -- that is, it will harm the freedom of speech and the freedom of learning. Mr. Diamond says that English, in his philosophy, would embrace all minorities learning how to speak English, but that's not necessarily true. This legislation says, at least here in Arizona, that legislators shall not make any law which diminishes the role of English as a common language. And then it goes beyond that -- it says a person who is a resident or doing business in this state may commence civil actions in Superior Court.

Dean Bender: We weren't looking at that one; that's a different proposal.

Tom Espinoza: But the point is this. A teacher, for instance, who could speak only English, may be in a classroom in Arizona where there are a large number of Hispanics, and, let's say, a large number of Navajos, who are trying to learn how to speak English. This teacher may get infuriated by the fact that he or she wants to be an instructor in that area, has not gotten the credentials, and then is moved on to another part of the school district. That teacher may decide he or she has been

discriminated against and may take the position that he or she wants to sue.

Dean Bender: This is the teacher?

Tom Espinoza: Right, the teacher gets so upset that he or she goes to an attorney and says, "You know, they're using Spanish and Navajo to teach these kids how to speak English and therefore, in reality, they're diminishing the use of the English language. My position would be that no language other than English should be used in the classroom."

Dean Bender: All right. You've disposed of the Carson provision, but that, as I said, is not the one we're talking about. A similar provision does not exist in the proposal we're talking about.

Tom Espinoza: It does not exist, but once you open the door and you allow this kind of cancer to start growing in the legislative process, the next step is to strengthen this kind of language in the law.

Dean Bender: But as it's now written (I'm looking at Subsection E) it says, "This article does not prohibit educational instruction in a language other than English if it is required as a transition method of making students who use a language other

than English proficient in English." In other words, if this were enacted, it says that it does not prohibit educational institutions from using a language other than English as a transition to making people literate in English. I take it Professor Moran doesn't have any objection to that at all.

Professor Moran: Can I just correct you on that? One thing that this subsection would preclude is a bilingual/bicultural instructional program which promotes long-term proficiency in both the native language and English. The provision does represent a change from the flexibility that districts currently enjoy. It would presumably, however, permit English-as-a-Second-Language, structured immersion, and transitional bilingual education. In my view, there is little reason to restrict experimentation with comprehensive bilingual-bicultural education programs.

Dean Bender: So you're an advocate of experiment, in this area, anyway, and you don't want a requirement that educational institutions in Arizona teach both languages so people can maintain their cultures and their heritage, but you want to leave them the opportunity to do that, and you object to this provision, Subsection E of the proposal, because to you it doesn't seem to permit that. It simply permits it as a transition, and once people learn English, then, even if the school wants at that stage to continue to teach them their native

language, it can only do that as an academic subject. Is that right?

Professor Moran: It is hard to see how someone with a native language other than English could remain in a bilingual-bicultural program by treating their native language as a foreign language. By exercising some creativity in the law's interpretation, you could try that approach. But my own sense is that a proper reading of the legislative intent would not support such an interpretation.

Dean Bender: You might be able to do that kind of continuing cultural training and instruction by saying that you're doing it as an academic subject. But that bothers you because that tends to mean it's a foreign language, and that if an educational institution in a bilingual community doesn't want to treat it as a foreign language you don't think they should have to?

Professor Moran: It does seem rather paradoxical to treat the child's native language as a language foreign to him.

Tom Espinoza: I think the bottom line is, we don't need it.

Dean Bender: You don't need what?

Tom Espinoza: We don't need this kind of legislation. Things in the State of Arizona are functioning very well right now in bilingual programs. And the point is, why then create any change at all? Period.

Dean Bender: Ms. Hermon, are you convinced we don't need this?

Bev Hermon: No, I'm not convinced.

Tom Espinoza: As an Arizona legislator representing your district, how do you see this legislation helping your constituents in your district and helping the State of Arizona?

Bev Hermon: Okay. Let's say for a minute that English is not the official language, which it isn't right now. When I pick up the newspaper and read that there is a great deal of growing concern about illiteracy in Arizona, and that we need to spend money to be sure that people are conversant with English as the language of commerce and industry and everything else, then I go downtown and I say, but we really don't need to spend money on those programs. If they are proficient in Spanish, we don't worry about it. We don't worry about people on the welfare rolls if the reason that they are there is because they are not language fluent. We don't worry about those things any more, because we really don't have an official language.

Tom Espinoza: You know that the larger number of people on welfare are not Hispanic, by the way, if you look at statistics. I think the question is a little deeper than that. How do you see this legislation helping the State of Arizona? What problems would disappear right now? Or in the future?

Bev Hermon: Tommy, I support it because, to my way of thinking, it would preserve the status quo in the future, for future generations.

Dean Bender: Does anybody think it has helped in the past? Ms. Garcia, did you go to public school in Arizona?

JoAnn Garcia: Yes I did.

Dean Bender: What was your experience in school with language? Was it bilingual education? Was it only in English?

JoAnn Garcia: Everything was instructed in English only. I'm having a pretty difficult time trying to grapple with what might be the problem. I'm not so sure what the intent is for this proposed legislation. I think, in fact, that what's happening is that there's probably some sort of hysteria out there regarding the influx of people who have come into the country. If, in fact, that is the problem, I am not sure that this legislation is the proper way to address that.

Dean Bender: What's wrong with it?

JoAnn Garcia: There are other ways in which to address a problem if, in fact, there is one. By simply stating that English is going to be the official language, I don't know that it addresses a problem at all. If, in fact, English has been the accepted or the common language in the United States for all of this time, and we know that, merely by, for example, the experiences that we have in school, what is going to change?

Dean Bender: I'm having the same thoughts. Let me just tell you what's in my mind and maybe someone here can answer it. What I'm hearing from Ms. Hermon, and what I think I'm hearing from Mr. Diamond, is that the main purpose here, at least in the educational area, is that children should learn to speak English because a lot of people in this country speak it, it's the language of the majority, and similar reasons. If that's what the function of this is, why not just say that every school system within the State of Arizona shall do everything it can to make sure that every child who graduates from that system, or spends a certain amount of time in that system, is literate in English? Why does it have to say don't do something else? Mr. Diamond.

Stanley Diamond: I'll give you a very simple answer to a very complicated question. Immigrant children to me and to us should be in English-speaking settings more or less within a year. Now, what else do you want to know?

Dean Bender: Do you think it's important to stop these immigrant children from speaking their native language?

Stanley Diamond: We are the strongest supporters of the maintenance of languages and cultures, but this is not a public responsibility, and I would object to the maintenance of languages and cultures as a school responsibility.

Dean Bender: Ms. Mendoza, you work in the bilingual education area. You must have been listening to all of this with a lot of interest. What are your views?

Nancy Mendoza: I'd like to respond first to Mr. Diamond's last remark, saying that he would resent the use of the public system as a vehicle for promoting or enhancing the retention of some aspects of culture. Schools have historically been established for the transmission of culture. In the early 1900s they were seen as the amalgamation entity in society; it was their role to transmit culture. Unfortunately, it was only a specific aspect of the national culture that was being transmitted by the schools. And if it is the role of the schools to transmit

culture, and that of society, then it certainly has been "monolithic" in its absence of representation of the myriad of cultures that are represented in society. So I don't think that it is the horror that it's been presented to be to have other languages and cultures represented in school, if schools are responsible for the transmission of culture.

Dean Bender: What would you like to see? Would you just like not to have any legislation passed, or would you like to see any additional legislation or constitutional provisions in Arizona to help or encourage or require the schools to do what you think they ought to do?

Nancy Mendoza: I think that any attempt to make constitutional amendments or legislative amendments at this time is superfluous. In the State of Arizona we have a very comprehensive law which addresses services to limited English proficient students which is extremely flexible in the options available to school districts. It allows a whole range of program types, as has been discussed, from the kind of structured immersion which includes cultural background in the history of students, all the way through to bilingual/bicultural education that allows a community to adopt that as its own program. One of the things that is almost sacrosanct in this State is the whole notion of local autonomy. It's almost ludicrous to say to a school district like Indian Oasis on the Tohono O'Odham Reservation or to the Window

Rock School District on the Navajo Reservation that you do not have it within your local autonomy to adopt a program of instruction that meets the requirements of state curriculum but does not address the environment in which the school operates.

Dean Bender: Is it your view that this constitutional provision, if adopted, would restrict the ability of school districts like that to do what they want to do?

Nancy Mendoza: Certainly I am not equipped to do a legal analysis of this.

Dean Bender: The only difference between you and people who say they are equipped to do a legal analysis is that they say it and you don't.

Nancy Mendoza: Let me say that, on its face, the provisions, particularly in B and C of the proposal, where it speaks to the restriction of a subdivision of the State to make or enforce laws that require the use of a language other than English, and C, related to statutes and ordinances, programs and policies, that yes, I think that there are serious implications for the conduct of our Department of Education and the State Board of Education as a subdivision of the State, which it is often considered. We have on our books certain provisions, such as informing parents about handicapping conditions of their children and their right

to refuse psychological evaluations, that can perennially label their children. All of these things currently, as part of our rules at the Department of Education and the State Board, allow parents to have interpreters, allow parents to receive documents in their language so that they can make these kinds of decisions. I think it would require a total revisiting of a whole range of rules and policies in our agency. Those would be the implications in my mind.

Dean Bender: I think I know what you're saying, but let me check it. You're saying that currently, in a school district where the parents may not speak English or may not speak it terribly well, and their children are in school, if the school wants to communicate with the parent it has the ability to communicate with them in their native language, and, in fact, many schools do that.

Nancy Mendoza: And in some cases it is required, for purposes of liability of the school district. Let's say we're going to take your children to a field trip to X, Y, or Z, and parents have to give informed consent allowing their child to do this.

Dean Bender: Mr. Diamond, do you want to stop the schools from doing that?

Stanley Diamond: I have my reservations.

Dean Bender: What are they?

Stanley Diamond: When communicating in other languages leads to and continues this kind of divisiveness, I have reservations. I understand, of course, that you have to have parental consent, and that is a need, that is a genuine need.

Dean Bender: You'd have no objection to schools communicating with parents who don't speak English in the language that the parents actually speak?

Stanley Diamond: That's right; I would only hope that it's temporary.

Nancy Mendoza: May I say that if that is the posture of this movement, it certainly has not been accommodated in any of the proposals that have been put, either to the voters in California, or as language introduced here. What was already adopted in California does preclude those actions, and, from our information, there are school districts that are afraid to send notices home because there is a private right of action to sue in California, and now they don't know whether they can obtain parental consent to protect their liability without being sued by proponents of the U.S. English movement.

Dean Bender: In looking at this particular Arizona proposal, do you see anything in there that you think would prevent an Arizona school district from sending notices to parents in a language other than English?

Nancy Mendoza: Yes, I do. School districts are considered subdivisions of the State in certain areas, and so, yes.

Dean Bender: Maybe I'm being thick about this. It says, "This State or any subdivision of this State," let's suppose school districts are included there, "shall not make or enforce a law which requires the use of any language other than English." That provision doesn't seem to me to say that the school, if it wants to, cannot send notices home in Spanish, or Navajo, or anything. Even if it's true that it applies to such notices as their programs, orders, rules, policies, whatever, in the next subsection, it doesn't say you can't do that. It just says you can't require the school to do that.

Nancy Mendoza: However, at the State Board of Education level, there are rules that protect students and that school districts are following in their sending of notices.

Dean Bender: So it takes the ability away from the State Board of Education to require local districts to do that, and you think that's wrong? Ms. Hermon, you don't disagree, do you, that the

State Board of Education ought to be able to tell local school districts to communicate with parents in the language the parents can understand?

Bev Hermon: Sounds logical to me.

Dean Bender: So this proposal at least needs changing in that area.

Bev Hermon: I think the language needs a lot of refinement.

Dean Bender: It's more than the language, I think. I'm getting the sense from this proposal that the idea is that everything ought to be in English. Here we have a policy that the Board of Education might want to have which is that everything should not be in English; in fact, it should be in another language because the people you're communicating with only speak that language. So there are some occasions when it's not only permissible, but even should be required to use a language other than English. I don't see that in this proposal. We'd want to make that change.

Bev Hermon: Absolutely. When you adopt legislation from another state, that's what happens. You expect a bill to go through several committee processes and be refined and end up on the ballot with some additional language that talks about the necessity of putting other things in the statute as a corollary.

And that's most generally what's happened with initiatives that have been on the ballot or referendum. I think all of those things, including the definition of "official," have to be clarified.

Dean Bender: So that has to be changed. Mr. Ronstadt, do you see anything else that you'd like to see changed in this proposal, other than omitting the language that would stop a state agency from requiring subsidiary agencies to use another language when it's required to do that in order to communicate with the people who need it? I take it, Ms. Hermon, you'd agree in the same spirit that the state welfare department could require local welfare offices to use Spanish or Navajo or Greek or whatever with people who can only speak that language and are entitled to get benefits?

Bev Hermon: Certainly.

Dean Bender: Mr. Ronstadt, do you have any other problems with this?

Jose Ronstadt: I have a lot of problems with it. Let me begin by saying first that I either must thank God, who, by the way, I think is multicultural and multilingual for all the different people on earth, or I must thank my good fortune that I never had Mr. Diamond as my teacher, because I probably would have had an F

my first eighteen years of my life, since I was monolingual Spanish, being an immigrant. Also, if Mr. Diamond heard my mother speaking in Spanish, he might flunk her because he would not understand my mother, in Spanish, saying "I pledge allegiance to the flag of the United States of America." I think the law is totally unnecessary. I think that the English language amendments that have been proposed only perpetuate the myth that immigrants, like myself and other minority groups, live in what they call "linguistic and economic ghettos," and, therefore, we are not productive members of society. They also confuse the issue of citizenship with being good citizens. There is nothing in this amendment in Arizona, or in any other state that I have seen, that says positive things about increasing English proficiency. Somehow they make a correlation between illiteracy in America and linguistic minorities. I think the biggest number of illiterates in America are monolingual English speakers, not necessarily linguistic minorities. I see that and many, many other problems. I sense that for 200 years the Constitution has worked extremely well, and I don't see why, all of a sudden, it needs to be repaired. I also fear that, with this type of an amendment, it would only perpetuate a notion of second-class citizenship in this nation, and I don't think that reflects the best values of America; it doesn't reflect the best values of Arizona, or of our society in general.

Dean Bender: So you would just not do this at all? Leave things the way they are? Or do you think there are other changes that need to be made?

Jose Ronstadt: I would throw this in the garbage.

[Applause.]

Dean Bender: Professor Magnet was making an additional point. I don't know whether he would throw this in the garbage, but he was suggesting that perhaps we ought to think of doing something like what's done in Canada to encourage people to maintain their separate linguistic and cultural heritage. Am I right in saying that, Professor Magnet?

Professor Magnet: Yes.

Dean Bender: Would you want to do that, or would you just leave things the way they are? We don't have a provision in our Constitution anything like this FACLC provision that says that the right of the people to preserve, foster, and promote their respective historical, linguistic, and cultural origins is recognized. Should we do that? Should we recognize that?

Jose Ronstadt: I don't think we need to mess with the Constitution as it is, period. I don't think we need to legalize

any of this issue. The fact is that immigrants to this nation recognize the importance of the English language. I think all immigrants, recent or in the past, have always known the fact that in order to succeed in this country, in order to be assimilated into America, learning English is the mechanism by which they are going to attain that success. And I don't think we have ever, as immigrants, denied that. And we have struggled from the moment we got here to learn English. My daughters, who are not immigrants, who are native-born citizens in this nation, are both bilingual. They can go from Spanish into English, and I don't see a problem with that. I don't see them growing up to be unAmerican or growing up to be nonproductive citizens.

Dean Bender: I understand what you're saying, and maybe I'm approaching this too much as a lawyer who's always looking toward the catastrophe in the future.

Jose Ronstadt: Don't let this stop you.

Dean Bender: But if we don't fiddle with the Constitution, which I think is a generally good attitude to have about the Constitution; if we leave the U.S. Constitution the way it is, and if Arizona does not enact this Official English proposal, as you don't think it should, suppose, however, Arizona, without an amendment to its constitution, decides to prohibit the speaking of any language other than English in school, or decides to

require that all public services be done solely in English? Do you want to permit a state to do that?

Jose Ronstadt: No. I think we should have flexibility and freedom. . . .

Dean Bender: How are you going to stop a state from requiring English in a way that might exclude people from services or education without a constitutional provision in the Constitution of the United States which says to states, "Don't do that?"

Jose Ronstadt: Dean Bender, I've never known how to stop the state or how to stop politicians from doing anything.

Dean Bender: That's what the Constitution is for. That's a serious point.

Jose Ronstadt: I guess I would rely on the final interpreter of the Constitution, which would be the Supreme Court.

Dean Bender: But right now there's nothing in the Constitution that says that people have the right to preserve their separate cultural and linguistic identities and heritages.

Jose Ronstadt: There's something that says that when certain land was acquired from the Republic of Mexico, under the treaty

of Guadalupe Hidalgo, the United States signed that they would agree to respect and preserve the language and customs of those people. There's something legally there.

Dean Bender: Even if you're right about that, let's take a national perspective. That wouldn't apply to Massachusetts or Rhode Island. And they have the same problem. So don't we want to have, as Professor Magnet suggests, a provision in our Constitution such as the FACLC provision? Let me put that before you as a good idea, one that ought to be enacted. The right of the people to preserve, foster, and promote their respective historical, linguistic, and cultural origins is recognized. No person shall be denied the equal protection of the laws because of culture or language. Ms. Zepeda, do you think it's a good idea to put that in our Constitution? Do we need something like that?

Ofelia Zepeda: If such a wording, and again I don't have enough background, if such a wording would work effectively to prevent states from doing something such as the English-Only amendment, then, in general, it sounds like a good idea. But again, what the implications really would be I don't know.

Dean Bender: Are you satisfied with the way a state like Arizona today treats cultural minorities and linguistic minorities? Do you believe that changes are needed in Arizona law, either

because they are required by the U.S. Constitution or just because they are a good idea, to make even stronger the right of people to retain their separate heritage?

Ofelia Zepeda: Personally, I think anything that can be done to provide services to indigenous groups or to other ethnic minorities in Arizona, of course, should be done. As we heard from the people representing the State and the State Department of Education, in particular where the issue here seems to affect the Arizona Indian tribes greatly, to this point the State of Arizona has serviced the Indian groups, I think, in the best way that they can. For instance, they do have specific services for limited-English-proficient children who, of course, are in great numbers among Arizona Indians. And they have been serviced appropriately up to this point.

Dean Bender: When you say the State services those children, what do you mean by that?

Ofelia Zepeda: Simply that the educational services are in the classroom, making sure that there is the language available in the classroom, whether it be Spanish or Navajo.

Dean Bender: But does the State affirmatively encourage these children to retain their ability in Navajo, and even to expand it, by having programs in the Navajo language in order to have

them fluent in that language, rather than merely to get the children to understand what's going on?

Ofelia Zepeda: I think, as Ms. Mendoza mentioned, that flexibility is there. They cannot force schools to do that, but that flexibility is definitely there.

Dean Bender: Do you think that's good enough, or should schools be required to do that? Ms. Mendoza.

Nancy Mendoza: There is nothing at the state level that requires that, but I might indicate that the State Board of Education, through its policies and bylaws, which are duly adopted by the Board, does have very specific policies that expressly encourage American Indian communities to maintain, preserve, and enhance the language of their communities, as well as other statements which indicate their respect for cultural diversity and ethnic autonomy. So there are things, while not legally binding, because they're not adopted as rules, that as a question of policy certainly give a message to the school districts.

Dean Bender: We've been talking a lot about education, and Mr. Velasquez, you've been very quiet, and I'm not going to let you stay that way any more. Should we also be talking about voting more than we have? Are there problems there that need attention?

Willy Velasquez: Well, if you look at the facts, Hispanics, for decades, did not register and vote. After the passage of the Voting Rights Act, a number of things started happening. If you look at the Census Bureau study, from 1972 to 1984, you will note that starting from 1972 to 1976, in that presidential quadrennium, Hispanics actually managed to go backward in the gross number registered to vote. There were more registered to vote in 1972 than in 1976. This was not unusual voting behavior by Hispanics. This was rather typical. From '76 to '80, the Hispanics became the fastest-growing group in registration in the United States. Many people thought that was a fluke, but then from '80 to '84 we increased that. As a matter of fact, for awhile there, we were growing three times as fast as the rest of the country in registration. The combination of being the fastest growing group in population and in registration has had some practical political consequences. Clearly, the Voting Rights Acts, bilingual ballots, and a number of other changes were instrumental in this. I think it's a little simplistic to say that bilingual ballots don't work. As a matter of fact, I'd like to know the citation that they don't work. GAO just finished an extensive study on the question. A lot of government agencies aren't worth much, but I'd be hard pressed to say the GAO is not worth much. I think that they're pretty good. They themselves admit that people use bilingual ballots. Secondly, they also say that the cost is very little. As a matter of fact, extraordinarily little. Yesterday somebody pointed out the cost.

Extraordinarily small amounts -- something like three cents, I think, per household in the city of San Francisco. I feel that there are sound reasons why, for a hundred years, Hispanics did not register and vote. Then you pass some legislation that simply applies the law, applies the Constitution, and in two presidential elections the Hispanics become the fastest growing in registration in the country. There is a sound correlation; it isn't, in my opinion, a gratuitous series of fortunate accidents.

Dean Bender: Was that growth in registration linked, at least in time, to the provision of bilingual ballots? That is, before that time were bilingual ballots not provided?

Willy Velasquez: Oh yes. As a matter of fact, the extension of the Voting Rights Act to the Southwest very, very much tracks the explosive growth. In Texas we have used the Voting Rights Act, certain sections of it, as much as all the rest of the South put together.

Dean Bender: Mr. Trasvina, why don't you give us a brief description of what the Federal Voting Rights Act requires in the way of bilingual ballots, and let's see if that's good enough, or bad enough.

John Trasvina: In order to do that, I think it's useful if I could just briefly quote from the congressional findings on the

extension in 1975. "The Congress finds that where state and local officials conducted elections only in English, language minority citizens were excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the 14th and 15th Amendments, it is necessary to eliminate such discrimination by prohibiting English-only elections." Administratively, the Congress designated that, in counties where 5 percent of the population was of a single language minority, those counties would have to provide bilingual election services.

Dean Bender: Is that 5 percent of the eligible voters, or 5 percent of the population?

John Trasvina: Five percent of the voting age population.

Dean Bender: Is what?

John Trasvina: Is Hispanic, or Asian American, or American Indian.

Dean Bender: In background, or are we talking about their actual language ability?

John Trasvina: Their background, based upon the census determinations. The second level of inquiry was, does that group have an illiteracy rate higher than the national average? If both of those things triggered, then you would have, under the Voting Rights Act, bilingual election services.

Dean Bender: Do you think that's adequate, or should that be broader? Suppose I'm in a place where less than 5 percent of the people have that background, or where not the requisite percentage of people are illiterate, and I don't speak English well enough to vote intelligently in English. Why should I be left out of the voting process?

John Trasvina: That only means that there is not federal attention to that problem; that the problem does not rise to a need for federal activity. States traditionally, under the law, control and govern the election process. States still provide bilingual services in French, in Greek, and in Italian in Massachusetts, in French in Maine, and in other languages in other states. This is an area of local flexibility.

Dean Bender: But I didn't think that numbers were important. If the State of X has a minority, say, of Black people in that state making up one half of one percent, can the state pass a law and say Black people can't vote because there are so few of them? In some ways that makes it worse, doesn't it?

John Trasvina: There are other federal provisions which address that concern. We're talking about what this law provides, and I'm saying what this law provides in the areas where there is a need for federal attention.

Dean Bender: I know you don't have enough to do as it is. I was just giving you something else to think about in your work for the Judiciary Committee. Why not think about expanding the coverage so it applies to everybody, even if they're the only person in a district who can't speak English?

John Trasvina: It's an attractive and a deceptive argument. It was used by Southern senators to say, well, let's have a national voting rights act for everybody. In 1970, in Katzenbach v. Morgan, the U.S. Supreme Court said that Congress could not do that unless there was a requisite record of discrimination, and that record of discrimination was clear for Hispanics in the Southwest. This does not preclude other groups and other individuals from getting language resources, or getting other assistance in order to vote.

Dean Bender: The existing federal legislation in this area turns on a finding or an assumption that there has been active discrimination in that place. In places that have not actively discriminated, as far as federal law is concerned, it is okay to

have English-only ballots, even though some people cannot understand them.

John Trasvina: No, there is also Section 2 of the Voting Rights Act, which covers other acts of discrimination and which does have nationwide coverage.

Dean Bender: You are an expert in federal law and the federal legislative system. Insofar as this Arizona proposal, if adopted, would forbid the use of bilingual ballots in situations where the federal Voting Rights Act would require it, what would the legal situation be if this Arizona provision were passed?

John Trasvina: Because of the supremacy consideration, the federal Voting Rights Act would govern. Even Stanley Diamond agrees that, in his terms, except where federally required, bilingual elections would be prohibited. The State of Arizona is covered under the federal Voting Rights Act, I think both state-wide and county-wide, so that this, by itself, would only conflict with, but would not supercede, the federal provisions.

Dean Bender: Insofar as this proposal would affect bilingual ballots, it would be unconstitutional if it would prevent bilingual ballots when the federal Voting Rights Act would require them?

John Trasvina: I'm not sure, and Professor Moran and I discussed this yesterday, whether this whole thing is unconstitutional on its face. I think it's ugly on its face, because it has brought about violence and intergroup ethnic tensions coast to coast. And there are many other ramifications, other than just voting and other than just education.

Dean Bender: Could you develop that? I like the idea that anything ugly is unconstitutional. Let's get some aesthetics into the Constitution. Assuming you can't do that, what is this argument you two were conspiring about yesterday -- to say that this whole thing is bad on its face? Regardless of any of these individual things we've been spending a lot of time talking about, bad on its face?

John Trasvina: Our debate yesterday was whether the U.S. Supreme Court has already ruled that English-Only legislation, such as the Nebraska Act of 1921, was unconstitutional. But getting back to this, and the debate as to whether we should push this language amendment or the other language amendment by the language rights group in Washington, what is really needed is not constitutional, not changing the constitutional protection, but addressing the problem of lack of language literacy and lack of language acquisition. One problem is that there are, right here in Maricopa county, 4000 people on waiting lists trying to get into adult English classes; the number in San Francisco is 2500,

the number in Los Angeles and New York together is up to 40,000. There is certainly a clear legislative need for more resources for adult English programs, something that the U.S. English group and English First have never supported. Last year there were 68 House co-sponsors of the English Proficiency Act, including John McCain, when he was a House member. That's been reintroduced in both houses this year. Not one of the supporters of the English Language Amendment in the House supported the English Proficiency Act. This year there are 75 sponsors in the House and eleven Senate cosponsors, including DeConcini and McCain again. And again, there is not the support from the English-Only groups for this legislation.

Dean Bender: So you're suggesting to those groups that if they really care about people being more literate in English they should, instead of cutting down those people's access to government and other rights because of their nonliteracy, affirmatively help them and encourage them to speak English by devoting more resources to adult education, education in public schools, and things like that?

John Trasvina: That's right. Without cutting off their access to voting, without cutting off their access to other educational services, without cutting off their access to public hospital care, which was the case in Dade County. It was not a U.S. English sponsored ordinance, but it was the Anti-bilingual

Ordinance of 1980 which got rid of prenatal care and post-operative instructions in Spanish to the patients at the hospital, and which got rid of other governmental services. It was even targeted to some private sector activities. Back to the original Diamond and Hermon colloquy about what their amendment means, there is not even a consistency between a legislative sponsor and the person who wrote the law as to what it means. You never want a constitutional amendment where even the proponents are inconsistent as to what it means.

Dean Bender: Professor Limage, from your more international perspective, how does this whole debate we've been having strike you?

Leslie Limage: Well, I'm going to do today what I didn't do yesterday. The whole spirit of what I am committed to as an international civil servant with a United Nations agency is partially contained in this Federation of American Cultural and Language Communities' statement. What I am professionally committed to, world wide, not just in the United States, is the recognition and preservation of cultural and linguistic heritages, and this is what I do professionally on a world wide basis.

Dean Bender: Have other countries adopted provisions like this recently?

Leslie Limage: There are a whole set of normative instruments, from the Universal Declaration of Human Rights to specific statements about protecting and preserving the cultural diversity of nations, which the United States has not ratified, and you're more knowledgeable, all of you, some of you anyway, why that is the case.

Dean Bender: The United States is notorious for not ratifying international agreements on human rights. Our system is so good that we don't have to worry about that. At most they would dilute our protections rather than . . . why are you laughing?

Leslie Limage: The alternative is to cry, to tell you the truth. I am also an American with a U.N. agency from which this administration has chosen to withdraw the United States. I don't interpret that as an unwillingness to recognize basic human rights, but I am concerned. Let me just leave it at that. So from the point of view of our discussion so far, I would indeed agree with the words you put into Joe Magnet's mouth. I would, of course, encourage this kind of approach to every country's constitution, including that of United States, on the one hand. But on the other hand, I am very convinced that the kind of an approach that has been discussed here yesterday and today is part of a larger economic and political climate very prevalent in Western Europe and the United States -- a conservative climate, a

climate of isolationism, a climate of xenophobia. This is a specific symptom that I'm worried about, and I'm not worried about it just here. I'm worried about it elsewhere. There is legislation, to respond to your question. I'm used to trying to be more diplomatic; I'm not used to this kind of relationship because we have 150-odd countries which are in a perpetual state of potential conflict in our forums. I am constantly searching for consensus while seeking to promote these normative statements about what ought to be the case in the world. Yes, indeed, there are countries which have enacted this kind of approach. Sweden, for example, in its own legislation and action, not only has an over-arching principle of preserving the cultural identity of its own tradition, it has extended these rights to its migrant workers who may not be citizens, who may choose to remain to be nationals of Turkey, Yugoslavia, etc. To a great extent I would say that this kind of approach is enshrined even in the approaches to language in the Union of Soviet Socialist Republics, and I hope that that would come up in discussion. Any of the multi-lingual countries that we have talked about yesterday, or we'll talk about again, have seen fit to enshrine this kind of approach in order to hold on to national unity. Diversity is important for national unity.

Dean Bender: That's an interesting and provocative statement, that diversity is important to unity. Don't those two things go in opposite directions?

Leslie Limage: That's not my personal view, nor is it the view of any of the normative statements of the United Nations. We believe that diversity, recognition of diversity; enhances unity.

Dean Bender: Perhaps the central question that we've all been talking about in one way or another this morning is whether we can have diversity with unity, or indeed whether we ought to enhance diversity and will reap from that the benefit of more unity. Mr. Diamond, we have all taken a lot of shots at you during the morning, myself included, and I think it's fair to give you a chance to respond briefly, and then we will open up the proceedings to some questions and comments.

Stanley Diamond: I have great difficulty with John Trasvina, both in misquoting me and in presenting his own position on facts. Since our constitutional amendment passed in California, there have been two bills introduced for the teaching of English to adult immigrants. An arch enemy of ours, Art Torres, is the state senator who was one of the leaders, along with John and other people in California who opposed Proposition 63. Senator Torres has a bill, for not very much money, five and a half million dollars, for the teaching of English to adult immigrants. I appeared in support of that bill ten days ago. Senator Gary Hart introduced a bill for twenty million dollars for the teaching of English to adult immigrants. I appeared in support

of that bill. There are others that we will support that lead in that direction, directly related to the passage of Proposition 63. So I think we ought to put that to rest as a position of U.S. English.

John Trasvina: Not completely, Stanley.

Stanley Diamond: Pardon me.

John Trasvina: Not completely.

Stanley Diamond: On the Torres bill and the Gary Hart bill, and your statement, the U.S. English has done nothing in this special area of teaching English to adult immigrants, it's the passage of Proposition 63. I just made two statements of fact on two bills. You say that didn't happen.

John Trasvina: Since the time you allegedly went up and supported that bill . . .

Stanley Diamond: Not alleged; I was there.

John Trasvina: You were there. The SB 9 is now one million instead of five million.

Dean Bender: Rather than getting lost in the details, Mr. Diamond, would you give us a brief reaction to Professor Limage's point, which I take it is diametrically the opposite of yours, that preserving diversity in fact helps national unity?

Stanley Diamond: We have always, and I have always, taken the position that -- you've heard me say it here at least two or three times -- all cultures, all languages, all customs are to be preserved. That is the history of this country; that is our heritage. I come out of a Spanish background myself. My father's family is Hispanic, my wife is Hispanic, my kids are bilingual in Spanish, and we tend, both in art and music and in other areas, to be Latino oriented. So I do bring that special sensitivity. I agree with the preservation. At the other level, I do have some difficulty with the idea that it enhances unity. Maybe I'll have to think about that for awhile. I've said this so many times; at the level of the language of common discourse, we want one language here in the United States. What happens in homes, etc., you've heard me say. This is where I separate with Professor Magnet. Although his home is Canada, and I guess he would know something more about it than I, I'm not too sure that the tensions are not there, and that the French and English are not irrevocably separated and will continue to be so in perpetuity. That's what we want to prevent happening here in the United States.

Dean Bender: Thank you all very much, but you're not finished yet. Let's ask members of the audience if they would like to start participating in this discussion. Yes, sir.

Question: I would ask Ms. Hermon to pay close attention, because later on things are going to get involved and it's going to affect us in Arizona very, very personally, particularly our children and our elderly people. My question is based on what we learned from California, where 73 percent of the people voted. I understand they were bamboozled into that vote. People claimed that some of the voters in California were misled about what the proposition was really designed to do. I agree with them. In addition, I would like to know why you think people from U.S. English should be the authorities on designing language legislation for the United States.

Dean Bender: The question is whether, in leading this movement, Mr. Diamond and Mr. Hiakawa are trying to become the authorities on what is English.

Stanley Diamond: The seventy-three percent of the vote in California supporting Proposition 63 included Republicans, Democrats, Independents, a majority of the Asians, a majority of the Hispanics, a majority of the Blacks. If you are saying they were bamboozled, then you are saying you the voters must be pretty stupid. Do you believe in the right of voters to express

themselves? Don't you think the 73 percent represent the democratic process? The power in this country is in the people, isn't it? We want to carry out the laws that are expressed by the people. And how are they expressed? They are expressed in the vote. Now are you saying 73 percent, 5,066,000 Californians, are pretty dumb and pretty stupid? Is that what you're saying?

Dean Bender: The answer, I think, is that the line between bamboozling and politics is a very difficult one to determine.

Jose Ronstadt: I just want to add that part of the myth that Mr. Diamond and Company create is that Hispanics overwhelmingly supported Proposition 63. I'm sorry that Willy Velasquez left, because they just published the results in the exit polls that showed that 72 percent, I believe, of Hispanics in California, of all Latinos in California, voted against Proposition 63. Mr. Diamond, to insist on using that false information to perpetuate your myth, I think, is unethical and I think it's unAmerican.

[Applause.]

Stanley Diamond: That isn't true, either. That's an exit poll. The Mervyn Field Poll shows between 47 and 53.

Dean Bender: There apparently is different data. I don't think

we should get involved in questions of which particular facts are accurate, since we can't verify them.

Question: One observation I would like to make is that the issue of U.S. English is, to a very high degree, a response to the issue of bilingual election service and bilingual education. My question is whether the sudden and substantial increase in Hispanic voting is due to changes in federal law or to something else.

Dean Bender: The question is whether the substantial increase in Hispanic voting which Mr. Velasquez described really is attributable to the bilingual provisions of the federal law or to some other phenomenon. Mr. Trasvina?

John Trasvina: Mr. Hudson, you were one of the authors of the Federal Elections Commission report in 1979, weren't you? And that indicated that the provisions were not working well because registrars and local officials were not implementing them properly. That's one of the reasons why it cost so much at the beginning. We had targeting afterward, in '79, '80, and '82. I served four years on the Elections Commission in San Francisco overseeing the implementation of, not only our consent decree, but also the bilingual provisions. It's clear in my mind that the increase in Hispanic voter turnout and Chinese voter turnout was directly due to the provision of those services, of the

bilingual services, when they were effective. Prior to '79, the Chinese bilingual materials were going up to the Mission district and the Spanish bilingual materials were going up to Chinatown. Clearly, the Voting Rights Act, for the first five years, had no impact whatsoever because it was not being implemented. But once it was being implemented well, and much more cost effectively, it did bring an increase in voter turnout and registration, and now we have elected officials, both Asian American and Hispanic, in San Francisco.

Question: Professor Moran, I want to know what effect the kind of proposition that U.S. English is putting forth will have on Blacks, because, as you know, in Martin Luther King Junior Elementary School Children v. Michigan Board of Education, a federal court held that students who speak "Black English" are entitled to special instructional assistance.

Professor Moran: Because the Martin Luther King decision was based on federal provisions requiring schools to account for the special needs of minority group children, it will remain in force. State provisions cannot supersede these federal requirements.

Dean Bender: Professor Weinstein.

Professor Weinstein: If 50 years from now, it turned out that the majority language in this country were Spanish, and most people communicated in Spanish, would you be in favor of having Spanish as the official language of the United States?

Stanley Diamond: I'd like to be around 50 years from now to find out. You started off -- I have to say that this applies to everyone here with the exception of the appellate court justice yesterday -- you started off, Professor Weinstein, by calling this English-Only, as did 22 of 23 who commented yesterday. You know, there's nothing in the constitutional amendment that says anything about English-Only. Do you know that you started that for everyone else at the Memorial Union? You started off falsely.

Dean Bender: What's the point?

Stanley Diamond: Fifty years from now, who's speaking Spanish, the whole country?

Dean Bender: Fifty, sixty, seventy, eighty percent of the people in the United States speak Spanish in 50 years. The question is, would you then be in favor of Spanish being the official language?

Stanley Diamond: I would like this to be in the form of a statute in the states and/or a federal law, and if I had a chance to vote on it, I would almost surely vote yes.

Dean Bender: That's a responsive answer. Yes, sir.

Question: I would like to ask you, as the national executive director, what are the national positions at the state and national level regarding taking a position opposing the Official English movement?

Jose Trevino: We have toyed with the idea of fighting, if you will, symbolism with symbolism. We think it's a more positive way to promote tolerance and pluralism. I know we can't regulate it. If it was possible, we probably wouldn't be here discussing it. What LULAC has done, working with the Spanish American League Against Discrimination, is to have coined the phrase "English-Plus," and indeed that's the project that we maintain in Washington as a clearinghouse on issues like this, and we have produced some publications. We've worked with a whole range of different groups and, just to show that there is diversity and consensus with the concept of English-Plus, we've got many, if not all, of the Hispanic organizations that work in and around Washington, and many organizations representing other citizen groups, who believe that we need to capture the high ground. Professor Magnet commented yesterday that we've been on the

defensive so much that we really haven't characterized an offensive or a positive approach to English-Only strategy. I know that it grates on Mr. Diamond when we do call it English-Only; their name is U.S. English. We prefer to call them English-Only because we see their temperature go up a little bit. I think that's important as well, given that we have been in a defensive posture and somewhat on the run in the past. But we've been successful in cities like, most recently, San Antonio; in Houston; in Atlanta, as I mentioned earlier in my presentation; Osceola County, Florida, in the Osceola County School District; and we're making efforts in other areas where Hispanics are a significant number of the population. City councils that declare themselves in favor of English-Plus are declaring that they do indeed favor pluralism, tolerance, and recognition of linguistic minority communities' contributions to their respective communities. So rather than take the negative approach, the low road, so to speak, we'd rather take the high road and take a positive approach and promote that concept.

Question: Representative Hermon, you indicated that you wanted to maintain the status quo. Obviously you were looking into your crystal ball when you said that. You wanted to maintain the status quo in the future. What is it, one, that you see as the threat to the status quo in the future and, two, who presents the threat?

Bev Hermon: I don't know that there's a threat as much as there is a perceived threat, and, of course, as a person who is part of representative government, I have got to consider whether that's a reality and what position I'm going to take on that subject. I don't think this bill changes anything, and I do not like the language of the bill and a lot of what has been brought up today, but we made an assumption, when we came here today, that the proceedings would basically be in English. When we go to the theatre, we make that assumption. If we have, as California is anticipating, and I'm sure that was the major reason that this was passed in California, a situation where, by the year 2000 something, there will be more Hispanic population than "Anglo," whatever that means, they felt that it was time to decide to protect what they saw as the language of this country by putting this proposition into this particular form. Now, if you call that bigotry, trying to decide whether there is a language for conducting everything, I think that doesn't exclude other languages. I personally have no problem with the American culture and language communities' language. I'm just saying that maybe, because we anticipate that, sooner or later, we will be bicultural, bilingual, you may need to decide what language ought to be the official language.

Question: So then you see that threat, that need for protection, here as in California. Do you see that the Hispanics have that

size of population that they create some sort of threat, for example, here in Tempe?

Bev Hermon: As I say, I am not threatened. I just don't see anything wrong with deciding, and I'm not sure why anybody else would be threatened. We're all here speaking English today; why not admit that fact and put it down in black and white?

Question: But you're a legislator, and you're supposed to be thinking and reacting to reality, and yet you're engaging in speculation; aren't you speculating about threats?

Bev Hermon: No, I'm simply taking a reality that exists and saying, this is what we will continue to do in the future.

Dean Bender: So you are saying that you think it is legitimate and, indeed, wise to preserve the notion that when we go to a conference like this we all expect to speak English. What people do by themselves, in their own homes, is up to them, but you want to preserve the idea that the language of common discourse in the United States is English and English only. We can ask Joe Magnet to do his act in which he will mix French and English, sentence by sentence, indeed word by word, as happens in Canada. Is it true in Canada, Professor Magnet, that when you go to a public meeting, you expect the language to be French or English?

Professor Magnet: It depends on where that meeting is. But where important federal/state functions are taking place, one expects that the proceedings will be conducted in both languages. I must say that I had some expectation that we would hear some Spanish spoken at either the proceedings yesterday or today, and I was rather curious to see how that would be implemented and what the reaction to it would be, and a bit disappointed that I did not have that opportunity.

From the audience: That's because we've been assimilated. If a person can speak Spanish and English and chooses to speak English, then he or she is assimilated.

Professor Magnet: I must say that there is something to be learned in the histories of colonized and assimilated peoples throughout the world, some of whom exist in Canada. They exhibit certain common personality traits, certain common attitudes toward the majority populations, and certain common introversions, and common fears, and it's useful to survey that literature. We now know quite a bit about colonized and assimilated peoples. We want to see if we can learn something from it, so that the grosser forms of distortion, social and personality distortion, can be ameliorated and avoided.

Question: In the area of health services there is much concern about issues of medical and environmental protection of public

health. First, for example, in a hospital, by statute, you must have what is called "informed consent." I think any person, regardless of that person's origin or language, ought to know why he or she is getting cut or having an organ taken out, and we ought to have informed consent that allows the doctor or the surgeon to perform surgery or treatment. Secondly, I also ask from the standpoint of a broader perspective of public health, with regard to venereal disease, tuberculosis, AIDS, etc., that we ought to have the authority to translate. We testified with regard to that. I might add that when I was testifying, Mr. Diamond, or one of his associates, whispered in my ear, when he heard what I was saying, and called me devious and repeated it three times. I asked, if the legislation would be passed, that you consider putting in language allowing us to do this, if for no other reason, for the protection of children. This was not paid attention to. My question is this: how can we, in a shrinking world, provide for national security, for international competition, and then turn around and implement initiatives that stop, very abruptly, language facility at an early age? I don't understand how, at the same time, at the national level, foreign services are crying and begging for bilingual, multi-lingual people who will represent this country from a national perspective, for national security, for national competition, to maintain our country's strength. How can you, as a legislator, support this legislation?

Bev Hermon: The hearing you're speaking of was, of course, covered in the newspaper, and I was really not very aware of this particular subject and the complexities of it until I read where you were quoted in the newspaper telling the impracticality of not having the availability of the second language in the various roles that you perform in your daily job. The bill as written and drafted would need a great deal of work before I would ever support it in a final version. I also agree with your concept that we need to be multilingual, all of us. But you also have to decide what language you're going to print Arizona state statutes in. I'm just trying to provide some kind of practicality here, and that's the reason I signed on the bill to start with. I doubt that this is ever going to move through the Arizona legislature until those kinds of questions are answered. I would expect it, however, to probably be an initiative before too long. Did I answer your question?

Question: Yes. Where would you stand on an initiative if it were passed as proposed by Mr. Diamond?

Bev Hermon: With this language? No. It would have to be clarified.

Question: I'm going to ask a question, but first I'd like to say a few words. In 1939 here in the City of Phoenix. . .

Dean Bender: Few; keep the emphasis on few.

Question: The Convention of the Arizona Education Association faced the problem of children learning English when these children were speaking Spanish all the time on the playground and in the classroom. The convention passed a resolution that created a committee for the study of the subject in this state. And they concluded with sincerity and integrity to do everything possible to get the children, from the time they entered the playground, to use the English language, on the assumption that this would be the place where they probably would live for the rest of their lives. And because the English language is the super language of this country, the commercial language of the world, it was necessary for them to learn English, and the teachers should give adequate attention to that responsibility. Now, what is it that motivates Mr. Stanley Diamond and his cohorts to try to bring about a legalization of a language and, by inference, violate the sacred trust, privileges, immunities and rights of citizens, that should never be abridged in this nation? This I'll ask Mr. Diamond. Where do you think the passage of this legislation in Arizona would lead, and what is your motivation; what good do you think this will bring to the strength of this particular nation, to the betterment of the community of the nation, to the better understanding of the life of the community, and to the communication between the peoples of this nation?

Stanley Diamond: Very simple, I've said it over and over again. A language of common discourse that we all speak, all understand, is critical in maintaining our unity, to be able to travel from Maine to Phoenix to Los Angeles and all speak and understand each other. Now, to speak to each other, to understand each other, if we disagree, to understand and explore our disagreements, that's one of the major reasons. I react negatively to your talk about English as some kind of a super language, as though it is God-given. It isn't. It just happens to be the language of this country. It's no better, no worse, than any other language. I don't want to give it the kind of exaggerated importance that you seem to level on it. I don't know if I'm answering your question, but I would hope that what I am saying is an invitation, in your case here in Arizona as it is in California, to Hispanics, the dominant minority, to join the family and become part of our American society.

Dean Bender: One final question. Yes.

Question: Would this amendment have any special impact on Native American reservations within Arizona, in light of their special status?

Dean Bender: Ms. Zepeda.

Ofelia Zepeda: That was my question also. Yesterday there was information presented about certain indigenous communities, meaning tribes in Arizona, who have already adopted, for instance, official language policies where they stipulate the status for their languages and proposals for the future development of their languages. Those are, of course, legal and binding for the tribe, and I don't know how the state law or this particular amendment, if it should pass in whatever form, would impact or could be enforced on reservation communities.

Dean Bender: Right. It's a difficult legal question. Professor Moran.

Professor Moran: Just one brief followup. Under the Indian Self-Determination and Education Assistance Act, the federal government has declared that parental and community control of the educational process is of crucial importance to Native Americans. The Secretary of the Interior can enter into contracts with states or their political subdivisions to provide educational services to Native American tribes. The Secretary can only approve such agreements if contractors have submitted educational plans that adequately address the needs of Native Americans students and promise to meet those needs. Tribal advisory committees are given an opportunity to participate in the development and evaluation of such plans. In addition, tribes may receive assistance to operate their own private

schools. These federal processes will continue to govern the education of Native American students, regardless of whether Arizona passes an official language provision. To the extent that these processes yield a commitment to bilingual-bicultural education, this form of instruction will continue, because no state law can override these federal laws.

Dean Bender: Ms. Mendoza, do you have any special wisdom to bring to this?

Nancy Mendoza: I was going to reiterate the issue, the one of local autonomy, which is pervasive throughout all of the statutes that relate to public schools. There are certain broad parameters, in terms of selection of curriculum and programming. We're seeing more and more extensive permission given to local school boards to make those determinations. And I think this is one area related to indigenous populations that the U.S. English movement has really failed to address adequately, because all of their remarks are in terms of immigrant populations, and we are not talking about immigrant populations here.

Dean Bender: In this context, it is we who are the immigrants. Before we go, shall we thank the panelists for a wonderful job? Thank you all for coming.

English Only Policies and The Role of First Languages

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This is a paper which is included in the volume Official English and the Border States, edited by Karen Adams and Daniel Brink, currently under consideration for publication by the University of Arizona Press. It was originally presented at an international conference on Official English and the Border States, held March 27-28, 1987, at Arizona State University, which was sponsored by the Graduate College, the College of Law, the Interdisciplinary Linguistics Committee, and Antonio Zuniga, Esq. It is presented here with the kind permission of the editors of the volume in order to make the material available for consideration by policy makers in a timely fashion.

English Only Policies and The Role of First Languages in the Border States

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Discussions of the issue of developing an official English language policy in the United States and in the state of Arizona are curiously void of references to scholarly research on language, language policies, and bilingualism. This is particularly apparent in the popular media, where it appears that most participants are unaware of the existence of research that bears on the issues they are publicly discussing. Scholars should never be so naive as to believe that research evidence "speaks for itself" and they should not disdain communicating with the public. For scholarly research to have any impact on major policy decisions, our voices must be heard in public. Even in the case of conferences, disciplinary boundaries lead to a lack of awareness of relevant data and findings that bear on the issues. This paper reviews relevant research studies in English as a Second Language (ESL), bilingualism, cognitive psychology, psycholinguistics, sociolinguistics and education which address major issues raised by the proponents of official English policies.

English Language Instruction and Language Loyalty in Arizona

An issue commonly raised by Official English proponents is that there are large numbers of speakers of other languages "out

there" who are stubbornly refusing to learn English. What is the evidence for this proposition in Arizona? Evidence could be adduced in a variety of areas. One would be lack of enrollment in English as a Second Language or bilingual classes or classes cancelled for lack of enrollment. It must be remembered that American Indian languages and Spanish are the original indigenous languages in Arizona and much of the West. Widespread use of English in Arizona is quite recent. Arizona celebrated its 75th anniversary of statehood this year. Portions of Arizona north of the Gila River came under the jurisdiction of the United States in 1848 by the Treaty of Guadalupe Hidalgo, and the remainder in 1854, via the Gadsden Purchase. Especially for many American Indian groups, widespread contact with English did not begin until after the Second World War. The first issue concerns language loyalty and language choice. Many Indian tribes are either officially (Navajo, Tohono O'Odham, Yaqui) or unofficially in favor of the continued maintenance of their native language, but they are equally concerned that their children develop a high level of English language proficiency. All of the Indian languages spoken in the United States are endangered, including Navajo, the language of the largest tribe in the United States, which is spoken by perhaps no more than 60 percent of Navajo people (Platero, 1986). At the individual level, many parents have made a conscious decision not to transmit a language other than English to their children because of their hopes for academic success for their children. For Hispanics, Spanish

language loyalty is much more varied, since Hispanic communities do not exist as governments or sovereign entities as individual tribes do. Available research evidence indicates that the Spanish language is not being maintained in the United States, especially in the Southwest (see articles in Barkin, Brandt, and Ornstein-Galica, 1982).

In an attempt to answer the question of whether there were large numbers of individuals who refused to learn English, data were compiled from a variety of sources. The need for instruction in English below the adult level is the function of schools which under state law (Arizona Revised Statutes 15-751-756) must assess each student's language proficiency in English and the student's native language and provide either a bilingual program or an ESL program if the child is Limited English Proficient (LEP) until sufficient proficiency in English is achieved so that such instruction is no longer necessary.²²

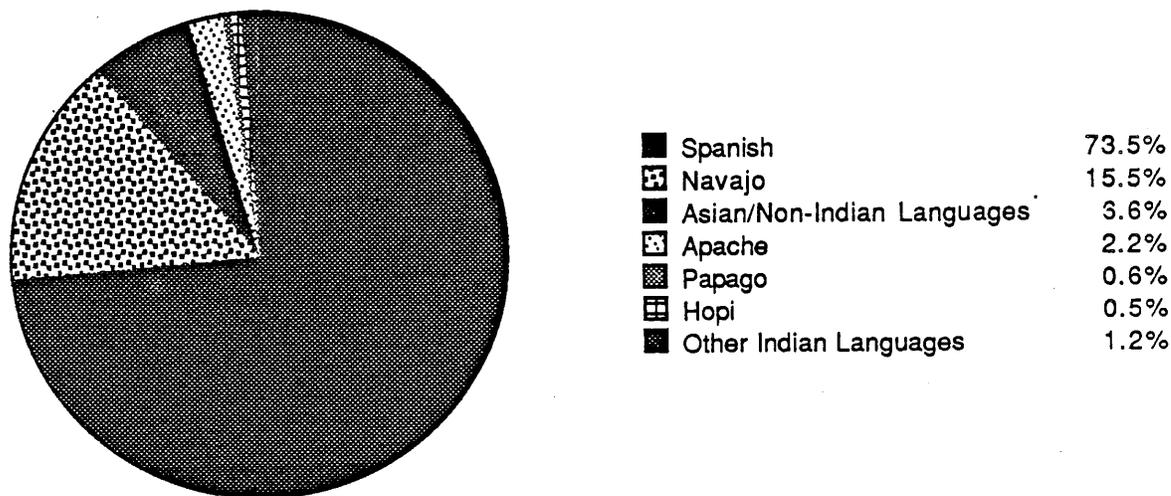
²² State Board of Education Rule R7-2-306 requires that the primary home language of all students shall be identified upon enrollment forms and on the home language survey. A child's primary language will be considered to be other than English if the language spoken most often in the home is not English, if the language spoken most often by the student is other than English or if another language was acquired first. Once such a determination has been made, all such students must have an oral language proficiency assessment test approved by the State Board given to assess the English proficiency of the students. If they fall below the publishers' cut-off score for fluent English proficient they are then classified as LEP students if they are in grades K-1. Students in grades 2-12 may be screened by the achievement level on the English reading comprehension subtest of the state pupil achievement testing program. If they score at or below the 40th percentile, then they will be given an oral language proficiency test and in addition will be assessed in their primary language. Limited English Proficient students shall be provided a program as prescribed in ARS 15-754 and the

Although provision of such services is mandated in Arizona, less than half of low-achieving Limited English Proficient language minority students are receiving such instruction (Mendoza, 1986). The first report of program services offered to students under the new law found that 84 percent of all students had English as their primary language and 90,228 or 16 percent were identified in the 1984-85 school year as having a primary language other than English (Arizona Department of Education, 1985). Of this number 31,563 or 34 percent were classified as LEP students. For the 1985-86 school year, English was the primary language of 83.83 percent of all students; Spanish of 11.38 percent; Indian languages were the primary language of 3.32 percent, with Asian and other non-Indian languages accounting for 1.06 percent (Arizona Department of Education, 1986). The 1985-86 figures show a total of 96,674 students in Arizona with a primary home language other than English. Of these, 38,747 students were assessed as Limited English Proficient (Arizona Department of Education, 1986:46). Thus, about 40 percent of children whose primary language is not English are classified as Limited English Proficient. The majority of LEP students are concentrated in the large urban districts of Maricopa and Pima counties and in lower grade levels. Arizona school districts provided service to only 35,388 LEP students, leaving 3,359 students unserved.

State Board of Education's course of study pursuant to R7-2-301-302. Students may be reassessed at any time, but must be tested for reclassification to fluent English proficient no less than every two years. (State Board of Education Rule R7-2-306.)

The figures reported here probably represent a massive undercount, since one large school district did not report at all and 54 percent of all districts did not reassess the language proficiency of their LEP students as required by state law. These students are concentrated in kindergarten and the first grade. There are forty-five different language categories or codes which can be reported. Figure 1 represents the languages in percent spoken by this group of students in Arizona. There has been an increase of over 6,446 students in Arizona schools over the 1985-86 school year.

Fig. 1 Non-English Languages



(Adapted from data and a graph in Arizona Department of Education, 1986)

Any school district with ten or more LEP students in kindergarten or any grade in any school must provide either a Bilingual Program or an English as a Second Language program.

Arizona State Law (ARS 15-754) provides a choice of four distinct allowable program options: 1) a K-6 Transitional Bilingual Program; 2) a 7-12 Structured Bilingual Program; 3) a K-12 Bilingual-Bicultural Program; and 4) an English as a Second Language Program (Arizona State Department of Education, 1985:14). Appendix 1 provides the full program definitions for allowable program models which fulfill a school district's responsibility in meeting the English proficiency needs of its LEP students. In the 1984-85 school year, many schools offered more than one model because of the differing needs of their students, and 78 school districts reported not implementing any model. At least 58 school districts were in violation of state law in this respect, since they had identified LEP students but provided no programs for them (Arizona State Department of Education, 1985:15). The most popular program options are ESL programs, followed by Individual Education Programs.

School districts with fewer than ten LEP students must provide either one of the programs described above or an Individualized Educational Program which will meet the cultural and linguistic needs of the LEP students. This program option is defined by ARS 15-74 (Arizona State Department of Education, 1985:15) as:

Individual Education Program - a systematic, individualized program of instruction designed to ensure equal educational opportunities for the student by promoting English language development and by

sustaining normal academic achievement through the use of the pupil's primary home language for subject matter instruction, to the extent possible. Under the supervision of a certified teacher, primary home language instruction may be given by paraprofessionals, community members, or pupils with proficiency in the primary home language serving as tutors.

Although Arizona has one of the most far-reaching laws in the nation dealing with the assessment and provision of services for language minority children to ensure that they become proficient in English and that their language and academic skills are correctly assessed (Arizona Revised Statutes 15-755), even after the second year of implementation, large numbers of schools are still out of compliance and failing to serve the needs of young children for English instruction. Proposed legislation for an English Only policy would impact upon these programs, since only one model, ESL, would be permitted by the language of these proposals.

What about adult needs for English? In Arizona, there are 508,000 adults who lack a high school diploma. The Division of Adult Education, Arizona State Department of Education has responsibility for GED preparation programs, the GED testing programs (45 testing centers state-wide), citizenship programs, English as a Second Language at two levels -- basic and advanced, and Adult Basic Education, also with two levels of competency. Students in basic English as a Second Language courses use them

to develop skills that make English a primary or principal language, developing language arts skills such as literacy. Many students may be illiterate in their first language as well as in English. The courses are taught by a process utilizing the native language to move to using English as a primary language. When a student achieves a higher degree of proficiency, he or she moves to the advanced level. Courses such as these would also be prohibited were currently-worded proposals for English Only to succeed.

There were 6,095 adults enrolled in entry level basic ESL programs in Spring 1987. There were 3,237 students enrolled in advanced levels last year. By ethnicity, these are the figures:

Table 1. Ethnicity of Students Under Jurisdiction of the State Division of Adult Education, Arizona State Department of Education:

White	570
Black	84
Hispanic	7,063
American Indian	27
Asian	1588
Total	9332

(Statistics on Adult Education, Basic Education, Arizona State Department of Education, 1987)

As can be seen, Hispanics make up by far the largest number served. Dr. Gary A. Eyre, Director of the Division of Adult Education, Arizona State Department of Education, estimates that his office is able to serve less than 10 percent of the need in the state for educational services, due to lack of funding. Funds are provided by both state and federal government in this area. The Arizona State Department of Education is not in favor of Official English legislation, since by practice, English is the official language in jobs, retail establishments, and the majority of other contexts. The students in these classes are well aware of the status of English. Adults who wish to take English courses are often unable to find a place in such courses. ESL courses offered through the Maricopa Community College District for adults in the Spring of 1988 had to be increased and enrollments doubled.

As can be seen from the data for both children and adults, there are, in fact, unmet needs for effective English instruction for language minority populations. In addition, the numbers of young language minority children are increasing, with the greatest percentage of increase in the major metropolitan areas of Phoenix and Tucson. There is no large group of individuals who are adamantly refusing to learn English. In fact, the need for English instruction, and the desire for it, is paramount among language minority populations. Neither school districts charged with delivering services to the young nor the adult

education agencies are currently able to fulfill the demand for services.

Is Bilingual Education Divisive and Dangerous?

Proponents of English Only policies often discuss the divisiveness and dangers of bilingual education. Here we deal with children and youth. The Canadian case of conflict between linguistic minorities is often evoked as a scare tactic. In fact, the cause of political separatism and social tension in Canada was the denial of language rights and the just treatment of cultural and linguistic minorities. Since the enactment of the federal Official Languages Act, which guarantees the right of French speakers to equitable participation in the civil service, and the expansion of this act, there has been no true support for political separatism. As Magnet (1987:4) shows, "It is the refusal to respect linguistic differences which leads to political difficulties in Canada, not the other way around."

There is a sizeable body of data on the history of bilingual education in this country, the outcomes of various teaching methodologies, theories of bilingualism, and theories of first and second language acquisition and learning. Often, it is argued that prior waves of immigrants did not have bilingual education and still acquired English, but this view is false. Bilingual education and ESL instruction were common from the 1800's on. In my own family, my grandmother, who was born in Indiana of German-speaking parents in the last century, attended

German-English bilingual schools and churches. Ohio had a sizeable bilingual program for Germans who arrived after 1848 (Faber, 1987). In 1869, Wisconsin organized foreign language instruction to attract Norwegian students to public schools. New Mexico did the same for Spanish students in 1884. Classes in English for immigrants were organized on a voluntary basis all over the country and taught by female school teachers who were not paid for this service.

After World War I, twenty-one states enacted laws which made English their official language and barred the teaching of other languages in schools, especially German, due to sentiments against Germany's role in the war. I learned very little German as a child, even though members of my family on both sides spoke German. When I asked my oldest cousin why we had never spoken German in our family, he told me that the family decided the feelings against Germans were too strong and that any indication of German language knowledge or use often resulted in attacks and beatings. After members of the family had been assaulted, my family chose not to speak German, except in very private contexts. Although the U.S. Supreme Court declared the Official English laws of many states unconstitutional in 1923 in the Meyer v. Nebraska decision, they continued to be official policy.

As a consequence of these policies which eradicated language proficiency in many European and Asian languages, the U.S. was woefully unprepared linguistically during the Second World War and thereafter. Such concerns led Congress to pass the National

Defense Education Act, which funded programs and students in order to develop a national capacity in foreign languages at the level of higher education after this capacity had been eradicated at the levels where they already existed. It was through funding provided under this act that I finally learned German fully and was able to complete my education as a linguist. Since the 1920's and 1930's the U.S. has experimented with Official English legislation, oscillating between bilingual and ESL instruction, Official English policies, and then policies to remedy the effects of such legislation. We are currently attempting to improve instruction in English and foreign languages. The Federal government has recently funded a national research center for this purpose located at UCLA.

Opposition to Bilingual Education in English Only Movements

Much opposition is directed, in the Official English movement, against programs in bilingual education. Much of this opposition is based on a misunderstanding of the nature of bilingual education and the role of the first language in the acquisition of a second, in this case, English. A common view is that there is a linear relationship between English exposure and English fluency -- the more English exposure, the more English learning. This common sense view, while plausible, is not supported by the research evidence. Stephen Krashen, a leading second language researcher, argues that the only causal variable in second language acquisition is the need for comprehensible

input (Krashen, 1981). All other variables work only when comprehensible input is present. Comprehensive input does not mean simple exposure to the second language; rather, it is the provision of context and support to help the learner understand the message transmitted in the second language. Critical to the process is interaction with a speaker. Given our models of instruction, most classes consist of very little interaction with teachers or with other students. But many methods can provide this, such as certain ESL methods, interaction with native speakers and other speakers of the language, the presentation of known material or content in the second language, and extensive context. It is critical that students move from the known to the unknown, and are able to find a value for what they already know. Many methods have also been shown to be very ineffective. These include "submersion," or sink or swim classes, grammar drill, repetitive drills (the audiolingual method), and grammar-translation. Translation of material in bilingual classes has also been shown to be ineffective, as learners simply listen to the language they know for the information. Huge numbers of ESL classes rely upon grammar drills for the teaching of English, one of the most ineffective methods for language teaching.

In addition to method, a number of other factors come into play when learning a second language, such as individual differences and motivation. Krashen also argues that a major constraint on L2 acquisition and learning is the affective filter. According to his Affective Filter hypothesis, language

learners who are put on the defensive, who are anxious, or who dislike those who speak the language, will develop a mental block which prevents them from using input from the second language.

There is significant evidence for this in Arizona. In fact there used to be laws against teaching in languages other than English. In Arizona one such law was repealed in the early 1970's. The prohibition against other languages did not lead to increased achievement or English acquisition on the part of language minority students. Students, in fact, were severely punished for speaking their native languages in school, even during recesses or in dormitories in Indian boarding schools. Factors such as this led students to hate school. School runaways and dropouts were frequent among Indian and other language minority children. According to one teacher on the San Carlos Indian Reservation, punishment for speaking Apache consisted of chaining students to the desk with leg irons. One prominent Navajo educator, when asked about the best thing he had done in his life, stated, "I ran away from school. That should count for something."

We have significant amounts of experience with high affective filters which are created in students by policies such as these in Arizona and other areas. We know that such punitive policies do interfere significantly with the development of proficiency in English in school settings. We have created a significant legacy of school failure over generations for Hispanics and American Indian children by school-based English-

Only policies and ineffective methods for teaching English. I can think of no reason to repeat policies which have been a national disgrace.

The Effect of a Minority First Language on School Achievement

Other major questions of concern are: What impact does the use of a first language have on school achievement? What impact does the use of the first language have on language proficiency in the first language and in English? Does first language fluency affect student achievement, lead to greater student dropout, or impair their English language proficiency? These views are widely held often by school administrators and sometimes even by other colleagues.

There is, however, a body of research that demonstrates that use of the first language improves academic performance. Rosier and Farella (1976), in a study conducted at Rock Point School on the Navajo Reservation, found that instruction in Navajo with a transition into English reading skills after Navajo reading skills had already been established (around mid-second grade) made a dramatic difference in student performance and achievement. Students in this school had been two years behind national norms in spite of six years of intensive English instruction. When Navajo literacy and language development was continued for several years, they were able to make a transfer from the skills in Navajo to English, and their performance

improved until they were above U.S. norms with considerably less instruction in English.

This is not an isolated finding. Hirst (1986) analyzed the mathematics, language and reading achievement scores of Indian Chapter I students on the standardized California Achievement Test in seven elementary schools -- 3 contract schools under local community control and four Bureau of Indian Affairs (B.I.A.) schools under the control of the BIA Phoenix Area Office over a four year period (1980-84). Local community control was touted as a means of bettering the school experience for Indian children and as a way of increasing achievement and retention. Hirst's analysis hypothesized that students in such schools would have higher scores, but this was not the case. After testing the effect of variables such as teacher/teacher aide tenure, administrative tenure, length of time as a contract school, and the primary language of the teacher/teacher aide, only the language variable had an effect upon student scores in reading and language. If the teacher/teacher aide spoke the first language, the students scored significantly higher in reading and language, but this had no effect upon mathematics scores. The local control variable had no effect upon achievement. Scollon (1981) found similar patterns in his study of Alaskan Native students and teachers.

Renker and Arnold, in a study with Makah, an American Indian language spoken in Washington state, found that school involvement with Makah language and culture increased Makah

language proficiency by 12 percentage points compared with preschoolers. On the basis of their community language survey they found a positive effect for English as well. Ninety-two of the students with Makah proficiency were judged to speak English "very well" compared to students non-proficient in Makah, whose English "very well" rating was only 62 percent. Two independent school evaluations (Leap and Cissna 1984; 1985), as well as a later reservation language survey, showed that the introduction of Makah language in school had a positive effect upon Makah students' achievement on standardized tests. Language Arts scores on the California Test of Achievement showed an increase of 18 points. Prior to the introduction of Makah language instruction, children showed a "performance gap" between their scores and those of non-Makah children. After five years of Makah instruction in school this gap had been reduced by 83.6 percent. The dropout rate of Makah students also decreased slightly.

These sorts of results are not limited to Indian communities. A recent large scale evaluation study commissioned by the U.S. Department of Education to determine the effectiveness of the English immersion method found similar results for Hispanic students. Critics of bilingual education have argued that the way to improve English proficiency is to immerse students in English. The reasoning is that the more English instruction the students have the greater their proficiency should be. The Department of Education under current

secretary William J. Bennett has argued that bilingual education has failed and favors greater "flexibility" in instructional methods, such as English as a Second Language (ESL) and immersion for Limited English Proficient (LEP) children (Fiske 1985:B-44; Hertling 1985). A four-year study (Crawford 1986:10) was conducted comparing 4,000 students in kindergarten, 1st grade, and 3rd grade under three different program types: immersion classes, "early exit" or transitional bilingual education, and "late exit" or bilingual maintenance programs. The amount of English used in each condition was carefully monitored, with English used 90 percent of the time in the immersion classes, 67 percent in the early exit classes, and 33 percent in the late-exit programs. The immersion programs were different from the "submersion" programs of the past. The instructors were often fluent in the children's native language and the instruction was geared to the student's English proficiency level. Immersion programs have been quite successful with middle-class language majority students in Canada who are acquiring a minority language (French), but some researchers have seriously questioned whether the Canadian experience can be transferred, due to such differing factors as culture, social class, and status of majority v. minority languages in the U.S. First-year results of the evaluation were opposite to the initial hypotheses. They found that the larger the native language instruction component, the better the students performed in English. The English immersion students performed the worst in English language: the greater

the exposure to English, the poorer the students performed. Apparently as a consequence of such politically explosive findings, the study was cancelled.

Cummins (1981) has a theoretical explanation for the findings showing a strong connection between first language instruction and improved achievement in English and other areas. He proposes the Common Underlying Proficiency (CUP) Model of Bilingual Proficiency in contrast to the Separate Underlying Proficiency (SUP) Model upon which methods such as immersion or ESL are based. The SUP model assumes that there is a separate proficiency in each language, and therefore content and skills learned in one do not transfer to a second language. If we want to increase proficiency in the language, we provide greater input in that language. Cummins (1981:23) states, regarding the SUP model: "However, despite, its intuitive appeal, there is not one shred of evidence in support of the model." This appears to be the case even in more recent studies such as the Department of Education study. The CUP model argues for a unitary model of proficiency underlying both languages, so that experience with either language increases the common language proficiency, assuming that the person has adequate motivation and exposure to both languages in or out of school. He refers to this as the Interdependence Hypothesis (1981:29). Evidence of the sort presented above supports this model as well as other lines of inquiry.

While we have focused on positive studies that support a relationship between instruction in the first language and enhanced achievement and language proficiency, there are studies that show negative consequences of bilingualism for students in situations where their L1 is being replaced by a more prestigious L2. To explain these findings Cummins (1976; 1981:39) postulates the Threshold Hypothesis, which states that there are two threshold levels. If low proficiency is attained in both languages, there are likely to be negative cognitive effects. If the first threshold is obtained, with native-like control in one language, then negative effects can be avoided but positive cognitive benefits may not be present. If the second threshold is attained with high levels of proficiency in both languages, then positive cognitive benefits will be achieved.

Collier (1987) reported a series of findings which also support the model of Common Underlying Language Proficiency. Her data confirm Cummins (1981) earlier findings that the development of cognitive-academic proficiency in English takes a minimum of four years, and may take eight years or more as measured by standardized tests for the most advantaged Limited English Proficient students. Her work confirms that fluency in a first language can assist students in acquiring a second language. She shows that continued development of young children's first language cognitive-academic proficiency from ages 4-12 significantly increased their cognitive-academic proficiency in the second language. For secondary students, her data show that

students are most in need of content area classes in their native language while they learn English. If these are not provided, they fall further and further behind in content studies. These data support the provision of content area classes teaching the second language as soon as possible, as well as the provision of content area classes in the native language. The data support bilingual models and perhaps the development of accelerated content areas classes for advanced students in ESL. Students cannot afford the time it will take them to acquire English, four to eight years, without learning content area courses. Her work has been focused on the most advantaged students. Those who have little or no formal schooling, or whose schooling has been interrupted, are an even greater challenge.

To return to the questions posed at the beginning of the section, we are now in a position to answer some of them. Because the development of cognitive-academic language proficiency is a very slow process of four to eight years, it is critical that students receive content area instruction in the first language while they are learning English, or that content area courses be used to teach English, since children cannot afford to wait the years to learn the rest of the curriculum. The student's first language should be incorporated into schooling because it has positive effects on overall language proficiency, increases first and English language proficiency, improves achievement on standardized tests, and may prevent some student dropout. This is most critical for students in the

secondary years. Regardless of political persuasion, it would be hard to find an educator or legislator opposed to increasing standardized test scores, raising English proficiency or lowering the dropout rate.

The data show that the development of language fluency in a second language is a lengthy process taking a minimum of four years and often more than eight. Students who have formal schooling in a first language are able to transfer their skills to a second language. If schools are unable to provide schooling in a child's first language, then community and parental resources should be used to provide continuing first language literacy development and vocabulary, so that children's cognitive and academic skills continue to develop.

First language fluency does not seem to cost students achievement or to impair English language fluency. In fact, the research evidence supports the view that providing additional development in the student's first language increases English proficiency, assuming that the student has achieved a minimal threshold or better in at least one language. For these findings to have any impact upon the educational community, the Indian and Hispanic communities, decision-makers, and those directly responsible for language planning efforts, they must be known and disseminated. The political decisions that affect the future of the nation should not be made without access to research findings on the topics of consideration. The provision of language fluency in English and the development of an informed and able

citizenry able to function in the high level tasks demanded by
today's technological world cannot be met by pursuing or
mandating language policies that have already proved themselves
to be ineffective.

Appendix 1 Program Options for Limited English Proficient Students

Under ARS 15-754 (Arizona State Department of Education, 1985:14)

1. K-6 Transitional Bilingual Program - an organized program of instruction which is conducted in kindergarten programs and grades one through six in which participating pupils receive instruction in and through English and the primary home language of the students. The principal goal of a Transitional Bilingual Program is to increase the English language proficiency and academic achievement of the pupils in order to transfer them to all English instruction when they meet the reassessment criteria as prescribed in ARS 15-753, subsection C.
2. 7-12 Structured Bilingual Program - a language learning program for grades seven through twelve consisting of a structured bilingual program to promote English language proficiency and academic achievement through the use of the pupil's primary home language for instruction in the elective and non-elective content courses required for graduation.
3. K-12 Bilingual-Bicultural Program - for kindergarten programs and grades one through eight, or for kindergarten programs and grades one through twelve, consisting of a

system of instruction which uses two languages, one of which is English, as a means of instruction. It is a means of instruction which builds on and expands the existing language skills of each participating pupil, which will enable the pupil to achieve competency and literacy in both languages. This instruction shall include the history and culture of this State and the United States, as well as customs and values of the cultures associated with the languages being taught.

4. **English as a Second Language Program (ESL) - a formal ESL program consisting of:**

(a) Daily instruction in English language development including:

- (i) Listening and speaking skills
- (ii) Reading and writing skills
- (iii) Cognitive and academic skill development in English

(b) A plan to develop an understanding of the history and culture of the United States as well as an understanding of customs and values of the cultures associated with the primary home language of the pupils in the program.

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