1-1-1999

Note, A Birthright Rearticulated: The Politics of Bilingual Education

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A BIRTHRIGHT REARTICULATED: THE POLITICS OF BILINGUAL EDUCATION

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This Note addresses Proposition 227, California's recently enacted voter initiative banning bilingual education in public schools. Nirej Sekhon argues that the proposition functions rhetorically as a racially inflected exhortation to nonwhite peoples in the United States. The proposition equates American identity with white identity by claiming English as the birthright privilege of white Americans. As such, the proposition is continuous with the history of language and education politics in the United States. The author concludes by sketching the broad challenge that his analysis poses to current legal mechanisms.

INTRODUCTION

President Bush once sent forth hundreds of Peace Corps volunteers with these affirming words: "English literacy has become the key to progress.... [Y]our language came to you as a birthright...."[1] Bush's words evoke colonial nostalgia.[2] "Progress" is imagined as a civilizing mission with young white Americans as its agents.[3] In a world where express invocations of race are thought distasteful, language is left to structure the relationship between "civilizer" and "uncivilized."[4] For the "civilizer," English is an inherent capacity, a birthright; for the "uncivilized," English is a learned capacity. The no-

* This meager footnote is nowhere near commodious enough to allow for all the thanks that are due. I, however, owe an especial debt of gratitude to Professor K.A. Appiah, Iris Bennett, Carol Kaplan, and Keith Buell for their energetic criticism.

1 James Crawford, Hold Your Tongue 206 (1992).

2 See id. at 49-51 (describing U.S. colonial policy as creating "sense of Anglo-Saxon purpose" mandating introduction of English). United States colonial policy viewed English's spread as synonymous with progress. American colonial policy was especially intensive in Hawaii, Puerto Rico, and the Philippines. See id. at 49-50. In Puerto Rico, three generations of schoolchildren were subjected to forced English-medium schooling before the policy was recognized as a failure. See id. at 51.

3 See Dennis Carlson, Respondent: Self Education—Identity, Self, and the New Politics of Education, in Power/Knowledge/Pedagogy: The Meaning of Democratic Education in Unsettling Times 191, 192 (Dennis Carlson & Michael W. Apple eds., 1998) (describing relationship between white identity and colonialism); see also Ronald Takaki, Strangers from a Different Shore: A History of Asian Americans 21-23 (1998) (describing white Hawaiian settlers' attitudes towards immigrant Chinese laborers).

4 See Kiyoko Kamio Knapp, Language Minorities: Forgotten Victims of Discrimination, 11 Geo. Immigr. L.J. 747, 753 (1997) (noting that society feels more comfortable focusing on language rather than race).

tion of English as "birthright" casts light on why primary fluency in non-English languages is perceived as a problem rather than a resource in the United States. [5]

It was in the spirit of rectifying a problem that California voters approved the antibilingual education initiative Proposition 227[6] in June of 1998.[7] Ron Unz, a wealthy Silicon Valley businessman, was Proposition 227's principal sponsor.[8] Unz contended that California's public schools had stopped teaching English to "immigrant" children under the guise of providing bilingual education.[9] Proposition 227 requires educational programs in which non-English-speaking students are "taught English . . . in English."[10] Although opponents challenged Proposition 227 in court, they did not succeed in enjoining its implementation.[11]

During the campaign to enact Proposition 227, supporters directed criticism at "late-exit," transitional bilingual education (TBE).[12] These were programs organized around the ambition that students would transition from their native language into English over a five- to six-year period.[13] Proposition 227, however, prohibits more than just late-exit TBE programs. Its reach encompasses a range of programs imprecisely labeled "bilingual education."[14] More startling

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5 See Crawford, supra note 1, at 207 (asking what accounts for "Americans' obstinate monolingualism").

6 1998 Cal. Legis. Serv. Prop. 227 (West) (codified at Cal. Educ. Code §§ 300-340 (West Supp. 1999)) [hereinafter Prop. 227]. The full text of Proposition 227 is reproduced in the Appendix to this Note.

7 See George Skelton, A Voters' Primer on the Lessons of the Open Primary, L.A. Times, June 4, 1998, at A3 (noting Proposition 227's passage). Sixty-one percent of those voting voted in favor of Proposition 227. See Richard Lee Colvin & Doug Smith, Prop. 227 Foes Vow to Block It Despite Wide Vote Margin, L.A. Times, June 4, 1998, at A1. The California Constitution grants to the electorate the power to propose and approve (or reject) statutes and constitutional amendments. See Cal. Const. art. II, § 8(a). In order to have an initiative put to the voters, the sponsors must submit a petition to the Secretary of State that contains signatures equal in number to at least five percent (for statutory amendments) and eight percent (for constitutional amendments) of the total votes cast in the previous gubernatorial election. See id. § 8(b). A proposition may not embrace more than one subject or contain alternative provisions. See id. § 8(d)-(f).

8 See Margot Hornblower, The Man Behind Prop. 227, Time, June 8, 1998, at 56.

9 See Ron K. Unz, Bilingual Is a Damaging Myth, L.A. Times, Oct. 19, 1997, at M5.

10 Prop. 227, supra note 6, § 305.

11 See Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1027 (N.D. Cal. 1998) (refusing to enjoin implementation of Proposition 227 after challenge by "limited English proficient" students).

12 See supra note 9 and accompanying text.

13 See infra notes 65, 124 and accompanying text.

14 Intuitively, the term "bilingual education" suggests a program designed to foster bilingualism. This is generally not the case. Most bilingual programs are designed to facilitate transition from a non-English language into English. See infra note 62 (describing various kinds of programs); see also infra Part II.C (same). Unless specified, I shall use the

is that over seventy percent of students in California who were eligible for such programs never received any type of special bilingual education.[15]

In the realm of racial meaning,[16] Proposition 227 functions as an exhortation to public schools and non-English-speaking people who are primarily nonwhite:[17] "You have to learn our language." The exhortation equates authentic "Americanness" with "whiteness" by constructing "the other"[18] as she who does not know "our" language. The proposition never enunciates a specific racial appellation. "Language" does all of the work.

Proposition 227 positions English as "our" language by constructing it as our unlearned capacity: It is our birthright. The proposition differentiates "us" from "them" by denominating them in terms of an essential inability to call English their own. They must learn it. Proposition 227 not only demands that they learn our language, it demands that they "forget" their own.[19] In so demanding, the proposition not only unleashes a salvo in the bilingual education debate, but is a moment in the broader debate over assimilation and acculturation.[20]

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term "bilingual" to refer to any educational program that would have been designated as such by the California Department of Education.

15 See California Dep't of Educ., Fact Book 1997-98: Handbook of Education Information 46 [hereinafter California Fact Book].

16 See Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 355-57 (1987) (decoupling racial meaning from conscious racist intent).

17 Spanish-speaking students constitute the largest segment of California's non-English-speaking student population. They comprise 80.2% of California's 1.38 million non-English-speaking student population. See California Fact Book, supra note 15, at 45-46. The remaining 19.8% speak primarily Asian languages: Vietnamese, 3.3%; Hmong, 2.3%; Cantonese, 1.9%; Filipino, 1.5%; Khmer, 1.4%; Korean, 1.2%. See id. at 46. In this note, I shall often refer to Latina/o and Asian people collectively. The terms "Latina/o" and "Asian," independently, conceal tremendous heterogeneity, let alone when conjoined. Proposition 227, however, pays no heed to such heterogeneity. Rather, it is concerned with highlighting Latina/os' and Asians' common "deficiency": not having English. See infra Part I.B. It is in the interest of representing this dynamic that I use the designations Asian and Latina/o jointly—not in the interest of making essential claims about the relationship between the two.

18 See, e.g., Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1372-73 (1988) (explaining that articulation of debased other "reinforces identification with the dominant group" and helps create illusion of its unity); see also text accompanying notes 75-77.

19 See infra note 136 and accompanying text.

20 See Peter Beinart, How the California G.O.P Got a Spanish Lesson, Time, May 18, 1998, at 58 (noting Republicans' accusations that bilingual education produces a "culturally alien . . . immigrant underclass"); Hornblower, supra note 8, at 56 (quoting Unz's thoughts on America's assimilation of immigrants); Andrew Phillips, Language Wars: Spanish Speakers Fight to Overturn Bilingual Education, Maclean's, June 1, 1998, at 34, 36 (noting

Proposition 227 does not radically break from the bilingual education programs it renders illegal. Rather, it is a more violent[21] articulation of the same underlying imperative: to consolidate America's status as a monoglot English-speaking nation.[22] Both bilingual and English-only educational schemes tend to emphasize English's centrality while demonizing primary fluency in a non-English language.

This Note examines the homologous ways in which this imperative animates Proposition 227 *and* its predecessors.[23] Part I describes the proposition and the terms of its passage; it then shows how Proposition 227 reestablishes English as the cultural property of white Americans. Part II situates the proposition in a broader discourse on Americanness. Americanization,[24] immigration, and educational policy have all contributed to the production of very particular notions of what it means to be an American. Bilingual education programs have reflected the particularity of such notions in that most bilingual programs never aimed to produce actual bilinguals. Part III suggests how the analyses in Parts I and II may complicate a standard reading of the Fourteenth Amendment's Equal Protection Clause[25] and the Equal

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that Proposition 227 is about "how best to integrate the second-biggest wave of immigration this century into the American mainstream").

21 I do not use the term "violent" to refer singularly to physical force as it is conventionally imagined. Nor do I use it to refer to the psychic impact that draconian language policies might have upon particular categories of people, although such a use would surely be appropriate. Rather, "violent" refers to "performative force": the images and meanings mobilized by particular arrangements of words and expressions. See Jacques Derrida, Force of Law: The "Mystical Foundation of Authority" (Mary Quaintance trans.), in Deconstruction and the Possibility of Justice 3, 6-7 (Drucilla Cornell et al. eds., 1992).

22 This assertion should not be read to mean that teaching English is not an important function of American public schools. Rather, the statement (like this Note, more generally) seeks to question the way in which English's importance is imagined and represented in certain discourses.

23 The predecessors to which I refer include many—although not necessarily all—programs encompassed by the label "bilingual education." See infra Part II.C.

24 "Americanization" refers not only to a general process of acculturation, but also to an early twentieth-century movement whose ambition was systematically to make "Americans" out of Eastern and Southern Europeans. See Robert A. Carlson, The Americanization Syndrome: A Quest for Conformity 5 (1987).

25 The Fourteenth Amendment provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

For the purposes of this Note, a "standard reading" is one that takes identity as a given: that is, a fixed attribute. Such readings imagine the law to operate upon people who are possessed of stable identities. This Note takes the view that identities are inherently unstable. That is to say, identities are constantly being constituted, consolidated, and de-

Education Opportunities Act of 1974 (EEOA).[26]

I
PROPOSITION 227

A. *A Troublesome Proposition*

Proposition 227 inaugurates an educational program in which English is "taught in English."[27] A violent assumption undergirds Proposition 227's English "immersion" scheme: Immigrant children will only learn English if they are submerged in it.[28] The proposition reaffirms English's status as America's "public language";[29] it follows that one needs to learn it in order to achieve "social advancement."[30] Admittedly, California's public schools have done a poor job educating immigrant children.[31] Proposition 227 squarely ascribes the failure to bilingual education.[32] According to the proposition's preamble, this is shameful on account of immigrant children's unique capacity to acquire "full fluency" in English if "heavily exposed to [it] in the classroom."[33] Because Proposition 227 only permits non-English languages to be taught as foreign languages to English speakers,[34] it

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stroyed. See generally Michael Omi & Howard Winant, Racial Formation in the United States: From the 1960s to the 1990s (1994). These processes operate through myriad discourses of which the law is prominent.

26 20 U.S.C. §§ 1701-1758 (1994).

27 Prop. 227, supra note 6, § 305 ("[A]ll children in California public schools shall be taught English by being taught in English.").

28 The expression "sink or swim" was often used to describe Proposition 227's immersion scheme. See, e.g., Nick Anderson & Amy Pyle, Bilingual Classes a Knotty Issue, L.A. Times, May 18, 1998, at R2; Editorial, Two Languages, Two Strategies, L.A. Times (Ventura County Edition), Oct. 11, 1998, at B16, available in 1998 WL 18882601.

29 Prop. 227, supra note 6, § 300(a).

30 Id. § 300(b).

31 See, e.g., id. § 300(d) ("The public schools of California currently do a poor job of educating immigrant children, . . . demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children . . . ."); see also Nick Anderson, State's Students Rank Below National Average, L.A. Times, July 22, 1998, at A1 (noting poor standardized test scores for students not fluent in English); Tina Nguyen, Remedial Reading Efforts in California Not on Same Page, L.A. Times, Oct. 4, 1998, at A1 (reporting inadequacy of remedial literacy programs); Louis Sahagun, Facing the Poverty Factor, L.A. Times, Nov. 1, 1998, at A1 (discussing education of poor immigrants in California public schools).

32 See Prop. 227, supra note 6, § 300(d) (stating that "costly experimental language programs [have] fail[ed] over the past two decades" to educate immigrant children). However, singularly ascribing blame, if any at all, to bilingual education programs is unjustified because most non-English-speaking children were never in them. See supra note 15 and accompanying text.

33 Prop. 227, supra note 6, § 300(e).

34 See id. § 311(a) (creating waiver for students fluent in English).

implies that fluency in two languages cannot be fostered at the same time.[35]

Proposition 227 outlines the scheme that replaces California's various bilingual education programs.[36] Section 305 requires that, prior to "English learners" entering English-only classrooms, they spend no more than one year in transitional ("sheltered English immersion") programs that impart a "good working knowledge of English."[37] During the one-year immersion, schools are encouraged to mix children of different language backgrounds and allowed to mix children of different ages.[38]

Proposition 227 does not concretely describe an implementation scheme. This lacuna created considerable confusion in the wake of its passage.[39] More alarming, however, is that the proposition implements a unitary instructional program that is backed by questionable empirical research.[40] In so doing, the proposition eschews the notion that localities should exert control over their schools[41] and prevents schools from addressing the specific needs of different communities.[42]

Proposition 227's expansive reach should not be underestimated.[43] In the name of doing away with bilingual education, Propo-

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[35] See id. §§ 300(e), 305, 311(a) (stating that immigrant children learn English if they are "heavily exposed to it," requiring that English be taught in English, and prohibiting non-English language instruction to students not already fluent in English); infra text accompanying note 136.

[36] See Prop. 227, supra note 6, § 305.

[37] Id.

[38] See id.

[39] See Nick Anderson & Doug Smith, State Board Grapples with Prop. 227, L.A. Times, Aug. 1, 1998, at A16 (describing uncertainty over how transition to "immersion" would be effected); Tina Nguyen, Loophole Lets Schools Delay Prop. 227, L.A. Times, July 30, 1998, at A3 (noting school districts' confusion over implementation strategy).

[40] See Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction at 1, Valeria G. v. Wilson, 12 F. Supp. 2d 1007 (N.D. Cal. 1998) (No. C 98-2252 CAL). But see *Valeria G.*, 12 F. Supp. 2d at 1015 (recognizing policy debate among educators and scholars regarding best program and noting that each side in case has "extensive evidence and arguments, including research studies" to support its position). If the goal is teaching English, it has been shown that transitional bilingual education (TBE) programs are more effective than immersion programs. See Geoffrey Nunberg, Lingo Jingo: English-Only and the New Nativism, Am. Prospect, July-Aug. 1997, at 40, 44.

[41] See Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction at 24-29, *Valeria G.* (No. C 98-2252 CAL). Some California Republicans found in the "local control" issue a reason to oppose Proposition 227. See Cathleen Decker, Rivals for Governor Face Off in Lively Forum, L.A. Times, May 14, 1998, at A1.

[42] See Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction at 23, *Valeria G.* (No. C 98-2252 CAL).

[43] Proposition 227 does allow for waivers to the immersion scheme it inaugurates. See Prop. 227, supra note 6, § 310. Such waivers, however, are only available for children who know English, children older than 10 years of age, and children with "special needs." Id. § 311. Parents must personally visit their child's school to obtain a waiver. Only if 20 such waivers are applied for in a particular grade can the school offer a bilingual class for that

sition 227 prohibits successful dual immersion programs as well.[44] These programs, which seek to produce bilingual/biliterate students, capitalize on students' native fluency by mixing Spanish and English speakers.[45] In contrast, Proposition 227 not only alters curricular substance, but transforms the physical space in which that substance is communicated. Posters and artwork in Spanish are not becoming of an English-only classroom.[46]

Proposition 227 has a political genealogy in that it is the latest in a line of English-only initiatives.[47] California was among the first states to pass an English-only law with Proposition 63 in 1986, which amended the California Constitution.[48] Although ostensibly symbolic,[49] Proposition 63 enabled English-only proponents to suggest that bilingual education was illegal.[50]

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grade. Other requirements also may apply depending upon the provision under which a waiver is applied for. See id. §§ 310-311. The requirements imposed upon parents present obvious problems for parents of non-English-speaking students, who are primarily working class and poor. See Ofelia García & Ricardo Otheguy, The Bilingual Education of Cuban-American Children in Dade County's Ethnic Schools, in Policy and Practice in Bilingual Education 93, 93 (Ofelia García & Colin Baker eds., 1995) ("Children who speak languages other than English in the United States come mostly from working-class homes or from the homes of the poor . . . ."). Among the proposition's other prominent features is a section granting parents standing to sue schools, schools board members, teachers, and other elected officials for failing to implement Proposition 227. See Prop. 227, supra note 6, § 320. The proposition also ensures its own longevity by requiring a two-thirds vote in each legislative house for amendment. See id. § 335.

44 Although "dual immersion" is a kind of bilingual education, "bilingual education" generally refers to TBE, whose purpose is gently to facilitate transition into the English language. See infra note 61-62 and accompanying text. For a clinical description of different kinds of language programs, see Colin Baker, Key Issues in Bilingualism and Bilingual Education 82 (1988).

45 See Nick Anderson, A Boomtown of Bilingual Education, L.A. Times, May 25, 1998, at A1 (noting that mixed student groups are ideal for dual-immersion type programs); Editorial, Some Bilingual Programs Deserve to Be Saved, S.F. Chron., Aug. 16, 1998, at 6 (noting successes of dual-immersion programs).

46 See Fred Alvarez & Jennifer Hamm, No Habla Espanol: Spanish Is Banished From Classrooms as Teachers Implement English Immersion, L.A. Times (Ventura County Edition), Sept. 6, 1998, at B1, available in 1998 WL 18871685 (describing removal of Spanish posters and books from classroom); Liz Seymour, Schools Set for New Era of English-Only, L.A. Times (Orange County Edition), Sept. 8, 1998, at A1, available in 1998 WL 18872106 (same).

47 At least 22 states now have such laws. See Cecilia Wong, Language is Speech, 30 U.C. Davis L. Rev. 277, 278 & n.6 (1996) (listing state statutes).

48 See Cal. Const. art. III, § 6. Proposition 63 passed in 1986 with a 73% majority. See The 1986 Election, 17 Cal. J. 587, 592 (1986).

49 Proposition 63 did little more than declare English to be California's official language. It left implementation to the legislature without specifying what implementation might mean. See Cal. Const. art. III, § 6.

50 See Antonio J. Califa, Declaring English the Official Language: Prejudice Spoken Here, 24 Harv. C.R.-C.L. L. Rev. 293, 301-03 (1989) (analyzing English-only laws). Propo-

In Proposition 63's wake, California voters passed a host of propositions that implicated race and identity.[51] Commentaries in the popular press were quick to articulate Proposition 227's connection to these propositions.[52] Supporters of Proposition 227 feared that it would become conceptually linked with Proposition 187, which was pilloried as virulently anti-immigrant.[53] The linkage was especially damning given that anti-bilingual education organizers have targeted Latina/o and Asian communities in California (and the United States, more generally).[54] Proposition 227 supporters' fear of a 227/187 linkage suggests an awareness that the bilingual education debate was racially circumscribed.

Consequently, it is unsurprising that Proposition 227's supporters went to great lengths to represent the proposition as both for the benefit of, and supported by, non-English-speaking minorities.[55] The

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sition 63 passed just before California's bilingual education law was scheduled to sunset. See Cal. Educ. Code § 62000.2(e) (West 1989) (setting sunset date of June 30, 1987).

[51] See 1996 Cal. Legis. Serv. Prop. 209 (West) (codified at Cal. Const. art. I, § 31 (West Supp. 1999)) (eliminating public affirmative action programs); 1994 Cal. Legis. Serv. Prop. 187 (West) (codified in scattered sections of Cal. Educ., Gov't, Health & Safety, Penal, Welf. & Inst. Codes) [hereinafter Prop. 187] (restricting public services for undocumented immigrants).

[52] See Bettina Boxall, Unusual Crusade: *Que Pasa Aqui?*, L.A. Times, Apr. 5, 1998, at B1 (discussing Propositions 187, 209, and 227); Carl Ingram, Wilson Backs Ballot Measure to Ban Bilingual Education, L.A. Times, May 19, 1998, at A1 (same); Kathleen Les, No Mas for Bilingual, 29 Cal. J. 24, 24 (1998) (observing that Latina/o voters linked Prop. 227 to Prop. 187 and Prop. 209); Tony Perry, Social Issues Bring Out Differences, L.A. Times, Sept. 27, 1998, at A3 (comparing senatorial candidates' positions on Propositions 187, 209, and 227); Amy Pyle et al., Latino Voter Participation Doubled Since '94 Primary, L.A. Times, June 4, 1998, at A1 (noting Latina/o voting patterns for Propositions 187, 209, and 227).

[53] See Ingram, supra note 52, at A1 (discussing Proposition 227 sponsors' fear that Wilson's endorsement would invite voters to link Propositions 227 and 187, which Wilson also endorsed). Proposition 187 proposed denying all but emergency medical services to undocumented persons in California. See Prop. 187, supra note 51, § 6. It also proposed more extensive monitoring and reporting of those suspected of being undocumented. See id. § 4. Legal action blocked Proposition 187's implementation. See League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995). Had this not occurred, Proposition 187 would have harnessed institutions such as public schools for the purpose of identifying and reporting anyone who might "reasonably" have appeared undocumented. See Prop. 187, supra note 51, § 7(d).

[54] Cf. Crawford, supra note 1, at 122 (contrasting English-only movement's treatment of Latina/o and Asian communities with hands-off treatment of Soviet Jewish immigrants in Brooklyn, New York).

[55] Proposition 227 asserts as much in its preamble. See Prop. 227, supra note 6, § 300(b) ("Immigrant parents are eager to have their children acquire a good knowledge of English . . . ."). Proposition 227's chief sponsor, Ron Unz, also made it clear that he intended the proposition to benefit Latinas/os. See Unz, supra note 9, at M5. Unz cleverly appointed Jaime Escalante (the East Los Angeles math teacher represented in the film *Stand and Deliver*) to be the honorary spokesperson of Proposition 227's campaign organization. See Jenifer Warren, Hooked on Politics, L.A. Times, July 16, 1998, at A3. Spanish

popular press helped create an atmosphere in which it was difficult not to believe that the majority of Latina/o voters supported Proposition 227.[56] However, polling results suggest that supporters' claims were tenuous at best. The majority of Latina/o-identified voters cast their ballots against the proposition.[57] According to polling data, Proposition 227 was most popular with those who described themselves as white, conservative, and male.[58]

Post-election results published in the *Los Angeles Times* begin to suggest why Proposition 227 supporters might have voted as they did. Seventy-three percent of those polled before the election who planned to vote in favor of the proposition were going to do so because they believed that "if you live in America you need to speak English."[59] This explanation invites two interpretations; both equate Americanness with English fluency. In the first interpretation, English is an organic marker of Americanness: To be American *is* to speak English. The second interpretation emphasizes English's instrumentality: Because English happens to be America's public language, one needs to know it in order to participate in society. Both of these interpretations highlight Proposition 227's peculiarity. Its sponsors' purported objective was to provide "English for the children."[60] This very objective, however, animated California's bilingual education law as well:

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television ads sponsored by Los Angeles mayor Richard Riordan stated that he "supports Proposition 227 to give your children a chance." Nick Anderson, L.A. Teachers Group Pledges Defiance if Prop. 227 Passes, L.A. Times, May 21, 1998, at A3.

[56] The L.A. Times reported that Latinas/os favored Proposition 227. See Bettina Boxall, Popularity Extends Past Racial Lines, L.A. Times, May 29, 1998, at A3. For a detailed criticism of the Proposition 227 media coverage, see James Crawford, The Bilingual Education Story: Why Can't the News Media Get It Right? (last modified September 27, 1999) <http://ourworld.compuserve.com/homepages/jwcrawford/NAHJ.htm>. James Crawford was a journalist for Education Week. He has written extensively on language policy in the United States. During the summer of 1998, Crawford's homepage was among the more robust sources of electronic information regarding the politicking surrounding Proposition 227.

[57] Post-election polling revealed that 63% of voters self-identifying as Latina/o voted against Proposition 227. See Pyle, supra note 52, at A1.

[58] Poll results indicated that 81% of voters identifying themselves as male Republicans and 67% of voters identifying themselves as white voted for Proposition 227. See L.A. Times Poll (visited Sept. 24, 1999) <http://www.latimes.com/HOME/NEWS/POLLS/exitpollsuper.htm>.

[59] L.A. Times Poll Alert (visited Sept. 1, 1998) <http://www.latimes.com/HOME/NEWS/POLLS/PDF/410pa2da.pdf>. Ambiguous polling results are often mobilized for dubious political ends. James Crawford discusses how slanted polling questions helped produce the results that showed Latinas/os to be overwhelmingly in favor of Proposition 227. See James Crawford, Responding to Unz-Supported Claims (visited Aug. 11, 1999) <http://www.ourworld.compuserve.com/homepages/jwcrawford/unzargs.htm>.

[60] Proposition 227 and its sponsoring organization were named "English for the Children." See Unz, supra note 9, at M5.

It mandated instruction in non-English languages for the purpose of "transitioning" school children into English.[61]

To the extent that many California schools may have failed to equip their students with English fluency, there is no evidence that factors intrinsic to bilingual education were responsible. To argue otherwise is fatuous given the number of programs to which "bilingual education" refers.[62] Moreover, the vast majority of California's non-English-speaking students have known nothing but English-only education.[63] For the thirty percent enrolled in programs described as "bilingual," many were in early-exit programs. Contrary to pro-Proposition 227 rhetoric,[64] such programs were quite short and often conducted in English.[65] Persistent shortages of qualified bilingual instructors also rendered many programs less effective than they otherwise would have been.[66]

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61 "Basic bilingual education" only allows for the use of pupils' native language until they can be transferred into English language classes. See Cal. Educ. Code § 52163(a)(2) (West 1989).

62 Most bilingual education programs in California were designed explicitly for non-English-speaking children. These programs were created for the purpose of transitioning such children into English, not for the purpose of developing their native fluency. Appropriately, such programs are called transitional bilingual education. See Baker, supra note 44, at 46. TBE programs can be broken down further into late exit and early exit. Late-exit programs are five- to six-years long while early-exit programs are usually no more than two. Initially, late-exit programs are conducted almost entirely in the children's native language. By the end of the program, instruction is almost entirely in English. See J. David Ramirez et al., Longitudinal Study of Structured English Immersion Strategy, Early-Exit and Late-Exit Transitional Bilingual Education Programs for Language-Minority Children 1-2 (1991).

63 See supra note 15 and accompanying text.

64 See supra note 9 and accompanying text.

65 Often the label "bilingual" is little more than a name. In early-exit programs, the bilingual component is often restricted to as little as 30 minutes a day. See Ramirez, supra note 62, at 2. Teachers in early-exit programs are, generally, not fluent in anything but English. The same is not true for late-exit programs. See id. at 17; Crawford, supra note 1, at 221. In short, early-exit often amounts to little more than an immersion program with limited tutoring on the side. In *Teresa P. v. Berkeley Unified School District*, the plaintiffs challenged just such a program for its inadequacy. 724 F. Supp. 698 (N.D. Cal. 1989) (holding that school satisfied requirement for overcoming "educational barriers" of Equal Educational Opportunity Act of 1974 (EEOA)).

66 See California Dep't of Educ., Remedying the Shortage of Teachers for Limited-English-Proficient Students 2, 4, 7 (1991) (urging California legislature to provide funding to hire additional qualified bilingual instructors); Laurie Olsen et al., The Unfinished Journey: Restructuring Schools in a Diverse Society 206 (1994) (noting that shortage of bilingual teachers interferes with implementation of effective bilingual programs); Young Im Yoo, Schools Are Failing All Students, L.A. Times, May 30, 1997, at B7 (noting persistent shortage of bilingual teachers).

B. A Critical Framework

Proposition 227 reacted to an *idea* of bilingual education that bore scant resemblance to some of California's more salient educational realities.[67] Perhaps this should not be surprising given the symbolic stature of bilingual education as a political issue.[68]

Professor Rachel Moran's article, *Bilingual Education as Status Conflict*, is one of few efforts within legal discourse to account for the debate's ferocity.[69] Professor Moran invokes the notion of "status conflict" to make sense of the bilingual education debate.[70] Drawing on Joseph Gusfield's sociological work,[71] Professor Moran argues that Hispanics have used language as "a proxy for their culture, customs, and values."[72] As such, bilingual education confers status not just upon Spanish, but upon a way of being. Moran's account, however, does not even begin to address what has elsewhere been called "the other question."[73]

In his essay, "The Other Question," Homi Bhabha contends that social domination is necessarily dependent upon "the concept of 'fixity' in the ideological construction of otherness."[74] Although Bhabha

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67 Cf. Joshua A. Fishman, 'English Only': Its Ghosts, Myths and Dangers, 74 Int'l J. Soc. Language 125, 132 (1988) (speculating that there are more Anglo-oriented Americans turned off to idea of bilingual education than children who have received it). Concerning the Proposition 227 debate, Governor Pete Wilson declared: "'[I]n California's schools, English should not be a foreign language.'" Ingram, supra note 52, at A1. Wilson obviously had not spent much time studying California's educational programs. See supra note 15 and accompanying text.

68 See Kenji Hakuta, The Mirror of Language 226 (1986) (arguing that bilingual education symbolically threatens status of English language by openly acknowledging legitimacy of non-English languages).

69 Rachel F. Moran, Bilingual Education as a Status Conflict, 75 Cal. L. Rev. 321 (1987).

70 Id. at 325.

71 See, e.g., Joseph R. Gusfield, Symbolic Crusade (1963). Gusfield employed the notion of "status conflict" to explain the American Temperance Movement. Gusfield noted that in "status politics," conflict arises where there is a discrepancy between the prestige afforded a particular group and the prestige to which group members think themselves entitled. See id. at 17. Gusfield insisted on the fixity of "status communities": "Status communities are sharply delineated segments of the status system . . . ." Id. at 21. Gusfield pointed to racial and religious groups as examples of "status communities." See id.

72 Moran, supra note 69, at 345.

73 Homi Bhabha, The Other Question, in Contemporary Postcolonial Theory 37, 37 (Padmini Mongia ed., 1996). For discussion of his thesis, see infra notes 74, 79.

74 Id. Fixing the other is necessarily a discursive project. Elaborate studies expound upon the other's essential characteristics. As such, studies of the other may say more about the studier's subject position than the other's essential nature. See generally Edward W. Said, Orientalism 122 (1979) (arguing that:

> [T]he essential aspects of modern Orientalist theory and praxis . . . can be understood, not as a sudden access of objective knowledge about the Orient, but as a set of structures inherited from the past, secularized, redisposed, and

speaks specifically of colonial discourse, his assessment applies to other modes of social domination. In Bhabha's analysis, social domination requires the express differentiation of us from them, or alternatively, self from other. For instance, "whiteness" and "blackness" emerged as identity concepts through the practice of slavery in the seventeenth century.[75] The very existence of "whiteness" depends upon the sustained articulation of an "other"—in slavery's case, "blackness." Put another way, it is only through the marking of an "other" qua an other that a self's constitution is possible.[76] This scheme suggests not only that notions of self are contingent upon notions of other, but that both conceptual entities are unstable. Positing "fixity" is thus necessary for sustaining any mode of social domination. White supremacy, for example, requires ritual insistence that bodies are definitively intelligible through fixed racial categories.[77]

"Fixity" is posited through myriad strategies, rhetorical and otherwise. Bhabha emphasizes the stereotype's role in the process of fixing racial meaning.[78] The stereotype "vacillates between what is . . . already known, and something that must be anxiously repeated . . . ."[79] It creates a "predictability" that is always "in *excess* of

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re-formed by such disciplines as philology, which in turn were naturalized, modernized, and laicized substitutes for . . . Christian supernaturalism.).

That it is the other who generally gets studied is a fact of enormous consequence. See Ruth Frankenberg, White Women, Race Matters 17-18 (1993) (discussing her study of whiteness as opposed to traditional studies of other that have left white self unexamined and unnamed).

[75] See Cameron McCarthy, The Uses of Culture 58 (1998) (arguing that notions of "whiteness" allowed settlers of different ancestry to claim common identity); see also Omi & Winant, supra note 25, at 62 (arguing that notions of "Europeanness" and "Otherness" coalesced through violent practices of domination and extermination).

[76] See Frankenberg, supra note 74, at 17 ("[T]he Western self is itself produced as *an effect* of the Western discursive production of its Others."); Bhabha, supra note 73, at 42 ("[T]he suggestion that colonial power and discourse is possessed entirely by the coloniser . . . is a historical and theoretical simplification . . . . [T]he intentionality and unidirectionality of colonial power . . . also unify the subject of colonial enunciation.").

[77] See, e.g., Howard Winant, Racial Dualism at Century's End, in The House that Race Built 87, 88-91 (Wahneema Lubiano ed., 1998) (describing consolidation of "white versus other" notion of difference during period of "monolithic white supremacy").

[78] See Bhabha, supra note 73, at 46 (discussing black child's disavowal of her race in self-identification).

[79] Id. at 37. The subject behind the stereotype's articulation "turns around the pivot of the 'stereotype' to return to a point of total identification." Id. at 46. The stereotype's articulation allows the articulating subject's *return* to *him*self. Put another way, it is through the stereotype's ritual articulation that the articulating subject is able to stabilize a "fixed" concept of *him*self. The stereotype, nevertheless, points to that which simultaneously needs no proof, and yet cannot be empirically proven. As such, it is a "process of ambivalence." Id. at 37. This process threatens the unity of both the stereotype's subject and object. In Bhabha's words: "The stereotype . . . for both coloniser and colonised, is the scene of a similar fantasy and defence—the desire for an originality which is again threatened by the differences of race, colour and culture." Id. at 45.

what can be empirically proved."[80] In the case of Latinas/os, for example, there is no empirical evidence suggesting that a significant number of those who are not fluent in English are averse to learning it.[81] Nonetheless, the idea that Latinas/os are averse to learning English has tremendous currency.[82] Similar is the idea that Latinas/os will not learn English but for the institution of draconian language policies.[83] These stereotypes invite us to consider how language policy delimits self by marking an other.

Jacques Derrida suggests that one's language is never really one's own.[84] Language does not spring from one's body upon birth. Language is always a learned capacity.[85] Any organic claim to a language is necessarily tenuous. Because language is always a learned capacity, any ordinarily competent person could, theoretically, learn any language. Regardless, languages are generally described as the cultural property of national groups. Languages are routinely claimed in terms of a national self (i.e., English as America's language). Derrida suggests that it is only through the systematic imposition of "one's" language upon an other that one is able to claim that language as one's own.[86] To put it differently, it is only by imposing a language *as* "one's own" that it becomes one's own. The modes of imposition include political rhetoric and schooling.[87] Proposition 227 encompasses both.

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[80] Id. at 37.

[81] Empirical evidence suggests that Latinas/os are acquiring English proficiency as quickly as any other group. See Califa, supra note 50, at 294 (citing studies showing that "the Hispanic community is acquiring English proficiency as rapidly as other immigrants have").

[82] See Linda Chavez, Out of the Barrio 87 (1991) (referring to animosity stirred by notions of Latina/o resistance to learning English); Laurie Olsen, Made in America: Immigrant Students in Our Public Schools 65 (1997) (contending that many Americans believe immigrant newcomers are averse to learning English).

[83] See, e.g., Crawford, supra note 1, at 73-74 (citing Texas English-only policy that was construed as criminalizing speaking Spanish on public-school property).

[84] See Jacques Derrida, Monolingualism of the Other; or, The Prosthesis of Origin 1-6 (Patrick Mensah trans., Stanford Univ. Press 1998) (1996).

[85] See id. at 40. Language is not only conferred from *without*, it is, through articulation, returned to that *without*. Thus, to call a language *one's* own in any sort of essential way is an impossibility. See id.

[86] Using the metaphor of colonialism, Derrida refers to such an articulation as the "first trick." Id. at 24. A colonizer cannot assert proprietary rights over the language he speaks. See supra note 85. It is only through forcing the colonized to *believe* that the language belongs to the colonizer that the colonizer can come to believe it himself. This is a "trick" in that it is the functioning of certain bureaucratic apparatuses—i.e., schools—that produce the notion of a language that *belongs* to the colonizer. See id. at 23-24.

[87] See id. at 23.

C. *Evoking an Un-Raced Subject: What Proposition 227 Does and Does Not Do*

Proposition 227 reaffirms English's status as America's public language[88] and thereby marks the other as she who does not know it. The proposition authorizes a lingual interdiction[89]—i.e., the proposition prohibits the development of native language literacy for students who cannot call English their own. Non-English instruction is only available to those for whom the language is foreign.[90]

Even popular press representations of Proposition 227 suggested that more was at stake than how best to teach English. Some of these representations articulated a fear that the Proposition 227 debate would become racially charged like the Proposition 187 debate four years earlier.[91] These representations, however, did very little to elaborate the precise ideological relationship between the two propositions. Perhaps this should not be surprising given the ideological relationship's complexity. Although both propositions were directed at Latina/o and Asian people,[92] neither proposition explicitly articulated a racially specific target population. Or did they?

Proposition 187 refers to those who might be "reasonably suspected" of being undocumented,[93] while Proposition 227 refers to those who need to learn how to speak English.[94] The two categories are often imagined as coextensive. The capacity to speak "unaccented," standard English is not race neutral.[95] Rather, it positions

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88 See Prop. 227, supra note 6, § 300(a) ("The English language is the national public language of the United States of America . . . .").

89 Derrida uses the term "interdict" to describe two phenomena. On the one hand, the term signifies the material practices through which the other is denied access to her native language. Ironically, however, this very subject's access to the colonial language is also "interdicted" but in a very different way. Although the other is forced to learn it in school, she is constantly reminded that it is not her own. See Derrida, supra note 84, at 31.

90 Proposition 227 grants exception to its English-only policy for "children who already know English." Prop. 227, supra note 6, § 311(a).

91 See, e.g., Frank del Olmo, Take High Road in Bilingual Debate, L.A. Times, Feb. 15, 1998, at M5 (writing of desire to spare public anger that could arise if Proposition 227 fight "gets as ugly as the fight over Proposition 187 did").

92 See Ruben J. Garcia, Comment, Critical Race Theory and Proposition 187, 17 Chicano-Latino L. Rev. 118, 122 (1995) ("Proposition 187 can be viewed as the latest in a long line of immigration laws which have a racial subtext.").

93 Cal. Educ. Code § 48215(e) (West 1999) (codifying parts of Proposition 187).

94 See Prop. 227, supra note 6, § 300(c).

95 That standard English is seen as unaccented is in and of itself suggestive. The perceived neutrality of standard English may parallel the way in which the racial category "white" is often interpreted as neutral. See Frankenberg, supra note 74, at 199. Similarly, the appellation "standard" conceals a normative judgment regarding the validity of particular kinds of English *as* English.

some bodies outside the designation "reasonably suspected."[96] Behind Proposition 187's rhetoric rests the concept of someone who is never "reasonably suspected"; similarly, Proposition 227 reconsolidates the position of someone who need not learn English—for it is already her language. It would appear that where Proposition 187 sketches a standard of suspicion, Proposition 227 fills it out.

By marking an other as an other, Propositions 227 and 187 reequate "Americanness" with "whiteness." This is not to say that becoming a citizen of the United States is still expressly predicated upon race.[97] One's ability to lay claim to an American identity, however, is racially circumscribed. Consider the phenomena of "hyphenated-American" identities.[98] In the case of hyphenated identities, the hyphen marks an ontological distance from an essential Americanness.[99] However reassuring it may be to claim an American identity, to do so in a hyphenated capacity is to concede impurity.[100] The hyphen demarcates marginality in a way that allows the (pure) "center" to command significance without its explicit recognition as center ever becoming necessary.[101] The penumbra of racial hyphenations around

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96 See National Network for Immigrant and Refugee Rights, The Impact of Immigration Raids on Families, Workers, and Communities 29 (1998) (relating episode in which Immigration and Naturalization Service agents assumed that Spanish fluency was tantamount to being undocumented).

97 The first naturalization law passed in 1790 restricted naturalization to "white" immigrants. See Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 103; see also Takaki, supra note 3, at 82, 113, 207. It, however, has been somewhat modified in the intervening years. In 1965, Congress abandoned its erstwhile expressly racist immigration quota system. See Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911, 911 (codified as amended in scattered sections of 8 U.S.C.). The current law, however, retains per-country limits. No country may receive more than seven percent of the total quota of family-sponsored and employment-based immigrant visas for any particular year. See Immigration and Nationality Act § 202(a)(2), 8 U.S.C. § 1152(a)(2) (1994). The per-country limit translates into longer waits for applicants from high-immigration countries.

98 See Mary C. Waters, Ethnic Options 158-60 (1990) (discussing extent to which being Asian and American seem to many to be mutually exclusive).

99 The appellations being conjoined present themselves as mutually exclusive. See id.

100 See, e.g., Takaki, supra note 3, at 212-29 (highlighting experience of second-generation Japanese immigrants and their desire to identify as "American"). This may not be the case when a hyphenated identity does not legitimate one's claim of the designation "American." For many white Americans, claiming a hyphenated American identity has more to do with laying claim to a "culture" than legitimating their status as "American." As such, claiming a hyphenated identity may be purely volitional. See Waters, supra note 98, at 18-19. Even when claiming a hyphenated identity is not a volitional matter, the hyphen need not be seen singularly as a "minus" sign. See Werner Sollors, Beyond Ethnicity 243 (1986) (stating that hyphen is seen as token of avant-garde modernism).

101 See Mike Hill, Trading Races: Majorities, Modernities: A Critique, in Education and Cultural Studies 139, 143 (Henry A. Giroux & Patrick Shannon eds., 1997) ("[W]hite subjectivity sustains its normative value by remaining somehow outside the differences it wants to name . . . .").

Americanness suggests that a notion of whiteness sits at its normative core.[102]

"American" unqualified is generally used to refer to white Americans.[103] In this Note, "whiteness" is used to designate people who espouse "a set of cultural practices that are usually unmarked and unnamed."[104] Whiteness is the category against which difference is measured.[105] White Americans often describe themselves as without an identity or, alternatively, without a culture.[106] By these terms, white people are positioned as the embodiment of a neutral "sameness" while people of color are positioned as the embodiment of "difference."[107] These notions of sameness and difference cannot function without one another.[108] In this dependence relation one can discern structural similarity to the relationship between "American" and its hyphenated progeny. Both "white" and "American" function as "normative . . . residual[s]": They are what is left when "difference" is purged.[109] The circularity of this formulation is, at once, obvious and destabilizing. What might it mean to say that America has always had a "white core"[110] if that core's very intelligibility is dependent upon those thought not to constitute it?[111] The core's centrality becomes unstable because it is radically dependent upon that which is not it. Creating the fiction of stability (or "fixity") requires persistent restatement of what separates them from us.

Both Propositions 187 and 227 are restatements as such. Proposition 187 mandated an extensive surveillance regime for the purpose of

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102 See Peter Brimelow, Alien Nation 10 (1995) (arguing that America has always had white core).

103 See Olsen, supra note 82, at 40-41 (noting assumed equivalence between "American" and "white" in common parlance); Takaki, supra note 3, at 6-7 (same); R. Valerie Lucas, Yellow Peril in the Promised Land, in 1 Europe and Its Others 41, 41 (Francis Barker et al. eds., 1985) (same).

104 Frankenberg, supra note 74, at 1.

105 See Hill, supra note 101, at 143; George Lipsitz, The Possessive Investment in Whiteness, 47 Am. Q. 369, 369 (1995) (discussing notions of racial privilege arising from "whiteness"); Stephen Nathan Haymes, White Culture and the Politics of Racial Difference: Implications for Multiculturalism, in Multicultural Education, Critical Pedagogy, and the Politics of Difference 105, 107 (Christine E. Sleeter & Peter L. McLaren eds., 1995) (exploring "white" culture's "politics of difference").

106 See Frankenberg, supra note 74, at 196 (describing young white women's feelings of culturelessness); Haymes, supra note 105, at 113 (noting that white people sometimes "express feelings of culturelessness").

107 See Frankenberg, supra note 74, at 197.

108 See generally Toni Morrison, Playing in the Dark: Whiteness and the Literary Imagination (1992) (exploring manifestations of black others in American literature).

109 Frankenberg, supra note 74, at 198.

110 See Brimelow, supra note 102, at 10 ("[T]he American nation has always had a specific ethnic core. And that core has been white.").

111 See McCarthy, supra note 75, at 111-13.

identifying and excluding those deemed not to belong.[112] It is nonwhite immigrants who are accused of bringing about a "massive . . . transformation" in America's political and cultural texture.[113] Presumably, the characteristics that account for the "massive transformation" also would have rendered nonwhite immigrants "reasonably suspect." Proposition 187's sponsors did, after all, name their organization "Save Our State" (SOS).[114] Had Proposition 187 gone into effect, its "reasonably suspected" designation would have compromised Asian- and Latin-looking or -sounding[115] peoples' status as "American." Through its designation, Proposition 187 implicitly reconsolidated the identity of a person whose Americanness is beyond question.

Proposition 227 also consolidates racial meaning, albeit in a more subtle way than Proposition 187. Ostensibly, Proposition 227 is predicated upon a neutral assertion: English fluency allows for upward mobility.[116] By articulating this assertion, Proposition 227 can rationalize the "immersion" program it prescribes by claiming to speak *for* poor, primarily Spanish-speaking people of color.[117] They, after all, should be "eager" for their children to learn English.[118] English unquestionably enjoys national hegemony. English's hegemony, however, is not a neutral fact. Rather, it is a fact saturated with histories of violence.[119]

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112 The Proposition's purpose was to "establish a system of required notification by and between [state] agencies to prevent illegal aliens in the United States from receiving benefits or public services." See Prop. 187, supra note 51, § 1. With regard to schools, Proposition 187 created affirmative obligations for schools to identify, report, and exclude anyone not legally in the United States. See id. § 7.

113 Brimelow, supra note 102, at 10 ("[T]he massive ethnic and racial transformation that public policy is now inflicting on America is totally new . . . .")

114 See Garcia, supra note 92, at 118.

115 Language not only marks those who might have been thought "reasonably" suspect, it has historically featured as an exclusionary criterion in American naturalization policy. See Naturalization Act of 1906, ch. 3592, § 8, 34 Stat. 596, 599 (1906) (denying citizenship to non-English-speaking immigrants); Juan F. Perea, Demography and Distrust, 77 Minn. L. Rev. 269, 332-33 (1992) (discussing effect of English literacy requirements of immigration and naturalization laws (citing 8 U.S.C. §§ 1255a(b)(1)(D)(i), 1423 (1994))).

116 See Prop. 227, supra note 6, § 300(b) (finding that English enables participation "in the American Dream of economic and social advancement"). But see Fishman, supra note 67, at 131 (suggesting that English fluency may be almost as inoperative for Hispanics' social mobility as it is for Blacks').

117 See supra note 55.

118 See Prop. 227, supra note 6, § 300(b).

119 See Perea, supra note 115, at 315 ("We must recognize . . . the coercion . . . inherent in the dominance of English as the language of most Americans."). America's language policy toward native peoples is also suggestive. Until the late nineteenth century, native- and mission-run schools educated Native American children. Many of those schools were bilingual. The Bureau of Indian Affairs, created in the late 19th century, closed all such schools. The Bureau was charged with the responsibility of creating school environments that would induce Native American children to turn away from their native languages. To

Even if we were willing to overlook these histories, Proposition 227's failure to deliver the English fluency whose importance it so righteously proclaims must warrant skepticism.[120] Because it fails on its own terms, it is easier to argue that Proposition 227 functions primarily at a rhetorical level as racist exhortation.

Proposition 227 emphasizes the importance of forcing immigrant children to learn English without providing a mechanism to achieve that end. Opponents have denounced Proposition 227's educational scheme as terribly inadequate.[121] The one-year sheltered immersion, which is to precede students' transfer into English-only classrooms, will not equip children with sufficient English fluency to succeed in English-medium classrooms.[122] Successfully functioning in an English-only academic environment requires more than just rudimentary familiarity with English.[123]

Studies reveal children do not necessarily "pick up" English more quickly if "immersed" in it.[124] It may take five or six years for chil-

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achieve this end, the Bureau created "boarding schools" that were located away from native children's tribal homes. It was thought that removing children from their cultural context would speed English acculturation. At the boarding schools, children were organized into mixed language groups to ensure that the children would have to rely upon English. The schools' policy prohibited native speech, and violators were punished severely. See Shirley Silver & Wick R. Miller, American Indian Languages: Cultural and Social Contexts 11 (1997).

120 See Prop. 227, supra note 6, § 300(c) ("California [has] a moral obligation and a constitutional duty to provide all of California's children, regardless of their ethnicity or national origins, with . . . literacy in the English language . . . .").

121 Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction at 11, Valeria G. v. Wilson, 12 F. Supp. 2d 1007 (N.D. Cal. 1998) (No. C 98-2252 CAL). The irony, of course, is that Proposition 227 reinstitutes what has always been the de facto, if not official, language policy in most California schools. The vast majority of California's public schools never created bilingual programs. As a result, 70% of California's non-English-speaking students went without any sort of special language program. See supra notes 15, 17 and accompanying text. For those districts that instituted transitional bilingual programs, many functioned as little more than English-only programs. See supra notes 65-66 and accompanying text.

122 See infra notes 123-25 and accompanying text. I am assuming that there is a profound difference between "getting by" and "succeeding." By its own terms, Proposition 227 only requires that children have a "good working knowledge" of English prior to being transferred into mainstream, English-only classrooms. See Prop. 227, supra note 6, § 305; see also supra notes 37-38 and accompanying text.

123 Cf. Henry T. Trueba, Raising Silent Voices 30 (1989) (noting that consistent "English as a second language" instruction fails to equip pupils with enough English to function in English-speaking classrooms). Proposition 227's vision of sheltered immersion is not only very short, it encourages the mixing of students who are of different ages and language backgrounds. See Prop. 227, supra note 6, § 305.

124 Of the few studies of bilingual education, one of the more recent and sophisticated was prepared for the U.S. Department of Education. The eight-year longitudinal study sought to compare the relative effectiveness of immersion, early-exit, and late-exit TBE programs. Among the study's stated implications are that non-English-speaking students

dren who do not speak English to become proficient in English to the extent necessary to succeed in English-medium classes.[125]

Throughout the Proposition 227 campaign, it was no secret that the proposition was addressed to Latina/o and Asian communities. They constitute the vast majority of California's non-English-speaking students.[126] It is telling that Proposition 227 implies that all non-English-speaking children are "immigrants."[127] Proposition 227's assumption is that if one does not speak English one is not American. Many non-English-speaking children, however, were born in the United States.[128]

Regardless, Proposition 227 designates all non-English-speaking students "English learners."[129] It bears repeating that Proposition 227 reaffirms English as America's "public language" and the "leading world language."[130] Latina/o and Asian children are marked as other in a vast, sweeping gesture that enunciates their common deficiency: not *having* English.[131]

The designation "English learner" should at once seem odd. Everyone must learn English in order to speak and use it.[132] Nevertheless, Proposition 227 uses the designation "English learner" to refer only to non-English-speaking schoolchildren.[133] Through its assignation of "English learner" status, the proposition consolidates the identity of a subject who is not an "English learner" because

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may require prolonged assistance if they are to succeed in English-only classes. See Ramirez et al., supra note 62, at 40; see also Nunberg, supra note 40, at 44 ("[C]ompared with various types of 'immersion' programs, bilingual education reduces the time to reach full English fluency by between two and three years.").

125 Seven years is the approximate length of most late-exit programs. See Ramirez et al., supra note 62, at 2.

126 See supra note 17.

127 The proposition claims that California schools do a poor job educating immigrant children. See Prop. 227, supra note 6, § 300(d).

128 A 1993 study for the U.S. Department of Education found that 41% of elementary-school students with low English proficiency were born in the United States. See Howard L. Fleischman & Paul J. Hopstock, 1 Descriptive Study of Services to Limited English Proficient Students 6 (1993).

129 Prop. 227, supra note 6, §§ 305, 306(a).

130 Id. § 300(a).

131 Proposition 227 defines an "English learner" in terms of deficiency. "'English learner' means a child who does not speak English . . . and who is not currently able to perform ordinary classroom work in English, also known as a Limited English Proficiency or LEP child." Id. § 306(a).

132 This, of course, holds true for every language. Language is always a learned capacity; learning a language necessarily entails an imposition from without *one's* self. Articulating proprietary rights over a language is, therefore, very peculiar. Derrida reflects on such in asserting that language always comes from and is returned (through speech, presumably) to a place that is outside *one's* self. See Derrida, supra note 84, at 40.

133 Prop. 227, supra note 6, § 306(a). Ninety-eight percent of pupils so classified are people of color. See Olsen et al., supra note 66, at 214.

America's public language is already his own. He speaks English not because he has learned it, but because it *belongs* to him: It is his birthright.[134]

Proposition 227's unnamed linguistic claimant is necessarily white.[135] For the white American, Spanish (Chinese, Khmer, etc.) is always a *foreign* language. Proposition 227 consolidates this understanding by, implicitly, constructing *native* Spanish (Chinese, Khmer, etc.) fluency as a problem in desperate need of eradication. The Proposition requires public schools to abandon any commitment to fostering literacy in non-English, native languages. It effectively provides that non-English languages can only be taught as *foreign* languages.[136] In so doing, Proposition 227 gives rise to a strange paradox: A non-English student can only begin to learn her native language in school when it is clear that she has forgotten it.

II
A Larger Context

Proposition 227's evocation of racial meaning cannot be fully appreciated without reference to the broader contradictions that inhere in American national identity. Throughout the 20th century, education and language policy have featured centrally in efforts to shore up Americanness. Part II will consider these dynamics in relation to Proposition 227.

A. A Nation Whose Bounds Lie in Its Boundlessness

Proposition 227's participation in the consolidation of racial meaning is not unique. It is entirely continuous with an assimilation ethic that embraces school as the site of "de-ethnization."[137] "De-ethnization's" upshot is, presumably, a subject without race or ethnic-

134 Derrida would call this a "trick." See supra note 86.

135 The identity of Proposition 227's (implicit) English non-learner is complicated by America's sizable black population. Ostensibly, most black Americans are English speakers. "Black English," however, is stigmatized as impure—a deviant English that, under ideal conditions, would be absorbed back into standard English. See Henry Louis Gates, Jr., The Signifying Monkey xix (1988) (noting predictions that Black English would disappear with integration). The demonization of non-English primary fluency and Black English may be coterminous. The Ebonics controversy in California suggested as much. See, e.g., Editorial, Mainstream English is the Key: Official Status for Black English Won't Cure Educational Problems, L.A. Times, Dec. 22, 1996, at M4.

136 See Prop. 227, supra note 6, § 311(a) (making waivers to English-only requirement available to "[c]hildren who already know English").

137 See Joshua A. Fishman, Language Loyalty in the United States 21 (1966) (discussing social scientists' fascination with assimilation or "disappearance phenomena" rather than "maintenance phenomena").

ity.[138] As such, "de-ethnization," of which learning standardized English is an important aspect, has been central to notions of American national identity.[139] "De-ethnization's" emphasis on "neutralizing" subjects normalizes the equation between essential Americanness and whiteness.[140]

Nations are conceptually reliant upon some notion of "us."[141] More precisely, "nation" marks an exclusionary community that is rhetorically organized around some specified us.[142] Calling oneself a member of a national community always entails more than simply identifying with a spatial abstraction. The way in which national "space" is delimited and invested with significance depends upon the articulation of an "us."[143] Calling oneself "American," for instance, requires identifying with specified concepts of Americanness that are not merely the effect of existing within America's territorial boundaries.[144] Rather, notions of Americanness lend particularized significance to one's existence within America's territorial boundaries.

It is ironic that "national concepts" often consolidate their legitimacy by positing the nation as "the exemplar of universal qualities."[145] American nationalist rhetoric relentlessly translates "America" into one of many pithy universalisms: America is the land of liberty, freedom, opportunity, etc. It is often stated that because American is an idea, being American requires little more than vigor-

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138 See supra notes 106-09 and accompanying text.

139 See Fishman, supra note 137, at 21.

140 See Frankenberg, supra note 74, at 196.

141 See Nirmala Srirekam PuruShotam, Negotiating Language, Constructing Race 5 (1997) (arguing that nation is form of social knowledge). Studies of nationalism have sought to substantiate the claim that a shared culture engenders nationalism. See, e.g., Ernest Gellner, Nationalism 4 (1997). Such accounts, however, may ignore the extent to which cultural "pasts" are invented ex post for the nation. See, e.g., Eric Hobsbawm, Introduction: Inventing Traditions, in The Invention of Tradition 1, 1 (Eric Hobsbawm & Terence Ranger eds., 1983).

142 See Joan Copjec, The Phenomenal Nonphenomenal: Private Space in Film Noir, in Shades of Noir 167, 174 (Joan Copjec ed., 1993) (asking what "allows the nation to collect a vast array of people, discount all their positive differences, and count them as citizens, as members of the same set, in logical terms as identical[ ]"); Klaus Schleicher, Introduction to Nationalism in Education 13, 21 (Klaus Schleicher ed., 1993) (asserting that nation's social meaning is predicated upon separation from other countries).

143 See Doreen Massey, Double Articulation, in Displacements 110, 114 (Angelika Bammer ed., 1994) (arguing that national "characterizations of place are all attempts to . . . give [them] single, fixed identities and to define them as bounded . . . , characterized by their own internal history, and through their differentiation from [the] 'outside.'").

144 See Copjec, supra note 142, at 174.

145 Peter Fitzpatrick, 'We Know What It Is When You Do Not Ask Us,' in Nationalism, Racism and the Rule of Law 3, 9-10 (Peter Fitzpatrick ed., 1995) (arguing that nation's conceptual legitimacy may depend upon rhetorical self-effacement through which national community is styled as not nationalistic).

ous commitment to that idea.[146] However seductive, this brand of universalism leaves "America" teetering on absurdity's brink. America as an idea leaves open the possibility of an America without physical limits.[147]

The national identity contradiction demands the construction of an oppositional universality.[148] That is to say, the nation must represent itself as universal in opposition to what is outside its universality.[149] The nation requires an other; that other takes the form of she who does not embody the nation's universal qualities or aspirations.[150] In America's case, the other is conceived as she who is unable to take advantage of American liberty and opportunity on account of indolence, inability to speak English, etc.[151] In her most alarming manifestation, the nation's other threatens the very unity upon which the nation's universal qualities depend.[152] America simply cannot continue being the land of opportunity if people radically dissimilar from us are permitted to call it their home.[153] Assimilation and exclusion thus present themselves as linked strategies for managing otherness.

The assimilable other can be re-formed into a likeness of the conceptual us while the unassimilable other simply cannot.[154] Exclusion

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146 "America is an idea as much as it is a country. [It] has . . . everything to do with allegiance to a set of principles." Henry Grunwald, Home Is Where You Are Happy, Time, July 8, 1985, at 100-01. Grunwald's piece reflects American universalism and the contradictions that inhere therein.

147 See Fitzpatrick, supra note 145, at 10; Copjec, supra note 142, at 175 (describing how enumeration of citizens could continue ad infinitum without geographic limits). We know that America has very definite limits. Not every kind of person can become an American. In most cases, one needs to have been a lawful permanent resident for five years before one can naturalize. See 8 U.S.C. § 1427(a) (1994). In order to become a lawful permanent resident, one has to be admitted to the United States. Admission criteria include health, political ideology, and class, among others. See 8 U.S.C. § 1182(a)(1), (3)(D), (4) (1994).

148 See Fitzpatrick, supra note 145, at 22.

149 See id.

150 See id.

151 See David R. Roediger, The Wages of Whiteness: Race and the Making of the American Working Class 13-15 (1991).

152 One sees the traces of this sensibility in the gloom and doom suggestions that rampant immigration threatens to overwhelm the United States. See Brimelow, supra note 102, at xv.

153 See id. at 7 (arguing that unassimilable immigrants may threaten American ideal figuratively and white Americans literally).

154 See id. at 9 (trying to show that new immigrants are radically different from America's majority). One sees the traces of a similar sensibility in Justice Harlan's famous dissent in Plessy v. Ferguson, 163 U.S. 537 (1896). Harlan articulated the link between America's exclusionary citizenship laws and the intractable otherness of Chinese immigrants. See id. at 561 (Harlan, J., dissenting) ("There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Per-

becomes a strategy for dealing with those who are not assimilable.[155] Both exclusion and assimilation type the other vis-à-vis the national "we." The national we, in turn, depends upon these processes for its integrity and stability.

The image of an "ideal American" suggests how the national we is imagined. The idealized blond-haired, blue-eyed American presents more than just a physical emblem of essential Americanness. She connotes a way of being that encompasses language, tastes, sexual orientation, and more.[156] One's physical similarity to the ideal has, historically, determined the capacity in which one is allowed to participate in American society (to the extent one is permitted to participate at all).[157] New Mexico, for instance, was denied statehood in 1902 for failing to be sufficiently Anglo.[158]

None of this is to say that America's putative "white core" is stable. What it means to be white is in constant flux just as is any other racial category.[159] With each successive round of assimilation and/or exclusion, white Americanness emerges a bit different from what it was before.[160] Managing the white core's tenuousness has presented constant challenge. Its persistent instability is revealed through the core's self-articulated relationship with the other.[161] Efforts at manag-

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sons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.").

155 Restrictive immigration policies are often rationalized in terms of how different the people being excluded are. See Takaki, supra note 3, at 201.

156 See generally Ann duCille, The Shirley Temple of My Familiar, Transition, Issue 73, at 10 (1998) (discussing idealization of Shirley Temple).

157 For a powerful representation of this point, see Toni Morrison, The Bluest Eye (1970).

158 In 1902, a congressional delegation visited New Mexico in order to investigate the possibility of statehood. In rationalizing its recommendation against statehood, the congressional committee reported:

> [W]hen the mass of the people . . . shall, in the usages and employment of their daily life, have become identical in language and customs with the great body of the American people; when the immigration of English speaking people . . . does its modifying work with the "Mexican" element—when all these things have come to pass, the committee hopes and believes that this mass of people, unlike us in race, language, and social customs, will finally come to form a creditable portion of American citizenship.

S. Rep. No. 57-2206, at 9 (1902); see also Crawford, supra note 1, at 52; Perea, supra note 115, at 320-23.

159 See Omi & Winant, supra note 25, at 54-55; see also Stuart Hall, Cultural Identity and Diaspora, in Contemporary Postcolonial Theory, supra note 73, at 110, 110 ("[W]e should think . . . of identity as a 'production', which is never complete . . . .").

160 See Noel Ignatiev, How the Irish Became White 69 (1995) (arguing that expanding "whiteness" to include Irish was needed by whites to justify perpetuation of slavery).

161 A YMCA motto from the early twentieth century spoke in reference to new immigrants: "Unless we Americanize them they will foreignize us." See Carlson, supra note 24, at 86.

ing the other were necessarily informed by a desire for self-consolidation.

Proposition 227 is another chapter in a nationalistic narrative that seeks to stabilize America's putative "we." The proposition rearticulates aggressive "de-ethnization" as a strategy for managing otherness. Moreover, Proposition 227 rearticulates American specificity (e.g., English-only) as the predicate for American universalism (e.g., "land of liberty and opportunity"): *You've* got to learn English if *you're* going to "make it" in America. Proposition 227 not only reproduces America's white "us," it reemphasizes the extent to which school is the site for that reproduction. As this Note discusses in the following section, public schools have been among the primary sites for American de-ethnization.

B. Making Americans in Our Own Image

School is not a space in which already constituted subjects passively ingest information.[162] The Supreme Court in *Brown v. Board of Education*[163] rightly saw that an important role of schools is to make citizens out of children.[164] There is, however, another idea at play in *Brown* and a number of cases that follow it—an understanding that school preserves (through reproduction) *our* values.[165] This understanding might cast light on why schools appear at the center of American language politics.[166] What is thought to be "at stake" is sometimes seen in terms as grand as our "national unity."[167]

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[162] See Michael W. Apple, Cultural Politics & Education 64 (1996) (discussing formation of conservative groups interested in affecting what counts as "official knowledge" in public schools); see also Henry A. Giroux, Ideology, Culture, and the Process of Schooling 22 (1981) (arguing that schools are sites where ideologies are sustained, produced, and rejected).

[163] 347 U.S. 483 (1954).

[164] See id. at 493 ("Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship.").

[165] See Ambach v. Norwick, 441 U.S. 68, 76 (1979) (acknowledging "[t]he importance of public schools . . . in the preservation of the values on which our society rests"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29-30 (1973) (agreeing that education "is a principal instrument in awakening the child to cultural values" (quoting *Brown*, 347 U.S. at 493)); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) (same).

[166] Michael Apple, for instance, writes about how issues of traditionalism, the transmission of values, and personal security animate discussions of dropout rates, illiteracy, and curricular inadequacy. See Apple, supra note 162, at 6-7.

[167] Many proponents of English-only statutes have insisted that America's national unity hinges upon a shared fluency in English. See Crawford, supra note 1, at 24 (listing arguments made by others). Many such proponents have held Canada out as an example of what might happen if America endorsed bilingualism. See Norman Shumway, Preserve the Primacy of English, in Language Loyalties 121, 122 (James Crawford ed., 1992). The

While it is plausible that there is some connection between a shared set of values and national unity,[168] it does not logically follow that the nation need be homogeneous. Nonetheless, the suggestion that learning in a foreign language is inimical to the inculcation of "American values" has been forcefully made throughout America's recent history.[169] It is telling that in educational policy debates, the question of language instruction drowns out virtually every other significant educational issue involving non-English-speaking children.[170] This obsession, like all others, has a history.

Americanization refers generally to processes of de-ethnization and, specifically, to an assimilation movement that has its roots in the eighteenth century, but peaked in the early twentieth century.[171] Despite the fact that it is no longer a formal movement, Americanization's central concerns continue to govern how educational objectives are conceived for non-English-speaking children. Initially, Americanization's principal agents were young, Protestant college graduates. They sought to tap new immigrants' "democratic potential."[172] Americanizers often received state and local support.[173] Reformers subscribed to dominant ideas regarding the "tenaciousness" of immigrants' foreign characteristics.[174] In response to immigrants' rigid foreignness, Americanizers sought to enact intensive programs of "social remediation."[175]

Ninth Circuit, in Guadalupe Organization Inc. v. Tempe Elementary School District, 587 F.2d 1022 (9th Cir. 1978), suggested that English-only educational programs preserve national unity, which is a legitimate state interest. See id. at 1027.

168 "National unity" tends to take the conceptual form of a unitary "we." The American *we*'s reliance upon universalistic abstraction is evidenced by the hegemonic claim that "we are all immigrants." It is a claim that is ritually intoned in many public schools. The homogenizing rhetoric of being an "immigrant nation," however, erases the differential conditions of arrival and the myriad ways in which race circumscribes participation in American society. See Apple, supra note 162, at 15-17.

169 Raymond Tatalovich, for instance, notes the notional role played by "un-American values" in the lower court's decision in Meyer v. State, 187 N.W. 100 (Neb. 1922), rev'd sub nom. Meyer v. Nebraska, 262 U.S. 390 (1923). See Raymond Tatalovich, Nativism Reborn 58 (1995).

170 See Olsen, supra note 82, at 91; García & Otheguy, supra note 43, at 99.

171 See Carlson, supra note 24, at 1-5.

172 See id. at 60-61.

173 In Los Angeles, for example, a municipal law was enacted allowing Americanizers to pursue their program within the homes of Americanization's immigrant beneficiaries. See George J. Sanchez, Becoming Mexican American 98-99 (1993).

174 See Paula S. Fass, Outside In 23 (1989) (describing how Americanizers highlighted ethnic differences in effort to eradicate them).

175 Schools were to become the "agents of culture [and] connect the democratic potential of an enormously diverse population to the unities of an ancient citizenship...." Id. at 34. This idea may not seem especially surprising now. However, until the early twentieth century, schools were not conceived of as systematically serving a socialization function. See id.

Americanizers initially designated the workplace as the primary site of their activity.[176] Rather quickly, they shifted their focus to schools on account of schools' broad socializing potential.[177] Schools offered the potential of saving immigrant children from their own pathological cultures.[178] Schools serve a socializing function regardless of whether intended or not.[179] Americanizers, however, not only articulated socialization as an educational objective, but urged that it should take the form of making "Americans" of the new immigrants.[180] Lingual interdiction was an important strategy in the effort.

Until the late 1960s, linguistic interdiction was rationalized by the association of bilingualism with intellectual inferiority.[181] At the very least, it was thought that bilingualism produced confusion.[182] Through such understandings, an educational policy geared towards producing monoglot English speakers was made to seem as if it were in the best interests of immigrants, not to mention national unity.

Teaching English was one of Americanization's core ambitions.[183] To this day, as the Proposition 227 debate evidences, language instruction is the most salient policy question pertaining to immigrant education.[184] In its various incarnations, however, Americanization has insisted on something more than just English fluency. It has demanded English above all others. The exhortation to "learn English" linked the affirmative act of learning a new language with the negative

176 See id. at 23-25.

177 See id. at 24 ("The school was the only institution that could hope to alter immigrant culture where it was environmentally most permeable—the care and instruction of children.").

178 See id. at 25 (noting that only schools could "save the child from the life he was destined otherwise to lead").

179 See Carlson & Apple, supra note 3, at 198 (criticizing traditional notion that education entails merely passive communication of information).

180 See Fass, supra note 174, at 26 ("[Reformers] hoped the schools would replace objectionable forms of living and prepare the young to live better (and more American) lives than they would have lived without schooling.").

181 See Hakuta, supra note 68, at 10 (noting socially assumed connection between bilingualism and inferiority); Tove Skutnabb-Kangas, Multilingualism and the Education of Minority Children, in Policy and Practice in Bilingual Education, supra note 43, at 40, 42 (same). In certain circles, the repudiation of the bilingualism-inferiority link has not yet registered. President Ronald Reagan was quick to note that bilingual education is designed to preserve native-language fluency, which retards English acquisition. See James T. Lyons, The Past and Future Directions of Federal Bilingual-Education Policy, in Policy and Practice in Bilingual Education, supra note 43, at 1, 6.

182 See Hakuta, supra note 68, at 28.

183 See Sanchez, supra note 173, at 100 ("The most potent weapon used to imbue the foreigner with American values was the English language.").

184 See supra text accompanying note 170.

act of forgetting an "other" language.[185] Such linkage is logically continuous with the Americanization movement's demand that immigrants be purged of any "foreignisms."[186] In 1918, for instance, Texas instituted criminal penalties against teachers caught speaking any non-English language in class.[187] *Meyer v. Nebraska*[188] overturned a similar law in Nebraska. Sanctions against teachers, however, only begin to suggest the dimensions of Americanization's lingual interdiction.

Americanization's edict that immigrants must learn English precipitated the intensification of an academic surveillance that implicated both students and teachers.[189] In schools with Spanish-speaking students, for instance, teachers would often put up signs exhorting students to "speak in English" or, alternatively, not to speak in Spanish.[190] These and other rhetorical strategies implicitly, if not explicitly, served to rearticulate the essential connection between being American and speaking English.[191] Speaking Spanish in school invited verbal and physical reprimand by students and teachers.[192] Both were agents of the lingual prohibition's enforcement.[193]

The lingual prohibition's violence betrays the agents' insecurity. At stake was not just the other's capacity to speak English, but the

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185 "Both the *fact* and the *expectation* of de-ethnization have affected language maintenance in the United States . . . ." Fishman, supra note 137, at 29. School is, of course, integral to the process of de-ethnization.

186 See Carlson, supra note 24, at 5 (explaining that factories, YMCAs, and community organizations established classes to instruct immigrants in English, citizenship, and American customs).

187 See Crawford, supra note 1, at 72.

188 262 U.S. 390 (1923).

189 Surveillance does not refer to a neutral practice of watching. Rather, it refers to an apparatus of power through which knowledge is assembled. Power perpetually creates knowledge which, in turn, induces effects of power. See Michel Foucault, Power/Knowledge 52 (Colin Gordon ed., Colin Gordon et al. trans., The Harvester Press 1980) (1972). Surveillance does not emanate from a point; rather, it is "[a]n inspecting gaze, a gaze which each individual under its weight will end by interiorising to the point that he is his own overseer, each individual thus exercising this surveillance over, and against, himself." Id. at 155. It is not by sociological accident that most students become increasingly disinterested in speaking their "mother tongue" as they proceed through American schools. See Fishman, supra note 137, at 123.

190 See Carlson, supra note 24, at 116-17 (reporting Mexican American student's recollection that "SPEAK ENGLISH" signs at his school pointed out to him that he was "not acceptable").

191 James Crawford relates a story from the 1940s of a Texas high school that, its 99% Mexican enrollment notwithstanding, had an English-only policy. Students were given ribbons reading, "I Am an American—I Speak English." Students were encouraged to report each other for violating the sacred equation. Violators also faced corporal punishment. See Crawford, supra note 1, at 79.

192 See id. at 79-80; Kevin Baxter, Finding His Roots—and a Powerful Voice, L.A. Times, Apr. 19, 1996, at E1 (noting author Victor Villaseñor's memories of his English-only education).

193 See supra notes 191-92.

agent's capacity to call himself a "real American." The Americanizers' objectives were not simply to teach English or American history, but rather to "reform" immigrants through the imposition of an idealized notion of Americanness—one saturated by an Anglo-Protestant sensibility.[194] Americanization necessarily demanded invasive operating procedures.[195] In Los Angeles, for instance, middle-class Anglo women were Americanization's chief agents. Pursuant to the Home Teacher Act, white American women were permitted to work *in* their pupils' homes.[196] The "teacher's" purpose was not only to teach children English, but to instruct their parents in the way of "proper" diet, sanitation, etc.[197] In the case of Mexican immigrants in Southern California, instilling a proper work ethic was an important objective as well.[198]

One should not exaggerate the extent to which Americanization really sought to make Americans of Mexican immigrants in California. Those whom it targeted were presented with an image of Americanness so idealized as to be inimitable.[199] Americanization's point in Southern California was, perhaps, less to Americanize and more to consolidate a particularized way of being by holding it out as *worth imitating*. By the 1930s the Great Depression's onset had brought Americanization to a halt. Assimilation efforts gave way to exclusion efforts.[200] Mexicans were repatriated; during the 1930s, 500,000 Mexi-

194 Americanization reflected a mode of reconciling a perceived Protestant history with mass influxes of non-Protestant immigrants. See Carlson, supra note 24, at 1-12. We must also recall the import of any violent cultural imposition. Impositions are not *just* exhortations; they consolidate the status of that which is imposed. See discussion of Derrida supra Part I.B.

195 Americanizers' attention was trained upon language, eating and bathing habits, family dynamics, children's games, etc. See Fass, supra note 174, at 24-25.

196 See Sanchez, supra note 173, at 99.

197 See id. at 102-03.

198 See id. at 104. Americanizers saw Mexicans, although "lazy," as more "adaptable" than Asians. See id. at 95. Asians manifested otherness in a capacity so extreme that exclusion was thought the only strategy for dealing with them. See id.; Takaki, supra note 3, at 199-201. That Mexicans were thought amenable to Americanization was certainly a function of California's racial texture during the 1910s and 1920s. In other parts of the country, Americanization was primarily directed at southern and eastern Europeans. Mexicans constituted a substantial portion of California's population. Many migrated to California after 1910. See Mike Davis, City of Quartz 114 (1992). The early twentieth century also witnessed the dramatic influx of middle-class, Midwestern Protestants. See id. Many of these immigrants had been lured to California by aggressive advertising campaigns that pitched Southern California as a safe space for the white race's preservation. See id. at 30.

199 See Sanchez, supra note 173, at 105 (explaining that Americanization programs offered unattainable, idealized versions of American values).

200 See id. at 106.

cans left the United States.[201] Notwithstanding its formal demise, Americanization permanently affected how public education is conceived. In a sense, "Americanization" persists as an objective that no longer requires a movement.

C. *Making Americans, Not Bilinguals*

As first conceived in the 1960s, bilingual education sought to produce students who were literate and fluent in two languages.[202] As such, bilingual education was not for the exclusive benefit of non-English-speaking students. Rather, it was supposed to allow native English and non-English speakers to learn from one another. Where implemented, many such programs have been successful.[203] Although mandated by California's bilingual education law,[204] such programs were far from the norm.[205]

Most bilingual education programs are not designed to produce bilinguals.[206] It is no surprise, given that both the Bilingual Education Act (BEA)[207] and California's state bilingual law embrace a "deficit theory" of non-English fluency.[208] The BEA and California's state

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201 See id. Although they technically left the United States by choice, the government put intense pressure upon Mexicans in California to return to Mexico. See id. at 209-12. California, for instance, prohibited the employment of "aliens" on public works in 1931. See id. at 211.

202 See Hakuta, supra note 68, at 194.

203 See supra note 45.

204 Such programs were authorized under the designation "bilingual-bicultural education." In popular discourse, these programs were referred to as "dual immersion." The stated purpose of such programs was to "enable the pupil to achieve competency" in both English and her "primary language." Cal. Educ. Code § 52163(a)(2), (b) (West 1989).

205 There were only about 100 dual immersion programs in California as of Proposition 227's passage. See Liz Seymour, Fighting for Dual Immersion Education, L.A. Times (Orange County Edition), June 23, 1998, at B1, available in 1998 WL 2439760.

206 See, e.g., Cal. Educ. Code § 52163(a)(2) (West 1989) (stating that instruction in "primary language" will continue until "transfer" to English is made); David Spener, Transitional Bilingual Education and the Socialization of Immigrants, 58 Harv. Educ. Rev. 133, 147 (1988) (explaining that goal of federally funded TBE has never been "production" of bilingual adults).

207 The BEA was passed in 1968. Pub. L. No. 90-247, 81 Stat. 816 (codified as amended in scattered sections of 20 U.S.C.). The BEA is part of the Elementary and Secondary Education Act Amendments of 1967, Pub. L. No. 90-247, 81 Stat. 783, and was an extension of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27. In its current incarnation, the BEA emphasizes developing English skills, but makes some allowance for the development of native language skills. See 20 U.S.C. § 7402(c)(3) (1994). The BEA is designed to provide states with funding for bilingual education programs. It does not create any sort of affirmative legal obligation that states must provide special services to non-English-speaking children. See id. §§ 7402-7403 (1994).

208 See John J. Attinasi, Racism, Language Variety, and Urban U.S. Minorities: Issues in Bilingualism and Bidialectalism, in Race 319, 319 (Steven Gregory & Roger Sanjek eds., 1994) (arguing that terms such as "non-English proficient" perpetuate "deficit theory regarding cultural diversity").

law speak of "children of limited English proficiency" (LEP).[209] Fluency in a non-English language is coded negatively, as a defect.[210] Constructing Spanish-speaking children as LEPs frames a limited policy response. The BEA's primary purpose is to provide financial support for transitional bilingual programs, not programs that develop literacy in two languages.[211] Spanish language instruction is intended to ensure that children do not lose academic ground in non-language-related subjects while they are learning English.[212] Once transition is completed, Spanish language instruction ceases.

The BEA, as amended in 1974, refused federal support to all dual-immersion-type schemes.[213] One should not, however, overlook how dramatic the BEA's initial passage was. Although it reiterated a "de-ethnization" ethic,[214] the BEA conceded to Spanish a status previously denied. In pushing for the BEA's passage, activists and legislators were, in large part, responding to the criminalization of Spanish in public schools.[215]

In the discussion above, I refer exclusively to Spanish rather than non-English languages. Although the BEA does not refer exclusively to Spanish, its sponsor, Senator Ralph Yarborough, thought that the BEA's benefits should accrue to Hispanics alone.[216] Yarborough's proposal was, avowedly, in response to high Hispanic dropout rates in the Southwest.[217] By his logic, Hispanics deserved concessions because, while other immigrants chose to immigrate, the United States

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209 See 20 U.S.C § 7402(a)(5) (1994) ("[L]imited English proficient children . . . face a number of challenges in receiving an education that will enable [them] to participate fully in American society . . . ."); see also Reynaldo F. Macías, Language and Ethnic Classification of Language Minorities: Chicano and Latino Students in the 1990s, 15 Hispanic J. Behav. Sci. 230, 235-36 (1993) (contending that LEP may be used as ersatz ethnic category).

210 See Attinasi, supra note 208, at 319 (stating that "[t]erms such as . . . non-English proficient perpetuate a deficit theory regarding cultural diversity.").

211 See Lyons, supra note 181, at 2.

212 See id.

213 See id. But see supra note 207 (describing how BEA in current form makes some allowance for development of native language skills).

214 See Fishman, supra note 137, at 21.

215 See Crawford, supra note 1, at 81.

216 See Diane Ravitch, The Troubled Crusade 271 (1983) (discussing debate surrounding BEA).

217 Emphasizing the co-occurrence of language and minority "failure" may obfuscate the extent to which institutional racism produces certain educational outcomes. See Macías, supra note 209, at 235 (noting that proficiency in non-English language may qualify students for civil rights law protection). The BEA's reliance on LEP as an organizing principle compounds the obfuscation by decoupling language from race. This is a serious problem given that certain ideas of race govern discussions of language (in the bilingual education context). See id. at 231.

conquered the Southwest.[218] Yarborough's model of Americanness was unwavering; it was merely a question of how intensively the state should exhort immigrants to imitate the model. Ultimately, TBE's purpose was largely coterminous with that of English-only programs: to teach English.[219]

Despite xenophobic representations to the contrary,[220] bilingual education as conceived in the BEA was not intended to destabilize the equation between Americanness and monoglot English fluency. If anything, the BEA consolidated the equation.[221] State laws authorizing bilingual education mirror the BEA's "deficiency" model. California's Chacon-Moscone Bilingual-Bicultural Education Act of 1976[222] is illustrative.

The Act defines bilingual education as building upon non-English-speaking pupils' (non-English) language skills while teaching English.[223] Upon first glance, this approach seems to undermine Americanization's insistence upon linking Americanness with monoglot English fluency. Closer inspection, however, reveals a serious qualification: Bilingual education was only to "build-upon" pupils' native-language skills until they could transfer into English-medium classrooms.[224] California's Act, however, did authorize dual immersion under the designation "bilingual-bicultural education."[225] Nonetheless, the California law ceded considerable power to school districts to decide the tenor of local programs.[226] Very few schools ever created such "bilingual-bicultural" programs.[227]

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218 See Ravitch, supra note 216, at 271.

219 See Nunberg, supra note 40, at 43 ("Today . . . all publicly supported bilingual education programs are aimed at facilitating the transition to English.").

220 Some have gone as far as to equate bilingual education with the consolidation of Spanish enclaves in the United States. The "enclave" notion seems to invoke the spectral possibility of violent separatism. See Brimelow, supra note 102, at 77. Brimelow's venom seems terribly unjustified given how vociferous bilingual education statutes have been in insisting that bilingual education not "interfere with the systematic, sequential, and regular instruction of all pupils in the English language." Cal. Educ. Code § 30 (West 1994).

221 A poll conducted by University of California–Los Angeles political scientists in 1983 found that the majority of Anglos accepted bilingual education so long as it was designed to promote the rapid acquisition of English. See Jack Citrin, Language Politics and American Identity, Pub. Interest, Spring 1990, at 96, 98.

222 Cal. Educ. Code § 52160 (West 1994).

223 The point was to ensure that pupils kept up in their non-language subjects while they were learning English. See id. § 52163(a)(2).

224 See id.

225 Id. § 52163(b).

226 In particular, "[t]he governing board of any school district . . . may determine when and under what circumstances instruction may be given bilingually." Id. § 30.

227 See Seymour, supra note 205, at B1 (noting existence of only one hundred dual immersion programs in California). One should recall that most California schools never instituted any sort of bilingual program. See California Fact Book, supra note 15, at 46

As with any discourse, the bilingual education debate has played out in an enclosure delimited by certain critical assumptions. Although ostensibly responding to non-English-speaking students' needs, bilingual education programs reproduce the equation between Americanness and monoglot English fluency. This is not to say that bilingual education and Proposition 227 are the same thing. Although they emphasized the centrality of English, TBE programs were not expressly hostile to bilingualism. Proposition 227, on the other hand, is.[228]

III
A Legal Challenge

One would think that Proposition 227's opponents would be committed to demonstrating the extent to which it participates in fostering Anglo hegemony. Instead, legal arguments against the proposition have congealed primarily around the narrow question of whether the proposition offers an effective strategy for teaching English.[229] Absent in the anti-Proposition 227 arguments is any trace of the critique sketched in Parts I and II. Blame, however, cannot be ascribed to the proposition's legal opponents. The primary legal instruments available for challenging Proposition 227 do not permit acknowledgement of its very particular mode of marking otherness.

Neither the EEOA nor the Fourteenth Amendment's Equal Protection Clause responds to the primary ideological functions Proposition 227 serves, namely the consolidation of America's white "us."[230] To the contrary, the EEOA and the Equal Protection Clause engage otherness in a way that precludes critical legal response to Proposition 227. The EEOA positions non-English fluency as an essential deficit, thereby reinscribing the notions of Americanness discussed in Parts I.C and II.A. Current equal protection jurisprudence responds to discrete, hypostatic others rather than to *othering* as an ideological process.[231] As such, it is not flexible enough to address the relationship between language, identity, and education policy sketched in Parts I

("Fewer than 30% of LEP students receive primary language instruction."); Seymour, supra note 46, at A1; supra note 15 and accompanying text.

228 See supra Part I.C.

229 See Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction at 1-2, 46-47, Valeria G. v. Wilson, 12 F. Supp. 2d 1007 (N.D. Cal. 1998) (No. C 98-2252 CAL). The petitioners' arguments included the following: Proposition 227 violates the EEOA by not taking appropriate action to overcome language barriers; and Proposition 227 denies language minorities the necessary English language development to compete with other English-speaking students. See id.

230 See supra Part I.C.

231 See supra Part I.B.

and II. Instead of asking whether a language classification consolidates the equation between Americanness and whiteness, current equal protection jurisprudence simply asks whether the interdicted language[232] is a proxy for some discrete (nonwhite) race. An equal protection claim might have been viable if Proposition 227 had exclusively prohibited Spanish bilingual education programs. Because Proposition 227 *others* in a more sweeping capacity, the Equal Protection Clause offers little basis for redress.

A. Equal Opportunity

The EEOA is extremely vague as to what states' educational obligations are to non-English-speaking children.[233] There is, however, no doubt that states do have a legal obligation toward such children, as established by *Lau v. Nichols*.[234] The Supreme Court, relying upon Title VI of the Civil Rights Act, stated that: "Where inability to speak and understand the English language excludes national origin-minority group children . . . , the district must take affirmative steps to rectify the language deficiency . . . ."[235]

Congress codified *Lau*'s "appropriate action" language in the EEOA.[236] The EEOA does not prescribe a specific educational scheme; rather, it requires that school districts "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[237] Only the Fifth Circuit, in *Castaneda v. Pickard*,[238] has articulated a test for assessing whether a school has taken "appropriate action."[239] The *Castaneda* test asks whether schools have made a "good faith effort . . . to remedy lan-

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232 For discussion on "interdiction," see supra note 89 and accompanying text.

233 See infra notes 237-41 and accompanying text.

234 414 U.S. 563, 566 (1974). The petitioners in *Lau* filed suit soon after San Francisco schools' integration in 1971. At the time, the district had 2856 non-English-speaking Chinese students. Of these students, about 1800 received supplemental English instruction while about 1000 did not. On behalf of the 1000 students, petitioners argued that the San Francisco Unified School District was providing unequal educational opportunity. See id. at 564.

235 Id. at 568 (internal quotation marks omitted). The Court, however, only casually suggested what these steps might include; concrete indicia of noncompliance were not specified. See id. at 564-65.

236 Pub. L. 93-380, 88 Stat. 514 (codified at 20 U.S.C. §§ 1701-1758 (1994)); see also Lori A. McMullen & Charlene R. Lynde, Comment, The Official English Movement and the Demise of Diversity, 32 Land & Water Rev. 789, 795 (1997) (discussing congressional codification of *Lau*).

237 20 U.S.C. § 1703(f) (1994). In the absence of congressional direction, courts have had difficulty determining what exactly "appropriate action" should entail. See Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1016 (N.D. Cal. 1998).

238 648 F.2d 989 (5th Cir. 1981).

239 Id. at 1009-10.

guage *deficiencies*."[240] The test encompasses the following questions: 1) is the program informed by a sound education theory; 2) are school practices reasonably calculated to implement the educational theory; and 3) has the plan succeeded.[241] The *Castaneda* test clearly embraces a "deficit theory" of language. This is not to say that it is inconsistent with the EEOA. Regardless, *Castaneda* is not the only plausible reading of the EEOA.

Castaneda's reading of the EEOA, much like the BEA, decouples language from identity. The BEA refers to non-English-speaking children as LEP while the EEOA speaks of "language barriers." In so doing the statutes construct non-English fluency as a deracinated problem whose solution need not entail a systematic, antiracist critique of language policy.[242] The BEA reaffirms that schools should produce monolingual English speakers while *Castaneda*'s interpretation of the EEOA merely asks whether any given program effectively achieves that end. *Castaneda*'s interpretation of the EEOA leaves no room to question the imperative of producing monolingual English speakers. The EEOA fixes non-English-speaking pupils as "deficient." In this context, it is no wonder that the legal contest over Proposition 227 has revolved almost exclusively around the narrow question of how best to teach English. A broader understanding of the EEOA's "appropriate action" language might constitute the first step in engaging the bilingual education debate's "other question."[243]

B. Equal Protection

Petitioners in *Valeria G. v. Wilson*, the Proposition 227 case, have constructed an equal protection argument based on minorities' fundamental right to participate in the political process.[244] To the extent

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[240] Id. at 1009 (emphasis added).

[241] See id. at 1009-10. *Castaneda* is noticeably silent as to what exactly constitutes a "sound educational theory." In the case for injunctive relief against Proposition 227, the court decided that its responsibility only encompassed deciding whether the "school is pursuing a program informed by an educational theory recognized as sound by some experts in the field." *Valeria G.*, 12 F. Supp. 2d at 1018 (internal quotation marks omitted). It may be that the court in *Valeria G.* decided not to articulate a more exact definition of "sound educational theory" because the case was one for injunctive relief. The court had no opportunity to answer the third prong of *Castaneda*'s test because it was too soon to determine whether the plan had succeeded.

[242] See Macías, supra note 209, at 235 (noting that proficiency in non-English language may qualify students for civil rights law protection).

[243] See supra notes 73, 74, 79 and accompanying text.

[244] 12 F. Supp. 2d at 1023-24. Proposition 227 requires a two-thirds majority in each of California's two legislative houses for amendment. See Prop. 227, supra note 6, § 335. Petitioners argue that because Proposition 227 inordinately affects national-origin minori-

that the Equal Protection Clause represents one of the courts' primary instruments for responding to state-sponsored racism,[245] it is somewhat surprising that Proposition 227's opponents have responded with timidity. Their argument does not even begin to speak to the educational scheme Proposition 227 inaugurates.[246] Current equal protection jurisprudence does not allow for constructive engagement of the problems outlined in Part I. The discussion below will sketch equal protection's inadequacy without undertaking the arduous task of proposing an alternative.

By the terms of current equal protection jurisprudence, courts will examine a contested classification with heightened scrutiny if it: 1) burdens a fundamental right,[247] 2) is shown to have been animated by discriminatory intent,[248] or 3) is inherently "suspect."[249] In the absence of one of these factors, courts need only look to whether the contested policy is rationally related to a legitimate state interest.[250] In *San Antonio Independent School District v. Rodriguez*,[251] the Supreme Court held that the right to an education is not "fundamental."[252] Supported by this standard, the Ninth Circuit has held that the

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ties and because, prior to 227's passage, curricular change could be affected by local political action, Proposition 227 unduly burdens minorities' fundamental rights to participate in the political process. See *Valeria G.*, 12 F. Supp. 2d at 1023-24.

245 See Palmore v. Sidotti, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."). Some would argue that the Supreme Court has never used the Fourteenth Amendment meaningfully to promote racial justice. See Donald E. Lively & Stephen Plass, Equal Protection: The Jurisprudence of Denial and Evasion, 40 Am. U. L. Rev. 1307, 1311 (1991) ("With rare exceptions, the Supreme Court . . . has formulated legal principles and standards that have avoided, rather than confronted, racial injustice.").

246 Judge Legge noted as much in *Valeria G.*, 12 F. Supp. 2d at 1025.

247 See, e.g., Plyler v. Doe, 457 U.S. 202, 216-18 (1982) (explaining operation of fundamental rights analysis in equal protection context).

248 This standard is applied to so-called "facially neutral" policies. See, e.g., Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 264-65 (1977) (holding that showing of discriminatory intent is necessary in order to trigger strict scrutiny regardless of whether there is disparate impact); Washington v. Davis, 426 U.S. 229, 238-39, 242 (1976) (same).

249 This basis for strict scrutiny's application was first articulated in Korematsu v. United States, 323 U.S. 214 (1944), with reference to race. "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect .... [C]ourts must subject them to the most rigid scrutiny." Id. at 216. In *Korematsu*, the Court found that the Japanese internment passed strict scrutiny. See id. at 217-18. *Korematsu* is one of very few cases in which an outwardly racist law was upheld under strict scrutiny. See Derrick A. Bell, Jr., Constitutional Conflicts, pt. 1, at 200 (1997).

250 See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (explaining rational basis review). Rational basis review is very relaxed. The legislative classification need not be perfect. It simply cannot be irrational. Under rational basis review, the statutory classification is virtually presumed legitimate. See id.

251 411 U.S. 1 (1973).

252 See id. at 33-35. But *Rodriguez* conceded that education is one of the state's most important responsibilities. See id. at 29. Although the Court found that a rational rela-

Equal Protection Clause imposes no duty to provide bilingual education.[253] In Proposition 227's case, proving discriminatory intent would be nearly as futile as arguing for the existence of a fundamental right to bilingual education.[254]

Intuitively, Proposition 227 seems to enunciate a suspect classification. The notion of a "suspect" legal classification descends from the famous fourth footnote of *United States v. Carolene Products Co.*[255] In that note, Justice Stone suggested that the Supreme Court would be willing to review legislation with more exacting scrutiny in the interest of protecting "discrete and insular minorities" from majoritarian tyranny.[256] Footnote four's terms suggest an immediate limitation for challenging racially inflected language classifications. Non-English speakers are not even vaguely "discrete and insular." In addition, the Supreme Court has been unwilling to extend heightened scrutiny to anything but a few ostensibly "discrete" classifications.[257] These classifications include: race,[258] national origin,[259] sex,[260] alien-

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tionship to a legitimate state purpose existed in the school financing scheme at issue in *Rodriguez*, the Court suggested that such a relationship may be absent when the educational scheme fails to provide children with the opportunity to learn the most basic skills. See id. at 37.

253 See Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist., 587 F.2d 1022, 1027 (9th Cir. 1978). For discussion of this case, see supra note 167.

254 Proving discriminatory intent is very difficult. Evidence of disparate impact is not enough to prove discriminatory intent unless the disparate impact is exceptionally stark. See Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. at 266. A plaintiff must prove that the legislative or administrative body whose decision is being challenged made its decision "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979). Charles Lawrence III has argued that a discriminatory intent standard places too large a burden on the wrong side in cases involving "facially neutral" policies that have disparate racial effects. See Lawrence, supra note 16, at 319.

255 304 U.S. 144, 152 n.4 (1938).

256 See id. at 153 n.4 ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.")

257 See Mark Strasser, Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise, 64 Temp. L. Rev. 937, 937 (1991) (noting Supreme Court's reluctance to recognize new groups as suspect).

258 See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226-27 (1995) (applying strict scrutiny to race-based federal transportation department set-aside program); Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying strict scrutiny to Virginia's antimiscegenation statute); see also supra note 249.

259 See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986) (applying strict scrutiny to public schools' national origin-based proportional-layoff provision).

260 See, e.g., J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 136-37 (1994) (applying intermediate scrutiny to gender-based peremptory strikes); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (applying intermediate scrutiny to nursing school's gender-based admission policy); Craig v. Boren, 429 U.S. 190, 197-99 (1976) (applying in-

age,[261] and illegitimacy.[262] The Court has never provided a clear explanation as to why these five classifications deserve heightened scrutiny and others do not.[263]

Proposition 227's language classification implicates race in a regressive way; the proposition's "English learner" designation consolidates the subjective position of a "non-English learner."[264] In so doing, the language classification reproduces a racially loaded concept of Americanness.[265] As the Supreme Court's current equal protection jurisprudence stands, however, a language classification as such would not qualify for heightened scrutiny. Although the current jurisprudence "privileges the talismanic classification[ ] of race,"[266] language is not thought of as marking race except in rare cases where a language classification appears to track a "discrete" racial group.

The Supreme Court has never held that language might function as a proxy for race in the context of an equal protection claim. In *Hernandez v. New York*,[267] the Court refused to answer the question definitively.[268] In dicta, however, the Court acknowledged that for some groups it may be necessary to treat "proficiency in a particular language . . . as a surrogate for race . . . ."[269] For now, it remains true

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termediate scrutiny to gender-based alcohol sale statute). As the designation suggests, "intermediate scrutiny" lies between strict scrutiny and rational basis review. In particular, passing intermediate scrutiny requires that the contested law be substantially related to an important governmental objective. See id. at 197. Passing strict scrutiny, however, requires that the contested law be narrowly tailored to achieve a compelling governmental purpose. See *Adarand Constructors, Inc.*, 515 U.S. at 227.

261 See, e.g., Nyquist v. Mauclet, 432 U.S. 1, 7-9 (1977) (applying strict scrutiny to state statute restricting college financial aid to resident aliens); Sugarman v. Dougall, 413 U.S. 634, 641-43 (1973) (applying "close scrutiny" to flat, state statutory ban on noncitizens for competitive civil service jobs); Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (applying strict scrutiny to statute that denied welfare benefits to noncitizens).

262 See, e.g., Reed v. Campbell, 476 U.S. 852, 854-56 (1986) (applying heightened scrutiny to Texas prohibition on illegitimate child inheriting from father); Pickett v. Brown, 462 U.S. 1, 7-8 (1983) (applying intermediate scrutiny to restriction on support suits by illegitimate children).

263 See Kenji Yoshino, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell," 108 Yale L.J. 485, 559 (1998).

264 See supra Part I.C.

265 See supra Part I.C.

266 Yoshino, supra note 263, at 487.

267 500 U.S. 352 (1991).

268 The petitioner charged that the prosecutor in his criminal trial used his peremptory challenges to exclude Latinas/os from the jury in violation of the Fourteenth Amendment. The prosecutor excluded Spanish-speaking jurors for fear that they would follow Spanish-speaking witnesses' actual testimony rather than that of the translator. See id. at 355-57. The petitioner argued, in part, that Spanish language ability is a proxy for ethnicity. The Supreme Court, however, decided that it was not necessary to reach the issue. See id. at 359-60.

269 Id. at 371.

that classifications distinguishing English from non-English-speaking peoples do not trigger heightened scrutiny. No circuit has held that a language classification alone will suffice as a justification for strict scrutiny's application.[270] In cases where the language classification tracks a "discrete and insular" national origin group/race, however, strict scrutiny might be applied.

The Ninth Circuit is one of the only circuits that actually has applied heightened scrutiny to a language classification in the context of an equal protection claim. In *Olagues v. Russoniello*,[271] the Ninth Circuit had to answer whether a U.S. Attorney's Office investigation into voter fraud was unconstitutional.[272] The investigation targeted immigrant voters who requested bilingual ballots (which were only available in Spanish and Chinese).[273] In declaring the investigation unconstitutional, the court looked to the facts that those investigated were all foreign-born, recently registered voters, and had requested bilingual ballots.[274] These three characteristics coupled with the fact that those investigated were necessarily Spanish or Chinese speaking justified strict scrutiny's application.[275] The Ninth Circuit stated that for all practical purposes, the language classification at issue was a race-based classification. The court, however, reiterated that non-English/English-speaking classifications are neutral without additional indicia of suspectness.[276]

The extent to which current equal protection jurisprudence constructs language classifications as racially neutral is troublesome. As matters stand, language classifications are almost presumed neutral. The more general a language classification is, the more forceful the presumption. The presumption stems from the requirement that advocates show a concrete relationship between the interdicted language[277] and a "discrete" other. Such a requirement ignores the extent to which a general language classification might function as an interdiction—an interdiction that consolidates racially specific ideas about Americanness.[278]

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270 See, e.g., Soberal-Perez v. Heckler, 717 F.2d 36, 41-42 (2d Cir. 1983) (holding that providing Social Security notices only in English does not violate Spanish-speaking plaintiffs' equal protection rights); Frontera v. Sindell, 522 F.2d 1215, 1218 (6th Cir. 1975) (holding that civil service exam administered in English does not violate Spanish-speaking plaintiffs' equal protection rights).

271 797 F.2d 1511, 1520-21 (9th Cir. 1986) (en banc).

272 See id. at 1513-15.

273 See id.

274 See id. at 1521.

275 See id.

276 See id.

277 For discussion on "interdiction," see supra note 89 and accompanying text.

278 See supra Parts I.C, II.

Equal protection jurisprudence allows little room for challenging state action that uses language to mark otherness in as vast and sweeping a gesture as Proposition 227 does. As Part I.B and II.A sought to show, the American "core's" social intelligibility as "core" is dependent upon marking those who do not constitute it. Although such marking may take form in the articulation of one "discrete" racial other, it often does not.

Statutory schemes like Proposition 227 do not evoke racist meaning or produce racist effects by naming a specific racial other.[279] Requiring the presentation of a "discrete minority" cabins the legal inquiry. In schemes like Proposition 227, it is the self that finds specificity, not the other. In particular, the self finds specificity through a generalized articulation of who cannot call English his or her own. This proposition confirms that language is a proxy for race. The *race*, however, like the *language* does not belong to the other.

CONCLUSION

Proposition 227 rearticulates a lingual birthright: What is ours is reaffirmed through Proposition 227's violent exhortation to the other to learn English. It is important, however, not to romanticize the myriad bilingual education programs that preceded Proposition 227. With the exception of dual immersion schemes, bilingual programs also functioned as racially inflected exhortations—albeit gentler, more modulated ones. Successful dual immersion programs may suggest a model for responding to the critiques sketched in this Note. For now, however, the birthright stands forcefully rearticulated.

[279] Nor are they animated by "discriminatory intent" in any simplistic way. See supra note 254.

APPENDIX[280]

SCHOOLS AND SCHOOL DISTRICTS— ENGLISH LANGUAGE IN PUBLIC SCHOOLS—INITIATIVE STATUTE

Proposition 227

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

PROPOSED LAW

SECTION 1. Chapter 3 (commencing with Section 300) is added to Part 1 of the Education Code, to read:

CHAPTER 3. ENGLISH LANGUAGE EDUCATION FOR IMMIGRANT CHILDREN

Article 1. Findings and Declarations

300. The People of California find and declare as follows:

(a) Whereas, The English language is the national public language of the United States of America and of the State of California, is spoken by the vast majority of California residents, and is also the leading world language for science, technology, and international business, thereby being the language of economic opportunity; and

(b) Whereas, Immigrant parents are eager to have their children acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream of economic and social advancement; and

(c) Whereas, The government and the public schools of California have a moral obligation and a constitutional duty to provide all of California's children, regardless of their ethnicity or national origins, with the skills necessary to become productive members of our society, and of these skills, literacy in the English language is among the most important; and

(d) Whereas, The public schools of California currently do a poor job of educating immigrant children, wasting financial resources on costly experimental language programs whose failure over the past two decades is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children; and

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[280] The following is the text of Proposition 227, the antibilingual education initiative approved by California voters on June 2, 1998. See supra notes 6-22 and accompanying text.

(e) Whereas, Young immigrant children can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language in the classroom at an early age.

(f) Therefore, It is resolved that: all children in California public schools shall be taught English as rapidly and effectively as possible.

Article 2. English Language Education

305. Subject to the exceptions provided in Article 3 (commencing with Section 310), all children in California public schools shall be taught English by being taught in English. In particular, this shall require that all children be placed in English language classrooms. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year. Local schools shall be permitted to place in the same classroom English learners of different ages but whose degree of English proficiency is similar. Local schools shall be encouraged to mix together in the same classroom English learners from different native-language groups but with the same degree of English fluency. Once English learners have acquired a good working knowledge of English, they shall be transferred to English language mainstream classrooms. As much as possible, current supplemental funding for English learners shall be maintained, subject to possible modification under Article 8 (commencing with Section 335) below.

306. The definitions of the terms used in this article and in Article 3 (commencing with Section 310) are as follows:

(a) "English learner" means a child who does not speak English or whose native language is not English and who is not currently able to perform ordinary classroom work in English, also known as a Limited English Proficiency or LEP child.

(b) "English language classroom" means a classroom in which the language of instruction used by the teaching personnel is overwhelmingly the English language, and in which such teaching personnel possess a good knowledge of the English language.

(c) "English language mainstream classroom" means a classroom in which the pupils either are native English language speakers or already have acquired reasonable fluency in English.

(d) "Sheltered English immersion" or "structured English immersion" means an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language.

(e) "Bilingual education/native language instruction" means a language acquisition process for pupils in which much or all instruction, textbooks, and teaching materials are in the child's native language.

Article 3. Parental Exceptions

310. The requirements of Section 305 may be waived with the prior written informed consent, to be provided annually, of the child's parents or legal guardian under the circumstances specified below and in Section 311. Such informed consent shall require that said parents or legal guardian personally visit the school to apply for the waiver and that they there be provided a full description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child. Under such parental waiver conditions, children may be transferred to classes where they are taught English and other subjects through bilingual education techniques or other generally recognized educational methodologies permitted by law. Individual schools in which 20 pupils or more of a given grade level receive a waiver shall be required to offer such a class; otherwise, they must allow the pupils to transfer to a public school in which such a class is offered.

311. The circumstances in which a parental exception waiver may be granted under Section 310 are as follows:

(a) Children who already know English: the child already possesses good English language skills, as measured by standardized tests of English vocabulary comprehension, reading, and writing, in which the child scores at or above the state average for his or her grade level or at or above the 5th grade average, whichever is lower; or

(b) Older children: the child is age 10 years or older, and it is the informed belief of the school principal and educational staff that an alternate course of educational study would be better suited to the child's rapid acquisition of basic English language skills; or

(c) Children with special needs: the child already has been placed for a period of not less than thirty days during that school year in an English language classroom and it is subsequently the informed belief of the school principal and educational staff that the child has such special physical, emotional, psychological, or educational needs that an alternate course of educational study would be better suited to the child's overall educational development. A written description of these special needs must be provided and any such decision is to be made subject to the examination and approval of the local school superintendent, under guidelines established by and subject to the re-

view of the local Board of Education and ultimately the State Board of Education. The existence of such special needs shall not compel issuance of a waiver, and the parents shall be fully informed of their right to refuse to agree to a waiver.

Article 4. Community-Based English Tutoring

315. In furtherance of its constitutional and legal requirement to offer special language assistance to children coming from backgrounds of limited English proficiency, the state shall encourage family members and others to provide personal English language tutoring to such children, and support these efforts by raising the general level of English language knowledge in the community. Commencing with the fiscal year in which this initiative is enacted and for each of the nine fiscal years following thereafter, a sum of fifty million dollars ($50,000,000) per year is hereby appropriated from the General Fund for the purpose of providing additional funding for free or subsidized programs of adult English language instruction to parents or other members of the community who pledge to provide personal English language tutoring to California school children with limited English proficiency.

316. Programs funded pursuant to this section shall be provided through schools or community organizations. Funding for these programs shall be administered by the Office of the Superintendent of Public Instruction, and shall be disbursed at the discretion of the local school boards, under reasonable guidelines established by, and subject to the review of, the State Board of Education.

Article 5. Legal Standing and Parental Enforcement

320. As detailed in Article 2 (commencing with Section 305) and Article 3 (commencing with Section 310), all California school children have the right to be provided with an English language public education. If a California school child has been denied the option of an English language instructional curriculum in public school, the child's parent or legal guardian shall have legal standing to sue for enforcement of the provisions of this statute, and if successful shall be awarded normal and customary attorney's fees and actual damages, but not punitive or consequential damages. Any school board member or other elected official or public school teacher or administrator who willfully and repeatedly refuses to implement the terms of this statute by providing such an English language educational option at an available public school to a California school child may be held

personally liable for fees and actual damages by the child's parents or legal guardian.

Article 6. Severability

325. If any part or parts of this statute are found to be in conflict with federal law or the United States or the California State Constitution, the statute shall be implemented to the maximum extent that federal law, and the United States and the California State Constitution permit. Any provision held invalid shall be severed from the remaining portions of this statute.

Article 7. Operative Date

330. This initiative shall become operative for all school terms which begin more than sixty days following the date on which it becomes effective.

Article 8. Amendment

335. The provisions of this act may be amended by a statute that becomes effective upon approval by the electorate or by a statute to further the act's purpose passed by a two-thirds vote of each house of the Legislature and signed by the Governor.

Article 9. Interpretation

340. Under circumstances in which portions of this statute are subject to conflicting interpretations, Section 300 shall be assumed to contain the governing intent of the statute.