Here is another court opinion that bears on our concerns about maintaining a common language. The following is an excerpt from an article in the Supreme Court Review section of Trial, *August 1991 by Daniel Farber, Henry J. Fletcher Professor of Law at the University of Minnesota. We have selected the material in the Hernandez case as being most pertinent for our readership.*

PICKING THE JURY

By Daniel A. Farber

Within a one-week period, the Supreme Court decided three important cases dealing with jury selection. On May 28, the Court announced its decision in *Hernandez v. New York*, 59 U.S.L.W. 4501, which involved the use of peremptory challenges to strike bilingual potential jurors. Two days later, the decision in *Mu'Min v. Virginia*, 59 U.S.L.W. 4519, came down. upholding a rather perfunctory *voir dire* regarding the effect of pretrial publicity in a capital case. Four days after that came the decision in *Edmundson v. Leesville Concrete Co.*, 59 U.S.L.W. 4574, which broke new ground by holding that racially motivated peremptory challenges are unconstitutional even in civil cases.

Notably, Justice Kennedy contributed a thoughtful opinion in all three. The cases are important to trial lawyers, and *Edmundson* in particular may become a leading constitutional case.

Hernandez involved an application of *Batson v. Kentucky*, 476 U.S. 79 (1986), in which the Court held that a prosecutor's discriminatory use of peremptories violated the equal protection clause. In *Hernandez*, the issue was a prosecutor's use of peremptory challenges to exclude two Hispanic jurors. After the defense lawyer objected to the peremptories, the prosecutor explained that he was unsure that the two would be willing to rely on the translation of Spanish-language testimony rather than on their own understanding of the testimony.

The Court held that this was a valid justification. The plurality opinion was written by Justice Kennedy and joined by Rehnquist, Souter, and White. Justice O'Connor wrote a concurrence, which was joined by Scalia.

Kennedy's opinion said that only intentional discrimination violated the equal protection clause of the fourteenth amendment. Although Spanish-language ability is related to ethnicity, the prosecutor did not rely solely on linguistic ability, but also relied on the specific responses and demeanor of the two people in question. As to whether it was the prosecutor's true justification or merely a pretext, he said that the trial judge's determination of credibility must stand unless shown to be clearly erroneous.

Although Kennedy rejected the discrimination claim, he displayed some sensitivity to the problem of language-based discrimination:

> *Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond....*
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> *Just as a shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate hostility.*

In his first few years on the Court, Justice Kennedy was sometimes considered to be merely an intellectual follower of Justice Scalia. Notably, in none of these three cases did he join in the same opinion as Scalia. All three of Kennedy's opinions reflect his own "quiet rationality" and commitment to impartiality and fair treatment. In the end, they may be remembered in part as marking the emergence of Justice Kennedy as a distinctive voice on the Court.■

[This item as well as the previous one were drawn to our attention by Professor Victor Kramer who teaches legal ethics at the University of Minnesota and at George Washington University.]