¿Only English? How Bilingual Education Can Mitigate the Damage of English-Only

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INTRODUCTION

"Pizza, por favor." These three simple words recently caused an uproar when Dallas-based pizza chain, Pizza Patrón, launched a new promotion: free pepperoni pizza if you order in Spanish. According to a company press release, the June 5, 2012 promotion was the first in a series of immigrant-targeted events that Pizza Patrón will launch this year "to celebrate the brand's Hispanic focus and honor the positive force of change immigrants have made in communities throughout America."[1] Critics like Peter Thomas, chairman of the Conservative Caucus, which advocates English as the official language of the United States, denounced the promotion as "punish[ing] people who can't speak Spanish."[2] Others even deemed the promotion racist.[3] Nonetheless, the marketing ploy may very well be the first promotion to reward customers who exhibit linguistic diversity—whether it comes in the form of broken Spanish, first-time Spanish, or fluent Spanish.

Unlike Pizza Patrón's promotion, English-Only rules in the workplace and the vast majority of English acquisition programs in American public schools treat language diversity as a problem or a social liability.[4] This perspective is not surprising given that people are uncomfortable with language conflict, and linguistic outsiders naturally have feelings of disorientation, powerlessness and vulnerability.[5] The modern English-Only movement,[6] spearheaded by political

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1. Press Release, Pizza Patrón, Pizza Patrón Gives Away Free Pizza to Those that Order in Spanish (May 22, 2012), *available at* http://www.pizzapatron.com/news/blog/2012/05/pizza-patron-gives-away-free-pizza-to-those-that-order-in-spanish.html.

2. *'Pizza Patrón' Pizza Chain Offers Free Pizza Pie If You Place Your Order in Spanish*, HUFFINGTON POST (May 24, 2012 4:45 PM), http://www.huffingtonpost.com/2012/05/24/pizza-patron-offers-free-pizza_n_1542602.html?ref=food&ir=Food.

3. *Id.*

4. Richard Ruiz, *Orientations in Language Planning*, 8 J. NAT'L ASS'N BILINGUAL EDUC. 15, 86 n.175 (1984).

5. Cristina Rodriguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689, 1694 (2006); *see also* Michael Lichter & Rodger Waldinger, *Producing Conflict: Immigration and the Management of Diversity in the Multiethnic Metropolis*, *in* COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA 147, 163 (John David Skrentny ed., 2001) ("Use of unfamiliar languages arouses unhappiness for a variety of reasons, some of which are purely practical in nature.").

action groups like U.S. English, capitalizes on this anxiety and lobbies for legislation that restricts the use of languages other than English by the government and, in some cases, the private sector as well.[7] As a result of these campaigns, many states have passed English-Only laws, primarily targeting Latino and Asian immigrants. Some laws make English the "official" state language, and others limit or bar the government from providing non-English language assistance and services.[8] As of August 2012, thirty states had identified English as their only official language.[9] On August 2, 2012 the House Judiciary's Subcommittee on the Constitution heard testimony regarding the latest incarnation of a federal English-Only bill: the "English Language Unity Act of 2011" (H.R. 977), sponsored by Representative Steven King of Iowa.[10]

The school and the workplace have become the primary battlegrounds of the English-Only debate. In recent years, the English-Only movement has spawned numerous so-called "Unz Initiatives,"[11] state legislation aimed at abolishing bilingual education by replacing it with English acquisition classes, imposing a time limit on English acquisition, and removing bicultural education from public schools.[12] In the workplace, employers justify English-Only rules with arguments that mirror the claims made by the Official English Movement at large. Both argue that a common language is required for efficiency in a multi-lingual society and claim that an official language will promote social harmony.[13] Studies have revealed that "linguistically complex workplaces create pressure

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6. Also known as the Official English Movement.

7. American Civil Liberties Union, *English Only* (Briefing Paper No. 6, 1996), *available at* http://www.lectlaw.com/files/con09.htm.

8. *Id.* ("Some state statutes simply declare English as the 'official' language of the state. Other state and local edicts limit or bar government's provision of non-English language assistance and services.").

9. *Official English Map*, PROENGLISH (August 14, 2012), http://www.proenglish.org/official-english/state-profiles.html. Interestingly, the U.S. English website counts Louisiana as an "Official English" state when, in fact, the Louisiana State Constitution does not declare a *de jure* official language and the current *de facto* administrative languages of the Louisiana state government are English and French. Article XII, section 4 of the Louisiana Constitution specifically recognizes "the right to preserve, foster, and promote their respective historic linguistic and cultural origins." LA. CONST. art. XII, § 4 (1974). Louisiana's revised statutes reconfirm the "traditional right to publish documents in the French language in addition to English." LA. REV. STAT. ANN. § 43:204 (B) (2012).

10. H.R. REP. NO. 997 (2011); Lauren Fox, *Congressman Steve King Strives to Make English the Official Language of the U.S.*, US NEWS & WORLD REPORT (Aug. 2, 2012), http://www.usnews.com/news/articles/2012/08/02/congressman-steve-king-strives-to-make-english-the-official-language-of-us.

11. *See* William Ryan, Note, *The Unz Initiatives and the Abolition of Bilingual Education*, 43 B.C. L. REV. 487, 487 (2002). Named for former California gubernatorial candidate and Silicon Valley millionaire, Ron Unz spearheaded the passage of California's Proposition 227, "English for the Children," in 1998, which effectively dismantled over a third of America's bilingual programs. English Language Education for Immigrant Children, (Proposition 227, 1998), *available at* http://primary98.sos.ca.gov/VoterGuide/Propositions/227text.htm.

12. *See* Ryan, *supra* note 11, at 487 (stating that Arizona legislation to ban bilingual education was the "brainchild" of Ron Unz, who also led the passage of Proposition 227 in California and subsequently brought his campaign to Massachusetts and Colorado).

13. *Compare Fact Sheets: About U.S. English,* U.S. ENGLISH, http://www.us-english.org/view/308 (stating that a common language would keep our nation unified), *with* discussion *infra* Section A. n.33-51.

[on employers] to 'suppress linguistic differences,'" by implementing English-Only rules, "because language, an obvious marker of changes brought on by immigration, 'crystallizes resentment and anxiety.'"[14]

While proponents of the English-Only movement have adopted a language-as-problem approach, opponents of the movement tend to view language as a right. Critics assert that the constitutionality of Official English laws is questionable, and courts have struck down particularly draconian English-Only statutes at the state level in both Alaska[15] and Arizona.[16] Courts grounded the respective rulings in constitutional guarantees of freedom of speech and equal protection, and the finding that the State had no compelling interest to justify an infringement of these rights.[17] The Arizona court declared: "[t]he Amendment's goal to promote English as a common language does not require a general prohibition on non-English usage. English can be promoted without prohibiting the use of other languages by state and local governments."[18] Moreover, critics contend that Official English legislation aims to override Executive Order 13166.[19] This Order "requir[es] federal agencies and grant recipients to make their programs accessible to limited-English proficient persons," and is grounded in Title VI of the Civil Rights Act of 1964, which prohibits national origin discrimination in federally supported activities.[20]

The tension between the language-as-problem and language-as-right camps is seemingly intractable due to the reality that language policies are never just about language. Regardless of their breadth, these laws inevitably reflect attitudes toward the speakers of certain languages and anxiety over America's changing demographics. Indeed, the English-Only movement tends to ebb and flow with fluctuations of anti-immigrant sentiment. Latinos have become the primary target of public anxiety regarding the status of English because the majority of recent immigrants are Spanish-speaking and come from Latin America.[21] In fact, Spanish is the most widely spoken language in the United States after English, spoken by 12.8% of the population.[22]

Anti-immigrant sentiment has been associated with the English-Only movement since its inception in the 1980s. John Tanton, the founder of U.S.

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14. Rodriguez, *supra* note 5, at 1694 (quoting Lichter & Waldinger, *supra* note 5, at 163, 164).

15. Alaskans for a Common Language Inc. v. Kritz, 170 P.3d 183 (Alaska 2007) (holding that while the State had a compelling interest in promoting English as "the common unifying language" of Alaska, the means chosen—a total ban on all languages but English—was not tailored narrowly enough to further that interest).

16. Yñiguez v. Arizonans for Official English, 42 F.2d 1217 (9th Cir. 1994).

17. *Id.* at 1220, 1237, 1242.

18. Ruíz v. Hull, 957 P.2d 984, 1001 (Ariz. 1998).

19. *Official English Legislation: Bad for Civil Rights, Bad for America's Interests, and Even Bad for English: Hearing Before the Subcomm. on Educ. Reform of the H. Comm. of Educ. and the Workforce*, 109th Cong. 63 (2006) ("Frequently Asked Questions About Official English" by James Crawford, Dir., Inst. for Language and Educ. Policy).

20. *Id.*

21. STEVEN BENDER, COMPRENDE? THE SIGNIFICANCE OF SPANISH IN ENGLISH-ONLY TIMES 15-16 (Roberto Cabello-Argandoña & Kerri Kruger eds., 2009).

22. *2010 American Community Survey*, UNITED STATES CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_GCT1602.US01PR&prodType=table (last visited Aug. 14, 2012).

English, the oldest and largest Official English lobby, was forced to resign in 1988 after a memo he wrote became public. The memo contained a number of fierce anti-Latino stereotypes, including:

> *Gobernar es poblar* translates "to govern is to populate." In this society where the majority rules, does this hold? Will the present majority peaceably hand over its political power to a group that is simply more fertile? . . . *Perhaps this is the first instance in which those with their pants up are going to get caught by those with their pants down!*[23]

Unfortunately, incendiary views were not limited to the leadership of U.S. English. During the same year in which the above referenced memo came to light, an internal survey commissioned by U.S. English found that 42% of its members said that they joined the organization because they "wanted America to stand strong and not cave in to Hispanics who shouldn't be here."[24] Although over two decades have passed since that survey was commissioned, and nearly three decades have passed since Senator S.I. Hayakawa of California first proposed an Official English constitutional amendment, the English-Only debate remains a microcosm for the "mythic struggle [] raging over models of Americanism, preconceptions about immigrants and their place in the pecking order, shibboleths of belonging and exclusion . . . ."[25]

Given these complexities, the debate between the "language-as-problem" and "language-as-right" camps appears irreconcilable. There is hope, however, in an approach that looks at language neither as a problem, nor as a right, but rather as a resource. The language-as-resource perspective is developed in the alternative, but often overlooked, English Plus movement. The English Plus movement urges the acquisition of multiple languages by all citizens, not just immigrants and their families.[26] It does so, not because of the benefits to a particular population, but because of its advantages for the country more broadly. It argues that "the national interest is best served when all members of our society have full access to effective opportunities to acquire strong English language proficiency *plus* mastery of a second or multiple languages."[27] In this paper, I look to the English Plus movement for an approach that would both reduce the kind of anxiety that has produced English-Only rules, and enhance educational and workplace opportunities for bilingual speakers. English-Only policies have not reduced the anxiety that produced them but only increased the distance between communities based on their respective languages. Insistence

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23. JAMES CRAWFORD, HOLD YOUR TONGUE: BILINGUALISM AND THE POLITICS OF 'ENGLISH ONLY' 151 (1992) [hereinafter HOLD YOUR TONGUE] (emphasis added) (quoting Memorandum from John Tanton to WITAN IV Attendees (Oct. 10, 1986)).

24. James Crawford, *Frequently Asked Questions About Official English*, LANGUAGE & EDUC. POL'Y, http://www.elladvocates.org/documents/englishonly/OfficialEnglishFAQ.pdf (last visited Dec. 2, 2010) (quoting Telephone survey by Gary C. Lawrence Co. of Santa Ana, CA).

25. JAMES CRAWFORD, *Editor's Introduction*, *in* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 1, 5 (1992) [hereinafter LANGUAGE LOYALTIES].

26. *Statement of Purpose & Core Beliefs*, ENGLISH PLUS MOVEMENT, http://www.massenglishplus.org/mep/engplus.html (last visited Dec. 1, 2012) [hereinafter ENGLISH PLUS].

27. *Id.* (emphasis added).

on the right of immigrants to speak in their native tongue has also exacerbated tensions, without resolving the underlying cause of those tensions. The English Plus approach addresses vulnerabilities on both sides of the equation by providing a long-term yet realistic remedy to the legitimate concerns of both factions.

I. WHAT'S WRONG WITH ENGLISH-ONLY?

A. English-Only at Work

Social science research indicates that intergroup exposure and contact at work is the single most important factor in reducing group-based stereotypes in the workplace.[28] Cynthia Estlund's *Working Together* demonstrates that the modern workplace is the "most promising arena" for diverse individuals to meet and develop meaningful relationships.[29] Although the "typical American workplace is [not] genuinely integrated, [] even the partial demographic integration in the workplace "yields far more *social* integration – actual interracial interaction and friendship – than any other domain of American society."[30] Gordon Allport's 1964 "contact hypothesis" identified four key conditions that determined whether increased contact with a group led to an improved attitude towards that group and subsequent research validated his findings.[31] The four conditions required to reduce intergroup bias via contact were: (1) equal status between the groups; (2) common goals; (3) interdependence of the groups; and (4) positive support from authorities, laws or custom.[32] While the bulk of social science research in this area focuses on breaking down race and gender barriers at work, this theory is also applicable to ethnicity barriers and educational settings. However, language diversity may severely impede the development of Allport's key conditions.

Even with increased tolerance for linguistic diversity, there is no doubt that language differences complicate social dynamics and cooperation in the workplace and at school. Communication, nearly impossible without a common language, is essential for "cooperation, sociability, and sharing of work-related concerns . . . . Where language differences make conversation difficult or impossible, one of the major engines of social connectedness is stalled."[33] Under the current system, employers do not have many options to encourage communicative cooperation. They can (1) encourage English-language acquisition by non-English speakers, an admirable but prohibitively expensive approach for most employers; or (2) implement an English-Only rule, an approach that may only function if most employees speak at least some

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28. *See generally* CYNTHIA ESTLUND, WORKING TOGETHER (2003); Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination,* 95 VA. L. REV. 1983, 1953 (2009).

29. ESTLUND, *supra* note 28, at 9.

30. *Id.*

31. Bartlett, *supra* note 28, at 1953-55 (citing GORDON ALLPORT, THE NATURE OF PREJUDICE 281 (1954)).

32. *Id.* at 1953.

33. ESTLUND, *supra* note 28, at 97.

English.[34]

Employers have begun to turn to English-Only policies of varying degrees in order to achieve assorted goals. In *Garcia v. Gloor*, an early case from the United States Court of Appeals for the Fifth Circuit, the court upheld the employer's English-Only rule, as applied to a bilingual employee, concluding that it did not amount to national origin discrimination under Title VII of the Civil Rights Act of 1964.[35] The plaintiff, Mr. Garcia, was a bilingual, Mexican-American salesman at Gloor Lumber and Supply, a company that prohibited bilingual employees from speaking Spanish on the job unless they were talking to Spanish-speaking customers; the rule did not apply during breaks.[36] While at work, Mr. Garcia was asked by a fellow bilingual, Mexican-American co-worker whether an item requested by a customer was available.[37] Mr. Garcia responded in Spanish and was subsequently fired for violating the English-Only rule.[38] The court reasoned that Title VII's prohibition on national origin discrimination did not extend to language because language, unlike sex, race, or national origin, was a mutable characteristic.[39] While the court conceded that "language may be used as a covert basis for national origin discrimination," the English-Only rule in this case was not discriminatory because Mr. Garcia was bilingual and his observance or nonobservance of the rule was a "matter of individual preference."[40] Therefore the court held that the English-Only rule had no disparate impact.[41]

One of the most significant problems with this ruling was the narrow interpretation of national origin. By limiting national origin claims to those explicitly involving ancestry, the court effectively rendered the statute useless in combating discrimination against people considered "foreign." Indeed, most national origin discrimination does not stem from someone being born outside the United States, but from "the attributed 'foreignness' of one's characteristics such as non-English or non-mainstream language, accent, appearance, name or culture . . . ."[42] Recognizing the problems with the court's narrow interpretation of national origin, the Equal Employment Opportunity Commission (EEOC) issued new guidelines clarifying that Title VII prohibits language discrimination as a form of national origin discrimination.[43]

Today, the EEOC presumes that English-Only rules that apply at all times

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34. Rodriguez, *supra* note 5, at 1707.

35. Garcia v. Gloor, 618 F.2d 264, 272 (5th Cir. 1980).

36. *Id.* at 266.

37. *Id.* at 266-67.

38. *Id.* at 270.

39. *Id.* at 269. *See also* Dwight Davis, Note, Garcia v. Gloor*: Mutable Characteristics Rationale Extended to National Origin Discrimination*, 32 MERCER L. REV., 1279 (1981) (stating the application of the mutable-immutable characteristics rationale in *Garcia v. Gloor* was a significant expansion of the doctrine).

40. *Garcia*, 618 F.2d at 268, 270.

41. *Id.*

42. Juan F. Perea, *The New American Spanish War: How the Courts and the Legislatures Are Aiding the Suppression of Languages Other Than English*, *in* LANGUAGE IDEOLOGIES: CRITICAL PERSPECTIVES ON THE OFFICIAL ENGLISH MOVEMENT 121, 126-27 (Roseann Dueñas González & Ildikó Melis eds., 2000).

43. *See id.* at 129 ("[I]ssu[ing] detailed guidelines making clear that language discrimination is prohibited under Title VII and that in many cases English Only rules will violate the statute.").

violate Title VII, and the EEOC has recognized that such rules may "create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory work environment."[44] However, limited English-Only rules—those that apply only at certain times or under certain circumstances—may be lawful if the employer can show that they are justified by business necessity.[45] In turn, employers have developed three general types of business necessity justifications.[46]

The first justification focuses on workplace harmony, particularly among co-workers; the second posits that English-Only rules are linked to customer satisfaction; and the third revolves around issues of workplace management, primarily focusing on safety and efficiency concerns.[47] Employers have claimed that English-Only rules promote workplace harmony by putting all minorities on equal footing, despite placing a heavier burden on linguistic minorities.[48] English-Only rules may also help prevent race-based and sexual harassment by preventing employees from using a non-English language to intimidate fellow workers.[49] Further, employers have argued that linguistic diversity exacerbates inter-ethnic tensions.[50] These tensions may intensify due to the increased competition, perceived or actual, that immigrants have created for English-dominant minorities, such as African-Americans.[51]

Employers may claim that English monolingual customers and employees are intimidated and uncomfortable when confronted with a language that they cannot understand, and often suspect that they are being disparaged in a tongue they do not share.[52] Though customer preference is not an acceptable justification with respect to race or sex, employers may still invoke this defense in English-

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44. *Id.*

45. 29 C.F.R. § 1606.7 (1990). The EEOC guidelines state that English-only rules must be justified by "business necessity." *Id.* Courts are divided on the application of Title VII to English-only rules and the validity of the EEOC guidelines. *Compare* EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1073 (N.D. Tex. 2000) (noting that English-only rules "disproportionately burden national origin minorities because they preclude many members of these groups from speaking the language in which they are best able to communicate"), *and* EEOC v. Synchro-Start Prods., Inc., 29 F. Supp. 2d 911, 914 (N.D. Ill. 1999) ("[T]his Court is persuaded . . . that such English-only rules may 'create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.'"), *with* Garcia v. Spun Steak Co., 998 F.2d 1480, 1487, 1489 (9th Cir. 1993) (finding that the EEOC's guidelines on English-only rules could not be applied to truly bilingual employees because such individuals do not suffer any adverse impact from these rules and holding that the guidelines impermissibly presume that English-only policies have a disparate impact without requiring proof of such), *and* Long v. First Union Corp., 894 F. Supp. 933, 940 (E.D. Va. 1995), *aff'd per curiam*, No. 95-1986, 1996 WL 281954 (4th Cir. May 29, 1996) (affirming the district court decision without addressing the EEOC guidelines).

46. Rodriguez, *supra* note 5, at 1760, 1761 n.290.

47. *Id.* at 1761.

48. *Id.* at 1717–19.

49. *Id.* at 1717–18.

50. *Id.*

51. *Id.*

52. *See, e.g.*, Maldonado v. City of Altus, 433 F.3d 1294, 1300 (10th Cir. 2006); Garcia v. Spun Steak Co., 998 F.2d 1480, 1483 (9th Cir. 1993) (noting employer implemented an English-only rule in response to complaints from English monolingual employees that bilingual employees were harassing and insulting them in Spanish).

Only cases because "[m]ost courts regard this concern for employee morale in the face of cognitive dissonance as a legitimate and enforceable norm" with regard to national origin claims.[53] As in cases of race and sex-based discrimination, these concerns may benefit the employer's profit margin by catering to certain employees and segments of society, but they do so by perpetuating public anxieties.[54] Customer preference concerns have also been framed as an argument for "civility," by labeling as offensive the act of speaking a foreign language around individuals who do not understand the language.[55] It is interesting to note the asymmetry in language expectations. The fact that courts have not recognized an inverse civility claim – "that it would be offensive to a non-English speaker to be surrounded by people speaking English" – is one of many reflections signaling the social dominance of English and the sense of entitlement that stems from this dominance.[56]

The EEOC has indicated that English-Only rules citing blanket safety concerns are improper.[57] Employers must specify what the safety concern is and demonstrate that the English-Only rule is appropriately tailored to meet this specific concern.[58] Consequently, a safety justification should succeed in work settings where potentially dangerous substances or equipment are present and "effective communication" is crucial to avoid accidents and injuries.[59] The efficiency justification is essentially a claim that employers should be able to decide how they want to run their businesses, including how to optimize their employees' performance.[60] Like safety justifications, the efficiency rationale is a strong argument when job function actually requires speaking English.[61] The issue then becomes defining "requires." Efficiency concerns are directly related to the employer's goal of profit maximization, and usually claim either that a monolingual workplace is necessary to run the business effectively, or that a common language is required for supervisors to be able to effectively monitor employee performance.[62] While safety and efficiency concerns present the most compelling and practical justification for English-Only rules, neither considers a

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53. Rodriguez, *supra* note 5, at 1767; *see also* ROBERT C. POST, PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 1, 36-39 (2001) (noting that under Title VII, courts have permitted employers to enforce gender norms regarding grooming and dress despite the fact that such norms may perpetuate gender stereotypes).

54. Rodriguez, *supra* note 5, at 1766.

55. *Id.*; *see* Kania v. Archdiocese of Phila., 14 F. Supp. 2d 730, 731, 736 (E.D. Pa. 1998) (noting that the plaintiff instituted an English-only rule because "it is offensive and derisive to speak a language which others do not understand").

56. Rodriguez, *supra* note 5, at 1713.

57. *Cf.* EEOC Dec. No. 83-7, 2 Lab. L. Rep. (CCH) ¶ 6836 (Apr. 20, 1983) (holding that a narrowly drawn rule requiring employees to speak English during emergencies and while in areas or performing job duties where there is high risk of injury is not unlawful).

58. *Id.*; *see* Rodriguez, *supra* note 4, at 1763 ("[A] specific safety concern cannot be addressed by a general prohibition on the speaking of non-English.").

59. *See* EEOC Dec. No. 83-7, 2 Lab. L. Rep. (CCH) ¶ 6836 (Apr. 20, 1983) (holding as lawful a rule that "is narrowly drawn to accomplish the specific purpose of assuring effective communication among its employees during specified times and in specified areas").

60. Rodriguez, *supra* note 5, at 1763.

61. *Id.*

62. *Id.*

"generalized interest in regulating the interpersonal dynamics of the workplace."[63]

B. Parallel Consequences of English-Only Schools and Workplaces

Reforming bilingual education policy is a reasonable starting point to change social norms that will have long term benefits on individual American businesses, the economy, and individual liberties. The workplace does not have the same goals or obligations as the public education system, and no one can refute that some level of communication is essential in the workplace. Nonetheless, the three primary social consequences of English-Only rules in the workplace are equally applicable to education settings where linguistic diversity is not tolerated. First, workplaces with English-Only rules and linguistically intolerant schools isolate themselves from their communities, creating a tension between themselves and the community or exacerbating an existing rift.[64] According to language and immigration law scholar Cristina Rodriguez, English-Only rules reflect "the desire by certain parties – employers, employees, and segments of the public – to control the social dynamics of the workplace."[65] Employers often justify English-Only rules by claiming they promote workplace harmony and serve customer preferences, but "in expressing these interests, [the employer] is also articulating what he has determined is best for the bottom line of his business, [and] the bottom line is inextricable from social assumptions about the propriety and desirability of non-English in public spaces."[66]

English-Only rules also interfere with individuals' associative interests by obstructing the development of social relationships among co-workers and fellow students.[67] The workplace and the school are far more than commercial and educational settings; they are social institutions where individuals spend the vast majority of their waking hours.[68] They are the places where important relationships are developed with both peers and authority figures, and the relationships formed within their walls extend well beyond them.[69] Though the consequences of English-Only rules at work are primarily social, they nonetheless should be of concern to employers, as social dynamics affect workplace harmony, efficiency, and ultimately, employers' bottom line. Likewise, the social consequences of English-Only schools affect the interpersonal dynamics of students within and beyond the classroom.

Finally, English-Only rules relegate non-English languages to private, familial spaces. Not only does this relegation send a strong message devaluing language diversity, it also threatens the sustainability of minority languages and

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63. *Id.*; *see, e.g.*, Garcia v. Spun Steak Co., 998 F.2d 1480, 1489 (9th Cir. 1993) ("The dynamics of an individual workplace are enormously complex; we cannot conclude, as a matter of law, that the introduction of an English-only policy, in every workplace, will always have the same effect.").

64. *See* Rodriguez, *supra* note 5, at 1692 (stating that a rift is created when an important public space is detached from the identity of the community in which it is situated).

65. *Id.* at 1691.

66. *Id.* at 1693.

67. *Id.* at 1692.

68. *Id.* at 1693.

69. *Id.*

facilitates language loss.[70] Language loss is particularly concerning given that the shortage of "language-competent" citizens required to meet domestic and international needs has been recognized for decades.[71] Language planning and socio-linguistic scholars have endorsed multilingualism as a valuable resource for all individuals and society.[72] Notably, some scholars have recognized that "efforts to address national economy needs for a bilingual work force are cost- and time-inefficient when they concentrate on developing second language competence in monolingual English speakers, while the enormous language resources of the growing ethnic non-English populations in the country are wasted."[73]

C. Language Loss

Despite varying levels of income and education, immigrants are acquiring English and losing their heritage languages quickly. "Language loss" is a term describing the typical life of an immigrant language in the United States.[74] Language loss is characterized by a consistent inter-generational pattern that occurs across language groups, and it has been verified by numerous research studies.[75] The phenomenon begins with the adult immigrant coming to the United States and learning enough English to get by in daily life while continuing to use his or her native tongue – the so-called "heritage language"– at home.[76] The adult immigrant raises his or her kids to speak the heritage language.[77] However, once the kids start school and learn English, it becomes their preferred language with siblings and friends, and "[b]y the time they graduate from elementary school, these same children are better speakers of English than they are of the home language and prefer using English in nearly

70. *Id.* at 1692.

71. G. Richard Tucker, *Second-Language Education: Issues and Perspectives*, *in* FOREIGN LANGUAGE EDUCATION: ISSUES AND STRATEGIES 13, 13 (Amado M. Padilla et al. eds., 1990); *see* Betty Bullard, *Personal Statement to the President's Commission on Foreign Language and International Studies*, *in* PRESIDENT'S COMMISSION ON FOREIGN LANGUAGES AND INTERNATIONAL STUDIES: BACKGROUND PAPERS AND STUDIES 1,1 (1979) (stating that the United States has a mandate to improve competency "in the use and comprehension of foreign languages"); National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform*, 84 ELEMENTARY SCH. J. 12,112, 117 (1983) (stating that the need for improved teaching in foreign languages is larger than the need for improvement in math and science).

72. Tucker, *supra* note 71, at 13-21.

73. Lourdes Ortega, *Language and Equality: Ideological and Structural Constraints in Foreign Language Education in the U.S.*, *in* SOCIOPOLITICAL PERSPECTIVES ON LANGUAGE POLICY AND PLANNING IN THE USA 243, 247 (Thom Huebner & Kathryn A. Davis eds., 1999) (citing JOSHUA A. FISHMAN, LANGUAGE LOYALTY IN THE UNITED STATES (1966); Richard D. Lambert, *The Improvement of Foreign Language Competency in the United States*, 490 ANNALS AM. ACAD. POL. & SOC. SCI. 9 (1987); G. Richard Tucker, *Toward the Development of a Language-competent American Society*, 45 INT'L. J. SOC. LANGUAGE 153 (1984); Tucker, *supra* note 71.

74. LUCY TSE, "WHY DON'T THEY LEARN ENGLISH?": SEPARATING FACT FROM FALLACY IN THE U.S. LANGUAGE DEBATE 30–31 (2001).

75. *Id.*

76. *Id.* at 30.

77. *Id.*

every realm."[78] The original adult immigrant's grandchildren usually grow up in a home where only English is spoken.[79] Subsequently, these grandchildren typically have little, if any, familiarity with the heritage language.[80]

Language loss poses a number of problems for immigrant communities. First, a communicative gap emerges between generations of the community, which can lead to estrangement between parents and children, and children and their heritage language community.[81] Those who lack heritage language skills may be considered outsiders because they lack one of the most obvious markers of group membership.[82] An interfamilial lack of communication can cause frustration, miscommunication, and inability to convey basic messages, "undermining the parent-child relationship" and limiting the guidance and support parents can provide and children can receive.[83]

In addition, it can be very difficult to regain a heritage language once it is lost, especially for less common dialects and languages.[84] Public schools often do not offer programs within their foreign language departments that are designed to meet the needs of native speakers.[85] Some teachers may incorrectly presume that heritage language speakers have high levels of proficiency, when in fact their proficiency may be generally limited or primarily oral.[86] Non-heritage speaking peers may also resent native speakers who excel in oral activities, further disincentivizing language maintenance.[87]

The causes of language loss are numerous and intertwined. Strong command of the English language is required for full participation in political, economic, social, and pop culture sectors; and English proficiency is a status symbol in immigrant communities.[88] Particularly among younger generations, perfect English is seen as key to being accepted by mainstream society.[89] In fact, today's immigrants are acquiring English faster than ever before. Census data shows that among foreign-born residents, almost 75% of those 5 years of age and older reported that they spoke English "well" or "very well."[90] English proficiency is advancing particularly fast among children of immigrants and child and teenage immigrants. A study by Alejandro Portes and Lingxin Hao surveyed over 5,000 eighth and ninth graders in two of the country's largest immigrant communities: Miami-Ft. Lauderdale and San Diego.[91] The survey respondents were primarily U.S. born, but varied in national origin, and

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78. *Id.* at 30–31.
79. *Id.* at 31.
80. *Id.*
81. *Id.* at 52.
82. *Id.* at 53.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 32–33.
89. *Id.*
90. *Id.* at 14.
91. Alejandro Portes & Lingxin Hao, *E Pluribus Unum: Bilingualism and Loss of Language in the Second Generation*, 71 SOC. EDUC. 269, 272 (1998).

attended both inner city and suburban schools.[92] The study found that students of all immigrant groups had high overall levels of self-reported English proficiency, regardless of educational background or social class. The vast majority (93.6%) said that they spoke English "well" or "very well" and almost 75% of the students said they preferred to speak English over their native tongue.[93] Research by Xue Lue Rong found that

> [o]f the more than 2.2 million foreign-born children age 5 to 18, 86.8% reported speaking English 'well' or 'very well.' This is made even more remarkable by the fact that more than *half* of these children had been in the United States for less than 5 years, and one third for less than 3 years.[94]

Unfortunately, the pull of English is so powerful in immigrant communities that the heritage language is often neglected, and many immigrant parents mistakenly believe that speaking the heritage language at home will hinder their children's English acquisition and academic success.[95] Foreign-born U.S. residents facing language barriers on a daily basis know better than anyone the importance of English proficiency in America. They may push their children to learn English to protect them from the discrimination that they have faced for their imperfect, or non-existent, English.[96] Subsequently, both they and their children come to view English fluency as a badge of prestige, a membership card for entry into the mainstream. According to surveys by the Pew Hispanic Center, a clear majority of Latinos agree that immigrants "have to speak English to be part of American society."[97] Meanwhile, 92% of Latinos say it is "very important" for immigrant children to be taught English – a higher percentage than non-Hispanic whites (87%) or blacks (83%).[98] This narrow focus on English acquisition often causes immigrant parents to overlook the cost to their children of losing their heritage language.

Beyond the family unit, the heritage language community can encourage or discourage the development of language in its children. Adolescents are particularly prone to peer influence, and "the presence or absence of such heritage language groups determines to a large extent whether the language is seen as an asset or a liability."[99] This finding indicates that language acquisition, or lack thereof, is strongly influenced by peer language choices. However, given the strong pull of English and the language loss phenomena described above, heritage languages are more likely to be seen as a liability.

Perhaps one of the most significant causes of language loss is the limited opportunities to maintain and develop one's heritage language. In some locales,

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92. *Id.*

93. *Id.* at 274.

94. TSE, *supra* note 74, at 18.

95. *Id.* at 37.

96. *Id.* at 37–38.

97. *2006 Fact Sheet: Hispanic Attitudes Toward Learning English*, PEW HISPANIC CTR., June 7, 2006, http://pewhispanic.org/files/factsheets/20.pdf (last visited Sept. 13, 2012).

98. *Id.*

99. TSE, *supra* note 74, at 39.

community language schools exist.[100] These programs, which usually take the form of an after-school program or Saturday school, attempt to teach students some basic heritage language skills, but they are usually understaffed and have limited resources.[101] Additionally, some schools offer foreign language courses for the "native-speaker."[102] These are separate classes for heritage speakers that focus on their unique educational needs, which are usually grammar and literacy, since their oral and comprehension skills have developed at home.[103] The needs of native speakers differ significantly from traditional language learners, who have no background ability to speak the language.[104] These programs are not found in all areas and can vary in quality.[105] A third opportunity to learn one's heritage language is a "maintenance" bilingual education program "designed to help students become fluent and literate in two languages by maintaining and developing the native language while students learn English."[106] Contrary to popular belief, most bilingual programs do not follow this model, and aim to replace the native language rather than preserve it. In fact, maintenance bilingual education programs make up only a small percentage of bilingual education programs in the United States.[107]

D. Why Promote Bilingualism?

For the first half of the twentieth-century, linguists and psychologists believed that bilingualism and cognitive development were incompatible.[108] This conclusion was strongly influenced by the eugenics movement, which "considered the retention of a foreign language and the lack of fluency in English a further sign of the intellectual inferiority of immigrants[.]"[109] Members of the "nurture school" agreed, considering bilingualism a cause of immigrant children's alleged mental retardation, and framing bilingualism as a handicap "devoid of any apparent advantage."[110] In 1962, a landmark study by Peal and Lambert, which examined the cognitive correlates of bilingualism in French-Canadian children, addressed these misconceptions.[111] In striking contrast to earlier research, the study found that "bilingual students outperformed monolingual students of the same [socioeconomic status] in almost all cognitive tests."[112] The positive association of bilingualism and intellectual development

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100. *See id.* at 35 ("In some communities, secular or parochial private community schools exist to teach the language. Generally, these private community schools are supported by parents who want their children to learn the heritage language and to gain some familiarity with the heritage culture.").

101. *Id.* at 35–36.

102. *Id.* at 36.

103. *Id.*

104. *Id.* at 36–37.

105. *See id.* at 37 ("[S]uch courses are far from being systematically implemented throughout secondary and higher education institutions.").

106. *Id.* at 36.

107. *Id.*

108. Portes & Hao, *supra* note 91, at 270.

109. *Id.*

110. *Id.*

111. *Id.* at 271.

112. *Id.*

has since been confirmed by various large sample sociological studies.[113]

Bilingualism provides enormous benefits on both an individual and societal level. Indeed, a study by M. Tienda and L. Neidert found no basis for assuming that bilingual education programs, which encourage the retention of Spanish among Hispanics, retard their socioeconomic success, "provided that a reasonable level of proficiency in English is acquired."[114] As discussed in Section I(C), immigrant children learn English faster if they can take advantage of their heritage language skills while they are tackling the new language.[115] Maintaining and building heritage language skills not only accelerates the rate of English acquisition, but also makes it possible for English language learners to continue learning other academic subjects in their native tongue while still improving English. Bilingual individuals not only have dual linguistic and literary skills but also possess additional cognitive skills and awareness about language.[116]

Academically, studies have shown that bilingual Latino students have "high[er] educational attainment and expectations."[117] Researchers suggest the reason for this bilingual advantage is that bilingual students "have more than one way of thinking about a given concept, making them more 'divergent' thinkers and more effective problem solvers."[118] Bilingual individuals also have access to multiple sources of information, which increases their social capital – their connections between networks – and their funds of knowledge, "the[] historically accumulated and culturally developed bodies of knowledge and skills essential for household or individual functioning and well-being."[119] Bilingualism also minimizes the generational gap within families and heritage language communities that is often exacerbated by language loss.

These advantages translate into economic benefits, as bilingualism opens doors to more career options and higher paying jobs. "Latinos in Florida, for example, who speak English very well and who also speak Spanish have annual median incomes about 20% higher than Latinos who speak only English."[120] In Spanish-rich communities, such as Miami-Dade County, the pay difference was 50% more than monolingual employees.[121]

Bilingual individuals may serve society most prominently as "language brokers," individuals who interpret and translate on behalf of others. Numerous studies have shown that immigrant children frequently act as language brokers, a task that requires and develops sophisticated linguistic, cultural, and cognitive

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113. *Id.*

114. Marta Tienda & Lisa J. Neidert, *Language Education, and the Socioeconomic Achievement of Hispanic Origin Men*, 65 SOC. SCI. Q. 519, 533 (1984).

115. TSE, *supra* note 74, at 44.

116. BILL PIATT, ¿ONLY ENGLISH?: LAW AND LANGUAGE POLICY IN THE UNITED STATES 50 (1990).

117. TSE, *supra* note 74, at 48.

118. *Id.*

119. Luis C. Moll et al., *Funds of Knowledge for Teaching: Using a Qualitative Approach to Connect Homes and Classrooms*, 31 THEORY INTO PRAC. 132, 133 (1992) (internal citation omitted).

120. TSE, *supra* note 74, at 48.

121. *Id.*

skills.[122] While this term usually references the translation that bilingual children conduct for their parents or other monolingual adult family members, language brokering skills are applicable to employment settings as well. Individuals who possess linguistic and cultural skills can play pivotal roles in domestic and international business, but businesses have a very difficult time finding individuals who are truly bilingual and bi-literate. A 1998 article in *Hispanic Business* highlighted this problem, citing the experiences of various large businesses in Miami, a city where about 75% of residents are Latino, 30% of all trade with South America takes place, and 43% of trade with Central America takes place.[123] These demographics create a need for bilingual employees that the market does not currently fulfill. For example, Visa International's Latin American headquarters in Miami said they were unable to find bilingual employees who could give business presentations without grammatical errors.[124] Managers of another $20 million company said they had to check correspondence drafted by "bilingual" sales associates due to past inaccuracies.[125]

The need for bilingual speakers is especially acute in fields such as diplomacy and national security. The government has invested substantially in building a multilingual international corps since 1946, when it opened the Defense Language Institute, the largest-foreign language school in the country.[126] The institute was created specifically to develop multilingualism among government personnel.[127] Despite these efforts, key government agencies, such as the CIA, report difficulty in meeting its needs for critical language skills, even with commonly spoken languages like Spanish.[128]

II. FEDERAL INVOLVEMENT IN THE RISE AND FALL OF BILINGUAL EDUCATION

A. Judicial and Legislative Background

The right to education has been conferred a unique status by the Supreme

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122. *See, e.g.*, Marguerite Malakoff & Kenji Hakuta, *Translation Skill and Metalinguistic Awareness in Bilinguals*, *in* LANGUAGE PROCESSING IN BILINGUAL CHILDREN 141, 141–66 (Ellen Bialystok ed., 1991) (studying the efficiency and quality of translations by Spanish-English bilingual children); Jeff McQuillan & Lucy Tse, *Child Language Brokering in Linguistic Minority Communities: Effects on Cultural Interaction, Cognition, and Literacy*, 9 LANGUAGE & EDUC. 195, 196–212 (1995) (noting an interview study of bilingual adults reporting on past language brokering experiences); Lucy Tse, *Language Brokering Among Latino Adolescents: Prevalence, Attitudes, and School Performance*, 17 HISPANIC J. BEHAV. SCIS. 180, 180–93 (1995) (surveying Spanish-speaking students on language brokering issues); Lucy Tse, *Language Brokering in Linguistic Minority Communities: The Case of Chinese- and Vietnamese-American Students*, 20 BILINGUAL RES. J. 485, 485–98 (1996) (surveying Vietnamese and Chinese speaking students on a variety of broker-related issues).

123. Derek Reveron, *'Spanglish' Won't Cut It*, HISPANIC BUSINESS, Nov. 1998, 14–15 (1998).

124. *Id.* at 14.

125. *Id.*

126. TSE, *supra* note 74, at 50.

127. *Id.* General information about the Defense Language Institute can be found at Defense Language Institute Website, http://www.dliflc.edu/index.html (last visited Sept. 6, 2012).

128. JIM CUMMINS, NEGOTIATING IDENTITIES: EDUCATION FOR EMPOWERMENT IN A DIVERSE SOCIETY 221 (1996).

Court. In *San Antonio Independent School District v. Rodriguez*,[129] the Supreme Court found that education was not a fundamental right.[130] Nine years later, in *Plyer v. Doe*,[131] the Court held that, despite the fact that public education is not a right granted to individuals by the Constitution, a denial of education is subject to elevated scrutiny and can only be justified by showing it furthers a substantial state interest.[132] Consequently, state legislatures have been awarded great deference in determining education policy.[133] However, this deference has not prevented the federal government from regulating education via the taxing and spending clause.[134]

Title VI of the Civil Rights Act of 1964 (Title VI) prohibits discrimination based on race, color, or national origin by government agencies receiving federal funding, including school districts. [135] When the Bilingual Education Act (BEA) was added to the Elementary and Secondary School Act (ESEA) in 1968, it was the first federal recognition of the educational needs of minority language students.[136] The BEA was part of President Johnson's Great Society initiative and "represented part of a federal effort to address a variety of social issues including language diversity among students in U.S. schools (as well as broader issues of poverty and discrimination)."[137] Title VII of the ESEA most directly addressed the education of students with limited English proficiency (LEP) and, under the Act, federal funding became available for programs that maintained and developed languages other than English.[138] This funding included research grants to promote investigation and experimentation regarding how to meet the needs of children with limited or no English language proficiency.[139] In addition

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129. 411 U.S. 1 (1973).

130. *Id.* at 18.

131. 457 U.S. 202 (1982).

132. *See id.* at 230.

133. Ryan, *supra* note 11, at 489 ("Since education has never been recognized as a constitutional right, great deference is given to a state legislature's determinations of educational policy.").

134. *See* South Dakota v. Dole, 483 U.S. 203, 206-08 (1987) (holding that in addition to the power to use taxes to punish disfavored conduct, Congress can also use its power to spend to encourage favored conduct; noting Congress may attach unambiguous broad conditions to the receipt of federal funds, including funds for education).

135. 42 U.S.C. § 2000 (1964).

136. 20 U.S.C. § 7401 (2000) (recognizing that in addition to improving the academic outcomes of ELLs, using a student's native language for instruction promotes his self-esteem and develops the language resources of the country).

137. Donna Christian, *Looking at Federal Education Legislation From a Language Policy/Planning Perspective*, *in* SOCIOPOLITICAL PERSPECTIVES ON LANGUAGE POLICY AND PLANNING IN THE USA 117, 121 (Thom Huebner & Kathryn A. Davis eds., 1999).

138. Jamie B. Draper & Martha Jim'nez, *A Chronology of the Official English Movement*, *in* OFFICIAL ENGLISH? NO!: TESOL'S RECOMMENDATIONS FOR COUNTERING THE OFFICIAL ENGLISH MOVEMENT IN THE U.S. 1, 1 (1996), *available at* https://docs.google.com/viewer?a=v&q=cache:LBX2aquBeG0J:www.smkb.ac.il/privweb/Teachers/Chaim_Tir/nurit/OFFICIAL%2520ENGLIS1.doc+&hl=en&gl=us&pid=bl&srcid=ADGEESgWcuotl8CUveVDeUrXAZh061j55wPtjMJIb3ZJygHD_93JVkrjQ0JAPXLn_yak0Htjgka6SPTPrfOwFvnbhxYKkB50_3dQ1cDydYDq5vSSlpD4gab9qT746iS3_pQ_4qfVejet&sig=AHIEtbRaAqX0XJZbz3iNvLqIlqqzqFCp1w.

139. PIATT, *supra* note 116, at 32. For discussion of funding and grants, *see* Garland Cannon, *Bilingual Problems and Developments in the United States*, 86 PUBL'N MOD. LANG. ASS'N 452, 453 (1971); Rachel F. Moran, *Bilingual Education, Immigration, and the Culture of Divestment*, 2 J. GENDER RACE &

to improving the academic outcomes of English language learners, the Act also recognized that using students' native language in instruction promotes their self-esteem and develops the language resources of the country.[140]

In 1970, the Department of Health Education and Welfare (HEW) enacted legislation pursuant to Title VI of the Civil Rights Act of 1964 declaring that programs and activities receiving federal funding could not discriminate based on race, color, or national origin.[141] With regard to education, HEW further announced that,

> where inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.[142]

B. Lau v. Nichols

A few short years after the BEA was passed, the Supreme Court decided *Lau v. Nichols*,[143] a case in which Chinese-speaking plaintiffs alleged that the San Francisco public schools denied them a public education by only offering classes in English.[144] The Court held that the students were denied their civil rights, in violation of Title VI's ban on educational discrimination on the basis of national origin, because the lack of linguistically appropriate accommodations effectively denied the Chinese students equal educational opportunities on the basis of their ethnicity.[145] This decision expanded the rights of limited English proficient students across the country. *Lau* reflects the now widely accepted view, including the view of the EEOC,[146] that a person's language is so closely intertwined with their national origin that language-based discrimination is effectively a proxy for national origin discrimination.

In the wake of *Lau* there was significant legislative momentum in favor of bilingual education. In direct response to *Lau*, Congress passed the Equal Educational Opportunities Act of 1974 (EEOA), requiring school districts to take "appropriate action" to overcome language barriers that may impede student progress.[147] However, Congress did not define "appropriate action," leaving room for state legislatures and lower courts to deal with bilingual education

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JUST. 163, 166-67 (1999).

140. 20 U.S.C. § 7402(a)(14)(A)-(C) (2000); *see* Moran, *supra* note 138, at 166.

141. PIATT, *supra* note 116, at 43.

142. *Id.* Note, however, that according to Moran, the Office of Civil Rights "did not actively enforce the 1970 interpretation, [but] the memorandum made clear that civil rights concerns were not limited exclusively to Blacks." Moran, *supra* note 139, at 166.

143. 414 U.S. 563 (1974).

144. *Id.* at 564.

145. *Id.* at 568-69.

146. *See, e.g.*, *Facts About National Origin Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/facts/fs-nator.html (last visited Nov. 18, 2012) (linking accent-discrimination, mandatory English fluency, and English-only rules with national origin discrimination).

147. 20 U.S.C. § 1703(f) (1974).

strategies independently. In 1979, the President's Commission on Foreign Language and International Studies released a report calling Americans' lack of foreign language ability "scandalous."[148] At the time, "not one state had foreign language requirements for high-school graduation, and many did not even require schools to offer foreign language instruction."[149] Further, the Office for Civil Rights was tasked with determining what services would remedy the type of discrimination that took place in *Lau*.[150] These guidelines, known as the "Lau Remedies," were developed and implemented from 1975 through 1981.[151] Early formulations of these guidelines were quite progressive. They called for "native language instruction for students in a school where twenty or more LEP students shared the same language."[152]

C. Bilingual Education Under Attack

In the mid-1970s bilingual education began to come under attack in lower courts and in Congress. Despite the fact that federal civil rights authorities were aggressively enforcing *Lau v. Nichols* and requiring schools to provide special assistance to LEP students, many school districts resented this federal mandate of "bilingual" instruction.[153] Later policies did not specify which approach to use, as long as the approach ensured that the students learned English and received comprehensible instruction.[154] In turn, one of the most controversial issues has centered on what type and what extent of bilingual education is most appropriate, and what is required under law. Since Congress did not define "appropriate action" in the EEOA, lower courts have disagreed over the existence of statutory and regulatory rights to bilingual education, and struggled with establishing school districts' affirmative obligations towards English language learners.[155]

In 1972, the United States District Court for the District of New Mexico held that a school district had discriminated against Spanish-surnamed students, in violation of Title VI, by providing an inadequate program for English language learners.[156] The Tenth Circuit boldly affirmed the district court's decision ordering the implementation of a bilingual/bicultural education program as a remedy.[157] However, the very next year, the same circuit refused to affirm implementation of this same remedy in *Keyes v. School District No. 1*.[158] In an

148. Draper & Jim'nez, *supra* note 138, at 1.

149. *Id.*

150. Moran, *supra* note 139, at 166.

151. *Id.*

152. Christian, *supra* note 137, at 121.

153. Draper & Jim'nez, *supra* note 138, at 1.

154. Christian, *supra* note 137, at 122.

155. *See, e.g.*, Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1042-43 (7th Cir. 1987); Castaneda v. Pickard, 648 F.2d 989, 1015 (5th Cir. 1981); Teresa v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 712-16 (N.D. Cal. 1989). Serna v. Portales Mun. Schs., 351 F. Supp. 1279, 1283 (D. N.M. 1972), *aff'd*, 499 F.2d 1147 (10th Cir. 1974).

156. *See Serna*, 351 F.Supp. at 1153-54.

157. Serna v. Portales Mun. Sch., 499 F.2d 1147, 1154 (10th Cir. 1974).

158. 521 F.2d 465, 480 (10th Cir. 1975).

opinion that indicated the weaning of its judicial activism, the court distinguished *Keys* from its previous ruling in *Serna v. Portales* because it involved a Fourteenth Amendment equal protection claim rather than a statutory claim.[159] Parents and children in various jurisdictions have sued their school systems in order to obtain results similar to *Serna*, but have met with varying degrees of success.[160]

Three years after *Keys*, in 1978, Congress amended the BEA to focus on the goal of English competence, which translated to restricting funding to transitional support programs only, and providing no funds for heritage language maintenance programs.[161] Further reflecting the decline in support for bilingual education, in 1981, the Fifth Circuit set out a three-part test in *Castaneda v. Pickard*[162] to determine whether school districts were taking "appropriate action" under the EEOA.[163] It has since become a widely accepted standard for evaluating whether a district's limited English proficiency program constitutes "appropriate action."[164]

According to the test, a school's program must first be evaluated with regard to the soundness of the educational theory or principles upon which the program is based.[165] The court will only ascertain "that a school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy," nothing more.[166] Then, the court will ask whether the endorsed educational theory or strategy is being implemented effectively.[167] Finally, the court will determine whether the program is producing results, by alleviating language barriers.[168] In addition to outlining this test, the court reaffirmed *Lau's* "essential holding," requiring schools to provide limited English-speaking students with language assistance to enable them to participate in the district's instructional program, but stated that there was nothing that required school districts to provide bilingual education.[169]

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159. *Id.* at 484-85.

160. *See, e.g.*, United States v. Texas, 680 F.2d 356, 374 (5th Cir. 1982) (deferring to school districts to determine appropriate educational programs); Guadalupe Org. v. Tempe Elementary Sch. Dist., 587 F.2d 1022, 1027 (9th Cir. 1978) (denying student's claim to compel the school district to implement bilingual-bicultural education for all non-English speaking Mexican-American and Yaqui-Indian students); Rios v. Read, 480 F. Supp. 14, 23 (E.D.N.Y. 1978) (ordering the school district to implement a new bilingual education program after finding its previous program was insufficient under Title VI and the EEOA).

161. *See* Christian, *supra* note 137, at 121, 124.

162. 648 F.2d 989 (5th Cir. 1981).

163. *Id.* at 1015 (finding the school district's approach to bilingual education did not violate Title VI of the Civil Rights Act and was an "appropriate action" for educating English language learners under the EEOA).

164. *See, e.g.*, Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030, 1041 (7th Cir. 1987); Flores v. Arizona, 172 F. Supp. 2d 1225, 1239 (D. Ariz. 2000); Teresa v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 713 (N.D. Cal. 1989).

165. *Castaneda*, 648 F.2d at 1009.

166. *Id.*

167. *Id.* at 1010.

168. *Id.*

169. *Id.* at 1008-09.

At the same time, lobbying groups, particularly U.S. English, began an aggressive "English-Only" campaign.[170] Consistent with the goals of the English-Only movement, every reauthorization of the BEA has included Title VII for the purpose of assisting limited English proficient students to learn English and succeed academically.[171] The title of this act is misleading, though, as its "intent remains to facilitate transition to the all-English curriculum" without regard to maintenance of the heritage language.[172]

Nonetheless, the 1980s witnessed a growth in the number of "maintenance" bilingual education programs, largely due to changes in federal policy and funding.[173] Pre-1980 there were only a few of these programs, but in the mid-1980s federal funds were allocated for a "research center that investigated the two-way model (the Center for Language Education and Research at UCLA) and also resumed funding for developmental bilingual education through the Office of Bilingual Education and Minority Languages Affairs that provided schools with funds to offer two-way programs."[174] The 1994 re-authorization of the ESEA, which includes the BEA, maintained funding for two-way bilingual immersion programs and encouraged programs that developed bilingualism in students.[175]

D. Bilingual Education Left Behind

Unlike the 1994 reauthorization, the most recent reauthorization of the ESEA, the No Child Left Behind Act of 2001 (NCLB), focuses on LEP students developing skills in English only.[176] The shift away from bilingual programs and towards English acquisition is reflected in the language of the law: the word bilingual has been all but banished.[177] "[T]he federal Office of Bilingual Education and Minority Affairs (OBEMLA) . . . now becomes the Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited-English-Proficient Students (OELALEAALEPS), not even a pronounceable acronym."[178]

Contrary to the majority of available research, NCLB imposes inappropriately strict timelines for English language learners to transition into English-Only classrooms. Researchers estimate that it generally takes between five to seven years for an English language learner to develop sufficient English skills necessary to successfully learn in an English-Only classroom.[179] ELLs must

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170. Christian, *supra* note 137, at 121.

171. *Id.*

172. *Id.*

173. *Id.* at 122.

174. *Id.*

175. *Id.*

176. James Crawford, *The Bilingual Education Act, 1968-2002: An Obituary*, *in* ADVOCATING FOR ENGLISH LEARNERS: SELECTED ESSAYS, 124, 124-25 (Nancy H. Hornberger & Colin Baker eds., 2008) [hereinafter *Obituary*].

177. *Id.*; *see, e.g.*, Christian, *supra* note 137, at 123-24.

178. *Obituary*, *supra* note 176, at 125.

179. Marilyn Farquharson, *Proposition 227: A Burning Issue for California's Bilingual Students*, 8 B.U. PUB. INT. L.J. 333, 353 (1999).

be tested in mathematics from day one and in reading/language arts after just 10 months.[180]

NCLB's testing requirements and delegation of authority severely threaten the future of bilingual education and run contrary to the intentions of Title VI, *Lau*, the EEOA, and *Castenada.* NCLB threatens many underserved schools by subjecting all students, including English language learners (ELLs), to high stakes testing that determines the school's future.[181] This is especially problematic given that NCLB has also drastically cut funding of bilingual education and essentially eliminated any evaluation and regulation of such programs.[182] Previously, grants were administered via a competitive process, in hopes of promoting innovation, excellence and quality control.[183] Now, they are distributed to states according to formulas that merely take into account the enrollment of English language learners and immigrant students.[184] Under NCLB, low-performing schools with greater numbers of underserved populations, such as ELLs, are receiving fewer resources, thus allowing ELLs to "fail" along with their schools.[185] Crawford explains that, practically speaking, "ELLs are *defined* by their low achievement" because when members of the subgroup are re-classified after becoming proficient in English, their improved scores are no longer counted in evaluating their school's progress.[186] Consequently, "[e]ven when individual students are making good progress, their progress is not fully credited under NCLB. . . . Thus it is not merely unrealistic – it is a mathematical impossibility – for 100% of the ELL subgroup to reach proficiency by 2014, as the law requires."[187] Thus, the practical effect of the legislation is contrary to Title VI's mandate that no one be denied access to a federally funded program based on their national origin, because it systematically funnels federal funds away from schools with a high proportion of underperforming minority and ELL students.

Perhaps one of the most problematic features of NCLB is that it gives state education agencies much more power over funding decisions, including decisions about which pedagogical methods to impose.[188] The result has been the passage of state legislation that severely undermines bilingual education

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180. James Crawford, *No Child Left Behind: Misguided Approach to School Accountability for English Language Learners*, *in* ADVOCATING FOR ENGLISH LEARNERS: SELECTED ESSAYS, 128, 130 (Nancy H. Hornberger & Colin Baker eds., 2008) [hereinafter *No Child Left Behind*].

181. James Crawford, *The Decline of Bilingual Education in the USA: How to Reverse a Troubling Trend?*, *in* ADVOCATING FOR ENGLISH LEARNERS: SELECTED ESSAYS, 144, 146 (Nancy H. Hornberger & Colin Baker eds., 2008); *No Child Left Behind, supra* note 179, at 128-29 .

182. *Obituary*, *supra* note 176, at 126 ("Title VII previously served only a small fraction of the estimated 4.4 million ELLs nationwide through competitive grants to school districts. Under the new law, renamed Title III, districts will automatically receive funding based on their enrollments of ELLS and immigrant students. Despite the overall increase in appropriations, Title III will now provide only $149 per eligible student. So the impact of federal dollars on individual programs will be reduced.").

183. *Id.* at 125.

184. *Id.*

185. *No Child Left Behind*, *supra* at note 180, at 133.

186. *Id.* at 131.

187. *Id.*

188. *Obituary*, *supra* note 176, at 125.

efforts, even in traditionally progressive states with significant immigrant populations.[189] So-called Unz Initiatives have passed in California, Arizona, Massachusetts and Colorado, with the legislative purpose of ending bilingual education.[190] Silicon Valley millionaire and former California gubernatorial candidate, Ron Unz spearheaded the campaigns in these states and has "transformed the issue of bilingual education from a pedagogical debate into a prominent legal and political issue."[191]

CONCLUSION: PRODUCTIVE ALTERNATIVES

A. Resuscitating Bilingual Education

Much confusion and misunderstanding exists regarding what bilingual education is and whether it works. Overall, research supports "'strong"' forms of bilingual education, "where a student's home language is cultivated by the school."[192] "'Weak' bilingual education programs, which focus on replacing a student's native tongue with English, have proven less effective."[193] Immigrant children learn English faster if they can take advantage of their heritage language skills while they are tackling the new language.[194] Maintaining and building heritage language skills not only accelerates the rate of English acquisition, but also makes it possible for English language learners to continue learning other academic subjects in their native tongue while still improving their English language skills.

Language learning research also indicates that people "appear to have an infinite capacity for language learning, but previous knowledge of one language can help the learner pick up a second language better and faster because it means not having to start from scratch."[195] Languages are interdependent, and full bilingualism is attainable at no expense to either language; academic skills, such as reading, transfer between languages, and bilingual education actually provides a faster transition into English.[196] The stronger a student's educational background in their native tongue, the stronger the foundation he or she will have to build upon during English acquisition. A child accustomed to being in a classroom will already have the tools they need to understand common school tasks, so they will be able to focus more on learning the language than adjusting to schooling.[197] Indeed, research by Stephen Krashen of the University of Southern California has highlighted that the critical difference between Asian

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189. Ryan, *supra* note 11, at 487 (analyzing Proposition 227 and its "offspring" in Arizona and arguing "this legislation is violative of federal statutes, politically unsound, culturally biased, and pedagogically inaccurate").

190. *See id.* at 487-88.

191. *Id.* at 488.

192. COLIN BAKER, FOUNDATIONS OF BILINGUAL EDUCATION AND BILINGUALISM 280 (Nancy H. Hornberger & Colin Baker eds., 5th ed. 2011).

193. *Id.*

194. *Id.* at 271-72.

195. *Id.*

196. *See* PIATT, *supra* note 116, at 49-50; *see also* Ortega, *supra* note 72, at 248.

197. PIATT, *supra* note 116, at 49-50.

and Latino immigrants, in terms of academic success, is not the cultural heritage of the students but the quality of the education they received in their home country.[198] It is unreasonable to expect poverty-stricken political or economic refugees with little prior access to education to perform or progress academically at the same level as immigrants from affluent, highly-educated family backgrounds.[199]

Despite the evidence supporting "strong" bilingual education programs, NCLB and Unz Initiatives continue to support variations on the "immersion" approach, which aim to teach English to LEP students as quickly as possible, without any regard for maintaining their native tongues.[200] On the other hand, immersion programs are essentially a sink or swim method in which LEP children spend a very short period in a "sheltered English" classroom, and are then promptly mainstreamed into English-Only classrooms with no support.[201] The underlying premise is that the linguistically unfriendly environment will cause the LEP students to either succeed or fail due to the urgency of the challenge.[202] Second-language acquisition research contradicts the premise of these programs and actually argues in favor of extending the time period in which students receive instruction in their native language.[203] Bilingual education provides a pedagogically sound alternative to "sink or swim" English-Only schools.

B. English Plus

Though sociolinguistic and language planning scholars have embraced the "language-as-resource" perspective, a philosophical schism remains in political and social spheres, and powerful groups continue to tout the language-as-problem agenda. Despite its loud advocates, English-Only is not the only option. Cristina Rodriguez has advocated a somewhat idealistic concept of cultural burden sharing in the workplace, and the broader concept of social burden shifting.[204] With respect to language rules, Rodriguez notes that since linguistic minorities are obliged to communicate with their English-speaking customers and colleagues in English, a reciprocal obligation should exist requiring "monolingual English speakers to engage in a bit of personal accommodation of their own – to tolerate the speaking of non-English in their presence."[205] As there

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198. *See* STEPHEN D. KRASHEN, UNDER ATTACK: THE CASE AGAINST BILINGUAL EDUCATION (1996), *cited in* TSE, *supra* note 74, at 22-23.

199. *Id.*; *No Child Left Behind*, *supra* note 179, at 132.

200. Ryan, *supra* note 11, at 499.

201. *Id.*

202. *Id.* ("The immersion program is often characterized as a *sink or swim* approach wherein the non-English speaker, in an attempt to learn English, succeeds or fails because of the urgency of the challenge.").

203. *See* Farquharson, *supra* note 179, at 353.

204. Rodriguez, *supra* note 5, at 1714 ("We can then move from this idea of burden sharing on the interpersonal level to a broader conception of social burden shifting. The process of absorbing the cultural consequences of immigration must involve shared burdens, both for fairness reasons and because the process of assimilation will be facilitated by the majority's willingness to accept some of the costs of the process.").

205. *Id.* at 1712.

is a reasonable and widespread expectation that linguistically diverse immigrants will learn English, there is too a reasonable expectation that everyone will share the cultural consequences of immigration. Rodriguez advocates that society at large must alter its expectations with regards to "aesthetic and linguistic surroundings in light of an evolving population."[206] In altering expectations and promoting linguistic tolerance in the schools and in the workplace, one also promotes such tolerance in society.

However, social burden shifting and linguistic tolerance will not occur on its own. Reforming bilingual education policy is a reasonable starting point to change social norms that will have long-term benefits on American businesses, the economy, and individual liberties. This will only be possible if Congress embraces the language-as-resource view expounded by the English Plus movement. While the English Plus goal of creating a fully bilingual or multi-lingual society is a long-term goal, it is the direction in which language policy in this country should be moving. English Plus recognizes that English "is and will remain the primary language of the United States," but advocates "for an expanded network of facilities and programs for comprehensive instruction in English *and* other languages."[207]

This approach must begin with a pedagogical paradigm shift in education policy, focusing on conserving and developing heritage language skills alongside, and to the same extent as, English language skills. Congress may begin this shift by revisiting No Child Left Behind, and perhaps elaborating upon the framework developed in *Castaneda* with refined educational goals. It must not only require school programs be based on a sound educational theory, but also oblige that the educational theory promote language as a resource that should be developed and maintained.[208] Not only would English Plus encourage ethnic tolerance, it would develop a new generation of truly bilingual members of society and the workforce. Their bilingualism and biculturalism would result in personal and societal benefits, including a decrease in the need and desire for oppressive English-Only rules, and an increase in America's international competitiveness.

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206. *Id.* at 1693.
207. ENGLISH PLUS, *supra* note 26 (emphasis added).
208. Castaneda v. Pickard, 648 F. 2d 989, 1009 (5th Cir. 1981).