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SUMMARY:

... The law currently provides no right to bilingual education as such. The state does have a duty to take reasonable steps to overcome the English language deficiencies of children whose native language is not English. ... The argument here is: (i) that the inaction of the majority can also constitute tyranny; (ii) that at times the majority has an obligation to act affirmatively to advance minority rights; and (iii) that the provision of full bilingual education for non-native English speakers is one such obligation. ... Providing bilingual education, when necessary to afford non-native English speakers a comparable opportunity to attain proficiency in English, is also an example of required responsiveness to difference. ... Full Bilingual Education as a Fundamental Right ... While the Plyler Court reaffirmed that education is not a fundamental right, the pivotal role that education plays in social life was the key to the case, as against other less important governmental benefits the state could presumably withhold from the children of undocumented aliens. ... One likely objection to my proposal is that schools would be required to provide full bilingual education in all native languages, and that having to do so would be administratively impracticable and prohibitively expensive. ...

TEXT:

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The law currently provides no right to bilingual education as such. The state does have a duty to take reasonable steps to overcome the English language deficiencies of children whose native language is not English. ⁿ¹ If transitional bilingual education is necessary to achieve that end, then it is required. ⁿ² But if not, for example, if immersion works as a way to achieve proficiency in English, ⁿ³ then bilingual education is not required. ⁿ⁴ Moreover, to the extent it is [*934] required, bilingual education can be discontinued once the transition to English is achieved. ⁿ⁵ There is no obligation to enable a non-native English speaking child to become proficient in his or her native language. ⁿ⁶

Consequently, non-native English speaking parents who want their children to attain proficiency in their native languages have to pursue that on their own. Some, including perhaps a majority of the Hispanic students in my Public Education Law classes over the years, think this is the way it should be. As Barbara Mujica, a well-known author and professor of Spanish at Georgetown University, wrote in an op-ed piece some years ago:

Mine is a Spanish-speaking household. We use Spanish exclusively. I have made an effort not only to encourage use of the language but also to familiarize my children with Hispanic culture... . Instilling in my children a sense of family and ethnic identity is my role; it is not the role of the school system ... The primary goal of bilingual education must be the mainstreaming of non-English speaking children through the teaching of English. But while the schools teach my children English, I will continue to teach them Spanish at home, because Spanish is part of their heritage. Ethnic identity, like religion, is a family matter. ⁿ⁷

[*935] I take issue with that view. I contend that democratic principles mandate, for parents who want it and until children are old enough to choose otherwise, that public schools seek to enable non-native English speaking children to

develop proficiency in their native languages.⁸⁸ Further, I contend that as a legal matter the Equal Protection Clause, properly interpreted in accordance with the democratic principles implicit in it, mandates what I call full bilingual education.⁸⁹

I. Full Bilingual Education and Democratic Principles

Some equate democracy with majority rule. A fuller conception of democracy is a society committed to the welfare of all, as the people of the society perceive it.⁹⁰ Majority rule helps resolve differences of opinion over [*936] how best to pursue the welfare of all.⁹¹ However, as a majoritarian decision takes society down a particular path, the fuller conception of democracy requires that society respond fairly and proportionately to the minority's interests. Otherwise, the majority will be appropriating more than its fair share of the goods of social life.⁹²

This disproportionate appropriation of the goods of social life is ultimately what the notion of the tyranny of the majority is all about. Thus, the counter-majoritarianism of the Bill of Rights, in protecting fundamental minority interests against the will of the majority, enhances democracy.⁹³ The foremost examples of majority tyranny consist of actions that trample on minority rights, like enforced segregation or imprisoning someone without a trial. The argument here is: (i) that the inaction of the majority can also constitute tyranny;⁹⁴ [*937] (ii) that at times the majority has an obligation to act affirmatively to advance minority rights;⁹⁵ and (iii) that the provision of full bilingual education for non-native English speakers is one such obligation.

II. Full Bilingual Education and Equal Protection

An analysis of equal protection law helps to flesh out when affirmative action is required of the state. In some situations, equal protection mandates sameness of treatment. For example, states may not confer legal rights on the white majority and withhold those rights from others based on ethnicity. Thus, it would be unconstitutional to run a public school system open only to whites, even if all others were excused from having to pay taxes to support it, because that would unfairly appropriate this public good for whites. All must be allowed access to public schools on equal terms.⁹⁶

In other situations, equal protection requires responsiveness to difference, thereby sometimes obligating the state not to treat all persons the same and to respond fairly to their unique needs. The rationale is the same as that for equal treatment, namely that the failure to respond to relevant differences would result in an unfair distribution of public goods. Thus, it would violate equal protection not to provide sightless students with books in Braille because that would deprive them of an opportunity to learn to read comparable, according to their abilities, to the opportunity accorded sighted students.⁹⁷ Similarly, it [*938] would violate equal protection to run a unisex athletic program if the result were that boys dominated due to their generally greater physical strength, since that would deprive girls of a comparable opportunity to the educational benefit of an athletic experience.⁹⁸ Conversely, when in responding to difference separate athletic programs are run for boys and girls, those girls who can compete with boys must be allowed to participate in the boys' program on equal terms, since otherwise they would be deprived of a comparable opportunity to develop their athletic skills.⁹⁹

Providing bilingual education, when necessary to afford non-native English speakers a comparable opportunity to attain proficiency in English, is also an example of required responsiveness to difference.¹⁰⁰ My contention here is that responsiveness to difference also requires the opportunity for non-native English speakers to attain full proficiency in their native languages. However, if that is required, does responsiveness to difference also require that school authorities offer courses to satisfy the whims of all students, my favorite example being the history of rock and roll? If not, and I take it most would [*939] agree that neither democratic principles nor equal protection mandates a course in the history of rock and roll, this raises the question of how to tell when responsiveness to difference is required and when it is permissible to treat everyone the same.

III. Full Bilingual Education as a Fundamental Right

To sort out which claims of required responsiveness to difference have merit, we need a theory of those interests democratic principles require be treated as fundamental rights in order to address the welfare of all fairly and proportionately. Voting and free speech are obvious candidates, because they enable people to advance their interests and express their views about what the public good entails. Formal schooling may not have been fundamental in earlier times, but in light of its importance to success in life, it is today - at least in my view.

It is true that in *Rodriguez*, the famous school finance case, the Supreme Court held education not to be a fundamental constitutional right.¹⁰¹ In *Rodriguez*, the Court sanctioned, wrongly so in my opinion, a school financing scheme

that denied equal educational opportunity to lower income children on the ground that despite the inequalities, it still afforded them a minimum education.ⁿ²² However, the Court inferred that a financing scheme that totally deprived lower income children of access to a good as important as education would be unconstitutional.ⁿ²³ Subsequently, in *Plyler v. Doe*, the Court held that a state may not deny an education to the children of undocumented aliens.ⁿ²⁴ While the *Plyler* Court reaffirmed that education is not a fundamental right, the pivotal role that education plays in social life was the key to the case, as against other less important governmental benefits the state could presumably withhold from the children of undocumented aliens.ⁿ²⁵ After *Rodriguez and Plyler*, as well as *Brown v. Board of Education*,ⁿ²⁶ it seems fair to say that education is at least a quasi-fundamental right. Hopefully, the Supreme Court will one day acknowledge it as the fully fundamental right it deserves to be.ⁿ²⁷

[*940] Education is fundamental not only because it opens the door to economic opportunity but also because of its importance to one's development as a person, fundamental aspects of which are one's sense of self and one's relationship to others. A fundamental aspect of this, in turn, is the opportunity to learn about one's cultural background and to preserve, if one so chooses, one's cultural identity. The opportunity to learn and develop proficiency in one's native language is integral to this process.ⁿ²⁸ One can appreciate *Don Quijote* in English, but one can fully appreciate it only in Spanish, and doubly so for someone from a Spanish-speaking culture.

While learning English enhances the marketability of all who learn it, it also uniquely benefits native English speakers by enabling them to preserve their Anglo-American cultural identity, a central feature of which is the English language.ⁿ²⁹ This process occurs virtually invisibly. Because English is the society's dominant language, and because native English speakers are in the majority, the Anglo-American cultural bias of public education seems as normal and natural, at least to native English speakers, as all the other day-to-day cultural biases that pass unnoticed by the dominant group in any society.

Without public education, it would be more difficult to preserve Anglo-American cultural identity. Many, if not most, native English speaking parents, if left to their own devices, would be incapable of teaching their children English at a high level of proficiency.ⁿ³⁰ So would other ethnic groups with **[*941]** regard to their native languages, the *Barbara Mujicas* of this society being the exception rather than the rule.ⁿ³¹ Therefore, for public schools to aid native English speakers to learn their native language, while not providing the same benefit for non-native English speakers, is to violate the democratic principle of proportionality with respect to a fundamental aspect of social life. What distinguishes cultural identity and rock and roll is that the former is fundamental while rock and roll is not - I like it, but it's only rock and roll.ⁿ³²

IV. Full Bilingual Education and the Value of Pluralism

Related to the principle of proportionality is the democratic value of pluralism.ⁿ³³ In a democracy there is no one right way. In general, as reflected in the rights of free association and free exercise of religion, all have the individual and group right to pursue their particular visions of the good life. Indeed, diversity is a positive value that contributes to the vitality of a democratic society.ⁿ³⁴

[*942] It may be that the viability of any society requires a common value system to which most adhere and which society may promote through public education in furtherance of the common good.ⁿ³⁵ But a democratic society may do so only with regard to those core values essential to its survival. The majority may not use state power to try to stamp out cultural differences just because they differ from the majority's, as happened in the past to non-native English speaking immigrants from Europe and Asiaⁿ³⁶ and as is reflected more recently in the English-only movement that underlies the current attack on bilingual education.ⁿ³⁷ To the contrary, to the extent that the majority uses the public education system to help inculcate its cultural values in its children, the principles of pluralism and proportionality require that those whose values differ from the majority's receive comparable assistance.

Thus, a school library that only contained books by and about whites would violate the democratic rights of other ethnic groups to receive comparable **[*943]** exposure.ⁿ³⁸ Not to offer instruction in students' native languages, while offering English to native English speakers, is tantamount, I assert, to the same thing. Moreover, I assert that to require non-native English speakers to learn English, as I shall assume is permissible in the interest of a cohesive society,ⁿ³⁹ but without at the same time assisting those who want to retain their native languages to do so, is tantamount to stamping out the native language.ⁿ⁴⁰

V. Objections to Full Bilingual Education

One likely objection to my proposal is that schools would be required to provide full bilingual education in all native languages, and that having to do so would be administratively impracticable and prohibitively expensive.ⁿ⁴¹ Such considerations do come into play in other contexts, as regards, for example, what school authorities must do to accommodate the unique needs of the disabled.ⁿ⁴² So I acknowledge that school authorities might be excused from providing [*944] full bilingual education when small numbers of students want it in each of a variety of different languages.ⁿ⁴³ But when the numbers are substantial, democratic principles require school authorities to allocate available funds so as to respond fairly to the needs of all students. That it might be necessary to cut boys' athletic programs in half in order to establish programs for girls is not a valid reason for denying girls a comparable opportunity to participate in athletics.ⁿ⁴⁴ Similarly, if schools need to reallocate funds from other areas of the educational program in order to provide full bilingual education when substantial numbers of students want it, then that is simply what democratic education is all about.ⁿ⁴⁵

Another objection to my proposal is that it would unfairly privilege non-native English speakers over religious groups for schools to assist the former in preserving their cultural heritage while denying similar assistance to those wanting to preserve their religious heritage. Put another way, if religion is a family matter, then why not cultural heritage? The stock response, i.e., that to provide such assistance to religious groups would violate the Establishment Clause, is to me unsatisfactory. Establishment Clause concerns must be balanced against or meshed with free exercise concerns. So my response is that [*945] school authorities do have an obligation to accommodate the analogous needs of religious groups, as long as accommodation does not cross the line and become the affirmative promotion of religion, and especially of the dominant religion in the locale.ⁿ⁴⁶

VI. Conclusion

In sum, my argument for full bilingual education for those who want it stems from a vision of a democratic society as one that fairly and proportionately responds to the needs of all of society's members. The role of public education in the democratic society is to bring the pluralistic elements of society under one roof, so that all can learn from each other and come to respect and value each other's differences. This cannot happen when the schools cater only to the interests of the majority. What is likely to occur then is that those whose needs are not attended to will drop out of public school, as so many Hispanics do now,ⁿ⁴⁷ or will depart to private schools, as is a growing trend and as is being promoted through proposals to replace traditional public education with a voucher system.ⁿ⁴⁸ Such phenomena undermine the ability of public education to contribute to the construction of a cohesive society.

However, given the conservative drift of the Supreme Court over the past thirty years or so, full bilingual education is not likely to come about through judicial intervention. It may be implicit in equal protection properly understood. But at this stage in history, it will likely happen only as one aspect of a mass movement for racial and social justice of all who are disadvantaged by the society's inegalitarian social structure.ⁿ⁴⁹ Si no estamos juntos, estamos separados.

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Religion in Schools Free Exercise of Religion Education Law Students Bilingual Students Governments Local Governments Libraries

FOOTNOTES:

n1. *Lau v. Nichols*, 414 U.S. 563 (1974) (mandating public schools to act affirmatively to rectify the English language deficiencies of Chinese-speaking students pursuant to federal regulations under Title VI of the Civil Rights Act of 1964, which bans discrimination based on national origin in programs receiving federal aid, but without requiring the use of any particular approach to achieve that end). Following *Lau*, Congress passed the Equal Educational Opportunity Act of 1974, section 204 of which provides:

No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by ... (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

20 U.S.C. § 1703 (2000).

n2. Transitional bilingual education consists of teaching students primarily or partially in their native languages until they attain proficiency in English. It has been the dominant approach over the past thirty-five years or so. See Guadalupe San Miguel, Jr., *Contested Policy: The Rise and Fall of Federal Bilingual Education in the United States* (2004) (a history of bilingual education in the U.S., detailing the impetus provided by the Bilingual Education Act of 1968, the expansion of bilingual education nationwide in the 1970s, the rising opposition to it and the beginnings of retrenchment during the 1980s and '90s, and culminating with its effective repeal and federal support instead for English-only programs with the No Child Left Behind Act of 2001).

n3. Total immersion consists of placing non-English speaking students in regular classrooms where they are treated little differently from English speaking students, while structured immersion consists of instruction in separate classrooms in English at a slower pace and with limited or no use of the native language. In recent years, voter initiatives in California (1998), Arizona (2000), and Massachusetts (2002) have required states to replace bilingual education in whole or in part with forms of immersion. On the details and impact of the approaches, see Tom Horne, *English Immersion Works Fine*, *Ariz. Republic*, Aug. 19, 2004, available at <http://www.public.asu.edu/macswan/ade/AR08-19-04.htm>; Jeff MacSwan, *Bad Data Poison Language Study*, *Ariz. Republic*, Aug. 13, 2004, available at <http://www.public.asu.edu/macswan/ade/AR08-13-04.htm>; Monica Rhor, *Family Adjusts to English-Only Law*, *Boston Globe*, Oct. 12, 2003, available at <http://www.boston.com/news/education/k12/specials/immersion>; Christine H. Rossell, *Dismantling Bilingual Education, Implementing English Immersion: The California Initiative* (2002), available at <http://www.bu.edu/polisci/people/faculty/rossell/papers/DismantlingBilingualEducationJuly2002.pdf>.

n4. As with all empirical matters, there is disagreement among the experts as to what methods best achieve English proficiency for non-English-speaking students. See, e.g., Christine H. Rossell & Keith Baker, *The Educational Effectiveness of Bilingual Education*, 30 *Res. in the Teaching of Eng.* 7 (1996), available at <http://www.bu.edu/polisci/people/faculty/rossell/papers/effectiveness.pdf> (concluding, based on an analysis of seventy-two studies they find methodologically sound, that bilingual education produces only slightly better results on standardized tests than total immersion in regular classroom instruction and never performs better than structured immersion, noting other studies concluding that bilingual education lacks empirical research support, and critiquing studies to the contrary as methodologically flawed); Jay P. Greene, *A Meta-Analysis of the Effectiveness of Bilingual Education* (1998), <http://ourworld.compuserve.com/homepages/JWCRAWFORD/greene.htm> (agreeing with Rossell & Baker's criteria for methodological soundness, finding that only eleven of the studies they considered actually meet those criteria and that their conclusions are unreliable due to lack of rigor and consistency in analyzing studies, and concluding based on an analysis of the eleven adequate studies "that children with limited English proficiency who are taught using at least some of their native language perform significantly better on standardized tests than similar children who are taught only in English").

n5. See, e.g., *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981) (holding that the EEOA's "appropriate action" requirement does not mandate bilingual education in all instances but only that school authorities make "a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students," and upholding as generally adequate a program of bilingual education through the third grade followed by classroom instruction in English, accompanied for students needing it by special remedial programs, English as a second language classes, and tutoring in English). Similarly, see also, *Teresa P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698 (N.D. Cal. 1989); *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030 (7th Cir. 1987).

n6. By "non-native English-speaking" I mean anyone who identifies as a member of an ethnic or cultural group whose primary or original language is other than English. This includes recent immigrants who speak little or no English, as well those whose families have been here for generations and have little or no familiarity with the language of their ancestors. The argument herein for full bilingual education is intended to apply equally, for example, to immigrants from Latin America and Asia who want their children to retain the native language they still speak and to Native-Americans and European-Americans who speak only English and want their children to regain the language of their ancestors.

n7. Barbara Mujica, *Learning English is a Matter of Survival*, *Houston Chron.*, Mar. 5, 1984, β 2, at 7.

n8. Compare Cristina M. Rodriguez, *Language and Participation*, 94 *Cal. L. Rev.* 687, 694, 758-65 (2006) (advancing a "participatory theory of language difference" based on the notion that "bilingualism in individuals and multilingualism in society promote democratic values" by advancing the complementary goals of "social investment by minority language groups and personal control or autonomy over matters of deeply personal concern, including cultural destiny;" positing that participatory democracy in a large, heterogeneous society like the U.S. is best served by a decentralized approach to political and social life; and arguing with respect to education that bans on native language instruction should be declared unconstitutional as violating parents' fundamental rights regarding child rearing and that such questions should

be left up to parents and local school boards); Julie Chi-Hye Suk, *Economic Opportunities and the Protection of Minority Languages*, 1 J.L. & Ethics Hum. Rts. 134 (2007) (arguing that liberal states should abet the preservation of minority languages through state funding of minority language instruction as a means of fostering individuals' interest in establishing their personal identity, maintaining relationships with family, and participating in the lives of their ancestral communities).

n9. The Supreme Court, as presently constituted, is unlikely to interpret equal protection so. Consequently, if full bilingual education is to come about, it will require either congressional action or state legislative or judicial intervention. One of the most disgraceful moves of the Court has been to arrogate to itself the sole authority to determine the meaning of equal protection and to foreclose Congress from using its enforcement power under the Fourteenth Amendment to advance its vision of equal protection. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (striking down Americans with Disabilities Act of 1990's prohibition against state discrimination against the disabled in employment). But even if the Court were not to allow Congress to require full bilingual education under the Fourteenth Amendment, Congress could do so through strings attached to federal aid, as it has done with respect to other equal protection-type matters related to education, such as English proficiency and the rights of women and the disabled. See *supra* notes 1 and 2, and *infra* notes 17, 18 and 20 and accompanying text. However, given the current English-only trend, as reflected in voter initiatives requiring immersion as a means to English proficiency, *supra* note 3, congressional or state level action is unlikely to occur without the impetus of a mass political movement as discussed at the conclusion of this essay.

n10. Compare Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in *Democracy and Difference* 67, 69 (Seyla Benhabib ed., 1996) ("The basis of legitimacy in democratic institutions is to be traced back to the presumption that the instances which claim obligatory power for themselves do so because their decisions represent an impartial standpoint said to be equally in the interests of all."); Robert A. Dahl, *Democracy and Its Critics* 108, 109 (1989) (advancing as democratic principles that "the good of each member is entitled to equal consideration" and that "at the decisive stage of collective decisions, each citizen must be ensured an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by any other citizen").

n11. Compare Dahl, *supra* note 10, at 156 ("Despite their advocates, neither majority rule nor various nonmajoritarian arrangements can be prescribed as invariably the best system for arriving at collective decisions in a democratic country."); Benhabib, *supra* note 10, at 72 ("In many instances the majority rule is a fair and rational decision procedure, not because legitimacy resides in numbers but because if a majority of people are convinced at one point on the basis of reasons formulated as closely as possible as a result of a process of discursive deliberation that conclusion A is the right thing to do, then this conclusion can remain valid until challenged by good reasons by some other group."); Luis Fuentes-Rohwer, *The Emptiness of Majority Rule*, 1 Mich. J. Race & L. 195 (1996) (arguing that majority rule is not inherently more democratic than other decision-making approaches, and that deviating from it may at times be warranted in order to enhance the effective participation of and responsiveness of the political process to disfavored and underrepresented groups).

n12. Compare Benhabib, *supra* note 10, at 78 ("Insofar as a discourse theory of ethics considers participants to be equal and free beings, equally entitled to take part in those discourses which determine the norms that are to affect their lives, it proceeds from a view of persons as being entitled to certain 'moral rights.' I have named this moral right the entitlement to universal moral respect."); Dahl, *supra* note 10, at 311-312 ("The close connection between democracy and certain kinds of equality leads to a powerful moral conclusion: If freedom, self-development, and the advancement of shared interests are good ends, and if persons are intrinsically equal in their moral worth, then opportunities for attaining these goods should be distributed equally to all persons. Considered from this perspective, the democratic process becomes nothing less than a requirement of distributive justice."); John Rawls, *A Theory of Justice* 62 (1971) (advancing as a basic principle of social justice that: "All social values - liberty and opportunity, income and wealth, and the bases of self-respect - are to be distributed equally unless an unequal distribution of any, or all, of those values is to everyone's advantage").

n13. Compare, e.g., Rebecca L. Brown, *The Logic of Majority Rule*, 9 U. Pa. J. Const. L. 23, 45 (2006) ("The logic of equality ... has brought us to the judicial protection, in at least some minimal way, of unenumerated rights. By taking this protection seriously, the Court should not be understood to throw down a 'trump' card to overpower majority rule or deprive majorities of their right to govern as they see fit. Rather, it should be perceived as providing the consistency of principle that makes majority rule possible in a constitutional democracy committed to equality. By protecting liberty in the name of equality, therefore, the Court enables, rather than obstructs, democracy."); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 100-01, 103 (1980) ("The Constitution has ... proceeded from the quite sensible assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority not systematically treat others less well than it treats itself"; the democratic process malfunctions when "representatives beholden to an effective majority are systematically disadvantaging some minority ... and thereby denying that minority the protection afforded other groups").

n14. Compare Thomas A. Eaton & Michael Lewis Wells, *Governmental Inaction as a Constitutional Tort: Deshaney and Its Aftermath*, 66 Wash. L. Rev. 107, 110 (1991) (arguing, with regard to governmental liability for due process violations due to its failure to act to aid someone in jeopardy, that "it is appropriate to recognize an affirmative constitutional duty only when governmental inaction can be characterized

as an 'abuse of power,'" and that this standard is met only when the government has some involvement in producing the situation and government officials show deliberate indifference to the person's plight). I would contend that democratic principles call for a more expansive view of governmental responsibility for its inactions. Nonetheless, the government's failure to assist non-native English speaking children to attain proficiency in the native language might well violate the abuse of power standard in that compulsory education laws effectively force most children into the public school system and that the government's inaction, while more adequately attending to the educational needs of the majority, reflects deliberate indifference to the needs of the minority.

n15. See, e.g., *Sheff v. O'Neill*, 678 A.2d 1267, 1277 (Conn. 1996) (holding, in light of the fact that the state constitution mandates substantially equal educational opportunity, that "if the legislature fails, for whatever reason, to take action to remedy substantial inequalities in the educational opportunities that such children are being afforded, its actions and its omissions constitute state action.").

n16. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

n17. Compare the Individuals with Disabilities in Education Act of 2005's requirement of "free appropriate public education" for disabled students and an "individualized education program" that meets their "unique needs." 20 U.S.C. §§1400(d), 1414(d) (2000). These requirements have been in place since Congress enacted the Education for All Handicapped Students Act of 1975. See 20 U.S.C. § 1400(c)(3). The U.S. Department of Education's regulations require that an IEP provide instruction in Braille for visually disabled students, 34 C.F.R. § 300.324 (2006), and the Department's commentary to its regulation on free appropriate education provides: "To be appropriate, such services must be designed to meet disabled children's individual educational needs to the same extent that those of nonhandicapped children are met." 34 C.F.R. pt. 104, app. A, P 23. However, in *Board of Education v. Rowley*, 458 U.S. 176, 200 (1982), the Court held that the requirement of "free appropriate public education" is satisfied as long as the program confers "some educational benefit" to the child. The dissent argued that IDEA was intended to afford disabled students "an equal opportunity to learn if that is reasonably possible." *Rowley*, 458 U.S. at 212, 215 (White, J., dissenting). In light of IDEA the Supreme Court has not had occasion to decide what equal protection requires for disabled students. My contention is that IDEA represents Congress' effort to discern what equal protection requires for disabled children, that a comparable education standard is implicit in the concept of equal protection, and that to the extent the majority opinion in *Rowley* implies otherwise it misunderstands equal protection's democratic foundations.

n18. 34 C.F.R. § 106.41(c) (2006) (Department of Education regulation requiring "equal athletic opportunity for ... both sexes" pursuant to prohibition in Title IX of the Educational Amendments of 1972 against discrimination based on sex in educational programs). Again, I would contend that Title IX represents Congress' effort to discern the requirements of equal protection regarding gender discrimination.

n19. See, e.g., *Saint v. Neb. Sch. Activities Ass'n*, 684 F. Supp. 626 (D. Neb. 1988) (temporary restraining order prohibiting exclusion of female high school student from boy's wrestling team in light of likely equal protection violation); *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020 (W.D. Mo. 1983) (equal protection requires that eighth grade female be allowed to compete for football team).

n20. The Supreme Court has not explicitly ruled that equal protection requires affirmative measures to overcome English language deficiencies. In mandating such measures based on Title VI in *Lau v. Nichols*, it did say: "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." 414 U.S. 563, 566 (1974). But that ruling was based on regulations barring actions with a discriminatory "effect even though no purposeful design is present." *Id.* at 568 (emphasis in original). In light of subsequent holdings that the equal protection clause only bars purposeful discrimination, *Washington v. Davis*, 426 U.S. 229 (1976), it might be contended that failing to act to overcome English language deficiencies is constitutionally permissible when based on assertedly non-discriminatory reasons such as cost considerations. But in light of the quasi-fundamental-right treatment accorded education in other cases, see *infra* notes 21-25 and accompanying text, it seems unlikely the Court would adopt that position, at least when non-English speaking students are thereby deprived of "any meaningful education." If it should so rule, that would, in my view, constitute a profound misunderstanding of the democratic principles underlying the concept of equal protection.

n21. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-38 (1973).

n22. *Id.* at 36-37.

n23. Id. at 23-24 ("The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth.... The Equal Protection Clause does not require absolute equality or precisely equal advantages.").

n24. 457 U.S. 202, 202 (1982).

n25. Id. at 221 ("Public education is not a 'right' granted to individuals by the Constitution ... But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction ... Education has a fundamental role in maintaining the fabric of our society.").

n26. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

n27. A number of state courts have treated education as a fundamental right in school finance cases based on state constitutional provisions mandating state provision of public education, although whether they have been able to bring about meaningful reform in the face of political opposition is open to question. See, e.g., Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in *Law and School Reform* 88, 90 (1999) (noting that "despite litigation in nearly every state over the past two decades, interdistrict disparities in the United States have not diminished").

n28. On the integral relationship between cultural identity and native language, see, e.g., David Crystal, *Language Death* 36-43, 119-126 (2000) ("Rituals, music, painting, crafts, and other forms of behaviour all play their part [in cultural identity]; but language plays the largest part Language is the primary index, or symbol, or register of identity."); *Endangered Languages* (Lenore A. Grenoble & Lindsay J. Whaley, eds., 1998) (a series of articles on the diminishing language diversity throughout the world, the benefits of diversity, and the efforts of ethnic groups to retain and revitalize their native languages as a means of maintaining cultural identity); Rodriguez, *supra* note 8, at 735 ("A cultural community's loss of its common language often presages an impoverishing of its culture, because language operates as a repository of cultural meaning. Cultural vitality therefore depends heavily on language maintenance."). The importance of the relationship and of the opportunity to receive native-language education have been acknowledged under international law. See, e.g., *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), art. 27, 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) available at <http://www.ohchr.org/english/law/pdf/ccpr.pdf>; *United Nations Human Rights Council, Draft United Nations Declaration on the Rights of Indigenous Peoples*, art. 14, available at <http://www.ohchr.org/english/issues/indigenous/docs/declaration.doc>.

n29. By "Anglo-American culture" I mean the dominant culture of American society, which I take to be an amalgam of its various subcultures but with the predominant influence being European and especially English and with the English language being a central unifying feature. Most Americans have been acculturated to the Anglo-American culture to one degree or another, although many also identify with subcultures that depart from the dominant culture in various ways. One of those ways is by choosing to retain or regain proficiency in a native language other than English.

n30. According to the 2003 National Assessment of Adult Literacy, only 12% of American adults had literacy skills at a level defined as Proficient, while 53% were at the Intermediate level and 36% were at the Basic or Below Basic levels. For whites the Proficient figure was only 14%, while 28% were at the Basic or Below Basic levels. National Center for Education Statistics, *The Health Literacy of America's Adults* 10, 11 fig. 2-5 (2006), <http://nces.ed.gov/pubs2006/2006483.pdf>.

n31. See *supra* note 7 and accompanying text. Compare Alejandro Portes & Ruben G. Rumbaut, *Immigrant America: A Portrait* 218-32 (2d ed. 2006) (concluding, based on an analysis of various studies, that the great majority of non-native English speakers become monolingual in English by the third generation); Ruben G. Rumbaut et al., *Linguistic Life Expectancies: Immigration Language Retention in Southern California*, 32 *Population & Dev. Rev.* 447, 454-55, 459 (2006), available at <http://www.popcouncil.org/PDR/LinguisticLifeExpectancy.pdf> (finding, based on surveys of more than 5000 Hispanics and Asians, that 3.5 generations after their ancestors' arrival, only 7% of Mexican

Americans speak fluent Spanish, and that for Asians the figure is less than 6% at 2.5 generations; and concluding that "without strong social structural supports, ... the chances of sustaining fluent bilingualism in American communities seem slim.").

n32. The contrast between proficiency in one's native language and the history of rock and roll is intended to be humorous. However, a participant at the LatCrit conference suggested that in some cultures music may function not only as entertainment but as an integral aspect of cultural identity. At some level that is no doubt true in all societies. Exposure to music certainly has a prominent place in schools in this society. To the extent music is incorporated in the curriculum, the implication of this article is that it must be done in a way that exposes students who want it to the music of all subcultures represented in the school.

n33. See, e.g., Joshua Cohen, Procedure and Substance in Deliberative Democracy, in *Democracy and Difference*, supra note 10, at 95-96 (advancing "a conception of democracy suited to the kind of human difference captured in the 'fact of reasonable pluralism' - the fact that there are distinct, incompatible understandings of value, each one reasonable, to which people are drawn under favorable conditions for the exercise of their practical reason"); Chantal Mouffe, Democracy, Power and the "Political", in *Democracy and Difference*, supra note 10, at 245-46 ("The difference between ancient and modern democracy is not one of size but of nature. The crucial difference lies in the acceptance of pluralism, which is constitutive of modern liberal democracy. By pluralism I mean the end of a substantive idea of the good life." (emphasis in original)).

n34. Compare Mouffe, supra note 33, at 246 ("Pluralism ... is taken to be constitutive at the conceptual level of the very nature of modern democracy and considered as something that we should celebrate and enhance" (emphasis in original)); Iris Marion Young, Justice and the Politics of Difference 191 (1990) ("The ideal of the just society as eliminating group differences is both unrealistic and undesirable. Instead justice in a group-differentiated society demands social equality of groups, and mutual recognition and affirmation of group differences. Attending to group specific needs and providing for group representation both promotes that social equality and provides the recognition that undermines cultural imperialism.").

n35. See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979) (acknowledging the role of public education in "the preservation of the values on which our society rests" and in "inculcating fundamental values necessary to the maintenance of a democratic political system"). Regrettably, in *Ambach* the Court failed to understand the implications of its own rhetoric and upheld a state law forbidding certification as public school teachers of immigrants who are eligible but have not yet manifested an intention to apply for citizenship. Such individuals could both provide needed bilingual instruction and add diversity to the educational experience of all students.

n36. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down statute making it a crime for public or private school teachers to teach subjects in any language except English or to teach languages other than English below the high school level); *Farrington v. Tokushige*, 273 U.S. 284 (1927) (striking down Hawaii statute and administrative regulations limiting age at which pupils may attend and time they may spend in foreign language schools, defined as schools taught in other than English or Hawaiian).

n37. See, e.g., Samuel P. Huntington, The Hispanic Challenge, *Foreign Pol'y*, Mar.-Apr. 2004, at 30, available at [http://cyber.law.harvard.edu/blogs/gems/culturalagency1/Samuel HuntingtonTheHispanicC.pdf](http://cyber.law.harvard.edu/blogs/gems/culturalagency1/Samuel%20HuntingtonTheHispanicC.pdf) (arguing that "Mexicans and other Latinos have not assimilated into mainstream U.S. culture," that "the persistent inflow of Hispanic immigrants threatens to divide the United States into two peoples, two cultures, and two languages," and that Hispanics will share in the American Dream "only if they dream in English"); Wendy Olson, The Shame of Spanish: Cultural Bias in English First Legislation, 11 *Chicano-Latino L. Rev.* 1 (1991) (arguing that English-only and English-as-official-language laws adopted by a number of states in the 1980s are designed to promote the supremacy of Anglo culture and to denigrate the use of Spanish and Hispanic culture and heritage, and that as such they violate equal protection); John E. Petrovic, Balkanization, Bilingualism, and Comparisons of Language Situations at Home and Abroad, 21 *Bilingual Res. J.* 233 (1997), (arguing, based on comparisons with Canada and Belgium, that the Official English movement could undermine national unity by breeding resentment toward the majority language group and that the claim that making English the official language is necessary to prevent "institutionalized language segregation" is erroneous in that "both geodemographic intermingling and the English language are viewed as such overwhelming political and economic realities in the United States that virtually all language minority group members seek mastery of the dominant language for themselves and their progeny") (quoting R.J. Schmidt, *Language Policy and Conflict*, in *The Rising Tide of Cultural Pluralism: The Nation-State at Bay* 73, 83 (Crawford Young ed., 1993)).

n38. Compare *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (holding that, while books may be removed from school library for reasons of educational unsuitability, First Amendment bars removal for the purpose of denying students access to ideas); *Id.* at 875, 878 (Blackmun, J. concurring) ("It is difficult to see how a school board, consistent with the First Amendment, could refuse for political reasons to buy books written by Democrats or by Negroes, or books that are 'anti-American' in the broadest sense of that term.").

n39. In fact, most immigrants become fluent in English at some level of proficiency fairly rapidly. Portes & Rumbaut, *supra* note 31; Rumbaut et al., *supra* note 31, at 447 (citing studies indicating that immigrants from Latin America tend to become fluent in English between the first and second generations). The level of English proficiency varies depending on the place of origin and ethnicity, with Whites and Asians having the highest level of proficiency followed by African Americans and Native Americans followed by Hispanics. National Center for Education Statistics, *supra* note 30, at 5 tbl.1-1, 11 fig.2-5 (reporting that about 40% of Hispanics, as compared with about 25% of African Americans and Native Americans, have Below Basic English proficiency defined as falling between non-literate and "no more than the most simple and concrete literacy skills" such as "following written instructions in simple documents").

n40. That it is pedagogically possible to teach children more than one language at the same time at a high level of proficiency is apparent. See, e.g., *Foreign Language Education: Issues and Strategies 7-8* (Amado M. Padilla et al. eds., 1990) ("Throughout the world today, there are many more bilingual individuals than there are monolinguals Thus, in most of the world, bilingualism and innovative approaches to education involving the utilization of more than one language constitute the status quo - a way of life, a natural experience. The phenomenon of bilingualism in most countries is not problematic, and achieving competency in more than one language is not particularly onerous or burdensome."); Portes & Rumbaut, *supra* note 31, at 208, 212-18 (noting that "the use of two languages is not exceptional but normal in the experience of a good part of the world's population," and discussing evidence that fluency in both English and the native language is correlated with high academic achievement).

n41. Compare *Lau v. Nichols*, 414 U.S. 563, 571-72 (1974) (Blackmun, J., concurring) ("I stress the fact that the children with whom we are concerned here number about 1,800 I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child ... , I would not regard today's decision ... as conclusive upon the issue whether the statute and the guideline require the funded school district to provide special instruction. For me, the numbers are at the heart of this case.").

n42. See *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 78 (1999) (holding that IDEA requires the provision of a ventilator and one-on-one nursing services to a wheelchair bound student, while noting that "the potential financial burdens imposed ... may be relevant to arriving at sensible construction of the IDEA"); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 892 (1984) (holding that catheterization services to student with spina bifida do not fall within the IDEA's "medical services" exclusion, while noting as a legitimate justification for the exclusion its purpose "to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence").

n43. Before democratic principles could excuse full bilingual education on such grounds, the cost and administrative burdens would have to be substantially greater than those school authorities must incur in meeting their general obligation to fairly and proportionately respond to students' diverse needs.

n44. Compare *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997) (rejecting budgetary constraints as justification for eliminating women's gymnastics and volleyball teams in light of University's failure to afford women proportionate athletic opportunities in violation of Title IX); *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578 (W.D. Pa. 1992) (same).

n45. With regard to public benefits other than education, courts have consistently denied claims that the state is constitutionally required to respond to the language needs of non-native English speakers, often on grounds of cost considerations. For example, in *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975), the court held that the Equal Protection Clause does not obligate a city to administer exams for public employment in other than English to applicants of limited English proficiency. The underlying assumption is that it is legitimate to expect applicants to learn English. In my view, given the importance of access to employment, such a ruling could only satisfy democratic principles if society affords people a fair opportunity to learn English. If so, then an applicant would have to claim that the state's insistence on learning English is illegitimate and that the state must respond to the language needs of those who choose to remain monolingual in their native languages. My argument here is that assuming the state may insist that children learn English, it is obligated in the name of cultural pluralism to assist them to become proficient not only in English but in their native languages as well. The cultural pluralism argument is apt in the educational context because of the intimate connection between education and knowledge of one's culture. It is less apt in the employment context, at least with respect to job related matters as to which the ability of everyone to understand and communicate with each other is significant. When not legitimately job related, however, English-only employment requirements might well pose problems of unfair discrimination or impingement on freedom of association, as, for example, a ban on using one's native language on one's free time. See, e.g., *Rodriguez*, *supra* note 8, at 754-57; L. Darnell Weeden, *The Less Than Fair Employment Practice of English Only Rules in the Workplace*, 7 Nev. L.J. 947 (2007).

n46. Compare *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (Equal Access Act, in requiring public schools that allow non-sectarian student clubs to allow comparable religious clubs, does not violate Establishment Clause per secular purpose of preventing discrimination against religion); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 300 (1963) (although mandatory school prayer and Bible reading violate Establishment Clause, this "does not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature and history." (emphasis in original)).

n47. The high school dropout rates of 16-24-year-olds in 2000 was about 28% for Hispanics, as against 7% for Whites and 13% for African Americans. National Center for Educational Statistics, *Dropout Rates in the United States: 2000*, tbl.A (2001), <http://nces.ed.gov/pubs2002/2002114.pdf>. As of 2003, only about 59% of Hispanics were high school graduates, as compared to 90% of Whites and 80% of African Americans. U.S. Census Bureau, *Educational Attainment in the United States: 2004*, tbl.1a (2005), <http://www.census.gov/population/socdemo/education/cps2004/tab01a-01.pdf>.

n48. On the merits and demerits of voucher systems, see, e.g., James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 *Geo. L.J.* 1287 (2005); James A. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *Yale L.J.* 2043 (2002).

n49. See, e.g., Bill Ong Hing & Kevin R. Johnson, *The Immigrants Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 *Harv. C.R.-C.L. L. Rev.* 99 (2007) (analyzing from the perspective of the immigrants' rights movement the prospects for a multiracial movement for social justice, and suggesting possible common grounds for struggle, in particular the common interest in combating ethnic discrimination, enhancing economic and educational opportunities, confronting entrenched power, and achieving "full social membership in American society"); Thomas Kleven, *Brown's Lesson: To Integrate or Separate Is Not the Question, But How to Achieve a Non-Racist Society*, 5 *U. Md. L.J. Race, Religion, Gender & Class* 43 (2005) (arguing that the achievement of racial and social justice go hand-in-hand and require a unified struggle that bridges current ethnic divisions).