

The Proposed English Language Amendment: Shield or Sword?

Introduction

In the past few years attempts to protect the official status of the English language in American life have appeared in a variety of local and national contexts. At the local level, voters in Dade County, Florida, renounced official bilingualism in 1980, replacing it with a prohibition on government use or support of foreign languages.¹ In July, 1983, workers in Elizabeth, New Jersey, were ordered to speak only English while on the job.² In November, 1984, voters in California approved a proposition which urged a return to English-only ballots in the state by a 71-29 margin.³ In all, five states have designated English their official language, Virginia as recently as 1981.⁴ At the federal level, an early version of the proposed Immigration Reform and Control Act contained a declaration that "the English language is the official language of the United States,"⁵ while the version of the Immigration and Reform Act that died with the 98th Congress included a requirement that applicants for legalization be either proficient in the English language or pursuing a recognized course of English language study.⁶

More important than any of these individual attempts to secure the status of English in the United States is the effort currently underway to give English explicit constitutional protection by declaring it the official language of the United States. An English Language Amendment (ELA) was introduced in the last two Congresses and has been reintroduced early in the 99th.⁷ It consists of

1. N. Y. Times, Nov. 9, 1980, at A24, col. 1.

2. N. Y. Times, July 18, 1983, at B1, col. 1.

3. Los Angeles Times, Nov. 8, 1984, at 19, col. 1.

4. *The English Language Amendment, 1984: Hearings on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. (1984)* (opening statement of Sen. Orrin Hatch, Chairman of the Subcomm. on the Constitution) (unpublished statements and testimony, on file with *Yale Law and Policy Review*) [hereinafter cited as *Hearings*].

5. *Hearings, supra* note 4 (testimony of Sen. Walter Huddleston at 6).

6. S. REP. NO. 62, 98th Cong., 1st Sess. 107 (1983); H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H6065 (daily ed. June 19, 1984).

7. Former Senator S.I. Hayakawa, the author of the official language provision in the Immigration Reform and Control Act, first proposed such an amendment in 1981. In 1983, similar amendments were introduced in the House and the Senate, and the Subcommittee on the Constitution of the Senate Committee on the Judiciary for the 98th

only two sentences:

Sec. 1 The English Language shall be the official language of the United States.

Sec. 2 The Congress shall have the power to enforce this article by appropriate legislation.

Supporters of the ELA and other measures to protect the English language in the United States base their proposals on a venerable idea, one reaching back at least to biblical times: a common language is a strong bond of nationhood.⁸ The Select Committee on Immigration and Refugee Policy based its recommendation for continuing the language requirement for naturalization on this idea, simply quoting Noah Webster's famous dictum that "a *national language* is a bond of *national union*."⁹ In justifying the additional burden of a requirement that aliens seeking legalization study English, Representative Jim Wright admitted that this demand was inconsistent with the policy of other Federal programs, but stated that such a requirement was necessary to reverse a national trend toward "balkanization" because "language is the thread, the common thread, that ties us all together."¹⁰ In supporting inclusion in the Immigration Reform Act of a declaration that English is the official language of the United States, the Senate Judiciary Committee warned, "If language and cultural separatism rise above a certain level, the unity and political stability of the nation will — in time — be seriously diminished."¹¹ This truism supports such a declaration, however, only if the Senate Judiciary Committee believes that such a point is already near and that limiting linguistic and cultural "separatism" depends largely on protecting the language.

During the hearings on the ELA before the Senate Subcommittee on the Constitution, Gerda Bikales, the executive director of *U.S. English*, an organization formed to combat the displacement of the English language from official life, described how general cultural and political fragmentation has created a situation in which "English

Congress held hearings on the proposed amendment on June 12, 1984. See *Hearings, supra* note 4. The ELA was reintroduced in the Senate in S.J. Res. 20, 99th Cong., 1st Sess., 131 CONG. REC. S468 (daily ed. Jan. 22, 1985), and in the House in H.R.J. Res. 96, 99th Cong., 1st Sess., 131 CONG. REC. H167 (daily ed. Jan. 24, 1985).

8. J.A. FISHMAN, *LANGUAGE AND NATIONALISM* 44 (1972); A. OSTROWER, *LANGUAGE, LAW, AND DIPLOMACY* 589 (1965).

9. STAFF OF COMMITTEES ON THE JUDICIARY: HOUSE OF REPRESENTATIVES AND UNITED STATES SENATE, 97TH CONG., 1ST SESS., *FINAL REPORT ON U. S. IMMIGRATION POLICY AND THE NATIONAL INTEREST* 289 (Comm. Print 1981).

10. 130 CONG. REC. H6066 (daily ed. June 19, 1984) (statement of Rep. Wright).

11. S. REP. NO. 62, 98th Cong., 1st Sess. 7 (1983).

English Language Amendment

. . . is no longer *a* bond but *the* bond between all of us.”¹²

As these statements show, an acceptance of the language/nationhood link can lead to the conclusion that threats to the hegemony of English in the United States may strike at the very heart of our political and cultural institutions. The urgency with which proposals to protect English are being pressed in turn reflects a belief that other national bonds have already been weakened to such an extent that language is our last hope, or that language usage is itself such a powerful determinant of national identity that other national bonds are ineffective without a national language.

Part I of this comment examines the demographic and political changes in American life that lie behind the sudden surge in efforts to protect English and relates the ways the ELA's supporters think the amendment will help reverse these trends. Part II questions the fundamental socio-linguistic assumptions underlying the nationhood/language link and rejects the dark demographic predictions of the ELA's supporters. Part III describes how the present supporters of the ELA resemble the Americanizers of the early 20th Century and recasts the debate in terms of a struggle between two opposing visions of American life: Anglo-conformity and cultural pluralism. Building on the previous sections, Part IV argues that we

12. *Hearings, supra* note 4 (testimony of Gerda Bikales at 6). Representative Norman D. Shumway, the sponsor of the ELA in the House, uses the same rhetoric:

I believe such protection is fitting and proper for the language which has been for over two centuries one of our nation's strongest unifying forces. The U.S. has always prided itself on the national unity it has achieved despite the ethnic, religious, and cultural diversity of our nation. . . . it is therefore past time that the importance of the English language, and the contribution our common tongue has made to our social cohesion and political stability, be officially recognized.

Hearings, supra note 4 (testimony of Rep. Norman D. Shumway at 1-2).

Senator Quentin N. Burdick, a co-sponsor of the ELA, similarly discounts other elements of American unity while elevating the English language to a place of precious primacy:

The English Language has been the centripetal force in American Society, bringing together in the rewards and obligations of citizenship people from all races, religions, and cultural traditions. Americans know instinctively that, without a common language, our differences, now a source of national strength and personal pride, would become unmanageable and irreconcilable.

130 CONG. REC. S385 (daily ed. Jan. 30, 1984) (statement of Sen. Quentin N. Burdick).

Writing in 1916, Edward A. Steiner made much the same point:

A cleavage in the language now would mean to us a cleavage of the nation in its most vulnerable if not in its most essential part . . . The Hungarian, who equally dislikes the Czesch, will try to make a place for Magyar as the class-room language, and with Scandinavian, Finnish, Yiddish, and other languages clamoring for the same privilege, we may at once say good-bye to the unity of the United States.

Mr. Steiner went on to say, however, that, "The acceptance of this country's language by the immigrant is essential; but it is a mistake to force it upon him." E. STEINER, *NATIONALIZING AMERICA* 102-105 (1916).

must reject the ELA and the re-emergence of Anglo-conformity that it represents.

I. *Why the ELA?*

A. *The First Problem: The Demographic Threat*

The current debate over the status of the English language in the United States is largely a debate over the nature and seriousness of the problems posed for American political and cultural institutions by Spanish speakers in the United States. Though facially neutral, most attempts to protect English have been specifically targeted at Spanish speakers.¹³ Moreover, the supporters of the ELA acknowledge that English needs constitutional protection at this late date in our nation's history because of the unique threat posed by the growing Spanish-speaking population of the United States.

The proponents of the ELA are at least partially correct: the situation of Spanish speakers in the United States may actually be "unique" in several significant respects. First, Spanish speakers are not all immigrants. Some Spanish-speaking populations in the Southwest and California have a longer history than do Anglo-American settlers.¹⁴ Second, Mexico and Latin America provide an apparently unstoppable flow of new Spanish speakers into the United States, some of whom settle permanently, but many of whom move back and forth across the border as economic and political pressures change. Puerto Rico too provides a constant flow of legal residents in both directions. Finally, some Spanish-speaking communities may have become large enough to sustain themselves as essentially monolingual Spanish enclaves within the larger English-speaking society. Substantial Cuban-American communities exist in Florida and other areas of the United States. The largest Hispanic population in the United States, mostly of Mexican origin (legal and illegal), is heavily concentrated in the urban areas of the Southwest. Puerto Ricans provide the greatest number of Spanish-speakers in the Northeast, most of whom live in New York. Each of these enclaves is large enough to be self-supporting. In the face of traditional American hostility to non-Anglo-Saxon immigrant groups, it should be no surprise that these Spanish-speaking communities band tightly together. It is also a safe bet that they are likely to

13. As were the actions taken in Florida, New Jersey and California described in the opening paragraph of this comment, *supra* notes 1-3 and accompanying text.

14. Christian & Christian, *Spanish Language and Culture in the Southwest*, in LANGUAGE LOYALTY IN THE UNITED STATES 1 (J.A. Fishman ed. 1966).

English Language Amendment

continue to do so.¹⁵

All these elements — a substantial indigenous population; a continuing influx of new Spanish speakers; large, densely populated areas that are essentially monolingual Spanish; a high percentage of sojourners with no long-term commitment to American society — promote mother-tongue maintenance and may slow English acquisition.¹⁶ A high Hispanic birth rate in the United States and even greater population pressure in Mexico ensure that these trends will continue.¹⁷

Census and other data seem to confirm that the disincentives to assimilation inherent in the situation of most Spanish speakers in the United States may be overwhelming the traditional economic and political incentives to acquisition of English, namely jobs requiring English, the mass media and social pressure.¹⁸ Though essentially monolingual Spanish speakers, Puerto Ricans are already U.S. citizens, while newcomers from Mexico have an extremely low naturalization rate, probably because of the high numbers of sojourners and the closeness of their homeland.¹⁹ Though the income levels of the different Spanish-origin groups vary, approximately 30 percent of all persons of Spanish origin had incomes below the poverty level in 1982.²⁰ Despite educational advances, Hispanic educational achievement continues to lag when compared to that of either white or black Americans. So far at least, education, including bilingual education, has not been able to integrate these people into

15. See Baily, *Status of the Hispanic Population in the United States*, reprinted in CONGRESSIONAL RESEARCH SERVICE FOR THE SUBCOMM. ON CENSUS AND POPULATION OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, REPORT ON THE HISPANIC POPULATION OF THE UNITED STATES: AN OVERVIEW, H.R. REP. NO. 7, 98th Cong., 1st Sess. 8 (1983).

16. Lieberman, Dalto & Johnston, *The Course of Mother-Tongue Diversity in Nations*, 81 AM. J. SOC. 34-61 (1975). See also Forbes & Lemos, *The History of American Language Policy*, reprinted in STAFF OF COMMITTEES ON THE JUDICIARY: HOUSE OF REPRESENTATIVES AND UNITED STATES SENATE, 97TH CONG., 1ST SESS., FINAL REPORT ON U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST Appendix A at 20-27 (Comm. Print 1981); Fishman & Hofman, *Mother Tongue and Nativity in the American Population*, in LANGUAGE LOYALTY IN THE UNITED STATES 47 (J.A. Fishman ed. 1966).

17. Baily, *supra* note 15, at 7.

18. For example, according to Gerda Bikales, there are more than 300 Spanish-language television stations and 200 radio stations serving Spanish speakers, a situation qualitatively, as well as quantitatively, different from any experienced by earlier immigrant groups. U.S.A. Today, April 10, 1985 at 8A.

19. S. REP. NO. 62, 98th Cong., 1st Sess. 7 (1983).

20. "In 1978, 20 percent of all Spanish-origin families in the Nation, or 559,000 Spanish-origin families, were living below the poverty level." Baily, *supra* note 15, at 11. In 1982, 29.9 percent of all persons of Spanish origin were living below the poverty level. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 474 (1984) [hereinafter STATISTICAL ABSTRACT].

American society.²¹

In specifically linguistic terms the same picture seems to be emerging. The 1980 census reveals that over eight million adults and almost three million children speak Spanish at home, and of these, 27.6 percent of the adults and 15.4 percent of the children have difficulty speaking English.²² Of the 310 jurisdictions required to provide multilingual ballots under the Voting Rights Act of 1975,²³ 281 involve Spanish speakers.²⁴ Spanish-speaking children also make up approximately 80 percent of the total enrollment in bilingual education programs.²⁵

B. *The Second Problem: Good Intentions Gone Awry*

If an apparently unstoppable, unassimilable growth of the Spanish-speaking population in the United States is the obvious problem underlying efforts to protect American culture by protecting the English language, the perception that attempts by an activist federal government to solve this problem may actually be making it worse is the second factor behind the current drive to grant official protection to the English language. As the statistics in the section above reveal, Spanish speakers are overwhelmingly the target group of both multilingual ballot provisions and bilingual education programs. The Federal government has responded to the explosive growth of the Spanish-speaking population in the United States with these programs in an attempt to ease and encourage Hispanic assimilation into the mainstream of American culture. Decisions of the judiciary have played a major role in legitimizing, even mandating, greater national governmental involvement in the mechanisms of assimilation. In particular, the revolution in the conception of due process and equal protection symbolized by *Brown v. Board of*

21. STATISTICAL ABSTRACT, *supra* note 20, at 144. See also *Demographic and Socioeconomic Characteristics of the Hispanic Population: Results from the 1980 Census: Hearings Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 98th Cong., 1st Sess. 277 (1983) (statement of Kirk Brown).

22. STATISTICAL ABSTRACT, *supra* note 20, at 43.

23. 42 U.S.C. §§ 1971-1973 (1981 & Supp. 1985).

24. A. LEIBOWITZ, *FEDERAL RECOGNITION OF THE RIGHTS OF MINORITY LANGUAGE GROUPS* 8 (1982).

25. Boren, *Education of Hispanics: Access and Achievement*, reprinted in CONGRESSIONAL RESEARCH SERVICE FOR THE SUBCOMM. ON CENSUS AND POPULATION OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, *REPORT ON THE HISPANIC POPULATION OF THE UNITED STATES: AN OVERVIEW*, H.R. REP. NO. 7, 98th Cong., 1st Sess. 18 (1983) At the same time, however, only approximately one half of the limited-English-speaking (LES) and non-English-speaking children in the United States were being served by bilingual education programs in 1976. *Id.* at 18.

English Language Amendment

*Education*²⁶ has manifested itself in several federal court decisions touching upon language issues and the rights of language minorities.

The most striking thing about these court decisions is that they tread, but do not cross, the line of constitutionalizing language rights, despite the urging of plaintiffs and scholarly commentary to do so.²⁷ In several cases, the Supreme Court has upheld the power of Congress to pass legislation under the 14th Amendment to remove language barriers to participation in political processes.²⁸ In *Katzenbach v. Morgan*²⁹ the Court upheld provision 4(e) of the Voting Rights Act of 1965,³⁰ which suspended state English literacy requirements if the voter had completed the sixth grade in an American flag school where the language of instruction was other than English. Section 4(e) was enacted largely in response to the large numbers of Spanish-speaking Puerto Ricans disenfranchised by the English literacy requirements in New York State's Constitution.³¹ Similarly, a series of other federal and state decisions prompted the Congress to enact the multilingual ballot provisions of the Voting Rights Act Amendments of 1975.³²

The major case behind the Court Interpreters Act of 1978,³³ *United States ex rel. Negron v. New York*,³⁴ spoke the language of constitutionally mandated due process without explicitly finding a violation of constitutional proportions in the failure of a criminal court to provide a translator to a non-English-speaking defendant.³⁵ Other

26. 349 U.S. 294 (1955).

27. Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52 (1974); Comment, *Cultural Pluralism*, 13 HARV. C.R.-C.L. L. REV. 133 (1978); Comment, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. MAR. L. REV. 667 (1982); A. LEIBOWITZ, *supra* note 24, at 11.

28. For a discussion of several decisions, see Leibowitz, *The Official Character of Language in the United States: Literacy Requirements for Immigration, Citizenship, and Entrance into American Life*, reprinted in STAFF OF COMMITTEES ON THE JUDICIARY: HOUSE OF REPRESENTATIVES AND UNITED STATES SENATE, 97TH CONG., 1ST SESS., FINAL REPORT ON U. S. IMMIGRATION POLICY AND THE NATIONAL INTEREST Appendix A at 430 (Comm. Print 1981).

29. 384 U.S. 641 (1966).

30. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1976)).

31. Leibowitz, *supra* note 28, at 432.

32. *Id.* at 434, 460 n.143 (cases cited).

33. Court Interpreters Act, 28 U.S.C. § 1827 (1978).

34. 434 F.2d 386 (2d Cir. 1970).

35. In a much more recent case involving an excludable alien's right to translation services during exclusion proceedings, the Second Circuit found violations of the alien's statutory procedural rights and "very likely" violations of constitutional due process as well. Still, the "process due" was not the result of direct constitutional mandate but was the product of Congress's intent, embodied in a rule of positive law, to provide a hearing "without regard to language skills." *Augustin v. Sava*, 735 F.2d 32 (2d Cir. 1984).

courts have either split on the issue or refused to impose translation requirements on specific governmental programs and services. But whatever decision they did reach, all denied that translation was a constitutional requirement.³⁶ Though the EEOC has sometimes assumed otherwise, several courts have held that language discrimination is not impermissible national origin discrimination,³⁷ and some have gone so far as to voice concern about the dangers of linguistic fragmentation.³⁸

Like all of the above decisions, the Supreme Court case with the greatest impact on language policy in the United States, *Lau v. Nichols*,³⁹ managed to resist the explicit constitutionalization of language rights. In *Lau*, Chinese children in San Francisco public schools who had not mastered English claimed that their placement in English-only classrooms violated their constitutional right to equal protection. Both the District Court and the Ninth Circuit rejected the petitioners' equal protection claims. The Supreme Court reversed, but avoided the constitutional issue. Instead the Justices gave the force of law to HEW regulations issued under the Civil Rights Act of 1964 that directed school boards to rectify the discriminatory effects of children's language deficiencies. Though the *Lau* decision itself left open the question of specific remedies, HEW reacted with the "Lau Remedies", specific guidelines that imposed a particular form of bilingual education on the nation's public schools.⁴⁰ For good measure, Congress itself codified the Court's holding in the Equal

36. *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983); *Carmona v. Sheffield*, 325 F. Supp. 1341 (N.D. Cal. 1971). For other cases, see A. LEIBOWITZ, *supra* note 24, at 17.

37. See Comment, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. MAR. L. REV. 667 (1982).

38. In essence, plaintiffs' contention would require the State of California and, presumably, all other States and the Federal Government to provide forms and to conduct its affairs and proceedings in whatever language is spoken and understood by any person or group affected thereby. The breadth and scope of such a contention is so staggering as virtually to constitute its own refutation. If adopted in as cosmopolitan a society as ours, enriched as it has been by the immigration of persons from many lands with their distinctive linguistic and cultural heritages, it would virtually cause the processes of government to grind to a halt. The conduct of official business, including the proceedings and enactments of Congress, the Courts and administrative agencies, would become all but impossible.

Carmona v. Sheffield, 325 F. Supp. 1341, 1342 (N.D. Cal. 1971). See also *Guadalupe Org. Inc. v. Tempe Elementary School Dist. No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978) ("Linguistic and cultural diversity within the nation-state, whatever may be its advantages from time to time, can restrict the scope of the fundamental compact. Diversity limits unity.").

39. 414 U.S. 563 (1974).

40. See Rotberg, *Some Legal and Research Considerations in Establishing Federal Policy in Bilingual Education*, 52 HARV. EDUC. REV. 303 (May 1982); McFadden, *Bilingual Education and the Law*, 12 J. OF LAW & EDUC. 1 (Jan. 1983); Roos, *Bilingual Education: The Hispanic Response to Unequal Educational Opportunity*, 42 LAW & CONTEMP. PROBS. 111 (Aut. 1979).

English Language Amendment

Educational Opportunity Act of 1974.⁴¹

There is a high degree of congruence between judicial expansion of minority language rights and legislative and executive policy in the area. In some instances the courts have applied provisions of enacted civil rights legislation, while in others Congress and the executive branch have reacted quickly and forcefully to judicial initiatives. In the area of bilingual education in particular, the political branches, perhaps for political reasons, have shown an even greater zeal for expanding language rights than have the courts.⁴² Nevertheless, it is worth repeating that the judiciary has consistently refused irrevocably to constitutionalize minority language rights in the United States and that the political branches have generally not called for the courts to do so.

Supporters of the ELA, however, seek to constitutionalize majority language rights precisely because they believe that well-intentioned but misguided judicial and political actions have not solved the problems posed by Spanish-speaking populations in the United States; rather these actions have exacerbated the problems to such a degree that only a constitutional amendment can undo the damage already done and prevent similar threats to our national language and national well-being in the future.

Supporters of the ELA argue that bilingual education and multilingual ballots discourage rather than encourage assimilation, send mixed signals about what is important in American life, encourage separatism and hostility toward American ideals, and benefit no one other than Hispanic political leaders and their minions. They see Canada as the dark model of what will happen in the United States if the government continues to promote programs that create disincentives to learn English while doing nothing to protect our common language from the threat of language-based separatism.⁴³

In their statements before the Senate Subcommittee on the Constitution, the ELA's supporters listed both what they intend the amendment would do and what it would not. All agreed that multilingual ballots would go. Bicultural and language maintenance elements of bilingual education programs would be purged, and bilingual education would be narrowly restricted to programs whose sole purpose is the rapid acquisition of English.⁴⁴ Senator Huddle-

41. 20 U.S.C. § 1703(f) (Supp. V 1975).

42. Rotberg, *supra* note 40.

43. *Hearings, supra* note 4 (testimony of Rep. Norman D. Shumway at 2; testimony of Sen. Quentin N. Burdick at 4; testimony of Sen. Walter D. Huddleston at 5).

44. In the words of President Reagan, "It is absolutely wrong and against American

ston stated that the amendment would apply to all governments, state and local as well as federal.⁴⁵ At the same time, sponsors of the ELA argue that passage of the amendment will have no effect on the teaching of foreign language courses in the schools or the use of foreign languages in private contexts. Senator Huddleston specifically exempts the use of foreign languages for public safety, claiming such an amendment, "would not deny individuals their civil rights or, as some have referred to them, their linguistic and cultural rights."⁴⁶ Of the amendment's supporters, only Gerda Bikales mentions the question of Puerto Rican statehood, asserting that, "it would be wise to settle firmly on the language of the nation before Puerto Rican statehood is up for consideration."⁴⁷

Even after passage, the ELA's supporters believe its symbolic effects would be at least as important as its specific legal ramifications. According to its sponsors, passage would assure the national consensus concerning the importance of a common language, without which even a pluralistic society cannot exist. Most importantly, a post-ELA world would send a clear message to immigrants and non-English speakers that mastery of English is a prerequisite to participation in American society. Instead of sending mixed signals to newcomers, the United States would restore the incentives to assimilation that well-meaning but misguided government programs have destroyed.

II. *Doubtful Assumptions, Doubtful Data*

In an era in which "old-fashioned" patriotism is popular again,⁴⁸ prospects of significant immigration reform are rapidly receding, and monolingual English speakers often feel like aliens in their own land,⁴⁹ the argument that difficult problems can be eased or solved

concepts to have a bilingual education program that is now openly, admittedly dedicated to preserving their native language and never getting them adequate in English so they can get out in the job market and participate." *Hearings, supra* note 4 (opening statement of Sen. Orrin Hatch at 3).

45. *Hearings, supra* note 4 (testimony of Sen. Walter D. Huddleston at 7).

46. *Id.*

47. *Hearings, supra* note 4 (testimony of Gerda Bikales at 8). As Ms. Bikales surely knows, passage of the ELA would severely diminish any chance of Puerto Rican statehood in the foreseeable future.

48. Consider the show of American patriotism at the 1984 Summer Olympics in Los Angeles and the popularity of Ronald Reagan, a politician who has capitalized on simple, "old-fashioned" notions of patriotism.

49. In some major metropolitan areas *English is the second language*. Minorities, who speak only English, are being told that they must learn a foreign language in order to be eligible for a job in parts of this country. And, in many stores, non-English languages are the only ones used to conduct business.

English Language Amendment

simply by granting English the constitutional protection it “obviously” deserves is quite seductive. Unfortunately, the assumptions, arguments, conclusions —and in some cases, the motives — of the ELA’s supporters are highly suspect.

A. *Statistical and Linguistic Weaknesses*

First, the statistical arguments made by the amendment’s proponents are flawed and unpersuasive. For example, there is serious doubt whether a problem of the kind or magnitude described by the sponsors of the ELA actually exists. Some researchers contend that Spanish speakers are following the traditional pattern of English acquisition, only at a pace slowed somewhat by the continual influx of large numbers of Spanish speakers. Calvin Veltman, a sociolinguist who has studied Spanish-speaking communities in the U.S., concludes that: “Hispanics will survive as an ethnic identity, but not as a language group. If the border closed, Spanish would fade out.”⁵⁰ If Veltman is correct, then the problem is much smaller than imagined and is more a result of migration patterns than language policy. Attempting to solve the problem with a constitutional language amendment aimed solely at language usage would seem to be inappropriate at best, and at worst, counterproductive.

Second, even accepting the idea that language and nationhood are linked, it does not follow that language is not just *a*, but *the* most important bonding force of a people. Language is only one of a multiplicity of factors that can bind or rend a people, a fact that was manifestly apparent to the Founding Fathers. It is true that the enlightenment theory that lay behind the birth of the United States explicitly embraced the idea that a common language was essential for successful nations.⁵¹ But other forces in our early history led in another direction. The core notions of individual liberty and tolerance upon which the new nation was based (and which arguably justified its very existence), as well as the obvious supremacy of the English language in national life, militated against any inclination to grant English official status or special protection.⁵² Also, the fact that the United States was breaking away from a nation that spoke

Hearings, supra note 4 (testimony of Sen. Walter D. Huddleston at 4, emphasis in original).

50. Ingwerson, *A Tale of 2 Languages: For Hispanic Immigrants, Shift to English is Slow, but Sure*, *Christian Science Monitor*, Aug. 22, 1983, at 1, col. 1 (quoting Veltman).

51. Forbes & Lemos, *supra* note 16, at 39-45.

52. Heath, *A National Language Academy? Debate in the New Nation*, 11 *INT. J. OF SOCIOLOGY OF LANGUAGE* 9,10 (1976).

the same language tended to undermine some aspects of the argument for the link between language and nationhood, even leading to some strained attempts to distinguish English from the American language.⁵³ The results of a study which examined the voting patterns in linguistically and religiously divided countries also undermine the simple equation of obviousness with importance. Though language was a strong second, religion was found to be the most important determinant of voting behavior.⁵⁴

The sociolinguist Karl Deutsch provides a vivid anecdotal confirmation that language is neither the only nor the most important bond of a people. A prominent German-Swiss editor reported the following experience:

I found that my German was more closely akin to the French of my [French-Swiss] friend than to the likewise German (Ebenfallsdeutsch) of the foreigner. . . . The French-Swiss and I were using different words for the same concepts, but we understood each other. The man from Vienna and I were using the same words for different concepts, and thus we did not understand each other in the least.⁵⁵

Deutsch explains this seemingly counter-intuitive outcome in this way:

The Swiss may speak four different languages and still act as one people, for each of them has enough learned habits, preferences, symbols, memories, patterns of landholding and social stratification, events in history, and personal associations, all of which together permit him to communicate more effectively with other Swiss than with the speakers of his own language who belong to other peoples.⁵⁶

Supporters of the ELA seem to be making precisely the mistake of equating the obviousness of language usage with its importance to national unity. Of course, they do not claim that language is the only bond of the American people, but the ease with which they dismiss other elements of national unity and their eagerness to elevate English to a role as the primary (if not the only) guardian of the

53. Thus, the apocryphal stories that the Founding Fathers appreciated the importance of English in the United States so little and wanted to break with Great Britain so completely that they seriously considered declaring German or Greek the official language of the United States are only slightly less indicative of the colonial attitude toward English than the historically genuine musings of Jefferson on the linguistic dangers to fragile political institutions, the fulminations of Franklin against German speakers in Pennsylvania, and the quixotic quest of Webster to force "Federal English" on an unconcerned nation. See D.E. BARON, *GRAMMAR AND GOOD TASTE* 7 *passim* (1982); Heath, *supra* note 52, at 36.

54. Lijphart, *Religious v. Linguistic v. Class Voting: The Crucial Experiment of Comparing Belgium, Canada, S. Africa, and Switzerland*, 73 *AM. POL. SCI. REV.* 442 (1979).

55. K. DEUTSCH, *NATIONALISM AND SOCIAL COMMUNICATION* 97 (1966).

56. *Id.*

English Language Amendment

American way of life reveal that their allusions to notions of cultural diversity are little more than perfunctory. For instance, before reaching her conclusion that English is “no longer a bond but *the* bond between all of us,” Gerda Bikales outlines the components of nationhood by reference to the criteria of John Jay:

- A large expanse of connected, contiguous territory;
- Descent from common ancestors;
- A common language;
- Attachment to the same principles of government;
- Similarity of manners and customs;
- A long and common history of war, suffering and a happy outcome;
- Readiness to forget past intergroup conflicts.⁵⁷

Even accepting the continuing validity of such Enlightenment criteria, a list of this sort should serve only as a starting point for a serious inquiry into the health of our national commitment. Such an inquiry would involve an analysis of the list for under- or over-inclusiveness, a ranking of relative importance of each element, and a consideration of the precise status of each component in today’s society. Even prior to such steps, “unity” and “national commitment” would have to be defined in terms of a coherent vision of American society.

Instead of engaging in such an inquiry, Bikales immediately dismisses all but two of the elements on her list: a common language and a commitment to democratic governance. Doubtful even of our commitment to democratic ideals, she suggests that perhaps only “one and a half” of the necessary components still survive. In Bikales’ view, then, we are justified in focusing our energy on defending the English language because English is all that remains.⁵⁸

Admittedly, foreign language use is the most striking symbol of foreignness itself. There is little doubt that acquisition of a nation’s language audibly manifests an immigrant’s desire to join the mainstream of society, while at the same time removing the veil of incomprehension that appears to threaten both sides. It is not so clear, however, that a mastery of English is a prerequisite for commitment to American ideals or that speaking English assures loyalty to American values. Yet, as Bikales’ testimony shows, this fact is easily lost

57. *Hearings, supra* note 4 (testimony of Gerda Bikales at 4-5).

58. *Hearings, supra* note 4 (testimony of Gerda Bikales at 6). Other supporters of the amendment say even less about the possibility that forces other than language usage can bind a nation together.

when forced to compete with the immediate symbolic impact of language use.

B. *The Canadian Analogy*

Just as supporters of the ELA feel it is unnecessary to delve deeply into their sociolinguistic assumptions and empirical data, they casually depict a nightmarish vision of separatist Quebec as the inevitable future of the United States if we fail to protect English now.⁵⁹ Once again, however, the purveyors of these warnings rely completely on their "obvious" correctness and immediate emotional impact, without any careful examination of the cultural, political, historical, religious and linguistic differences between Canada and the United States. Calvin Veltman completely rejects any linguistic comparison between the French-speaking population in Quebec and Spanish speakers in the United States, noting that in Quebec only 2 percent of native speakers of French become primarily English speakers, while in the American Southwest, 60 percent of the Spanish speakers adopt English as their language.⁶⁰

Lawrence H. Fuchs identifies five factors whose different roles in the two societies make Mexican-American separatism of the Quebec sort extremely unlikely in the United States: language itself; territory, political memory, and geographic mobility; the church; politics; and the founding myths. Considering all of these factors, Fuchs concludes that fears of Mexican-American separatism comparable to the movement in Quebec "appear to be groundless."⁶¹

A potentially destructive irony may also lurk in the reliance on the prospect of a Quebec-like future to promote the English Language

59. *Hearings, supra* note 4 (testimony of Rep. Norman D. Shumway at 2; testimony of Sen. Quentin N. Burdick at 4; testimony of Sen. Walter D. Huddleston at 5).

60. Quoted in Ingwerson, *supra* note 50, at 13.

61. (1) *Role of Language*—Unlike the French-speaking Quebecois, Mexican-American leaders strongly favor the acquisition of English even while promoting cultural and ethnic maintenance. (2) *Role of territory, political memory and geographic mobility*—Most Mexican-Americans in the United States are immigrants or descendants of immigrants who feel no historic sense of defeat and loss. At the same time, they do not constitute a majority in any state or region in the United States and have adopted the migratory patterns of other Americans. (3) *Role of the Church*—Unlike the Quebec Catholic Church, the Catholic Church in the United States is national and assimilationist. (4) *Role of Politics*—Unlike the political system in Canada, American politics is integrationist, with involvement in it promoting assimilationist, nationalizing values. (5) *Role of the Founding Myths*—Canada's founding myth is based on the idea of national union between two nations, each with its own separate language, culture and religion; in sharp contrast, the founding myth of the United States is premised on the idea of individuals forming a nation to protect their liberties free from group controls. Fuchs, *Immigration, Pluralism and Public Policy: The Challenge of the Pluribus to the Unum*, in U.S. IMMIGRATION AND REFUGEE POLICY 289, 308-310 (M. Kritz ed. 1983).

English Language Amendment

Amendment. According to Maxwell Yalden, the commissioner of official languages for Canada, "We do not have the separatist problem in Canada because we have two languages. We have the problem because we refuse to give status to the other [French] language."⁶² If Yalden is correct, supporters of the ELA may be playing the role of characters in Greek tragedy who bring about their fate through their efforts to avoid it.

III. *Lessons from The Americanization Movement*

Though the ELA supporters' use of Canadian history and their frequent reverential references to the United States' past performance as a "melting pot" reveal little about the merits of the arguments for promoting national unity through protection of the English language, a deeper look at our actual as opposed to imagined history — specifically that of the Americanization movement of seventy years ago — points to the two least visible but most important elements in the debate over the ELA. The first has to do with the nature of language issues themselves; the second with our vision of ourselves as a society.

A. *Language as an Offensive Weapon*

Language diversity did not become a major issue in American life until the beginning of the twentieth century, when massive waves of immigrants from Southeastern Europe began landing on our shores and crowding our cities. The reaction to these newcomers was far from uniform: some welcomed them and were genuinely concerned for their well-being; others feared and detested them for racial or other xenophobic reasons and hoped to be rid of them, or at least "neutralize" their effect on American society, as quickly as possible. All agreed, however, that the new immigrants already here must be "Americanized" — for their own good, for America's good, or both. From this morass of contradictory impulses and assumptions, the "Americanization" movement of the first two decades of the twentieth century was born with a single goal: making Americans out of foreigners as quickly as possible.

Though in theory only one of several elements important in the definition of an assimilated American, language became in practice the major, if somewhat schizophrenic, focus of the Americanization

62. Turbak, *Bilingualism: Terrible Time Bomb?*, KIWANIS MAGAZINE 21,22 (June-July 1984).

movement. English language education emerged as the chief goal (and perhaps the only lasting product) of its positive program, while the exclusion of the new immigrants from American Society through the use of onerous English language requirements for entry, employment and political participation was a major part of its nativist and restrictionist agenda.⁶³

"English First" was accepted as a cornerstone of the Americanization movement by all concerned: progressives who welcomed the new immigrants but feared they would be culturally and politically exploited and physically threatened without knowledge of English; employers who wanted simultaneously to communicate with and socialize a docile work force; nativists who, though resigned to the presence of those immigrants already here, feared the corrupting influence of the foreign ideas carried by foreign tongues; and perhaps most of all, the immigrants themselves, the vast majority of whom truly desired to enter the mainstream of American society. By the end of World War I, in the closing years of the Americanization movement, reporters for *The New Republic* attending the last national Americanization conference concluded that the conference participants thought about Americanization "as chiefly and exclusively a problem in English instruction."⁶⁴ To a large extent, this assessment was correct, and if the English language instruction and adult education programs that emerged from the movement were its

63. By 1918, over one hundred national bodies and six Federal government agencies claimed to be dealing with immigrant education, the main thrust of which was the English language. But one should not impose late-twentieth century notions of government involvement on early-twentieth century activities. The motive force for the Americanization movement came from private business, civic and patriotic organizations and from local and state governments. These included such civic and patriotic groups as the Daughters of the American Revolution, the YMCA and the American Legion; business interests such as the Ford Motor Company and the National Association of Manufacturers; organizations formed especially to promote Americanization such as the National Americanization Committee and The North American Civic League; and immigrant organizations such as the Educational Alliance (Jewish), the Society for Italian Immigrants, and the Hungarian-American Loyalty League.

While such groups were teaching English to adult immigrants, state and local institutions were Americanizing their children. As time went on, local governments began providing night classes for adults as well, with New Jersey passing the first state legislation providing schooling in English and civics in 1907. At the same time, only two Federal agencies, the Bureau of Education and the Bureau of Naturalization were major actors in the Americanization movement, and their independent role was actually much smaller than it first appeared. The Bureau of Education was largely financed and staffed by the Committee for Immigrants in America and other private groups. After 1917, the year Congress outlawed such private funding of public agencies, the Bureau of Education repeatedly failed to obtain direct Congressional funding and ultimately disappeared from the scene. See generally E. HARTMANN, *THE MOVEMENT TO AMERICANIZE THE IMMIGRANT* 24 *passim* (1948).

64. *Id.* at 229-230.

English Language Amendment

only legacy, the Americanization movement might have gone down in history as one of our nation's brighter moments.

Unfortunately, the mix of motives and mentalities that made up the movement was a volatile one, including large doses of fear, racism, and xenophobia.⁶⁵ Responding to national and international events, particularly the patriotic excesses of World War I and the post-war "Red Scare", as well as to emergent theories of racialism, these elements came to dominate Americanization in the form of the "100% American movement" and the crusade against "hyphenated Americans."⁶⁶ Not surprisingly, this segment of the Americanization movement came to use language issues and the "defense" of the English language as a major weapon against the new immigrants.

Immigration restriction was the direct goal of those who most feared the corrupting influence of the new immigrants, but the opposition of powerful groups such as the National Association of Manufacturers, whose members needed immigrant workers, and politicians who depended upon the votes of newly enfranchised immigrants (or who suffered from attacks of principle) prevented for the moment a frontal attack upon the problem. Language barriers became an obvious, if not wholly satisfactory, substitute for more substantial walls: immigrants could enter the country but not its society. State and local governments continued to play an important part in this darker side of the Americanization endeavor, but the national government's plenary power over immigration and naturalization ensured that it too would be called upon to use the English language to protect the purity of our national union.

Though English language education was the prime carrier of the movement's positive program, education could also be used to reinforce the nativists' narrow notions of patriotism. Nativists rejected the contention that one could keep one's mother tongue yet still be a good citizen of the United States. Learning English was not enough: a committed immigrant must also cast off her alien tongue with her alien status. Some immigrant groups, however, resisted the

65. There were the two sides of the Americanization movement. The impulse of fear and the impulse of love ran throughout its whole course, clashing in principle though in practice sometimes strangely blended. One current tended to soften the movement, orienting it toward the welfare of the immigrant; the other steeled it to an imperious demand for conformity. Out of fear, the Americanization movement fostered a militant nationalism, and by this means it eventually made its widest, most fervent appeal to the native-born public.

HIGHAM, STRANGERS IN THE LAND 237 (1955).

66. *Id.* at 249 *passim*.

idea that deracination was a prerequisite for good citizenship.⁶⁷ German speakers, in particular, had a long tradition of mother-tongue maintenance and bilingual education in the United States, a fact not unnoticed by nativists and know-nothings as far back as the middle of the nineteenth century.⁶⁸ The coming of World War I reawoke hostility toward the teaching of German and other foreign languages, and by 1919 fifteen states had passed legislation installing English as the sole language of instruction in all public and private primary schools.⁶⁹ In striking down such legislation in *Meyer v. Nebraska*,⁷⁰ the Supreme Court nevertheless reaffirmed the right of the states to require that instruction be given in English.

States also used more direct language restrictions to exclude foreigners from economic and political participation in American life. As early as 1897, Pennsylvania imposed residency and language requirements on miners.⁷¹ In 1918, New York passed a law requiring foreign-language speakers to be enrolled in educational programs as a condition of continued employment. Other states had similar laws.⁷² In a particularly venal move, a Republican administration fearful of Jewish votes amended the New York State Constitution to include a language requirement whose purpose was to disenfranchise over one million Yiddish-speaking citizens. Once again, neither New York's goal nor its method were unique.⁷³

In the areas of language requirements for employment and voting, the states often followed the lead of the federal government, which had exclusive control over the imposition of language qualifications for immigration and naturalization. Unfortunately, much federal action was guided by the report of the U.S. Immigration Commission (better known as the Dillingham Commission), issued in 42 volumes in 1911. Beginning with racist and restrictionist presuppositions and ignoring or distorting much of its own data, the Commission concluded that the new immigrants were inferior intellectually, racially, and educationally; were not learning English, assimilating, or naturalizing quickly enough; and were criminally

67. E. HARTMANN, *supra* note 63, at 253-258. See also CULTURAL PLURALISM V. ASSIMILATION: VIEWS OF AGER, WALDEMAR (O. Lovoll ed. —) (opposing relinquishment of Norwegian language and culture in the U.S.).

68. HIGHAM, *supra* note 65, at 8, 54.

69. *Id.* at 260.

70. 262 U.S. 390 (1923).

71. HIGHAM, *supra* note 65, at 72.

72. Forbes & Lemos, *supra* note 16, at 53.

73. Leibowitz, *supra* note 28, at 410, 452 n.65. See also Garcia, *Language Barriers to Voting: Literacy Tests and the Bilingual Ballot*, 6 COLUM. H. R. L. REV. 83, 86 (Spring 1974).

English Language Amendment

inclined.⁷⁴

Literacy tests for admission to the United States early became a goal of immigration restrictionists, who openly admitted that their purpose was to decrease immigration by 25 percent, specifically that 25 percent which came from Southeastern Europe.⁷⁵ Some proponents of the literacy test wanted to base admissibility to the United States on knowledge of English itself,⁷⁶ but the legislation that emerged merely required literacy in the prospective immigrant's own language. First introduced in 1906, the literacy legislation was not enacted into law until 1917, when war-time enthusiasm enabled the Congress to override President Wilson's veto. However, passage was largely a pyrrhic victory for the restrictionists, for by 1917 most of the immigrants who were still coming to the United States could meet the test's requirements (especially with a little tutoring back home). In any case, the test itself was rendered obsolete by the enactment of straightforward immigration restriction in the early 1920's.⁷⁷

The English language requirement for naturalization had a much easier birth. Recommended by the U.S. Commission on Naturalization in 1905, this requirement was included in the Naturalization Act of 1906.⁷⁸ Under the Act's provisions, an applicant for citizenship had to be able to sign his name and speak English to the satisfaction of a naturalization examiner. Even the opponents of the nativists and the 100 % Americanizers regarded these requirements as the minimum necessary to assure the maintenance of American culture and political institutions.⁷⁹ In fact, similar requirements had already been imposed by courts who considered English competency a prerequisite to "attachment to the Constitution."⁸⁰ Thus when courts later pruned back language requirements in other areas, they explicitly disavowed any concern for language requirements in the area of naturalization.⁸¹

The fervor of the war years and the growth of the 100% American movement produced more ominous proposals linking English language requirements to naturalization. During the war, the National Americanization Committee proposed requiring all aliens to learn

74. E. HARTMANN, *supra* note 63, at 66.

75. Leibowitz, *supra* note 28, at 427.

76. Forbes & Lemos, *supra* note 16, at 117-118.

77. Leibowitz, *supra* note 28, at 418.

78. *Id.* at 404.

79. Forbes & Lemos, *supra* note 16, at 123.

80. Leibowitz, *supra* note 28, at 449 n.47.

81. *Id.* at 418.

English and apply for citizenship within three years or face deportation.⁸² Teddy Roosevelt was more liberal in that he would have allowed the alien five years to learn English before deporting her.⁸³ Even Woodrow Wilson joined the crusade against "hyphenated Americans."⁸⁴

The imposition of direct immigration restriction in the 1920's removed most of the reasons for worrying about the threat posed by aliens to the American way of life, and so removed the incentive for using English as a weapon against such a threat. The fact that language can be used as an offensive and ugly weapon against foreign-language speakers, whether through political, economic, or educational requirements, is, however, an unavoidable lesson of the Americanization movement.

In the past fifty years, the notions of racial and linguistic inferiority of immigrants that motivated much of both the positive and negative efforts of the Americanizers have been roundly rejected by historical experience and modern thought; likewise the simple equation of foreignness with opposition to American institutions and democratic processes. In fact, the immigrants of the early years of the century showed that same zeal for embracing American ideals and values as their predecessors, and if they in fact turned out to be "unique," such uniqueness lay in the fact that they overcame greater barriers than their predecessors with almost unbelievable speed.

In specifically linguistic terms, the new immigrants' acquisition of English depended more on economic reality and their own motivation than on the impositions of the Americanization movement.⁸⁵ This is not to say that the educational programs that grew out of the movement were ineffective or negative, but it is clear that the Founding Fathers' initial reliance on the natural dominance of English in American life was more realistic than the elaborate programs of the Americanizers.

The Americanization movement is an example of the use of language not just as a shield, but also as an offensive weapon against hidden, nonlinguistic targets. This is because language not only uses symbols but is symbolic itself. The apparent solicitude for the national language exhibited by many of the Americanizers was a mask for racial, economic, and political hostility toward users of

82. HIGHAM, *supra* note 65, at 249.

83. Forbes & Lemos, *supra* note 16, at 157.

84. HIGHAM, *supra* note 65, at 199.

85. Forbes & Lemos, *supra* note 16, at 92.

English Language Amendment

other tongues.⁸⁶ Because language issues can easily be loaded with otherwise unsavory or unacceptable agendas, segments of the Americanization movement were able to transform language from a shield against linguistic chaos into a sword against supposed *nonlinguistic* differences as well — even when those supposed differences were arguably beyond the reach of legitimate public debate.

The Americanization movement's strident defense of threatened American institutions from alien influences raises questions about how accurately such threats were gauged. Even more intriguing is the distinct possibility that the real threat to American institutions in this period arose more from the Americanizers themselves than from any alien hordes. This too seems to be a common pattern in American life, one to be watched for in any renewed attempt to raise walls of language around supposedly fragile American institutions. Of course, mere reference to the mistakes of the Americanizers answers no questions about the merit of present claims concerning the status of English in the United States and its role in protecting American institutions and values. But the first important lesson of the Americanization movement must be that attempts to use language for "patriotic ends" must be subjected to the strictest sort of scrutiny, and that elements of jingoism, racism and xenophobia hiding behind expressed concern for linguistic unity must be identified and rooted out of the debate before proposals to impose English on our official and unofficial life are given any serious consideration.

B. *Two Models of American Society*

The second lesson to be derived from the Americanization movement and the responses it provoked is that the debate over the protection of English in the United States can be viewed as a major battle in the ongoing struggle between two normative visions of American society: Anglo-conformity and cultural pluralism.

According to Milton Gordon, the ideal of "Anglo-conformity," of "maintaining English institutions (as modified by the American Revolution), the English language, and English-oriented cultural patterns as dominant in American life," has dominated our history until very recently.⁸⁷ During the heyday of the Americanization movement, its requirement that immigrants must completely shed their own identity was accepted by both reformers and racists alike.

Yet the narrowness of the vision of Anglo-conformity underlying

86. *Id.* at 18-19.

87. M. GORDON, *ASSIMILATION IN AMERICAN LIFE* 89 (1964).

the Americanization movement never commanded complete unanimity, and its harsh prescriptions stimulated the search for more tolerant outlooks.⁸⁸ There arose an intellectually well-developed alternative vision of American society which has come to be known as "cultural pluralism." Beginning in 1915, Horace Kallen began to develop this vision of an America in which cultural and linguistic diversity were not a threat to be avoided, but the strength and genius of American democracy. While recognizing the importance of English as the common language of the United States, Kallen sought to promote the maintenance of mother-tongues and ethnic identity as the best way to realize American democratic ideals.⁸⁹

Like the systems of thought with which it competes, cultural pluralism raises problems of definition and historical accuracy. Nevertheless, as a normative vision of American society, it offers a clear alternative to Anglo-conformity and drives policy in a radically different direction. Proponents of cultural pluralism accept the basic proposition that a common language provides social cohesion, but given the ease with which arbitrary language requirements can be used to discriminate, they argue that society should encourage mother-tongue maintenance and individual choice in language usage.⁹⁰

88. *Id.* at 115 *passim*.

89. H. KALLEN, *CULTURE AND DEMOCRACY IN THE UNITED STATES* (1924); H. KALLEN, *CULTURAL PLURALISM AND THE AMERICAN IDEA* (1956). For a summary of Kallen's ideas, see M. GORDON, *supra* note 87, at 141 *passim*.

90. Our political and cultural foundations are weakened when large population groupings do not feel encouraged to express, to safeguard, and to develop behavioral patterns that are traditionally meaningful to them. Our national creativity and personal purposefulness are rendered more shallow when constructive channels of self-expression are blocked and when alienation from ethnic-cultural roots becomes the necessary price of self-respect and social advancement, regardless of the merits of the cultural components of these roots. For those groups and individuals that desire it there must be openly sanctioned and publicly encouraged avenues of linguistic and cultural distinctiveness which will provide both a general atmosphere and specific facilitation for diversity within the general framework of American unity.

Fishman, *Planned Reinforcement of Language Maintenance in the United States: Suggestions for the Conservation of a Neglected National Resource*, in *LANGUAGE LOYALTY IN THE UNITED STATES* 369, 374-375 (J.A. Fishman ed. 1966).

For other forceful assertions of minority language rights within a cultural pluralism model of society, see McDougal, Lasswell & Chen, *Freedom from Discrimination in Choice of Language and International Human Rights*, 1976 *SO. ILL. U. L. J.* 151-174; Comment, *Cultural Pluralism*, 13 *HARV. C.R.-C.L. L. REV.* 133 (1978).

In commenting on the retention of the English language requirement for Naturalization, Commissioner Reynoso has said, "In short, America is a *political* union — not a cultural linguistic, religious or racial union." *STAFF OF COMMITTEES ON THE JUDICIARY: HOUSE OF REPRESENTATIVES AND UNITED STATES SENATE, 97TH CONG., 1SR SESS., FINAL REPORT ON U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST* Appendix B at 407 (Comm. Print 1981).

English Language Amendment

In the decades since the end of the Americanization movement, cultural pluralism has come to dominate most of the rhetoric and much of the political action of our society. This change in outlook has many complex sources, but among its major components must be included the repudiation of the suspect sociology and race-science which served to legitimate many of the harsher prescriptions of Anglo-conformity, the horrific lessons of World War II about the consequences of obsessive drives for national unity and purity, the flowering of the civil rights movement, and the growing awareness of later generations of Americans of the price paid for their assimilation.⁹¹ Of course, this list is neither exhaustive nor indicative of the complex interactions among these and other sources of our changed conception of American society. What is clear, however, is that our conception has changed and that Anglo-conformity must contend with, and perhaps yield, to something very different.

This change in the normative model of American society has been accompanied by an equally dramatic change in our conception of the role of the national government. Despite the Federal government's control over immigration, the essentially conservative, traditionalist thrust of the Americanizers militated against the national government's playing a dominant role in the Americanization movement. Instead, the Americanizers' attempt to realize the ideal of Anglo-conformity played itself out in areas largely under the control of private individuals and local governments, primarily employment and education. In contrast, cultural pluralism's emphasis on assuring the cultural and linguistic rights of minorities seems to require the active assistance of the Federal government. It is, therefore, not surprising that the national government has not only entered traditionally local and private areas of American life, but has also created such programs as bilingual education, multilingual ballots and translation services in an attempt to promote a culturally pluralistic society.

Once again, however, the pendulum seems to have swung. Just as the theoretical and political excesses of the Americanization movement stimulated a contrary response, the perceived failure of government programs motivated by a vision of cultural pluralism to produce their intended results, and the perception that well-intentioned government programs may actually be exacerbating the

91. Fuchs, *supra* note 61, at 302-304 *passim*.

problems they were intended to solve,⁹² have undermined some of the basic assumptions of the cultural pluralism model of American society and made notions of Anglo-conformity attractive again.⁹³

IV. *Why We Must Reject the ELA*

Although as a matter of political necessity they speak the language of cultural pluralism, there is no doubt that most supporters of the ELA embrace an astonishingly pure form of Anglo-conformity. Sadly, it appears that in embracing an ideal of Anglo-conformity, some supporters of the ELA have also embraced its affinity for using language issues as a weapon against those who are already the objects of cultural or racial prejudice.

Whereas the Americanizers were afraid of slavish hordes, supporters of the ELA are afraid of Spanish and the people who speak it. It is almost as if we had traveled back in time seventy-five years; once again the United States is facing unprecedented numbers of non-English speakers, seemingly unassimilable, and possibly hostile to American ideals and institutions. In ominous echoes of the Americanizers, the supporters of the ELA not only insist that the problem posed by Spanish speakers is unique (which, as noted in the discussion above, may very well be true), they also view this new situation

92. See the discussion of *Good Intentions Gone Awry*, *supra* text accompanying notes 26-47.

93. Of course, "Anglo-conformity" and "cultural pluralism" are both relative terms. Distinguishing between the two outlooks might be more a matter of degree of tolerance for diversity of different sorts rather than actual polar opposition. Even within the framework of cultural pluralism, strong arguments can be made against some recent programs, or aspects of recent programs, designed to facilitate a culturally pluralistic society. For instance, one could accept the importance of cultural and mother-tongue maintenance yet still question the efficacy and wisdom of a particular form of bilingual education. Or, one could favor the use of multilingual ballots, yet at the same time ask a citizen to begin studying English as a condition of using such a ballot. Telephone conversation with Julio Barreto, Jr., Legislative Assistant, League of United Latin American Citizens (Nov. 6, 1984). Specific positions on these and similar questions would depend on where the line at which linguistic diversity "costs" a society more than it benefits it is drawn.

Most Americans, including the vast majority of Spanish speakers in the United States, would probably draw this line far short of the point at which English was no longer recognized as necessary for assimilation and success in American society. *Hearings, supra* note 4 (testimony of Arnold Torres; testimony of Baltasar Corrada). Given this general agreement, the debate should focus on ways to ease social and linguistic assimilation while neither threatening the identity of minority groups nor undermining the supremacy of the English language. At the same time, given the historical, scientific and political developments of the past sixty years, one would not expect modern Americanizers to embrace discredited racial assumptions or to employ xenophobic rhetoric; language, however, remains just as ready as ever to stand-in for other concerns, some of which our society may no longer accept as legitimate objects of debate in their own right.

English Language Amendment

in the exact way their predecessors viewed the coming of the new immigrants at the turn of the century — as a threat, not as an opportunity or a challenge. In other words, the current supporters of the ELA seem to be reacting to a unique situation in an all too familiar way.

According to Senator Huddleston, “[I]n recent years, we have experienced a growing resistance to the acceptance of our historic language. Increasingly, we have been subjected to an antagonistic questioning of the melting pot philosophy that has traditionally helped speed newcomers into the American mainstream.” He then goes on to quote Theodore White for the proposition that, “Some Hispanics have, however, made a demand never voiced by immigrants before: that the United States, in effect, officially recognize itself as a bicultural, bilingual nation.”⁹⁴

In remarks placed in the *Congressional Record* and mailed to his constituents in North Dakota, Senator Burdick finds it unnecessary even to mention Spanish by name, referring to it as “that language.”⁹⁵ Former Senator Hayakawa contrasts the eagerness of other immigrant groups to learn English and assimilate with the failure of Hispanics to do so. In apportioning the blame for this failure, Hayakawa disavows any prejudice or hostility toward Hispanics, blaming the current state of affairs on Hispanic political leaders, not Spanish speakers themselves.⁹⁶

Such rhetoric is disconcerting in an age where blatant racism and xenophobia are unacceptable in public debate, but language issues remain susceptible to use as barely disguised carriers of covert messages. Nevertheless, the language the ELA’s supporters use in talking about language issues may help explain the particular path

94. *Hearings, supra* note 4 (testimony of Sen. Walter D. Huddleston at 1-2). By “some Hispanics,” Congressman Huddleston and Mr. White are probably referring to very small radical Chicano groups in the Southwest whose positions are explicitly and repeatedly disavowed by the Hispanic mainstream. To generalize about the Hispanic population as a whole from these groups is a serious mistake, probably the equivalent of taking Meyer Kahane to be representative of Jews or describing Linden LaRouche as a leader of the Democratic party.

95. 130 CONG. REC. S385 (daily ed. Jan. 30, 1984).

96. *Hearings, supra* note 4 (testimony of Sen. S.I. Hayakawa). Calvin Veltman, the researcher cited by both Ingwerson, *supra* note 50, and Turbak, *supra* note 62, disputes the general assumption that Hispanics are not learning English. He argues that English becomes the dominant language for Hispanics in the second or third American generation. Turbak, *supra* note 62, at 23.

Of course, in another parallel to the experience of the Americanization movement, not all supporters of official protection for English have suspect motives or secret racial or xenophobic agendas. Once again many prominent supporters are immigrants themselves and persons sincerely dedicated as much to the welfare of Spanish speakers as to that of the established culture. See R. RODRIGUEZ, *HUNGER OF MEMORY* (1982).

the drive to support the official use of English in the United States has taken.

A. *The Constitutional Path*

In opening the hearing held on the ELA in June of 1984, Orrin Hatch, the Chairman of the Senate Subcommittee on the Constitution, questioned the wisdom of attempting to protect the primacy of English in the United States by means of a constitutional amendment: "Regardless of the merit of current bilingualism policy, a constitutional response to these problems of recent origin may overlook the fundamental character of our Constitution and create more problems than it would resolve."⁹⁷ Given the fact that the programs and policies that are the chief targets of the supporters of the ELA — bilingual education and multilingual ballots — have not been constitutionally mandated but are the products of legislative and administrative decision making and judicial statutory interpretation, taking the arduous and uncertain constitutional route just does not seem to make sense.⁹⁸

Nevertheless, supporters of the ELA claim that the drive for the amendment is about much more than simply bilingual education and multilingual ballots. They say it is about the future of unity of American society in such a fundamental way that only a constitutional amendment can express the seriousness of our commitment to that particular future. In practical terms, however, that future unity will be achieved largely through the extinction of multilingual ballots and most forms of bilingual education. Yet, the ELA may not accomplish even these things. Arnold Torres, National Executive Director of The League of United Latin American Citizens (LU-LAC), thinks that forbidding most forms of bilingual education would just shift such programs from the public to the private sector.⁹⁹ Baltasar Corrada argues that the Tenth Amendment would prevent the strictures of the ELA from applying to the States.¹⁰⁰ Similarly, Torres suggests that such an amendment would violate the Treaty of Guadalupe with Mexico and would render unconstitutional those sections of the New Mexico constitution giving recogni-

97. *Hearings, supra* note 4 (opening statement of Sen. Orrin Hatch at 4).

98. In his testimony, Senator Huddleston himself points out that the Federal government and the states have both imposed English upon certain areas of American life by statute. *Hearings, supra* note 4 (testimony of Sen. Walter D. Huddleston at 5). Further concerns could be addressed in the same way without the broad sweep of a constitutional amendment.

99. *Hearings, supra* note 4 (testimony of Arnold Torres at 5).

100. *Hearings, supra* note 4 (testimony of Baltasar Corrada at 4).

English Language Amendment

tion and protection to Spanish.¹⁰¹

Given that passing a constitutional amendment is no easy task, and that a successful drive for the ELA may not even bring about some of its supporters' major goals, there must be some other reason that the constitutional route has become so attractive to opponents of specific, non-constitutionally mandated governmental language programs.

One possibility is that passage of the ELA is not the true goal of many of its erstwhile supporters. These particular proponents may be using the *idea* of the amendment as simply one part of an attack on despised programs and emergent Hispanic political power. Supporters of the ELA often depict bilingual education as largely Hispanic porkbarreling, a means of providing jobs and influence to the Hispanic population, particularly its political leaders.¹⁰² Faced with what seems to them to be pure self-interest masquerading as part of the civil rights movement, the opponents of such programs might want to trump Hispanic political power by linking their position to an even more powerful, self-evident, patriotic imperative. In this context, wrapping their primary goals in the mantle of support for the English language in the United States changes the terms of the political argument in a way that "naturally" favors their position.¹⁰³ Cast in these new terms, the argument is no longer about assuring the civil rights of a minority but rather about protecting the fabric of American society from linguistic and cultural fragmentation. From this perspective actual passage of the Amendment may be largely irrelevant. Just waging the battle — recasting the terms of the political debate in a way that puts opponents on the defensive against a seemingly obvious, patriotic position — may constitute winning it.

Senator Huddleston acknowledges that one of the reasons he chose the constitutional path was to "focus national attention on the problem, and subject it to the type of thorough, national debate which is necessary."¹⁰⁴ Proving that the "problem" is general dissatisfaction with the normative vision of cultural pluralism rather than specific concern about linguistic fragmentation is difficult, but to ignore this possibility would be to neglect both the complexities of the political process in the United States and the malleable nature of the idea of language unity. The fact that Hispanic groups appear

101. *Hearings, supra* note 4 (testimony of Arnold Torres at 5).

102. *Hearings, supra* note 4 (testimony of Sen. S.I. Hayakawa at 6).

103. Cf. Schon, *Generative Metaphor: A Perspective on Problem Setting in Social Policy*, in *METAPHOR AND THOUGHT* 254 (A. Ortony ed. 1979).

104. *Hearings, supra* note 4 (testimony of Sen. Walter D. Huddleston at 7).

to be giving ground on the issue of bilingual education may simply be the result of increasing awareness of the educational deficiencies of some bilingual education programs; on the other hand, it just might indicate that Senator Huddleston's use of the constitutional path to refocus the debate in a way that the issue is not civil rights but national unity is having its intended effect.¹⁰⁵

There is, however, a deep irony underlying such a symbolic strategy. The explicit claim of the ELA's supporters is that Spanish speakers are failing to enter the American mainstream and that this failure threatens our political and cultural institutions. But supporters of the ELA seem to have chosen the constitutional route for precisely the opposite reason: Hispanic political power is too strong and has been too successful at getting what it wants out of the American political system. Is the problem then really block voting rather than not voting?¹⁰⁶ If it is, if Hispanics are voting "self-interest," why is the exercise of Hispanic political power in traditional American ways threatening to the integrity of the American political system?

It is probably true that Hispanics, like everyone else in American society, may be committed to some governmental programs or aspects of such programs for purely selfish reasons. At the same time, however, Hispanic political leaders and groups have continually reiterated their commitment to American values and institutions — including the necessity of the English language in American society. Given the ease with which language issues may mask other disreputable agendas, the ELA's supporters' choice of political tactics — making language usage the sole determinant of political and cultural unity — may encourage new forms of racial and cultural xenophobia, even if it does not begin explicitly with these elements. When an issue is recast in such simple and dogmatic terms, one no longer need confront the complexities and uncertainties of actual programs or the possibility of debased motives or unintended consequences, but these complexities and pitfalls nevertheless remain.

In their testimony, the opponents of the ELA attempted to demonstrate these complexities and pitfalls. Not surprisingly, given the fact that their model of American society is so different from that

105. See Letter from Arnold Torres, National Executive Director of LULAC, to Representatives (July 23, 1984) (urging support for H.R. 5231, The Academic Equity and Excellence Through Bilingual Education Act of 1984) (on file with *Yale Law & Policy Rev.*).

106. Senator Huddleston seems to imply that this is the case. *Hearings, supra* note 4 (testimony of Sen. Walter D. Huddleston at 3).

English Language Amendment

of the supporters of the ELA, they see the ramifications of the ELA very differently even when they acknowledge the legitimacy of some supporters' claims. While admitting that some bilingual programs are ineffective, they reject the broad brush approach of outlawing whole types of programs.¹⁰⁷

Like the supporters of the ELA, its opponents see the effects of passage largely in symbolic terms. But while the supporters see the ELA protecting the bare minimum that a society — even a culturally pluralistic society — needs to survive, the amendment's opponents see it as a repudiation of the essential ideals of tolerance and respect for diversity that underlie American democracy. They see it as a return to racial and ethnic discrimination and to the xenophobia and provincialism that have marked much of American history.

B. *Secondary Effects of the ELA*

Even accepting the premise that the current paucity of hard sociolinguistic data on assimilation rates and the continuing disagreement over the degree of linguistic and nonlinguistic diversity we should tolerate encourages us to err on the side of protecting the English language in the United States, the likely costs of the ELA are far too high.

Except for areas that fall within Senator Huddleston's exception for "public safety," federal, state, and local governments would probably not be permitted to communicate in a language other than English. Foreign language provisions of other federal programs, including alcohol and drug-abuse rehabilitation, legal services and veterans medical facilities would also be likely to fall.¹⁰⁸

Mr. Torres' confidence that the ELA would only shift the locus of bilingual education from public to private schools overlooks the fact that such a solution would most likely favor the wealthy and further disadvantage the poor. There may even be something to Senator Hatch's claim that the ELA would constitute a constitutional reversal of *Meyer v. Nebraska*.¹⁰⁹ The avowed purpose of Nebraska's statute was to protect the English language; passage of the ELA might render such a law permissible. As unlikely as this may sound, one

107. In his opening remarks at the Senate Subcommittee hearing, even Senator Hatch questioned what sort of *legal* standard would be able to distinguish between acceptable and unacceptable bilingual education programs. *Hearings, supra* note 4 (opening statement of Sen. Orrin Hatch at 4).

108. *Hearings, supra* note 4 (testimony of Sen. Walter D. Huddleston; testimony of Sen. Quentin N. Burdick; testimony of Sen. S.I. Hayawaka; testimony of Rep. Norman D. Shumway; testimony of Gerda Bikales).

109. 262 U.S. 390 (1923).

need only look to the favorite nation of the ELA supporters, Canada, to find a court holding that, "Freedom of expression does not include the freedom of choosing the language of expression."¹¹⁰

The ELA would surely destroy any chance of Puerto Rican statehood. Members of the statehood movement rely heavily on the proposition that Puerto Rico would be able to choose Spanish as its official language upon entry to the Union. They base this assumption on the Tenth Amendment and the "equal footing" doctrine, and repeatedly asseverate that it would take a constitutional amendment to remove this power.¹¹¹ The ELA is just that amendment.

The multilingual ballot provisions of the Voting Rights Act of 1975, as extended in 1982,¹¹² are intended to prevent the exclusion of minority language *citizens* from the election process.¹¹³ Denying such citizens access to the electoral process may, as the supporters of the ELA claim, increase these citizens' incentive to learn English, or, assuming that English literacy tests are not reinstated, may instead provide an incentive for such citizens to cast uninformed votes. Furthermore, it seems likely that the reinstatement of monolingual English ballots would disenfranchise at least some Spanish-speaking citizens, either through the increased difficulty of casting a vote or discouragement with the system itself. Since such disenfranchisement would in turn reduce Hispanic political power, it is hard to believe that such a result is an unintended or unforeseen consequence for at least some of the ELA's supporters.

The judicial system would be included in the ELA's prohibitions, so the Federal Court Interpretation Act and its state equivalents might be rendered unconstitutional. The end of translation in judicial processes raises still more serious questions. As noted above,¹¹⁴ the courts have uniformly rejected a constitutional right to receive

110. *Devine c. P.G. du Quebec*, [1982] Que. C. S. 355, 379 (1982). See generally Tetley, *Language and Education Rights in Quebec and Canada (A Legislative History and Personal Political Diary)*, 45 LAW AND CONTEMP. PROBS. 177,204 (Aut. 1982).

111. GRUPO DE INVESTAGADORES PUERTORRIQUENOS, INC., *BREAKTHROUGH FROM COLONIALISM: AN INTERDISCIPLINARY STUDY OF STATEHOOD 1399-1478* (1984); Davila-Colon, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 CASE W. RES. J. OF INT'L. LAW 315 (1981). See also *Hearings*, *supra* note 4 (testimony of Baltasar Corrada at 4).

112. 42 U.S.C. §§ 1971-1973 (1981 & Supp. 1985).

113. Just as permitting illiterates to vote and providing them with assistance is not intended to encourage illiteracy, providing election materials in a language other than English is not intended to compromise the role of English as the national language but to prevent the exclusion of qualified citizens from the electoral process. Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 CATH. U.L. REV. 250, 270 (1977).

114. See *supra* notes 26-41 and accompanying text.

English Language Amendment

administrative and regulatory notices in a foreign language, but in the areas of criminal procedure and immigration they have employed constitutional due process doctrine in requiring translation for non-English-speaking defendants. Though at this moment it seems highly unlikely that the courts would interpret passage of the ELA as rolling back fundamental due process rights, it is not beyond the realm of imagination or the apparent intentions of the amendment's supporters that the ELA's passage could return non-English speakers to the situation of the appellant in *The Japanese Immigrant Case*: "If the appellant's want of knowledge of the English language put her at some disadvantage in the investigation conducted by that officer, that was her misfortune, and constitutes no reason, under the acts of Congress, or under any rule of law, for the intervention of the Court by *habeas corpus*."¹¹⁵

Conclusion

One can understand the impulse behind the movement for official protection of the English language, and one can sympathize with the fears felt by those concerned for our country's future. Nevertheless, passage of the ELA would be a major mistake.

The goal of a unified citizenry committed to democratic ideals is an admirable one, and universal acquisition of the English language by all residents of the United States would no doubt further that goal. But the means by which we promote English should not in themselves run counter to our democratic tradition. Imposing English upon Spanish speakers through a constitutional amendment would likely exclude many from political participation, sacrifice equal justice in the courtroom, narrowly restrict educational alternatives on the basis of political criteria and mark most as "un-American" in the eyes of the rest of society. Based on undocumented fears of separatism and cultural fragmentation, passage of the ELA would insult and alienate a significant portion of our society in the name of national unity.

None of these outcomes would necessarily require bad faith on the part of the majority of Americans, but our history and much of our present rhetoric indicate that the potential to disguise political and racial hostility as solicitude for our national language remains strong within American society. Passage of the ELA would cast a veneer of patriotism over such illegitimate uses of language issues,

115. 189 U.S. 86, 102 (1902).

thereby making such tactics both more frequent and more acceptable in public debate. This is not to say that the concerns of many of the supporters of the ELA and others who want to protect the status of English in the United States are invalid or necessarily inimical to our basic values. But such issues must be addressed within narrow contexts, and responses must be formulated that do not sacrifice either our ideals or our people to unexamined assumptions and patriotic excess. If the supporters are unhappy with bilingual education and other government programs, they should attempt to modify or eliminate those programs directly, not use the blunderbuss of a constitutional amendment. If they are unhappy with the degree of political and cultural fragmentation tolerated by a society committed to some form of cultural pluralism, they should make explicit their points of disagreement and not allow a single issue — language — to cover a mass of messages, including some that could not survive the light of day on their own.

The goal of a society fully committed to democratic processes and individual liberty is an admirable one. And there is plenty of room to debate just how to reach it. The ELA moves us away from, not toward, that goal.

— *Joseph Leibowicz*