

THE FIBER OF THE COMMON BOND

INTRODUCTION

Imagine a country with no official religion, no fixed authoritative political party or leader, no defining social ideology—a country made up of every racial and ethnic category imaginable with virtually no delineating physical features or standards to mark its citizens. Of course, the United States of America has been described in this way many times. Our diversity has long been touted as one of our greatest strengths.¹

But differences divide more easily than unite. What is the source of our supposed strength? What holds this nation of infinitely varied individuals together?² This paper proposes that there are only two essential things which establish the national character of Americans in all their myriad flavors and stripes—and forges true strength from what would otherwise be an endless collection of differences and sources of possible division. They are the Constitution and the language of that document, English.

However, these two elements must really be viewed as a unity. English is the language of the Constitution.³ Moreover it is the language of *the*

¹ See, e.g., *Cohen v. California*, 403 U.S. 15, 24-25 (1971) (stating that the United States is a “diverse and populous” society and “[t]hat the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength.”); *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 948 (9th Cir. 1995) (“[T]he diverse and multicultural character of our society is widely recognized as being among our greatest strengths.”); see generally JOHN FERNANDEZ, *THE DIVERSITY ADVANTAGE* (1993).

² Though the opening to this paper sounds Pollyannaish, the nation’s greatest achievement might well be the ability of every person to express his or her own individuality and chart a personal course free from almost any official, state-sanctioned, societal conformity. Our system allows each person to explore and harvest the full value of idiosyncratic choices and activities. To be free and independent is to be free and independent from other people, i.e. society. Of course, there must be limits to every freedom if a cohesive society is going to exist. See PAUL BREST ET AL., *PROCESS OF CONSTITUTIONAL DECISION MAKING: CASES AND MATERIALS* 309 (4th ed. 2002) [hereinafter CASEBOOK]. “There was no doubt in the late nineteenth century that the United States was (and remains) the most diverse country in the world, and then (as now) people often expressed concerns about *how* diverse the citizenry could become, racially or culturally, and still maintain itself as a republican political order.” *Id.* (emphasis in original). This paper seeks to explore one such limit, perhaps the only one, by looking at the Constitution through the lenses of organizational and communication theory.

³ This statement has been made as almost a throw away line by several commentators because it is so obvious. Cecilia Wong, *Language is Speech: The Illegitimacy of Official English After Yniguez v. Arizonans For Official English*, 30 U.C. DAVIS L. REV. 277, 281 (1996); Frank M. Lowrey, IV, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 EMORY L.J. 223, 282 (1992); Leila Sadat Wexler, *Official English, Nationalism and Linguistic Terror: A French Lesson*, 71 WASH. L. REV. 285, 336 (1996); Juan F. Perea, *Killing Me Softly With His Song: Anglocentrism and Celebrating Nouveaux Latinas/os*, 55 FLA. L. REV. 441, 450 (2003) [hereinafter Perea, *Killing Me Softly*]. Mr.

idea which is the Constitution—the vehicle that carries and constructs the idea of the Constitution itself. Justice Holmes insightfully described words as “the skin of a living thought.”⁴ But words, and the language which supplies them, have a significance that is far more than skin deep. Nor can this skin ever be removed without doing terrible violence to the living thought it forms. The English language, then, is literally a constituent component not only of the document, but the concept of the Constitution as well, and is properly understood as, essentially, an implied term.

If, ultimately, the Constitution holds the nation together politically and serves as the foundation of our entire government (not a challenging proposition),⁵ the English language must be understood as the actualizing force of our government. The English language is the factor that brings our Constitution from the realm of conception and puts it into actual practice. This paper will argue that it is the language itself, serving as the platform for our participatory political process, that acts as the unifying force within the United States.

This paper then, takes the unusual position of arguing for something that is at the same time both so subtle and obvious that it usually goes unnoticed: the *means and form* of communication as opposed to the meaning and substance. It also takes the somewhat quixotic stance of arguing for the importance and power of language to an audience, the legal community, that is intimately familiar with the importance, power, and use of language.

Part I briefly introduces the background and current status of the debate to designate an official language.⁶ Part II introduces some theories from the study of communications, particularly organizational communications, to show that communication itself is central to the existence and maintenance of any organization. The organization that will be the focus of the paper is, of course, the nation. The Constitution then, is something of a

Perea quotes a line removed from the Fifth Circuit’s first opinion in *Garcia v. Gloor*, 609 F.2d 156, 161 (5th Cir. 1980), “English, spoken well or badly, is the language of our Constitution. . . .” It is the aim of this paper to show this statement, even though painfully obvious, is more profound than its initial drafters likely realized - or they would not have dropped it from their final published decision.

⁴ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

⁵ See U.S. CONST. art. VI § 2 (“This Constitution . . . shall be the supreme Law of the Land”).

⁶ There is a distinction between the terms “Official English” and “English-only” although many commentators treat them interchangeably. Michael DiChiara, *A Modern Day Myth: The Necessity of English as the Official Language*, 17 B.C. THIRD WORLD L.J. 101, 102 n.8 (1997). “English-only” restricts official government action exclusively to the English language. *Id.* “Official English” establishes English as the authoritative language for government action, but does not prevent the use of other languages. *Id.* See also Lowrey, *supra* note 3, at 283 n.311; Michael W. Valente, *One Nation Divisible By Language: An Analysis of Official English Laws in the Wake of Yniquez v. Arizonans for Official English*, 8 SETON HALL CONST. L.J. 205, 208 n.18 (1997). The paper and the author argue for the non-restrictive “Official English” designation.

national mission statement or directive. Our goal: to form a more perfect union.⁷

A language is an essential and indivisible component of communications in the realm of law and government.⁸ However, language is not a passive, unidimensional tool but an extraordinarily complex and organic process. Part III highlights language relativism and some of the profound ways in which language itself creates and shapes not only our conversations but our very consciousness, thoughts, perceptions, and reality.

Against this background of communications and organizational theory, Part IV suggests how the Constitution and the English language may work, not as the glue that holds the union together, but as the common ground that allows for the foundation of our government in the first place. In conclusion, the paper proposes a “solution,” or rather, a course of action to address the official language issue.

I. BACKGROUND OF THE ENGLISH LANGUAGE DEBATE

A. History

Because of its origin as a nation of immigrants, the United States draws from an extraordinarily rich linguistic background.⁹ At the time of the founding, there were significant populations of French, Spanish, Dutch, Swedish, and German¹⁰ speaking peoples in addition to many African languages and several hundred Native American languages spoken within the territory that we now know as the United States.¹¹

⁷ See U.S. CONST. pmb.

⁸ Josiane Deschamps Abel, *Language, Nationality and the Law: What Lies Ahead for America?*, 34 U. MIAMI INTER-AM. L. REV. 343, 345 (2003) (“[I]n huge areas of real life the language is the culture and . . . neither law nor education nor religion nor government nor politics nor social organization would be possible without it.”).

⁹ See generally Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992) [hereinafter Perea, *Demography and Distrust*].

¹⁰ *Id.* at 284.

¹¹ *Id.* Professor Perea does not mention African languages but estimates approximately 1000 distinct Native American languages. *Id.* But cf. Wexler, *supra* note 3, at 334 (“[O]ver 500 Native American languages belonging to about fifteen language families may have been spoken in North America.”). Professor Wexler references but does not quantify “the languages of West Africa.” *Id.*; see also James Crawford, *Anatomy of the English Only Movement*, A Paper Presented at a Conference on Language Legislation and Linguistic Rights, University of Illinois at Urbana-Champaign (March 21, 1996), at <http://ourworld.compuserve.com/homepages/JWCRAWFORD/anatomy.htm> [hereinafter

Although many Americans believe otherwise, there is no “official” language of the United States¹² - nor has there ever been one.¹³ The debate about whether to denote an official language, however, has been going on since before the beginning of our government.¹⁴ The Continental Congress translated several documents into various languages and even published the Articles of Confederation in German and French as well as English.¹⁵ Several of the Founding Fathers had very strong opinions regarding language use in the colonies and the young nation. Benjamin Franklin made hostile and derogatory comments about the large population of German-speaking immigrants in his state of Pennsylvania, expressing his concern that the growing minority would one day lead to factionalism and social disorder.¹⁶ Benjamin Rush and Thomas Jefferson encouraged fluency in multiple languages.¹⁷ Rush was a great proponent of education¹⁸ and identified it as “perhaps the *only possible means*, consistent with their liberty, of spreading a knowledge of the English language” among the German-speaking population.¹⁹ Jefferson was especially fond of French, in which he was fluent, and encouraged multilingualism as “absolutely essential under our present cir-

Crawford, Anatomy] (estimating that about 175 indigenous languages survive in the U.S. today, representing about half the number that existed when Europeans first arrived).

¹² Jenning Kohlberger, *Using Principles of International Law to Reshape American Legislation of State Official English Laws*, 29 J. LEGIS. 253, 253 (2003).

¹³ Perea, *Demography and Distrust*, *supra* note 9, at 308-09. Professor Perea also notes the difference between language “standardization” (creating uniformity within a single language) and government designation of an “official” language (stamp of use for authoritative government action). The “common” language of a country is the one most widely spoken. *Id.* at 297 n.124; Wong, *supra* note 3, at 277 n.1.

¹⁴ See generally Perea, *Demography and Distrust*, *supra* note 9, at 281-350. Professor Perea notes that England never declared an official language or established a language academy unlike many European powers, attributing this to a “spirit of English liberty” which he then imputes to the founders. *Id.* at 276, 296-97, 281-84. But see Wexler, *supra* note 3, at 331-38. Professor Wexler points out that Irish, Scots, Gaelic, Welsh, Cornish, and Manx were actively suppressed for the benefit of the West Saxon dialect that became “standard” English. *Id.* at 337 n.215. In addition, the reason that England did not establish a language academy might have more to do with the death of Queen Anne and succession of George I, who “was not sufficiently interested in the English language even to learn to speak it himself.” *Id.* at 333 n.197.

¹⁵ Perea, *Demography and Distrust*, *supra* note 9, at 285-86.

¹⁶ *Id.* at 287-89. Franklin’s true opinions are probably quite complex. Though he did make extremely disparaging comments about Germans, he also started the first German language newspaper in the Americas and later in his life helped found (along with Benjamin Rush) a German college in Lancaster, Pennsylvania, to which he even lent his name: Franklin and Marshall College. Crawford, Anatomy, *supra* note 11.

¹⁷ Perea, *Demography and Distrust*, *supra* note 9, at 289-90.

¹⁸ *Id.* at 290, 291 n.91. A signatory of the Declaration of Independence, Rush was also a co-founder of Franklin and Marshall College. *Id.*

¹⁹ *Id.* at 291 (emphasis in original).

cumstances.”²⁰ John Adams proposed that Congress establish a national language academy to standardize the English language.²¹ Adams realized the critical importance of language, and the central role it plays in government and society, and pointed out “that the form of government has an influence on language, and language in its turn influences not only the form of government, but the temper, the sentiments, and the manners of the people.”²² Congress never acted on his proposal, though private academies, such as the American Academy of Languages & Belles Lettres,²³ were established for short times.²⁴

One famous myth, the Muhlenberg²⁵ Legend, even has Congress defeating by one vote a proposal to make German the official language of the United States, perhaps as a clearer symbol of the recent separation from England.²⁶ In truth, the legend probably stems from a vote on whether to authorize the printing of additional copies of government documents in the German language for distribution within Virginia’s German-speaking community.²⁷ Efforts to separate the United States from England linguistically came most visibly through Noah Webster’s dictionary, deliberately changing the spellings of certain words in part to mark the differences be-

²⁰ *Id.* at 289, 289 n.85. Jefferson also made particular note of the current and future importance of the Spanish language in America. *Id.* at 289-90, 290 n.88. Language choice may have been a largely political decision for Jefferson who also encouraged sending 30,000 English speakers to settle in the Louisiana Territory to undermine the continued influence of French. *Id.* at 289 n.85.

²¹ *Id.* 295-96; see also H.L. MENCKEN, *THE AMERICAN LANGUAGE: AN INQUIRY INTO THE DEVELOPMENT OF ENGLISH IN THE UNITED STATES* 11 (Raven I. McDavid, Jr. & David W. Maurer eds., Alfred A. Knopf 4th ed. 1963).

²² Perea, *Demography and Distrust*, *supra* note 9, at 295.

²³ *Id.* at 298-303; MENCKEN, *supra* note 21, at 11-13. Members and affiliates of the Academy included not only John Adams and his son John Quincy Adams, but such luminaries as Thomas Jefferson (honorary member), James Madison, James Monroe, John Marshall, Joseph Story, John Jay, Noah and Daniel Webster, Henry Clay, William Astor, and General Winfield Scott. Perea, *Demography and Distrust*, *supra* note 9, at 299; MENCKEN, *supra* note 21, at 12-13.

²⁴ Other private academies included: the American Philosophical Society of Philadelphia, the Connecticut Academy of Arts and Sciences, and the Philological Society of New York. MENCKEN, *supra* note 21, at 11-12, 12 n.6.

²⁵ The legend is named for Frederick Muhlenberg, a German-American and the first Speaker of the House. James Crawford, *The Muhlenberg Legend: Official Languages in U.S. History*, at <http://ourworld.compuserve.com/homepages/JWCRAWFORD/can-muhl.htm> [hereinafter Crawford, *Muhlenberg Legend*] (last visited Dec. 30, 2004).

²⁶ Perea, *Demography and Distrust*, *supra* note 9, at 304.

²⁷ According to the legend, Muhlenberg either stepped down from his post as Speaker to cast the deciding vote against the measure or did not vote at all. Cf. Perea, *Demography and Distrust*, *supra* note 9, at 304 (he did not vote) with James Crawford, *Muhlenberg Legend*, *supra* note 25 (he cast the deciding vote). For more on the Muhlenberg Legend see WILLI PAUL ADAMS ET AL., *THE GERMAN AMERICANS: AN ETHNIC EXPERIENCE, GERMAN OR ENGLISH?* (LaVern J. Rippley & Eberhard Reichmann trans.1993) (1990), available at <http://www.ulib.iupui.edu/kade/adams/chap7.html>.

tween the language spoken in America and the King's English.²⁸ English, however, has always been the dominant language of government in the United States.²⁹

The choice not to explicitly declare an official language has been attributed to the Founders' attitudes toward democracy and individual liberty, or their acceptance of cultural and ethnic plurality, or perhaps their fear that an official declaration carried the taint of monarchism.³⁰ However, it is at least equally likely that an express declaration was viewed as unnecessary.³¹ The Founders simply may have assumed English to be the official language since it was the most commonly spoken language among the European colonists,³² as well as the language used to draft the foundational documents of the new nation.³³

At a practical level, the Founders also needed to appeal to significant linguistic minority groups in the colonies³⁴ and attract new immigrants. Initially, this was done to win support for the Revolution³⁵ and later to help build the new nation. It is estimated that over one third of the population of Pennsylvania was German-speaking at the time of the founding.³⁶ As the territory of the United States expanded, it came to include significant populations of French-speakers in the Louisiana Territory and Spanish-speakers in Spain's former colonies in Florida and the southwest.³⁷ These large communities necessarily demanded political attention in a democracy. In response, a few states even maintained some form of official bilingualism into the nineteenth century and beyond.³⁸

²⁸ Webster wanted to simplify English spelling but also hoped the changes would encourage the printing of books in America and serve as "a band of national union." MENCKEN, *supra* note 21, at 480; Perea, *Demography and Distrust*, *supra* note 9, at 297-98. See also Merriam-Webster, *Noah Webster and America's First Dictionary*, at <http://www.m-w.com/info/noah.htm> (last visited Dec. 30, 2004) ("He believed fervently in the developing cultural independence of the United States, a chief part of which was to be a distinctive American language with its own idiom, pronunciation, and style.").

²⁹ See Wexler, *supra* note 3, at 334; see also Perea, *Demography and Distrust*, *supra* note 9, at 276.

³⁰ Lowrey, *supra* note 3, at 281-82; see also Perea, *Demography and Distrust*, *supra* note 9, at 275-76, 292-94, 296-97. Adams's proposal to found a national language academy may have died in part because it was seen as smacking of monarchism. *Id.* at 297.

³¹ Wexler, *supra* note 3, at 335-36.

³² *Id.* at 336 n.210.

³³ *Id.* at 336.

³⁴ Perea, *Demography and Distrust*, *supra* note 9, at 285-87.

³⁵ See *id.* at 285 & n.66 (The Founders were very anxious to convince Canada to join the Revolution and to that end translated documents into French).

³⁶ *Id.* at 310. Into the 1830s German-speakers still made up one-third of the population and controlled about one third of the state's wealth. *Id.* at 311.

³⁷ *Id.* at 284 & n.62.

³⁸ See *id.* at 309-328 (providing an excellent historical discussion). There was some form of official recognition of German in Pennsylvania, Spanish in California and New Mexico, and French in

A significant change in immigration patterns at the beginning of the twentieth century spurred concerns to establish English as the official language.³⁹ Congress responded in 1906 by making the ability to understand basic English a component of the naturalization process.⁴⁰ Currently, this provision is as close as the federal government has come to recognizing an official language.⁴¹ Historically, perhaps the two most significant factors driving the official language debate have been immigration and war.⁴² For this reason, it is a common criticism that the push to designate an official language has often reflected influences of xenophobia and racism.⁴³

World War I spawned a significant backlash against all things German and helped push many states to pass statutes restricting grade school education to English.⁴⁴ Thirty-four states had such laws by the time the Supreme Court heard its first language related challenge in 1923.⁴⁵ Congress imposed immigration quotas a year later and the language issue largely disappeared from the political scene until the 1960s.⁴⁶

Congress finally lifted the immigration quota system in 1965, leading to another dramatic shift in immigration patterns and undoubtedly helping fuel the “modern” movement to designate an official language.⁴⁷ The language debate again gained attention at the federal level in the early 1980s thanks to the efforts of advocacy groups such as U.S. ENGLISH, Inc.⁴⁸

Louisiana. *Id.*; Wexler, *supra* note 3, at 340 n.226; *see also* Crawford, *Anatomy*, *supra* note 11 (discussing bilingualism in Hawaii and Puerto Rico). Hawaii retains an official designation for the Hawaiian language. *See infra* note 57.

³⁹ Wong, *supra* note 3, at 282 & n.34.

⁴⁰ *Id.* at 282; Perea, *Demography and Distrust*, *supra* note 9, at 337.

⁴¹ Perea, *Demography and Distrust*, *supra* note 9, at 338. These provisions are codified at 8 U.S.C. § 1423 (1999).

⁴² Perea, *Demography and Distrust*, *supra* note 9, at 340. Professor Perea groups these together under the negative label of “nativism” instead of seeing them as international tensions. *Id.*; *see also* Valente, *supra* note 6, at 209 (the language debate “is often coupled with the immigration debate”).

⁴³ *See generally* Perea, *Demography and Distrust*, *supra* note 9, at 328-50; Lowrey, *supra* note 3, at 290-292; Crawford, *Anatomy*, *supra* note 11.

⁴⁴ Perea, *Demography and Distrust*, *supra* note 9, at 329-332.

⁴⁵ Wong, *supra* note 3, at 282. The companion cases were *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Bartels v. Iowa*, 262 U.S. 404 (1923), which actually represented a number of consolidated cases. *See infra* notes 66-72 and accompanying text.

⁴⁶ Lowrey, *supra* note 3, at 283.

⁴⁷ *Id.*

⁴⁸ *Id.* at 289; Valente, *supra* note 6, at 208-09. For more information on groups involved in the language debate see U.S. ENGLISH, Inc., at <http://www.us-english.org/inc/default.asp> (last visited Feb 10, 2005); English First, at <http://www.englishfirst.org/> (last visited Dec. 30, 2004); National Clearinghouse for English Language Acquisition, at <http://www.ncela.gwu.edu/> (last visited Dec. 30, 2004); National Association for Bilingual Education, at <http://www.nabe.org/> (last visited Dec. 30, 2004); and James Crawford’s Language Policy Website and Emporium, at <http://ourworld.compuserve.com/homepages/JWCRAWFORD/home.htm> (last visited Dec. 30, 2004).

Constitutional Amendments that would establish English as the official language have been introduced in Congress repeatedly since 1981.⁴⁹ In addition, numerous pieces of traditional legislation designed to establish an official language have also been introduced at the federal level.⁵⁰ One notable example is the Emerson English Language Empowerment Act, which passed the House of Representatives on August 1, 1996, on a bipartisan vote of 259 to 169.⁵¹ The measure died while awaiting Senate action when President Clinton threatened a veto.⁵² President Clinton also weighed in on the language debate with Executive Order 13166, directing federal agencies and recipients of agency financial assistance to “take reasonable steps to ensure meaningful access” for persons of limited English proficiency (LEP).⁵³ Most recently, there were several bills and a proposed Constitutional Amendment before the 108th Congress addressing the topic of an official language declaration.⁵⁴

After encountering resistance at the federal level, English advocacy groups shifted their focus to action at the state level⁵⁵ and have achieved tremendous success⁵⁶ through a variety of ballot initiatives, state constitutional amendments, and legislative enactments. There are currently 27 states with some provision to officially recognize English.⁵⁷ It is beyond the

⁴⁹ See James Crawford’s Language Policy Website and Emporium, *Language Legislation in the U.S.A.*, at <http://ourworld.compuserve.com/homepages/JWCRAWFORD/langleg.htm> (last visited Dec. 30, 2004) (providing a comprehensive listing of language bills that have been introduced).

⁵⁰ *Id.*

⁵¹ DiChiara, *supra* note 6, at 105.

⁵² Crawford, *Anatomy*, *supra* note 11.

⁵³ Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (August 11, 2000).

⁵⁴ National Language Act of 2003, H.R. 931, 108th Cong. (2003); English Language Unity Act of 2003, H.R. 997, 108th Cong. (2003); English Plus Resolution, H.R. Con. Res. 5, 108th Cong. (2003); a bill to repeal or de-fund Executive Order 13166, H.R. 300, 108th Cong. (2003); a proposed Amendment to the Constitution to establish English as the official language of the United States, H.J. Res. 94, 108th Cong. (2004).

⁵⁵ Lowrey, *supra* note 3, at 284-85.

⁵⁶ See Perea, *Demography and Distrust*, *supra* note 9, at 342 (noting that direct popular votes on English language referenda have passed by “overwhelming margins”); Crawford, *Anatomy*, *supra* note 11 (noting that measures typically pass by 60 to 90 percent margins and support is “a mainstream phenomenon”); DiChiara, *supra* note 6, at 106 (“According to a 1995 *U.S. News & World Report* poll, seventy-three percent of Americans think that English should be the official language of the U.S. Government.”).

⁵⁷ As many commentators point out, these provisions vary greatly in their structure, substance, and impact. See, e.g., Lucy Chiu, *The Emerson English Language Empowerment Act: The House’s “Straw Man” Bill*, 23 J. LEGIS. 231, 238 (1997) (“these statutes differ greatly in substance and strictness”); Wong, *supra* note 3, at 283-84 (“The laws range from declaratory to obligatory.”); Valente, *supra* note 6, at 210 (“Some states merely make declarations that ‘English is the Official Language,’ while others are more restrictive.”). Professor Perea notes that only two of these laws, from Nebraska and Illinois, were passed before the early 1980s. Perea, *Demography and Distrust*, *supra* note 9, at 342 n.407. Illinois actually declared “American” to be its official language in 1923—only changing to

scope of this paper to fully address the question of whether official languages would properly be a national or a state matter under the Tenth Amendment and our federalist system.⁵⁸

“English” in 1969. Note, *‘Official English’: Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345, 1346 n.7 (1987).

The provisions making some official recognition of English are: Alabama, ALA. CONST. amend. 509; Alaska, ALASKA STAT. §§ 44.12.300-390 (Michie 2004); Arkansas, ARK. CODE ANN. § 1-4-117 (Michie 1996); California, CAL. CONST. art. III, § 6; Colorado, COLO. CONST. art. II, § 30a; Florida, FLA. CONST. art. II, § 9; Georgia, GA. CODE ANN. § 50-3-100 (1998); Illinois, 5 ILL. COMP. STAT. 460/20 (1993); Indiana, IND. CODE ANN. § 1-2-10-1 (Michie 2002); Iowa, IOWA CODE ANN. § 1.18 (West Supp. 2004); Kentucky, KY. REV. STAT. ANN. § 2.013 (Michie 2003); Mississippi, MISS. CODE ANN. § 3-3-31 (1999); Missouri, MO. ANN. STAT. § 1.028 (West 2000); Montana, MONT. CODE ANN. § 1-1-510 (2003); Nebraska, NEB. CONST. art. I, § 27; New Hampshire, N.H. REV. STAT. ANN. §§ 3-C:1 to 3-C:4 (2001); North Carolina, N.C. GEN. STAT. § 145-12 (2003); North Dakota, N.D. CENT. CODE § 54-02-13 (2001); South Carolina, S.C. Code Ann. §§ 1-1-696 to 1-1-698 (Law. Co-op. Supp. 2003); South Dakota, S.D. CODIFIED LAWS § 1-27-20 to 1-27-26 (Michie 2003); Tennessee, TENN. CODE ANN. § 4-1-404 (1998); Utah, UTAH CODE ANN. § 63-13-1.5 (Supp. 2004); Virginia, VA. CODE ANN. § 7.1-42 (Michie 2001); Wyoming, WYO. STAT. ANN. § 8-6-101 (Michie 1999).

Louisiana is an interesting case with opponents of official designation pointing to the state constitution and supporters of official designation pointing to Louisiana’s Enabling Act. *Compare* LA. CONST. art. XII, § 4 (“The right of the people to preserve, foster, and promote their respective historic, linguistic, and cultural origins is recognized.”) with 2 U.S. STAT. 641, § 3 (1811) (requiring that the laws, judicial, and legislative proceedings of the state be conducted in the same language used by the United States for the same purposes). In addition, state law declares that advertisements for “judicial process or any other legal process of whatever kind, . . . shall be made in the English language and may in addition be duplicated in the French language. State and local officials and public institutions are reconfirmed in the traditional right to publish documents in the French language in addition to English.” LA. REV. STAT. ANN. § 43:204 (West 2003). Thus, Louisiana is counted among the states with an official designation though the true nature and impact of this designation is far from clear.

Hawaii is also an interesting case as it is currently the only state with two explicitly official languages. HAW. CONST. art. XV, § 4 (“English and Hawaiian shall be the official languages of Hawaii, except that Hawaiian shall be required for public acts and transactions only as provided by law.”). Other provisions also make clear that Hawaiian is not required for public acts and the English version of a law will be binding if the languages are found to differ. HAW. REV. STAT. §§ 1-13, 5-6.5 (2003).

New Mexico is sometimes considered an officially bilingual state in English and Spanish, and certainly it was so when admitted to the union. *See* Perea, *Demography and Distrust*, *supra* note 9, at 319-23. There are still provisions in the state constitution that touch on language. N.M. CONST. art. XII, § 8 (providing for school teachers in English and Spanish); art. XIX, § 1 (directing certain publications be made in both English and Spanish language newspapers if available); art. XX, § 12 (“For the first twenty years after this constitution goes into effect all laws passed by the legislature shall be published in both the English and Spanish languages and thereafter such publication shall be made as the legislature may provide.”). Given this, it is with some trepidation that this paper counts New Mexico as among those states with an “official” declaration.

⁵⁸ Specifically, the paper does not address the question of whether a state can, consistent with our federalist system, mandate additional language requirements or make designations beyond English such as Hawaii’s dual official languages of English and Hawaiian. *See supra* note 57.

B. *Judicial Response*

The federal courts, and the Supreme Court in particular, have only sporadically addressed the issue of language laws, and then usually, only tangentially.⁵⁹ This is understandable since language itself cannot easily be defined or classified by the legal community.⁶⁰ An official language designation could conceivably implicate a large number of legal issues depending on how such a bill or amendment would be drawn.⁶¹ The trend has been for an increasing number of challenges as provisions are passed in more states⁶² and are increasingly called into question by a burgeoning population with limited English skills.⁶³ Many commentators think that the issue will be addressed again (and perhaps finally resolved) in the Supreme Court in the not too distant future.⁶⁴

By the time the Supreme Court heard its first language case in 1923, thirty-four states had enacted some form of language restriction in the realm of education.⁶⁵ *Meyer v. Nebraska*⁶⁶ challenged one such restriction forbidding the teaching of any language other than English to any child who had not yet completed the eighth grade.⁶⁷ Justice McReynolds' opinion noted:

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it

⁵⁹ Along with the following discussion, see *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) (specifically avoiding the issue of Alabama's language requirement in administration of its driver's license tests and focusing instead on whether Title VI of the Civil Right Act allows for a private right of action without a showing of intentional discrimination).

⁶⁰ Christina M. Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 133-34 (2001) ("[I]t is unclear whether to classify language as culture, ethnicity, or behavior.>").

⁶¹ Such issues may include the First, Fifth, and Fourteenth Amendments to the Constitution, the Civil Rights Act, Voting Rights Act, and Equal Education Opportunity Act. Valente, *supra* note 6, at 212, 241-42.

⁶² See *supra* note 57.

⁶³ The 2000 Census reports that 11.9 million people in the U.S. live in "linguistically isolated" households (4.4 million households). A "linguistically isolated" household is one in which no one aged 14 or older speaks English at least "very well." In 1990, 7.7 million people (2.9 million households) were linguistically isolated. HYON B SHIN & ROSALIND BRUNO, U.S. CENSUS BUREAU, LANGUAGE USE AND ENGLISH SPEAKING ABILITY: 2000 10 (2003) available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>.

⁶⁴ E.g., Valente, *supra* note 6, at 207.

⁶⁵ See *supra* note 45.

⁶⁶ 262 U.S. 390 (1923).

⁶⁷ *Id.* at 396-97.

would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.⁶⁸

The “fundamental rights” that the Court based its holding on however, were not explicit rights to language but the rights of teachers to teach, children to learn, and parents to direct their child’s education.⁶⁹ The Nebraska law was struck down as a violation of due process under the Fourteenth Amendment.⁷⁰ Justice Holmes’ dissent in the companion case *Bartels v. Iowa*⁷¹ begins with a line still resonant in the language debate today: “We all agree, I take it, that it is desirable that all the citizens of the United States should speak a common tongue. . . .”⁷²

A few years later the Court added an equal protection component⁷³ to the substantive due process analysis of *Meyer* to invalidate a Philippine statute that forbade any business “to keep its account books in any language other than English, Spanish, or any local dialect.”⁷⁴ The decision in *Yu Cong Eng v. Trinidad* noted that the statute effectively targeted Chinese businessmen for unfair treatment and denied them equal protection of the laws in the operation of their businesses.⁷⁵ Again, the Court declined to recognize an explicit right to language. Instead, it protected the fundamental right to pursue an occupation or run a business without undue government interference.⁷⁶

These cases typified the Court’s early treatment, or near treatment, of language.⁷⁷ Political developments did not make the language issue significant again until the mid-1960s.⁷⁸ These later challenges of the ‘60s found greater traction under federal statutes.

In 1966, *Katzenbach v. Morgan*⁷⁹ touched on a traditionally sensitive area of the language debate—voting rights and bilingual ballots.⁸⁰ In *Morgan*, the Court upheld a provision of the Voting Rights Act of 1965 as a

⁶⁸ *Id.* at 401.

⁶⁹ *Id. Contra Wong, supra* note 3, at 287 n.62 (asserting that the Court’s holding indicates a “fundamental, individual right of choice of language.”); Valente, *supra* note 6, at 235 (“The Supreme Court has indeed recognized language rights to some extent. . . .”).

⁷⁰ *Meyer*, 262 U.S. at 399-400.

⁷¹ 262 U.S. 404 (1923).

⁷² *Id.* at 412.

⁷³ *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 524-25 (1926).

⁷⁴ *Id.* at 508.

⁷⁵ *Id.* at 514, 528.

⁷⁶ *See id.*

⁷⁷ *Wong, supra* note 3, at 289, 289 n.75.

⁷⁸ *See* notes 46-47 *supra* and accompanying text.

⁷⁹ 384 U.S. 641 (1966).

⁸⁰ *Perea, Demography and Distrust, supra* note 9, at 347-50.

valid use of Congress' power under Section 5 of the Fourteenth Amendment.⁸¹ The provision of the Voting Rights Act in question, section 4(e), prohibited "conditioning the right to vote . . . on [the] ability to read, write, understand, or interpret any matter in English language" to any person educated in an American flag school even if the primary language of instruction was not English.⁸² This decision prevented the enforcement of a New York law requiring proof of English proficiency to register⁸³ - a law that presented a major hurdle to many of New York's Puerto Rican immigrants. However, the Court did not pass on the question of whether this requirement was facially unconstitutional or even whether New York's law was discriminatory as applied.⁸⁴ Again, language was treated tangentially, this time to the question of Congress' power over the states.

In 1974, the Supreme Court returned to the controversial area of bilingual education with the landmark case of *Lau v. Nichols*.⁸⁵ *Lau* presented a claim by 1,800 Chinese-speaking students in the San Francisco Unified School District who believed they were being denied an equal education because of a lack of supplemental courses in the English language.⁸⁶ The Court agreed that the lack of English language instruction had the effect of discrimination⁸⁷ against the Chinese-speaking students in violation of the Civil Rights Act of 1964⁸⁸ (CRA) as well as California's own education code regarding English language deficiency.⁸⁹ The Court, however, declined to reach the issue of the Fourteenth Amendment⁹⁰ or to specify any particular remedy.⁹¹ Significantly, the Court also noted that "[b]asic English skills are at the very core of what these public schools teach," and "students who do not understand English are effectively foreclosed from any meaningful education."⁹² Congress passed the Equal Education Opportunities

⁸¹ *Morgan*, 384 U.S. at 646-47.

⁸² *Id.* at 643 n.1.

⁸³ *Id.* at 647; *see also id.* at 644 n.2 (setting out the New York law at issue).

⁸⁴ *Id.* at 649. The Court specifically distinguished its decision in *Lassiter v. Northampton Bd. of Elections*, 360 U.S. 45 (1959) (upholding facial constitutionality of voting literacy test). *Id.*

⁸⁵ 414 U.S. 563 (1974).

⁸⁶ *Id.* at 564.

⁸⁷ *Id.* at 568.

⁸⁸ *Id.* at 566-67. The treatment of the Chinese-speaking students violated regulations of the Department of Health, Education, and Welfare promulgated under the authority of the Civil Rights Act. *Id.* The Civil Rights Act is codified at 42 U.S.C. § 2000(e) *et seq.* and prohibits discrimination on the basis of race, color, religion, sex, and national origin but does not specifically mention language.

⁸⁹ *Id.* at 565-66.

⁹⁰ *Id.* at 566.

⁹¹ *Lau*, 414 U.S. at 564-65 ("Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others.").

⁹² *Id.* at 566.

Act of 1974 to codify the *Lau* decision.⁹³ Unfortunately, Congress codified the same lack of precise remedies from the decision by directing that a school system must “take appropriate action” to overcome language barriers that impede equal participation by its students in its instructional programs.”⁹⁴

Other significant language challenges under the CRA have been made in the workplace and employment settings. In *Garcia v. Gloor*,⁹⁵ the Fifth Circuit decided that “speak-only-English” workplace rules did not violate the CRA, declining to automatically equate choice of language with prohibited national origin discrimination.⁹⁶ The Ninth Circuit followed this reasoning in *Garcia v. Spun Steak Co.*⁹⁷ Both decisions note that workplace language rules may serve as a proxy for forbidden discrimination based on national origin or race, and therefore, are not automatically valid.⁹⁸ However, without proof of discriminatory intent, or a rule based on a prohibited immutable characteristic, employers are free to run their businesses as they choose.⁹⁹ These decisions held that language, to a multilingual person, is not an immutable characteristic but a matter of choice.¹⁰⁰ The Second Circuit has also adopted the position that “[l]anguage by itself does not identify a suspect class.”¹⁰¹ In response to *Gloor*, the Equal Employment Opportunity Commission adopted the position that language discrimination does in fact equate with national origin discrimination.¹⁰²

⁹³ See Valente, *supra* note 6, at 249.

⁹⁴ 20 U.S.C.A. § 1703(f) (2000).

⁹⁵ 618 F.2d 264 (5th Cir. 1980).

⁹⁶ See *id.* at 266, 270.

⁹⁷ 998 F.2d 1480, 1489 (9th Cir. 1993).

⁹⁸ See *Gloor*, 618 F.2d at 268, 270, 272; *Spun Steak*, 998 F.2d at 1489 (whether an English-only policy amounts to discrimination must be examined in “the totality of circumstances in the particular factual context.”).

⁹⁹ See *Gloor*, 618 F.2d at 269-70; *Spun Steak*, 998 F.2d at 1484-85, 1489-90; cf. *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 526, 528 (1926) (the ability of a business owner to choose a language is “something indispensable to the carrying on of their business”); see also *supra* notes 75-78 and accompanying text.

¹⁰⁰ *Gloor*, 618 F.2d at 270; *Spun Steak*, 998 F.2d at 1487. *Gloor*, however, notes that language might be “an immutable characteristic like skin color, sex, or place of birth” to a monolingual person. 618 F.2d at 270.

¹⁰¹ *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) (quoting *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975)). The Second Circuit also made the bold assertion that “English is the national language of the United States.” *Id.* at 42.

¹⁰² Valente, *supra* note 6, at 242 & n.246; see also Perea, *Killing Me Softly*, *supra* note 3, at 450; Valente, *supra* note 6, at 242 & n.246. The EEOC guideline on national origin discrimination defines such discrimination as “including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.” 29 C.F.R. § 1606.1 (2004). In addition, the EEOC guideline on “speak-English-only” rules states in part:

Federal courts have also occasionally addressed the issue of language within the legal arena itself. For example, in *Hernandez v. New York*,¹⁰³ the Supreme Court accepted that a bilingual person may properly be excluded from a jury panel by reason that he or she might be unwilling or unable to follow court provided translation.¹⁰⁴ Language ability itself was not found to be an impermissible basis for dismissal as is race or national origin.¹⁰⁵ The First Circuit has also found that English language ability is a permissible requirement for jury service.¹⁰⁶ The Second Circuit, in *United States ex rel Negron v. New York*, found a right to an interpreter for criminal defendants without an understanding of English.¹⁰⁷ Operating without an interpreter was tantamount to denying a defendant the ability to be fully present at his own trial.¹⁰⁸ Once again, these decisions did not deal purely with a right to language, but rather with comprehension of legal proceedings.

In recent cases, the Supreme Court has continued to explicitly avoid treating the issue of language laws head on.¹⁰⁹ *Arizonans for Official English v. Arizona*¹¹⁰ started with a challenge to an Arizona state constitutional amendment passed in 1988 by ballot initiative.¹¹¹ Except for a few specified exceptions to comply with federal law, the amendment restricted the state (and all its political subdivisions) to “act in English and in no other language.”¹¹² A state employee challenged the law and eventually the Ninth Circuit decided *en banc* (6-5) that the law violated the First Amendment.¹¹³

When applied at all times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. [footnote omitted] Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it.

29 C.F.R. § 1606.7(a) (2004).

The *Spun Steak* decision considered the EEOC guidelines and expressly declined to follow them. *See* 998 F.2d at 1489.

¹⁰³ 500 U.S. 352 (1991).

¹⁰⁴ *See id.* at 360-61, 372 (accepting a distinction made on bilingual ability as race-neutral).

¹⁰⁵ *See id.* at 369-72.

¹⁰⁶ *See* *United States v. Benmuhar*, 658 F.2d 14, 18-20 (1st Cir. 1981).

¹⁰⁷ 434 F.2d 386, 390-91 (2d Cir. 1970).

¹⁰⁸ *Cf. id.*

¹⁰⁹ Along with the following discussion, see *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001), *supra* note 59.

¹¹⁰ 520 U.S. 43 (1997).

¹¹¹ *Id.* at 48-49. The Arizona amendment was Article XXVIII. *See id.* at 80-82.

¹¹² *Id.* at 49.

¹¹³ *See id.* at 48. The Ninth Circuit's vacated *en banc* decision is reported at *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995).

After detailing the many steps and missteps in the long and twisted procedural history of the case, a unanimous Supreme Court vacated the Ninth Circuit's decision based on mootness and lack of standing.¹¹⁴ The High Court pointedly withheld expressing any opinion as to the constitutionality of the Arizona language amendment.¹¹⁵

When the Arizona Supreme Court finally issued an opinion on the amendment in *Ruiz v. Hull*,¹¹⁶ it closely followed the logic of the vacated Ninth Circuit decision¹¹⁷ to find that it violated the First and Fourteenth Amendments to the U.S. Constitution.¹¹⁸ This opinion noted that Arizona's law was "unique" in being "the most restrictive" of the state level official English measures.¹¹⁹ Although expressly declining to rule on the appropriate constitutional scope of a language law,¹²⁰ the Arizona Supreme Court compared provisions from Wyoming, Montana, Colorado, Arkansas, Florida, California and other states as a way to highlight the problems with the unconstitutional Arizona amendment.¹²¹ This decision, and the vacated Ninth Circuit opinion and dissents,¹²² provide some initial insight into the concerns surrounding the appropriate scope of a legitimate official language designation, though the opinions expressly deny they are doing so.¹²³

¹¹⁴ 520 U.S. at 48, 80.

¹¹⁵ *Id.* at 49.

¹¹⁶ 957 P.2d 984 (Ariz. 1998).

¹¹⁷ *Id.* at 987 n.1.

¹¹⁸ *Id.* at 987.

¹¹⁹ *Id.* at 994-95. Commentators have also noted that the Arizona law was an easy target for a constitutional challenge because of its unusually broad prohibitions. Wong, *supra* note 3, at 310.

¹²⁰ *Ruiz*, 957 P.2d at 987, 996.

¹²¹ *Id.* at 995-96. See Chiu, *supra* note 57 (providing an extensive comparison of various state language laws).

¹²² The dissents of Judge Kozinski and Judge Fernandez point out that the state, as an employer, has the right to control what its employees say on its behalf. *Yniguez*, 69 F.3d at 957, 961-62. The decisions of what the government says (and how) would then properly be viewed as a policy questions to be decided by the policy makers, in this case the voters. See *id.* at 958, 961-62.

¹²³ *Ruiz*, 957 P.2d at 987, 996. Though he disagrees with the majority opinion finding the amendment unconstitutional, Judge Kozinski also declined to say that the amendment was constitutional. *Yniguez*, 69 F.3d at 963 (Kozinski, J., dissenting).

II. ORGANIZATION, COMMUNICATION, AND LANGUAGE

A. *Communications*

It is greatly beyond the scope of this paper to do more than present a brief introduction to communications theory in order to gain an insight into how the Constitution, as a communication, may function as a central unifying force. First, a word of caution; not only is defining communications difficult, it may well be impossible.¹²⁴ The reason is that every communications theory tends to evoke its own definition¹²⁵ and there have been hundreds of communications theories postulated.¹²⁶

Moreover, these theories can be seen from a variety of perspectives, each focusing on different aspects of the communications process. A rhetorical perspective shifts the theoretical focus to messages, how they are crafted to persuade, and their intended purpose.¹²⁷ A transmissional perspective, by contrast, tends to focus on the channel of communication and how a message is transmitted through that channel.¹²⁸ A psychological perspective places greater emphasis on the minds of the communicators, their values, beliefs, attitudes, fears, and prejudices,¹²⁹ while a sociological perspective sees the communal nature of communication and emphasizes the group, social, or cultural aspects.¹³⁰ Finally, a transactional perspective sees communication as creating a dynamic relationship (or system) and focuses

¹²⁴ See JOHN F. CRAGAN & DONALD C. SHIELDS, UNDERSTANDING COMMUNICATION THEORY: THE COMMUNICATIVE FORCES FOR HUMAN ACTION 5 (1998).

¹²⁵ *Id.* “Theories drive the definition of communication. . . . [y]ou cannot define communication in the absence of a stated or implied communication theory.” *Id.* The authors present 42 different communication theories in their book, each with a different definition. *Id.* See also ROBERT L. HEATH & JENNINGS BRYANT, HUMAN COMMUNICATIONS THEORY AND RESEARCH: CONCEPTS, CONTEXT, AND CHALLENGES 46 (2000). The authors claim that “hundreds of definitions [of communication] have been proposed over the last 50 years, but none is entirely satisfactory.” *Id.* They then list a few such as: “the process or act of transmitting a message from a sender to a receiver, through a channel and with the interference of noise;” and “interaction through messages. . . [m]essages are formally coded symbolic or representational events of some shared significance in a culture, produced for the purpose of evoking significance;” and “a process through which persons create, maintain, and alter social order, relationships, and identities.” *Id.* at 46-47.

¹²⁶ WILLIAM W. NEHER, ORGANIZATIONAL COMMUNICATION: CHALLENGES OF CHANGE, DIVERSITY, AND CONTINUITY 41 (1997).

¹²⁷ *Id.* at 42-43.

¹²⁸ *Id.* at 43-46.

¹²⁹ *Id.* at 46-48.

¹³⁰ *Id.* at 48-51.

on that relationship as its own independent event.¹³¹ It is therefore with some trepidation that this paper, even with its limited focus, turns to as basic and broad a definition as possible: *communication is the transmission of information by various means*.¹³² Far from being authoritative, this working definition should give the reader merely a starting point to build a richer understanding of how complex a process communication really is.

One of the most influential questions for the development of communications theory was Harold Lasswell's, "who says what to whom, through what channel, with what purpose and effect?"¹³³ This question, along with some basic models, helps identify the constituent parts of any communication. Lasswell's model describes communication with five essential elements: 1) transmitter, 2) message, 3) medium, 4) recipient, 5) effect/impact.¹³⁴ Another early and very influential model comes from the work of Claude Shannon and Warren Weaver at Bell Labs¹³⁵ and breaks down the elements of communication in a slightly different way: 1) a source, 2) an encoder, 3) a message, 4) a channel or medium for the message, 5) a decoder, 6) and a receiver.¹³⁶ The Sender-Message-Channel-Receiver (S-M-C-R) model introduced by David Berlo gives yet another division of the communications process.¹³⁷

A major criticism of the early transmission-focused models is their unidirectional flow. There is no feedback. Even though the audience is a vital part of the process, the speaker (transmitter) seems to be in total con-

¹³¹ *Id.* at 51-54. See also GARY L. KREPS, ORGANIZATIONAL COMMUNICATION 27 (2d ed. 1990).

¹³² See AM. HERITAGE DICTIONARIES, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, definition 3(b) (4th ed. 2000), at <http://www.dictionary.reference.com/search?q=communication>.

¹³³ HEATH, *supra* note 125, at 57. It is also worth noting that, as Lasswell was deeply interested in propaganda, the real question he was interested in was "why"—or, *the motivation* behind the "who" that was speaking. See *id.*

¹³⁴ Communication, Cultural and Media Studies (Mick Underwood ed.) at <http://www.ccms-infobase.com> (last visited Feb. 15, 2005) [hereinafter CCMS], Subject: La: *The Lasswell Formula*.

¹³⁵ HEATH, *supra* note 125, at 63. Shannon and Weaver defined communications as "all of the procedures by which one mind may affect another." *Id.* Shannon especially viewed communications from a more technical perspective, concerned with the engineering difficulties of fidelity in telephonic and other transmissions. *Id.* at 63, 65.

¹³⁶ See *id.* at 63-65. This and other models also include the concept of "noise" or "interference" which can affect, impair, or degrade the communications process. Given their technical focus with telephony, identifying and eliminating the source of the "noise" was key to Shannon and Weaver. Later work by other researchers came to view noise as a constituent part of any communications process. See *id.* at 64; CCMS, *supra* note 134, at Subject: Sa: *The Shannon-Weaver Model*.

¹³⁷ See HEATH, *supra* note 125, at 61, 68. This is actually quite a complex model that takes many psychological and cultural factors into account. For a more complete description see DAVID K. BERLO, THE PROCESS OF COMMUNICATION 40-72 (1960); CCMS, *supra* note 134, at Subject: Ba: *Berlo's SMCR Model*.

trol.¹³⁸ A circular model of communications suggested by Wilbur Schramm basically doubles the transmission model back on itself to acknowledge that communicators are simultaneously sending *and receiving* information.¹³⁹ According to this circular model, communications is a true interaction with the initial “receiver” sending information back to the initial “transmitter.”¹⁴⁰ Indeed, this is how actual conversation takes place. Even a blank stare on the listener’s face sends important information back to the speaker. Feedback is a vital part of the communications cycle, helping to verify that the original message was received and decoded properly, thereby enhancing the effectiveness of any communication.¹⁴¹

The fact that an audience (a receiver) is a vital part of the communications process is so obvious it is commonly overlooked.¹⁴² Communicating is inherently relational and communal, not a solitary act controlled by one individual. Circular communication models draw attention to this fact and put at least as much emphasis on the recipient of the message—the listener or reader—as on the sender of the message. It is not merely up to the speaker to be clear, and even a clear message is no guarantee that the intended meaning is successfully conveyed to the receiver. The listener or reader plays at least as large a role and is an *active participant* in any successful transmission of meaningful information. Not only must a clear message be sent, it must be successfully decoded by the audience.

All communication is therefore indirect, relying on some symbolic representation to convey information between speaker and audience.¹⁴³ Speakers express information they would like their audiences to understand, but can never get inside the heads of the audience members to know what exactly is being understood from their message, and what is being missed, misunderstood, or ignored.

¹³⁸ See HEATH, *supra* note 125, at 65.

¹³⁹ HEATH, *supra* note 125, at 65-66; CCMS, *supra* note 134, at Subject: Sa: *Schramm and Os-good's Model*.

¹⁴⁰ This “feedback” can be either explicit or implicit or both. In any face-to-face communication, this back and forth is going on simultaneously as when a listener smiles or frowns during the conversation. See HEATH, *supra* note 125, at 65-66. The transmitter is constantly receiving messages from the audience (usually non-verbal) that lets the speaker know something of how the message is being received (or ignored). In written communications, this must necessarily proceed in distinct stages if at all.

¹⁴¹ KREPS, *supra* note 131, at 35.

¹⁴² See *id.* at 26. The linear model of communication is an oversimplification. “No one individual is only a sender or only a receiver.” *Id.*

¹⁴³ NEHER, *supra* note 126, at 18.

B. *Communicating Meaning*

“Meanings are not in things, they are in people *Meanings are our interpretations.*”¹⁴⁴

Though there are many ways of transmitting information¹⁴⁵ (i.e. communicating), the focus of this paper is on language and it will be nearly impossible to separate the discussion of “communications” from the discussion of “language.”¹⁴⁶ Language is the means most often employed in society to expressly convey thoughts and ideas.¹⁴⁷ It is also virtually the exclusive means of transmitting information in the law and in large organizations, such as government. Further, as with any written communication, language is the means adopted by the Constitution. It is only important to note that communication takes place in many forms, through many channels, simultaneously and continually. Although language, spoken and especially written, will be the focus of this paper, it may be only the tip of the communications iceberg.

As was noted above, placing equal stress on the audience and the speaker highlights the communal and relational nature of communications, and therefore, language. The transmission of information, in any communication, is itself a collaborative and interactive process.

If universal meanings were found in words, then everyone would understand any language or code.¹⁴⁸ Indeed, if meaning were inherent to a specific word, in essence, there would be only one language. Clearly, things are more complex. Meaning comes from both the internal associations that the language users (speaker and audience members) bring to the act of communicating and from the specific language itself.¹⁴⁹

¹⁴⁴ BERLO, *supra* note 137, at 187 (emphasis in original).

¹⁴⁵ Information may potentially be transmitted through any of the five senses. *See* BERLO, *supra* note 137, at 66. There is even research to suggest some kind of chemical communication beyond the five senses. *See* CCMS, *supra* note 134, at Subject: Sa: *Sixth Sense* (describing the phenomenon that menstrual cycles among women who live in close proximity tend to become synchronized).

¹⁴⁶ In addition, given the limited scope of his paper, the author makes no attempt to delve into the vast fields of information from such disciplines as linguistics, semiotics, syntactics and others that treat language more explicitly as its own phenomenon. It is sufficient that language is identified as the primary form of human communication.

¹⁴⁷ *See* BERLO, *supra* note 137, at 169. *See also* HEATH, *supra* note 125, at 91

¹⁴⁸ *See* CCMS, *supra* note 134, at Subject: Ba: *Berlo on Meaning*.

¹⁴⁹ *See generally* BERLO, *supra* note 137, at 168-189.

Words themselves are arbitrary and have no inherent meaning.¹⁵⁰ Words are symbols that refer to things, concepts, feelings, you name it.¹⁵¹ As Berlo noted, words themselves do not “mean” anything, only people “mean.”¹⁵² Instead, as we all know, any particular word can have many different meanings, depending on the context in which it is used. And the creation of meaning is a uniquely personal process.¹⁵³ The word “current” means something very different to an electrical engineer, a naval officer, a news junkie, and a berry picker. Why?

Words get their meaning from context.¹⁵⁴ Successful communication depends on shared context between speaker and listener.¹⁵⁵ However, a shared context is not so simple a thing to achieve. Context is personal.¹⁵⁶ It is created within us based on our own knowledge and experience. Further, context is, itself, an interpretation of the relevant aspects of any situation, and one of the most important aspects to any communication is the language being used in that communication. To explain this a bit further, it would be useful to introduce a few terms from ethnomethodology.¹⁵⁷ This field of study is based on two essential facts of communications: 1) the meaning of language depends on context (indexicality), and 2) the context depends on the meaning of language (reflexivity).¹⁵⁸

Ethnomethodology views all words as having multiple meanings,¹⁵⁹—and this is, in fact, our experience in the everyday world. The classic example of how context provides meaning is the word “it.”¹⁶⁰ Within the context of the conversation, “it” means exactly one specific, individual thing—the exact thing you are talking about. But without the background context of

¹⁵⁰ This concept of “arbitrariness” was introduced by Ferdinand de Saussure and posits that there is no necessary connect between the form of a word and its meaning. Different languages create different words and sounds to denote the same object. Further, identical words and sounds can denote completely different things in different languages. R.L. TRASK, KEY CONCEPTS IN LANGUAGE AND LINGUISTICS 19-20, 174 (1999).

¹⁵¹ See TREVOR A. HARLEY, THE PSYCHOLOGY OF LANGUAGE: FROM DATA TO THEORY 5 (2d ed. 2001) [hereinafter HARLEY]. Sorry for the pun.

¹⁵² BERLO, *supra* note 137, at 176. “It has often been said that words do not mean the same to all people. It is more accurate to say that *words do not mean at all*. Only people mean, and people do not mean the same by all words.” *Id.* (emphasis in original); cf. KREPS, *supra* note 131, at 29 (“Meanings are in people, not in words, objects, or things.”).

¹⁵³ KREPS, *supra* note 131, at 29.

¹⁵⁴ RICHARD HEYMAN, WHY DIDN’T YOU SAY THAT IN THE FIRST PLACE?: HOW TO BE UNDERSTOOD AT WORK 17 (1994).

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ Ethnomethodology is defined as “the study of people’s methods of making sense of each other.” *Id.* at 9

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ HEYMAN, *supra* note 154.

the ongoing communication, there is no way to know what “it” is supposed to mean. Thus, without knowing the context, all words are ambiguous. This highlights the indexicality of language.¹⁶¹

Merely understanding that the meaning of a word is an interpretation based on context is not the end of the process, however. Context is itself indexical. That is, context itself is an interpretation of what factors are relevant to the communication, and this is largely based on the language being used. This is the reflexivity of language.¹⁶²

Context does not exist as a universal, immutable given in any particular word but is, instead, created within us. We must make a choice, consciously or unconsciously, about which aspects of the situation and communication are important.¹⁶³ Thus context is uniquely ours. It is a choice that we must make internally based on our own knowledge and experiences about which aspects of the setting are relevant and which are not.¹⁶⁴ And this is largely based on the language that is being used at the time. Meaning and context each provide the basis for the other.¹⁶⁵

Although this concept seems complicated and problematic at first, a moment’s reflection shows that it is actually quite straightforward. Suppose that you are talking to your friend at a baseball game. She asks about a project you are both working on and the conversation turns to some of the problems you are both having at work. You talk about work not because of your external circumstances (the ballgame) but because of the context of your conversation. It is the context of your discussion (work) that provides meaning for your language, and it is your language that establishes the context.

This example also shows that context is not a given, and is not static.¹⁶⁶ A minute earlier, the discussion could have revolved around the game, or troubled family relations, or your friend’s effort to find a parking spot. In the next minute it might return to the game or drift on to anything else. As the conversation flows, so the words themselves take on and express different meanings. For example, the word “strike” can have drastically different meanings within the context of the baseball game, the workplace, and stormy family relations.

Context is constantly changing based on the flow of information and the change of circumstances.¹⁶⁷ Moreover, context can include, not only

¹⁶¹ *Id.*

¹⁶² *Id.* at 10.

¹⁶³ *Id.* at 25.

¹⁶⁴ *Id.* at 17, 25.

¹⁶⁵ *Id.* at 10.

¹⁶⁶ See HEYMAN, *supra* note 154, at 10, 17.

¹⁶⁷ See *id.* at 10.

what factors are present at the moment of communication (and our own past experiences and knowledge) but everything that comes afterward as well.¹⁶⁸ Context can change retroactively—thus our understanding of the meaning can change over time. We have all had the experience of thinking back on a conversation hours, days, or even years, later and thinking, “oh, *that’s* what she meant.” Some new piece of information can change the context in which we had understood some long-ago message. As the context changes, the message changes as well.¹⁶⁹

Speakers cannot always be sure that their audience is bringing the right context to the conversation—and therefore, cannot be sure that the intended message is being conveyed. To some extent, a speaker can improve the accuracy of the communication by explicitly providing more clues to the relevant context—deliberately filling in more of the unspoken background context for the listener.¹⁷⁰

However, there is a limit to how much information we can provide to our audience. Much is necessarily left up to the listener to fill in. Ethnomethodologists refer to this as the “et cetera principle.”¹⁷¹ Providing too much information comes across as “talking down” to someone—the way we might provide much more explicit instructions to a child or someone we know to be lacking in knowledge or experience. This can insult people, or make them feel stupid, and may actually decrease the effectiveness of communication since people might take offense instead of focusing on the message.¹⁷²

Further, this process works both ways. If a listener continually asks for more and more detail, and clarification of the original message, the speaker is likely to become annoyed. The implication is that the message was not clear in the first place.¹⁷³

A speaker, then, necessarily trusts listeners to create the relevant context and fill in the meaning on their own.¹⁷⁴ What is key to remember, as this paper mentioned previously, is that this context is individual to each listener. Each listener creates his or her own context by connecting the message to factors such as the place, the time, the speaker’s biography and intentions, the location and occasion of the communication, the listener’s

¹⁶⁸ *Id.* at 25.

¹⁶⁹ *Id.*

¹⁷⁰ *See id.* at 12, 25.

¹⁷¹ *Id.* at 13.

¹⁷² *See* HEYMAN, *supra* note 154, at 12-13.

¹⁷³ *See id.* As an experiment, try asking someone for additional clarification on a point that would normally be taken for granted. See how many questions it takes before the communication breaks down. This example potently proves the “et cetera principle.”

¹⁷⁴ *Id.* at 13.

background knowledge and assumptions, et cetera.¹⁷⁵ And against the background of an individual context, each listener necessarily comes up with his or her own personal meaning for any message.¹⁷⁶

There are also other types of meaning worth mentioning—denotative and connotative.¹⁷⁷ Denotative meaning is roughly “dictionary meaning” or what society generally agrees a word means.¹⁷⁸ This meaning is essentially defined by the culture and, as we have seen, is determined by how the word is used in context. Connotative meaning, however, is based on a person’s particular experiences and associations with a word.¹⁷⁹ For example, a person who grew up continually harassed or attacked by a neighbor’s bulldog may come to have very negative associations with the word “bulldog.” By contrast, a person who grew up a rabid fan of the University of Georgia football team might have very positive feelings associated with the word “bulldog.”¹⁸⁰ The *denotation* may be exactly the same (based on context) but each person can have a markedly different experience and understanding based on their own personal *connotations* for the word. In addition, it is important to note that connotation can change radically over time as we continue to gain new experiences.¹⁸¹ Both denotative and connotative meanings play a role in each person’s interpretation, and creation, of meaning.¹⁸² Once again, this underscores the personal nature of meaning and understanding.

¹⁷⁵ *Id.* at 25.

¹⁷⁶ Although the paper has been using the terms speaker and listener, written language operates in the same way as spoken. All meaning comes from context which is created within the listener or reader. *See id.* at 74, 90.

¹⁷⁷ KREPS, *supra* note 131, at 40. *Cf.* BERLO, *supra* note 137, at 190-215. Berlo also describes “structural” meaning (meaning derived from grammar and syntax) and “contextual” meaning (meaning derived from surrounding words). *See id.* at 196-208.

¹⁷⁸ KREPS, *supra* note 131, at 40. *Cf.* BERLO, *supra* note 137, at 193-96. This oversimplifies the issue for Berlo who defines denotative meaning as “relationships between word-signs and objects that exist in the physical world.” *Id.* at 195. He would hasten to point out that: 1) meanings are in people, not texts; and, 2) meanings change over time, dictionaries do not. Dictionaries therefore do not control meaning. At best, they report on some past meanings. *See id.* at 193-96.

¹⁷⁹ KREPS, *supra* note 131, at 40. BERLO, *supra* note 137, at 208-213.

¹⁸⁰ *See* HEATH, *supra* note 125, at 105 (providing an analogous example).

¹⁸¹ *See* BERLO, *supra* note 137, at 208-13.

¹⁸² To Berlo, “[d]enotative and connotative meanings are not different in kind; they differ only in degree.” *Id.* at 211 (emphasis in original).

C. *Organization and Communications*

“Language provides both the constructive instrumentality and the conceptual frame to make and understand organization.”¹⁸³

“Social reality is not merely described by language but emerges in it.”¹⁸⁴

Karl Weick described organization as collective information processing.¹⁸⁵ Life confronts us with problems that we cannot solve as individuals. To overcome these obstacles and enhance the stability of life, we must coordinate our actions—that is, we must form organizations.¹⁸⁶ To Weick, human interaction is the essential phenomenon of organization and communication is the crucial link that enables individuals to work together.¹⁸⁷ Communication is the process that permits an organization to exist.¹⁸⁸ Moreover, communications is itself fundamentally organizational.¹⁸⁹ Organization, then, is an emergent property of communication; the two arise together.¹⁹⁰

Since language is the primary way of communicating complex symbolic ideas,¹⁹¹ it is crucial to organization and collective action. In addition, language, especially written language, allows for human knowledge to be stored and conveyed over time in a relatively stable form. This is known as “timebinding.”¹⁹² Timebinding permits crucial organizational information to be conveyed over time, affecting the behavior of future generations in an organization. What’s more, society itself fits well in an organizational framework.¹⁹³ Thus, language allows organizations, societies, and cultures to arise.

183 JAMES R. TAYLOR & ELIZABETH J. VAN EVERY, *THE EMERGENT ORGANIZATION: COMMUNICATION AS ITS SITE AND SURFACE* 72 (2000).

184 *Id.* at 69.

185 *See* KREPS, *supra* note 131, at 103.

186 *See id.* at 103-04.

187 *Id.* at 104.

188 *Id.*

189 TAYLOR & VAN EVERY, *supra* note 183, at 72.

190 *Id.* at 72, 104.

191 *See* KREPS, *supra* note 131, at 37 (“It is difficult to convey very technical, complex information nonverbally. . . .”). As a thought experiment, imagine trying to do something as simple as order a few pizzas for a group of friends without using words, spoken or written.

192 *Id.* at 38.

193 *See id.* at 124 (“Organizational cultures have virtually the same characteristics as societal cultures.”).

One final note: language is itself an emergent phenomenon.¹⁹⁴ It changes, evolves, and develops over time to serve the needs of its users.¹⁹⁵ Language adapts to the needs of the organization and grows with the society that uses it.¹⁹⁶ These concepts are all inextricably linked. Though each can be identified separately and discussed meaningfully as individual phenomena, in practice, the degree of overlap and dependency between language, communication, organization, and society is significant and irreducible.

Communication connects us and facilitates coordinated collective action. It is the basis and essence of virtually all organizations, whether a family unit, tribe, corporation, nation, or sandlot ball team. Language allows the communication of complex symbolic ideas that, in turn, shape an organization, hold it together, and define its limits.¹⁹⁷ Communication itself is the key.

Communication alone does not ensure the rise of a cohesive organization, nor does it prevent the division of one. Some commentators have argued with some force that language is not the nationally unifying force it is often claimed to be.¹⁹⁸ One undeniable fact is that both the American Revolution and the Civil War were fought in this country between groups speaking largely the same language. But this misses an essential point. Communication is not a sufficient condition for cohesive collective action—it will not guarantee peace and unity on its own. Communication is instead a *necessary* condition for collective action, and thus the peace and unity that *may* follow. Differences can always be found between individuals and groups. Symbolic communication, however, is the only way to bridge these differences, overcome the divisions, and forge unity of opinion and/or action. Without the ability to communicate symbolically, the only options are greater separation or physical conflict.¹⁹⁹ Communication works best to

¹⁹⁴ *Id.* at 41.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 41-42.

¹⁹⁷ An organization's internal communications (between members) socializes new members to the culture of the organization, directs member's actions, and establishes the organization's rules and regulations. KREPS, *supra* note 131, at 269.

¹⁹⁸ See, e.g., DiChiara, *supra* note 6, at 111-13 (pointing to multilingual systems in some nations); Perea, *Demography and Distrust*, *supra* note 9, at 278 ("The first myth is that our national unity depends solely on the English language. . . ."); Rodríguez, *supra* note 60, at 135 (treating language as part of an "individual's legal status"); see also generally Jose Roberto Juárez, Jr., *The American Tradition of Language Rights, ¡Que Viva Texas!: The Forgotten Right to Government in a "Known Tongue,"* 1 SCHOLAR 45, 53 (1999) (advocating the "fundamental right of government in a 'known tongue.'").

¹⁹⁹ Physical contact can also be a way to transmit information—that is, a form of communication. A tap, caress, slap, kick, and bite all convey different messages. What is more, this type of information transmission is nearly universal not merely among all people, but all animals—even animals we might not otherwise think capable of communicating.

remove differences and forge unity among groups when it is as widespread and inclusive as possible.

III. FURTHER NOTES ON THE NATURE OF LANGUAGE

“The limits of my language mean the limits of my world.”²⁰⁰

“Language shapes the way we think and determines what we can think about.”²⁰¹

The foregoing discussion only hints at how complex a phenomenon language is. Brilliant minds in numerous recognized fields²⁰² have grappled with what language is, what it does, how it works, and why. Webster’s Encyclopedic Unabridged New Deluxe Edition Dictionary provides 14 definitions of “language.”²⁰³ The Oxford English Dictionary dedicates almost two full pages to the subject.²⁰⁴ Yet, language defies a simple legal classification.²⁰⁵ Further, we’ve seen that language itself forms a major part of the very context that allows us to decode and understand its meaning. The role that language plays in shaping and forming this context—and by extension our understanding—is both profound and subtle.

There is no such thing as a literal description.²⁰⁶ No two people (and no two witnesses)²⁰⁷ will ever describe any thing or event in precisely the same way. All description is a choice of which aspects are important.²⁰⁸ We actively, though perhaps unconsciously, interpret reality based on our background knowledge and experience.²⁰⁹ And our language is a crucial part of this background knowledge, helping form our individual understanding of every situation.²¹⁰

Every law student is taught, in basic legal writing courses, that language shapes and directs our perceptions—often in ways that are not no-

²⁰⁰ LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 149 (C.K. Ogden trans., Routledge 1992) (1921).

²⁰¹ Benjamin Lee Whorf, at <http://quotemeonit.com/language.html> (last visited Dec. 30, 2004).

²⁰² See HARLEY, *supra* note 151, at 4, 6 (identifying such fields of study as psycholinguistics, semantics, syntax, morphology, pragmatics, phonetics, phonology).

²⁰³ WEBSTER’S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE UNITED STATES 1081 (New Deluxe ed. 2001).

²⁰⁴ 8 OXFORD ENGLISH DICTIONARY 634-35 (2d ed., 1989).

²⁰⁵ See *supra* note 60.

²⁰⁶ HEYMAN, *supra* note 154, at 18.

²⁰⁷ *Id.* at 96.

²⁰⁸ *Id.* at 18.

²⁰⁹ *Id.* at 25-29.

²¹⁰ See *id.* at 46.

ticed without close attention and study.²¹¹ The ways we describe something makes a difference in how people (including ourselves as legal professionals) perceive, experience, and relate to the subject being described. This is the essence of propaganda, the basis of most legal writing, and virtually all politics, sales and advertising. To describe someone as “the suspect,” “the defendant,” “my neighbor,” “Mr. Smith,” “Joe,” or “my client” all shift our perception of, and relation to, that person—even though the same person is being described in each instance.²¹² That words are crucial to perception is agreed.²¹³ This property of language is obvious and well known to any competent language user.

However, the ability of language to influence perception goes beyond mere description (the choice of words within a language). The form and structure of language itself can shape perceptions in subtle ways. We have all heard of foreign words or terms that have “no exact translation.”²¹⁴ But it is only when we encounter these foreign terms that we realize our own experience and perception of reality may have a gap.²¹⁵ At the very least, our experience of reality is different from a person raised with a different language even though we may be in the same setting, experiencing the same stimuli.

Edward Sapir and Benjamin Lee Whorf studied this phenomenon and developed their theory of linguistic relativism, commonly known as the Sapir-Whorf hypothesis. Language relativism states that languages are necessarily loaded with an ideology and cannot be neutral.²¹⁶ People impose meaning on their social and physical world through their language, and each language expresses a different world view.²¹⁷ For example, the word “cow” in the English language denotes an animal raised for food and carries with it a certain view of that animal in America. In India, the equivalent word for “cow” evokes a very different view and establishes a different relationship between the speaker and the animal. A cow is therefore whatever each language defines it to be.²¹⁸ Our language itself greatly affects the very way in which we perceive the world, and as each language is different, each creates a unique world view.²¹⁹

²¹¹ See, e.g., MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 149-174 (2002) (describing techniques of persuasive writing).

²¹² See HEATH, *supra* note 125, at 95.

²¹³ *Id.*

²¹⁴ See, e.g., Ruiz v. Hull, 957 P.2d 984, 998 (Ariz. 1998) (“[S]ome words, such as idioms and colloquialisms, do not translate well, if at all.”).

²¹⁵ See CHARLES G. RUSSELL, LANGUAGE AND BEHAVIOR 117-19 (2d ed. 1993).

²¹⁶ HEATH, *supra* note 125, at 108.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 108, 115.

In its most absolute form, the Sapir-Whorf hypothesis states that language determines the structure of our thought processes, affecting the way we remember and the way we perceive.²²⁰ Whorf believed that language plays a dominant role in shaping our conception and experience of the world. He defined language as principally “a classification and arrangement of the stream of sensory experience which results in a certain world order.”²²¹

Language relativism starts from the premise that the world is a continual stream of sensory inputs and there are an infinite number of things and aspects of things (salient characteristics) vying for our attention.²²² To make sense of the world we must impose some order and structure. According to this view, the universe is “something like a cheese” that people can slice in an infinite number of ways.²²³ To Whorf, language is our primary way of imposing order by slicing the infinite things and aspects of the world into manageable units labeled with names and words.²²⁴ When we use these names/words, we necessarily focus on certain salient, defining aspects to the exclusion of other aspects. Thus, language helps control and shape perception.²²⁵ Necessarily, if there are an infinite number of things, then we always perceive something less than everything.²²⁶ Our language identifies which things are most likely to be consciously perceived—thus it serves as a screen to cut down on our possible range of perceptions.²²⁷

If words are arbitrary,²²⁸ and there are an infinite number of things that we could pay attention to, then words in different languages could very well have drawn different boundaries. Terms could have been drawn narrower or wider to designate a different set of salient characteristics.²²⁹ Once these terms have been established and the boundaries have been set, aspects that fall outside the boundaries become more difficult to notice; they are systematically discounted through our use of the specific term. Our language, and its arbitrary demarcation of the world, serves as a unique and subtle filter for our perceptions.²³⁰ The world we live in is the world described by our language.²³¹ Moreover, the logic of each language—its in-

220 HARLEY, *supra* note 151, at 80.

221 RUSSELL, *supra* note 215, at 128.

222 See CCMS, *supra* note 134, at Subject: Sa: *Sapir-Whorf hypothesis*.

223 HEATH, *supra* note 125, at 113.

224 See *id.* at 109.

225 *Id.* at 112; see also RUSSELL, *supra* note 215, at 10-14.

226 RUSSELL, *supra* note 215, at 11.

227 HEATH, *supra* note 125, at 96, 108, 112.

228 See *supra* note 150.

229 See HEATH, *supra* note 125, at 113.

230 *Id.* at 112.

231 In a way, people are separated from the “real world” by their language, a tool of their own

ternal form and structure—imposes a different view of the world.²³² Our language conditions us to see things in a particular way—a view necessarily different from the views provided by other languages.²³³

Whorf used anthropological evidence drawn from his studies of several Native American languages to formulate his theories.²³⁴ One of his better known examples comes from his claim that the Hopi language has no exact word for “time.”²³⁵ In addition, Whorf reported that Hopi verbs do not have tenses to indicate past, present, and future.²³⁶ Other researchers have reported similar examples of language differences: Hopi has no words for three dimensional space, the traditional Sioux language does not have a word for the concept “late,” and Chinese does not have an exact equivalent to “yes” and “no.”²³⁷ This does not suggest that Hopi speakers do not experience time or three dimensional space. Rather, Whorf would suggest that Hopi-speakers must conceive of time and space in markedly different ways from English-speakers since their language describes and delineates it quite differently.²³⁸

Three versions of the Sapir-Whorf hypothesis have developed from this early work. The strongest version of the hypothesis—most directly in line with Whorf’s belief—holds that language determines the speaker’s thought.²³⁹ Intermediate versions of the hypothesis suggest that language only affects a speaker’s perception. In the weakest formulation, language affects the ability to perform certain mental tasks involving a high degree of

creation. *Id.*

²³² HEATH, *supra* note 125, at 109.

²³³ Russell points out that the English language may lead to conclusions of “allness” and the systematic discounting of potentially relevant information. RUSSELL, *supra* note 215, at 96. “Allness” is the tendency of words or phrases to lead to the conclusion that there are no exceptions. *See id.* at 93. For example, the phrase “Americans believe in democracy” tends to lead English-speakers to the conclusion that *all* Americans believe in democracy *without exception*. *Id.* at 94. The author specifically notes the “allness” phenomenon in relation to the inclusive thesis of this paper, written in English.

²³⁴ HARLEY, *supra* note 151, at 80.

²³⁵ RUSSELL, *supra* note 215, at 128.

²³⁶ *Id.* Instead, Whorf suggested that the Hopi language views “time” as a “getting later of everything that has been done,” and that Hopi verb forms express time in a way more aligned with an English-speaker’s conception of “consciousness.” *Id.* at 129.

²³⁷ *Id.* at 118.

²³⁸ *See generally id.* at 118-33. As a thought experiment, try to get through a day or even a span of several hours, without using any relative adjectives (e.g., tall, hot, large, etc) or perhaps without using the terms “yes” and “no.” Your speech will naturally have to shift to compensate. See if your thinking doesn’t also shift in subtle ways.

²³⁹ HARLEY, *supra* note 151, at 81. This formulation has largely been rejected by modern researchers. *Id.* at 87. At the very least, there is very little evidence to support the strong version. *See id.* at 81 (asserting that the “[intermediate] version . . . has proved easiest to test” and has “the most support”). Whorf’s anthropological examples are seen as unreliable and circular. HARLEY, *supra* note 151, at 82; *see also* CCMS, *supra* note 134, at Subject: Sa: *Sapir-Whorf hypothesis*.

linguistic encoding.²⁴⁰ There is far more evidence supporting some intermediate form of the hypothesis now widely accepted by modern linguists.²⁴¹

Along with the anthropological evidence suggested by Whorf and others, other lines of evidence examine vocabulary differences. A greater number of words referring to the same stimuli allows for a greater variety of distinctions to be made between different aspects of that stimuli. That is, more words enable greater detail to be identified and discussed. A commonly referenced example is the many Inuit (Eskimo) words for “snow.”²⁴² By contrast, Aztec has one word to denote not only “snow,” but “cold” and “ice” as well.²⁴³ Theoretically, this provides Inuit-speakers with a more detailed and in-depth experience of snow. This in turn, should allow Inuit-speakers to deal more successfully with their environment.

Further, this phenomenon operates on the level of the individual as well as the culture. I may have only one word to address “frozen white stuff that falls from the sky” while my neighbor—an experienced skier—has dozens.²⁴⁴ There is little need for me to have numerous words for snow and there is little need for me to perceive the different aspects of snow that my neighbor does. Not having a word for a particular aspect of snow will not necessarily mean that I do not perceive it.²⁴⁵ However, learning a new word will almost certainly bring that new aspect or distinction into my consciousness and point out to me something I may never have noticed before. In this way, language can certainly shape and guide our perception in an active way.

This phenomenon also shows how perception and expression are linked. For example, if I have only the word “wine,” there is only so much I can express. A greater number of words permits not only more accurate description, but finer levels of perception. By adding the terms “red” and “white” to my wine vocabulary, and then several varietal names (Chardonnay, Merlot, Pinot Noir) I can focus on, and convey, finer distinctions within each group. When I start learning about “oak” and “tannins” and “nose,” my perception is increasingly narrowed to even more specific as-

²⁴⁰ HARLEY, *supra* note 151, at 81; *see also* CCMS, *supra* note 134, at Subject: Sa: *Sapir-Whorf hypothesis*.

²⁴¹ HARLEY, *supra* note 151, at 81, 83, 87.

²⁴² *See id.* at 82 (citing some references to the Inuit “snow” example). This widely used example is largely thought to be apocryphal but still illustrates the point. *Id.*

²⁴³ Of course, this indicates that the physical world also influences the words each language creates. There is simply no need for Aztec to have multiple words for snow. CCMS, *supra* note 134, at Subject: Sa: *Sapir-Whorf hypothesis*.

²⁴⁴ RUSSELL, *supra* note 215, at 124 (internal quotation marks omitted).

²⁴⁵ *Id.*

pects.²⁴⁶ The real question is whether I would have identified “oak” on my own without hearing the word. Where does the process stop? Does language guide the senses or do the senses guide the language? At the very least, we cannot be sure since we must use language to express our sense experiences.²⁴⁷

Two more lines of evidence draw on terms for numbers and colors. First, the structure of a language’s numbering system has indirect effects on arithmetical ability (mental processing of numbers).²⁴⁸ English has thirteen basic number terms to denote 0 through 12. In addition, English has special terms for the “teens” and then a general set of rules to name 20 through 100 with specialized terms beyond that (thousand, million, billion, etc.).²⁴⁹ By contrast, Chinese has basic number terms for 0 through 10 and only three special terms beyond (for one hundred, one thousand, and ten thousand).²⁵⁰ English-speaking children generally have greater difficulty learning to count in the teens than Chinese-speakers. The form of the language—our terms for the numbers—has a subtle influence on cognition by making information more or less difficult to process.²⁵¹ If a thought is not directly expressible in one language, it will require more words to express indirectly. The greater number of words will be more difficult to process mentally—especially when the concept is new and unfamiliar.²⁵² The differences may be slight, but they are real and measurable.

Finally, some of the most convincing evidence for language relativism comes from color names in various languages and the speaker’s perceptions of color.²⁵³ For example, a hunter-gatherer tribe in New Guinea, the Berinmo, have five basic color terms, none of which notes the difference between “blue” and “green.”²⁵⁴ Instead, Berinmo has terms for “nol” and “wor”—colors that have no direct equivalent in the basic color terms of English. Research indicates that English-speakers have a memory advantage in making the distinction across the blue-green color boundary,

²⁴⁶ Sense perceptions themselves, such as taste and smell, can be affected to some extent by the linguistic descriptions accompanying the experience. See HEATH, *supra* note 125, at 95; RUSSELL, *supra* note 215, at 158. Russell suggests that a verbal description or name can change a food from enjoyable to inedible. Russel, *supra* note 215, at 158. Merely telling a person that the unknown dish they have been enjoying is something culturally unacceptable (such as dog meat in Western cultures) may even make that person physically ill. *Id.*

²⁴⁷ See HEATH, *supra* note 125, at 95 (suggesting that the influence probably goes both ways).

²⁴⁸ HARLEY, *supra* note 151, at 84.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² See *id.* at 87 (“Having one word for a concept instead of having to use a whole sentence might reduce memory load.”).

²⁵³ *Id.* at 84-87.

²⁵⁴ HARLEY, *supra* note 151, at 86.

whereas Berinmo speakers show an advantage across the nol-wor color boundary.²⁵⁵ Having a term for a color certainly helps fix it in the mind and may help (or hinder) the ability to perceive it in the first place.²⁵⁶

As Colin Cherry put it: “The language of a people largely constrains their thoughts. Its words, concepts, and syntax, out of all the signs people use, are the most important determinant of what they are *free* and *able* to think.”²⁵⁷ The choice of language is meaningful because language itself shapes and creates meaning, consciousness, and reality for its speakers. Whenever a language is being used, there is far more going on than meets the eye (or ear).

IV. THE CONSTITUTION AS COMMUNICATION

As noted in the introduction, Americans come in every race and ethnicity (and mix thereof), from every nation and region. Americans practice every religion and support every political affiliation. The Constitution can be seen as the mission statement that holds our nation—one of distinct individuals—together. As we have come to interpret it, the document itself lays out an overarching doctrine of political equality and stands for the proposition that all the personal and idiosyncratic differences between us do not matter in the political sphere. It is one of the few things that all Americans have in common, and the one thing (along with the language of the document) that holds us together as a nation.

This argument only relies on a few basic premises. First, communication is central to organizations.²⁵⁸ It is the uniting and defining process that establishes members as “inside” and non-members as “outside.”²⁵⁹ Communication allows for collective action, and carries forward the information of the organization through time from member to member. Further, language is the principle form of organizational communication. Virtually all complex human organizations require language. Government is perhaps the most complex of human organizations and certainly the law—the organizational communications of government—requires language. The specific wording used for a law, the language chosen, then controls the law and becomes the law.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ HEATH, *supra* note 125, at 110.

²⁵⁸ *See supra* notes 183-199 and accompanying text.

²⁵⁹ *Cf.* Perea, *Demography and Distrust*, *supra* note 9, at 366 (“language operates to define in and out groups”).

Second, each language is a unique lens to shape meaning, perception, and thought.²⁶⁰ Language is inseparably interwoven in the fiber of ideas and concepts. Moreover, language shapes our perceptions, thoughts, and reality in subtle, yet undeniable, ways. Language creates the social world in which we live. Language is the lens through which we think.²⁶¹ We do not see the lens itself but it shapes everything we do see.

The United States of America is an organization. The Constitution is our mission statement. Our goal: to form a more perfect union. If the meaning of the Constitution cannot be separated from the nation, and the language of the Constitution cannot be separated from the meaning, then the language of the Constitution cannot be separated from the nation. The medium cannot be separated from the message.²⁶² The medium (English) and the message (the Constitution) and ourselves (the citizens) have all shaped each other.

A. *How It Works (the most presumptuously named section of the argument)*

The communication that goes on to hold our American organization together is two-fold. As must be obvious, the first stage is from the Constitution to us as citizens. This, however, is not a passive reception on our part. As noted above, meaning is not to be found in the text; *it is created in the reader.*²⁶³ We have to interpret the document, mentally process the language as we would any communication, deciphering its meaning against the background of our own unspoken individual contexts. This makes us active participants in the document. We must create an understanding for ourselves. In this sense, the Constitution holds us together as we reach out and hold to it.

But, this alone does not make “a more perfect union” and cannot unite us any more than a hub by itself can unite individual spokes to make a wheel. What is needed is connection among the spokes—or to carry the wheel metaphor further, a rim is needed. The second stage of national conversation is that which goes on among ourselves as citizens. If understand-

²⁶⁰ See *supra* notes 200-257 and accompanying text.

²⁶¹ This metaphor is much inspired by Ruth Fulton Benedict’s quote, “we do not see the lens through which we look.” *Life and Reality—Quotations*, at <http://www.open-mind.pl/Ideas/LifeC.htm> (last visited Jan. 3, 2004).

²⁶² Apologies to Marshall McLuhan’s famous bon mot “the medium is the message.” HEATH, *supra* note 125, at 81. The medium is not *the whole* message but it is at least a vital and indivisible part of the message.

²⁶³ See *supra* notes 144-82 and accompanying text.

ing is never “perfect” but is, instead, “individual,”²⁶⁴ we must compare and contrast our understandings of our national organization, our country. Perhaps the wheel metaphor would be better conceived as a net with nodes connected directly to each other, or woven together with myriad connections to form a strong and stable fabric.

This interpersonal dialogue perfects our understanding of the Constitution, and thus our nation, by allowing us to share differing perspectives and points of view. Understanding and appreciating other’s perceptions of our national organization only enriches our own understanding and perception. Second, multiple overlapping interpretations also lead to a more perfect understanding of the Constitution through the aggregation of opinion. Whether the “perfect” interpretation of the “true” meaning creates the aggregation of opinion around it, or the aggregation of opinion creates the “true” meaning is a matter of debate beyond the scope of this paper. But it is also entirely irrelevant in a relational world. If meaning is created in readers and not objectively contained in a static message, all we have ever had is a collection of individual understandings. Given the individual nature of understanding described above, all we can hope for is a greater aggregation of understandings - a unity of truths, not absolute truth. The more perfect union is achieved either way through the most democratic of processes.

One important difference between the first stage of the national communication (Constitution to person) and the second stage (between citizens) is based on the very nature and limits of the medium. Written communications are fixed and unidirectional. We must read and interpret the Constitution. But aside from legislative action to build on the document, or the rare Article V action to change it,²⁶⁵ there is no real response to the written word of the Constitution. Nor can we ask a written document for more information or clarifying examples. The circular nature of communications,²⁶⁶ the feedback we rely on for clarity of understanding, does not seem to be present. Also missing are the non-verbal (or non-linguistic) aspects of communication.²⁶⁷ By some estimates, over 90%²⁶⁸ of the information we get in a face-to-face conversation is non-verbal (such things as body language, eye contact, posture, facial expression, tone, volume, etc). Our reliance on written communication may, therefore, deny us a good deal of what the Fram-

²⁶⁴ See *supra* notes 144-82 and accompanying text.

²⁶⁵ See U.S. CONST. art. V for a description of the processes for amending the Constitution.

²⁶⁶ See *supra* notes 138-42 and accompanying text.

²⁶⁷ See KREPS, *supra* note 131, at 42-49 for a discussion of non-verbal aspects of communication.

²⁶⁸ Select, Assess & Train, *Management Files—Non-Verbal Communication*, at <http://www.selectassestrain.com/hint6.asp> (last visited Jan. 3, 2005) (claiming that 93% of the information we get is non-verbal).

ers intended with a particular clause, or the emphasis it should be given in interpretation.

The passage of time also means that we can less assuredly rely on a common understanding of the words as used in the document. Human languages constantly change.²⁶⁹ Although this may not affect the meaning laid down in the document, it affects our later interpretation and, therefore, has much the same effect.

As should be apparent from the argument thus far—and from almost every Supreme Court dissent ever written—personal interpretation of the document is critically important. A parade example of the individual nature of interpreting the Constitution can be seen by contrasting Chief Justice Taney’s 1857 decision in *Dred Scott v. Sanford*²⁷⁰ and Frederick Douglass’ understanding of the very same Constitutional passages from a speech he delivered in Glasgow.²⁷¹ Taney’s ultimate and infamous holding is that the language used by the people at the time of the framing shows that they could not have meant for the protections of the Constitution to have extended to “the enslaved African race.”²⁷² To Taney, the Constitution referenced slavery (without explicitly using the word) and therefore condoned and authorized it.²⁷³ Frederick Douglass—looking at the exact same document but bringing a very different personal context²⁷⁴ to the job of interpretation—read those same references to be declarations of freedom. To Douglass, the words of the Constitution did not allow for the continuation of slavery and could not be twisted to deny freedom and citizenship on the basis of race.²⁷⁵

The fact that the document cannot talk back to us and answer questions as to its “true” meaning (or provide explanatory examples) is the real-

²⁶⁹ HEATH, *supra* note 125, at 94; TRASK, *supra* note 150, at 149-50 (“It is absolutely impossible for language to avoid changing.”).

²⁷⁰ 60 U.S. (19 How.) 393 (1857). Taney notes in his decision that “[t]he duty of the court is, to interpret the instrument they have framed.” *Id.* at 405.

²⁷¹ Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?*, Speech Delivered in Glasgow, Scotland (March 26, 1860) in CASEBOOK, *supra* note 2, at 207-11. Douglass notes,

where would be the advantage of a written Constitution, if, instead of seeking its meaning in its words, we had to seek them in the secret intentions of individuals who may have had something to do with writing the paper. What will the people of America a hundred years hence care about the intentions of the scribes who wrote the Constitution? . . . Common sense, and common justice and sound rules of interpretation all drive us to the words of the law for the meaning of the law.

Id. at 208.

²⁷² See *Dred Scott*, 60 U.S. at 410.

²⁷³ The constitutional provisions at issue between the two interpretations are article I, sections 2, 8, 9; article IV, section 2, and the preamble. CASEBOOK, *supra* note 2, at 209, 211.

²⁷⁴ Douglass was himself a former slave. *Id.* at 207 n.48.

²⁷⁵ See *id.* at 207-11.

ity of all written communication. True meaning, however, comes in linking the document and the reader.²⁷⁶ Neither the lack of apparent feedback, nor the passage of time, detract from its existing message.

B. *Moving Forward*

Communication is a process. And our American national political conversation, since it was spawned by the Constitution, must frequently return to that document to refresh itself and remain true to those ideals (as we have come to understand and interpret them). We must regularly check our evolving and deepening understanding against the fixed words of our national mission statement. This continual nature of dialogue allows for change, growth, and evolution as we change and grow as a nation. However, the largely fixed nature of the Constitution allows for stability and continuity through time²⁷⁷—putting a check on evolution or at least keeping it to a measured pace.

The national dialogue is enriched by the understandings and interpretations of new citizens, especially immigrants, and our own changing and deepening understanding gained through interpersonal dialogue. In addition, the interpersonal dialogue—the ties between personal interpretations—also moderates the pace of evolution. A drastic change in direction is difficult if we all have to move more or less together, bound by the same document. Imagine a group of people with linked arms. Yes, the group can move if it chooses. However, the aggregate group is really a collection of individuals moving together and the group's movement depends on the collective movement of its individuals. The larger the group, the more difficult it is to coordinate any dramatic mass movement. Thus, evolution takes a longer time for larger, more closely connected groups. Only when a smaller unit breaks off (is no longer inter-connected to a larger whole) can it move dramatically in new directions. Such separation leads to new species and organisms in biological evolution, and to new sects, parties, religions, and even nations in the ideological (or organizational) sphere. The new splinter group is distinctly different from the larger unit and becomes a new organization, establishing its own internal pattern of communication.

To translate the Constitution to a new language, or even to re-interpret or “clarify” it in English, would be to create something new.²⁷⁸ To read the

²⁷⁶ What kind of understanding of the Constitution might we now have if those with views like Frederick Douglass had never been able to read and interpret the document for themselves?

²⁷⁷ See *supra* notes 192-93 and accompanying text (discussing “timebinding”).

²⁷⁸ It is an interesting mental exercise to imagine how you would re-write the Constitution in modern English merely to clarify and consolidate (not alter) its meaning. Now compare your “Restatement” of the Constitution with a few other people’s “Restatements.” Is the meaning of your “Restate-

document in a new language would be to decipher a meaning subtly different than what is expressed in English.²⁷⁹ This would change the “hub” of our communications wheel ever so slightly. But even this is not the real issue. As already argued, meaning and understanding is individual and each of us, therefore, has a unique interpretation of the document. The real crux is the second stage of communication—the inter-personal stage. Once we have each achieved some understanding of the document directly,²⁸⁰ the national dialogue must be carried on amongst ourselves. The direct interpretation of the document is not enough by itself to unite a nation. Only when we actively communicate with each other does the document serve its final purpose of connecting us and forming a more perfect union—completing the “rim” of the national wheel. By returning to the original document, as well as exchanging our views with each other, we provide some degree of “feedback” and complete the communications process.

To communicate with each other we need a language in common. Since the language of the document is English, and our clearest understanding of it will come through a reading in English, it is only natural to carry on the national political discussion between us in English. The conversation is already underway. We must carry on the dialogue.

C. *Why Now?*

A powerful argument many commentators have made is that a language declaration is simply unnecessary. There are two parts to this argument: 1) we have existed as a nation for over two hundred years without an express declaration, and 2) even if language is the unifying, cohesive force many claim, most immigrants learn English on their own due to social and economic forces.²⁸¹ Either way, there is no need to expend the effort to make an official declaration; at least not now.

ment” accurate? How about your friend’s “Restatement?” This exercise serves to 1) highlight your own understanding of the document’s meaning and importance, 2) show the problems inherent in interpretation, even within one language, 3) highlight the individual nature of meaning, 4) show how language is in fact a living, changing thing, 5) undercut the notion of a single, definitive, authoritative meaning. While this can be a very entertaining mental exercise, the author does not encourage undertaking a national Restatement of the Constitution anytime soon.

²⁷⁹ See *supra* notes 200-57 and accompanying text.

²⁸⁰ And if each language does provide a unique world view, the clearest understanding of the Constitution will come from the original document in English.

²⁸¹ See, e.g., Perea, *Demography and Distrust*, *supra* note 9, at 354 (“[K]nowledge of English is essential to success in the economy, in education, and in society. These are powerful incentives that have always led immigrant peoples to acquire English.”); DiChiara, *supra* note 6, at 102; Rodríguez, *supra* note 60, at 140. Rodríguez points out that the historical trend for language acquisition in this country has followed a three generation pattern: the immigrant generation is monolingual in their native

The importance of declaring something explicitly is that it becomes less susceptible of misinterpretation. Or, in light of the foregoing discussion on communications and language, it is susceptible of a far narrower range of interpretations.

There is value in making something explicit when there is consensus of opinion.²⁸² Such a declaration takes a common understanding out of the realm of unspoken contextual assumption and fixes it in the denotated meaning of the document. In the realm of Constitutional law, an official declaration makes something an agreed, express part of the document, and thus a fixed point around which the national conversation can continue. Indeed, many of the Amendments to the Constitution have simply codified an unspoken understanding many people had about the document. Examples include the codifications in the Bill of Rights,²⁸³ the doctrine of state sovereign immunity implied in the Eleventh Amendment,²⁸⁴ the abolition of

tongue, the second generation is bilingual, and the third generation is monolingual in English. *Id.* at 139. In addition, new research suggests we may be approaching a two generation pattern of acclimation. *Id.* Crawford also stresses these language acquisition patterns when discussing an immigrant's "almost gravitational attraction toward English" in this country. Crawford, *Anatomy*, *supra* note 11.

More importantly, many commentators confuse a national language declaration with protection of the language itself. *See, e.g.*, Crawford, *Anatomy*, *supra* note 11 ("The campaign to 'officialize' English in the United States rests of the absurd claim that the most successful and dominant world language in history is under siege in its strongest bastion."); *see also* Rodríguez, *supra* note 60, at 140 ("it can be concluded that no serious threat to the English language exists, regardless of how many linguistic minorities populate the United States."). It is the point of this paper that language should be recognized for its organizational function. It is not the sanctity of the English language itself that needs to be protected or recognized. What is significant is the common communication that forms our national organization.

²⁸² *See supra* note 56 and accompanying text (discussing the broad support for an official language declaration. National polls show widespread popular support for declaring English to be the official language in a non-restrictive way). A 2002 study conducted by the Tarrance Group, and commissioned by U.S. ENGLISH, Inc., showed 84% of Americans supported such a declaration with 11% opposed. *U.S. ENGLISH to Congress: Listen to American People, Make English U.S. Official Language; Poll Reveals Majority Favors English*, US Newswire, Feb. 11, 2002, at <http://www.usnewswire.com/topnews/temp/0211-144.html>. Among Republicans, support was 89% and among Democrats and Independents, support was 80%. *Id.* In addition, a Pew Research Center poll released in June 2003 shows that knowledge of English is recognized internationally as being essential to success. *See* Mauro E. Mujica, *Why the U.S. Needs an Official Language*, THE WORLD & I, at <http://www.worldandi.com/newhome/public/2003/december/cipub2.asp> (last visited Dec. 30, 2004).

²⁸³ Both the Federalists and anti-Federalists were in agreement that the first ten amendments did not work any real substantive change to the Constitution. The Federalists feared that specifically declaring limits to government power, when the government had never been given such powers in the first place, might lead some to claim other powers for the government that had not been expressly limited. *See* CASEBOOK, *supra* note 2, at 5-6. George Mason felt so strongly that the freedoms guaranteed by the Bill of Rights should be an express part of the Constitution (not merely implied) that he refused to sign the document. *Id.* at 5.

²⁸⁴ The Eleventh Amendment was a response to the Supreme Court's unpopular decision in *Chis-*

slavery brought about by the Thirteenth Amendment,²⁸⁵ and the two-term limit to the presidency formalized with the Twenty-Second Amendment.²⁸⁶ Making something explicit, especially at the level of a Constitutional Amendment, reshapes the interpretation of meaning and can eliminate potentially divergent understandings.

Divergent trends are bound to develop in any organic process. Even within one language group there is potential for serious divisions to grow out of differences in interpretation and understanding.²⁸⁷ However, multiple languages, each producing translations susceptible of a different range of interpretations, would greatly increase the potential for divergent understandings. Without communication, these *differences* in understanding would tend to become entrenched, turning into lines of *division* and potentially leading to separation.²⁸⁸ Although the language line may seem to be the line of separation, the real dividing line is between differing interpretations and understandings—as with Taney and Douglass. Only further communication offers the potential to bridge such a division and provide reconciliation or long-term stability.

The opportunities for such divisions in understanding may be increased due to a “clustering” pattern of immigration—or, the tendency for people from the same language group to settle in the same discrete areas.²⁸⁹ While this trend is understandable, it tends to artificially create what Justice

holm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), holding the state of Georgia liable for damages in a civil suit brought by South Carolina citizens. CASEBOOK, *supra* note 2, at 72. For discussion of state sovereign immunity and the Eleventh Amendment see *id.* at 72, 608-13.

²⁸⁵ Consider again the views of the Constitution held by Frederick Douglass. *Id.* at 207-11. However, some abolitionists understood the Constitution to be pro-slavery and condemned it as such. *Id.* at 207. William Lloyd Garrison held this view and labeled the document as a “Covenant with Death and Agreement with Hell.” *Id.*

²⁸⁶ George Washington established the custom that a president would serve no more than two terms by declining to run for a third term. WIKIPEDIA, *Twenty-Second Amendment to the Constitution*, at http://en.wikipedia.org/wiki/Twenty-second_Amendment_to_the_United_States_Constitution (last visited Jan. 3, 2005). The Twenty-Second Amendment was ratified in 1951 after Franklin Roosevelt became the first to break the tradition by being elected more than twice. *Id.*

²⁸⁷ See *supra* notes 197-99 and accompanying text.

²⁸⁸ Even within one language group, a difference in interpretation is more likely to become the basis for separation only when communications break down.

²⁸⁹ Lowrey, *supra* note 3, at 312-13 (“[S]table bastions of Spanish language use will attract the majority of new Hispanic immigrants to established areas of Hispanic settlement. Even if new Hispanic immigrants initially settle in other areas, there will be strong cultural and economic incentives to gravitate towards one of these enclaves.”) Lowrey also points out that this clustering pattern creates many regions where a minority language is the dominant language. See *id.* at 268; see also Abel, *supra* note 8, at 344 (“Spanish is the majority language in certain areas of the United States.”) Abel also states that the “large Hispanic presence in the United States exemplifies the effects of clustering and language retention” before discussing the issue in more detail. *Id.* at 350. This “clustering” is certainly not a new trend as the immigration of German-speakers to Pennsylvania shows. See discussion *supra* Part I.A.

Stone identified as “discrete and insular minorities.”²⁹⁰ These minority language communities establish fewer and weaker connections across the communications barrier as there is less need to reach out to the rest of the nation and more time is spent within the language community.²⁹¹ For this reason, “clustering” would tend to establish the *most* insular (and politically isolated) of all minorities since the language barrier is a barrier to most other social interaction. If communication is, in fact, the essential element of human organization, the lack of a language in common between a language minority and the larger society points to a critical division.²⁹²

The history of Texas shows how a burgeoning language minority that refuses to acclimate can lead to political division, and even war.²⁹³ In the Mexican territory that became Texas, English-speaking immigrants started out as a language minority but grew increasingly resistant to assimilation as their population swelled in the 1820s and 1830s.²⁹⁴ This led to increasing tensions with the native Spanish-speakers and eventual secession from Mexico.²⁹⁵ A similar pattern of division may also be at work in modern Canada as French-speakers in the province of Quebec²⁹⁶ demand special

²⁹⁰ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

²⁹¹ See Abel, *supra* note 8, at 350-53 (discussing this self-isolating phenomenon at play in this country). Such isolated language enclaves have been dubbed “language ghettos” by some commentators. See Andre Sole, *Official English: A Socratic Dialogue/Law and Economics Analysis*, 45 FLA. L. REV. 803, 810 (1993).

²⁹² This is especially true if, as this paper suggests, the interpersonal dialogue is one of the vital steps in the national conversation that forms our union. For a powerful discussion of the critical divisions that tend to form along the lines of language see Lowrey, *supra* note 3, at 303-10 and generally.

²⁹³ See generally Juárez, *supra* note 198.

²⁹⁴ See *id.* at 58-59, 76 (“Almost all of the Anglo-American immigrants, however, did not speak Spanish. Nor did many appear to make any particular effort to learn Spanish.”), 77-88 (describing the increasing level of government services offered at first bilingually and then solely in English), 91 (“Despite these remarkably liberal provisions and practices providing access to government for monolingual English-speaking immigrants to a Spanish-speaking country, Anglo-American immigrants were not satisfied.”).

²⁹⁵ See *id.* at 91-118 (describing the increasing demands English-speakers made on the Mexican government, eventually including independence). While providing a detailed historical overview of the flood of English-speaking immigrants into Mexican territory and establishing a very distinct language enclave, Professor Juárez comes to the ultimate conclusion that this proves a “fundamental right of access to governmental services in a ‘known tongue’”—essentially, a right to demand governmental accommodation and refuse to assimilate. See *id.* at 53. Professor Juárez points out that “[t]he failure of the Mexican government to be *even more* responsive to Texians’ concerns about government in an ‘unknown tongue’ was one of the reasons given by Texians for declaring independence” *Id.* at 59 (emphasis added). Significantly, Professor Juárez points out that many Texans also demanded the “right” to own slaves even though Mexican laws prohibited the practice. *Id.* at 121.

²⁹⁶ French-speakers in Canada are a minority overall, consisting of 23% of the population. Abel, *supra* note 8, at 366-67. Within the province of Quebec, however, French-speakers are the clear majority at 81%. *Bilingualism Thrives in Quebec Despite Laws*, CANADIAN PRESS (Montreal), Dec. 10, 2002, at <http://www.canada.com/national/features/census/story.html?id=F1BCCB42-B6C8-40D8-AF57->

accommodation from the national government.²⁹⁷ The communications divide between the French and English language communities in Canada is becoming more entrenched as French-speakers continue to move into Quebec and English-speakers continue to move out.²⁹⁸ With fewer and fewer interpersonal connections between these different groups, the organizational bonds between them (the bonds of national unity) are also weakened. In the most recent election on the issue, the province of Quebec voted by only 50.5% not to secede from Canada.²⁹⁹ If these patterns continue, a future vote may see the province of Quebec separate from Canada to establish a new French-speaking nation.

D. *Interpretation and Inequality*

The problem of interpretation, as in so many other areas of social/political life, is that “separate but equal” is not equal.³⁰⁰ And the real crux of that statement, the key division, is not the inequality but the separation itself.³⁰¹ While *Brown v. Board of Education* pointed to an economic inequality that clearly left one group disadvantaged relative to another group, that kind of relationship does not exist in interpretation. After all, how are we to really know if my interpretation is inferior or superior to yours? In reality, both of us are likely to think that our own interpretation is superior and neither of us would admit of any inferiority. Nor should we—at first. There is no inherently “inferior” interpretation without reference to an agreed absolute. And as close as we get to an agreed absolute in Constitutional interpretation is the original document itself, in English, which is

3CDAEFBB47F0 [hereinafter *Bilingualism Thrives in Quebec*].

²⁹⁷ Some of the accommodations include the virtual elimination of schooling in English, the publication of all laws and public signs in French, and the requirement of French in business activity (especially corporate management) as well as “all municipalities, school boards, and local health and social service institutions.” Lowrey, *supra* note 3, at 240-242. See generally *id.* at 224-265 (providing an excellent discussion and analysis of the development of the French language rights issue and the separatist movement in Quebec).

²⁹⁸ In 2002, about half the immigrants to the province of Quebec already spoke French while the majority of those leaving the province were English-speakers. See *Bilingualism Thrives in Quebec*, *supra* note 296. According to Statistics Canada’s 2001 Census Consultation Guide on Language, “[t]he proportion of people with English as a home language in Quebec and the proportion with French as a home language in the other provinces have continued to decrease.” *2001 Census Consultation Guide*, at <http://www.statcan.ca/english/freepub/92-125-GIE/html/lan.htm> (last visited Dec. 30, 2004).

²⁹⁹ Abel, *supra* note 8, at 367.

³⁰⁰ See *Brown v. Bd. of Educ. of Topeka, Kansas*, 347 U.S. 483 (1954).

³⁰¹ J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 993 (1995) (“It must be remembered that the odious part of the *Plessy v. Ferguson* formulation was always the word ‘separate.’”).

the very thing we are interpreting. More importantly, the dialogue in which we compare our varying interpretations will enrich and improve both of our understandings even if neither of our opinions change in the process.

The danger we need to overcome is the separation. Any “inequality” in interpretation is largely an illusion and a distraction. And the way to overcome this separation is through dialogue—communication itself. In the realm of politics, as in the rest of everyday life, we need a language to overcome that separation, to reach out to each other and compare meaning and understanding. For this we need not one common language, but one language in common. Since the conversation has already begun in English with the Constitution, that is a natural choice for the language in common.

Shifting away from the language of the document itself can lead to real inequality. If a discrete and insular minority cannot access the document (and therefore the essence of government) directly for themselves because of language divisions, they will need someone to interpret it for them. The problem is that the class of interpreters would then be in a position to claim a “superior” or “official” understanding which could be used to manipulate the marginalized group. That we might consider this a laughable possibility today shows only that we have taken for granted widespread English literacy, and thus widespread access to the Constitution and law.³⁰² Centralized power of all types (including control over access to information) is open to abuse and is a temptation to those who would use it exploitively. The danger posed by an “authorized” interpretation from one source³⁰³ is lessened by the dialogue between individuals. After all, it is the

³⁰² Consider again the how the Constitution was understood in the days of Frederick Douglass’s youth when literacy among African Americans was exceptionally rare.

³⁰³ This kind of “authorized” interpretation is perhaps more common in the religious sphere. Literacy during the middle ages (in Latin no less, essentially a foreign tongue to most lay people) was quite rare enough to establish the clergy as a class who had nearly exclusive access to, and were the official arbiters of, the scriptures. Literacy was an essential tool of control for the medieval Church. See Diane Baisley, *Medieval Literacy*, at <http://www.sunysuffolk.edu/~baisd69/literacy.htm> (last visited Dec. 30, 2004); see also Dr. Dianne Tillotson, *Medieval Writing: History, Heritage, and Data Source*, at <http://medievalwriting.50megs.com/whyread/latin.htm> (last visited Dec. 30, 2004) (“Language represents power, and it is undoubtedly the case that the bureaucracy of the Christian church retained Latin for all its rituals and its writings in order to keep control of thought within the preserve of the literate clergy. The laity, not versed in the language, could not scrutinise or question the fundamental texts or the commentaries of scholars directly. They relied on the oral teachings of the clergy.”). Only in 1962 did the Second Vatican Council of the Catholic Church officially drop the requirement that Mass be celebrated in Latin. See Vatican, Documents of the II Vatican Council, at http://www.vatican.va/archive/hist_councils/ii_vatican_council/index.htm (last visited Dec. 30, 2004). A more recent example, Joseph Smith claimed to be the only one able to interpret a mystical set of golden plates inscribed with the book of Mormon. See The Church of Jesus Christ of Latter-Day Saints, *Translation of the Book of Mormon* (2002), at <http://www.mormon.org/learn/0,8672,1293-1,00.html>.

It is worth noting that lawyers and the courts already serve as a privileged class for interpreting the law, including the Constitution. The Supreme Court, of course, has claimed the authority to act as

rim as well as the hub that holds the wheel together. The center only establishes the focal point around which the discussion turns.³⁰⁴ This reinforces the need for a language in common among the people to overcome the dangers of any centralized official interpretation. The argument for official linguistic pluralism—full legal equality of languages in government—is in reality an argument for “separate, but equal.” It would maintain lines of separation under the guise of equality. It would create divisions that might never be bridged. As *Brown* established, “separate, but equal” is not. The real danger we face is the separation.³⁰⁵

CONCLUSION

Teach English. Ironically, this “solution” is one part of the official language debate that most commentators seem to agree on (though possibly with varying approaches).³⁰⁶ English proficiency instruction would empower new immigrants to participate more fully in both the economic and political life of the country. The benefits of this education accrue not only to the individual learning English but to the larger society as well. It is an investment in the human capital of the nation with positive spillover effects to the individual, the economy, employers, national unity, and the government itself.

Communication is the essential element for all human organization and language is the means of communication used in law and government. In the United States, the language of the national organization is the language of our prime organizational communication, the Constitution. Having English language proficiency unites each person to this national “hub,” and therefore to the nation itself. More importantly, having one language of

the final (though not necessarily exclusive) interpreter of the Constitution at least since the landmark case of *Marbury v. Madison*. See 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

³⁰⁴ This analogy, however, does show the need for some centralized process to counteract divergent strains of interpretation. Whether this process is best served by the Supreme Court or an Article V amendment (or both) is outside the scope of this paper.

³⁰⁵ See *supra* note 301.

³⁰⁶ See, e.g., Perea, *Killing Me Softly*, *supra* note 3, at 445 (“Advocates of Official English should spend their ample funds subsidizing scarce English-language instruction. . . .”); Chiu, *supra* note 57, at 247 (“Logically, a bill intended to assist immigrants and other non-English speaking residents, would provide educational programs to teach English as a second language.”); DiChiara, *supra* note 6, at 122 (“[T]he benefits of bilingual education are plentiful, for students are taught in their native language while they gradually learn English.”); Sole, *supra* note 291, at 832-33 (“[W]e need to teach people to speak more languages, or at least a single common one.”). It is a wonder there is a debate at all with so much agreement on the best course of action.

government common to all citizens enables greater interpersonal communication, completing the “rim” of our national organization. These interpersonal ties are the real strength in any organization, including any nation.

But it is not enough merely to acknowledge this fact and declare an official language. If the United States continues to evolve and fulfill the promise of the American dream, we have to reach out to help make people a part of this organization, making the values and the ideals of our Constitution available to all our citizens. The best way to accomplish that is to help people get the tools they need (English proficiency) to access the Constitution and all of government directly. If we are to fulfill our national mission statement of forming a more perfect union, we have to teach English, not just decree that it be spoken. Establishing that we have one language in common, one official language, is only the first step toward greater unity.

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