OF DEMOCRACY, DEVALUATION, AND BILINGUAL EDUCATION

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In The Man Who Mistook His Wife for a Hat,1 Oliver Sacks describes the case of Dr. P., a famous musician who had lost his capacity to visualize faces and scenes. Bereft of visual drama and narrative, Dr. P. lived in a world of abstractions, schemata without any connection to concrete realities. As Sacks describes one encounter:

I had stopped at a florist on my way to [Dr. P.'s] apartment and bought myself an extravagant red rose for my buttonhole. Now I removed this and handed it to him. He took it like a botanist or morphologist given a specimen, not like a person given a flower.

‘About six inches in length,’ he commented. ‘A convoluted red form with a linear green attachment.’

‘Yes,’ I said encouragingly, ‘and what do you think it is, Dr. P.?’

‘Not easy to say.’ He seemed perplexed. ‘It lacks the simple symmetry of the Platonic solids, although it may have a higher symmetry of its own. . . . I think this could be an inflorescence or flower.’

‘Could be?’, I queried.

‘Could be,’ he confirmed.

‘Smell it,’ I suggested, and he again looked somewhat puzzled, as if I had asked him to smell a higher symmetry. But he complied courteously, and took it to his nose. Now, suddenly, he came to life.

‘Beautiful!’ he exclaimed. ‘An early rose. What a heavenly smell!’ He started to hum ‘Die Rose, die Lillie . . .’. Reality, it seemed, might be conveyed by smell, not by sight.2

Dr. P. suffered from visual agnosia, a systematic inability to convert the sensory inputs from his eyes into a concrete visual experience. Dr. P. could not comprehend the full implications of what he saw, and today, I want to argue that federal policymakers have suffered from a similarly diminished vision when considering bilingual

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2. Id. at 12-13.
education advocates' claims. In particular, federal decisionmakers have focused narrowly on the relationship between the individual and the State, while largely overlooking the significance of linguistic and cultural groups in the formation of personal identity and the development of interpersonal skills. This partial perception has limited decisionmakers' ability to fashion comprehensive federal policies on bilingual education.

Bilingual education proponents have demanded pluralistic programs that incorporate a child's native language into the instructional process. These include transitional bilingual education ("TBE") programs, which use the child's native tongue as a bridge to acquiring English, and bilingual-bicultural programs, which promote mastery in the child's first language as well as English and foster respect for the child's cultural heritage.

In pressing for such reforms, advocates have questioned the utility of assimilationist programs that rely heavily on English, such as English as a Second Language ("ESL") and structured immersion programs. ESL programs provide intensive English instruction to non-English-proficient ("NEP") and limited-English-proficient ("LEP") students, who otherwise spend most of the day in English-speaking classrooms. Structured immersion programs primarily rely on English for subject-matter instruction, but the curriculum is designed in a way that does not assume extensive familiarity with English.

Reformers have claimed that TBE and bilingual-bicultural pro-

3. The term "group" is broadly used in this Article to refer to aggregations of two or more individuals. Later, I will refine my discussion of groups by examining different types that play some role in bilingual education policymaking. See infra notes 149-200 and accompanying text. This strategy is adopted in a somewhat Whorfian fashion: when arguing simply that groups in general have been undervalued in the political process, only a rather gross definition is necessary; however, if groups are to be affirmatively valued and play a central role in the political process, more refined definitions become essential.

4. These programs utilize subject-matter instruction in a child's native language until the child is sufficiently proficient in English to participate in a regular classroom. To facilitate English acquisition, the child generally learns to read in both the native language and English. Office for Civil Rights, Task-Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under Lau v. Nichols § IX, pt. 5 (1975) [hereinafter Office for Civil Rights], reprinted in Bilingual Education 213, 221 (Keith A. Baker & Adriana A. de Kanter eds., 1983) [hereinafter Bilingual Education]; Keith A. Baker & Adriana A. de Kanter, Federal Policy and the Effectiveness of Bilingual Education, in Bilingual Education, supra, at 34, 35.

5. Office for Civil Rights, supra note 4, § IX, pt. 1.

6. Bilingual Education, supra note 4, at 34.

7. The teacher speaks both the child's native language and English. The child may ask questions about a subject in the native tongue, but the teacher usually responds in English. Id.
grams are not only more effective in promoting academic achievement among NEP and LEP students but also better designed to affirm the continuing value of linguistic and cultural differences than are ESL and structured immersion programs.\(^8\) According to this view, affording a significant role to the student's native language and culture in the instructional process through TBE and bilingual-bicultural education prevents the sense of rejection often engendered by ESL and structured immersion. This sense of rejection can jeopardize a student's development of positive attitudes toward school and impede the child's scholastic attainment. The child's alienation from the curriculum also thwarts the growth of self-esteem and a sense of linguistic and cultural pride, which in turn undermines the student's ability to forge a healthy identity and strong interpersonal relationships through the cultivation of family and community ties.\(^9\)

Despite these justifications for reform, federal policymakers have systematically discounted demands for respect and encouragement of linguistic and cultural group ties. Instead, they have relied on norms of individual achievement or professionalism in education to justify intervention. Whether the federal government has relied on grants-in-aid to promote bilingual education research or civil rights laws to punish program failures, policymakers have consistently undervalued the role of linguistic and cultural groups as identity-forming enclaves and crucibles for forging interpersonal skills.

After reviewing how federal policymakers have devalued the role of groups in the growth of personal identity and interpersonal skills, I will argue that the federal government's selective inattention results not from an involuntary cognitive deficit, as Dr. P.'s did, but from a deliberate normative choice. In particular, this undervalua-

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\(^8\) See, e.g., Bilingual Education: Hearings on S. 428 Before the Special Subcomm. on Bilingual Education of the Senate Comm. on Labor & Public Welfare, 90th Cong., 1st Sess. 74-77 (1967) [hereinafter 1967 Senate Hearings] (remarks of Joseph Monserrat, Director, Migration Division, Department of Labor, Commonwealth of Puerto Rico); id. at 96 (remarks of Monroe Sweetland, Legislative Consultant, Western States, West Coast Regional Office of the National Education Association); id. at 123-25 (remarks of Dr. Joshua Fishman, Research Professor of Social Sciences, Yeshiva University); id. at 244-45 (remarks of Carlos Truan, Texas State Deputy Director, League of United Latin American Citizens); id. at 327 (remarks of Joe Bernal, State Senator, Bexar County, Texas); id. at 425 (statement of Rep. George Brown, D-Cal.); id. at 486-88 (remarks of Marcos de Leon, Board of Directors, Foundation for Mexican-American Studies); id. at 505 (remarks of Rep. Jacob Gilbert, D-N.Y.); id. at 542-43 (remarks of Dr. Frank Cordasco, Professor of Education, Montclair State College); id. at 581-82 (remarks of Louis Cardona, Deputy Commissioner, Manpower Operations, New York City); Bilingual Education: Hearings on H.R. 9840 and H.R. 10224 Before the General Subcomm. on Education of the House Comm. on Education & Labor, 90th Cong., 1st Sess. 306 (1967) [hereinafter 1967 House Hearings] (remarks of Mr. Sweetland).

tion derives from the dominance of two models of democratic decisionmaking in the national arena: special-interest bargaining and "technocratic" republicanism.

Under special-interest bargaining, decisionmakers have embraced norms of individualism that place a premium on personal liberties and the maximization of individual interests. Groups are relevant only insofar as they facilitate the aggregation and expression of already-existing individual preferences. Under this model, the role of linguistic and cultural groups in the formation of personal identity is off limits.

Under technocratic republicanism, federal policymakers have overcome a clash of special interests by turning to allegedly impartial experts, or "technocrats," to identify the public interest. Rather than rely on broad-ranging deliberations among a civic-minded citizenry, as classic republicanism does, decisionmakers have relied on authoritative experts to ferret out collective concerns. In the quest for the common good, technocrats have limited group input that raises the spectre of factionalization. Under this view, linguistic and cultural groups that demand a permanent place for distinctive ways of life are divisive and dangerous.

After evaluating these influential decisionmaking models, I will close by exploring whether they can be supplemented by an ethic of pluralism. At the core of this ethic is a commitment to preserve linguistic and cultural groups without excessively limiting individual autonomy or undermining collective welfare. Linguistic and cultural groups should be affirmatively valued because they play a valuable role in developing individual identity and affording children their first opportunities to engage in compromise and consensus-building. To illustrate the impact on bilingual education policy of acknowledging linguistic and cultural groups' contributions to identity and interpersonal relations, I will examine how current governmental strategies for intervention might be restructured to accommodate an ethic of pluralism.

I. OF BILINGUAL EDUCATION: THE HISTORY OF FEDERAL INTERVENTION ON BEHALF OF LINGUISTIC MINORITY STUDENTS

Language diversity is not a new feature on the American scene. Indeed, the Founders declined to establish an official language in the United States Constitution, in part to avoid infringing on the religious freedom of those who worshiped in languages other than Eng-
lish. Until the late 1960s, federal policy barred unreasonable state infringement on private decisions about language use. The United States Supreme Court's 1923 decision in *Meyer v. Nebraska* exemplifies this view. The Court in *Meyer* struck down a state statute that prohibited instruction in any language other than English for children who had not yet completed the eighth grade. The statute applied to both public and private schools because the State legislature had concluded that in either instance, foreign-language instruction undermined a young child's loyalty to the United States. In overturning the statute as a violation of due process, the Court limited its decision to foreign-language instruction in private schools, announcing that the State could not promote a common language by "materially . . . interfering with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."12

In the late 1960s and early 1970s Congress assumed a more active role in influencing how public schools dealt with linguistic and cultural diversity. Congress passed three statutes designed to promote greater responsiveness to linguistic minority students' needs: the Bilingual Education Act,13 Title VI of the Civil Rights Act,14 and the Equal Educational Opportunities Act ("EEOA").15 Administrative agencies, such as the Office for Civil Rights ("OCR") and the Office of Bilingual Education and Minority Language Affairs ("OBEMLA"), were directed to implement these provisions.16 The federal courts supplemented administrative initiatives by adjudicating linguistic minorities' claims that school districts had violated applicable federal requirements.17


16. See Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 Cal. L. Rev. 1249, 1266-68, 1276-77, 1279-80 (1988). The Office of Bilingual Education and Minority Language Affairs ("OBEMLA") has undergone several name changes since it was first established as the Office of Bilingual Education in 1974. See *id.* at 1277 n.127. Here, I simply refer to it by its current title as the OBEMLA.

All three statutes remain in force and reflect two distinctive approaches to improving the education of linguistic minority students. The Bilingual Education Act authorizes grants-in-aid to school districts for experimentation with innovative programs to meet NEP and LEP students' needs. By contrast, Title VI and the EEOA enable linguistic minority students to demand as a civil right that school districts provide special services that ensure them meaningful access to the curriculum. These two approaches have evolved somewhat independently of one another and are based on competing accounts of why school districts fail to serve linguistic minority students. After reviewing each approach, I will examine how "official English" reformers have attempted to limit bilingual reforms by proposing that English be declared the official language at the federal, state, and local levels.

A. THE BILINGUAL EDUCATION ACT: LEAVING IT TO THE EXPERTS

The Bilingual Education Act of 1968 ("Act") was the first piece of federal legislation devoted exclusively to addressing linguistic minority students' needs. Although the federal government had dealt earlier with the problems of children disadvantaged by segregation and poverty, bilingual education became an organizing principle for Hispanics who considered themselves uniquely excluded from the educational process by linguistic and cultural differences.

During deliberations on the Act, parents and community leaders repeatedly pointed out that bilingual programs were a necessary first step in promoting full participation by linguistic minorities in the nation's political, social, and economic life. Citing the schools' legacy of educational failure among Hispanics, as evidenced by students' low achievement scores and high drop-out rates, bilingual education advocates argued that curricular reforms were essential to break a dismal pattern of diminished life chances. Ultimately, proponents suggested that without greater scholastic success, Hispanics were unlikely to gain better-paying jobs and organize effectively in the political arena.

19. 1967 Senate Hearings, supra note 8, at 1, 270 (remarks of Sen. Ralph Yarborough, D-Tex.).
21. See, e.g., 1967 Senate Hearings, supra note 8, at 74-77 (remarks of Mr. Monserrat); id. at 96 (remarks of Mr. Sweetland); 244-45 (remarks of Sen. Truan); id. at 425 (statement of Rep. Brown); id. at 505 (remarks of Rep. Gilbert). These witnesses sometimes treated statistics on Hispanic students' achievement as interchangeable with those on linguistic minority students' achievement, in part because of the paucity of data available in the late 1960s. The equation of these statistics is inappropriate for
Because some parents and community leaders thought that a harshly assimilationist, English-only curriculum harmed NEP and LEP students' academic performance, they favored programs that incorporated a child's native language and culture. Moreover, they contended that cultural heritage instruction could benefit all Hispanic students, irrespective of their linguistic background.\textsuperscript{22} For these proponents, a TBE program that eventually enabled NEP and LEP students to succeed in the English-speaking curriculum might suffice — at least if the English-speaking curriculum were constructed in a culturally sensitive way.

Other bilingual education advocates, however, rejected programmatic reforms limited to special instruction for linguistic or ethnic minority group children. In the view of these advocates, because school officials would categorize such programs as compensatory education, children with linguistically and culturally distinctive backgrounds would be stigmatized as having a handicap rather than an asset. To avoid such pejorative implications, these parents and community leaders sought to foster linguistic and cultural diversity through bilingual-bicultural education that produced students fully competent in at least two languages and cultures. Because all students could benefit from bilingualism and biculturalism, proponents demanded that English-speaking children from all racial and ethnic backgrounds be exposed to diverse languages and cultures.\textsuperscript{23} According to these advocates, not only would their reforms improve the nation's linguistic competencies and tolerance for other cultures, but also the programs could improve the United States' international relations, especially with Latin America.\textsuperscript{24}

Despite parents' and community leaders' high aspirations for the Bilingual Education Act, it initially was nothing more than a modest

\textsuperscript{22} See, e.g., 1967 House Hearings, supra note 8, at 254-55 (prepared statement of John Carpenter, Center for International Education, University of Southern California); 1967 Senate Hearings, supra note 8, at 397-98 (remarks of Albert Pena, Jr., County Commissioner, Bexar County, Texas); id. at 448-49 (remarks of Dionicio Morales, Executive Director, Mexican-American Opportunity Foundation).

\textsuperscript{23} See, e.g., 1967 House Hearings, supra note 8, at 306 (remarks of Mr. Sweetland); 1967 Senate Hearings, supra note 8, at 123-25 (remarks of Dr. Fishman); id. at 327 (remarks of Sen. Bernal); id. at 488-88 (remarks of Mr. de Leon); id. at 542-43 (remarks of Dr. Cordasco); id. at 581-82 (remarks of Mr. Cardona).

\textsuperscript{24} See, e.g., 1967 House Hearings, supra note 8, at 309-10 (remarks of Mr. Sweetland); 1967 Senate Hearings, supra note 8, at 89-90 (remarks of Dr. William Carr, Executive Secretary of the National Education Association and Secretary-General of the World Confederation of Organizations of the Teaching Profession); id. at 225-26 (remarks of Dr. Hector Garcia, Founder of the American GI Forum); id. at 253-54 (remarks of Chester Christian, Director, Inter-American Institute, University of Texas at El Paso).
grant-in-aid program designed to promote research and experimentation in bilingual education. 25 Legislators emphasized the need for expert assessment of program effectiveness, 26 and Congress vested administrators in the federal educational bureaucracy with considerable discretion to screen funding applications and determine which proposals were pedagogically sound. Eventually, as funding under the Act increased, Congress established a special unit, the Office of Bilingual Education and Minority Language Affairs, to administer grants under the Act. 27

Congress relied on educational experts not only to screen program proposals, but also to monitor and evaluate programs that received funding. Although OBEMLA officials decided which applications deserved federal support, government experts in the Office of Planning, Budget, and Evaluation ("OPBE") were particularly influential in the follow-up evaluation process. 28 In fact, OPBE’s prominence grew as Congress authorized and appropriated more grant money under the Act. Educational researchers at OPBE defined program effectiveness primarily in terms of NEP and LEP students’ scores on academic achievement tests, especially in English and mathematics. 29 This definition implicitly classified bilingual programs as compensatory education. Consequently, influential govern-


27. SUBCOMMITTEE ON ELEMENTARY, SECONDARY, AND VOCATIONAL EDUCATION, 100TH CONG., 1ST SESS., FEDERAL ASSISTANCE FOR ELEMENTARY AND SECONDARY EDUCATION: BACKGROUND INFORMATION ON SELECTED PROGRAMS LIKELY TO BE CONSIDERED FOR REAUTHORIZATION BY THE 100TH CONGRESS (Comm. Print 1987).


29. For example, the American Institute for Research ("AIR") released a report in 1977-78 which concluded that bilingual programs had little, if any, impact on NEP and LEP students’ performance on achievement tests in English and mathematics. AMERICAN INSTITUTES FOR RESEARCH, EVALUATION OF THE IMPACT OF ESEA TITLE VII SPANISH/ENGLISH BILINGUAL EDUCATION PROGRAM at VIII-3 to -5 (1977-78). The report caused furor in Congress, which cared little that the programs improved children’s proficiency in their native tongues. Moran, 76 CAL. L. REV. at 1285, 1286-87.
BILINGUAL EDUCATION assessments said little or nothing about how a bilingual-bicultural curriculum might improve all children's linguistic skills and cultural tolerance.

Underlying the Act's research orientation was an assumption that educators were well-intentioned but ill-informed about how best to serve NEP and LEP pupils. Schools failed to meet linguistic minority students' needs not because educators were hostile or insensitive, but because they were unsure about which instructional techniques would prove effective. Therefore, the federal government's role was simply to sponsor the empirical research necessary to resolve pedagogical uncertainty and then disseminate the findings.\(^\text{30}\)

Intractable doubts about how best to meet linguistic minority students' needs have posed the greatest challenge to Congress's approach under the Bilingual Education Act. Despite years of funding for bilingual education research, experts remain deeply divided over whether TBE and bilingual-bicultural education programs are more effective in promoting academic achievement than ESL and structured immersion programs. For example, in 1977 and 1978, the American Institutes for Research ("AIR") released an evaluation of bilingual education projects, most of which were TBE programs funded under the Act.\(^\text{31}\) The AIR study found that the programs were of limited effectiveness in promoting proficiency in English and mathematics among NEP and LEP students.\(^\text{32}\) Supporters of TBE and bilingual-bicultural instruction bitterly attacked the study as both empirically unsound and ideologically tainted.\(^\text{33}\) In 1981, the OPBE issued yet another negative report on the value of programs that incorporate native-language instruction.\(^\text{34}\) Again, critics denounced the study's methodology, suggesting that its authors had been motivated by philosophical opposition to TBE and bilingual-bicultural instruction.\(^\text{35}\)

The persistence of this volatile, seemingly endless debate among educational researchers has tested policymakers' faith in expert opin-

\(^{30}\) Id. at 1321-22.

\(^{31}\) Id. at 1285 n.151.

\(^{32}\) See supra note 29 and accompanying text.

\(^{33}\) Moran, 33 CAL. L. REV. at 1285-87.


ion. Confronted with ongoing controversy, some legislators have sought alternatives to a research rationale for appropriating funds under the Act. These congressional representatives have cited the need to revitalize local schools' ability to deliver educational services. Grants have been earmarked for "capacity-building," rather than for research and experimentation.\footnote{Capacity-building, though largely undefined in the legislative debate, presumably refers to development of a qualified teaching force and appropriate instructional materials.}  

Faced with mixed opinion among national experts on the efficacy of various techniques, legislators advocating capacity-building have attempted to delegate to local school officials the task of selecting those programs best calculated to meet NEP and LEP students' needs. The effort to shift discretion to the school district level is consistent with a broader push to minimize the federal government's involvement in social welfare programs in favor of state and local control under the "new federalism."\footnote{The new federalism not only reflects a continuing faith in the basic goodwill of local educators, but also assumes that they, rather than national experts, are optimally situated to undertake innovation to meet NEP and LEP students' needs. Of course, bilingual education proponents who continue to doubt the goodwill or capacity of many teachers and administrators have vigorously opposed the new federalists' efforts to transfer discretion to the local level.\footnote{Bilingual Education Amendments of 1981: Hearings on S. 2002 Before the Subcomm. on Education, Arts, and Humanities of the Senate Comm. on Labor & Human Resources, 97th Cong., 2d Sess. 2-3 (1982) (remarks of Terrel Bell, U.S. Secretary of Education); The Bilingual Education Improvement Act of 1983: Hearings on H.R. 2882 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education & Labor, 98th Cong., 1st Sess. 25 (1983) (remarks of Sec. Bell); Bilingual Education Act of 1984, 20 U.S.C. § 3242(e)(Supp. IV 1986), amended by Bilingual Education Act of 1988, Pub. L. No. 100-297, 102 Stat. 274 (1988).}}

B. TITLE VI AND THE EQUAL EDUCATIONAL OPPORTUNITIES ACT: APPLYING THE CIVIL RIGHTS ENFORCEMENT REGIME

In marked contrast to the Bilingual Education Act, both Title VI and the EEOA create enforceable entitlements to special assistance for NEP and LEP children under a civil rights framework. Linguistic minority students can assert these rights by filing administrative complaints with the Office for Civil Rights or by bringing suit in fed-
eral district court. Because Title VI and the EEOA developed in distinct ways, I will examine them separately here.

1. **Title VI of the Civil Rights Act**

Title VI of the Civil Rights Act of 1964 provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."\(^{40}\) As originally enacted, Title VI was an omnibus civil rights bill primarily aimed at eliminating racial segregation in the South.\(^{41}\) The statute’s implications for linguistic minority students at first were unclear. Only in 1970 did OCR issue a memorandum proclaiming that "[w]here 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."\(^{42}\)

OCR’s interpretation utilized an “effects” test, which did not require linguistic minority plaintiffs to prove discriminatory intent as an element of a Title VI violation. Rather, students could obtain affirmative relief simply by showing that a district’s program had the effect of excluding them from meaningful participation in the curriculum.\(^{43}\) If a district failed to satisfy Title VI standards, it could lose federal funding or become subject to binding program requirements as a condition of receiving further assistance.\(^{44}\) The memorandum’s reference to a “language deficiency” suggests that OCR was concerned only that districts afford NEP and LEP students compensatory education programs, not that districts implement an extensive bilingual-bicultural curriculum for all students.\(^{45}\)

OCR’s approach to protecting linguistic minority students was heavily influenced by its previous experience in battling racial discrimination in the South. By adopting a civil rights enforcement re-


\(^{43}\) Margulies, 17 J.L. & Soc. Probs. at 115.

\(^{44}\) Rabkin, *supra* note 41, at 307-08.

gime, OCR posited that school districts had to be punished for abuses of discretion arising from hostility or insensitivity to NEP and LEP students' needs. OCR therefore focused on correcting the unjust exclusion of linguistic minority students from the educational curriculum, rather than on promoting research and experimentation to resolve pedagogical uncertainty. Although the Bilingual Education Act accorded districts considerable flexibility to adopt a range of programs because of doubts about their relative effectiveness, Title VI constrained districts' options by sanctioning the use of ineffectual programs.46

Despite OCR's 1970 pronouncement, federal officials initially devoted few resources to enforcing NEP and LEP students' rights under Title VI.47 Only in 1974, after the United States Supreme Court decided Lau v. Nichols,48 did OCR mount a substantial enforcement campaign to address linguistic minority concerns. In Lau, a class of non-English-speaking Chinese students sued the San Francisco, California, school system, alleging that it had failed to meet their special needs. The Supreme Court found that of the 2856 Chinese NEP and LEP students in the district, only about one-third were receiving special instruction.49 The Court relied on OCR's interpretation of Title VI to conclude that the students' civil rights had been violated. The Court ruled that the district's failure to provide any special assistance to nearly 2000 linguistic minority students effectively barred them from participating in the school program, regardless of the district's motivations.50 The Court remanded the case to the trial court to allow the school district to apply its expertise in formulating an appropriate remedy.51

In Lau, the Court relied heavily on the need to vindicate individual students' rights to equal educational opportunity. The majority's decision did not discuss the relevance of preserving avenues for membership in linguistic and cultural groups. Only Chief Justice Warren Burger and Justice Harry Blackmun, in a separate concurrence, dealt with the relationship between an individual claim to bilingual assistance and group membership. Carefully limiting the Court's decision to its facts, they stressed that approximately 1800 children had been deprived of meaningful schooling because of their inability to under-

47. San Miguel, 65 SOC. SCI. Q. at 507. See generally Rabkin, supra note 41, at 304-53 (evaluating OCR's systematic enforcement problems).
50. Id. at 566-69.
51. Id. at 569.
stand English. According to Justice Blackmun's concurrence, "numbers are at the heart of this case," and the decision would not be binding where only one child or a few children were affected. Unfortunately, the concurring opinion did not make clear whether numbers were relevant simply because they influenced the feasibility of affording relief or because a group, rather than an individual, interest was at stake. Given the Court's ongoing emphasis on the individual nature of entitlements, it seems likely that feasibility considerations underpinned the concurrence's remarks.

The Court's decision in *Lau* had a number of ramifications. It spurred Congress to authorize and appropriate more funds under the Bilingual Education Act, to attach more conditions to funding grants, and to monitor grant recipients more extensively through expert evaluation than it had before 1974. Congress increased grants to school districts in response to state and local educators' concerns about complying with *Lau*. At the same time, Congress abandoned the Act's pure research orientation and began to demand assurances that districts would not trample students' civil rights. The increased prominence of Title VI thus led to greater efforts to constrain school officials' discretion under the Bilingual Education Act.

More importantly, the *Lau* decision prompted OCR to promulgate the *Lau* Guidelines, which set forth the characteristics of acceptable programs for linguistic minority students under Title VI. In 1975, OCR appointed a task force composed of bilingual educators, lawyers, and representatives of linguistic minority groups to draft the Guidelines. The task force members uniformly favored heavy reliance on native-language instruction, and the Guidelines plainly reflected this preference. By participating in the Guidelines' formulation, Hispanic activists were able to reintroduce their concerns about preserving and promoting bilingualism and biculturalism as part of an effort to expand the federal government's narrow focus on compensatory education.

The Guidelines required schools to use a TBE program, a bilin-

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52. *Id.* at 571-72 (Blackmun, J., concurring).
53. *Id.* at 572 (Blackmun, J., concurring).
55. OFFICE FOR CIVIL RIGHTS, supra note 4, reprinted in BILINGUAL EDUCATION, supra note 4, at 213-21. The U.S. Office of Education also established *Lau* Centers to assist school districts in complying with the Supreme Court's decision. CHARLES HARRINGTON, BILINGUAL EDUCATION IN THE UNITED STATES: A VIEW FROM 1980, at 6-7 (1980).
gual-bicultural education program, or a multilingual-multicultural program at the elementary and intermediate school levels. All three programs relied on a child's native language and culture in developing academic skills and enhancing a student's adjustment to school. In addition, the bilingual-bicultural and multilingual-multicultural approaches reflected an especially strong commitment to fostering linguistic competencies and cultural tolerance. Only at the secondary school level could teachers employ intensive English instructional programs, such as ESL and structured immersion; the Guidelines justified the use of such programs based on high school students' greater maturity and the limited time available for them to learn English.

The Lau Guidelines represented the federal government's strongest exercise of centralized control over program options for NEP and LEP students. Promulgation of the Guidelines was particularly noteworthy because OCR began to devote substantial resources to their enforcement. For example, in 1973 and 1974, OCR subjected only seventy-two districts to compliance reviews, but after the Court's decision, in 1975 and 1976 alone, OCR investigated more than 300 districts for failure to comply with Title VI's requirements.

Only a few years after the Guidelines were issued, the Lau enforcement regime began to unravel. The Guidelines could not withstand increasing pedagogical uncertainty and changing judicial views about Title VI's scope. In 1977 and 1978, the federal government released the AIR evaluation, which indicated that the benefits of native-language instruction in promoting academic achievement were equivocal at best. The study heightened doubts about whether the programs were motivated by pedagogical concerns or an ideological agenda. At about the same time that the AIR study rekindled controversy about the utility of bilingual education programs, the Supreme Court suggested in Regents of the University of California v. Bakke that the effects test endorsed in Lau was inappropriate under Title VI. Although Lau technically remained good law, the

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58. The TBE program used native-language instruction only until a child was proficient in English, while the bilingual-bicultural and multilingual-multicultural programs continued to utilize native-language instruction to produce students who were proficient in two or more languages or cultures. OFFICE FOR CIVIL RIGHTS, supra note 4, reprinted in BILINGUAL EDUCATION, supra note 4, at 221.
59. Id. at 215-18.
60. NATIONAL ADVISORY COUNCIL ON BILINGUAL EDUCATION, SECOND ANNUAL REPORT 16-17 (Nov. 1976); see Levin, 12 J.L. & EDUC. at 37 (observing that OCR negotiated nearly 500 consent decrees on the basis of the Guidelines, which covered most districts with substantial populations of linguistic minority students).
61. See supra notes 29-32 and accompanying text.
Court indicated that plaintiffs should be required to prove discriminatory intent as well as an adverse effect to establish a Title VI violation. With the release of the AIR findings and the *Bakke* decision, the *Lau* Guidelines became extremely vulnerable to attack. The Guidelines established curricular requirements based on controverted assumptions about program effectiveness and then applied an effects test of dubious legality to sanction districts for non-compliance.

In *Northwest Arctic School District v. Califano*, the State of Alaska and several of its school districts sued to enjoin enforcement of the Guidelines on the ground that their rigid application made them tantamount to rules. According to the plaintiffs, the Guidelines were invalid because the public had no opportunity to provide input through the notice and comment rulemaking process prescribed under the Administrative Procedure Act. In September, 1978, the United States District Court for the District of Alaska resolved the dispute by approving a consent decree that required the United States Department of Health, Education, and Welfare to publish the Guidelines as proposed regulations.

Rather than publish the Guidelines, the newly-formed Department of Education issued a Notice of Proposed Rulemaking ("NPRM") in August, 1980, that emphasized rapid English acquisition coupled with native-language instruction to prevent a child from falling behind in required courses. By stressing the prompt acquisition of English, the NPRM retreated from the Guidelines' emphasis on long-term enrichment through bilingualism and biculturalism to a narrower focus on short-term compensatory education. In general, the NPRM accorded state and local educators greater discretion in making program choices than the Guidelines had.

The NPRM provoked acrimonious debate. On the one hand, proponents of TBE and bilingual-bicultural education programs argued that the NPRM did not go far enough in protecting NEP and LEP students from exclusionary educational practices. On the other hand, professional educators attacked the NPRM as an unwarranted intru-
sion on their discretionary prerogatives. Official English reformers, who sought to have English declared the official language, further fueled the controversy by alleging that bilingual education programs promoted separatism and threatened national unity.\textsuperscript{70} Paralyzed by political wrangling, the Department of Education never officially adopted the NPRM.\textsuperscript{71} Later, the \textit{Lau} Guidelines were withdrawn, and no similarly comprehensive regulations have replaced them.\textsuperscript{72} Title VI's protections for NEP and LEP students thus have come full circle: the controlling administrative pronouncement is once again OCR's 1970 memorandum, which served as the basis for the \textit{Lau} decision.

2. The Equal Educational Opportunities Act

By passing the Equal Educational Opportunities Act in 1974, Congress affirmed the Supreme Court's approach in \textit{Lau} by codifying it.\textsuperscript{73} In contrast to Title VI, the EEOA expressly deals with the problems of linguistic minority students. The EEOA provides that: "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . 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."\textsuperscript{74} Like the \textit{Lau} decision, the EEOA adopts an effects test and refrains from prescribing particular program choices.\textsuperscript{75}

Mirroring \textit{Lau}, the EEOA focuses on compensatory education for the disadvantaged, rather than treating bilingualism and biculturalism as assets to be encouraged. In fact, the EEOA was designed to implement quality education programs in lieu of relying on the increasingly unpopular remedy of desegregation through court-ordered busing.\textsuperscript{76} Drawing on the rationale of the Court in \textit{Lau}, Congress concluded that special programs for NEP and LEP students constituted one such quality educational measure for the underprivileged.

Initially, the EEOA had relatively little impact on linguistic minority students' claims against school districts because Title VI and

\textsuperscript{70} Id. at 39-40, 51-53, 56.
\textsuperscript{71} Id. at 50.
\textsuperscript{73} Moran, 76 CAL. L. REV. at 1271.
\textsuperscript{76} Id. at 233-34, 236.
the Lau Guidelines already afforded extensive protections. With the demise of the Guidelines, however, the EEOA became an attractive basis for challenging school district practices because it explicitly embodied an effects test. According to the leading decision on the EEOA's requirements, school districts can establish compliance by showing that: (1) they have adopted programs based on sound educational theories; (2) they have implemented the theories effectively through their choice of programs and practices; and (3) they have monitored the results of the programs carefully and modified the curriculum as necessary. The EEOA thus mandates that teachers and administrators exercise their discretion wisely in making program choices for NEP and LEP students. Unfortunately, even if plaintiffs establish an abuse of discretion under these criteria, the EEOA provides little guidance in formulating an appropriate remedy.

C. THE PROPOSED OFFICIAL LANGUAGE AMENDMENT: PRESERVING UNITY IN THE FACE OF DIVERSITY

During the early 1980s, official English reformers began to press for an amendment to make English the official language of the United States. These reformers asserted that TBE and bilingual-bicultural education programs threatened to balkanize language groups and promote separatism. By making English the official language, official English proponents hoped to foster national unity by restoring the preeminence of English and the American way of life.

Official English reformers have enjoyed relatively little success in enacting an amendment to the United States Constitution that would make English the official language. Their greatest victories have come at the state and local levels, but state constitutional amendments and statutes and municipal ordinances making English the official language often have been so vague that their impact on bilingual education programs is uncertain. Moreover, state and local pronouncements making English the official language do not supersede federal requirements regarding bilingual education. For example, a state's official language amendment cannot obviate school

77. Moran, 76 CAL. L. REV. at 1271-72.
78. Id. at 1298.
80. See generally Joseph Leibowicz, Note, The Proposed English Language Amendment: Shield or Sword?, 3 YALE L. & POL'Y REV. 519 (1985) (discussing recent attempts to make English the official language).
82. Moran, 76 CAL. L. REV. at 1256; Moran, 75 CAL. L. REV. at 332-33.
districts’ obligations under a consent decree or federal court order based on Title VI and the EEOA. 83

The official English movement portrays the United States as a consensual community with a common language and culture. By rejecting multilingualism and multiculturalism as divisive and unpatriotic, official English proponents have attempted to discredit linguistic and cultural groups’ efforts to preserve distinctive ways of life. Ironically, however, official English advocates rely almost exclusively on language as the unifying thread of the United States. In an increasingly heterogeneous, urban society, the notion of “an American way of life” apparently has become difficult to define. Indeed, as the parameters of the American way become increasingly amorphous, a sub-culture that espouses cohesive customs and values may seem particularly threatening. 84

II. OF DEVALUATION: DOMINANT MODELS OF DECISIONMAKING AND THE INVISIBILITY OF CERTAIN CONTRIBUTIONS BY LINGUISTIC AND CULTURAL GROUPS

The history of federal intervention in bilingual education reveals a consistent preference among policymakers for improving individual achievement among NEP and LEP students as well as promoting norms of professionalism in education. Decisionmakers largely ignore contentions that schools must help preserve the integrity of linguistic and cultural groups to develop positive identities among students and foster improved relations among students from different backgrounds.

I will argue that the systematic neglect of claims based on these group functions stems from the dominance of two models of decision-making in the bilingual education field: special-interest bargaining and technocratic republicanism. Under special-interest bargaining, policymakers concern themselves with individual preferences, not group interests; by contrast, under technocratic republicanism, decisionmakers focus on transcending self-interest to advance the common good. Neither model acknowledges a significant and valued role for linguistic and cultural groups in the formation of individual preferences or the forging of societal consensus. The models are so pow-

83. Moran, 75 CAL. L. REV. at 356.
84. See PAULA S. FASS, OUTSIDE IN: MINORITIES AND THE TRANSFORMATION OF AMERICAN EDUCATION 23-24 (1989)(noting how the decline of early nineteenth-century Protestantism and its clear-cut implications for citizenship training coincided with a greater concern about how immigrants would be assimilated into American life in the late 1800s and early 1900s).
erful that even recent critiques of federal bilingual education policy
by the new federalists and official English advocates have focused ex-
clusively on relationships between individuals and the State, while
neglecting the potential contributions of groups as identity-forming
enclaves and laboratories for developing interpersonal skills.

A. THE DEVALUATION OF THE ROLE OF LINGUISTIC AND CULTURAL
   GROUPS IN FORGING PERSONAL IDENTITY AND
   INTERPERSONAL SKILLS

In developing federal bilingual education policy, decisionmakers
have emphasized the maximization of NEP and LEP students' indi-
vidual achievement through the proper exercise of professional dis-
cretion. Under the Bilingual Education Act, for example, high scores
on standardized achievement tests have become the hallmark of suc-
cessful programs.85 Compliance with Title VI and the EEOA often is
assessed by comparing linguistic minority students' achievement test
scores to those of English-speaking students to determine whether
school districts have provided meaningful access to the curriculum.86
This focus on individual achievement has made compensatory educa-
tion programs the most sensible policy choice; linguistic minority stu-
dents simply are classified as underachievers whose academic
shortcomings must be rectified.

In the pursuit of individual achievement, federal policymakers
have relied heavily on educational experts. Under the Bilingual Edu-
cation Act, experts have determined which grant applications deserve
funding and have evaluated the success of federally-sponsored pro-
grams.87 To formulate compliance standards under Title VI, OCR ap-
pointed a task force of experts to draft the Lau Guidelines.88 Later,
confronted with disagreement among experts about program effec-
tiveness, OCR withdrew the Guidelines.89

By turning to experts, federal policymakers sought to unravel a
Gordian knot of conflicting claims about bilingual education through
the application of empirical methods. Experts used measurement
techniques, such as standardized tests, that treat individual achieve-
ment scores in subjects like English and mathematics as proxies for
success. Under this approach, the sole objective of the programs in

85. See supra note 28 and accompanying text.
86. See MICHAEL A. REBELL & ARTHUR P. BLOCK, EDUCATIONAL POLICY MAKING
   AND THE COURTS 147-65 (1982) [hereinafter REBELL & BLOCK] (describing the discov-
ery process in Otero v. Mesa County Valley Sch. Dist. No. 51, 628 F.2d 1271 (10th Cir.
1980)).
87. See supra notes 25-29 and accompanying text.
88. See supra note 56 and accompanying text.
89. See supra notes 61-72 and accompanying text.
meeting the needs of NEP and LEP students is the straightforward maximization of technical, academic skills.

Policymakers have neglected arguments that native-language and cultural heritage instruction are essential to preserve linguistic and cultural identifications and to foster respect for the linguistically and culturally different. When the role of linguistic and cultural groups in shaping identity and structuring interpersonal interactions has been addressed, its reception has been chilly. The official English movement, for instance, has labeled demands for recognition of the ongoing influence of linguistic and cultural groups as illegitimate and subversive of a common national identity. Although federal policymakers have not yet taken significant steps to make English the official language, they have expressed their distaste for claims about group influence in other ways. For example, when high-level officials signed a consent decree in *Northwest Arctic School District v. Califano* and dismantled the *Lau* Guidelines, they made clear their antipathy to programs that maintain native language and culture. Joseph Califano, then Secretary of Health, Education, and Welfare, remarked that federally-sponsored bilingual programs "had become captive[s] of the professional Hispanic and other ethnic groups, with their understandably emotional but often exaggerated political rhetoric of biculturalism." President Jimmy Carter indicated his agreement when he wrote in the margin of a memorandum on bilingual education: "I want language taught — not ethnic 'culture.'"

If, however, the schools influence aspects of a child's development, such as self-image and interactions with peers, policymakers must consider not only how to transmit technical skills but also how to transmit appropriate social values. School officials must move beyond exclusive reliance on experts to consider the views of parents and community leaders, who can attest to how linguistic and cultural ties shape children's identities and relationships with others. Broadened consultation is certainly necessary if schools hope to transform bilingual education from a set of compensatory programs defining a child's native language as a barrier into a set of enrichment programs defining bilingualism and biculturalism as assets.

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90. *See supra* notes 80-84 and accompanying text.
B. TWO MODELS OF DECISIONMAKING

Here, I will examine the two dominant paradigms in federal decisionmaking regarding bilingual education: special-interest bargaining and technocratic republicanism. Each emphasizes an individual's relationship to the State and only considers linguistic and cultural groups to the extent that they mediate between the State and the individual. Consequently, both produce policies that focus on norms of individual achievement or professionalism to the exclusion of concerns about linguistic and cultural groups' vitality and integrity.

1. Special-Interest Bargaining

Under a special-interest bargaining model, the political process aggregates individual preferences and intervenes as necessary to maximize overall utility or satisfaction. Under this view, bilingual education policymakers primarily have confronted a clash between special-interest groups seeking to optimize linguistic minority students' access to education and educational lobbies seeking to maximize their members' professional prerogatives.

Under the Bilingual Education Act, these claims have been balanced by allocating scarce grant money to educators specifically charged with improving the scholastic performance of NEP and LEP students. This compromise enhances the resources available to linguistic minority pupils and at the same time preserves considerable discretion for administrators and teachers. Under Title VI and the EEOA, these competing interests have been addressed by affording minority pupils who do not speak English fluently an entitlement to special educational assistance. Again, resources are directed to NEP and LEP children, but this approach vests less discretion in local teachers and administrators than a grant-in-aid plan. The Lau Guidelines, coupled with significant enforcement efforts, reflected a serious intrusion on professional prerogatives in the interest of ensuring student access to the curriculum. The Guidelines' decline reestablishes the balance of interests in favor of preserving local educators' discretion.

Special-interest politics is especially significant for decisionmakers directly accountable to the electorate, such as legislators.


95. See Moran, 76 Cal. L. Rev. at 1251-53.
After all, the electorate presumably is composed of self-interested individuals who determine which candidates to vote for based on how well they have served voters' preferences. Special-interest groups wield less immediate influence over appointees who do not run for reelection, such as career bureaucrats in administrative agencies and judges who enjoy life tenure.96

Constrained by special-interest bargaining, Congress enacted the Bilingual Education Act, a grant-in-aid program that both appeased minority groups by enhancing resources for bilingual programs and appealed to educators by leaving professional discretion largely intact. The expansion of the civil rights regime to encompass NEP and LEP students upset this legislative compromise of linguistic minority interests and educational prerogatives.

Not surprisingly, OCR and the federal courts played an important role in shifting the balance of interests. With their greater insulation from special-interest politics, judges and administrators could act more forcefully on behalf of under-organized linguistic minorities than could legislators who faced the predictable wrath of powerful education lobbies. Yet, when the civil rights regime generated excessive controversy in the political arena, courts and administrative agencies eventually retreated from their initiatives on behalf of linguistic minorities by relaxing federal regulation under Title VI and the EEOA.

In weighing competing claims of interest, federal policymakers have assumed that individuals reign supreme in the policymaking process. To avoid overreaching individual choice, decisionmakers have treated personal preferences as exogenous; that is, policymakers do not concern themselves with the source of individual utilities.97 Groups therefore are recognized only insofar as they facilitate the expression of individual interests. Isolated persons generally cannot invest the resources necessary to gain effective access to a centralized,


federal policymaking process. By joining with others who share similar interests, individuals improve the likelihood that decisionmakers will recognize their preferences and accord them adequate weight.\textsuperscript{98} Under this view, Hispanic advocacy groups are relevant to bilingual education policymaking mainly as spokespersons for parents and children who otherwise could not express their views effectively through the political process.

Because a special-interest bargaining model treats groups as conduits for freely chosen individual preferences, rather than as enclaves for ongoing identity formation, decisionmakers have been unreceptive to claims that linguistic and cultural groups must be preserved to ensure that individual values are not distorted by coercive assimilation. The emphasis on groups as a bulwark against government overreaching reveals that the State has played and will continue to play a significant role in shaping the choices of linguistically and culturally different groups through socialization practices in the schools. This intimation is antithetical to the assumption that individual choice is shaped free of government interference.\textsuperscript{99}

Moreover, the focus on linguistic and cultural groups as mediating influences that mold personal identity undercuts the assumption that individual preferences invariably precede and determine group formation. Under special-interest bargaining, a group is nothing but the aggregation of personal preferences, an artifact of individual choices. If linguistic and cultural groups explicitly seek to shape the values of their members, these groups cease to be wholly subordinate to individuals. When linguistic and cultural minority group leaders openly acknowledge a desire to influence choices of their members, decisionmakers quickly dismiss their efforts as demagoguery that places group interests before individual liberties.\textsuperscript{100} Fearing group tyranny, policymakers systematically reject a linguistic or cultural

\textsuperscript{98} DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS 264-70 (2d ed. 1971) [hereinafter TRUMAN] (noting that the basic objective of special-interest politics is to gain access to decisionmakers).

\textsuperscript{99} Sunstein, 38 STAN. L. REV. at 33 (observing that state efforts to shape preferences are a form of tyranny under special-interest bargaining); see Robert M. Cover, The Supreme Court 1982 Term — Foreword: Nomos and Narrative, 97 HARV. L. REV. 4, 60-68 (1983) (describing the conflict between a state's efforts at legal ordering and the creation of insular and autonomous normative communities through the educational process).

\textsuperscript{100} See Bernard Manin, On Legitimacy and Political Deliberation, 15 POL. THEORY 338, 345-46 (1987) (describing Rousseau's fear that special interests would seduce individuals through influence and eloquence); William S. Livingston, Introduction Liberal Democracy: The Heritage of the Declaration and the Constitution, in A PROSPECT OF LIBERAL DEMOCRACY 3, 6-9 (William S. Livingston ed., 1979) (describing the tensions inherent in liberal democracy, including the rise of intermediate groups that obscure the relationship between the state and the individual).
group's claim that its way of life should be valued as a crucible in which individual identities can be forged.

Under a special-interest bargaining model, groups are harmful if they obstruct the effective expression of individual preferences. That is, decisionmakers must evaluate whether group leaders accurately have identified, aggregated, and communicated their members' preferences. Often policymakers worry that a leader will discount members' preferences in order to perpetuate the organization as a personal power base. Dissenters then will be excluded from decisionmaking, and competing interests will be seriously undervalued.

The government therefore concerns itself with the concentration of power in large, private groups because their leaders potentially can monopolize access to the political process.

Concerns about lack of representation are particularly acute when leaders purport to speak for individuals with little sophistication about the political process and few resources to advance their interests effectively. Because linguistic and cultural minorities often are poor and relatively uneducated, critics regularly claim that bilingual education advocates do not genuinely reflect the needs of their constituents. For example, in lawsuits filed under Title VI and the EEOA, some school districts charged that civil rights attorneys were "outside agitators" who pursued their own political agenda at the expense of their clients. Similarly, during legislative and administrative hearings, opponents of bilingual education claimed that activists had "stacked" the hearings by busing in program supporters who were not representative of the linguistic minority population.

102. See William A. Galston, Pluralism and Social Unity, 99 ETHICS 711, 722 (1989) (noting that "[a]t the heart of the liberal vision is the conviction that individuality is not only shaped but also threatened by the community, that concentrations of social and political power can serve as vehicles for repressing as well expressing individual identity").
103. See STEVEN LUKES, POWER 16-20 (1974) (describing how certain persons and groups control the decisionmaking agenda in ways that exclude the concerns of other persons and groups). These pervasive concerns about representativeness would not arise in a political environment characterized by freely available information and low transaction costs. In such a world, members easily could leave a group upon learning that its leaders had adopted positions divergent from their own. In a world characterized by imperfect information and high transaction costs, however, leaders can conceal unrepresentative actions from their unwitting constituents. Even if constituents learn of the actions, they may tolerate some deviation from their personal views simply because of the high costs of exiting the group in search of more adequate representation.
104. For data on the education and income of non-English-proficient Hispanics, see LORI S. ORUM, THE EDUCATION OF HISPANIANS: SELECTED STATISTICS 6-25 (1985); Moran, 75 CAL. L. REV. at 352.
Courts have not been receptive to such allegations, perhaps in part because judges are less likely than legislators and administrators to endorse wholeheartedly a special-interest bargaining model. However, it is less clear how doubts about representation have influenced legislators and administrators. Certainly, efforts to dismantle the Lau Guidelines based on a perception that programs had become the captives of "professional Hispanic and other ethnic groups" suggest that high-level federal officials feared that distorted representation had influenced bilingual education policy.

Because personal preferences are treated as exogenous by the special-interest bargaining model, federal policymakers also have disregarded arguments that bilingual education could serve as a springboard to mobilize Hispanics in the political process. Decisionmakers typically attribute the failure to organize to voluntary individual choices. According to this view, based on weighing the costs and benefits of organization, potential members simply conclude that their interests are better served by not affiliating. To avoid distorting individual choices, the government refrains from promoting groups' organizational efforts, including those of linguistic and cultural minorities. Acknowledging that policy outcomes, like support for bilingual education, could catalyze individual action suggests that government policies shape personal utilities; this implication once more impermissibly violates the assumption of individual sovereignty and exogenous preferences.

Ironically, advocates who serve individuals with limited resources face a double bind. Governmental unwillingness to subsidize linguistic and cultural minority group organization makes it less likely that potential constituents will mobilize effectively. However, if spokespeople come forward on their behalf, policymakers will doubt the genuineness of their representation.

2. Technocratic Republicanism

Although special-interest bargaining has exerted a strong influence over federal policymakers, a variant of civic republicanism, which I will call "technocratic republicanism," also has commanded some support. Classically, civic republicanism relies on consensual decisionmaking. To determine the common good, policymakers en-

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107. See, e.g., Keyes v. School Dist. No. 1, 576 F. Supp. 1503, 1508 (D. Colo. 1983) (rejecting school district's claims that advocates did not represent their clients' interests and were pursuing their own political agenda).

108. See supra notes 91-93 and accompanying text.

courage broad-ranging, reflective deliberations that draw on a wide assortment of citizens. This deliberative process does more than aggregate preferences; it reconciles conflicting interests to yield a sense of shared purpose.\footnote{110} Special-interest bargaining encourages participants to make arm's-length compromises based on self-advancement, so participants concern themselves with others' interests only strategically to strike an advantageous bargain.\footnote{111} By contrast, civic republicanism demands that citizens place their own interests in context by carefully considering and even empathizing with others' concerns. A compromise by atomistic actors is second best because mutual agreement, not self-advancement, is the political objective.\footnote{112}

Perhaps the classical model of civic republicanism made sense in an era in which small, relatively homogeneous communities were the loci of decisionmaking.\footnote{113} Today, the model seems chimerical. With the rise of a centralized, modern administrative state, broad-ranging participation appears unlikely. It is hard to achieve a town meeting atmosphere in a national arena that serves more than two hundred million citizens.\footnote{114} In addition, urban populations reflect such a wide array of values that consensus seems a distant possibility. In fact, the special-interest bargaining model reflects these very doubts: it relies on compromise because actors with wide-ranging concerns cannot effectively transcend self-interest to serve a larger social good.\footnote{115} Moreover, in the modern policymaking arena, civic republicans could find themselves consistently losing to special-interest partisans in a political version of the Prisoner's Dilemma game. Those choosing to cooperate in pursuit of the common good inevitably would be hurt by


\footnote{111} See Richard A. Epstein, Modern Republicanism — Or The Flight from Substance, 97 YALE L.J. 1633, 1640-41 (1988) (describing the rise of strategic behavior in imperfect, unregulated political markets operating on competitive exchange principles).

\footnote{112} Sunstein, 97 YALE L.J. at 1549.


\footnote{114} See Horwitz, 29 WM. & MARY L. REV. at 71-73; Ingber 69 TEX. L. REV. at 34; see also Kathryn Abrams, Law's Republicanism, 97 YALE L.J. 1591, 1604-06 (1988) (arguing for the superiority of local over national institutions for fostering a republican ethic); Paul Brest, Further Beyond the Republican Revival: Toward Radical Republicanism, 97 YALE L.J. 1623, 1626 (1988) (stating that the republican ethic is best derived from local rather than national institutions).

those choosing to compete unabashedly for limited resources.116

Policymakers dedicated to reviving a commitment to the common good are ambivalent about the role of groups, especially geographically localized ones, in the policymaking process. Small, localized groups could provide a forum for broad-ranging deliberations among the citizenry.117 Indeed, such an approach illustrates the ways in which intermediate groups can nurture the development of identity and interpersonal skills. Classic republicanism openly acknowledges the role that civic groups play in developing the identity of a citizen and the capacity for empathy essential to successful public deliberations.118 Calls for decentralized decisionmaking undoubtedly reflect a desire to use local arenas to encourage such civic virtue.

Still, when policymakers rely on small-scale deliberations, they must be confident that once localized groups achieve agreement, they will return to the centralized arena committed to consensus-building with other such groups. Based on the lessons of special-interest politics, republican decisionmakers fear that these local groups often will prove contentious, rather than conciliatory. That is, each group will return to the national arena rigidly determined that its resolution of the issues prevail.119 In fact, when federal policymakers decentralize educational decisionmaking with little or no centralized review of local decisions, their approach probably reflects doubts that parochial interests can be forged into a workable national consensus.120

Because of the difficulties of incorporating traditional republican deliberations into a centralized policymaking process, federal decisionmakers have employed a modified approach, technocratic republicanism. To avoid the intransigencies of special-interest politics, technocratic republicans rely on input from experts who purportedly transcend self-interest to deliberate objectively about the common good. Experts avoid becoming the captives of special-interest groups

116. See Epstein, 97 YALE L.J. at 1649-50 (stating that "individual self-interest is the engine both of economic and social advancement and political intrigue. . . . [The problem of self-interest] simply cannot be answered by assuming that universal deliberation will provide . . . some magic bullet that will cure all our intellectual and political ills").
118. As will be noted at greater length later, the classic republican model makes no allowance for the contributions that other, private groups can make to personality development. By contrast, an ethic of pluralism attempts to address such contributions where significant to the policymaking process. See infra notes 201-13 and accompanying text.
120. See Brest, 97 YALE L.J. at 1629-30 (noting the conflicting values at stake in a case involving a school board's decision to ban certain books from the library and the ambiguous role of the federal courts in regulating local politics).
by applying neutral and impartial methods to policy problems.\textsuperscript{121} Paradoxically, rather than foster deliberations by a broad cross-section of the population, technocratic republicanism designates an elite body of trustworthy experts to serve as the citizenry’s proxies. These experts ascertain the public interest through professional dialogue.\textsuperscript{122} Such a modification divests republicanism of its commitment to small-scale, localized debate, the very element of the model that made it possible to consider the role of intermediate groups in fostering personal identity and interpersonal skills.

Because special-interest politics is particularly influential in the legislature, elected representatives may engage in republican decisionmaking — even of the technocratic variety — only under exceptional circumstances. On the other hand, federal judges and career bureaucrats in administrative agencies, all of whom are more insulated from electoral pressures, may embrace republican alternatives to special-interest bargaining more readily than their legislative counterparts. Technocratic republicanism may be especially attractive to administrative agencies that base their authority on claims of expertise. Indeed, courts and administrative agencies sometimes can prompt legislatures to temper special-interest bargaining with republican norms — at least where such outcomes will not lead to legislators’ certain defeat at the ballot box.\textsuperscript{123}

The bilingual education debate reveals the influence of technocratic republicanism. As part of the civil rights perspective, decisionmakers have supplemented special-interest bargaining with a republican commitment to serve the public interest by distributing educational services equitably among all students. As part of this republican commitment, teachers and administrators should be responsive to the needs of NEP and LEP students and bring them fully within the school community. That is, school officials cannot exclude linguistically or culturally different groups from the definition of the common good.\textsuperscript{124}

Not surprisingly, administrative agencies and federal courts have played a leading role in formulating this inclusive view of the general welfare, thereby forcing Congress to accord these values greater weight in allocating resources. For example, OCR drafted the 1970

\textsuperscript{121.} See Epstein, 97 Yale L.J. at 1638.
\textsuperscript{122.} See Fitts, 97 Yale L.J. at 1660-61.
\textsuperscript{123.} Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013, 1022 (1984) (noting that republicanism emerges during extraordinary moments of “constitutional” as opposed to “normal” politics); Frank I. Michelman, The Supreme Court 1985 Term — Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 65-77 (1986) (arguing that courts are the repository for the elements of self-government otherwise missing from day-to-day legislative decisionmaking).
\textsuperscript{124.} See supra notes 40-51 and accompanying text.
memorandum establishing that schools subject to Title VI could not exclude NEP and LEP students by neglecting their special needs, and the Supreme Court affirmed and invigorated this interpretation in *Lau*. Only then did Congress codify this approach in the EEOA and significantly alter its funding practices under the Bilingual Education Act. As judicial commitment waned in *Bakke* and *Northwest Arctic*, an inclusionary vision of the common school\(^{125}\) became less prominent in congressional deliberations, and Congress reverted to a compromise that accorded greater discretion to teachers and administrators, who were part of a well-organized political lobby.

Extensive reliance on experts by bilingual education policymakers further illustrates the importance of technocratic republicanism. When Congress increased funding under the Bilingual Education Act after the *Lau* decision, school districts clashed over the award of grants. Torn between special-interest politics and the mandate of newly-created civil rights protections, decisionmakers turned to national experts for guidance in meting out scarce resources. In contrast to local school officials, these experts purportedly could stand above the political fray and make impartial evaluations of the merits of bilingual programs. Technocratic republicanism thus became a potential means of transcending special-interest conflicts to serve the common good. Because impartiality was the shield against narrowly partisan politics, critics could attack empirical studies of federally-funded programs, such as the AIR evaluation and the 1981 OPBE report, based on not only their claimed methodological defects but also their alleged ideological taint.\(^{126}\)

Similarly, in setting compliance standards under Title VI, OCR depended on educational experts to identify a civil rights violation. These experts formulated guidelines under *Lau* to ensure that NEP and LEP students enjoyed meaningful access to education.\(^{127}\) Although federal policymakers initially trusted researchers to be unbiased, continued squabbling over empirical findings eventually damaged their credibility and rendered their claims of neutrality suspect.\(^{128}\) If experts could not extricate themselves from special-interest politics, there was little, if any, reason to allow them to monopolize the bilingual education debate.

In fact, when the plaintiffs in *Northwest Arctic* challenged the


\(^{126}\) See supra notes 31-37 and accompanying text.

\(^{127}\) See supra notes 55-60 and accompanying text.

\(^{128}\) See supra notes 31-37 and 61-63 and accompanying text.
Laughter Guidelines, they capitalized on a classic republican tradition of broad-ranging input; that is, they argued that OCR should have elicited public comment, rather than turn exclusively to experts when formulating bilingual education rules. When the Department of Education subsequently held hearings on the NPRM, however, the discussion degenerated into a battle of special interests, rather than serving as a forum for republican deliberation. The political in-fighting surrounding the NPRM served as a grim reminder of the limits of classic republicanism in a centralized, heterogeneous decisionmaking arena.

C. Assaults on the Citadel: Critiques of Federal Policymaking

Both special-interest bargaining and technocratic republicanism have treated groups as intermediaries between the State and individuals. Neither model has accounted for bilingual education advocates' concerns about governmental inattention to the role of linguistic and cultural groups in forming personal identity and interpersonal skills. The models have even shaped the two major challenges to federal bilingual education policy: the new federalism and the official English movement. These critics have acknowledged that policymaking should focus on the relationship between the State and the individual. The new federalists have asserted that decentralized policymaking is essential, whether the goal is to aggregate individual preferences or to promote consensual deliberations. The official English movement has demanded a reaffirmation of the central importance of English and the American way of life in order to maintain the sense of commonality essential to republicanism.

1. The New Federalists

The new federalists contend that centralized policymaking hampers the expression of individual preferences because only large groups with considerable resources can gain meaningful access to the federal arena. In the new federalists' view, local educational decisionmaking can account more fully for individual concerns than federal policymaking can. Because the costs of involvement in local decisionmaking are lower than in the federal forum, individuals can express their preferences directly without the distortions introduced by large, organized lobbies.

According to the new federalists, centralized policymaking also

129. See supra notes 64-65 and accompanying text.
destroys any chance for republican deliberations. The new federalists argue that reliance on experts is a poor substitute for input from a wide range of individuals. Technocratic republicanism can be highly exclusionary if experts are elitist and out of touch with commonplace concerns. The new federalists believe that shifting decisionmaking to the local level revives the opportunity for classic republican decisionmaking. Under this view, a school district's deliberative process can approximate a town meeting.131

The new federalists thus assert that local educational decisionmaking is superior to centralized control of the curriculum, whether the prevailing policymaking paradigm is special-interest bargaining or republicanism. Unfortunately, the new federalists have paid scant attention to how decisionmaking processes should be structured to promote individual participation at the local level.132 Without any blueprint for fostering widespread participation, it seems likely that in many school districts, administrators and teachers would dominate the process with little input from students, parents, or community leaders.133 This risk seems especially grave in large, urban areas that serve heterogeneous populations. In these districts, school officials might try to minimize participation if they feared that individuals would be confrontational rather than cooperative.134 Under these circumstances, local educators' control over decisionmaking would not necessarily lead to accurate aggregation of the interests of students, parents, and community leaders, nor would it promote broad-ranging discussions and consensus-building. Instead, decentralization would substitute domination by local educators for domination by national experts.

2. The Official English Movement

The official English movement's attack on bilingual programs re-

131. See generally JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 295-98 (1983) (advocating participatory democracy at the local level as an alternative to the self-interested politics that characterize centralized decisionmaking).


133. See Moran, 76 CAL. L. REV. at 1333 (explaining why state and local educators will prevail over linguistic minority students and parents if local decisionmaking processes are unchecked by federal officials).

reflects the darker side of republicanism. Official English advocates have criticized proponents of TBE and bilingual-bicultural education programs for placing the interests of linguistic and cultural groups ahead of a commitment to national unity and harmony. Official English reformers assert that advocates of bilingualism and biculturalism balkanize language groups, rather than build consensus around English and an American way of life. To circumvent these allegedly divisive influences, the official English movement has given citizens the opportunity to reaffirm their common identity through popular referenda making English the official language at state and local levels. Official English amendments are designed to delegitimize linguistic or cultural allegiances that could jeopardize identification with the commonwealth.

Unfortunately, official English reformers often have stigmatized linguistic and cultural groups by labeling them separatist and un-American. Such labels exclude linguistic minorities and their representatives from republican deliberations. Imposing an official language on linguistic minority groups through popular referenda involves an element of coercion at odds with republicanism's commitment to voluntary deliberation and consensus-building. Under a truly republican system, the majority should not try to enforce conformity by fiat. Rather, it should seek to build consensus through informative debate that engenders mutual understanding and respect. The official English movement's campaign thus reinforces linguistic minorities' fears that republicanism requires them "to live in Salem, but not to believe in witches." Republicanism's failure to assuage these doubts has led some critics to dismiss it as "a passing fashion for those with the luxury to revel in the life of the mind,"

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135. See infra notes 181-91 and accompanying text (explaining how official English organizations combine republican aims with a hierarchical structure in a way that exacerbates the dangers described here).


137. Note, 3 YALE L. & POL'Y REV. at 527 (discussing claims that bilingual education promotes separatism).

138. See Moran, 75 CAL. L. REV. at 332.


Summary

Federal policymakers have been guided by models of special-interest bargaining and technocratic republicanism. These models fail to account for claims that bilingual education should recognize the role of linguistic and cultural groups in the development of individual identity and interpersonal skills. Under each model, the role of groups as identity-forming enclaves and crucibles for forging interpersonal relationships is relegated to terra incognita. A group's worth can be measured only by how well it facilitates relationships between the State and individuals. Under special-interest bargaining, a group's value is based on how well it represents individual interests; under republicanism, a group's worth is based on how well it enables the State to build a consensus among citizens. Neither approach addresses linguistic and cultural groups' unique contributions to personal and interpersonal development. Nor have critiques by the new federalists and official English advocates heightened awareness of these special concerns.

III. OF DEMOCRACY: CONSTRUCTING A PLURALISTIC MODEL OF BILINGUAL EDUCATION POLICYMAKING

Proposals that bilingual education policymaking recognize the role of linguistic and cultural groups in identity formation and interpersonal relationships rest on three fundamental assumptions. First, current policy systematically fails to account fully for linguistic and cultural groups' concerns. Second, this neglect is potentially detrimental to sound reform initiatives. Third, some governmental accommodation of linguistic and cultural groups is possible without undermining their value as enclaves for individual development.

The assumption that policymakers have neglected linguistic and cultural groups' concerns has been amply demonstrated by the preceding analysis of federal intervention in bilingual education. This neglect harms the policymaking process, if linguistic and cultural groups play an important role in developing qualities essential to political participation, regardless of their direct role in mediating an individual's relationship to the State. When linguistic and cultural groups serve as enclaves in which individuals forge their identities,
members develop preferences that fuel the special-interest bargain-
ing process.\textsuperscript{144} Interactions among groups can be important in alert-
ing individuals to a range of values; only through exposure to a
variety of lifestyles does individual choice become meaningful.\textsuperscript{145} In-
teraction among group members and contact with members of other
groups can produce the capacity for empathy essential to successful
republican deliberations.\textsuperscript{146}

Under this view, a linguistic and cultural group is not valued
simply because of its role in developing individual members' iden-
tities. Rather, a group is valued for the relationships it fosters with
other members and the contrasts it creates with other groups, thus
demonstrating to members and non-members alike the subjective
and relative nature of lifestyle choices.\textsuperscript{147} These aspects of personal
and interpersonal development may be critical to the conduct of the
political process, but neither special-interest bargaining nor techno-
cratic republicanism accounts for them in fashioning reforms that po-
tentially impinge on a linguistic or cultural group's ability to survive.
The more central these groups are to personal and interpersonal de-
velopment, the greater are the potential costs of this continuing
neglect.

The assumption that some government support of linguistic and
cultural groups is possible without undermining their value as en-
claves for the development of personal identity and interpersonal
skills depends on how the support is provided. For example, if the
government provides extensive financial assistance with numerous
strings attached, groups are apt to lose their integrity and indepen-
dence.\textsuperscript{148} On the other hand, if the government simply refrains from
highly intrusive policies that jeopardize a group's linguistic and cul-
tural heritage, the group should preserve its autonomy and vitality.
Advocates of government support therefore must pay careful atten-
tion to the circumstances in which government intervention is war-
ranted and the appropriate structuring of such intervention.

In the remainder of this section, I will examine the cogency of
each of these assumptions, beginning with a more careful examina-
tion of the nature of various groups and their roles in the policymak-

\textsuperscript{144} See Galston, \textit{99 ETHICS} at 719-20.
\textsuperscript{145} See Selznick, \textit{75 CAL. L. REV.} at 449-50 (describing the conditions for preserv-
ing both community and autonomy).
\textsuperscript{146} See Duncan Kennedy, \textit{Form and Substance in Private Law Adjudication,} 89
\textsuperscript{147} See Martha Minow, \textit{Pluralisms,} 21 \textit{CONN. L. REV.} 965, 966 n.3 (1989).
\textsuperscript{148} For a discussion of some of the dangers of cooptation in bilingual education
policymaking, see Moran, \textit{76 CAL. L. REV.} at 1324-25.
BILINGUAL EDUCATION

ing process. This exploration not only will refine an understanding of the nature of linguistic and cultural groups' omission from the policy process but also will enable me to evaluate the potential costs and benefits of accounting for these groups in shaping bilingual education policy. I will close by elaborating on how an ethic of pluralism, which expressly considers the value of linguistic and cultural groups, might be incorporated into reform initiatives on behalf of NEP and LEP students.

A. THE NATURE OF GROUPS AND THEIR ROLE IN BILINGUAL EDUCATION POLICYMAKING

Bilingual education policymakers have examined linguistic and cultural groups through a narrow lens because they have concentrated on how a group mediates between individuals and the State. Federal policymakers have emphasized a group's size and resources. Advocates of a special-interest bargaining model have feared that large groups with enough resources to gain access to the federal arena will yield leadership that distorts members' interest. Technocratic republicans have worried that the small groups initially necessary to promote consensual deliberations later will produce insularity. Although group size and resources are important characteristics, policymakers interested in addressing the role of linguistic and cultural groups more fully must consider other features as well.

Broadly defined, a group is a collection of individuals engaged in a mutually oriented activity or set of interconnected activities. Entry to a group occurs according to one or more criteria of membership. For the sake of simplicity, I assume that members identify themselves as part of a group and that others acknowledge this self-identification as legitimate.

Given this broad definition, groups can vary widely. Therefore, a

149. See Michael J. Malbin, Factions and Incentives in Congress, 86 PUB. INT. 91, 97-100 (1987) (noting the increasing difficulties that individual voters have in staying apprised of candidates' legislative records and the growing number and influence of national interest groups).

150. Sullivan, 97 YALE L.J. at 1719.

151. See, e.g., JAMES W. JOHNSON, THE AUTOBIOGRAPHY OF AN EX-COLOURED MAN 197-211 (1989) (a fictional account of a light-skinned black man who "passed" as white). In addition, a woman may be labeled as black by a public official, while she, her spouse, and her children identify her as white. See Calvin Trillin, American Chronicles: Black or White, The NEW YORKER, Apr. 14, 1986, at 62 (describing Susie Guillory Phipps' lawsuit against Louisiana officials who refused to change the designation on her birth certificate from "colored" to "white").
key task is to refine the conception of a group in ways that enable bilingual education policymakers to distinguish between groups with interests that are well-represented under special-interest bargaining and technocratic republicanism and groups with interests that are not. This refined definition of a group also ought to permit policymakers to assess the likelihood that recognition of the latter groups will generate significant benefits for the policymaking process because the groups play an important role in identity formation and the development of interpersonal relationships. Finally, the definition should allow policymakers to assess the potential risks of cooptation if previously neglected groups are acknowledged by policymakers.

Special-interest bargaining accounts for "representative organizations," which are groups with instrumental objectives and hierarchical leadership of a broad and peripherally involved membership base. Technocratic republicanism, by contrast, accounts for "professional elites," groups with a shared commitment to a field of inquiry and a common methodology for approaching problems. These elites are widely acknowledged as reputable experts through a process that typically relies heavily on peer review. Classical republicanism, on the other hand, recognizes "local speech communities," geographically discrete groups, the denizens of which share a sufficient number of common values to carry on a meaningful conversation.

Having examined the three groups accounted for by special-interest bargaining and variants of republicanism, I will show how the official English movement hybridizes the "representative organization" and "local speech community" with only mixed success. I will then close by arguing that none of these configurations fully accounts for linguistic and cultural groups.

1. Representative Organizations

A special-interest bargaining model focuses on the concerns of what have traditionally been termed "special-interest groups," which are narrowly defined as aggregates of individuals who share common, instrumental objectives.153 National interest groups typically adopt a formal, hierarchical structure in the democratic mold to represent their geographically dispersed membership base.154 A group's internal processes thus require that leaders be accountable to the membership through periodic elections and similar devices designed to legitimize the organization in light of general democratic expecta-
Although some groups can hold out tangible benefits or exact compulsory membership dues, those that focus on diffusely distributed goods and rely on voluntary membership may have to embrace multiple goals and make the cost of entry relatively low to generate broad membership and enhance their bargaining positions. Because the term "special-interest group" focuses heavily on group purpose, without much attention to practical constraints on group structure, I prefer to use the term "representative organization" here.

Federal policymakers dealing with bilingual education have been heavily influenced by representative organizations. At hearings on the Bilingual Education Act, national associations with skilled lobbyists, such as the Mexican American Legal Defense and Educational Fund ("MALDEF"), played a key role in providing testimony and making policy recommendations. These organizations typically had a range of instrumental goals. For example, MALDEF has pressed for employment protections, voting rights legislation, and immigration reform, as well as bilingual programs. Its organizational agenda has included proactive efforts to prompt government intervention and to shape prospective reforms, as well as reactive responses to adverse official decisions.

Thus, MALDEF has brought test-case litigation and lobbied for reforms in areas deemed ripe for change. Test-case litigation typically involves both proactive and reactive elements, as the lawsuits are designed to set favorable precedents and overturn unfavorable school policies. Lobbying, although typically thought of as more

155. Id. at 129-39.
156. Id. at 362-68 (discussing the need for interest groups to build alliances and engage in logrolling to succeed in the legislative arena and the effect these tactics have on organizational objectives).
157. For a description of the bilingual education policymaking process at the federal level and the representative organizations that participated on behalf of linguistic minorities, professional educators, and official English advocates, see Moran, 76 CAL. L. REV. at 1251-1314. For a description of the role of representative organizations in bilingual education litigation, see Moran, 75 CAL. L. REV. at 333-39; REBELL & BLOCK, supra note 86, at 147-74; see also Rachel F. Moran, Foreword — The Lessons of Keyes: How Do You Translate "The American Dream"?, 1 LA RAZA L. J. 195, 199-203 (1986) (describing divergent perceptions of MALDEF attorney and school board counsel in bilingual education lawsuit).
161. Apparently, MALDEF has on occasion brought garden-variety reactive litigation to serve linguistic minority plaintiffs insistent on challenging unfavorable official
proactive than litigation, also can be reactive if an organization is trying to stave off an ominous reform initiative, such as an unfavorable court decision. Bringing lawsuits diverts some of MALDEF's resources to decentralized forums, such as district courts, and away from centralized policymaking arenas, such as Congress.

Representative organizations typically have a hierarchical structure. For example, MALDEF has a governing board and officers who direct its activities. Moreover, attorneys and staff members of MALDEF are centrally important in implementing the organization's goals. These key players must garner broad-based support for their activities through membership drives that raise funds and create a constituency. Members typically mail in a contribution on an annual basis and in return receive newsletters updating them on organizational initiatives. Members can cease contributing at any time, so the organization must cultivate ongoing support by pursuing at least some reforms that make for "good press" in the media and their newsletters. Such reform efforts tend to be highly visible and widely acclaimed as successful.

Precisely because of its hierarchical structure, a representative organization usually adopts formal procedures to ensure that the leadership remains responsive to concerns of its members. Modeled actions, even when proactive organizational aims would not be served. See REBELL & BLOCK, supra note 86, at 283 n.11 (noting that MALDEF attorney agreed to represent "a local client attempting to overcome concrete aggrievements," even though he thought the dispute was a poor test case to bring as part of a national litigation strategy). Such cases probably constitute a small part of MALDEF's workload, however, because the organization abandoned a "legal aid" role early in its history. See Karen O'Connor & Lee Epstein, A Legal Voice for the Chicano Community: The Activities of the Mexican American Legal Defense and Educational Fund, 1987-82, 65 SOC. SCI. Q., 245 (1984). MALDEF may have taken on some cases without strong national implications to protect vital, local linguistic and cultural groups from state overreaching. See infra notes 199-200 and accompanying text.

162. Recent efforts to pass the Civil Rights Act of 1990 as a means of overturning Supreme Court decisions that made it more difficult for plaintiffs to prevail in employment discrimination cases are an excellent example of this phenomenon. See H.R. REP. No. 644, 101st Cong., 2d Sess., pt. 1, at 8, 10-12, 16-51 (1990); id. pt. 2, at 8-11. The bill was vetoed by President George Bush, and Congress narrowly failed to override the veto. Helen Dewar, Senate Upholds Civil Rights Bill Veto, WASH. POST, Oct. 25, 1990, at A15; Sharon LaFraniere, Civil Rights Veto Stems From Dispute Over Discrimination Ruling, WASH. POST, Oct. 24, 1990, p. A6.


164. In its early years, MALDEF relied heavily on support from the Ford Foundation, and its internal governance structure was strongly influenced by this outside source of funds. The Foundation actually created MALDEF, rather than being recruited by MALDEF as a constituency. O'Connor & Epstein, 65 SOC. SCI. Q. at 248-50.

on corporate governance structures, these procedures typically are less elaborate versions of techniques used to ensure fair representation in centralized political arenas. Thus, electoral processes are established to choose officers and board members on a periodic basis; the staff must report regularly to these board members before undertaking extensive litigation or lobbying campaigns.166

Representative organizations are the paradigmatic conduits for the expression of special interests. The leadership generally recruits support from individuals already sympathetic to its aims. The leadership can expand organizational objectives or alter priorities to attract new members, although some old members may respond by withdrawing support. Because the organization's goals are multiple and instrumental, the leadership enjoys greater flexibility in making trade-offs. One set of tangible benefits can be interchanged with another because no particular incremental reform is central to the members' identification with and support for the organization.167 Assuming that the group's internal procedures provide sufficient safeguards against autocracy, the organization's reform agenda will at least approximate members' overall preferences.

Because of their broad-based membership bases, representative organizations often invoke a wide array of values in demanding reforms in centralized policymaking arenas. Moreover, with the transformation of individual preferences into aggregated and diversified portfolios of political objectives, the potential for irreducible value conflicts is minimized. The interplay of representative organizations thus reduces the risk of stalemate by creating opportunities for flexible compromise.168

2. Republicanism's Progeny: Professional Elites and Local Speech Communities

Republicanism in its various guises acknowledges the value of groups committed to pursuing the common good. In the bilingual education debate, at least two kinds of republican organizations have played some role: professional elites have been deeply involved in the formulation of policy, and local speech communities have been touted

166. Charles R. Halpern & John M. Cunningham, Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy, 59 GEO. L.J. 1095, 1104-05 (1971). However, clients themselves play little or no direct role in governance decisions. Id. at 1109-10.

167. For a discussion of coalition-building and logrolling by special-interest groups pursuing instrumental reforms, see DENNIS C. MUELLER, PUBLIC CHOICE 49-58 (1979).

168. See Moran, 75 CAL. L. REV. at 356-57 (arguing that a multiple-issue, as opposed to a single-issue, orientation mitigates the dangers of stalemate in language politics).
to some extent by the new federalists as an alternative policymaking forum.

Under technocratic republicanism, professional elites consist of experts who ascertain the common good by using scientific methodology to transcend petty factionalism. In keeping with their professional role, experts remain detached and neutral so that they can utilize objective research techniques. In operationalizing variables for empirical study, professional elites define problems in instrumental terms so that discrete modifications in educational programs can be correlated to measurable indicia of success. As an example, bilingual education experts consistently defined program success as higher scores on academic achievement tests, a measure that provided consistency and uniformity in the evaluation process. Like special-interest groups, then, professional elites focus on instrumental objectives, but their priorities are dictated by the imperative of impartial methods.

Under classic republicanism, local speech communities achieve consensus about the common good by relying on deliberations among citizens, typically within a geographically bounded area. In contrast to both special-interest groups and professional elites, local speech communities usually embrace both instrumental and symbolic objectives. Symbolic aims are not directly translated into tangible costs and benefits; rather, their expressive content implicates intangible goods, often deeply-held principles that may not be easily susceptible of compromise. A symbolic message of belonging may, in fact, be essential to the creation of local speech communities in which meaningful deliberations can take place. In this vein, linguistic minority advocates often have demanded not only instrumental programs to enhance academic achievement but also a symbolic commitment to inclusion of NEP and LEP students and their parents in the school community.


171. See Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N. Car. L. Rev. 303, 323-36 (1986) (describing the interconnection of tolerance, participation, and assimilation in the experience of culturally distinct groups).

172. See, e.g., Education Amendments of 1977: Hearings on S.1753 Before the Subcomm. on Education, Arts and Humanities of the Senate Comm. on Human Resources,
The malleability of republicanism’s commitment to the common good is demonstrated by its capacity to accommodate groups as divergent as professional elites and local speech communities. Professional elites and local speech communities do, however, share an important structural characteristic that is key to their republican roots and sets them apart from representative organizations. Although representative organizations are structured hierarchically to aggregate and advocate the interests of their constituents, republicanism depends primarily on horizontal, not vertical, organization.

For both professional elites and local speech communities, deliberations ideally occur among equals committed to pursuit of the common good. Under technocratic republicanism, professional elites ferret out the general welfare through scientific exchange that depends importantly on shared standards of communication and universally accepted methodology coupled with peer review. Deliberations thus occur among a community of professional equals. Under classic republicanism, local speech communities elicit the common good through deliberations among lay citizenry, who should be treated as political equals at a town meeting. Only through a dialogue among equals can intersubjective truths emerge; these truths depend on reciprocal empathy and mutual respect that lead to “minds in congruence, minds that produce identical judgments, which, though less than objective, may nonetheless be regarded as more than merely subjective.”

Although the common structural characteristic of horizontal relationships is important, dissimilarities between professional elites

95th Cong., 1st Sess. 948 (1977) (remarks of Paul Sandoval, State Senator, Colorado); id. 960-61 (prepared statement of Federico Pena, Chicano Education Project).

However, it is unclear whether reforms aimed at enlarging community input, such as parent or community advisory boards, have led to meaningful exchanges in local speech communities. Advisory boards often draw on only a select portion of the linguistic minority community, and members quickly may become dependent on school administrators and teachers for information and advice. Moreover, the boards are purely consultative and have little policymaking clout. New federalists have failed to address these structural obstacles to the creation of local speech communities. See Moran, 76 CAL. L. REV. at 1334-35, 1337-38.


174. Of course, there are important hierarchical relationships implicated by technocratic republicanism because non-professionals are bound by the deliberations of professional elites. See RANDALL COLLINS, THE CREDENTIAL SOCIETY 123-24, 198-99 (1979) [hereinafter COLLINS] (describing the elitism built into science, scholarship, and high culture and the effetism of focusing on shared professional methodologies, rather than powerful theoretical ideas).

175. Sunstein, 97 YALE L.J. at 1552; Horwitz, 29 WM. & MARY L. REV. at 72.


and local speech communities also are striking. Professional elites deal with one another in a centralized forum, while local speech communities address issues in decentralized settings. The centralized nature of technocratic republicanism corresponds to high entry requirements for participants. Social scientists must invest a great deal in their human capital before they become qualified experts. The decentralized quality of classic republicanism generally reduces the costs of entry, for all who qualify as citizens in a certain area are eligible to take part in the deliberations.\(^\text{178}\)

The centralization of technocratic republican deliberation has other implications. The very distance of policymakers from the persons most directly affected by their decisions necessarily promotes the abstraction of issues from particular circumstances. This abstract perspective in turn correlates with proactive, rather than reactive, reform agendas. Remote from the problems, experts can afford to take a long-run, prospective view of controversies. Their distance reinforces the detachment considered essential to professional objectivity and neutrality.

Unfortunately, focusing on the independence of researchers from their subjects obscures a more insidious threat to scholarly impartiality: the dependence of experts on policymakers. To the extent that policymakers augment professional credentials by providing financial support, experts may slant their judgments to please influential patrons.\(^\text{179}\) For example, an expert may favor powerful, short-run interests to please the officials who commissioned a report but mask this preference in neutral, objective language. Consequently, an expert's proactive stance can be undermined by the reactive agendas of policymakers.

Likewise, the decentralization of classic republican deliberations has significant ramifications. The proximity of decisionmakers to those affected necessarily prompts an awareness of the direct, personal impact of a policy and bolsters the central importance of empathy as a means to transcend particularities.\(^\text{180}\) The very immediacy of adverse, short-term consequences makes it hard for policymakers to adopt a long-term, proactive approach. In essence, decisionmakers doubt that persons can be convinced to sacrifice themselves today for

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\(^{178}\) Horwitz, 29 WM. & MARY L. REV. at 71-72; Inger, 69 TEX. L. REV. at 31-32.

\(^{179}\) IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 211-12 (paperback ed. 1990) [hereinafter YOUNG]; COLLINS, supra note 174, at 95-125.

\(^{180}\) See NANCY L. ROSENBLUM, ANOTHER LIBERALISM 182 (1987) [hereinafter ROSENBLUM] (describing Roberto Unger's concept of "solidarity rights" as suggesting that "[o]nly empathy can inspire men and women to provide [communal] benefits for one another"); see also Inger, 69 TEX. L. REV. at 25 (expressing concern that empathic concern for community interests can overwhelm individuality).
the general good tomorrow. Sensitivity to the immediate consequences of a decision often leads policymakers to justify an impending redistribution of resources in retrospective, rather than prospective, terms. An individual must make an immediate sacrifice to rectify a past injustice to another, not to prevent a potential inequity in the future. The individual is asked to disgorge an ill-gotten gain, rather than to make an investment for generations to come. This corrective justice rationale converts the self-sacrificing member of the polity from innocent to guilty, and its invocation reflects a fear that civic virtue will be an insufficient prod to inspire citizens to forego tangible benefits for an intangible common good.181

3. A Curious Hybrid: The Official English Movement

Although the foregoing depictions of representative and republican organizations cover most groups given some recognition in the bilingual education debate, the official English movement does not fit so neatly into these classifications. Official English organizations splice a republican purpose with a representative structure, a potentially dangerous combination. Organizations like U.S. English endorse a republican objective, the construction of a national identity to preserve harmony and build consensus around English and an American way of life.182 This objective has strong symbolic overtones regarding the moral obligations of citizenship.183

At the same time, however, U.S. English and its sister organizations have assumed the hierarchical structure characteristic of representative organizations. It is not even clear that U.S. English evolved from grass-roots organizations. Instead, high-level officials, such as former Senator S.I. Hayakawa, R-Cal., appear to have played a critical role in prompting the development of U.S. English.184 By contrast, other single-issue organizations of national stature, such as anti-abortion groups, seem to have evolved from pockets of local resistance to deeply controverted federal policy.185 Whether built

181. See Young, supra note 179, at 81-91 (describing how local movements to empower insurgent constituencies through the creation of participatory decisionmaking processes or autonomous organizations are reabsorbed into debates about the allocation of resources).
182. See Note, 3 Yale L. & Pol'y Rev. at 520.
183. See Moran, 75 Cal. L. Rev. at 340-41.
184. See Armando Galvan et al., Are English Language Amendments in the National Interest? 2-3 (1986); Catherine G. Cahan, English Spoken Here, 13 Student Law. 6 (Apr. 1985).
185. See Kristin Luker, Abortion and the Politics of Motherhood 219-21 (1984) (describing how women opposed to abortion often have used personal computers to work out of their homes and to generate mailing lists, newsletters, and recruitment campaigns that build grass-roots support). Perhaps because U.S. English and its sister organizations did not evolve from the consolidation of local grass-roots organizations,
from the top down or the bottom up, however, these organizations have adopted a hierarchical structure to participate effectively in centralized policymaking.

Like modern-day political centaurs with republican heads and representative bodies, U.S. English and its sister organizations present an anomalous mix of political philosophies. Because these organizations do not allow for systematic local deliberations to build consensus about the common good, they tend to rigidify members' existing preferences regarding language use rather than to prompt their reexamination. In fact, this rigidification may be used to ensure that members continue as loyal supporters, especially if the organization remains committed to single-issue politics.

Where republicanism is touted in ways that intensify and rigidify local preferences, the nationalization of disputes through the creation of representative structures may not successfully mitigate value conflict. A single-issue orientation can hamper an organization's participation in special-interest bargaining. Single-issue groups find it difficult to effect political trade-offs because their aim is symbolic, not instrumental, and is construed as an uncompromisable principle.

Because their purpose and structure draw on competing political visions, official English organizations are inherently unstable hybrids. This instability will be resolved in one of two ways. First, official English organizations can diversify their objectives to resemble more closely a typical representative organization. Currently, U.S. English and its sister organizations have preserved a strong formal commitment to exclusive pursuit of English as the official language, perhaps because of their constituencies' intense symbolic support for this principle. Despite this formal commitment, these organizations have engaged in some tentative, informal diversification of their agendas. For example, leaders occasionally address such disparate issues as immigration reform, population control, and preservation of the environment. This informal shift may constitute the first step toward broadening the formal objectives of such organizations.

the official English movement's agenda consists not only of reactive opposition to government support of bilingual programs but also proactive efforts to make English the official language, even where bilingual programs have not been instituted. See, e.g., Raymond Tatalovich, English Language Statutes in Six Midwestern States: A Comparative Analysis 12-13 (Mar. 22-24, 1990) (paper presented at the Western Political Science Association Annual Meeting) (copy on file with author) (noting that legislators who passed English language amendments in states with few linguistic minorities saw themselves as "trustees" of their states' futures).

186. See Moran, 75 CAL. L. REV. at 357.
187. See Moran, 75 CAL. L. REV. at 356-57 (arguing that a multiple-issue, as opposed to a single-issue, orientation mitigates the dangers of stalemate in language politics).
188. See BILL PIATT, ¿ONLY ENGLISH?: LAW AND LANGUAGE POLICY IN THE UNITED
Second, official English organizations can adopt a more decentralized structure in keeping with their classic republican aims.\textsuperscript{189} U.S. English has had little success in convincing federal policymakers to adopt an official language provision. Consequently, this organization successfully has pursued vindication of its aims at the state and local levels.\textsuperscript{190} Although one might expect that the push for state and local reforms has led to significant decentralization of the decisionmaking structure of U.S. English, evidence suggests that national leaders continue to oversee the activities of state and local affiliates.\textsuperscript{191}

4. Linguistic and Cultural Groups as Formative Organizations: The Missing Link

Representative and republican organizations and their hybrids have been recognized as legitimate by bilingual education policymakers. However, formative organizations, such as linguistic and cultural groups, which shape individual identity and mold interpersonal skills, have not received similar recognition. It is therefore especially important to study how these formative organizations both approximate and diverge from representative and republican organizations and their hybrids. Only then will it be possible to assess whether these formative organizations can and should be included in the decisionmaking process to some extent.

Unlike representative organizations and professional elites, lin-
guistic and cultural groups have strongly symbolic as well as purely instrumental objectives. For instance, language skills are transmitted both to engender a sense of belonging and to facilitate effective communication. Like local speech communities, linguistic and cultural groups inculcate lessons of personal identity and interpersonal relationships. However, the deliberative process in local speech communities is designed to forge a civic identity and to develop the capacity for empathy, while formative organizations do not limit themselves to the public sphere. Local speech communities rely heavily on rational, verbal communication, but linguistic and cultural groups can rely on non-verbal as well as verbal behavior to transmit cultural lessons. Indeed, ritual activities that involve no deliberation whatsoever can be a cornerstone of cultural heritage.192

The wholly public nature of classic republican deliberations requires political parity so that no individual's voice is unfairly suppressed in the pursuit of the common good. Formative organizations, which operate in both public and private settings, are not similarly constrained. These organizations can, for example, capitalize on the distinctions between public and private settings by teaching children how to switch from English as a more formal, distant tongue to Spanish as a more informal, intimate one.193 By drawing on a mix of egalitarian and hierarchical arrangements, linguistic and cultural groups can set the boundaries of belonging by teaching children lessons as basic as the difference between terms of respect and terms of endearment. Through these lessons, a child develops a sense of self in relation to others.

Given this interplay among formal and informal as well as public and private uses of language and culture, it becomes critical to emphasize that the more localized a group is, the more central its role is likely to be in fostering identity and interpersonal skills. Thus, a NEP or LEP child may identify at some level with Spanish-speaking

192. See generally Theodore Schwartz, Cultural Totemism: Ethnic Identity Primitive and Modern, in ETHNIC IDENTITY: CULTURAL CONTINUITIES AND CHANGE, 106, 108 (George De Vos & Lola Romanucci-Ross eds., 1975) (describing how variations in hairdo, dress, and other non-verbal indicators can mark ethnic identity); CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 146-69 (1973) (describing the role that ritual can play in transmitting cultural values and how that role can be disrupted). On the other hand, some rituals can serve to suppress ethnic difference and celebrate commonalities. See Philip E. Leis, Ethnicity and the Fourth of July Committee, in ETHNIC ENCOUNTERS: IDENTITIES AND CONTEXTS 239, 240, 249-50 (George L. Hicks & Philip E. Leis eds., 1977) (describing how a Fourth of July committee in a small town emphasized themes of unity and abjured ethnic politics in planning the annual ritual of a parade).

peoples, but the everyday language he uses will depend heavily on the speech practices of Spanish speakers in his immediate neighborhood. Similarly, a student in East Los Angeles may embrace Hispanic culture in general, but she may more readily appreciate the patterns of interaction in the late twentieth-century theatrical works of Chicano playwright Luis Valdez than those in the early twentieth-century dramas of Spanish playwright Federico Garcia Lorca.194

In short, as with speech communities under classic republicanism, the most significant formative organizations are local in nature. For instance, a linguistic group may be governed by a professional elite, such as a language academy, that exercises formal hierarchical control over correct usage and pronunciation. At the same time, speakers informally can subvert the academy's edicts among family and friends by coining slang terms and dialects.195 Through this process, a formative organization inculcates a unique linguistic and cultural identity and a framework for organizing personal interactions with insiders and outsiders.

Like representative organizations and professional elites, institutional arbiters of language and culture infuse a proactive agenda into linguistic and cultural development. For instance, a language academy, as a professional elite, tries to set a universal, prospective language policy. Precisely because of its expert status, the academy can successfully promote its views in a centralized, hierarchical policymaking process. Yet, the formative organizations most critical to personal and interpersonal development generally will embrace reactive reforms at the local level, much like classic republican speech communities. That is, formative groups will emphasize the short-term, particularized consequences of decisions relating to language and culture. For example, linguistic and cultural groups may invest considerable energy and ingenuity in renaming themselves as "Chicanos" or "Latinos," rather than accepting an official label as "Mexican-American" or "Hispanic." Their concern is not with whether the official label is grammatically correct, but with how it affects their political and social identity.

194. Compare Luis Valdez y el Teatro Campesino, Actos (1971); Luis Valdez, Zoot Suit (1978), with Federico Garcia Lorca, La Casa de Bernarda Alba (1983). Works depicting a relatively contemporary American setting with Chicano protagonistics are arguably more accessible to Chicano students than classical Spanish plays.

Because the United States does not have an official language academy, many authoritative pronouncements about language and culture are transmitted primarily through the public school curriculum. Proactive efforts to develop a uniform instructional program can spark local resistance. Because linguistic and cultural groups are largely reactive, they may mobilize effectively only after government action threatens their integrity. For example, linguistic minority parents and community leaders often enter the bilingual education debate only after a district decides to close a neighborhood school or eliminate a special program that serves NEP and LEP students.\footnote{196. \textsc{Rebell} \& \textsc{Block}, supra note 86, at 148-50 (describing Chicano plaintiffs' involvement in \textit{Otero}); \textsc{Brenda Reyes} \& \textsc{Marsha Siegel}, \textsc{Zambrano v. Oakland Unified School District} 92-95, 101-05 (1985) (unpublished manuscript on file with author) (chronicling linguistic minority participation in a class action alleging failure to provide adequate bilingual education programs under state and federal law). For a discussion of the divergence between lawyers' and clients' perceptions of a lawsuit, see \textsc{Deborah L. Rhode}, \textit{Class Conflicts in Class Actions}, 34 STAN. L. REV. 1183, 1204-18 (1982).}

Even if long-term mechanisms for promoting parental and community participation are established as a result of the controversy, parents and community leaders may become quiescent once acceptable programs appear to be in place.\footnote{197. See \textsc{Joel F. Handler}, \textit{The Conditions of Discretion: Autonomy, Community, Bureaucracy} 111-12 (1986) (expressing concern that parents of handicapped students cease to utilize mechanisms for participation in educational decisionmaking once they are reassured that local school officials are exercising their discretion wisely). See generally \textsc{Murray Edelman}, \textit{Politics as Symbolic Action: Mass Arousal and Quiescence} 22-24 (1971) (describing how groups become mobilized by political action and later acquiesce in the resolution of a controverted issue).}

Because key formative organizations often are small and draw on symbolic aims that do not lend themselves to political compromise, these groups may not be well-suited to long-term participation in governmental decisionmaking.\footnote{198. See \textsc{Young}, supra note 179, at 232-34 (criticizing proposals that privilege face-to-face interactions among small, localized groups as "wildly utopian" schemes that "do[] not purify politics, ... but rather avoid[] politics").} When such ongoing participation is necessary to protect a linguistic or cultural group's aims, representative organizations are likely to evolve to serve members' special interests. With superior resources and a wider range of objectives, these representative organizations can pursue legislative reforms more effectively than small-scale, formative groups. Moreover, representative organizations, like \textsc{MALDEF}, sometimes can use their national position to assist local linguistic and cultural groups dissatisfied with educational policy by bringing a bilingual education lawsuit or handling informal negotiations with the school board.\footnote{199. See supra note 161 and accompanying text (providing examples of cases in which \textsc{MALDEF} assumed this role).} Finally,
while mediating between formative organizations and the State, representative organizations can buffer linguistic and cultural groups from pressures that might overwhelm their symbolic commitments and informal, localized structures.200

Summary

The foregoing analysis of representative, republican, and formative organizations illuminates how some, but not all, of linguistic and cultural groups’ concerns are factored into the current policymaking process. The treatment of formative organizations also shows how these groups can play a unique role in the development of personal identity and interpersonal skills. The question remains, however, whether the educational process can acknowledge linguistic and cultural groups without undercutting their integrity and independence.

B. AN ETHIC OF PLURALISM

I have argued that bilingual education decisionmaking promises to benefit from a consideration of how language and culture shape a child’s identity and relationships inside and outside the classroom. By evaluating the impact of school policy on linguistic and cultural groups, schools could build more effective partnerships with the communities they serve. These partnerships would promote academic achievement by reducing dangers of conflicted student identities and alienation at school or at home. Moreover, these alliances could contribute to the long-term vitality of linguistic and cultural groups if schools validated, rather than challenged, their heritages.

To reap these gains, a new philosophy, which I call an ethic of pluralism, must be injected into the policymaking process. I will now set forth the basic parameters of this pluralistic ethic so that the goals and limits of linguistic and cultural group participation are clear. The goal of an ethic of pluralism is not consolidation of the common good, but rather support for a dynamic constellation of linguistic and cultural groups. In keeping with this objective, an ethic of pluralism modifies local decisionmaking to permit group as well as individual and State interests to be considered. Tolerance for diverse ways of life is a precondition for development of this pluralistic outlook. An ethic of pluralism thus incorporates a belief in the equal worth of distinctive linguistic and cultural practices as well as in the political equality of individuals.201

200. See ROSENBLUM, supra note 180, at 140-43 (discussing a need for public and private life to check the excesses in either sphere of personal existence).
201. See YOUNG, supra note 179, at 178-81 (arguing that bilingual education policy has been fundamentally assimilationist, and advocating a pluralistic approach that
An ethic of pluralism recognizes significant limits on linguistic and cultural group participation. First, acknowledging linguistic and cultural groups is not equivalent to privileging them automatically when their concerns conflict with those of individuals or the State. Rather, an ethic of pluralism recognizes that at least in the field of bilingual education, relations are not and should not be exclusively bilateral between individuals and the State, but in some instances are and should be trilateral among individuals, linguistic and cultural groups, and the State. In these trilateral relations, the interests of groups should neither be completely excluded nor routinely preferred. Instead, decisionmakers must strike an appropriate balance among competing interests. Thus, a concern about preserving linguistic and cultural groups should not wholly divest members of their individual autonomy, nor should it seriously undermine the integrity of the State.202

Moreover, linguistic and cultural group difference should not be systematically suppressed out of a fear of factionalization. Yet group harmony cannot be taken for granted, either. For an ethic of pluralism to succeed, the State must make an explicit commitment to tolerance of divergent linguistic and cultural groups. In implementing this commitment, the State must do more than espouse tolerance as an abstract value. It also must build the conditions for tolerance into educational decisionmaking processes.203 Opportunities for participation by linguistic and cultural groups must be plentiful and varied, so that a wide range of groups can meaningfully participate. Groups should be encouraged not only to present their independent views but to interact with each other, so that mutual understanding and respect can develop.

Finally, while an ethic of pluralism depends on structures that allow for linguistic and cultural group input, these participatory mechanisms are permissive, not mandatory. That is, linguistic and cultural groups should have the opportunity to present their views if they desire but should not be required to do so. In contrast to the classical republican tenet that treats public participation as a hallmark of civic virtue, the pluralistic framework respects a linguistic and cultural group's decision to opt out of public deliberations in

202. Ingber, 69 Tex. L. Rev. at 75-76 (describing the dilemma of public education in balancing socialization against student autonomy and the inculcation of civic virtue against local control).

203. Id. at 85-86 (arguing that schools must integrate values of participation and tolerance into their structures if they are to inculcate these values effectively).
favor of private processes so long as the group truly enjoys a meaningful opportunity to participate.

An ethic of pluralism seeks to create conditions in which formative organizations can thrive, not to make these organizations arms of the State. Most linguistic and cultural groups will involve themselves in bilingual education policymaking only when school decisions seriously infringe on their ways of life. Their role may well be limited to defending private spaces in which their linguistic and cultural practices can survive unimpeded by adverse public policy. These formative organizations may avoid comprehensive participation in educational decisionmaking to preserve their independence from government. Under an ethic of pluralism, linguistic and cultural groups should be neither systematically excluded nor coercively included in educational administration.

C. THE PERILS OF FORMATIVE GROUP PARTICIPATION AND A FRAMEWORK FOR IMPLEMENTING AN ETHIC OF PLURALISM IN BILINGUAL EDUCATION POLICYMAKING

Recognizing the role of formative organizations could improve student outcomes by bolstering school-community relations, but government support for linguistic and cultural groups presents certain perils as well. Acknowledging and perpetuating these groups can produce factionalism and insularity. Insular groups like these in turn can dominate individual development so completely that the personal autonomy of members becomes a mythical concept. If the State intervenes to counteract these dangers of insularity and tyranny, it can distort the groups in ways that destroy their independence in transmitting a child’s linguistic and cultural heritage.

In addition to these difficulties, the very structure of linguistic and cultural groups can inhibit their participation in policymaking. Local in nature, these groups are apt to participate effectively only in decentralized arenas, yet in the modern administrative state, centralized decisionmaking necessarily will influence local educational administration. After all, significant amounts of funding are generated

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204. See Cover, 97 HARV. L. REV. at 26-33 (discussing the desire of the Amish, Mennonites, and other religious sects for autonomy and privacy to preserve their religious beliefs from State interference).
205. See Sullivan, 97 YALE L.J. at 1717 (stating that “[h]eterogeneity of ‘perspective’ would appear to bristle with just as much danger of faction and partiality as the heterogeneity of interests, preferences, and desires that Hobbesian rent-seekers trade on and republicanism condemns”).
207. Id. at 36-37.
at the state and federal levels, and some uniformity in the delivery of educational services generally is deemed desirable. Even when local forums for participation are available, linguistic and cultural groups probably will get involved only on a reactive, rather than a proactive, basis. Their engagement with the policymaking process will be sporadic, not constant. Yet educational administration is an ongoing, day-to-day enterprise.

In short, a paradox arises for those who want to account for the contribution that linguistic and cultural groups make to the development of personal identity and interpersonal skills while fostering respect for a wide array of values and customs. A state's promotion of linguistic and cultural groups leads to balkanization. This balkanization in turn can be a serious detriment to promoting individual tolerance for diverse ways of life. These dangers are especially great if linguistic and cultural groups do not forge ongoing contacts with the policymaking process. Yet, if the State relies exclusively on special-interest bargaining and technocratic republicanism to preserve heterogeneous values, the contributions of linguistic and cultural groups at the local level will remain unacknowledged and undervalued.

Moreover, this omission will not be rectified by classic republican deliberations, which present the same dangers of factionalism and do not account for the development of anything other than a civic identity.

Is there any way out of this policymaking dilemma? In the field

[208. RAVITCH, supra note 56, at 322-23 (noting the increasing importance of state-federal, as opposed to local-state, politics in school administration as the federal government sought to police local deficiencies in curriculum, personnel policy, disciplinary procedures, and resource allocation); TYACK, supra note 125, at 272-75 (describing how educators and other reformers successfully demanded that the federal government rectify funding inequities in local schools).]


[211. See ROSENBLUM, supra note 180, at 160-65 (1987) (discussing communitarian critiques of the excessive abstractness of liberal conceptions of the individual); see also TRUMAN, supra note 98, at 120, 128 (noting conflict between pressure to consolidate and centralize decisionmaking and concerns about the local impact of decisions in heterogeneous communities with public education given as an example). For a discussion of the controversy in philosophy and the social sciences over the methodological choice between impartial, objective, and distant techniques and relativistic, particularistic, and interactive ones, see Minow, 21 CONN. L. REV. 971-78. For a related discussion of the debate between sociologists who emphasize the role of power elites and political scientists who emphasize the role of diffusion of power through local participation, see Peter Bachrach & Morton S. Baratz, The Two Faces of Power, 56 AM. POL. SCI. REV. 947, 947-50 (1962).]
of bilingual education, one possible solution lies in the institutional diversity of educational decisionmakers. Decisionmakers can be legislators, administrators, or judges. These varied decisionmakers can act at the national, state, or local level. The interplay of these policymaking bodies can create opportunities for linguistic and cultural group participation while checking the perils of insularity and factionalization.

Small-scale, administrative forums at the local level may be best suited to direct participation by linguistic and cultural groups. Administrative processes can be flexibly structured to permit a range of opportunities to participate, and even relatively small groups will have some access. On the other hand, state and federal educational agencies, with their commitment to experts, will continue to provide substantial protection for professional norms. Congress, as a body responsive to an array of national interests, is apt to enact programs that emphasize individual achievement and mitigate any local influence that hampers development of technical skills.

National decisionmakers with their distance from particularized interests are probably best able to establish minimum principles of tolerance for heterogeneous ways of life. Courts could be especially useful in this regard because of their commitment to principles of autonomy and privacy that permit groups and their members to develop alternative beliefs and attitudes. Moreover, courts uphold tenets of civility and fairness that balance personal liberties against harm to others. These principles limit the use of coercion by individuals, groups, and the State to eliminate unpopular customs and folkways.

Institutional diversity already has shaped bilingual education policymaking. For example, the history of Title VI's provisions regarding linguistic minority students illustrates the interaction of the legislative, administrative, and judicial branches. In response to demands by civil rights groups to end racial and ethnic discrimination in the schools, Congress passed the Civil Rights Act of 1964 ("Act"). The Act's anti-discrimination principle did not explicitly address the problems of NEP and LEP students, presumably because linguistic minority groups had not yet mobilized effectively. Nevertheless, OCR, operating on general principles of inclusion, interpreted the Act to cover linguistic minority children, and the Supreme Court affirmed this interpretation in Lau. The combined administrative and judicial support for special programs for NEP and LEP pupils prompted federal enforcement initiatives under Title VI and an explicit legislative endorsement of linguistic minority protections. Eventually, the Court and OCR retreated from their commitment to bilingual education, and legislative support for programs concomi-
The waxing and waning of Title VI's protections for linguistic minority students suggest that judicial and administrative intrusions into special-interest politics in the legislature may be tenuous at best. Judicial and administrative initiatives will be especially ephemeral if they are based on interpretations of legislative actions, rather than on independent grounds. For example, the judicial commitment to fully include NEP and LEP students in the curriculum might better have withstood a changing political climate if it had been based on equal protection or other constitutional principles.

Bilingual education policy already has been influenced by the interplay of national, state, and local government. Under the Bilingual Education Act, for example, the federal government funded bilingual programs but left their development and implementation to local educational agencies. National civil rights initiatives, such as Title VI and the EEOA, continue to vest considerable discretion in local educators to design programs and deliver appropriate services. The federal government has made some effort to transform local school policymaking in the area of bilingual education. To promote community involvement, for instance, Congress has established parental advisory boards to participate in the design and evaluation of bilingual programs. Unfortunately, with few resources to undertake independent review of the programs, these boards often are relegated to a perfunctory, formalistic role.

Because decisionmakers have undervalued the contributions of linguistic and cultural groups, institutional diversity has not been used to promote an ethic of pluralism. If decisionmakers did commit themselves to such an ethic, they would need to consider how institutional diversity could be used to permit group input without undermining principles of autonomy and tolerance. In undertaking this difficult task, policymakers could benefit from the lessons of earlier attempts to restructure educational decisionmaking to promote equal educational opportunity.

212. See supra notes 40-72 and accompanying text.
214. Thus, local school districts design the program proposals funded under the Act and execute the plans if they are approved. Moran, 76 CAL. L. REV. at 1283-64.
217. Id. at 1291, 1347.
D. PUTTING INSTITUTIONAL DIVERSITY TO WORK IN THE SERVICE OF AN ETHIC OF PLURALISM

To understand how institutional diversity can usefully promote an ethic of pluralism, it is helpful to review policymakers' experience with three educational reform initiatives: (1) community control of the schools; (2) educational choice plans; and (3) communitarian schools. Each initiative seeks to restrike the balance of institutional control to advance educational reform and is instructive in formulating recommendations for pluralistic bilingual education decision-making.

1. Three Educational Reform Initiatives

a. Community Control of the Schools

Community control of the schools would rely on comprehensive parental and community participation as a means of reforming bilingual education. In the past, participation by parents and community leaders on bilingual education advisory boards often has been perfunctory. On at least one notable occasion, however, the federal government undertook bold efforts to promote parental and community participation in poor, minority neighborhoods with admittedly mixed results. In the late 1960s and early 1970s, the Office of Economic Opportunity ("OEO") espoused a principle of "maximum community participation" in all federally-sponsored anti-poverty programs. At about the same time, various urban school districts undertook experiments with community control of predominantly black schools. These experiments were designed to permit black neighborhoods to make policy for their educational institutions. Under a decentralized electoral system, minority neighborhoods chose their own school boards, which then wielded considerable influence over personnel, curriculum, and extracurricular activities.

Community control experiments provoked substantial controversy and dubious benefits. Minority boards remained quite dependent on centralized educational bureaucracies that allocated resources among the schools. The boards also had to rely on non-minority professionals to implement their reform proposals. Not all


teachers and administrators were receptive to community control, yet boards were unable to replace them because of collective bargaining agreements negotiated without the minority board's input. In demanding reforms, minority board representatives inevitably clashed with professional educators and administrators trying to protect their bureaucratic prerogatives.

Although these implementation problems could have been mitigated by according community boards greater autonomy, state and local officials were reluctant to do so. The educational bureaucracy's unwillingness to give boards greater power reflected skepticism about their legitimacy. Educators doubted the wisdom of recommendations made by board members who lacked pedagogical expertise. Moreover, because of high levels of turnover and low voter turn-outs in minority neighborhoods, officials questioned whether community school boards truly represented their constituencies. Critics alleged that minority board members did not accurately convey their constituents' preferences, but rather served their own political interests. Finally, official reticence about minority boards probably stemmed in part from discomfort with a system that accepted community insularity and did not undertake a rapprochement of group differences.

Community control experiments engendered fears of insularity and intolerance because the proposals did not capitalize fully on multiple avenues of participation. Although these school experiments used the language for "community," they relied exclusively on an electoral process that led to special-interest politics, rather than republican deliberations or pluralistic involvement by formative organizations. Participation for most members of the "community" was limited to casting a vote for a school board member. Community control experiments did not create sufficient opportunities for community building through wide-ranging discussions about the goals that schools ought to pursue and how the schools should be run.

Because community control experiments did not foster broad participation, the very definition of "community" remained amorphous and incomplete. Meanwhile, the concept of "control" seemed to become dangerously entrenched through the political elevation of

220. For one example of a community control experiment in New York City that suffered from all these problems, see CONFRONTATION AT OCEAN HILL-BROWNSVILLE (Maurice R. Berube & Marilyn Gittell eds., 1969).

221. See FANTINI, supra note 219, at 238 (noting that small factions may exploit community control to promote their own narrow political agendas); ALLAN C. ORNSTEIN, METROPOLITAN SCHOOLS: ADMINISTRATIVE DECENTRALIZATION VS. COMMUNITY CONTROL 252-53 (1974) (noting low voter turnouts in community school board elections and suggesting that boards therefore may be unrepresentative).

222. RAVITCH, supra note 56, at 174.
board members as spokespeople. The notion of community was so protean that critics raised contradictory complaints. On the one hand, some opponents of community control alleged that self-serving politicians had created "communities" out of whole cloth when neighborhoods in fact suffered from rapid turnover and lacked a firm sense of identity. On the other hand, a different set of critics charged that power-hungry politicians isolated their constituencies by converting neighborhood cohesiveness into long-term insularity and isolation.223

The failure to create meaningful chances for full community participation made experiments with minority boards extremely vulnerable and eventually led to their demise. Without a genuine forum for community building, these experiments could be characterized as special-interest politics of the worst kind. Professional educators then could argue successfully that only they could transcend the petty parochialism that plagued minority boards.224 Exclusive reliance on special-interest politics at the local level also meant that community boards could be overwhelmed by special-interest politics at higher levels of authority. For instance, community boards often found their initiatives stymied by teachers' unions with greater clout in lobbying before centralized educational agencies and state legislatures.225

b. Educational Choice Plans

Although community control experiments failed to strike an adequate balance in promoting local group participation, they are superior to reform initiatives that fail to account for such groups altogether. Recently, for example, the United States Department of Education has expressed a renewed interest in "choice" plans, which provide parents with vouchers to pay for preferred school programs.226 According to proponents of choice, these plans would stim-

223. Harold W. Pfautz, The Black Community, the Community School, and the Socialization Process: Some Caveats, in COMMUNITY CONTROL OF THE SCHOOLS 13, 18-26 (Henry M. Levin, ed. 1970); see Wiles, supra note 219, at 221 (sounding a cautionary note regarding the amorphous definition of "community").

224. See Leonard J. Fein, Community Schools and Social Theory: The Limits of Universalism, in COMMUNITY CONTROL OF THE SCHOOLS 76, 87-91 (Henry M. Levin, ed. 1970) (describing the conflict between the universalism inherent in a liberal vision of education embraced by professionals and the parochialism espoused by community control advocates).

225. See Fantini, supra note 219, at 74-76 (noting the enormous power that teachers' unions could exert on state and local officials in a centralized educational bureaucracy when they battled community control proposals).

ulate a diversity of programs that reflect heterogeneous values. For example, if linguistic minority parents prized their way of life, they would spend their vouchers on bilingual-bicultural education programs that utilize native-language and cultural heritage instruction. If not, parents would be free to support more assimilationist, intensive English courses.\footnote{227}

Choice plans, like special-interest bargaining, emphasize the government's role in maximizing the satisfaction of individual preferences. However, choice plans bypass the process of aggregating interests and striking policy compromises by using vouchers to promote one-on-one bargains between parents and school officials. In this regard, choice plans reflect a commitment to face-to-face, decentralized contracts not found in special-interest bargaining.

To some extent, the imagery of parents striking arm's-length bargains with school personnel may be misleading. As long as centralized bureaucracies continue to play a significant role in the delivery of school services, educational experts who profess objectivity and neutrality can shape parental preferences in important ways. Expert input will be justified in the name of professionalism, as a means to ensure that parents make wise, informed choices.\footnote{228} If experts primarily value instrumental, measurable objectives, they may be insensitive to parental concerns about the symbolic significance of language and culture. Parental access to independent experts does not resolve this difficulty; such access may reinforce expert hegemony or create a hopelessly confusing battle of the experts, rather than redress the power imbalance between parents and professional educators.\footnote{229} Moreover, by allowing only for expert support for parents, choice plans curtail the influence of linguistic and cultural groups by privileging professional elites in the decisionmaking process.\footnote{230}

\begin{itemize}
\item \footnote{228} See \textit{Richard A. Weatherley, Reforming Special Education: Policy Implementation from State Level to Street Level} 70-71 (1979) \textit{[hereinafter Weatherley]} (stating that school officials minimize parent participation and prefer expert input on the ground that professionals are better able to formulate a desirable educational plan).
\item \footnote{229} Compare Discussion in \textit{Private Schools and the Public Good} 158-59 (Edward M. Gaffney, Jr., ed., 1981) \textit{(remarks of Professor John Coons) with Michael H. Olivas, Information Inequities: A Fatal Flaw in Parochial Plans, in Private Schools and the Public Good} 133, 138-46 (Edward M. Gaffney, Jr., ed., 1981) \textit{[hereinafter Olivas]} (debating the adequacy of dissemination of information to all sectors of the populations served under voucher plans).
\item \footnote{230} Olivas, \textit{supra} note 229, at 139-40 (arguing that the formal information systems
\end{itemize}
Because of their emphasis on promoting parental autonomy, choice proponents seldom address the dangers of insularity that may arise if students end up in schools only with others like themselves. Perhaps voucher advocates believe that individuals can overcome differences in the public arena, regardless of whether they have regularly interacted with people whose ways of life differ from their own.231 If, however, the capacity for empathy, which is the bedrock of civic virtue, is fostered through concrete, daily encounters among students from varied backgrounds, the dearth of ongoing contact among linguistic and cultural groups is a serious concern.

Choice proponents make no attempt to assess a proposal's potential impact on linguistic and cultural groups. If individual decisions fail to preserve or promote such group affiliations, the voucher proponent's only concern is that this outcome be freely chosen. Although individual decisions may reinforce strong group ties, this is nothing more than a happy accident under a voucher plan.232 By establishing a bilingual education policymaking process that focuses solely on individual choice coupled with expert assistance, a voucher plan eliminates direct input from linguistic and cultural groups. By circumventing these groups, voucher plans may send a message to linguistic minority parents that individual autonomy is more valuable than communal ties.

c. Communitarian Schools

Another attempt at reform is illustrated by Joel Handler's proposal for a communitarian school.233 Handler studied the implementation of the Education for All Handicapped Children Act ("EAHCA") in the Madison, Wisconsin schools. The EAHCA established procedures for parents to participate in decisions regarding the placement of their children in special education programs.234 Handler found that in the Madison schools, parents, students, and community representatives worked closely with teachers and administrators to formulate an appropriate study program.235 Community representatives served as parent advocates, who helped par-

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231. See, e.g., Coons & Sugarmann, supra note 227, at 95-97 (defending voucher plans against charges that they would promote insularity and divisiveness).
232. See id. at 94 (stating that "[c]hoice in education would . . . permit the maintenance of cultural integrity; we would be surprised if this opportunity to cement group identities were to go unused. In any event, to sharpen the divisiveness issue, we will assume that it would be used").
233. Handler, supra note 197, at 283-300.
234. Id. at 60-61.
235. Id. at 92-94.
ents and students negotiate a complicated bureaucratic system in
devising an individualized educational plan. However, school
officials were disappointed that parents lapsed into apathy once they
thought an appropriate placement had been made, even though
teachers and administrators had solicited their ongoing
participation.

Handler's study, although encouraging, leaves a number of open
questions for bilingual education reformers. The EAHCA establishes
procedural guidelines for participation, but these guidelines provide
for only one avenue of input. School officials consult only with par-
ents about the particular placement of their children, although par-
ents can receive assistance from community representatives and
others. With its emphasis on parental participation in face-to-face in-
terchanges with school officials about programs for specific children,
the EAHCA ironically resembles choice plans. Despite Handler's de-
piction of the Madison school experience as communitarian, the
EAHCA makes no provision for people to come together, whether as
individuals or members of groups, to build a sense of community, ex-
plore differences, and influence school policy. In fact, the way in
which a local organization can gain some access to the process is by
serving as a source of parent advocates.

So long as no allowance is made for local deliberations, linguistic
and cultural groups remain largely shut out from decisionmaking
under the EAHCA. This oversight may not have significantly under-
mined the Madison program because it served a relatively small pop-
ulation that Handler describes as "more homogeneous and consensual than [that in] many other areas." In the field of bilin-
gual education, however, where linguistic and cultural heterogeneity
is pervasive, inattention to differences within the school community
could have more serious consequences.

As with choice plans, Handler's account of the communitarian
school may overstate the potential for parental autonomy. Experts
citing their superior knowledge and experience may exert considera-
ble pressure on parents in making placement decisions under the
EAHCA. Another study of the EAHCA's implementation found that
school districts often relied on formalistic compliance; parents re-
ceived information couched in technical terms from school profes-
sionals and were not able to do more than sign off perfunctorily on

236. Id. at 88-91.
237. Id. at 102-03.
238. Id. at 103-09.
239. Handler, supra note 197, at 302. Studies indicate that parents who mobilize
on behalf of their handicapped children tend to be relatively affluent, middle-class pro-
fessionals; Weatherley, supra note 228, at 10.
the experts' proposed plan.\(^{240}\) Even in Madison, parents withdrew from the process once an educational plan had been chosen, leaving its implementation to the experts. Parental apathy may have sprung in part from a perception that their participatory role was quite limited.

Under the communitarian model, expert domination may be mitigated somewhat by the availability of a broad array of parent advocates. Unfortunately, this outside guidance sometimes counts for very little because under the EAHCA, a parent's only real threat in the event of disagreement is the threat of an appeal. This threat often is an empty one because of the time and expense required to litigate.\(^{241}\) In Madison, parents and their advocates might have engaged professional educators in meaningful, comprehensive policy discussions if some participation took place outside the context of making individual placement decisions. This shift would have enabled parents and advocates to examine overarching concerns about special education. Then, their leverage need not have been limited to threatened litigation regarding an unsatisfactory program for a particular student.

2. Some Initial Recommendations for Bilingual Education Policymaking

Despite their limitations, these educational reform initiatives provide helpful insights in capitalizing on institutional diversity to forge a pluralistic bilingual education policymaking process. Building on the EAHCA as a model, Congress and state legislatures should condition federal or state funding of bilingual education programs on local districts' observance of procedural ground rules necessary for meaningful deliberations about school policy. The statutes could mandate the following safeguards for meaningful participation: (1) adequate notice of policy deliberations; (2) a meaningful opportunity to comment; and (3) ample dissemination of information about policy outcomes and the reasons for the decisions. Compliance with these guidelines could be used to defend against an allegation of discrimination under Title VI, the EEOA, and comparable state anti-discrimi-

\(^{240}\) Hassell, supra note 134, at 57-63; see Weatherley, supra note 228, at 51-52, 70.

\(^{241}\) See Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC. REV. 95, 136 (1974) (describing the obstacles that "have-nots" face in bringing test-case litigation to challenge unfavorable rules). By contrast, parents under choice plans easily can withhold their financial support of a school if it fails to perform satisfactorily. Cf. Handler, supra note 197, at 103-10 (describing wide array of sources of parental advocates, but noting that advocates were given financial support by the school districts).
nation laws. Expanding on the EAHCA’s approach, these rules would ensure broad access to the local policymaking process. Different settings for participation, such as district-wide hearings, smaller neighborhoods forums, and parent conferences, would promote widespread input and safeguard against expert domination of parents and their linguistic or cultural communities.

Administrative agencies should clarify and enforce these statutory mandates for participation. Federal agencies, with their greater distance from school district politics, may be better able to initiate these procedural reforms than state or local educational agencies. However, national experts often have dominated federal educational policymaking. Because local participation represents a direct challenge to their authority, they may be reluctant to implement these provisions. To avoid foot-dragging and to ensure vigorous efforts to enlist state and local cooperation, responsibility for administering the guidelines should not rest exclusively with federal educational agencies. Some responsibility should be vested in civil rights offices that traditionally have been committed to procedural protections.

In promoting local participation, school administrators must not try to create a traditional, civic republican milieu. A desire for the common good must be weighed against a competing wish for continuing heterogeneity. Administrators should place less emphasis on transcending difference and more on tolerating difference. Coexistence, not consensus, is a proper objective for a system that balances the claims of linguistic and cultural groups against those of individual parents and students and a unitary State.

Obviously, if legislative or administrative guidelines are promulgated, the judiciary should vigorously enforce them. If guidelines are not promulgated, the judiciary should impose due process standards for minimum participation by parents and students in educational decisions that significantly affect NEP and LEP pupils’ access to education. These standards would not be as expansive as those that a legislature or administrative agency could establish. The courts could fashion constitutional protections only for individuals with a direct stake in the outcome, such as parents and students, not for linguistic and cultural groups with a less immediate set of concerns. In addi-

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242. For a fuller discussion of how the federal government can encourage parental participation in bilingual education decisionmaking, see Moran, 76 CAL. L. REV. at 1346-51. See generally YOUNG, supra note 179, at 174-75, 184-91 (arguing for group-conscious policies in addition to a general system of rights and suggesting procedures for fostering group participation).

243. See YOUNG, supra note 179, at 183-86.

tion, judges could not establish a multiplicity of settings in which to gather input from parents and students; rather, due process would require simply that particular parents and students be allowed to challenge a decision affecting them in a trial-type hearing. Finally, constitutional safeguards could be applied only to students whose opportunity for an adequate education otherwise would be jeopardized by exclusionary educational decisionmaking. The court could not create participatory mechanisms to improve a minimally adequate school system. Although these judicial protections would not promote a fully pluralistic process, they could provide some bulwark against state overreaching of members of linguistic and cultural minority groups. Linguistic and cultural difference would be protected against arbitrary practices, if not encouraged through supportive ones.

If courts adjudicate a challenge to bilingual education programs under Title VI or the EEOA, they can, as part of a remedial order, require school districts to adhere to participatory guidelines. These guidelines can be considerably more expansive than minimal due process protections. To promote pluralistic policymaking, courts could implement guidelines comparable to the procedural ground rules suggested earlier, as a means of rectifying past discrimination under Title VI, the EEOA, or equal protection guarantees. These judicial initiatives admittedly would be interstitial at best because they would be limited only to districts found guilty of wrongful exclusionary practices. However, the judicial mandates might lead to “success

245. See, e.g., Willner v. Committee on Character and Fitness, 373 U.S. 96, 103-04 (1963) (holding that there is a due process right to be informed of and be given an opportunity to rebut evidence used to deny plaintiff admission to the bar); Perry v. Sindermann, 408 U.S. 593, 599-604 (1972) (holding that there is a due process right to challenge revocation of de facto tenure at a hearing).

246. See Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 457-62 (1988) (refusing to apply strict scrutiny to a student’s challenge of a bus fee because the Court refused to treat education as a fundamental interest, at least where private alternatives were available and the student was not wholly denied access).

247. For a discussion of the ways in which a rhetoric of rights can be used to restrain majoritarian overreaching and the limits of these strategies, see Rachel F. Moran, Knocking on the Schoolhouse Door and Wondering What’s Inside, 4 BERKELEY WOMEN’S L.J. 259, 263-67 (1989-90).

stories" in fostering local participation that could inspire more comprehensive legislative or administrative reforms — at least if school districts were not uniformly intransigent about complying.249

Broader participation for linguistic and cultural groups raises the daunting prospect of segmentation and stalemate. In considering these dangers, several points must be remembered. Linguistic and cultural factions already exist, so the question is whether factionalism will be alleviated or exacerbated by an ethic of pluralism. This ethic would make group differences an appropriate subject of public deliberations, rather than a wholly private phenomenon. I have argued that a properly constructed pluralistic ethic can mitigate linguistic and cultural frictions by nurturing public values of respect and tolerance.

Efforts to suppress group difference in the public domain have not been wholly successful. When threatened by state decisionmaking, linguistic and cultural groups have responded reactively, often by mobilizing around test-case litigation. Without other avenues for expressing their concerns, these groups have been forced into an adversarial setting that can aggravate factional differences.250 An ethic of pluralism could prevent linguistic and cultural minorities from resorting to combative lawsuits by creating other mechanisms for voicing their concerns.

Because linguistic and cultural groups intervene only reactively and sporadically, some administrators fear that these groups will have little to lose by resorting to confrontational, uncompromising tactics. Ironically, because few avenues for participation have been available, minority groups have had to use adversarial methods, such as lawsuits, to gain attention for their concerns. As opportunities for participation broaden, linguistic and cultural groups are more likely to be involved on a regular basis, not just during a crisis. In their continuing contacts with school districts, minority communities will be strongly influenced by members who are parents and students. With an ongoing stake in a cooperative, successful relationship with the school district, these parent and student members should serve as a deterrent to destructive strategies that disrupt the educational process. Thus, wider participation need not necessarily magnify the potential for political brinksmanship.

To date, policymakers have not fully capitalized on institutional


250. See Manin, 15 Pol. Theory at 361 (stating that pluralistic differences can check majoritarian decisionmaking if the majority knows resistance will be forthcoming from a minority group). See also supra note 160, 197-99 and accompanying text.
diversity. They have not tempered centralized special-interest bargaining with a commitment to decentralized deliberations. Nor have they mitigated the influence of technocratic republicanism by creating conditions for the revival of local participation. Even when opportunities for local deliberation have been considered, policymakers have not thought about ways to shelter distinctive linguistic and cultural groups from republican demands for consensus and homogeneity.

At the same time, these earlier efforts hint at the potential dangers if reforms fail to strike an appropriate balance among individual, group, and State interests. Special-interest bargaining can yield abstract legislation insensitive to particular community circumstances. National experts can overwhelm local deliberations with technical mumbo jumbo. Local deliberations can degenerate into factional warfare. These hazards are real, but so too, are the risks of systematically ignoring the contributions of linguistic and cultural groups. Statecraft will be required if the promise of acknowledging linguistic and cultural difference is to outweigh the peril, but political insight cannot reside in a blind eye that fails to see these groups altogether.

CONCLUSION

I began this Article with the case of Dr. P. Dr. P.'s "blind" eye could not visualize a concrete image, but his agnosia eventually was overcome when he learned to "see" the world through music. Surprisingly, the task proved quite easy. As a composer and performing artist, Dr. P. always had lived with music; now, he would live through it. Perhaps Dr. P. owed more to music all along than he cared to admit. Only the compelling need to overcome his agnosia forced him to acknowledge the debt.

All of us have a wide array of group affiliations, including linguistic and cultural ties. Yet, we underestimate how much they influence our identity and interpersonal relationships. The bilingual education debate can alert us to our agnosia, spurring us to recognize the importance of these links in both our public and private lives. The task of reconstructing decisionmaking paradigms to allow some role for linguistic and cultural groups is a challenging one, but it may be less overwhelming if we openly acknowledge our longstanding but hitherto unrecognized indebtedness to the formative ties that shape our ability to see the world.

251. See Moran, 4 BERKELEY WOMEN'S L.J. at 281-82 (discussing the risk of irreducible conflicts under a system of cooperative pluralism); Minow, 21 CONN. L. REV. at 967-68, 970, 977 (describing instances of conflict among groups and individuals).