Bilingual Education as a Status Conflict

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America has evolved for the better. She will pretty much meet you on your terms. In fact, I think that she has finally come to the conclusion that the Blacks, Mexicans, Indians, etc. are here to stay. And the only way to perceive them is to accept them and their existence as valid. Acceptance, that's really the key word. America is accepting all the people, as one people, the way it was meant to be. Today, at least, you can afford to be yourself.

—Maria, a Hispanic social worker¹

We have room for but one language here and that is the English language, for we intend to see that the crucible turns our people out as American, of American nationality, and not as dwellers in a polyglot boarding house.

—Theodore Roosevelt, as reprinted in a recent U.S. English brochure²

These voices bear witness to the conflict engendered by ethnic, linguistic, and cultural diversity. Especially since the 1960's, this conflict has frequently been addressed through the legal process, rather than through more informal means. Hispanics, for example, have repeatedly expressed concerns about their language and culture in promoting programs for non-English-proficient (NEP) and limited-English-proficient (LEP) children. They have often pressed for bilingual-bicultural education programs, which not only promote proficiency in English but also foster literacy in the native language and respect for the child's cultural heritage.³ Hispanics have also endorsed transitional bilingual education (TBE) programs that utilize subject-matter instruction in a student's

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1. Monreal, *Maria, Social Worker, Comments*, in *SIGHS AND SONGS OF AZTLAN* 100, 101-02 (F. Albi & J. Nieto eds. 1975).

2. U.S. English, *In Defense of Our Common Language* . . . (informational brochure, n.d.).

3. OFFICE FOR CIVIL RIGHTS, TASK-FORCE FINDINGS SPECIFYING REMEDIES AVAILABLE FOR ELIMINATING PAST EDUCATIONAL PRACTICES RULED UNLAWFUL UNDER *Lau v. Nichols*, at

native language until the child is sufficiently proficient in English to participate in a regular classroom. To facilitate acquisition of English, the child typically learns to read in both the native language and English.⁴

Critics of bilingual-bicultural education and TBE programs have argued that schools can best promote proficiency in English by minimizing reliance on the student's native language in the instructional process. They have pushed for English as a Second Language (ESL) and structured immersion programs. In ESL programs, linguistic minority children spend most of the day in regular classes but receive additional instruction in English for part of the day.⁵ Structured immersion programs use English to teach subject matter, although the teacher speaks both the native language and English. Children may ask questions about a subject in the native language, but the teacher generally responds only in English. The curriculum is structured so that extensive knowledge of English is not assumed as subjects are taught, and the program may provide thirty to sixty minutes of native-language instruction per day.⁶ In addition to advocating these alternative instructional approaches, some opponents of bilingual-bicultural education and TBE programs have supported English-only requirements in the schools to ensure the continuing preeminence of English.⁷

Typically, these disputes have been analyzed as yet another example of special interest groups' bargaining over the allocation of scarce resources. The crudest version of this analysis asserts that Hispanics support bilingual-bicultural education and TBE programs because they provide them with jobs as teachers and teachers' aides.⁸ For example, in an extremely influential article published in Harper's magazine in 1979, Tom Bethell stated that "[t]he bilingual education program is more or less the Hispanic equivalent of affirmative action."⁹ This view fails to explain why Hispanics have concluded that elementary and secondary schools provide a particularly fertile source of employment, especially in light of overall shrinking student enrollments.¹⁰ Perhaps Hispanics are

§ IX, pt. 1 (1975), reprinted in BILINGUAL EDUCATION 213, 221 (K. Baker & A. de Kanter eds. 1983).

4. *Id.* at § IX, pt. 5, reprinted in BILINGUAL EDUCATION, *supra* note 3, at 221; Baker & de Kanter, *Federal Policy and the Effectiveness of Bilingual Education*, in BILINGUAL EDUCATION, *supra* note 3, at 33, 35.

5. Baker & de Kanter, *supra* note 4, at 34.

6. *Id.*

7. See *infra* notes 55-64 and accompanying text.

8. N. EPSTEIN, LANGUAGE, ETHNICITY AND THE SCHOOLS 38 (1978) (remarks of A. Bruce Gaarder, former chief of the United States Office of Education's Modern Foreign Language Section); Bethell, *Against Bilingual Education: Why Johnny Can't Speak English*, HARPER'S, Feb. 1979, at 30.

9. Bethell, *supra* note 8, at 30; see also San Miguel, *Conflict and Controversy in the Evolution of Bilingual Education in the United States—An Interpretation*, 65 SOC. SCI. Q. 505, 512-13 (1984).

10. Levin, *An Analysis of the Federal Attempt to Regulate Bilingual Education: Protecting Civil Rights or Controlling Curriculum?*, 12 J.L. & EDUC. 29, 52 (1983). In California, there was a steady

unconcerned about this general decline because the population of NEP and LEP pupils is growing.¹¹ Still, it seems unlikely that these activists wholly failed to anticipate that English-speaking teachers would lodge objections based on their seniority if they were displaced by a bilingual education "jobs program" for Hispanics.¹²

Moreover, bilingual education statutes have typically included waiver provisions that enable English-speaking teachers to instruct NEP and LEP students while acquiring bilingual teaching skills.¹³ These provisions have been necessary because of the lack of qualified bilingual teachers.¹⁴ The prevalence of waiver provisions raises two troubling problems for those who treat bilingual education as merely a "jobs program" for Hispanics. First, it seems surprising that Hispanics would concentrate on generating employment opportunities in a field in which a pool of qualified Hispanics is not readily available.¹⁵ Second, once waiver

decline in enrollments during the 1970's but a gradual increase in the early 1980's. This increase is expected to continue as children of the "baby boomlet" enter the public schools. ASSEMBLY OFFICE OF RESEARCH, CALIFORNIA 2000, at 15 (June 1986).

11. *The Hispanic Population: Hearings Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 98th Cong., 1st Sess. 91 (1983) (statement of Dr. Gloria Zamora, President, National Association for Bilingual Education); *Bilingual Education: Hearing on H.R. 11 and H.R. 5231 Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the House Comm. on Educ. & Labor*, 98th Cong., 2d Sess. 124-25 (1984) [hereinafter *1984 House Hearings*] (prepared statement of Dr. M. Joan Parent, President, National School Boards Association). In California, a recent report indicated that by the 1990's, at least 15% of the students would arrive at school without any knowledge of English. ASSEMBLY OFFICE OF RESEARCH, *supra* note 10, at 15 (basing estimate on paper presented to California Board of Education by Norman G. Gold in 1985).

12. In fact, such objections did quite predictably materialize. See, e.g., *Morris v. Brentwood Union Free School Dist.*, 52 A.D.2d 584, 383 N.Y.S.2d 542, *leave to appeal denied*, 40 N.Y.2d 802 (1976) (granting tenured English-speaking teachers' petitions for reinstatement when they were dismissed while more junior bilingual teachers were retained); 60 Op. Cal. Att'y Gen. 80 (1977) (upholding district's right to retain junior nontenured teachers with bilingual competency while terminating senior tenured teachers without such competency where the district had adopted a bilingual education program pursuant to the California Education Code); 59 Op. Cal. Att'y Gen. 73 (1976) (same).

13. See R. IRIZARRY, BILINGUAL EDUCATION 24-25 (1978) ("Where teachers are not available with the established qualifications, provisions in the legislation frequently allow for exemptions."); ASSEMBLY OFFICE OF RESEARCH, BILINGUAL EDUCATION 18 (1986) (approximately 40% of the teachers in bilingual education programs in California have waivers; 60% of them are "non-Hispanic white.")

14. *1984 House Hearings*, *supra* note 11, at 56-57 (prepared statement of Gumeindo Salas, Chairperson, Michigan State Board of Education); *id.* at 72 (prepared statement of Dr. Gloria Zamora, President, National Association for Bilingual Education); *id.* at 84 (prepared statement of Nguyen Ngoc Bich, President-Elect, National Association for Vietnamese American Education); *id.* at 113 (prepared statement of Guillermo Lopez, State Director of Bilingual Education Office, California Department of Education).

15. Schoolteachers must be college graduates. Hispanics complete 10.5 years of schooling compared with 12.5 years for the non-Hispanic white population. The high school dropout rate for Hispanics is 18%, and in large urban areas, the rate is often found to be as high as 50%-70%. Of Hispanic high school graduates, fewer than 30% go on to college, a drop from 35.5% during 1975 to 1982. Of these, fewer than 50% actually graduate from college. Sotomayor, *Demographic*

provisions became a fairly uniform feature of bilingual education statutes, their potential as a source of jobs for Hispanics was considerably diminished. Yet advocates did not reduce their vigorous commitment to bilingual education by redirecting their attention to other programs for increasing Hispanic employment.¹⁶ Thus, although bilingual education programs have undoubtedly generated some jobs for Hispanics, this simple form of interest-group bargaining analysis hardly provides a comprehensive explanation of Hispanics' efforts to promote bilingual education reforms.

A more sophisticated interest-group bargaining analysis attributes the government's endorsement of bilingual education programs to Hispanics' growing political clout. According to this view, as Hispanics have grown in numbers,¹⁷ they have been able to exercise more influence over the political process in promoting their self-interest. Not only have legislators in general become more responsive to Hispanic views, but more Hispanics have also been elected or appointed to political office. In addition, Hispanic lobbying groups have become increasingly experienced and effective as they have gained greater access to the governmental decisionmaking process.¹⁸

While this view provides some helpful insights into the bilingual education controversy, it too is not a completely satisfying analysis. To

Characteristics of U.S. Hispanic Populations, in *HISPANICS IN AN AGING SOCIETY* 15, 17-18 (Torres-Gil ed. 1986).

16. Although Hispanics have always pursued other avenues of reform, such as employment discrimination claims, they continue to participate heavily in legislative hearings and litigation related to bilingual education. See, e.g., Avila, *Equal Educational Opportunities for Language Minority Children*, 55 U. COLO. L. REV. 559, 559, 569 (1984) (describing Mexican American Legal Defense and Educational Fund's investment of over one million dollars to identify and promote educational programs providing the greatest opportunities for Hispanic students).

17. Sotoinayor, *supra* note 15 (projecting that by the year 2000, the Hispanic population will be the fastest growing major ethnic group in the United States based on Bureau of the Census figures).

18. For various analyses of bilingual education policy that reflect interest-group bargaining considerations, see A. LEIBOWITZ, *THE BILINGUAL EDUCATION ACT 9-10* (1980); E. MOSHER, A. HASTINGS & J. WAGONER, JR., *PURSuing EQUAL EDUCATIONAL OPPORTUNITY* 13 (1979); M. REBELL & A. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS* 193-94 (1982); San Miguel, *supra* note 9, at 506. The analysis here is representative of these approaches without exhaustively describing their subtle variations.

Although the number of Hispanics elected to local, state, and national offices increased from 3,128 to 3,202 between 1980 and 1985, Hispanics still hold fewer than 1% of the nation's elected offices. Sotoinayor, *supra* note 15, at 18. Moreover, although the number of Hispanic women who were eligible to vote and went to the polls increased between 1978 and 1982, overall registration and voting participation for presidential elections during this period was lower than in 1972. In the last presidential election, 36% of Hispanics 18 years old and over indicated that they had registered to vote, but only 30% voted. *Id.* The consistently low voter turn-out among Hispanics presents some serious difficulties for an interest-group bargaining model that relies on Hispanics' growing political clout. It is possible, however, that legislators based their actions on a belief that Hispanics would mobilize more effectively in the future.

begin with, this approach does not explain why Hispanics consider bilingual-bicultural education and TBE programs to be of such central importance in advancing their interests. Hispanics have remained strong adherents of these programs, although empirical studies have produced mixed evidence on their effectiveness in promoting academic achievement.¹⁹ Even taking into account the methodological weaknesses of some of these studies,²⁰ an interest-group bargaining analysis does little to clarify Hispanics' unswerving support for these programs and their reluctance to substitute ESL and structured immersion programs.

Similarly, this analysis does not explain why English speakers with no direct stake in the dispute have dedicated themselves to imposing English-only requirements that would potentially eliminate bilingual-bicultural education and TBE programs. Obviously, English-speaking teachers whose jobs are threatened by such programs could be expected to intervene to protect their economic interests. More baffling, however, is the heavy involvement of English-speaking individuals who have little or no direct contact with the schools or with bilingual-bicultural education and TBE programs.²¹ Again, because interest-group bargaining analysis fails to address the underlying process of preference formulation, it can shed little light on this question.

To address these deficiencies in interest-group bargaining approaches, this Essay will utilize status conflict analysis to describe how participants in the bilingual education controversy have used language as a proxy for the status of their culture, customs, and values. It will argue that the participants' preoccupation with the respect and deference accorded to their way of life has strongly influenced the debate over bilingual education. Part I will first briefly recount the history of bilingual education policymaking at the federal level, examine two case studies of bilingual education litigation, and describe the bilingual education and English-only movements. After a review in Part II of earlier work on status conflicts, Part III will apply this theoretical framework to the poli-

19. *E.g.*, AMERICAN INSTITUTES FOR RESEARCH (AIR), EVALUATION OF THE IMPACT OF ESEA TITLE VII SPANISH/ENGLISH BILINGUAL EDUCATION PROGRAM (1977-78); Baker & de Kanter, *supra* note 4, at 50-51; Baker & de Kanter, *Assessing the Legal Profession's Contribution to the Education of Bilingual Students*, 1 LA RAZA L.J. 295, 309-15 (1986).

20. *See, e.g.*, INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION, THE AIR EVALUATION OF THE IMPACT OF ESEA TITLE VII SPANISH/ENGLISH BILINGUAL EDUCATION PROGRAMS (Eric Ed No. 151-435, 1977); Cardenas, *Response I*, in N. EPSTEIN, *supra* note 8, at 74-75. Recently, a General Accounting Office draft report concluded that the Department of Education had misinterpreted bilingual education research, thereby downplaying the benefits of native-language instruction for NEP and LEP children. May, *U.S. Faulted on Bilingual Education*, L.A. Times, Nov. 8, 1986, § I, at 20, col. 1.

21. For example, one of the leaders in the push for English-only reforms is an ophthalmologist from Petoskey, Michigan. Only about 200 of Petoskey's 6,100 residents are nonwhite, and almost all of them speak English. Trombley, *Prop. 63 Roots Traced to Small Michigan City*, L.A. Times, Oct. 20, 1986, § I, at 3, col. 1. *See infra* notes 58, 177-78 and accompanying text.

cymaking and litigation processes in the bilingual education field. It will also evaluate how status concerns have influenced the evolution of the bilingual education and English-only movements. Part IV will close with some tentative suggestions about the future of bilingual education policymaking and litigation, as well as the prospective development of the bilingual education and English-only movements.

I

AN OVERVIEW OF THE BILINGUAL EDUCATION CONTROVERSY

The debate over bilingual education has raged since the 1960's before a variety of governmental decisionmakers.²² This controversy will first be examined by reviewing the process through which relevant federal statutes were enacted and applied. Because Hispanics have frequently brought suit to enforce bilingual education provisions, this Part will next describe two empirical studies of such cases. It will then contrast the reform strategies employed by the bilingual education and English-only movements.

A. *The Policymaking Process*

In 1968, amid considerable fanfare, Congress enacted the Bilingual Education Act, the first piece of federal legislation devoted exclusively to the special educational needs of NEP and LEP children.²³ Witnesses expressed high hopes for the bill. They argued that bilingual education programs would promote academic achievement, thereby enabling Hispanics to participate more fully in the social, economic, and political life of the nation.²⁴ Several witnesses indicated that bilingual education programs were significant for Hispanics because they represented the schools' acceptance of the Spanish language and the best hope for mutual

22. There have been earlier disputes over language issues in the United States. The Founders decided not to establish an official language in the Constitution, in part because they feared that such a provision would infringe on the religious freedom of churches conducting services in languages other than English. Heath, *English in Our Language Heritage*, in *LANGUAGE IN THE U.S.A.* 6, 6-7, 12 (C. Ferguson & S. Heath eds. 1981). During the late 1800's and early 1900's, controversy arose over German instruction in public and private schools. *Id.* at 14-17; see generally H. KLOSS, *THE AMERICAN BILINGUAL TRADITION* 45, 46-47, 52-53, 60-61, 67-74 (1977) (describing early efforts to suppress use of German in the United States).

23. Bilingual Education Act of 1968, Pub. L. No. 90-247, 81 Stat. 816 (codified as amended at 20 U.S.C. §§ 3221-3262 (1982)).

24. See, e.g., *Bilingual Education Programs: Hearings on H.R. 9840 and H.R. 10224 Before the General Subcomm. on Educ. of the House Comm. on Educ. & Labor*, 90th Cong., 1st Sess. 144-47 (1967) (statement of Rep. Edward Roybal); *id.* at 245-47 (statement of Herman Badillo, President, Borough of the Bronx, New York City); see also C. HARRINGTON, *BILINGUAL EDUCATION IN THE UNITED STATES* 2-3 (1980); A. LEIBOWITZ, *supra* note 18, at 20-23; E. MOSHER, A. HASTINGS & J. WAGONER, JR., *supra* note 18, at 13.

understanding and respect.²⁵

For all this stirring rhetoric, the Bilingual Education Act was actually a quite modest grant-in-aid program designed to meet the needs of NEP and LEP children by promoting research and experimentation.²⁶ The Act never clearly defined bilingual education, in part because of an unresolved ambiguity about the programs' proper objectives. Some supporters saw the legislation simply as a way to maximize proficiency in English, while others viewed it as a means of furthering proficiency in both the native language and English and of instilling respect for the child's cultural heritage.²⁷ From 1968 to 1974, appropriations under the Act were significantly lower than authorized expenditures, but no popular outcry ensued.²⁸

Between 1968 and 1974, bilingual education proponents struggled to create and enforce an entitlement to special educational services for NEP and LEP children. Title VI, an omnibus civil rights bill enacted in 1964, provided that "[n]o person in the United States shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."²⁹ Congress left to the Office of Civil Rights (OCR) the task of elaborating on this broad, but rather ill-defined, mandate by promulgating and enforcing regulations.³⁰ Although Congress had not explicitly considered the problems of NEP and LEP children in enacting title VI, OCR issued a 1970 memorandum concluding that the provision barred discrimination against national origin-minority group children on the basis of language.³¹ How-

25. *Bilingual Education: Hearings on S. 428 Before the Special Subcomm. on Bilingual Education of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 327 (1967) [hereinafter *1967 Senate Hearings*] (remarks of Joe Bernal, Texas State Senate); *id.* at 382 (remarks of Tony Calderon, Representative of the Federation for the Advancement of Mexican Americans).

26. The Act "provide[d] financial assistance to local educational agencies to develop and carry out new and imaginative elementary and secondary school programs designed to meet the special educational needs [of NEP and LEP children]." 20 U.S.C. § 880b (as amended by Pub. L. No. 93-380, § 105(a)(1), 88 Stat. 503 (1975); omitted in codification by Pub. L. No. 95-561, § 701, 92 Stat. 2268 (1978)). According to the Senate Committee Report, the Act did not prescribe a specific type of program because of the need for extensive research. S. REP. NO. 726, 90th Cong., 1st Sess. 50 (1967), *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2730, 2781.

The Act authorized \$15 million in appropriations for the fiscal year ending June 30, 1968; \$30 million, for the fiscal year ending June 30, 1969; \$40 million for the fiscal year ending June 30, 1970; \$80 million for the fiscal year ending June 30, 1971; \$100 million for the fiscal year ending June 30, 1972; and \$135 million for the fiscal year ending June 30, 1973. 20 U.S.C. § 880b-1(a).

27. D. RAVITCH, *THE TROUBLED CRUSADE* 273 (1983).

28. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, *THE BUDGETS OF THE UNITED STATES GOVERNMENT FISCAL YEARS 1969-1975 (1968-1973)*.

29. 42 U.S.C. § 2000d.

30. Rabkin, *Office for Civil Rights*, in *THE POLITICS OF REGULATION* 307-13 (J. Wilson ed. 1980).

31. Identification of Discrimination and Denial of Services on the Basis of National Origin, 35

ever, this memorandum went largely unenforced.³²

In 1974, the Supreme Court adopted OCR's interpretation of title VI in its widely publicized decision in *Lau v. Nichols*.³³ In *Lau*, a class action brought by Chinese NEP and LEP children in the San Francisco schools, the plaintiffs established that approximately 1,800 Chinese-speaking children were receiving no special assistance whatsoever. The Court concluded that under title VI as interpreted by OCR, the district was obligated to take some steps to rectify the language barrier when English-only instruction had the effect of excluding NEP and LEP children from meaningful participation in the educational program.³⁴ However, it left the task of designing a remedy to local school officials.³⁵

Lau triggered a number of responses. It had significant effects on the allocation of resources to bilingual education. Following discussions on whether school districts could marshal the resources necessary to comply with *Lau*, Congress began to authorize and appropriate more funds under the Bilingual Education Act.³⁶ State legislatures also

Fed. Reg. 11595 (1970) (requiring school districts to take affirmative steps to rectify a language barrier where it excluded national origin-minority group children from effective participation in the educational program); see also Margulies, *Bilingual Education, Remedial Language Instruction, Title VI, and Proof of Discriminatory Purpose: A Suggested Approach*, 17 COLUM. J.L. & SOC. PROBS. 99, 115 (1981) (history of administrative interpretations of title VI's protection of NEP and LEP children).

32. San Miguel, *supra* note 9, at 507. For a general description of some of the enforcement problems that have plagued OCR, see Rabkin, *supra* note 30, at 304-53.

33. 414 U.S. 563 (1974).

34. *Id.* at 566-69. The Court asserted:

Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.

Id. at 566. The Court went on to conclude that "the Chinese-speaking minority receives fewer benefits than the English-speaking majority from [the] school system which denies them a meaningful opportunity to participate in the educational program." *Id.* at 568.

35. *Id.* at 564-65. The Court stated that although no specific remedy was requested, "[t]eaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others." *Id.* at 565.

36. For some representative statements on the problems of complying with *Lau*, see *Bilingual Education Act: Hearings on H.R. 1085, H.R. 2490, and H.R. 11464 Before the General Subcomm. on Educ. of the House Comm. on Educ. & Labor*, 93d Cong., 2d Sess. 7 (1974) (remarks of Rep. Lloyd Meeds); *id.* at 7-9 (remarks of Stanley Pottinger, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice); *id.* at 20-32 (remarks of Martin Gerry, Acting Director, Office for Civil Rights, Department of Health, Education, and Welfare).

Amendments to the Bilingual Education Act in 1974 authorized \$135 million for the fiscal year ending June 30, 1974; \$135 million for the fiscal year ending June 30, 1975; \$140 million for the fiscal year ending June 30, 1976; \$150 million for the fiscal year ending June 30, 1977; and \$160 million for the year ending June 30, 1978. Bilingual Education Act of 1974, § 702(b)(1), Pub. L. No. 93-380, § 105(a)(1), 88 Stat. 484, 504 (1974). In addition, the amendments authorized \$7.75 million for technical assistance in the fiscal year ending June 30, 1976; \$8.75 million in the fiscal year ending June 30, 1977; and \$9.75 million in the fiscal year ending June 30, 1978. *Id.* § 702(b)(2). More importantly, actual appropriations in 1974 and later years more closely approximated authorized

enacted their own bilingual education acts and appropriated monies under these provisions.³⁷

OCR stepped up its enforcement efforts by promulgating guidelines for districts to use in complying with *Lau* and applying these guidelines in negotiating consent agreements.³⁸ These guidelines went well beyond the minimal entitlement recognized in *Lau* by endorsing bilingual-bicultural education and TBE programs and deeming ESL programs inappropriate for elementary school students.³⁹

Congress also expressed its approval of *Lau* by passing the Equal Educational Opportunity Act (EEOA), which included a provision that explicitly adopted the decision's approach. The provision stated, "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."⁴⁰ Because the measure was enacted as an amendment from the floor, there was little legislative history to guide its interpretation.⁴¹

After 1974, Hispanics turned to the federal district courts to enforce NEP and LEP students' entitlement to special educational services.⁴² While these lawsuits were being brought with varying degrees of success

levels of expenditure. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, THE BUDGETS OF THE UNITED STATES GOVERNMENT FISCAL YEARS 1976-1980 (1974-1978).

37. E. MOSHER, A. HASTINGS & J. WAGONER, JR., *supra* note 18, at 16. *See generally* R. IRIZARRY, *supra* note 13, at 45-128 (collecting data on state bilingual education legislation). In general, state bilingual education acts declare the state's commitment to meeting the needs of NEP and LEP students, provide for the identification and assessment of these students, describe the kinds of programs that will meet these needs, set forth requirements for staffing and parental involvement, and authorize state funding. *See* Kobrick, *A Model Act Providing for Transitional Bilingual Education Programs in Public Schools*, 9 HARV. J. ON LEGIS. 260, 274-300 (1972).

38. OFFICE FOR CIVIL RIGHTS, *supra* note 3, reprinted in BILINGUAL EDUCATION, *supra* note 3, at 213-21; *see also* E. MOSHER, A. HASTINGS & J. WAGONER, JR., *supra* note 18, at 16 (federal enforcement efforts increased after *Lau*).

39. OFFICE FOR CIVIL RIGHTS, *supra* note 3, at III, reprinted in BILINGUAL EDUCATION, *supra* note 3, at 215-18. *See generally* Margulies, *supra* note 31, at 116 (describing how HEW drafted and disseminated the *Lau* guidelines).

40. 20 U.S.C. § 1703(f) (1982).

41. *United States v. Texas*, 506 F. Supp. 405, 431-32 (E.D. Tex. 1981), *rev'd*, 680 F.2d 356 (5th Cir. 1982); Haft, *Assuring Equal Educational Opportunity for Language-Minority Students: Bilingual Education and the Equal Educational Opportunity Act of 1974*, 18 COLUM. J.L. & SOC. PROBS. 209, 233 (1983).

42. *See, e.g.*, *Guadalupe Org. v. Teinpe Elementary School Dist.*, 587 F.2d 1022 (9th Cir. 1978); *Cintron v. Brentwood Union Free School Dist.*, 455 F. Supp. 57 (E.D.N.Y. 1978); *Rios v. Read*, 73 F.R.D. 589 (E.D.N.Y. 1977); *Otero v. Mesa County Valley School Dist.*, 408 F. Supp. 162 (D. Colo. 1975), *vacated*, 568 F.2d 1312 (10th Cir. 1977); *Aspira of New York v. Board of Educ.*, 394 F. Supp. 1161 (S.D.N.Y. 1975); *Keyes v. School Dist. No. 1*, 380 F. Supp. 673 (D. Colo. 1974), *modified*, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976), *on remand*, 576 F. Supp. 1503 (1983).

around the country, the federal government commissioned a systematic inquiry into the effectiveness of programs funded under the Bilingual Education Act. The results of this study, known as the AIR evaluation, were released in 1977-78. They indicated that the programs were not effective in promoting English proficiency and resulted in classroom segregation of Hispanic children.⁴³ Despite protests that the study was methodologically unsound, these results had a sobering effect on Congress as it reconsidered its commitment to the Bilingual Education Act.⁴⁴ After 1978, Congress became increasingly receptive to efforts to broaden the range of programs that would be funded under the Act. In particular, it expressly acknowledged that structured immersion and ESL programs might be viable alternatives to bilingual-bicultural education and TBE programs.⁴⁵ Concomitantly, funding under the Act steadily declined.⁴⁶

In 1978, the Supreme Court also began to retreat from the *Lau* decision by suggesting that it would no longer find a title VI violation when a program merely had the effect of excluding a disproportionate number of racial or ethnic minorities. In *Regents of the University of California v. Bakke*,⁴⁷ a majority of the Court appeared ready to treat title VI and the equal protection clause as coextensive, thereby requiring plaintiffs to prove discriminatory intent as well as an adverse effect under both provisions. Although the Court did not expressly overrule *Lau*, the *Bakke* decision cast serious doubt on its holding.⁴⁸

Shortly thereafter, the demise of the *Lau* guidelines further eroded

43. III AMERICAN INSTITUTES FOR RESEARCH (AIR), *supra* note 19, at IV-2 to IV-4.

44. For critiques of the study, see INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION, *supra* note 20; Cardenas, *supra* note 20, at 74-75. For evidence of the effect that the study had on legislators, see *Bilingual Education: Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the House Comm. on Educ. & Labor*, 95th Cong., 1st Sess. 352 (1977) [hereinafter *1977 House Hearings*] (remarks of Christopher Cross, Minority Senior Education Consultant) ("[Critics] have indicated . . . that we should not use the AIR report to base our judgments on changes. If not, what should we use?").

45. See, e.g., *1984 House Hearings*, *supra* note 11, at 99-100 (remarks of Reps. Steve Bartlett and Ron Packard); *id.* at 131-32 (prepared statement of Rep. Norman Shumway); *id.* at 132-33 (prepared statement of Rep. William Whitehurst); *The Bilingual Education Improvement Act of 1983: Hearings on H.R. 2682 Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the House Comm. on Educ. & Labor*, 98th Cong., 1st Sess. 22-23 (1983) [hereinafter *1983 House Hearings*] (prepared statement of Terrel H. Bell, Secretary of Education); *id.* at 31 (remarks of Rep. Ron Packard). In 1984, the Act was amended to reserve a specified percentage of funds for ESL, structured immersion, and similar programs. The total amounts that could be allocated to these programs were carefully limited. 20 U.S.C. § 3222(b)(3)-(4) (Supp. III 1985).

46. Orum & Yzaguirre, *Secretary Bennett's Bilingual Education Initiative: Historical Perspectives and Implications*, 1 LA RAZA L.J. 225, 235 (1986). The Undersecretary of Education has suggested that if the cap on funds that can be allocated to ESL and structured immersion programs were lifted, the Department of Education would increase funding for programs for NEP and LEP children. *Id.* at 239.

47. 438 U.S. 265 (1978).

48. *Id.* at 304-05; Margulies, *supra* note 31, at 130; see also *Guardians Ass'n v. Civil Service*

NEP and LEP children's entitlement to special educational services under title VI. In 1978, an Alaska school district challenged the validity of the *Lau* guidelines in federal district court, alleging that they were tantamount to rules and had not been published for notice and comment as required by the Administrative Procedure Act. Pursuant to a consent agreement, the federal government agreed to publish the guidelines.⁴⁹

Rather than publish the *Lau* guidelines, the newly formed Department of Education published a Notice of Proposed Rulemaking (NPRM) in 1980. The regional hearings on the NPRM were a political free-for-all, rife with stinging accusations. Opponents, including influential teachers' unions, bitterly attacked the regulations, and newspaper articles likening the Department of Education's approach to that in Quebec heightened the tension.⁵⁰ The controversy became so unmanageable that the NPRM was never finalized.⁵¹ Later, the *Lau* guidelines were quietly withdrawn, and the controlling administrative regulation under title VI is now OCR's 1970 memorandum.⁵²

Because of these developments, most bilingual education litigation today is decided under the EEOA, which looks only at whether a program has the effect of excluding NEP and LEP students from the educational program and does not require proof of discriminatory intent.⁵³ Although the EEOA allows plaintiffs to establish a violation more easily, its remedial consequences are different from those under the *Lau* guidelines. In contrast to the guidelines, which strongly endorsed bilingual-bicultural education and TBE programs, the EEOA's "appropriate action" requirement is arguably broad enough to encompass ESL and structured immersion programs as well.⁵⁴

In 1981, Senator S.I. Hayakawa began introducing proposals to amend the Constitution to declare English the official language of the United States.⁵⁵ Hayakawa argued that among other things, an English language amendment would counter the divisive effects of bilingual-bicultural education and TBE programs.⁵⁶ He feared that failure to pro-

Comm'n, 463 U.S. 582, 589-93 (1983) (opinion of White, J.) (analyzing whether *Bakke* overruled *Lau* by making title VI coextensive with the equal protection clause).

49. *Northwest Arctic School Dist. v. Califano*, No. A-77-216 (D. Alaska Sept. 29, 1978).

50. Levin, *supra* note 10, at 51-52.

51. *Id.* at 39-40, 50, 56-57.

52. Baker & de Kanter, *supra* note 19, at 307.

53. Haft, *supra* note 41, at 211-15 (1983); Margulies, *supra* note 31, at 108-09.

54. See *Castaneda v. Pickard*, 648 F.2d 989, 1008-09 (5th Cir. 1981) ("Congress' use of the less specific term 'appropriate action,' rather than 'bilingual education,' indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA."). But cf. Haft, *supra* note 41, at 263 (arguing that Congress in enacting the EEOA intended to advance already existing legislative and administrative policies favoring the use of bilingual-bicultural methods).

55. S.J. Res. 72, 97th Cong., 1st Sess., 127 CONG. REC. 7444-45 (1981).

56. *The English Language Amendment: Hearing on S.J. Res. 167 Before the Subcomm. on the*

mote a common language would produce instability and unrest as it had in other countries with balkanized language groups.⁵⁷ Hayakawa also founded U.S. English, a national organization devoted to preserving English as the official language of the United States. Its membership is composed primarily of individuals who have also worked to curb immigration, first-generation immigrants who learned English as a second language, and English-speaking schoolteachers.⁵⁸ When Hayakawa's repeated efforts to amend the Constitution failed, U.S. English attempted to have English declared an official language at the state and local level through popular referenda and legislative action.⁵⁹

These efforts have stirred deep emotional responses. For example, when the California chapter of U.S. English used the referendum process to make English the state's official language, opponents contended that the measure conveyed a symbolic message that culturally and linguistically different groups were unwanted.⁶⁰ They alleged that the campaign was a thinly veiled form of racism and derived from anti-immigrant sentiment.⁶¹ The proposal's supporters argued that it was a common sense way to ensure that California's population remained politically cohesive.⁶² After spirited debate, the proposal passed by an overwhelming majority in November 1986.⁶³ Hayakawa's followers succeeded in mak-

Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 54-56 (1984) (statement of Sen. Hayakawa). Hayakawa also expressed concern about the widespread use of bilingual ballots and election materials. *Id.* at 53.

57. See generally Note, *The Proposed English Language Amendment: Shield or Sword?*, 3 YALE L. & POL'Y REV. 519 (1985) (describing recent efforts to make English the official language, analogizing these attempts to the Americanization movement of the early twentieth century, and urging that such an amendment would be inappropriate despite the possible validity of some of its supporters' concerns).

58. A. GALVAN, R. MACIAS, R. MAGALLAN & L. ORUM, ARE ENGLISH LANGUAGE AMENDMENTS IN THE NATIONAL INTEREST? 2-3 (1986); Cahan, *English Spoken Here*, 13 STUDENT LAW. 6 (Apr. 1985); Trombley, *supra* note 21.

59. Cahan, *supra* note 58, at 6; Nakao, *Battle of Words Heats Up over 'English Only'*, San Francisco Examiner, Sept. 21, 1986, at A1, col. 1.

60. L.A. Times, Oct. 3, 1986, § II, at 4, col. 1; L.A. Times, Aug. 21, 1986, § I, at 23, col. 3.

61. Trombley, *English Ballot: Opinions Transcend Language*, L.A. Times, Oct. 12, 1986, § I, at 1, col. 2; del Olmo, *Se Habla Ingles: Prop. 63, a Cruel Joke, Could Cost Us Dearly*, L.A. Times, Aug. 28, 1986, § II, at 5, col. 1; Shaw, *Minority Groups Protest 'English Only' Movement*, San Francisco Examiner, Aug. 21, 1986, at A2, col. 1. In fact, according to a 1986 November general election survey conducted by Mervin Field, 46% of those who opposed the English language amendment considered it racist and discriminatory against new immigrants. Among Hispanics, 72% of those who rejected the measure expressed this view. The California Poll: 1986 November General Election Survey 196, 200 (directed by Mervin Field) (on file with author) [hereinafter California Poll].

62. Trombley, *supra* note 61; Nakao, *supra* note 59.

63. According to Field's 1986 November general election survey, 68% of those who voted on the proposal favored it, while 32% opposed it. While 72% of the white voters and 67% of the black voters endorsed the measure, 41% of the Hispanic voters and 56% of the Asian voters did so. California Poll, *supra* note 61, at 186, 188. Of those who cast ballots, 14% did not vote on the English language amendment. Ten percent of the white voters and 20% of the black voters did not

ing English the official language in California just as they have in at least seven other states and numerous cities and counties.⁶⁴

B. The Litigation Process

The foregoing analysis illuminates the general tenor and complexity of the bilingual education controversy, but this account would be incomplete without a closer examination of the lawsuits that Hispanics have brought to enforce federally created entitlements. Rather than enumerate the outcomes in various cases, this Section will explore the underlying dynamics of the litigation process by examining empirical studies of two bilingual education cases. Because of the paucity of empirical research in this area, it is not possible to say whether these studies are representative of most bilingual education litigation.⁶⁵ Still, their detailed inquiries provide some useful insights into the bilingual education debate.

The first case, *Otero v. Mesa County Valley School District No. 51*,⁶⁶ was brought in 1974 in a Colorado federal district court by a coalition of attorneys from the Mexican American Legal Defense and Education Fund (MALDEF), the Chicano Education Project (CEP), and Colorado Rural Legal Assistance (CRLA).⁶⁷ Brought on behalf of a class of Mexican-American parents and their children residing in Grand Junction, Colorado, the suit alleged that the district's educational program and hiring practices discriminated against Chicanos. To remedy the problem, the plaintiffs requested that the district implement a far-ranging bilingual-bicultural education program and institute affirmative action hiring programs for Chicano personnel.⁶⁸

Several years before the lawsuit was filed, there had been a marked increase in local Chicano political activism. The group primarily responsible for the increased political activity, La Voz de la Raza, spearheaded the lawsuit, and the traditionally nonpoliticized Chicano community associated the case with militancy. The school board thought that La Voz was run by outside "agitators" who wanted to use the litigation as a

register an opinion on the measure. Twelve percent of the Hispanic voters and 9% of the Asian voters did not do so. *Id.* at 188. For further discussion of these results, see *supra* note 61 and *infra* note 148.

64. See Note, *supra* note 57, at 519; *Harper's Index*, HARPER'S, Apr. 1987, at 15; Trombley, *Assemblyman Vows to Carry the Ball for English-Only Action*, L.A. Times, Nov. 6, 1986, § I, at 3, col. 5.

65. In an effort to increase the available data on bilingual education litigation, I am currently undertaking a case study of *Keyes v. School Dist. No. 1*, 576 F. Supp. 1503 (D. Colo. 1983).

66. 408 F. Supp. 162 (D. Colo. 1975), *remanded on other grounds*, 568 F.2d 1312 (10th Cir. 1977), *on remand*, 470 F. Supp. 326 (1979), *aff'd*, 628 F.2d 1271 (1980). The case study was done by Michael A. Rebell, a visiting lecturer in law at the Yale Law School, and Arthur A. Block, a lecturer in law at Columbia Law School. M. REBELL & A. BLOCK, *EQUALITY AND EDUCATION* (1985).

67. M. REBELL & A. BLOCK, *supra* note 18, at 147.

68. *Id.*

national test case, rather than advance the interests of local Chicanos. Consequently, the board was reluctant to negotiate as a means of avoiding a lawsuit, believing that *La Voz* would only be satisfied if the board completely abdicated its responsibility to design a curriculum responsive to the entire community's needs.⁶⁹

Because *Lau* had only recently been decided, the litigants had no well-developed precedents to guide in its interpretation. Understandably, the plaintiffs and the school district in *Otero* presented markedly different views about *Lau*'s holding. The plaintiffs contended that *Lau* supported their position that Chicano schoolchildren were discriminated against by a curriculum that did not account for their linguistic and cultural needs. To remedy such discrimination and ensure that Chicanos reaped equal benefits from the educational process, they claimed that the district had to adopt a bilingual-bicultural education program.⁷⁰

In contrast, the district interpreted *Lau* as prohibiting the exclusion of NEP and LEP students from the curriculum based on language. To remedy such exclusion, the district argued that it was simply obligated to furnish special instruction in English until children were sufficiently proficient to participate in the regular curriculum. According to the district, it had no obligation to ensure that NEP and LEP students actually performed as well as other children after their return to English-only classrooms.⁷¹

The case was bitterly contested. The discovery process was highly acrimonious, confused, and excessively litigious. Even the usual professional courtesies among lawyers failed to temper the parties' distrust and hostility. These problems were exacerbated by the uncertainty surrounding a relatively novel case and the trial judge's desultory efforts to address complex discovery issues and facilitate compromise.⁷²

The case also engendered deep emotional responses in the community. Although no violence actually occurred in connection with the trial, two Chicanos who planned to testify on the school district's behalf claimed that they had received anonymous death threats. The courtroom was also cleared several times because of bomb threats following accusations that the judge was biased against the plaintiffs.⁷³

On a more positive note, the case served an important educational function. The local newspaper covered the proceedings in considerable detail, even publishing school-by-school dropout statistics. Based on this publicity, one Chicano businessman decided to testify for the plaintiffs

69. *Id.* at 148-50.

70. *Id.* at 152-53.

71. *Id.* at 151-52.

72. *Id.* at 153-55.

73. *Id.* at 282 n.15.

because their ideas were gaining wider acceptance in the Chicano community.⁷⁴ At the end of the trial, the local newspaper observed that regardless of its outcome, the case had demonstrated the importance of responding to individual student needs, rather than "cramming [all children] into a common Anglo mold."⁷⁵

The trial court eventually rejected the plaintiffs' claim that Chicano students were entitled to a comprehensive bilingual-bicultural education program. A civil rights conservative, the judge had been unsympathetic to this argument from the outset.⁷⁶ Moreover, the plaintiffs were unable to produce convincing evidence that their suggested remedy was a workable response to the special needs of Chicano children in Grand Junction. The court was never persuaded that the plaintiffs' program was essential enough to override the school district's discretion in structuring the curriculum.⁷⁷

In *Zambrano v. Oakland Unified School District*,⁷⁸ the plaintiffs, a class of Cambodian, Filipino, Hispanic, and Asian linguistic minority children, alleged that the Oakland school system in California had failed to implement an adequate bilingual education program as required by federal and state law. The suit asked for injunctive relief to ensure compliance and the appointment of an independent auditor to monitor the district's progress.⁷⁹ The case was filed by Public Advocates, a San Francisco public interest firm, and the plaintiffs received additional assistance from attorneys at MALDEF and the Legal Aid Society of Alameda County.⁸⁰

Filed in 1984, *Zambrano* differs significantly from *Otero* because in the intervening ten years, an administrative and judicial framework had developed to address NEP and LEP students' demands for special educational services. California had also enacted a comprehensive bilingual education act, while the Colorado legislature had not addressed such concerns at the time of the *Otero* decision.⁸¹ Moreover, the

74. *Id.* at 150.

75. *Id.* (footnote omitted).

76. *Id.* at 155, 167, 290 n.85.

77. *Id.* at 172-74. The case generated a plethora of social science evidence regarding the linguistic abilities of Chicano schoolchildren in the district, their educational achievement, and the potential benefits of bilingual-bicultural education. The district enjoyed several advantages in presenting evidence on these questions. It had easier access to the relevant data, its principal expert was thoroughly familiar with the conditions in the district, and it was strongly committed to using social science evidence to refute the plaintiffs' expert testimony. *Id.* at 155-68, 171.

78. No. 584503-9 (Alameda Sup. Ct. May 1, 1985). The case study was done by Brenda Reyes and Marsha Siegel in conjunction with a seminar on children's rights and test-case litigation at Boalt Hall School of Law.

79. B. Reyes & M. Siegel, *Zambrano v. Oakland Unified School District* 1, 60 (1985) (unpublished manuscript) (on file with author).

80. *Id.* at 47-55.

81. *Id.* at 10-12. The Colorado legislature did enact a bilingual education act shortly after the

demographics of the classroom had changed, and Hispanics were more likely to be joined by Asian language groups in seeking special assistance for NEP and LEP children.⁸² What remained unchanged, however, was the animosity that such lawsuits provoked.

During the eight years before *Zambrano* was brought, four administrative complaints were filed with OCR, and at least two were filed with the California State Department of Education. These complaints consistently resulted in findings of noncompliance, and the district was repeatedly ordered to prepare plans and submit progress reports. The district did so, but it failed to implement adequately plans that on paper appeared fully operational.⁸³

Critical in catalyzing the lawsuit was the creation of a bilingual district advisory committee (BDAC) in Oakland pursuant to California's bilingual education act. Although the district had ignored the BDAC for several years, two activist parents were elected chair and vice-chair and ambitiously sought to develop and implement a bilingual master plan.⁸⁴ With help from two curriculum specialists in the district's Office of Bilingual Education, the BDAC prepared a plan for submission at a public hearing before the school board. Noting the BDAC's "advisory" character, the district rejected the plan and presented one of its own. The district's plan, which read the relevant statutes and regulations as narrowly as possible, expressed a strong preference for ESL instruction and utilized bilingual instructional aides and volunteers, rather than certified bilingual teachers.⁸⁵

Public hearings on the plans attracted as many as 200 to 300 parents and generated media coverage sympathetic to the BDAC's position. In light of this strong interest, the school board was unwilling to approve the district's plan, which many viewed as an illegitimate substitute for the BDAC's proposal. The district superintendent therefore appointed a committee of parents and school personnel to draft yet another plan. The committee's proposal favored native-language instruction as a bridge to learning English and required the district actively to recruit certified

Otero decision. M. REBELL & A. BLOCK, *supra* note 18, at 175. While the Colorado act originally endorsed bilingual-bicultural education for kindergarten through third grade, it was amended in 1977 to provide for TBE programs. *Id.* at 184. More recently, Colorado repealed its bilingual education law, substituting an ESL requirement. Levin, *supra* note 10, at 57 n.72.

82. According to the Assembly Office of Research, most NEP and LEP children in California schools speak Spanish, but many speak Asian languages, and the latter constitute the fastest growing segment of the linguistic minority population. ASSEMBLY OFFICE OF RESEARCH, *supra* note 13, at 1.

83. B. Reyes & M. Siegel, *supra* note 79, at 28-37, 46.

84. *Id.* at 36-40. Most BDAC members were linguistic minority parents, but some were education professionals. *Id.* at 36-38.

85. *Id.* at 40-41.

bilingual education teachers.⁸⁶

At a meeting attended by 300 supporters of the new plan and a number of reporters, the school board approved the committee's plan after heated debate.⁸⁷ The district responded by dismantling its Office of Bilingual Education and reassigning its personnel to positions in which they would be less able to do "politicking" for bilingual education. Thus, the district had a bilingual master plan but no central staff to implement it. Although the superintendent eventually established a new Office of Bilingual Education in response to public pressure, *Zambrano* was filed less than a year after the district instituted its purge.⁸⁸

In keeping with events leading up to the case, *Zambrano* generated considerable hostility and distrust among the parties. Although some district officials treated the suit as a predictable response to the district's history of noncompliance, others were outraged and thought the litigation had undermined their efforts to reorganize the Office of Bilingual Education and implement the new master plan. The district's formal response reflected the view that the plaintiffs' request for an injunction was unnecessary and highly intrusive, although its counsel faced the unenviable task of explaining away eight years of administrative violations.⁸⁹

The relationship between the attorneys in the case grew increasingly acrimonious. Shortly after the first court hearing, the district's counsel questioned whether a document drafted by plaintiffs' counsel accurately set forth an oral order in the case. Disputes arose about whether the district had provided the plaintiffs with adequate notice of motions and hearings and had served them with copies of orders it obtained.⁹⁰ These problems were aggravated when the court vacated an injunction requiring the district to conduct prompt language assessments. The district insisted that the plaintiffs post open-ended personal surety bonds as well as a corporate bond to provide for potential damages should the injunctive relief prove unwarranted. Not surprisingly, the plaintiffs were unable to meet this demand because of their limited incomes.⁹¹

Eventually, the district filed a countersuit against the plaintiffs and their attorney for \$250,000 in general damages and \$4 million in punitive damages, alleging that *Zambrano* was the product of a conspiracy to

86. *Id.* at 41-44.

87. *Id.* at 42.

88. *Id.* at 44-46.

89. *Id.* at 65-66, 73.

90. *Id.* at 83.

91. *Id.* at 79-80, 83. The plaintiffs lost their appeals to reinstate the injunction. When they subsequently petitioned the trial court for a new injunction, the district did not demand personal surety bonds. The court granted the injunctive relief. *Id.* at 81-82.

"harass, impede, embarrass and obstruct" district operations.⁹² The countersuit claimed that the plaintiffs and their attorney had instigated the suit to "generat[e] negative publicity based on facts known to [them] to be false; pursu[e] destructive, senseless and unnecessary preliminary injunctive relief while totally refusing to take recourse to their plain and fully adequate administrative remedy; and unreasonably withhold[] cooperation necessary to complete the process of staff appointments and organizational restructuring."⁹³ Ultimately, a superior court judge dismissed the countersuit and imposed sanctions on the district for bringing a frivolous claim in bad faith.⁹⁴

The district's counsel later deemed the countersuit "a gross political error."⁹⁵ When a popular outcry followed the district's action, it found itself in a peculiarly untenable position because it had filed the countersuit without first consulting the school board.⁹⁶ The brouhaha that attended the countersuit's filing may well have pushed the district to the settlement table. Ironically, by this point, the plaintiffs were reluctant to negotiate because they wanted the complete victory that a trial could provide. Eventually, however, they were persuaded that negotiations might prove fruitful.⁹⁷

Although a mediator had to be appointed to oversee the settlement negotiations because of continuing mistrust among the parties, an agreement was ultimately hammered out. This successful resolution was in part attributable to ongoing political pressure placed on the school board by community supporters of bilingual education.⁹⁸ The plan required that all NEP and LEP elementary schoolchildren have daily access to some form of bilingual instruction. It also expressed a "preference" for a bilingual classroom where thirty or more NEP and LEP secondary students attended a school. In addition, the plan ordered the district to take steps to hire all needed bilingual education teachers and instructional aides.⁹⁹ While the plan has been implemented under the supervision of a court-appointed monitor, an expert auditor, and the judge, some named plaintiffs have remained active in bilingual education affairs, primarily through the BDAC.¹⁰⁰

While these two cases are in many ways quite different, they share some important characteristics. In *Otero*, the parties confronted a rela-

92. *Id.* at 84.

93. *Id.* at 85.

94. *Id.* at 89.

95. *Id.* at 85.

96. *Id.* at 85-88.

97. *Id.* at 104-06.

98. *Id.* at 101-03.

99. *Id.* at 116-17.

100. *Id.* at 119, 124-36.

tively novel entitlement to special assistance for NEP and LEP students; the uncertainty surrounding the interpretation of this claim might have provoked the confusion and ill-will that permeated the proceedings. By the time *Zambrano* was filed, however, there had been longstanding efforts to define this entitlement more precisely. Nevertheless, the parties voiced fundamental disagreements about the scope of the district's obligation to NEP and LEP children. Moreover, the proceedings were characterized by the same type of deep-seated animosity observed in *Otero*. Although lawsuits are by definition adversarial, this cannot completely explain the parties' highly contentious behavior, for even the traditional courtesies among lawyers broke down during each case.

C. *The Bilingual Education and English-Only Movements*

The bilingual education movement first pursued reforms at the federal level and then used its successes to press more effectively for changes at the state and local level. It has sought to achieve its objectives through a mix of legislative, administrative, and judicial action. While Congress initially provided a useful forum for publicizing the educational problems of NEP and LEP children, it was ultimately necessary to turn to a nonelective and less visible decisionmaker, OCR, to establish an entitlement to special educational services for NEP and LEP students. These less publicized efforts culminated in a highly visible Supreme Court decision in *Lau*. This decision in turn provided bilingual education advocates with additional leverage in seeking further legislative and administrative reforms.

To attain their objectives, bilingual education supporters relied on omnibus civil rights bills, such as title VI and the EEOA, as well as more narrowly focused legislation, such as the Bilingual Education Act. These omnibus bills did not concentrate on the problems of NEP and LEP children. Title VI was enacted primarily in response to continuing racial discrimination against blacks; it was passed shortly after a brutal assault on civil rights marchers in Birmingham, Alabama and the 1963 March on Washington.¹⁰¹ The EEOA was enacted mainly out of concern about the widespread use of busing as a remedy for past segregation in the schools. Special educational services for NEP and LEP children were simply an example of the kind of "quality" educational programs that might be substituted for unpopular busing remedies.¹⁰²

To benefit from these omnibus civil rights bills, Hispanics had to ally themselves with other civil rights groups and engage in multiple-issue politics.¹⁰³ That is, they diversified their political portfolio by

101. Rabkin, *supra* note 30, at 309.

102. Haft, *supra* note 41, at 233-34.

103. C. HARRINGTON, *supra* note 24, at 2; A. LEIBOWITZ, *supra* note 18, at 9. One can also

expressing support for a broader array of civil rights reforms. Moreover, to bring themselves within the coverage of these omnibus bills, bilingual education advocates had to argue that language barriers were a proxy for racial and ethnic discrimination. Because this approach sensitized activists to different forms of discrimination and various potential remedies, it naturally limited their ability to engage in single-issue politics.

Despite pressures to rely on coalitions, compromises, and multiple-issue politics, advocates continued to press for special attention to the needs of NEP and LEP children. They supported the Bilingual Education Act, pursued administrative and judicial recognition of an entitlement to special services for linguistic minority students, and urged enactment of state bilingual education acts. Perhaps in part to distinguish themselves from black civil rights groups, Hispanics pressed decisionmakers to accord particular importance to language issues.¹⁰⁴

In contrast, the English-only movement has been unsuccessful in seeking reforms at the federal level. It has therefore attempted to change state and local government practices. Rather than pursue a mix of legislative, administrative, and judicial action, English-only adherents have relied exclusively on popular political processes, including referenda and legislative enactments. By achieving success at the state and local level, English-only supporters hope to create momentum for their national reform agenda.¹⁰⁵

The English-only movement has remained committed to single-issue politics, focusing exclusively on language issues without embracing a more generalized reform agenda.¹⁰⁶ Its proposals continue to treat lan-

analyze bilingual education advocates as "free riders" who benefited disproportionately from the black civil rights movement's investment of resources. Cf. M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 9-16 (1965) (analysis of "free rider" effects where individuals will benefit from activity of groups acting in the collective interest, whether or not the individual gives any support to the group). Certainly, in light of the black civil rights movement's successes at the federal level and potential roadblocks at the state and local level, Hispanics advocating bilingual education could have reasonably concluded that their resources would be optimally deployed at the federal level. See U.S. COMM'N ON CIVIL RIGHTS, *A BETTER CHANCE TO LEARN* 15-19 (1975) (describing educational neglect of linguistic minority children prior to federal intervention in the 1960's); U.S. COMM'N ON CIVIL RIGHTS, *THE EXCLUDED STUDENT* 14-20 (1972) (describing local schools' use of no-Spanish rules and punitive enforcement techniques). See generally A. OBERSCHALL, *SOCIAL CONFLICT AND SOCIAL MOVEMENTS* (1973) (theoretical analysis of how social movement groups maximize the use of their scarce resources).

104. See *infra* note 142.

105. Trombley, *supra* note 21. The English-only movement is certainly aware that its reforms can command broad support in some regions, in light of the long history of state and local legislation restricting the use of languages other than English. See generally, Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 45 NOTRE DAME L. REV. 7, 41-42, 51-67 (1969) (noting numerous state laws establishing English as the exclusive language of instruction in the school system). By first pursuing state and local victories through popular political processes, the English-only movement is arguably optimizing the use of its scarce organizational resources.

106. See, e.g., J. Barzun, *Language & Life* (undated essay published by U.S. English) (stressing

guage as uniquely significant and make no effort to link it to other characteristics, such as race, ethnicity, or socioeconomic status.

II

A THEORETICAL FRAMEWORK FOR ANALYZING THE BILINGUAL EDUCATION CONTROVERSY

Participants in the debate over bilingual education have often responded in deeply emotional ways that seem to transcend immediate concerns with the allocation of scarce resources. Some have openly acknowledged that more than pedagogy is at stake because government support of bilingual education signals acceptance of and respect for the Hispanic community.¹⁰⁷ A study of bilingual education that overlooks this symbolic component is arguably incomplete. Yet, legal scholars have not scrutinized this impact closely, presumably because such inquiries seem less systematic and scientific than interest-group bargaining analyses.¹⁰⁸ To address this omission, the Essay will draw on Joseph Gusfield's well-known efforts to develop a framework for understanding status conflicts in the context of the Temperance movement.

Gusfield asserts that status conflicts occur when groups clash in the political arena over the approval, respect, admiration, or deference that they are able to command by virtue of their way of life, including their culture, customs, and values.¹⁰⁹ When status groups compete with each other to change or defend their prestige allocation, they do so through symbolic actions. The significant meanings derive not so much from the intrinsic properties of the action but from what it has come to represent for the participants. The action is ritualistic and ceremonial because the goal is reached in the behavior itself, rather than in any desired state that

need to speak standard English); Tanton, *Bilingual Education: Is It Threatening to Divide the United States Along Language Lines?*, 33 VITAL ISSUES (1984) (arguing that linguistic diversity engenders conflict, while a common language promotes socially beneficial cooperation). Although some of the English-only movement's leaders are personally interested in curbing immigration, this has not yet become an organizational objective. Trombley, *supra* note 21.

107. See *supra* notes 24-25 and 60-61 and accompanying text.

108. For an important exception, see Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 314-15 (1986), which touches upon the symbolic components of cultural politics by relying in part on Gusfield's status conflict analysis. See also K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 7-8, 193, 242-43 (1984) (applying status conflict analysis to the abortion controversy).

109. J. GUSFIELD, SYMBOLIC CRUSADE 17-19 (1963); see also Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOC. PROBS. 175, 176-78 (1967). Gusfield's work draws upon Max Weber's earlier distinctions among three factors influencing the distribution of power: class, status group, and party. "Classes" are economic groups composed of persons with roughly the same life chances as determined by market forces. "Status groups" are somewhat amorphous communities composed of individuals whose life chances are similarly influenced by social estimations of honor or prestige. "Parties" are oriented to exercising power by influencing communal actions, whatever their content. H. GERTH & C. MILLS, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 180-95 (1946).

it brings about.¹¹⁰ Conflict resolution in symbolic terms is not necessarily irrational; in fact, it can be a highly useful institutionalized response in the face of social conflicts and tensions manifested in a disarray of the status order as well as other areas of action.¹¹¹

When concerns about status are translated into political disputes, issues are frequently framed in moral terms that seem antithetical to bargaining in a pluralistic process.¹¹² The association of an issue with its supporters' way of life can increase the tendency of political issues to turn into matters of "face," freezing the adherents to a given program and diminishing the possibility of compromise or graceful defeat. Because the dispute involves opposition over ways of life, each side feels compelled to degrade the other's cultural content.¹¹³ Where status elements are implicated, they often impart an erratic, highly emotional, and disturbing character to the dispute.¹¹⁴ Moreover, because status conflicts are highly symbolic, support and opposition frequently come from diverse coalitions that attach broad-ranging connotations to the issues. Status conflicts consequently emerge in diffuse, unfocused forms.¹¹⁵

Gusfield carefully distinguishes his treatment of status conflicts from Murray Edelman's analysis of symbolic politics.¹¹⁶ Edelman focuses on how legislative, administrative, and judicial decisionmakers resort to symbolic-expressive cues to appease those who in fact have lost out in the contest for tangible benefits.¹¹⁷ Because of symbolic reassurances that their interests are being protected, groups that do not obtain desired objectives nevertheless acquiesce in a decision.¹¹⁸ Edelman has treated reliance on symbolic cues as a commonplace, while Gusfield considers status conflicts a rarity in institutionalized politics under the American two-party system.¹¹⁹ As Gusfield also makes clear, a symbolic victory in a status conflict does more than assuage fear and resentment: It also affects important status interests. Any governmental action can be an act of deference because it confers power on one group and limits some other group.¹²⁰ Moreover, the relative status of groups is affected by actions

110. J. GUSFIELD, *supra* note 109, at 21.

111. *Id.* at 175-76.

112. *Id.* at 177-78, 183-84.

113. *Id.* at 184-85.

114. *Id.* at 186.

115. *Id.* at 186-87.

116. *Id.* at 182.

117. *Id.* See generally M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964); M. EDELMAN, *POLITICS AS SYMBOLIC ACTION* (1971); M. EDELMAN, *POLITICAL LANGUAGE* (1977) (describing how the formal appearance of an equal opportunity to participate in a seemingly rational governmental decisionmaking process induces acquiescence among losing groups who do not obtain desired tangible resources).

118. J. GUSFIELD, *supra* note 109, at 182.

119. *Id.* at 185-86.

120. *Id.* at 182.

that bear on their ways of life.¹²¹ Legislation that affirms a group's way of life is of particular importance to those attempting to defend or enhance their status.¹²²

Gusfield developed this framework as a way of understanding the American Temperance movement's drive to establish Prohibition. According to Gusfield, the Temperance movement originated in the 1820's as a reaction by the Federalist aristocracy to its loss of political, social, and religious standing.¹²³ Although the Federalists' efforts to vindicate a norm of abstinence reflected underlying changes in the status order, advocates of temperance did not attempt to legislate their morality during this period, instead relying solely on moral suasion.¹²⁴ Although these leaders did not seek a political resolution of the underlying status conflict, they openly asserted that intemperance had dangerous political consequences, including increased risks of "disobedience, renunciation, and rebellion."¹²⁵

Later, the Temperance movement was assimilated to a wave of religious revivalism during the 1830's and 1840's. As part of this revivalism, temperance was held up as a moral virtue, a means of self-improvement that would enable the worker or farmer to establish middle-class respectability.¹²⁶ In contrast to the earlier movement in the 1820's, the push for abstinence was no longer an effort to reform others but was instead an avenue of personal advancement for adherents.¹²⁷ The promotion of temperance was not politicized; rather, it reflected a stable status order with a clear hierarchy of values, which made strategies for achieving upward mobility plain.

During the 1840's and 1850's, however, support for the Temperance movement again shifted. Increasing urbanization and immigration threatened the social, moral, and cultural preeminence of rural Protestant Americans.¹²⁸ Once again, the drive for Temperance reflected an effort to maintain waning group status. Not surprisingly, the Temperance movement was closely allied with the nativist movement, which reflected similar concerns about urbanization and immigration. During this period, the Temperance movement first sought to resolve these uncertainties about status through legislative intervention. Temperance leaders successfully pursued Prohibition legislation in a number of states,

121. *Id.* at 182-83.

122. *Id.* at 180.

123. *Id.* at 37-44.

124. *Id.* at 51.

125. *Id.* at 42-43.

126. *Id.* at 44-47.

127. *Id.* at 46-47 (personal development was also affected through participation in fraternal temperance lodges that provided certain economic benefits to members).

128. *Id.* at 55-57.

although by the early 1890's, the laws had been largely eliminated.¹²⁹

The declining emphasis on Prohibition legislation after the 1850's and 1860's paralleled yet another shift in the Temperance movement. In 1872, the movement adopted a humanitarian orientation that emphasized assimilative reform.¹³⁰ In contrast to the earlier religious revivalists, Temperance leaders of the 1870's considered abstinence not as a means of personal improvement, but as a vehicle for improving the lives of the poor and working classes.¹³¹ During this period, the movement embraced wide-ranging platforms of social reform. To pursue these broader goals, the Women's Christian Temperance Union (WCTU) and the national Prohibition party were founded.¹³² According to Gusfield, these efforts reflected a basic satisfaction with the status order. Relatively secure in their social position, Temperance leaders responded to the problems of urban industrialization and immigration with pleas for ameliorative reforms within the system.¹³³

By the early 1900's, however, the increasing salience of urban centers and immigrant populations presented a growing challenge to the dominance of rural Protestant Americans. Earlier humanitarian reform efforts had failed to deflect this threat.¹³⁴ Once again, the fight to establish Prohibition became the proxy for an underlying concern about status. As in the 1850's and 1860's, support for Prohibition was strongest in areas that were Protestant, rural, and nativist; in fact, as the Temperance movement became more single-mindedly committed to Prohibition reforms, it grew increasingly isolated from progressive reform movements that had shared its earlier humanitarian objectives.¹³⁵ A new wave of Prohibition campaigns began, again culminating in restrictive legislation in a large number of states.¹³⁶ After these state and local victories, the drive for Prohibition took on national dimensions, resulting in the enactment of

129. The Massachusetts Legislature passed the first major Temperance bill in 1838. Called the Fifteen-Gallon law, it prohibited the purchase of liquor in quantities of less than 15 gallons. The bill's primary effect was to restrict drinking among the poor, and it was repealed two years later. *Id.* at 52-53. The drive to restrict liquor and beer consumption intensified during the 1850's, and by 1856, eight states had passed some form of Prohibition legislation. *Id.* at 51. Between 1843 and 1893, 15 states passed legislation prohibiting statewide sale of intoxicants, but by 1906 these laws remained in force in only three states. *Id.* at 100.

130. Gusfield, *Social Structure and Moral Reform: A Study of the Woman's Christian Temperance Union*, 61 AM. J. SOC. 221 (1955), reprinted in *SOCIAL MOVEMENTS AND SOCIAL CHANGE* 61-64 (R. Lauer ed. 1976).

131. *Id.* at 63-68.

132. The WCTU in particular adopted far-reaching plans for social reform. *Id.* at 62-64; J. GUSFIELD, *supra* note 109, at 94.

133. Gusfield, *supra* note 130, at 64, 67.

134. *Id.* at 64-65, 67-68.

135. J. GUSFIELD, *supra* note 109, at 100-10.

136. Seven states passed Prohibition laws between 1906 and 1912. By 1919, when Prohibition was elevated to a constitutional mandate, 19 more states had passed restrictive legislation. *Id.* at 100.

the eighteenth amendment, which stood as a testament to rural, Protestant American values for over a decade.¹³⁷

The eighteenth amendment's proscriptions against trafficking in intoxicating liquors were not stringently enforced; one observer has gone so far as to characterize this lackluster effort as "nullification by non-enforcement."¹³⁸ Underenforcement did not provoke a major outcry among Temperance leaders, who appeared satisfied with constitutional vindication of the norm of abstinence, regardless of whether it was fully observed.¹³⁹ Gusfield argues that this complacency confirms the highly symbolic character of status conflicts.¹⁴⁰

III

ANALYZING THE BILINGUAL EDUCATION CONTROVERSY AS A STATUS CONFLICT

Gusfield's analysis of status conflicts can illuminate the bilingual education controversy if Hispanics have used language as a proxy for their culture, customs, and values. Under these circumstances, government support of bilingual-bicultural education and TBE programs represents the deference accorded Hispanics' way of life.¹⁴¹ Termination of this support would undermine Hispanics' recently acquired and hard-won status.

To evaluate the merits of this approach, this Part will use status conflict analysis as a framework for explaining bilingual education policymaking, litigation, and the development of the bilingual education and

137. *Id.* at 106-07, 118-19.

138. Gusfield, *Prohibition: The Impact of Political Utopianism*, in *CHANGE AND CONTINUITY IN TWENTIETH-CENTURY AMERICA: THE 1920'S* 257, 269-70 (J. Braeman, R. Bremmer & D. Brody eds. 1968) (quoting C. MERTZ, *THE DRY DECADE* 120 (1937)). The eighteenth amendment gave Congress and the states concurrent power to enforce its requirements by appropriate legislation. The major federal enforcement effort was the National Prohibition Act, or Volstead Act. The Act imposed responsibility for detection and suppression of violations on the Commissioner of Internal Revenue in the Treasury Department, rather than on the Department of Justice. The Prohibition Bureau was not brought under the Civil Service, and the salaries of Prohibition agents were considerably lower than those of other personnel. Federal and state appropriations were seldom large enough to establish an effective legal and police organization. Ineffective organization and weak morale were further aggravated by a succession of appointed Prohibition commissioners. Only after Herbert Hoover was elected President in 1928 did the Bureau become regularized by requiring recruits to pass the Civil Service examination and by bringing its activities under the supervision of the Justice Department. *Id.* at 270-71.

139. J. GUSFIELD, *supra* note 109, at 120-21.

140. *Id.* at 122-24; Gusfield, *supra* note 138, at 286-90.

141. Bilingual-bicultural education programs most clearly vindicate Hispanics' way of life because they place the Spanish language and related cultural values on a par with English and its attendant cultural norms. TBE programs provide a more ambiguous affirmation since children are ultimately returned to English-speaking classrooms. However, some deference is still accorded to distinctive linguistic and cultural heritages. Certainly, TBE programs display a greater sensitivity to these concerns than ESL and structured immersion programs.

English-only movements.¹⁴² Applying Gusfield's work in each of these areas will also enrich his original observations.

A. *The Policymaking Process Revisited*

In 1968, the wide publicity and emotionally charged rhetoric surrounding passage of the Bilingual Education Act reflected the participants' belief that more was at stake than a modest grant-in-aid program to fund research on bilingual education. As the testimony indicated, proponents viewed the Act not only as a vehicle for upward mobility but also as an endorsement of their language, culture, customs, and values.¹⁴³ The Act's symbolic impact far exceeded its initially small effect on the allocation of resources to programs for NEP and LEP children. Yet, just as Temperance leaders did not protest the nullification of the eighteenth

142. Neither Gusfield's analysis nor this Essay examines why certain disputes over status become politicized and others do not. The dispute over bilingual education is clearly politicized, perhaps in part because it centers around a state-provided service, public education. Of course, in choosing to focus on a public service, the participants also may have implicitly decided to politicize the dispute. By contrast, the Temperance movement focused on the consumption of alcohol, a largely private activity that was not inherently politicized. In fact, the dispute over temperance that arose in the 1820's did not become a political issue until the 1840's. See *supra* notes 123-29 and accompanying text.

The readiness with which a status conflict becomes politicized may depend on the general tendency to address disputes in the public forum. For example, some commentators have noted the growing trend to address a variety of issues, including those relating to special education, by elaborating substantive rights and developing trial-type procedural protections. Neal & Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, in *SCHOOL DAYS, RULE DAYS* 343-45 (D. Kirp & D. Jensen eds. 1986). But cf. Gusfield, *The Modernity of Social Movements: Public Roles and Private Parts*, in *SOCIETAL GROWTH* 302-07 (A. Hawley ed. 1979) (arguing that the state will become a less vital arena for social movements and that the civil rights movement may be the last major movement to rely on centralized state power to effect its demands). The push to convert educational problems into legalistic terms may have increased the likelihood that the status conflict underlying the bilingual education controversy would become politicized.

A related issue is why Hispanics selected bilingual education to serve as the proxy for their status. This choice may in part have been dictated by resource mobilization considerations. Hispanics needed an issue that would unite, rather than divide, them along ethnic lines. Their shared language heritage was a logical choice. See Padilla, *On the Nature of Latino Ethnicity*, 65 Soc. Sci. Q. 651, 653, 655, 658-60 (1984); see also Rodriguez, *'Latino'—A Label Too Wide and Too Narrow for Reality*, L.A. Times, Jan. 8, 1987, § II, at 5, col. 1. They also needed to ensure that the issue was of sufficient concern to their constituents that they would mobilize to support it. Recent studies suggest that education is of critical importance to Hispanics, among both long-time residents and more recent immigrants. Garcia & de la Garza, *Mobilizing the Mexican Immigrant: The Role of Mexican-American Organizations*, 38 W. POL. Q. 551, 559 (1985) (citing generally low rates of political and community involvement for Mexican immigrants but noting surprisingly high participation in PTA chapters); Romo, *The Mexican Origin Population's Differing Perceptions of Their Children's Schooling*, 65 Soc. Sci. Q. 635, 637, 648-49 (1984) (noting that all Mexican-origin groups value education, although their expectations of and degree of alienation from the school system vary with length of residence). In addition to satisfying resource mobilization requirements, bilingual education enabled Hispanics to distinguish their demands from those of black civil rights groups, who had dominated many of the efforts to combat racial discrimination. Rodriguez, *supra*.

143. See *supra* notes 23-27 and accompanying text.

amendment by nonenforcement, bilingual education advocates refrained from loudly decrying the Act's consistent underfunding.

However, bilingual education advocates could not simply acquiesce in the Act's underenforcement. Unlike Temperance supporters who were defending their status against the threat of growing urban immigrant populations, bilingual education supporters sought to enhance their status despite a longstanding history of exclusion and prejudice. A symbolic victory for the Temperance movement was probably more resilient in the face of underenforcement because the message conformed to the traditional status order. The affirmation of rural, Protestant American values merely confirmed people's preexisting beliefs about status. By contrast, the vindication of Hispanics' language, culture, and way of life in the Bilingual Education Act was designed to revise the status order. Because the Act's message challenged most people's assumptions about status, its symbolic impact was extremely fragile in the absence of any significant changes in school district practices.¹⁴⁴ A wholly discretionary grant program therefore could not fully vindicate Hispanics' status: A mandatory entitlement to bilingual education was necessary.

The Act's supporters turned to administrators and the courts to establish an entitlement that would ensure that schools devoted a greater share of their resources to programs for NEP and LEP children. These efforts succeeded when OCR issued its 1970 memorandum extending title VI's protections to NEP and LEP students, and the Supreme Court endorsed OCR's position in *Lau*. By proceeding before administrative decisionmakers whose deliberations on title VI's coverage of NEP and LEP children received relatively little attention, proponents avoided the serious consequences of a widely publicized defeat in the political arena. Had these advocates loudly criticized the underfunding of the Bilingual Education Act, their protests might have been ignored, and the symbolic impact of the Act would have been undermined.

The *Lau* decision had some symbolic consequences when announced and significant effects on the allocation of resources as applied. Its declaration of rights affirmed the value of according NEP and LEP children a meaningful opportunity to participate in an educational program. Because the opinion did not specify a remedy for the exclusion of NEP and LEP children from the curriculum, however, it did

144. In his analysis of the Temperance movement, Gusfield did not distinguish between the strategies of groups seeking to enhance their status and those seeking to defend it. Apparently, rural Protestant Americans organized around the issue of abstinence, but burgeoning urban immigrant populations did not. The liquor industry mounted the primary opposition to Prohibition laws, but its arguments were predicated on economic self-interest, rather than on concern for a particular way of life. See Gusfield, *supra* note 138, at 303-04. Consequently, Gusfield's examination of the Temperance movement did not afford him an opportunity to compare status groups based on whether they were improving or preserving their position.

not clearly vindicate the language, culture, and way of life of linguistic minorities. In fact, the decision expressly acknowledged that teaching English to NEP and LEP children might be an acceptable alternative, regardless of whether they received native-language instruction or information about their cultural heritage. The *Lau* decision became associated with a commitment to programs that relied heavily on native-language instruction only because of the later interpretive gloss in the *Lau* guidelines, which established a strong preference for such programs over structured immersion and ESL programs.¹⁴⁵ OCR's interpretation not only affected how resources were allocated to programs for NEP and LEP children but also altered the symbolic impact of the *Lau* decision.

Originally, congressional enactment of the EEOA was nothing more than a sympathetic gesture since it merely reiterated the standard under title VI set forth in *Lau* and OCR's 1970 memorandum. The EEOA's original symbolic impact on the linguistic minority community was probably quite small compared to the effect of the Bilingual Education Act in 1968. After all, the provision relating to NEP and LEP children was added as an amendment from the floor with little discussion and was embedded in an omnibus civil rights bill. Moreover, most linguistic minorities preferred to obtain relief under title VI because of the availability of the *Lau* guidelines, which endorsed bilingual-bicultural education and TBE programs. Only later, when title VI's coverage became more ambiguous and the *Lau* guidelines were withdrawn, did the EEOA begin to have important symbolic and instrumental consequences. Although the EEOA has permitted litigants to continue to sue successfully for special educational assistance, it less clearly vindicates the language, culture, and values of linguistic minorities since it seems to permit ESL and structured immersion programs.¹⁴⁶

As enforcement efforts produced an increasingly important reallocation of resources to bilingual education programs, adversely affected groups organized around both economic interest and status. In 1977-78, when empirical research failed to demonstrate the effectiveness of bilingual education programs, opponents were able to challenge federal support for the programs successfully. The free-for-all surrounding the NPRM in 1980 reflected both interest-group and status politics. English-speaking teachers, who were probably concerned about their employment security in a shrinking job market, mounted a strong attack on the requirements. At the same time, concerns about official bilingualism and separatism reflected a preoccupation with the status of English as the preeminent language of the United States.¹⁴⁷

145. See *supra* notes 33-35 and 38-39 and accompanying text.

146. See *supra* notes 40-41 and 53-54 and accompanying text.

147. See *supra* notes 43-46 and 50-51 and accompanying text.

The movement to make English the official language of the United States even more clearly derives from a desire to preserve English and the "American" way of life from encroachment by a growing number of linguistic minority groups. The membership is composed of long-time citizens who want to curb immigration that may strain America's resources and undermine its standard of living. Other members are immigrants who learned English as a second language and want to ensure that their newfound and perhaps tenuous hold on respectability through assimilation is not undermined. They may believe that learning English and adopting American values is the only legitimate route to upward social mobility.¹⁴⁸ Although some supporters are English-speaking teachers with an economic interest in eliminating bilingual education programs, these interests have been subordinated to status concerns in the drive to make English the official language.¹⁴⁹

Only when bilingual education advocates had achieved a significant reallocation of resources did this "status backlash" develop. The symbolic victory associated with the Bilingual Education Act's passage in 1968 did not trigger a strong adverse reaction. The English-only movement mobilized only after funding for bilingual-bicultural education and TBE programs had greatly increased, and empirical evidence had failed to document the programs' benefits. The mixed research findings made it difficult to justify the programs as purely pedagogical devices designed to promote proficiency in English and achievement in other subjects. The continuing commitment to these programs plainly reflected other objectives, including the vindication of the language, culture, and values of

148. Among voters who favored making English the official language of California, 62% believed that "everyone living here should speak English," and 56% said that it was "important for immigrants to learn English." Interestingly, among Hispanics who favored the proposal, 68% endorsed these propositions, a rate nearly 10% higher than that among white voters who supported the measure. While 50% of the general voters who supported the English language amendment contended that it is "important to society to speak the same language," 58% of Hispanics who voted for the measure agreed with this statement. Apparently, for a substantial segment of the Hispanic electorate, learning English was seen as a key element to participation in American society. Significantly, however, the poll does not indicate whether these voters favored the elimination of bilingual services as a means to achieve an English-speaking society, nor does it report on the degree to which they wanted to encourage proficiency in Spanish and an awareness of their cultural heritage in addition to acquiring English language skills. *California Poll*, *supra* note 61, at 191, 193.

Interestingly, the results among Asian voters who endorsed the measure were somewhat different. Of these voters, 75% believed that "everyone living here should speak English," but only about 35% stated that it is "important for immigrants to learn English" or "important to society to speak the same language." Apparently, these voters did not attach peculiar significance to the need for immigrants to learn English nor did they believe that fundamental societal needs were at stake. Only further study can illuminate precisely why Asian voters endorsing the measure thought everyone should speak English. *Id.* at 193.

149. Note, *supra* note 57, at 520-21 (primary emphasis of English-only movement is need for common bond of English to ensure political stability); see *supra* note 58 and accompanying text.

linguistic minorities, especially Hispanics.¹⁵⁰ As these political implications became clearer, English-only adherents found the programs increasingly threatening to their chosen way of life. They therefore mobilized to promote English-only reforms.

Although the English-only movement has succeeded in enacting reforms in a number of cities, counties, and states, it is unclear whether these measures will be effectively enforced. Like Temperance adherents, the English-only movement seeks to preserve its place in the established status order against a perceived threat. It has relied on symbolic victories through popular political processes. Because these victories conform to expectations about status, their immediate impact will not be undermined by a lack of enforcement. Consequently, there is a real possibility that, like the eighteenth amendment, English-only reforms will also be at least partially nullified by nonenforcement.

B. *The Litigation Process Reexamined*

Both *Otero* and *Zambrano* share characteristics consistent with the view that the bilingual education controversy embodies a status conflict. In each case, the plaintiffs demanded bilingual-bicultural education or TBE programs, while the districts typically favored heavier reliance on ESL instruction. These differences arose despite ongoing legislative, judicial, and administrative efforts to define a school district's obligations to NEP and LEP students. Because ESL is a less expensive instructional program,¹⁵¹ the school districts' claims can be partly explained in terms of budgetary constraints. However, the plaintiffs' strong preference for native-language instruction is consistent with a desire to vindicate their culture, customs, and values, and the districts' choice of ESL programs may also reflect a tendency to uphold the traditional status order.¹⁵²

Both cases certainly had a strong symbolic impact on the surrounding community, at least in part because they attracted considerable media attention. In *Otero*, the plaintiffs may have favorably influenced

150. For example, John Molina, the director of the Office of Bilingual Education, responded to the AIR evaluation by explaining:

You actually can't evaluate a bilingual education program. It is philosophy and management. You can evaluate courses. For example, evaluation should be limited to reading, mathematics, science and social science. I think we need a tremendous amount of research in order to determine what are the best methods and if children learn in languages other than English.

D. RAVITCH, *supra* note 27, at 278. Professor Ravitch termed Molina's answer "a blunt admission that bilingual education proceeded from ideological grounds, and not as a result of research validating the best methods of teaching children of limited English-speaking ability." *Id.*

151. Birman & Ginsburg, *Introduction: Addressing the Needs of Language-Minority Children*, in BILINGUAL EDUCATION, *supra* note 3, at xvi-xvii; B. Reyes & M. Siegel, *supra* note 79, at 41.

152. See D. TYACK, *THE ONE BEST SYSTEM* 104-09 (1974) (when immigrant groups sought to influence school policies by imposing their values or affirming their subcultures, school personnel typically endorsed traditional values, which they took for granted as self-evident).

the status accorded their way of life, even though they failed to persuade the court that bilingual-bicultural education should be required. That a politically moderate Chicano businessman testified for the plaintiffs indicated that their views were gaining wider acceptance in the Chicano community. The local newspaper acknowledged that whatever the decision, the case had demonstrated the importance of recognizing the special needs of linguistically and culturally different children.¹⁵³

In *Zambrano*, not only did the media generate interest in the dispute, but the BDAC also used the bilingual master plan as a rallying cry to spark widespread community involvement. Supporters appeared by the hundreds at public hearings, and popular outrage at the district's countersuit may ultimately have forced it to the bargaining table. Moreover, continuing public pressure on the school board probably improved the plaintiffs' chances to obtain a favorable agreement.¹⁵⁴

Although these machinations may appear to be nothing more than another example of interest-group bargaining over educational resources, evidence suggests that more than pedagogy was at stake for the *Zambrano* plaintiffs. The plaintiffs were initially reluctant to enter into settlement negotiations with the district because they wanted a full trial and complete victory "to teach the [d]istrict a lesson."¹⁵⁵ After the agreement was reached, the plaintiffs hailed it as a great triumph. Now that the consent decree is being implemented, linguistic minority parents, including some of the named plaintiffs, remain heavily involved in BDAC meetings. The parents value this involvement because "[i]t marks their right to participate in decisions affecting their children's schooling and confers dignity on their linguistic heritage."¹⁵⁶ These parents demonstrate a high degree of ethnic and linguistic consciousness at the meetings.¹⁵⁷

Otero and *Zambrano* also demonstrate the polarization and heated emotional responses that often accompany a status conflict. In each case, the litigation was highly acrimonious, and even traditional professional courtesies broke down. In *Zambrano*, the animosity among the parties culminated in the district's filing of a countersuit alleging harassment by the plaintiffs and their attorney.¹⁵⁸ The cases also sparked deeply felt reactions in the community at large. In *Otero*, these feelings manifested themselves most virulently in threats of violence. In *Zambrano*, they were evidenced by the heavy attendance and heated debate at public

153. See *supra* notes 74-75 and accompanying text.

154. See *supra* notes 86-87 and 95-98 and accompanying text.

155. B. Reyes & M. Siegel, *supra* note 79, at 104.

156. *Id.* at 137.

157. *Id.* at 140.

158. See *supra* notes 72, 90-94 and accompanying text.

hearings and by the outcry that followed the countersuit.¹⁵⁹

The plaintiffs' substantial involvement in *Otero* and *Zambrano* may have significantly influenced the symbolic impact of the litigation. Although in both cases the school district portrayed the attorneys as outside "agitators," the lawyers reportedly had responded to the plaintiffs' vigorous request for representation, rather than stirring up the lawsuits.¹⁶⁰ Moreover, the attorneys worked closely with the named plaintiffs throughout each case.¹⁶¹ In *Zambrano*, the plaintiffs even served as liaisons to their broader ethnic, linguistic, and cultural communities.¹⁶² Because the plaintiffs played a substantial part in the litigation process, they may have been more likely to conclude that the cases enhanced their community's status. After all, sophisticated attorneys had deferred to their values.

By contrast, if clients are co-opted or become passive when confronted with counsel's superior expertise, litigation may do little to bolster the community's status. A favorable outcome is apt to be interpreted as a triumph of legal acumen, rather than as an act of deference to Hispanics' way of life.¹⁶³ NEP and LEP clients may be especially vulnerable to co-optation, making it more likely that a lawsuit will not vindicate their community's status. Typically, these clients are poor ethnic minorities who speak little or no English, have little formal education, and may have distinctive cultural values.¹⁶⁴ Confronted with an alien legal process, they are apt to defer to attorneys who are well-educated, financially secure, often white, and sometimes non-Spanish-speaking.¹⁶⁵ At least in *Otero* and *Zambrano*, counsel apparently overcame

159. See *supra* notes 73, 86-87, 95-97 and accompanying text.

160. The plaintiff's lead attorney in *Otero* thought that Grand Junction was a poor site for a test case because other districts had more NEP and LEP children and had engaged in more overt acts of discrimination. Yet he concluded that "his primary obligation was to La Voz, a local client attempting to overcome what it saw as concrete aggrievements, rather than to a more abstract national litigation strategy." M. REBELL & A. BLOCK, *supra* note 18, at 282 n.11. In *Zambrano*, the BDAC parents consulted with several attorneys before finding a public-interest lawyer both willing and able to take their case. B. Reyes & M. Siegel, *supra* note 79, at 46-51.

161. M. REBELL & A. BLOCK, *supra* note 18, at 171 (describing how plaintiff's attorneys adjusted their strategies and theories to fit the needs and perceptions of their clients); B. Reyes & M. Siegel, *supra* note 79, at 93-95.

162. B. Reyes & M. Siegel, *supra* note 79, at 101-03.

163. See S. OLSON, CLIENTS AND LAWYERS 28 (1984). Lawyer domination occurs when: (1) lawyers control the content and management of the case without sufficient input from their clients; and (2) clients become so dependent on lawyers that their capacity to function as an organization is impaired in the long run. *Id.* See generally Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C.L. REV. 1133, 1144-46 (1976) (analyzing how litigation affects community organization).

164. L. ORUM, THE EDUCATION OF HISPANICS 6-25 (Eric Ed. No. 262-121, 1985).

165. Parents may also be overshadowed by English-speaking representatives of the Hispanic community, such as Chicano educators, who become involved in the case. Cf. Post-Trial Brief of Defendant at 43-47, *Keyes v. School Dist. No. 1*, 576 F. Supp. 1503 (D. Colo. 1983) (discussing

the barriers to meaningful client involvement that such differences in language, culture, ethnicity, education, and social status frequently present.

C. The Development of the Bilingual Education and English-Only Movements

In addition to illuminating the policymaking and litigation processes, status conflict analysis is helpful in evaluating the evolution of the bilingual education and English-only movements. Because the bilingual education movement sought to enhance its status, it was less able to rely on popular political processes that are apt to affirm the longstanding, generally accepted status order. Moreover, the movement had limited resources available with which to overcome this popular inertia. Still, it had to ensure that any fragile symbolic victories it achieved were bolstered by some subsequent reallocation of resources to bilingual education. Otherwise, a purely symbolic impact could be eroded by school district practices that continued to conform to the traditional status order.

To stand any chance of success in the legislature, bilingual education proponents had to ally themselves with other civil rights groups. Yet, these alliances typically resulted in omnibus bills that relegated bilingual education to the background. During legislative deliberations, bilingual education was consistently overshadowed by other civil rights issues, such as segregation and busing. Only during deliberations on the Bilingual Education Act did Congress focus exclusively on the problems of NEP and LEP children. The modest grant-in-aid program that emerged from these discussions arguably demonstrates the limited potential of this narrow legislative reform effort.¹⁶⁶

Bilingual education advocates therefore confronted a dilemma: They could demand specific legislative consideration of their needs and reap extremely limited reforms, or they could join civil rights coalitions to gain more sweeping reforms that accorded little special attention to their concerns. Neither outcome was satisfactory for Hispanics who accorded a unique importance to language as a proxy for their way of life. To achieve a more meaningful endorsement of their language, culture, and values, these advocates had to turn to decisionmakers that were

standing, typicality, and commonality requirements of class action brought by an organization of Hispanic educators as well as students and their parents) (on file with author).

166. Bilingual education proponents may have traded their support on other issues for favorable consideration of the Bilingual Education Act, thereby using coalitions to promote a more single-minded focus on the issue. Because the Act benefited a much narrower class, however, bilingual education supporters probably expended much of their political capital on catapulting the issue to prominence. They were therefore unable to extract more stringent legislation. Again, interest-group bargaining plays a role in explaining the legislative process, but status conflict analysis illuminates why proponents were willing to trade off a great deal to make bilingual education a salient issue.

not directly accountable through the electoral process: the courts and administrative agencies. Relieved of some of the need to forge broader coalitions, proponents could insist more narrowly on explicit approval of bilingual-bicultural education and TBE programs as a means of affirming their way of life.¹⁶⁷ As they achieved judicial and administrative victories, they were able to use them to persuade the legislature that its choices in enacting a bilingual education act or in funding programs were quite limited.¹⁶⁸ This strategy enabled bilingual education supporters to highlight bilingual education as a singularly important symbol of their status.

In contrast to bilingual education proponents who have relied heavily on judicial and administrative as well as legislative intervention, English-only reformers have typically relied on legislative action and popular referenda. Because the English-only movement seeks to preserve the existing status order, it is better able to capitalize on popular political processes than are bilingual education advocates, who challenge that order.¹⁶⁹ The high visibility of these processes, especially the popular referendum, makes them particularly useful in symbolically affirming the value of the English-only reformers' way of life.

However, the message sent by these measures is often clouded by the need to generate widespread sympathy for the proposals and the opportunity for broad-ranging participation in the referendum process. In California, for example, one survey found that few voters had any clear idea of what the official language proposal meant. Some even simultaneously supported the English-only amendment and bilingual education or bilingual ballots.¹⁷⁰ The English-only movement may therefore achieve highly salient symbolic victories with extremely ambiguous connotations.¹⁷¹ In the short run, this ambiguity may not greatly trouble the

167. Although the plaintiffs in *Lau* did not request a specific remedy, most litigants, like those in *Otero* and *Zambrano*, have demanded bilingual-bicultural education or TBE programs. Baker & de Kanter, *supra* note 19, at 299-305; Levin, *supra* note 10, at 37-39. Of course, these demands were significantly shaped by the *Lau* guidelines, *id.* at 37, but even after the guidelines' demise, plaintiffs have pressed for such programs under the EEOA. Baker & DeKanter, *supra* note 19, at 302-05; Roos, *Implementation of the Federal Bilingual Education Mandate: The Keyes Case as a Paradigm*, 1 LA RAZA L.J. 257, 265-66 (1986).

168. See, e.g., M. REBELL & A. BLOCK, *supra* note 18, at 193.

169. See *supra* notes 101-06 and accompanying text.

170. Trombley, *Latino Backing of 'English-Only' a Puzzle*, L.A. Times, Oct. 25, 1986, § II, at 6, col. 1.

171. In fact, even some of the popular referenda themselves have been loosely worded. For example, in California, the state constitutional amendment provides simply that "English is the official language of the State of California." CAL. CONST. art. III, § 6(b) (amended 1986). It goes on to require the legislature to "enforce this section by appropriate legislation" and mandates that the legislature and state officials "take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced." *Id.* § 6(c) (amended 1986). It further prohibits the legislature from passing any law "which diminishes or ignores the role of English as the common language of the State of California." *Id.* The amendment also provides for a

supporters of English-only reforms. Disagreements about the provision's meaning are likely to become manifest only while implementing it; yet, as previously noted, English-only reformers who seek to affirm the established status order are less pressed to enforce their symbolic triumphs. In fact, they may shy away from enforcement efforts that are apt to disrupt their support by making clear the diverse interpretations of the measures.¹⁷²

IV

SOME PREDICTIONS AND SUGGESTIONS ABOUT BILINGUAL EDUCATION AND ENGLISH-ONLY REFORMS BASED ON STATUS CONFLICT ANALYSIS

This Essay would not be complete without using status conflict analysis to indulge in some speculation about the future of bilingual education policymaking and litigation as well as the prospective development of the bilingual education and English-only movements. These predictions are offered only tentatively, however, in light of the myriad factors that can influence these complicated events.

A. The Policymaking Process Projected

So far, the English-only movement has pursued highly symbolic affirmations of its values without evincing much concern about subsequent enforcement. The English-only movement is unlikely to address the allocation of educational resources except when bilingual education supporters press for bilingual-bicultural education and TBE programs.¹⁷³ These battles are most likely to occur when legislatures are deliberating on bilingual education acts or appropriating funds under them.¹⁷⁴ The English-only movement's "reactive" posture is wholly consistent with its effort to defend, rather than alter, its status.

private right of action to enforce its provisions. *Id.* § 6(d) (amended 1986). The amendment's all-encompassing wording is apt to spark a number of competing interpretations. Trombley, *supra* note 61; L.A. Times, Oct. 3, 1986, § II, at 4, col. 1.

172. For example, efforts to eliminate foreign language advertising have created considerable dissension within the English-only movement. May, *Opposition Intensifies to Ads Using Spanish*, L.A. Times, Sept. 8, 1986, § I, at 21, col. 1.

173. After the passage of the English-only amendment in California, leading officials were reluctant to enact legislation to implement its requirements. Ingram, *Prop. 63 Backers Aim at Bilingual Education*, L.A. Times, Nov. 24, 1986, § I, at 3, col. 1. Even an assemblyman who introduced bills to eliminate a wide range of bilingual services after the amendment's passage expressed doubts as to whether the legislature would endorse his proposals. Trombley, *supra* note 64; San Francisco Examiner, Nov. 6, 1986, at A3, col. 1.

174. In California, there is general agreement that English-only advocates will strenuously oppose efforts to extend the state's bilingual education provisions, which expire on June 30, 1987. Ingram, *supra* note 173; Trombley, *supra* note 64; San Francisco Examiner, *supra* note 173.

The English-only movement will probably have far less impact on omnibus civil rights statutes, such as title VI and the EEOA, because they treat language barriers as a proxy for discrimination on the basis of race or ethnicity. This framework makes it more difficult for bilingual education advocates or English-only proponents to elevate language to a position of singular importance. Moreover, these statutes are supported by a coalition of civil rights groups. Because of its single-issue orientation, the English-only movement may be less able to forge the alliances necessary to challenge this coalition.

The English-only movement is unlikely to file many administrative complaints and lawsuits to change bilingual education programs, although it would undoubtedly respond to any challenges to the validity of English-only measures. Instead, organizational resources are currently being devoted to political campaigns for English-only reforms across the country.¹⁷⁵ These campaigns have produced widely publicized, discrete changes with a strong symbolic impact. By contrast, administrative actions and litigation tend to be drawn out and may produce only mixed results for English-only supporters, given the strictures of title VI and the EEOA.¹⁷⁶ Because administrative proceedings are typically less publicized than higher court decisions, they are particularly unattractive avenues of change for English-only adherents because of their limited symbolic impact.

Moreover, few members of U.S. English have any direct stake in how English-only measures are enforced in the schools. Having had little direct contact with bilingual education programs, they are not likely to devote the time and energy necessary to investigate and challenge program implementation; in any event, mere passage of English-only measures vindicates their way of life.¹⁷⁷ The one exception is English-speaking teachers whose jobs may be threatened by bilingual education programs. Again, English-speaking teachers are apt to assume a "reac-

175. For instance, U.S. English loaned its California chapter \$385,000 to finance the English-only initiative. Trombley, *Prop. 63 Finance Infraction Alleged*, L.A. Times, Sept. 19, 1986, § I, at 25, col. 1; Nakao, *Prop. 63 Opponents Complain About Loan to Plan's Backers*, San Francisco Examiner, Sept. 19, 1986, at A6, col. 5.

176. Obviously, districts will remain bound by consent decrees negotiated pursuant to title VI. Baker & de Kanter, *supra* note 19, at 307-08. Moreover, the EEOA, which is now the principal source of federal protection for linguistic minority schoolchildren, only requires that districts take "appropriate action" to meet their needs. In the short term, this would clearly seem to allow properly implemented ESL and structured immersion programs. See *supra* note 54 and accompanying text. However, the prevailing interpretation of the requirement also requires districts to evaluate their programs and modify them if they do not improve NEP and LEP students' academic achievement. *Castaneda v. Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981). In the longer term, ESL and structured immersion programs might run afoul of the EEOA if ongoing evaluation revealed that they did not adequately enhance NEP and LEP students' opportunity to participate in the educational curriculum.

177. See *supra* notes 21, 58, 149 and accompanying text.

tive" posture, filing complaints only in response to bilingual education advocates' efforts to reallocate resources. Moreover, while displaced teachers may rely on the English-only measure, they are also apt to invoke their vested interests based on seniority.¹⁷⁸

To the extent that the English-only movement interjects itself into bilingual education debates, it will probably rigidify policy discussions by insisting on the unique role of English. Each side will increasingly view language as an absolute value that can not be traded off against other goods. As both sides grow more inflexible in their demands for vindication of their language's value, they will insist more vehemently on specific remedies that validate their ways of life. Each will be even less willing to consider empirical evidence on the effectiveness of different approaches to teaching NEP and LEP children. Instead, English-only advocates will invariably demand structured immersion and ESL programs because they promote the status of English. By the same token, Hispanics and perhaps other linguistic minority groups will demand bilingual-bicultural education and TBE programs that endorse their language, culture, and customs.¹⁷⁹ It will become increasingly difficult to mask this deep-seated conflict through compromises that advance neither side's status objectives.

B. *The Litigation Process Predicted*

Bilingual education advocates have relied heavily on the litigation process to ensure that programs for NEP and LEP children are adequately funded. However, this process has been increasingly complicated by tensions between bilingual education and desegregation and by the proliferation of linguistic minority groups. Bilingual education conflicts with desegregation in two ways. First, implementation of a desegregation decree often threatens bilingual education programs that require a minimum number of NEP and LEP students in a particular school to trigger program requirements. Even where programs continue after implementation of the decree, they are more likely to rely on ESL because bilingual-bicultural education and TBE programs are not utilized with a small number of students.¹⁸⁰ Second, to the extent that linguistic minority students must be separated from their English-speaking classmates for special instruction, bilingual education programs can result in racially or ethnically identifiable classrooms and undesirable

178. See *supra* note 12 and accompanying text. Of course, to the extent that claims based solely on seniority have proven unsuccessful, English-speaking teachers are apt to rely more heavily on English-only reforms.

179. The polarization of the bilingual education conflict along these lines is already beginning to emerge in California. Ingram, *supra* note 173; Trombley, *supra* note 64.

180. Roos, *Bilingual Education: The Hispanic Response to Unequal Educational Opportunity*, LAW & CONTEMP. PROBS., Autumn 1978, at 135.

isolation.¹⁸¹

Courts have responded to these tensions in a variety of ways. Some have simply accorded a higher priority to desegregation than bilingual education. Others have allocated NEP and LEP children among the schools covered by a desegregation decree in a way that preserves bilingual education programs.¹⁸² To avoid classroom segregation, Congress has provided that up to forty percent of the students in a federally funded bilingual education program can be English-proficient.¹⁸³ The courts and Congress have also required integrated classes in music, art, physical education, and other elective subjects.¹⁸⁴

The conflict between bilingual education and desegregation diminishes the symbolic impact of lawsuits in vindicating Hispanics' way of life. The litigation process makes clear the trade-offs required among different approaches to combatting racial and ethnic discrimination in the schools. In fact, these trade-offs reflect the omnibus character of the statutes that have spawned the litigation. By treating language as a proxy for race and ethnicity, these provisions acknowledge that children are vulnerable to various forms of discrimination, which may require distinctive remedies.

What remains uncertain is whether compromises forged in the legislature will endure the litigation process. When omnibus civil rights bills are passed in Congress, the trade-offs are abstract and remote, but in a lawsuit, they become concrete and immediate. Moreover, litigants are often more deeply committed to specific remedies than are lobbyists who regularly employ a wide range of tools to achieve an organizational objective.

Public-interest attorneys who litigate a number of bilingual education or desegregation cases can help to prevent the factionalization of plaintiffs along these lines by placing the plaintiffs' efforts in a broader perspective. Without divesting clients of ultimate decisionmaking authority, these attorneys can inform them about the wide range of approaches that have been used to fight racial and ethnic discrimination and the continuing commitment to each. If attorneys can persuade plaintiffs seeking desegregation and those seeking bilingual education

181. 1977 *House Hearings*, *supra* note 44, at 355-37 (remarks of Professor Gary Orfield, Political Science Department, University of Illinois at Urbana).

182. Roos, *supra* note 180, at 135-37 (describing approaches adopted in cases involving desegregation and bilingual education).

183. Bilingual Education Act, 20 U.S.C.A. § 3223(a)(4)(B) (Supp. 1986).

184. *E.g.*, *Cintron v. Brentwood Union Free School Dist.*, 455 F. Supp 57, 63 & n.9, 64 (E.D.N.Y. 1978); *see also* OFFICE FOR CIVIL RIGHTS, *supra* note 3, §§ IV, VI, *reprinted in* BILINGUAL EDUCATION, *supra* note 3, at 218-20 (no longer enforced); Bilingual Education Act, 20 U.S.C.A. § 3223(a)(4)(C) (requiring participation of NEP and LEP children in regular classes in elective courses, such as art, music, and physical education).

that cooperation is mutually beneficial, then the in-fighting that can potentially stymie meaningful judicial intervention may be prevented.¹⁸⁵ To some extent, the attorneys' success in preserving these alliances will depend on the degree to which the English-only movement rigidifies the focus on language as a basis for vindicating Hispanics' way of life. The more vigorously bilingual education advocates insist on the symbolic affirmation of their language, culture, and customs, the more likely that legislative trade-offs will not survive the litigation process.

The increasing number of linguistic minority groups also complicates the litigation process in bilingual education cases. Hispanic plaintiffs have played a leading role in many bilingual education cases, even where a number of other linguistic minority groups were potentially affected by the decree.¹⁸⁶ These other groups have seldom participated actively in formulating litigation strategies. Courts have frequently ignored their lack of involvement by assuming an identity of interest among language groups during the liability phase of a bilingual education case. Judges have, however, suggested that broader participation by these groups is required once liability is established and a remedy is being formulated.¹⁸⁷ Such protection at the remedial phase is probably more illusory than real. Once a school district has been found liable, it typically negotiates with the plaintiffs to draft a consent agreement subject to judicial approval. It is unclear whether previously uninvolved language groups meaningfully participate in this negotiation process.¹⁸⁸

If judges mandate more active participation by a wide range of affected linguistic minorities, Hispanic plaintiffs will have to forge new alliances with these groups to ensure successful litigation of their claims. If these coalitions fail to materialize, the lawsuit's potential to vindicate Hispanics' way of life will be seriously diminished. Not only will the suit's symbolic impact be diluted if groups bicker over the desired relief, but the case also will probably fail to produce any significant reallocation

185. This problem can be analyzed as a permutation of the Prisoners' Dilemma game, where both parties are better off in the long term by cooperating but believe that they can advance their short-term interests by competing. Because both respond competitively, each suffers both short-term and long-term disadvantages. Perhaps this feature of bilingual education litigation could appropriately be labeled Plaintiffs' Dilemma. See Elliott, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 324-26 (1985).

186. See, e.g., Moran, *Foreword—The Lessons of Keyes: How Do You Translate "The American Dream"?*, 1 LA RAZA L.J. 195, 201-02 (1986) (Spanish-speaking intervenors and their counsel directed bilingual education case with little or no input from other potentially affected language groups).

187. See, e.g., *Keyes v. School Dist. No. 1*, 576 F. Supp. 1503, 1506-08 (D. Colo. 1983) (although Hispanic plaintiff-intervenors were found to represent adequately the interests of Indochinese children during the liability phase of the trial, the court reserved authority to order separate representation during the remedy phase).

188. See Moran, *supra* note 186, at 202.

of resources. Eventually, litigation will cease to be an effective tool except in jurisdictions characterized by a relatively homogeneous linguistic minority population.

Even if alliances are forged, the very process of coalition building will alter the dynamics of the litigation process. In contrast to the tensions between desegregation and bilingual education, the tensions among linguistic minorities have not been extensively addressed during legislative deliberations. Congress paid scant attention to bilingual education issues during discussions of title VI and the EEOA, and Hispanics have overshadowed other groups at hearings on the Bilingual Education Act.¹⁸⁹ Moreover, the tensions between bilingual education and desegregation have promoted multiple-issue politics by highlighting the fact that the plaintiffs have suffered discrimination not only on the basis of language but also on the basis of race or ethnicity. In building coalitions among linguistic minorities, however, it will be necessary to emphasize the common denominator of language. By promoting single-issue politics, the formation of these alliances may intensify the commitment to language as a proxy for linguistic minorities' ways of life and rigidify demands for governmental intervention to vindicate these values. Under these circumstances, language will develop broader, more diffuse connotations for the participants and will provoke deeper emotional responses.

C. The Development of the Bilingual Education and English-Only Movements Divined

As previously noted, because bilingual education proponents sought to alter the status order by enhancing the deference accorded to their way of life, they had to engage in multiple-issue politics, joining with other civil rights groups to promote the reallocation of resources to bilingual education programs. Because English-only advocates are defending their place in the traditional status order, they have been able to pursue single-issue politics without an immediate concern about underenforcement of their reform measures.¹⁹⁰

189. See *supra* notes 101-06 and accompanying text. Several commentators have noted that the Bilingual Education Act primarily responded to Hispanic demands. See, e.g., C. HARRINGTON, *supra* note 24, at 2; A. LEIBOWITZ, *supra*, at 9; S. SCHNEIDER, REVOLUTION, REACTION, OR REFORM: THE 1974 BILINGUAL EDUCATION ACT 6-7 (1976). In fact, the bilingual education bill as originally introduced in the Senate covered only Spanish-speaking students but was later broadened to cover other linguistic minority groups, presumably to avoid legal challenges and an appearance of inequity. A. LEIBOWITZ, *supra*, at 15-17; S. SCHNEIDER, *supra*, at 22, 24. At the 1967 Senate hearings, over 60 people with a Spanish surname testified, while no Asian-surnamed persons appeared. 1967 Senate Hearings, *supra* note 25, at iii-vi. In recent years, however, other linguistic minority groups have played a greater role in the development of bilingual education legislation. L. ORUM, THE BILINGUAL EDUCATION ACT OF 1984: COMMUNITY INVOLVEMENT IN POLICY DEVELOPMENT 6 (1984).

190. For a description of another group that has engaged in single-issue politics, see Kristin

The prevalence of coalition-building and multiple-issue politics may have significant implications for each group's long-term resiliency. The bilingual education movement, by participating in coalitions and concerning itself with a number of civil rights issues, has diversified its political portfolio in a way that may improve its chances for survival. That is, if advocates encounter defeat in pursuing a particular reform, they can redirect their energies to other issues that promise greater opportunities for success. Conversely, if they succeed in one reform effort, supporters will not disband as readily as would a single-issue group because other reforms will remain on the agenda.¹⁹¹ Of course, if the English-only movement's emphasis on language forces bilingual education advocates to adopt a more single-minded commitment to this issue, their organizational resiliency may be impaired.

The English-only movement's exclusive focus on promoting the English language could jeopardize its chances for long-term survival. If a single-issue political group consistently fails to achieve desired reforms, it is more likely to lose members who become pessimistic about the possibilities for change and cannot devote themselves to alternative organizational objectives. For example, the WCTU's membership declined markedly after the repeal of Prohibition. Faced with a changed social and political environment that was more hostile to a norm of total abstinence, the WCTU nevertheless retained its single-minded commitment to temperance. As a consequence, its support, especially among the middle and upper middle classes, steadily diminished. The WCTU's former adherents could no longer identify with the largely discredited and unattainable goal of mandatory abstinence.¹⁹² On the other hand, if a single-issue group succeeds in promoting desired reforms, its membership is more likely to become apathetic and quiescent. For example, the

Luker's analysis of the anti-abortion movement. K. LUKER, *supra* note 108, at 223-24. Interestingly, until recently, adherents of the "right to choose" have been less likely to be single-issue voters. *Id.* at 286 n.11.

191. For a general description of the life cycle of social movements, including a discussion of their organizational decline, see C. STEWART, C. SMITH & R. DENTON, *PERSUASION AND SOCIAL MOVEMENTS* 37-50 (1984). Of course, economies of scale may also lead groups to diversify when start-up costs are prohibitive. Elliott, Ackerman & Millian, *supra* note 185, at 323. Multi-purpose organizations may confer other advantages as well. For example, groups that deal with multiple issues may better understand how various problems relate to one another and may more accurately predict the diverse ramifications of reform.

192. Gusfield, *supra* note 130, at 62-63, 72-75. Current WCTU members express moral indignation at the defection of middle and upper middle class members. *Id.* at 70-73. This new emphasis on moral outrage may signal a shift in the WCTU's relevant audience. Political appeals to establish Prohibition were undoubtedly directed at both members and nonmembers, while angry moralizing about the defection of former adherents is probably aimed at the remaining membership. Rather than shaming middle and upper middle class defectors into rejoining, these denunciations are designed to retain the current membership by promoting in-group solidarity. This change in focus may represent an implicit acknowledgment that the WCTU's temperance objective no longer can command broad political appeal.

WCTU's broad-ranging commitment to humanitarian reforms in the 1870's may have been designed to stave off apathy among members after the successful pursuit of Prohibition legislation in the 1840's through the 1860's.¹⁹³ So far, the English-only movement has successfully pursued reforms at the state and local level. Whether it will become apathetic after these initial successes or will broaden its reform agenda to maintain an active membership remains an open question.¹⁹⁴

CONCLUSION

Analyzing the bilingual education and English-only movements as part of a status conflict provides a useful supplement to interest-group bargaining analysis. Status conflict analysis is especially helpful in understanding why ongoing government intervention and empirical research have done relatively little to temper the highly emotional quality of the debate. Much more is at stake for the participants than optimizing the allocation of educational resources based on current pedagogical theories. For each side, language has become a proxy for their culture, customs, and values. If, for the foreseeable future, the United States will remain what Theodore Roosevelt termed a polyglot boarding house, the clash over bilingual education and English-only reforms will continue to reflect the status we accord its dwellers.

193. See *supra* notes 130-33 and accompanying text. Of course, this does not explain why the WCTU was able to diversify its goals in the 1870's after the successful pursuit of Prohibition legislation, but was not able to do so in the 1930's after the repeal of Prohibition. Perhaps, the WCTU was able to consider supplemental objectives so long as temperance remained a central organizing principle. Once abstinence became a discredited norm, however, the WCTU could not turn to other goals as substitutes for its self-proclaimed primary goal.

194. Regulating immigration would be a likely topic for a broadened reform agenda as several leaders of the English-only movement have expressed concern about this issue. Trombley, *supra* note 21 (both the chairman and executive director of U.S. English were active in an organization that lobbied for more stringent immigration laws and lower immigration quotas).