Sink or Swim? The State of Bilingual Education in the Wake of California Proposition 227

Thomas F. Felton
COMMENTS

SINK OR SWIM? THE STATE OF BILINGUAL EDUCATION IN THE WAKE OF CALIFORNIA PROPOSITION 227

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The “right” to an education enjoys an uncertain level of protection.1 Perhaps because the Constitution never explicitly addresses education,2 the judiciary has not developed a consistent approach to lawsuits based on the right—or lack thereof—to an education.3 Although many of the early education cases focused on the roles of race and segregation in education,4 the focus of educational jurisprudence recently has turned to the potential right to bilingual education.5 Unlike the racial segregation


2. See Klarman, supra note 1, at 288 (stating that in deciding Rodriguez, the Court refused to acknowledge fundamental rights that were not explicitly or implicitly evident in the Constitution).

3. See supra note 1 and accompanying text (discussing the different holdings of the Supreme Court with regard to the right to education).

4. See, e.g., Brown v. Board of Education, 349 U.S. 294, 301 (1955) (Brown II) (mandating that local courts compel school systems to desegregate with “all deliberate speed”); Brown, 347 U.S. at 494-95 (prohibiting segregated schools because separate was not equal and education was too important not to be equally provided); Plessy v. Ferguson, 163 U.S. 537, 544-549 (1896) (reasoning and holding that the Fourteenth Amendment Equal Protection Clause was not intended to abolish distinctions based on race; upholding the doctrine of “separate but equal” accommodations that allowed the proliferation of segregated schools), overruled by Brown v. Board of Educ., 347 U.S. 483 (1954).

5. See, e.g., Lau v. Nichols, 414 U.S. 563, 568-69 (1974) (holding that schools failing to address the needs of non-English-speaking students violated Title VI of the 1964 Civil Rights Act, which states that schools must provide students an equal opportunity to education); Castaneda v. Pickard, 648 F.2d 989, 1008-1009 (5th Cir. 1981) (Castaneda I) (holding
cases, which have a clear basis in constitutional jurisprudence, the bilingual education issue rests on less firm ground. Even though Congress now requires schools to address the needs of students who speak little or no English, judicial and legislative attempts to address the potential legal and constitutional protections of bilingual education have done little to clarify the issue.

Historically, the issue of language education was left to individual families and state and local governments, with minimal intervention from the Federal judiciary or Congress. Much of the recent push for bilingual education rights began at the grass roots level, as part of the 1960s civil rights movement. Proponents of bilingual education argued that teaching students only in a language they did not understand—English—

that bilingual education is not required under the Federal Bilingual Education Act; Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1027-28 (N.D. Cal. 1998) (finding that a constitutional challenge to California's Proposition 227, mandating English-immersion education for non-English-speaking students, would be unlikely to succeed based solely on the language of the measure).

6. See U.S. CONST. amend. XIV, § 1 (mandating equal protection and due process for all persons); Brown, 347 U.S. at 491-92 (citing cases finding violation of the Equal Protection Clause, with regard to inequality in education, based on the race of the students).

7. See Lau, 414 U.S. at 566 (declining to decide petitioner's complaint against the school system on constitutional grounds); Serna v. Portales Mun. Sch., 499 F.2d 1147, 1153 (10th Cir. 1974) (declining, as in Lau, to reach the Fourteenth Amendment issue); Gi Hyun An, Note, The Right to Bilingual Education: Providing Equal Educational Opportunity for Limited English Proficient Children in a Pluralist, Multicultural Society, 11 GEO. IMMIGR. L.J. 133, 149 (1996) (finding that courts have found statutory rights to bilingual education, as opposed to constitutional rights); Alberto T. Fernandez & Sarah W. J. Pell, Comment, The Right to Receive Bilingual Special Education, 53 EDUC. L. REP. 1067, 1068 (1989) (stating that courts have held consistently that the Equal Protection Clause does not require schools to provide bilingual education).

8. See Castaneda I, 648 F.2d at 1008.

9. Compare Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. §§ 1701-21 (1994) (mandating only that states overcome language barriers in educating limited English proficient (LEP) students), with Bilingual Education Act (BEA), 20 U.S.C. §§ 7401-91 (1994) (stating that bilingual education involving instruction in English and the native language is the authorized, basic teaching method) and H.R. REP. No. 105-587, at 18 (1998) (same), available in 1998 WL 323239; compare also Castaneda I, 648 F.2d at 1008-09 (holding that Congress intended to allow states to experiment with bilingual education programs under the EEOA), with Cintron v. Brentwood Union Free Sch. Dist., 455 F. Supp. 57, 63 (E.D.N.Y. 1978) (holding that the district's English-language immersion program conflicted with the EEOA and the BEA and, therefore, was unacceptable).


11. See id. at 1258-59 (discussing the civil rights movement and its impact on the Federal Government, particularly as evidenced by President Lyndon Johnson's "Great Society" program and increased federal involvement in areas of traditional local control).
was equivalent to not teaching. Parents and Hispanic community leaders argued that bilingual education would allow students to reverse the trends of low test scores, high dropout rates, and reduced life opportunities.

As the bilingual education movement grew, several teaching methodologies developed: the immersion, transitional, and maintenance or developmental methods. Under the immersion method, limited English proficient (LEP) students are taught entirely in English, ideally in simple language, to allow for the internalization of the English language. The transitional method provides for instruction of students partially in English and partially in their native languages, with the goal of moving the students into mainstream English classes. The maintenance, or developmental, education method allows students to acquire English while maintaining their native-language skills. During the past thirty years, each type of bilingual education has developed its own followers and each group propounds research that suggests its teaching methodology works best.


13. See Moran, supra note 10, at 1259-61 (tracking the hearings surrounding the passage of the Bilingual Education Act of 1968); see also Lynn Schnaiberg, In Battle Over Prop. 227, Both Sides Command Armies of Statistics, EDUC. WK., Apr. 29, 1998, at 17 (discussing the continuing arguments over statistics surrounding bilingual education). Critics of bilingual education point to the dropout rate among Hispanics, but the California Department of Education does not calculate drop out rates in terms of native-English and LEP speakers. See id. Supporters of bilingual education point to an internal report prepared in the Los Angeles school district showing that students in bilingual programs scored better than students in immersion programs on standardized tests. See id. Critics point to the fact that fewer students in the bilingual program took the tests, and in fact, fewer than two-thirds of fifth graders in bilingual classes were reading English at grade level. See id.


15. See id.

16. See id.

17. See id.

18. See Schnaiberg, supra note 13, at 17 (citing statistics and studies used on both sides of the bilingual education argument); English First Foundation, Evaluations of Current Bilingual Programs (last modified April 27, 1997) <http://www.englishfirst.org/efbe.htm> (listing various types of bilingual education with information on efficacy). Among the methodologies advocated are submersion, which involves placement in a classroom where only English is used; structured immersion, in which the student can use his or her native language; transitional bilingual education, similar to the transitional model; and English as a Second Language, where instruction of substantive courses is in English and the student receives extra instruction in English. See id. English First cites a study that shows no difference in the results achieved by students in transitional bilingual education programs and students not taught English at all. See id. The web-site explains that the
Beginning in the 1960s, the Federal Government became more involved with education in the furtherance of civil rights. For its part, the Federal Government favored transitional bilingual education, although it did not mandate any one teaching style. The tension among proponents of these various theories of bilingual education, along with federal intervention in state and local education decisions, has turned bilingual education into a highly divisive issue facing the country.

With the number of immigrants increasing and the debate over their education continuing, many states are looking to California for guidance in legislating bilingual education. Due to its large immigrant population, California is experienced in addressing bilingual education issues. In addition, California has a general history of initiating legislative trends.

reasons for maintaining bilingual education are not the programs' efficacy, but ethnic pride, mistaken science, or questionable ideologies. See id.

19. See Moran, supra note 10, at 1258-59 (discussing the Federal Government's response to the civil rights movement, through such programs as the Elementary and Secondary Education Act of 1965).


21. See Castaneda v. Pickard, 648 F.2d 989, 1008-09 (5th Cir. 1981) (holding that Congress did not intend to require adoption of a particular type of language program by mandating that states take "appropriate action," but rather intended that states develop their own programs).

22. See Moran, supra note 10, at 1258-59 (stating that federal regulation of bilingual education under the auspices of protecting civil rights has undercut state and local control of education); see also Bilingual Education, supra note 12 (providing an outline of the issues surrounding bilingual education and its history); Lynn Schnaiberg, The Politics of Language, EDUC. WK., Mar. 5, 1997, at 25 (discussing the ongoing debate in school districts and state governments and highlighting arguments on both sides).

23. See Lynn Schnaiberg, Will Calif.'s Bellwether Reputation Ring True?, EDUC. WK., June 17, 1998, at 6 (listing states that are considering modifications to their bilingual education programs and quoting experts and aides regarding the potential effect of the passage of Proposition 227); see also infra Part IV.A (discussing the expected legislative effects of California's legislation).


25. See infra Part II.B (discussing California's implementation of bilingual education legislation in the 1970s).

26. See Schnaiberg, Will Calif.'s Bellwether Reputation Ring True?, supra note 23, at 6. Currently, states including Arizona, Massachusetts, New Jersey, and Washington are considering altering their bilingual education programs. See id. A bill was also under con-
Against this backdrop, California voters passed Proposition 227 ("Proposition" or "Measure") on June 2, 1998. This measure requires that all non-English-speaking or LEP students be taught English through immersion classes, rather than through transitional bilingual education. Time in the immersion classes is not to exceed one year in normal circumstances. Immediately following passage of the Proposition, a class of LEP students filed a lawsuit challenging it, claiming violations of both the United States Constitution and federal education statutes. The plaintiffs moved for an injunction in the Northern District of California to prevent implementation of Proposition 227, which was scheduled to take effect in the fall of 1998. The court denied the injunction due to the plaintiffs' inability to show a likelihood of winning on the merits and, because the initiative had not yet been implemented, the lack of present injury.

By contrast, a more recent Northern District decision granted an injunction with regard to the application of Proposition 227 in the San Jose School District. In addition, two schools applied for and were granted exemptions from Proposition 227. By receiving such exemptions, or

28. See CAL. EDUC. CODE § 305. The Proposition, in addition to requiring English immersion programs, allows parental waivers from such programs under certain circumstances and provides that any part of the measure that conflicts with any other law is automatically struck, leaving the rest of the law intact. See id. §§ 310-11, 325.
29. See id. § 305.
31. See id. at 1012.
32. See id. at 1027-28.
34. See Bilingual Schools After All?, NAT'L L.J., Aug. 10, 1998, at A10; Rachel Tuinstra et al., 2 Schools Get Prop. 227 Waivers, ORANGE COUNTY REG., Sept. 4, 1998, at A1. Under state law, the California Board of Education must approve any request for a waiver from state regulations unless certain conditions exist. See CAL. EDUC. CODE § 33051 (West 1993). The education code lists seven criteria under which a waiver cannot be granted. See id. § 33051(a). The non-waivable conditions include, inter alia, failure to meet the educational needs of students, jeopardizing parental involvement, or increased state costs. See id. § 33051(a)(1), (5)-(6).

consideration in Congress to restructure the federal administration of states' bilingual education programs. See H.R. 3892, 105th Cong. (1998) (amending the Elementary and Secondary Education Act to provide block grant funding for bilingual education, limiting the time students can participate in federally-funded bilingual education classes, and terminating compliance agreements between the Department of Education and school district regarding bilingual education). The bill passed the House of Representatives on September 10, 1998 and was sent to the Senate, where it expired at the end of the 105th Congress. See Bilingual Ed. Legislation Passes House, EDUC. WK., Sept. 16, 1998, at 24; infra note 249.
waivers, local schools and school districts can avoid replacing their current bilingual program with the Proposition 227-mandated English immersion program.  

This Comment examines the history of bilingual education and the arguments for and against language education. Parts I and II explore the judicial and legislative arguments debating whether being taught in a non-English native language is a right, and if so, how it is to be carried out. Part III discusses the background and provisions of Proposition 227 and its impact within the state of California. Part IV proposes that, once implemented, Proposition 227 could establish boundaries for permissible types of bilingual education, and will clog the court system in California, and have other unintended consequences in that state. Finally, this Comment concludes that the impact of the California vote and any ultimate judicial action will establish guidelines that, when followed by other school districts across the country, will adversely affect LEP students.

I. FROM THE FOUNDING FATHERS TO FUNDAMENTAL PRINCIPLES: THE DEVELOPMENT OF EDUCATION "RIGHTS"

A. You Have the Right to an Education (for now): The Supreme Court Walks a Fine Line

The Constitution does not grant an explicit right to an education. In 1973, the Supreme Court found that education was neither an implicit substantive constitutional right nor a fundamental right meriting a high level of judicial scrutiny under the Equal Protection Clause. In San Antonio Independent School District v. Rodriguez, the parents of Mexican American children filed suit against the school district, claiming that a variance in school funding due to local property wealth violated the Equal Protection Clause. The Court was faced with the issue of whether education is a fundamental right.

The Court stated that its province was not “to create substantive con-

36. See supra notes 1-3 and accompanying text (discussing the history of education in constitutional jurisprudence and the uncertainty in the judiciary as to the “right” to education).
39. See id. at 4-6.
40. See id. at 17 (asking whether the Texas system of financing education through property taxes discriminated against poorer constituencies or impinged on a fundamental right to education).
stitutional rights in the name of guaranteeing equal protection of the laws. The Court proceeded to deny direct constitutional protection to education because the Constitution neither explicitly nor implicitly protects the right to education. The Court also rejected the plaintiffs’ argument that because rights, such as free speech, cannot be exercised effectively without an education, education should be protected as a fundamental right. In rejecting that argument, the Court found Texas’s school funding measure legitimate and therefore refused to intervene to protect important, but non-fundamental values.

Less than a decade later, the Supreme Court returned to the status of education rights in Plyler v. Doe. In Plyler, students of Mexican origin brought a class action suit against the state of Texas. The state denied the students attendance at the local public schools because they could not prove their lawful admission to the United States. Applying the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court examined Texas’s classification of the undocumented school children and analyzed whether that classification disadvantaged a suspect class or limited a fundamental right. Finding the children to constitute a suspect class, the Court turned to the issue of education as a fundamen-

41. Id. at 33. The Court made its pronouncement based on an analysis of an earlier case, which found that “the Constitution does not provide judicial remedies for every social and economic ill.” Id. at 32 (quoting Lindsey v. Normet, 405 U.S. 56, 74 (1972)).
42. See Rodriguez, 411 U.S. at 35. The Court upheld the statement in Brown that education is an important service, but reserved that such importance is not determinative of the level of protection attached to a supposed fundamental right. See id. at 30. The Court continued by saying that a right is fundamental only when it is explicitly or implicitly found in the Constitution. See id. at 33-34. A right does not become fundamental by being important or by being related to other Constitutional rights. See id.
43. See id. at 35-36. The plaintiffs claimed that education is necessary to receive and assimilate information and to use that information to speak intelligently and persuasively. See id. The plaintiffs also argued that education was necessary to exercise intelligently the protected right to vote. See id. at 35-36. The Court stated that such goals were “desirable,” but that it never assumed it had “the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.” Id. at 36.
44. See id.; see also J. Harvie Wilkinson III, The Role of Reason in the Rule of Law, 56 U. CHI. L. REV. 779, 807 (1989) (explaining Justice Powell’s judicial deference to state authority and expertise in Rodriguez as based on lack of judicial experience in education matters).
46. See id. at 206.
47. See id.
48. U.S. CONST. amend. XIV, § 1 (forbidding the denial of equal protection of the law).
49. See Plyler, 457 U.S. at 216-17.
50. See id. at 218-20. The Court stated that persons who enter the United States illegally may properly be refused governmental benefits due to the voluntary illegality of
The Court began its assessment by stating that education is not a constitutionally granted right, citing directly to *Rodriguez*.

The Court continued, however, stating that education is not just another benefit either. Rather, the Court found that "[t]he 'American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.'" The Court held that education is necessary to prepare citizens for participation in the American political system and vital in the transmission of societal values. Further, the Court said that deprivation of education places an obstacle in the path of student achievement, thus violating the Fourteenth Amendment, which guarantees equal protection of the law to all persons. For this point, the Court relied on its decision in *Brown v. Board of Education*, where it had found education to be the most important governmental function that must be provided to everyone equally, if it is provided to anyone. Thus, the Court in *Plyler*, while not overruling *Rodriguez*, subjected the Texas law to a higher standard of scrutiny than the *Rodriguez* Court apparently would have. Later Court decisions, however, have followed *Rodriguez* more closely, casting doubt on *Plyler*.
B. Does Equal Creation Mean Equal Education? Congress and the Supreme Court Say "Yes"

In *Plessy v. Ferguson*, the Supreme Court upheld the idea of "separate but equal" accommodations based on race—an idea that paved the way for states to segregate schools until *Plessy* was overturned by *Brown*. In *Brown*, African-American students in four states filed class action suits in an effort to attend nonsegregated public schools. The plaintiffs charged the respective school systems with violations of the Equal Protection Clause of the Fourteenth Amendment, claiming that the separate facilities were not equal and could not be made equal; therefore, the separate facilities deprived the students of equal protection.

In addressing the equal protection issue, the Court looked first to the history of the Fourteenth Amendment and its relation to education. Finding little guidance, the Court stated that the equality of public education only could be judged by looking at its place in American society. The Court proceeded to find that education may be the most important state or local government function due to its necessity in preparation for life. Therefore, the Court said, where states provide education, they

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61. 163 U.S. 537 (1896) (holding that the Fourteenth Amendment Equal Protection Clause was not intended to abolish distinctions based on race; upholding the doctrine of "separate but equal" accommodations), overruled by *Brown*, 347 U.S. at 495. Justice Brown's opinion in *Plessy* stated that state legislatures were "at liberty to act with reference to the established usages, customs and traditions of the people." *Id.* at 550.

62. *See id.*; *see also Brown*, 347 U.S. at 495. In overturning *Plessy*, the *Brown* Court stated that "[s]eparate educational facilities are inherently unequal." *Brown*, 347 U.S. at 495.

63. *See Brown*, 347 U.S. at 486-87. The cases arose in Kansas, South Carolina, Virginia, and Delaware. *See id.* at 486. In all but the Delaware case, the students had been denied admission to white-attended schools under the "separate but equal" doctrine announced in *Plessy*. *See id.* at 488. The state of Delaware observed the *Plessy* doctrine but allowed the African-American students to attend white schools because the segregated facilities were not equal. *See id.*

64. *See id.*

65. *See id.* at 489-93. The Court looked particularly to the adoption of the Fourteenth Amendment and early case law interpreting it. *See id.* at 489-91. The Court addressed *Plessy* and ensuing education cases involving its "separate but equal" doctrine. *See id.* at 490-92 & nn.7-8 (discussing *inter alia* *Sweatt v. Painter*, 339 U.S. 629 (1950) and *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)). The prior cases had all been decided within the context of the "separate but equal" doctrine; however, none had challenged the doctrine itself. *See id.* at 491-92 & n.8.

66. *See id.* at 492-93. The Court found that education, in particular public education, was not advanced at the time of the Amendment's passage and did not enter into the debate surrounding the adoption of the Amendment. *See id.* at 489-90.

67. *See id.* at 493; *see also supra* text accompanying 58 (citing the "most important function" language of *Brown*).
must provide it equally. 68 According to the Court, equal education was impossible at separate facilities. 69

The Supreme Court earlier had found a fundamental right in a parent's right to control his/her child's education in Pierce v. Society of Sisters. 70 There, the Court held that states could not require public school instruction. 71 Oregon had passed a Compulsory Education Act that required all children between the ages of eight and sixteen to attend public schools. 72 The Society of Sisters challenged the Act as violating parents' rights to choose the type of education they preferred for their children. 73 The Supreme Court struck down the Oregon law, agreeing that the Act "interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." 74 The Court held that a state could not standardize its children by mandating how education was provided, because attempting to do so violated a "fundamental theory of liberty." 75

The language in the Pierce decision echoed that of an even earlier Supreme Court decision regarding parental control and language instruction, Meyer v. Nebraska. 76 Due to anti-German sentiment during World War I, Nebraska had outlawed the teaching of the German language. 77 In Meyer, the Court invalidated the Nebraska law because it interfered with parental power to control their children's education. 78 This decision reflected the view that choices about education, including language, were

68. See Brown, 347 U.S. at 493.
69. See id. at 493-95. The Court found that separating students based solely on race would generate feelings of inferiority, which in turn would affect the students' ability to learn. See id. at 494. Based on this finding, the Court expressly overruled the Plessy Court's contrary holding. See id. at 494-95.
70. 268 U.S. 510, 534-35 (1925) (holding unanimously that states cannot standardize instruction by mandating public education).
71. See id.
72. See id. at 530.
73. See id. at 532.
74. Id. at 534-35.
75. Id. at 535.
76. See GUNTHER & SULLIVAN, supra note 60, at 517 (discussing the Court's views in the Pierce case).
77. 262 U.S. 390 (1923).
78. See id. at 401-02 (finding the state's rationale, that the use of foreign words has a negative effect on children and public safety, understandable based on the experience of World War I); see also Moran, supra note 10, at 1257. Moran tracks the development of the controversy surrounding German language instruction in schools. See id. The controversy began in the nineteenth century and culminated during World War I, resulting in the elimination of German instruction programs. See id.
79. See Meyer, 262 U.S. at 401-02.
similar to choices about religion and culture.\textsuperscript{80} Despite the protection
given to education by Meyer, it remained the only significant government
involvement in school curricula between the nation’s founding and the
1960s.\textsuperscript{81}

With the 1960s came increased pressure from the civil rights move-
ment, resulting in greater federal involvement in matters previously left
to state and local governments.\textsuperscript{82} Evidence of the Federal Government’s
new willingness to become involved can be found in President Lyndon
Johnson’s “Great Society” legislative program,\textsuperscript{83} which included the Civil
Rights Act of 1964.\textsuperscript{84}

Title VI of that Act prohibits any entity receiving federal funds from
discriminating on the basis of race, color, or national origin.\textsuperscript{85} To enforce
this mandate, Title VI also grants government agencies authority to issue
rules prohibiting discrimination in agency-administered programs.\textsuperscript{86} To
address this dualistic, statutory/regulatory approach, the Supreme Court
formulated two different standards, one for challenges brought under the
Title VI statute and another for challenges to violations of the imple-
menting regulations.\textsuperscript{87} Challengers suing under Title VI \textit{implementing
regulations} only need to prove that they suffered discrimination from the
effect of a governmental act, rather than from a governmental intent to
discriminate.\textsuperscript{88} The Supreme Court, however, subjected claims brought

\textsuperscript{80} See id. at 399 (stating the rights guaranteed by the Fourteenth Amendment in-
clude “right of the individual . . . to acquire useful knowledge, to marry, establish a home
and bring up children, to worship God”). \textit{But cf. id. at 402 (holding that the State does
have power to require classroom instruction in English and passing on state power to
mandate the curriculum for public schools only).}

\textsuperscript{81} See Moran, supra note 10, at 1257-58 (discussing the history of language use and
education in America and the government’s lack of involvement).

\textsuperscript{82} See id. at 1258.

\textsuperscript{83} See id. The “Great Society” was a program of economic and welfare reform
measures modeled on the New Deal. See \textsc{Thomas A. Bailey \& David M. Kennedy},
\textsc{The American Pageant} 867 (8th ed. 1987). One of the goals of the “Great Society”
was the “War on Poverty.” See id. at 869. Other results include the Civil Rights Act of
1964, aid to education, and economic redevelopment of the Appalachia region. See id.

(1994)).

\textsuperscript{85} See 42 U.S.C. § 2000d.

\textsuperscript{86} See id. § 2000d-1.

\textsuperscript{87} \textit{Compare} Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 287 (1978) (hold-
ing that Title VI is coextensive with the Equal Protection Clause and thus requires a
that a violation of the implementing regulation’s discriminatory effect language is suffi-
cient for a finding of discrimination).

\textsuperscript{88} See \textit{Lau}, 414 U.S. at 568; see also 45 C.F.R. § 80.3(b)(2) (1998) (stating that a re-
cipient “may not . . . utilize criteria or methods of administration which have the effect of
directly under Title VI to the same standard used in assessing equal protection claims—a "discriminatory intent standard." For a challenge to succeed under Title VI, the claimant must demonstrate that he or she suffered from a discriminatory act of the government that was motivated by a discriminatory intent.90

The Court's announcement of the stricter Title VI standard came in the context of an education claim, in Regents of the University of California v. Bakke.91 Bakke, a white male student, sued the University of California, challenging the graduate school's special admission policy for minorities after being denied entrance into medical school.92 Bakke challenged the admission policy in part on a claim that the special admissions program violated Title VI.93 Despite the filing of six separate opinions,94 a five-justice majority agreed that Title VI and the Equal Protection Clause are coextensive.95 The fractious nature of the Bakke

subjecting individuals to discrimination").

89. Compare Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582, 584, 607 (1983) (holding that discriminatory intent is required for compensatory, but not for injunctive relief under Title VI), with id. at 608 n.1 (1983) (Powell, J., concurring) (listing the seven Justices supporting the discriminatory intent requirement for any Title VI violation, along with Justice White's intent requirement for compensatory relief), and Washington v. Davis, 426 U.S. 229, 245 (1976) (holding that discriminatory intent is necessary to show a violation of the Equal Protection Clause); see also Bakke, 438 U.S. at 287 (holding that Title VI is coextensive with the Equal Protection Clause); Castaneda v. Pickard, 648 F.2d 989, 1007 (5th Cir. 1981) (citing Davis and Bakke for the principle that violations of Title VI require a showing of discriminatory intent). In Guardians, Justice White, writing for the plurality, stated that Bakke did not overrule the Lau holding that a Title VI challenge required proof of discriminatory intent. See Guardians, 463 U.S. at 590. Even if Bakke did overrule that part of Lau, Justice White continued, Bakke did not reach the holding that implementing regulations required more than a showing of discriminatory impact. See id. at 591-93.

90. See Davis, 426 U.S. at 239, 242 (holding that a law or act that has a larger impact on one group or race than another is not unconstitutional without a showing of the government's intent to discriminate).

91. 438 U.S. 265, 276-78 (1978) (challenging the school's policy of reserving a limited number of spaces in the incoming class for minority students).

92. See id. The school had two admissions committees, one for general admissions and one for special admissions. See id. at 272-74. The special admissions committee considered economically and educationally disadvantaged applicants and minorities. See id. at 274-75. Applicants considered through the special admissions program did not have to meet the strict academic requirements of general admissions applicants. See id. at 275.

93. See id. at 277-78.

94. See id. at 269, 324, 379, 387, 402, 408. Two four-justice concurring and dissenting opinions were filed and three additional single opinions were also filed. See id.

95. See id. at 287 (holding that Title VI prohibits only those racial categories prohibited by the Fifth Amendment and the Equal Protection Clause); see also id. at 328 (Brennan, White, Marshall, & Blackmun, JJ. concurring and dissenting) (concurring with that part of the majority holding). The remaining four Justices, in an opinion by Justice Stevens, declined to reach the constitutional issues, but focused only on the language of Title
holding, however, has left lower courts little guidance regarding the enforcement of the right to equal educational opportunities.96

II. PROTECTING THOSE WHO DON’T UNDERSTAND: EQUAL PROTECTION AND BILINGUAL EDUCATION

A. Law and Public Policy: Judicial and Legislative Oversight of Bilingual Education

In an effort to enforce Title VI, in 1964, the Department of Health, Education, and Welfare (HEW)97 issued guidelines prohibiting recipients of federal funds from using race, color, or national origin as a basis for providing disparate services and benefits or for restricting access to such opportunities.98 The regulations define discrimination in the realm of education as including discrimination in the use of academic or other facilities.99 In particular, HEW issued guidelines in 1970 requiring federally funded school districts to address any obstacles to learning posed by enrolled students’ lack of English language proficiency.100

The Supreme Court defined the reach of the HEW guidelines in Lau v. Nichols.101 In 1971, the San Francisco, California school system enrolled 2,856 students of Chinese descent who did not speak English.102 Fewer than one-half of those students were taught English.103 In 1974, a class of Chinese students sued the school system, claiming violations of both the Equal Protection Clause and Title VI, and demanding that the Board of

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96. See id. at 418; see also Davis, 426 U.S. at 274-78 (holding that violations of the Equal Protection Clause require findings of discriminatory intent and not mere discriminatory effect).
97. See, e.g., Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (stating that the opinion in Bakke, delivered by Justice Powell, is not binding precedent because he was the only signer and the opinion has never been adopted by the Court); Castaneda v. Pickard, 648 F.2d 989, 1007 (5th Cir. 1981) (finding that a majority of justices (including Justice Powell) did reach agreement on the Title VI issue in Bakke and, as a result, questioning the value of the holding in Lau v. Nichols, 414 U.S. 563 (1974)); Valeria G. v. Wilson 12 F. Supp. 2d 1007, 1023 (N.D. Cal. 1998) (stating that “regardless of which standard applies,” the plaintiffs were unlikely to win on the merits).
100. See 45 C.F.R. § 80.5(b).
103. See id. at 564.
104. See id. (noting that only approximately 1000 of these students were given additional training in the English language).
Education develop a solution to the lack of English instruction. The Ninth Circuit affirmed the district court ruling denying relief to the students, finding no violation of either the Equal Protection Clause or Title VI.

In overruling the Ninth Circuit, the Supreme Court did not reach the equal protection claim, but found support for its decision in Title VI. The Court looked to California's education policy of ensuring that all pupils master the English language. The Court found that providing the same facilities and curriculum did not translate to equal educational opportunities for students who did not understand English. In fact, the Court stated that the classroom experience lacks meaning when students cannot understand the language of instruction.

Such an experience, the Court said, resulted in the Chinese-speaking students receiving fewer benefits than English-speaking students did because the language barrier denied these students the opportunity to participate in school. Citing HEW's definition of discrimination and its regulations prohibiting discriminatory effect, the Court found that the Chinese-speaking students were subjected to discrimination under the school system's language policy. In fact, the Court held that Title VI alone did not require a showing of discriminatory intent to prove a violation. The Court then held that such discrimination was prohibited because the San Francisco School District received federal funds. Significantly, however, the suit did not request a specific remedy and the Supreme Court did not provide one.

104. See id. at 564-65.
105. See id. at 565.
106. See id. at 566 (citing the Civil Rights Act of 1964, which bans discrimination on the basis of race, color or national origin in any program receiving federal funding).
107. See id. at 565 (citing California's Education Code).
108. See id. at 566.
109. See id.; see also Bilingual Education, supra note 12 (presenting the argument that teaching students in a language they cannot understand is not teaching).
110. See 414 U.S. at 568.
111. See id. at 568-69 (citing 45 C.F.R. § 80.3(b)(2) (1973)).
112. See id. at 568.
113. See id. at 569. But see Regents of University of California v. Bakke, 438 U.S. 265, 287 (1978) (interpreting Title VI to be coextensive with the Equal Protection Clause, which does require discriminatory purpose); see also Castaneda v. Pickard, 648 F.2d 989, 1007 (5th Cir. 1981) (questioning the validity of the Lau holding in light of Bakke).
114. See Lau, 414 U.S. at 566, 568-69.
115. See id. at 564, 568-69 (stating that plaintiffs sought only to force the Board of Education to address the issue of LEP students).
Congress responded to the *Lau* decision in two ways.\textsuperscript{116} The first was the passage of the Equal Educational Opportunities Act of 1974 (EEOA).\textsuperscript{117} Ostensibly, the purpose of the EEOA was to address issues remaining from the desegregation of school systems under *Brown*.\textsuperscript{118} The EEOA prohibited states from denying equal educational opportunities to students based on race, color, sex, or national origin.\textsuperscript{119} In addition, however, the EEOA required schools and other educational agencies to overcome language barriers to a student's equal participation.\textsuperscript{120} The inclusion of such statutory language has provided the basis for numerous applications of the EEOA to matters outside of the historic racial segregation context.\textsuperscript{121}

\textsuperscript{116} See Moran, supra note 10, at 1270 (tracking Congress's response to *Lau* and the effects of its actions).

\textsuperscript{117} 20 U.S.C. §§ 1701-21 (1994). The EEOA established that all children, regardless of race, color, sex, or national origin, were entitled to equal educational opportunities. See id. § 1701. The EEOA focused primarily on race and busing, as evidenced by a provision that neighborhoods should be used to determine assignments of students to schools. See id. § 1701(a)(2). Language in 20 U.S.C. § 1703(f), however, specifically requires that states address language barriers. See id. § 1703(f); see also infra notes 120-21 and accompanying text (citing cases where § 1703(f) claims were brought by plaintiffs claiming school bilingual education programs did not adequately address language education).


\textsuperscript{120} See 20 U.S.C. § 1703(f). The EEOA stated that the policy of the United States was that all children were entitled to an equal opportunity for education. See id. § 1701(a)(1). In furtherance of that policy, the EEOA prohibited states from denying anyone an equal opportunity to an education based on race, color, sex, or national origin. See id. § 1703. The EEOA then enumerated specific prohibited policies, including "deliberate segregation" within schools based on race, color, or national origin, failure to eliminate remnants of a segregated school system, and failure to take "appropriate action" to remedy language barriers that impeded student participation in education. See id. § 1703(a),(b),(f); see also Martin Luther King Jr. Elementary Sch. Children v. Ann Arbor Sch. Dist. Bd., 473 F. Supp. 1371, 1383 (E.D. Mich. 1979) (holding that a school's language education program must consider the student's home language (in this case "Black English") and its effect on the student to avoid violating § 1703(f) of the EEOA). In addressing language barriers, the fact that teachers and students orally understand each other is not enough to end examination under § 1703(f). See id. at 1379. Appropriate reading skills are also required to meet the standard of equal participation. See id. at 1377. The Eastern District of Michigan held that teachers should recognize and use students' home language to teach reading skills in standard English. See id. at 1383.

\textsuperscript{121} See, e.g., Castaneda v. Pickard, 648 F.2d 989, 992 (5th Cir. 1981) (charging the
Congress's second action was a direct response to the *Lau* decision.\(^\text{122}\) In its ruling, the Court allowed the state and local school districts to decide what action to take to overcome the language barriers.\(^\text{123}\) Congress, however, decided it would address the teaching methodologies.\(^\text{124}\)

Prior to 1974, Congress had provided funding for bilingual education but had not established a preferred teaching style.\(^\text{125}\) After *Lau*, however, Congress did address the methodology issue in its 1974 amendments to the Bilingual Education Act.\(^\text{126}\) In those amendments, Congress provided

school district with violating the EEOA, not through segregation by race, but for failing to address the language barrier between LEP students and native English speakers. The plaintiffs also charged that the school district practiced unlawful segregation through classroom assignments. See *id.*; Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1016 (N.D. Cal. 1998) (addressing plaintiffs' claim that Proposition 227 violates § 1703(f) of the EEOA, which prohibits states from failing to take “appropriate action” to address language barriers).

122. See H.R. REP. NO. 93-805, at 69 (1974) (stating that the *Lau* decision indicates the need for federal oversight of bilingual education), reprinted in 1974 U.S.C.C.A.N. at 4150-51. The plaintiffs in *Lau* did not seek a specific remedy or request a particular teaching methodology. See *Lau* v. Nichols, 414 U.S. 563, 564 (1974). The Court acknowledged this, stating, “[t]eaching English to the students . . . is one choice. Giving instructions to this group in Chinese is another. There may be others.” Id. at 565. The Fifth Circuit later quoted this language in upholding a Texas school district's bilingual education program. See Castaneda 1, 648 F.2d at 1006. Such a statement, the Fifth Circuit said, indicates that school districts have several different options for teaching non-English-speaking students. See *id.*. Bilingual education is just one option. See *id.*

123. See *Lau*, 414 U.S. at 564-65; see also H.R. REP. NO. 105-587, at 11-12 (1998) (tracking the history of the Bilingual Education Act and finding that the *Lau* decision left to the state and local authorities the decision on which teaching methodology to use), available in 1998 WL 323239.


126. See 20 U.S.C. §§ 7401-91; see also H.R. REP. NO. 105-587 at 11-12 (1998) (tracking the history of the Bilingual Education Act), available in 1998 WL 323239. The Bilingual Education Act was originally passed in 1968 as Title VII of the Elementary and Secondary Education Act. See *id.* at 11. The purpose of the Act was to address the problem of students who were educationally disadvantaged due to a lack of English skills. See S. REP. NO. 90-276, at 49-50 (1967), reprinted in 1967 U.S.C.C.A.N. at 2780. The bill did not specify a type of program but encouraged localities to experiment. See *id.* at 50, reprinted in 1967 U.S.C.C.A.N. at 2781. Grants were provided to schools for design and implementation, and authorization was provided for programs to include historical and cultural instruction related to the students' native language. See Elementary and Secondary Education Amendments of 1967, Pub. L. No. 90-247, § 704, 81 Stat. 783, 817.
The State of Bilingual Education

for transitional bilingual education to be the basic teaching methodology used by school systems receiving funding under the Bilingual Education Act.\(^\text{127}\)

HEW responded to the Supreme Court decision by issuing so-called "Lau Guidelines" in an effort to assist school districts that found themselves in violation of Title VI after the Lau decision.\(^\text{128}\) Later cases, such as Castaneda v. Pickard\(^\text{129}\) (Castaneda I), called the efficacy of these guidelines into question.\(^\text{130}\)

In Castaneda I, the Fifth Circuit also addressed whether transitional bilingual education, the preferred method, was in fact the only allowable method.\(^\text{131}\) In the original suit, Mexican American children and their parents charged the Raymondville, Texas Independent School District with failing to provide adequate instructional programming to overcome the language barriers between English-speaking students and LEP students.\(^\text{132}\) On appeal, the Fifth Circuit first addressed the plaintiffs' Title

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\(^{128}\) See Task-Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful under Lau v. Nichols, Office for Civil Rights, reprinted in BILINGUAL EDUCATION 213 (Keith A. Baker & Adriana A. De Kanter eds., 1983); see also Castaneda v. Pickard, 648 F.2d 989, 1006-07 (5th Cir. 1981) (tracking the history of HEW regulation of bilingual education). The Lau guidelines were not published. See id. at 1007.

\(^{129}\) 648 F.2d 989 (5th Cir. 1981).

\(^{130}\) See id. (questioning the "Lau Guidelines" relevance after Bakke and Davis).

\(^{131}\) See id. at 1006. The plaintiffs contended that the language remediation program, used by the local school district, did not comply with Title VI of the Civil Rights Act or EEOA § 1703(f). See id. at 992. In upholding the program itself, the Fifth Circuit based its decision on the "appropriate action" language in that section. See id. at 1007-09. By using the more general "appropriate action" language, rather than a more specific phrase, such as "bilingual education," the Fifth Circuit reasoned that Congress did not intend to mandate bilingual education in local school districts. See id. at 1009.

\(^{132}\) See id. at 992. The claims filed against the school district also included racial discrimination in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act. See id. The claims were based on the district’s hiring practices and the grouping of students by their ability level, determined through standardized testing, grades, teacher evaluations and school counselor recommendations. See id. at 992, 998. The plaintiffs also argued that the bilingual program was inadequate under EEOA § 1703(f) and a violation of Title VI. See id. at 992. The plaintiffs supported their complaint by alleging a failure to
VI claim. Responding to the claim that the district’s bilingual education program violated the \textit{Lau} holding and HEW’s “\textit{Lau Guidelines},” the Fifth Circuit cited HEW’s own decision that failure to follow the Guidelines is not determinative of a Title VI violation. The court then questioned the applicability of both the HEW guidelines and the decision in \textit{Lau}, in the wake of more recent precedent which established stricter requirements for Title VI violations than those established by \textit{Lau}.

In addressing the EEOA claim, however, the \textit{Castaneda I} court upheld what it called the “essential holding of \textit{Lau},” that schools could not ignore the needs of LEP students. The threshold question, the court said, becomes what \textit{Lau} and the EEOA require of schools in addressing LEP students. Looking to the language of the EEOA, codified at 20 U.S.C. § 1703(f), the court held that the meaning of “appropriate action” meant only that some action must be taken by states and localities to meet the anti-discrimination requirement.

comply with the \textit{Lau} guidelines. \textit{See id.} at 1006. This allegation was made despite a prior HEW assessment of the District’s Title VI compliance that concluded failure to comply with the guidelines is not determinative of Title VI a violation. \textit{See id.} at 1007.

Raymondville, Texas is located in Willacy County in the Rio Grande Valley, one of the poorest counties in Texas (ranking 248th out of the 254 counties for average household income). \textit{See id.} at 993. The population at the time of the suit was estimated at 77\% Mexican American and 23\% Anglo-American. \textit{See id.} The student population was 85\% Mexican American, whereas only 27\% of the district teachers were Mexican American. \textit{See id.} at 993, 998.

\textit{See id.} at 1006-07. In 1973, representatives from HEW visited the Raymondville school district and found the district in violation of Title VI and its implementing regulations. \textit{See id.} at 992. After failed negotiations between the district and HEW, the agency sought to have the district’s federal funding revoked. \textit{See id.} at 993. The district requested and received a hearing on HEW’s findings. \textit{See id.} The case was heard before an administrative law judge who found that the district was not in violation of Title VI, a holding that was upheld upon review by HEW’s Office for Civil Rights. \textit{See id.} at 992-93.

\textit{See id.} at 1007. The court cited specifically \textit{Washington v. Davis}, 426 U.S. 229 (1976), which held that discriminatory intent must be proven to find a violation of the Equal Protection Clause, and \textit{University of California Regents v. Bakke}, 438 U.S. 265 (1978) which held that Title VI was coextensive with the Equal Protection Clause. \textit{See Castaneda I}, 648 F.2d at 1007; \textit{see also supra} note 113 and accompanying text (discussing the earlier, lower standard announced in \textit{Lau} that Title VI claims are subject to proof of discriminatory effect, not intent).

\textit{Castaneda I}, 648 F.2d at 1008. The court acknowledged that in enacting § 1703(f) of the EEOA, Congress codified much of the \textit{Lau} holding. \textit{See id.}

\textit{See id.} The court needed to address whether Congress intended the term “appropriate action” to place more specific obligations on schools than the general obligation of “some action” as imposed by the \textit{Lau} holding. \textit{See id.}

\textit{See id.} at 1007-09. Citing a lack of legislative history, the court based its decision on the plain language of the statute, in conjunction with contextual clues, such as the simultaneous enactment of the more specific Bilingual Education Act. \textit{See id.} The court also looked to the history of bilingual education and found that due to the then-
In § 1706 of the EEOA as codified, however, the court found that Congress imposed on courts the responsibility to determine whether schools met the obligation to remedy language barriers. To assess the school’s compliance with the EEOA, the Fifth Circuit developed a three-pronged test for bilingual educational programs: (1) whether the educational theory on which the program is based is sound; (2) whether the theory endorsed is implemented effectively; and (3) whether the program achieves results. Applying that test, the court found that the Ray mondville Independent School District was not implementing the program effectively. Principally, the court based its opinion on the inadequate Spanish language skills of the teachers responsible for teaching the LEP students and the inaccuracy of the school district’s testing methods. The court remanded the case with directions to identify problems in the teacher education program and to take any necessary steps to acquire a valid testing program.

experimental nature of such programs, Congress would have wanted states to experiment, rather than mandate a specific plan. See id. at 1008-09. The Fifth Circuit also made a point of stating that acts by an education agency can trigger § 1703(f) even absent an intent to discriminate. See id. at 1007-08. Such a construction approximates the language Lau applied in its Title VI interpretation. See id.


140. See Castaneda I, 648 F.2d at 1009-10. The court expressed great reluctance to engage in this program evaluation, finding itself “ill-equipped” to generate standards and policies of governance “properly reserved to other levels and branches.” Id. at 1009. The court developed a test to evaluate the programs in question without making value judgments. See id. To that end, the first prong of the test merely required that the theory endorsed by the school system be one that at least some educational experts recognize as sound or experimentally legitimate. See id. Once a program passed this first prong, the court found the remaining two prongs to be more objectively discernible. See id. at 1010.

141. See id. at 1013-14. In making this determination, the court looked at the qualifications of the district’s teachers to teach Spanish, the district’s programs to assess and assist bilingual education teachers to improve their abilities, and the testing procedures implemented by the school district. See id. at 1012-14.

142. See id. at 1013-1015. The record before the court illustrated that many of the teachers in the bilingual program were unable to converse with or understand the Spanish-speaking students. See id. at 1012. The school district certified prospective teachers based on a 100 hour course designed to teach a minimal 700 word vocabulary, culminating in an exam graded through an informal discussion after the candidates wrote a paragraph in Spanish, read from a Spanish text, and orally answered questions asked in Spanish. See id. In this case, the district tested student competency entirely in English, rather than in the language best understood by the student. See id. at 1014. The court found that such testing might not accurately reflect the student’s knowledge, as the student might not understand a question in English. See id. at 1013-14.

143. See id. at 1015. On remand, the district court found that the bilingual teacher issues had been remedied through newly hired Spanish-fluent instructors and that the program was in compliance with the EEOA. See Castaneda v. Pickard, 781 F.2d 456, 470 (5th Cir. 1986) (Castaneda II). In addition, during the course of the lawsuit, Texas passed the
B. California Addresses Bilingual Education

Following the Supreme Court’s decision in *Lau* and Congress’s passage of the Bilingual Education Act of 1974—but before *Castaneda I* called the methodology requirements into question—California implemented its own Bilingual-Bicultural Education Act in 1976 (BBEA). In doing so, the State combined the goals of the EEOA and the federal Bilingual Education Act. California established broad outlines allowing the Board of Education to adopt any rules necessary for the implementation of the BBEA; however, the BBEA specifically provided that bilingual education should contain teaching components in both English and the child’s native language. As students developed their English proficiency, the programs were to include more instruction in English and less instruction in the primary language. The BBEA defined bilingual-bicultural education as not only including instruction in both English and the pupil’s native language, but also development of the student’s native language skills. Localities were allowed to experiment in implementing programs to achieve the Act’s goals, but only to a limited extent.

Texas Bilingual Education Act. See id. Following the passage of that Act, the plaintiffs amended their complaint to file under the state law, rather than under the EEOA. See id. The district court found that both the teacher education program and the testing procedures complied with state law. See id. In affirming those findings, the Fifth Circuit, in *Castaneda II*, suggested that the change of law may have affected the outcome of the case. See id. ("If Plaintiffs had not taken the position before the district court that they did here, our review of a school district’s compliance with § 1703(f) would be different.").


145. See id. § 52161 (West 1989) (finding that a limited proficiency in English “presents an obstacle to . . . pupils’ right to an equal educational opportunity” and stating the purpose of offering bilingual education as the method to overcome this obstacle). While California did declare a goal to develop fluency in English and offered bilingual education to do so, the state left participation in such programs up to the parent or guardian. See id.; cf. supra notes 113, 115-16, 121-25 and accompanying text (discussing the purpose of the ESEA and BEA).

146. See CAL. EDUC. CODE § 52162.

147. See id. § 52163(a). The Act defined basic bilingual education as:

- a system of instruction which builds upon the language skills of the pupil and which consists of, but is not limited to, . . .

1. A structured English language development component, . . .

2. A structured primary language component . . . for the purpose of sustaining achievement in basic subject areas until the transfer to English is made.

Id.

148. See id.

149. See id. § 52163(b) (defining bilingual-bicultural education as including, *inter alia*, language development (oral and literacy) in the primary language, reading, teaching of selected subjects in the primary language, and education in the history and culture associated with the primary languages taught).
degree. The BBEA expired on June 30, 1987 but continued to form the framework for state policy.

Since the “sun-setting” of the BBEA, both the California school board and the state legislature have attempted to provide new guidance for bilingual education. The State Senate introduced the Alpert-Firestone English Learners Education Reform Act of 1998 (Alpert-Firestone Act) in an effort to allow more flexibility at the local level. The bill did not specify a methodology, but instead, “require[d] each school district to develop the type of [language] instructional services to best accomplish the goals of English language development.”

III. YOU WILL BE ASSIMilated: PROPOSITION 227 TELLS STUDENTS TO SINK OR SWIM

A. Education Policy Makes Strange Bedfellows: Supporters of Proposition 227 Are an Unlikely Group

The freedom sought by the Alpert-Firestone Act potentially ended on June 2, 1998 with California’s passage of Proposition 227. Rather than allowing school districts to experiment with different approaches to bi-

150. See id. § 52163(c) (limiting programs to those that conformed to the requirements of bilingual education under the Act).
151. See id. § 62000.2(e) (establishing the sunset date for the Act).
152. See Lynn Schnaiberg, Calif. Board Revises Policy for LEP Students, EDUC. WK., Apr. 15, 1998, at 25 (citing the BBEA’s continuing impact); see also Michael J. Fitzgerald, The Making of an Initiative, CALIF. LAW., May 1998, at 44, 47 (stating that the Bilingual-Bicultural Education Act of 1976 contained a provision providing for continued state funding of the bilingual programs, even if the Act expired).
153. See Schnaiberg, Calif. Board Revises Policy for LEP Students, supra note 152, at 25 (stating that the Board adopted a new policy providing schools with more flexibility and that the state legislature was considering a bill that would grant each district flexibility to determine how to help its own LEP students).
155. See id.
156. Id. This bill maintains the voluntariness of enrollment in a bilingual program, but also requires schools to notify parents about a student’s language skills and to discuss the various programs available. See id. To provide school districts with the materials for such a discussion, the bill requires the state Department of Education to compile research about the teaching methods and provide this research to school districts annually. See id. Like the Bilingual-Bicultural Education Act of 1976, this reform act contains a sunset provision, in this case, January 1, 2008. See id.; see also supra note 151 (citing the sunset provision of the Bilingual-Bicultural Education Act of 1976).
lingual education, the voter initiative mandates that all children, who are English learners, be taught English through a limited immersion program.\textsuperscript{158}

The origins of the Proposition, which passed by a margin of sixty-one to thirty-nine percent,\textsuperscript{159} can be found in the predominantly Spanish-speaking garment district of Los Angeles.\textsuperscript{160} For two weeks in 1996, parents of Hispanic students kept their children out of the local elementary school to protest the predominantly Spanish-language instruction of their children.\textsuperscript{161} While the school did introduce English slowly to the students, the parents wanted the children in English-language classes.\textsuperscript{162} In the parents' eyes, many of whom speak little or no English, the only way for their children to succeed and move beyond jobs in garment factories and as street vendors is to learn English.\textsuperscript{163} To that end, the parents requested repeatedly that the school district move the students into English-language settings, a legal request under California law.\textsuperscript{164} When the school district failed to comply with the requests, the parents pulled their children out of school.\textsuperscript{165}

The boycott caught the attention of Ron Unz, a multimillionaire who

\textsuperscript{158} See \textit{CAL. EDUC. CODE} § 305. The limited immersion program is designed to last for one year, under normal circumstances. See \textit{id}. In addition, the grouping of students in the immersion classes is based solely on language ability. See \textit{id}. Schools are encouraged to mix speakers of differing native languages and are allowed to place different age groups in the same immersion class. See \textit{id}. As the students develop a working knowledge of English, they are to be mainstreamed into regular classrooms. See \textit{id}.

\textsuperscript{159} See Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1012 (N.D. Cal. 1998).

\textsuperscript{160} See Michael Bazeley & Lori Aratani, \textit{English Initiative's Spanish-Speaking Roots: How Latino Parents' Boycott of a Los Angeles School Led to a Statewide Proposal to Scrap Bilingual Education}, SAN JOSE MERCURY NEWS, March 22, 1998, at 1A, available in <http://www.mercurycenter.com/resources/search/#newslibrary>. (The archive site is a fee-based service. To retrieve an article from the archives, registration is required with the site at a charge of $1.95 per article. The first two paragraphs are available without charge.) Critics of the programs claim that the catalyst—Ron Unz—is using the bilingual education issue to gain name recognition, possibly for a future run for political office. See Fitzgerald, \textit{supra} note 152, at 48.

\textsuperscript{161} See Bazeley & Aratani, \textit{supra} note 160 at 1A.

\textsuperscript{162} See \textit{id}. Children who switched into the English classrooms after the boycott say they prefer learning in English to learning in Spanish. See \textit{id}.

\textsuperscript{163} See \textit{id}. Many of the parents themselves worked in factory jobs for low wages. See \textit{id}.

\textsuperscript{164} See \textit{id}; see also \textit{CAL. EDUC. CODE} § 52161 (West 1989) (stating that participation in bilingual education programs is voluntary).

\textsuperscript{165} See Bazeley and Aratani, \textit{supra} note 160, at 1A. The boycott was held in February, and two weeks later, the school district agreed to place the children in English-language classes beginning the following fall. See \textit{id}. The children who were moved appeared to prefer the English-language classes, claiming a better understanding of what occurred in school. See \textit{id}. 
made a failed bid for the 1994 Republican gubernatorial nomination, losing to then-Governor Pete Wilson. In that bid, Unz spoke out against Proposition 187, which denied benefits to illegal immigrants, arguing that the measure was divisive. While some say Proposition 227 is equally divisive, Unz claims support among prominent Hispanic educators, including campaign co-chair Gloria Matta Tuchman, a Mexican American teacher, and Jaime Escalante, the inspiration for the movie "Stand and Deliver."

Unz believes that bilingual education does not teach students English. As support for his position, he points to the low test scores and general poor achievement of students in California's traditional bilingual education programs. Unz cites statistics that suggest that only five percent of children in the bilingual programs transfer to English-language classrooms each year, leaving most students unable to read and write in English.

Opponents on both sides of bilingual education, however, rely on statistics to support their respective arguments, frequently relying on the same statistics. Bilingual education supporters point to studies showing that LEP students in the transitional bilingual programs score better on

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166. See Frank Bruni, *The California Entrepreneur Who Beat Bilingual Teaching*, N.Y. TIMES, June 14, 1998, at A1. Unz would seem to be an unlikely leader for a measure to overhaul the California education system, because he is unmarried and has no children. See id. In fact, critics attacked Unz, stating that he was using Proposition 227 to remain in the political arena, and possibly for another gubernatorial race. See Fitzgerald, supra note 152, at 48.

167. See Bruni, supra note 166, at A1. Proposition 187 ultimately passed but has not taken effect due to legal challenges. See id.

168. See id.

169. See id.


171. See Phil Garcia, Star Latino Teacher Joins Bilingual Foes, SACRAMENTO BEE, Oct. 16, 1997, at A1. Escalante said that he agreed to serve as honorary chairman of Unz's campaign due to his experience as an immigrant who learned English. See id. Escalante believes that bilingual education leads to a feeling of inferiority and is a negative factor for immigrant children. See id.

172. See Bruni, supra note 166, at A1.

173. See id.

174. See Bilingual Education: Separate and Unequal, supra note 170, at 17.

175. See, e.g., Bazeley and Aratani, supra note 160, at 1A (citing statistics comparing students in native language programs to students in English-language programs and explaining that bilingual education proponents and opponents use the same statistics to bolster their own arguments); Schnaiberg, In Battle Over Prop. 227, Both Sides Command Armies of Statistics, supra note 13, at 17 (citing a Los Angeles school district comparison report that both proponents and opponents cite for support).
standardized tests than do students in English-language classrooms, while opponents cite the fact that neither group has a high overall success rate. Critics have complained that in a Los Angeles School District report, the district downplayed the fact that fewer students in the transitional program took the English literacy tests because the district deemed the students were not ready. A statistic frequently pointed to by critics of bilingual education involves the dropout rates of Hispanic students. Polls taken before the June vote, which showed 81% of Hispanic parents want their children to learn English as soon as possible and that 84% of California’s Hispanic voters favored Proposition 227; however, post-vote results showed that Hispanic voters in fact voted against the Measure, two-to-one.

B. Sometimes You Do Get What You Want: Proposition 227’s Provisions for Quick English

The goal of Proposition 227 is simple enough: “all children in California public schools shall be taught English as rapidly and effectively as

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176. See Bazeley and Aratani, supra note 160, at 1A. In a recent study, the Los Angeles school district examined standardized test scores for nearly 6000 students who had remained in the same school from first until fifth grade. See id. Students in the transitional bilingual program scored at the 28th and 33rd percentiles in reading and math respectively. See id. Students in the English-language programs scored in the 21st and 26th percentiles respectively on the same tests. See id. Critics pointed out that students who moved from school to school were not included in the sample. See id.

177. See id.; Schnaiberg, In Battle Over Prop. 227, Both Sides Command Armies of Statistics, supra note 13, at 17. Only 61% of fifth graders enrolled in the bilingual classes took the test, whereas 97% of those in English-language classes took the test. See id. The testing policy called for students in the bilingual classes to take the test only if the students were reading at a fifth grade level in English. See id. Students in the English classes were required to take the tests if they had attended a U.S. school for at least 30 months. See id.

178. See Schnaiberg, In Battle Over Prop. 227, Both Sides Command Armies of Statistics, supra note 13, at 17. The dropout rate for Hispanic students in California in 1995-96 was 5.6%, compared to California’s overall dropout rate of 3.9%. See id. However, comparisons of dropout rates between students in different bilingual programs are not tracked. See id.

179. See Bilingual Education: Separate and Unequal, supra note 170, at 16 (citing a poll by the Center for Equal Opportunity, a Washington, D.C.-based think tank); see also RICARDO LOPEZ, BILINGUAL EDUCATION: SEPARATING FACT FROM FICTION 4-5 (National Assoc. for Bilingual Education Report, Sept. 18, 1995). The report cites a LOS ANGELES TIMES poll finding that more than 80% of Hispanics favor bilingual education. See id. at 4. The report further states that polls showing Hispanics opposing bilingual education result from the phrasing of the questions, such as teaching “Spanish at the expense of English.” Id.

180. See Garcia, supra note 171, at A1 (citing a LOS ANGELES TIMES poll).

possible. To obtain this goal, the Proposition, as codified, mandates that all students are to be placed in English language classrooms, and that LEP students are to be placed in immersion programs not to exceed one year under normal circumstances.

Exceptions, or waivers, may be provided under certain conditions with written consent of a student’s parent or guardian, after a personal request by the parent or guardian. There are three waivable conditions: where the child already knows English as demonstrated through standardized test scores, where the child is older than age ten and the school administrators believe another method would be better suited for teaching English to the particular child, or where the child has identified special needs that would be better addressed through a different teaching method. If the child receives a waiver, he or she may be placed in a traditional bilingual education program. Where twenty or more students in a single grade at a single school have received waivers, the school is required to provide a bilingual class or to allow the students to transfer to a school offering such classes.

The Proposition also establishes standing for a parent to sue if a child has been denied the option of an English-language program. This enforcement section allows parents to sue any teacher, administrator, or elected official who “willfully and repeatedly refuses” to provide education in English to children in violation of Proposition 227. Officials sued under this provision may be held personally liable for actual damages and attorney’s fees. In addition, Proposition 227 allows for amendment only through referendum or a two-thirds vote in the legisla-

183. See CAL. EDUC. CODE § 305 (West Supp. 1999). An English language classroom is one where the teacher(s) use English to teach. See id. § 306(b). An immersion class is one where instruction is in English but is designed for students learning English. See id. § 306(d).
184. See id. § 310.
185. See id. § 311. Children testing out of the immersion program must score at or above the lower of either the state average for the enrolled grade level, or the fifth grade level. See id. § 311(a). Special needs are those physical, emotional, psychological, or educational needs identified by the school after the child has been in an immersion program for at least 30 days. See id. § 311(c). Parents of special need children are not required to agree to the program waiver. See id.
186. See id. § 310.
187. See id.
188. See id. § 320.
189. See id.
190. See id. The measure specifically prohibits the awarding of punitive or consequential damages. See id.
ture, and it contains a severance clause that allows the main provisions to continue in force if any single provision is invalidated.

C. Not As Written: Opponents Attack Before the Ink Is Dry

Within twenty-four hours of the Proposition's passage, several LEP students moved for a preliminary injunction in federal district court on federal statutory and constitutional grounds. In Valeria G. v. Wilson, the LEP students claimed that the Proposition violated four laws: Title VI, the EEOA, and the Equal Protection and Supremacy Clauses of the Constitution. At the time the suit was filed, no school had implemented the mandate of Proposition 227. As a result, the plaintiffs had to argue the measure was facially invalid; that is, the initiative could not be implemented validly in any circumstance, a challenge the district court noted as exceedingly difficult to win.

The court first addressed the EEOA claim. To constitute a violation, Proposition 227 had to be found not to be "appropriate action" under § 1703(f). Finding no definition of "appropriate action" in the statutory language or legislative history, nor even in the Ninth Circuit, the court turned to Castaneda I for a definition. Following the Fifth Circuit's analysis in Castaneda I, the district court found that Proposition 227 did not directly violate the EEOA, and then applied the three-

191. See id. §§ 325, 335.
192. See Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1012 (N.D. Cal. 1998). In addition, five groups filed amicus curiae briefs in support of the plaintiffs, while several parties joined the defendants in opposition to the motion for an injunction. See id.
194. See id. at 1015.
195. See id.
196. See id. (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). In considering the motion for the injunction, the court had to consider whether the children could demonstrate a likelihood of winning the case on the merits and whether they would be harmed if an injunction was not granted. See id. at 1014. The court also was faced with the question of whether the claim was ripe. See id. at 1015. Under Article III of the Constitution, courts cannot offer advisory opinions; therefore, to prove ripeness, the plaintiffs had to demonstrate injury or alleged injury so imminent and inevitable as to justify intervention. See id. at 1015-16 (setting out the "ripeness" standard).
197. See id. at 1016.
198. See id. at 1017; see also 20 U.S.C. § 1703(f) (1994) (requiring states "to take appropriate action to overcome language barriers that impede equal participation" by students).
199. See Valeria G., 12 F. Supp. 2d at 1016-17.
200. See id. The district court relied extensively on the Castaneda I court's analysis of statutory language, and it found no federal requirement for providing bilingual programs. See id.; see also supra note 138 and accompanying text (discussing how Castaneda I reached its holding that there was no congressional mandate for bilingual education).
pronged test for "appropriate action." In resolving the first prong, the requirement of a sound educational theory, the court found conflicting evidence presented by both sides. This conflicting evidence demonstrated the acute disagreement among authorities on educational theories and the court declined to choose one over the other.

Application of the second prong resulted in a similar fate. On the issue of whether the California schools had a program to implement the adopted theory, the plaintiffs claimed that Proposition 227 failed to specify methods of student assessment, left them with limited flexibility, and failed to establish teaching standards and requirements. Again, the timing of the challenge caused problems for the court, as it found that although the plaintiffs' allegations were true, the Proposition had not been implemented and nothing in the language of Proposition 227 prevented the schools from implementing the standards and testing mechanisms that the plaintiffs claimed were necessary. Reaching the third prong, examining the results of a program, the court found no results to evaluate and also found no language in the measure indicating California could not or would not evaluate the results.

The court then proceeded to the Title VI question. The students charged that Proposition 227 discriminated against them based on their national origin, an impact prohibited by Title VI. Citing Lau and

201. See Valeria G., 12 F. Supp. 2d at 1017-18; see also supra note 140 and accompanying text (discussing the "appropriate action" test developed by the Fifth Circuit).

202. See id. at 1018. Plaintiffs presented expert opinions that the sheltered English immersion program/mainstream English program is an unsound educational theory. See id. The defendants countered with evidence that the Proposition 227-structured English immersion program is already in place in various United States school districts and indeed is the main teaching method for immigrant children in much of the Western World. See id.

203. See id. at 1018-19. The court continued by addressing the students' concern that the immersion program would not fulfill the EEOA obligations of teaching a substantive curriculum. See id. at 1019. The court stated that, without a curriculum in place, such a judgment could not be rendered. See id. The court explained that § 1703(f) allows schools to determine how to approach the dual issues of teaching children English and teaching substantive courses, as long as the programs are designed to do both. See id.

204. See id. at 1020-21.

205. See id. at 1020.

206. See id. The court found judging the program at this stage to be premature. See id. With regard to the flexibility issue, the court cited the waiver provisions of Proposition 227 and the local schools' flexibility in granting the waivers in concluding that the provisions would allow schools to respond to individual needs or program weaknesses through legally permissible means. See id.; see also supra notes 184-86 and accompanying text (discussing Proposition 227's waiver provisions).

207. See Valeria G., 12 F. Supp. 2d at 1021.

208. See id. at 1022.

209. See id.
Bakke, the court found disparate rulings on the standard required in Title VI claims. The court, however, found that a different standard applied to claims arising under regulations implementing Title VI, as opposed to claims arising under Title VI itself. Under this second standard, challengers need not prove an intent to discriminate, but need only prove that the effect of the act or legislation is discriminatory. Ultimately, the court stated that the standard did not matter to the resolution of this case because the students had not argued discriminatory intent and, due to the lack of implementation, were unlikely to prove a discriminatory effect.

With respect to the equal protection claim, the students did not try to challenge Proposition 227 program prescriptions, but rather its amendatory provisions. The plaintiffs argued that the amendatory process disadvantages LEP students in that it makes California’s English education policy more difficult to change than other educational programs, thus denying these students equal protection. The court found no equal protection violation because Proposition 227’s amendatory process impairs only access to bilingual education, which is not a constitutional right. Further, the court could find no discriminatory intent underlying the amendment process, as LEP students can petition local school boards under the built-in exceptions to Proposition 227. Lastly, the court said that even if the amendatory process were unconstitutional, due to Proposition 227’s severance clause, only that portion would be struck; the remaining provisions would remain in place.

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210. See id. at 1022-23; see also supra note 95 and accompanying text (discussing the holding in Bakke, that Title VI is coextensive with the Equal Protection Clause and thus requires a showing of discriminatory intent); supra note 113 and accompanying text (discussing Lau’s holding that discriminatory effect was the appropriate standard).

211. See Valeria G., 12 F. Supp. 2d at 1023. The court stated that the Ninth Circuit, and more recent Supreme Court decisions, allowed injunctive or declarative relief under Title VI regulations where discriminatory effect was shown. See id.; see also Guardians Ass’n v. Civil Serv. Comm’n of New York, 463 U.S. 582, 607 (1983) (holding injunctive relief is appropriate for unintentional discrimination).

212. See Valeria G., 12 F. Supp. 2d at 1023. The court used this standard because the students also alleged a violation of Title VI implementing regulations. See id.

213. See id.

214. See id. at 1023-24. Proposition 227, as codified, contains its own amending procedure. See CAL. EDUC. CODE § 335 (West Supp. 1999). Under section 335, the Proposition can be amended only by a two-thirds vote in the state legislature or through a voter referendum. See id.


216. See id. at 1024.

217. See id. at 1025.

218. See id.; see also CAL. EDUC. CODE § 325 (West Supp. 1999) (providing that any
The court also found the plaintiffs' Supremacy Clause argument unlikely to succeed. Relying on Castaneda I for support, the court held that because Congress's passage of the EEOA did not mandate bilingual education, nothing prevented states from denying bilingual education. The court then conceded that Congress may have favored bilingual education, because it had provided grant money to schools offering bilingual education through the Bilingual Education Act of 1974; however, Congress did not require it. All that is required, the court held, is "appropriate action."

In closing, the court returned to the fact that the plaintiffs' complaint was a facial challenge and not based on actual injury. In the request for an injunction against Proposition 227's implementation, the court said the plaintiffs had shown only the possibility of statutory and constitutional violations. These possibilities, the court said, are not enough to invalidate an unimplemented statute. Though the challenge, therefore, was not ripe for a decision on the merits, the court acknowledged the possibility of a challenge when the measure is implemented under as-as-applied" standard.

D. That Settles That???: Disparate Rulings and Waivers Leave Proposition 227's Effect Uncertain Within California

Less than one month after U.S. District Judge Charles A. Legge issued his ruling in Valeria G., Judge Ronald M. Whyte, also in the Northern District of California, issued a temporary injunction forbidding the implementation of Proposition 227 in the San Jose School District. Citing a 1994 federal desegregation order, Judge Whyte's order allowed the school district to continue its dual immersion program without changing

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220. See id.; see also supra note 138 and accompanying text (explaining that bilingual education is not congressionally mandated).
221. See Valeria G., 12 F. Supp. 2d at 1022.
222. See id.
223. See id. at 1026 (addressing the issue of ripeness and the requirements for a facial challenge of statutory language).
224. See id. (describing the relief plaintiffs sought as "anticipatory").
225. See id. (citing Metzenbaum v. Federal Energy Regulatory Comm'n., 675 F.2d 1282, 1289-90 (D.C. Cir. 1982)).
226. See id.
227. See id. at 1011; Lori Aratani, Reprieve for S.J. School Program: Bilingual Teaching to Continue While Conflict Resolved, SAN JOSE MERCURY NEWS, Aug. 18, 1998, at 1B; U.S. Judge Rejects English-Only Measure, supra note 33, at A18.
its curriculum.\textsuperscript{228} The dual-immersion program at River Glen School, in the San Jose School District, has received national awards for teaching students to become fluent in both Spanish and English.\textsuperscript{229} Whyte's order only addressed Spanish-speaking students, however, because the federal desegregation order was directed only at Hispanic students.\textsuperscript{230} Other non-English speakers will be forced into the immersion programs mandated by Proposition 227.\textsuperscript{231} In addition, because Whyte's order is only temporary, the school board's trustees at San Jose's River Glen School District have applied to the California Board of Education for a permanent waiver from Proposition 227.\textsuperscript{232} To receive a permanent waiver, the San Jose School District has sought an exemption through the California Education Code, which allows the establishment of "alternative schools."\textsuperscript{233}

Parents of River Glen students are eager to retain the award-winning dual-immersion program, which, like others of its kind, has been extremely successful.\textsuperscript{234} The idea behind dual-language immersion is to group both native and non-native English speakers in a class from an early age, usually kindergarten, and teach them in two languages.\textsuperscript{235} The goal of the program is to produce students that are fluent in both lan-

\textsuperscript{228} See Aratani, supra note 227, at 1B.
\textsuperscript{229} See id.
\textsuperscript{230} See id.
\textsuperscript{231} See id. (citing Vietnamese and Portuguese-speaking students as those whose needs still must be addressed).
\textsuperscript{232} See Lori Aratani, School To Seek New Status, SAN JOSE MERCURY NEWS, Aug. 21, 1998, at 1B.
\textsuperscript{233} See id. To qualify as an alternative school, the school must be open to all students, not just those in the district, and teachers must choose voluntarily to work at the school. See id. An alternative school waiver would allow the school to maintain its dual-immersion program should Judge Whyte's order be reversed. See id. In September, the state Board of Education decided to delay ruling on all district waivers, citing its appeal of the order to hear waiver requests. See Lori Aratani, Prop. 227-Waiver Pleas Put on Hold, SAN JOSE MERCURY NEWS, Sept. 12, 1998, at 6B.
\textsuperscript{234} See Aratani, School To Seek New Status, supra note 232, at 1B.
\textsuperscript{235} See Jeremy D. Marcus, Note, Educating Immigrant Children: To What End?, 10 GEO. IMMGR. L.J. 485, 494-96 (1996) (describing various bilingual teaching methods and their goals and proposing a debate about those goals to decide the appropriate methodology). Learning English as quickly as possible is not the only goal in all bilingual teaching methodologies. See id. at 496. While the goal of English-as-a-second-language programs is the rapid development of English language capabilities, programs such as Transitional Bilingual Education have the added goal of the development of the native language and culture. See id. at 496-97. Until one goal is determined to be the appropriate goal of school bilingual education, the debate about any methodology's efficacy is meaningless, because no common desired result exists. See id. at 499.
guages and knowledgeable about both cultures. In fact, a George Mason University study showed that graduates of dual-language immersion programs receive higher test scores than either students in other bilingual programs or native English speakers from English-only classrooms.

Not surprisingly, other dual-language immersion programs in California have also sought waivers from Proposition 227. In applying for the waivers, school districts may apply for district-wide, "blanket" waivers or for waivers for limited programs. Despite initial indications to the contrary, the State's Board of Education has considered granting Proposition 227 waivers to school districts, at least within the context of dual-immersion or similar alternative programs.

IV. IS THE CURE WORSE THAN THE DISEASE? EFFECTS OF PROPOSITION 227

A. Beyond the Borders

To borrow a phrase, when California acts, people pay attention. California's passage of Proposition 227 is expected to draw its fair share of attention as other states consider restructuring or overhauling their re-

236. See id. at 495.
237. See Hornblower, supra note 24, at 49 (citing a 13-year study by two George Mason University professors examining the performance of 42,000 non-English speaking students); Anika M. Scott, Dual-Language Classes Aim for a Broader Bilingualism, CHICAGO TRIB., Sept. 16, 1998, § 2, at 3 (citing the same study). The study found that students who received six years of bilingual education performed better than students who had been transferred out of bilingual classes sooner, even where classroom aides and additional English training were provided to such students. See Hornblower, supra note 24, at 49.
238. See Tuinstra et al., supra note 34, at A1. Two Orange County, California schools received waivers from the state school system. See id. As in the San Jose school system, the two Orange County schools will provide dual-immersion programs, where instruction is in both Spanish and English. See id.
239. See Michael Bazeley, Waiver Pleas Will Be Heard, SAN JOSE MERCURY NEWS, Sept. 3, 1998, at 1B.
240. See Edgar Sanchez, Bilingual Education Waivers Are Ruled Out, SACRAMENTO BEE, June 27, 1998, at A3. The state Board of Education initially stated that it would not consider issuing waivers from Proposition 227 to local school districts. See id. The Board based its initial decision on advice from its attorney and the passage at the polls of Proposition 227, claiming it represented "the will of the people." Id. The general counsel to the state Education Department, however, had told the board that such waivers were legally possible. See id.
241. See Bazeley, supra note 239, at 1B; Defao & Maxwell, supra note 35, at A1.
242. See Schnaiberg, Will Calif.'s Bellwether Reputation Ring True?, supra note 23, at 6 (quoting Brenda Welburn, executive director of the National Association of State Boards of Education).
spective bilingual education programs. Arizona already has its own chapter of English for the Children, the organization that successfully sponsored Proposition 227 in California. Ron Unz, the millionaire behind the California group, has expressed interest in the Arizona group, and has spoken to other groups in Colorado, Texas, Washington, and New York.

Even Congress noted Proposition 227 in its reports on H.R. 3892, the English Language Fluency Act (ELFA). The purpose of the bill is to amend the Elementary and Secondary Education Act of 1965 (ESEA), including the sections amended by the Bilingual Education Act of 1974. The ELFA would change the current funding procedures for bilingual education from directed grants to block grants, and would permit students to remain in federally funded bilingual education programs for a maximum of three years. Although the ELFA has been passed in the House of Representatives, a Senate vote is not expected until the Spring of 1999 when the ESEA is scheduled for reauthorization.

While Proposition 227 demonstrates the current interest in bilingual education, the Measure's value as a predictor of action in other states is less certain. According to Marcelo Gaete, Director of Constituent

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243. See id. Several states, including Arizona, New Jersey, and Massachusetts, are considering revising their bilingual education programs. See id. California's vote may force legislators to speed up action on the issue, to avoid being perceived as ignoring it. See id.

244. See Sara Tully Tapia, Statewide Push To Kill Bilingual Education Gains, ARIZ. DAILY STAR, Aug. 2, 1998, at 1B.

245. See id.


247. See id. at 1, 14. Section 1 of the bill states that it is amending Title VII of the ESEA, which is the BEA. See id. at 1. The report summary states a need to reform specifically the Bilingual Education Act. See id. at 14.

248. See id. at 19, 88. Block grants would not be targeted at specific schools or school systems, but rather would give funds to the state in lump sums. See id. at 88.

249. See Bilingual Ed. Legislation Passes House, supra note 26, at 24 (discussing the bill's passage in the House of Representatives and its future in the Senate). If the ELFA is approved in the Senate, it will need to be resubmitted to the House for reconsideration because the House of Representatives is not a continuing body. See 145 CONG. REC. H212 (daily ed. Jan. 6, 1999) (statement of Rep. Hyde) (stating that the House of Representatives is not a continuing body; thus the current session, the 106th Congress, must reconsider legislation continued from the previous session of Congress, the 105th Congress).

250. Compare Schnaiberg, Will Calif.'s Bellwether Reputation Ring True?, supra note 23, at 6 (quoting legislative aides from states that are considering bilingual education reform, but do not support a 227-like measure), with Tully Tapia, supra note 2444, at 1B (stating that in Arizona, the local English for the Children chapter hoped to replace that state's bilingual education programs with an English immersion program similar to the
Services for the National Association of Latino Elected and Appointed Officials, California often sets the standard for how others act. In states like Massachusetts and Texas, however, where efforts are underway to reform bilingual education, indications exist that changes in those states are unlikely to be as extensive as the changes in California. In fact, recruiters from Arlington, Texas visited California districts to recruit bilingual teachers looking for a less restrictive teaching environment.

B. Judicial Effects

Even if Proposition 227 does not spawn copycat legislation across the country, its impact has been, and will continue to be, felt in judicial challenges. If Proposition 227 ultimately is upheld, future bilingual education challenges could be limited significantly. In ruling on the measure, the court necessarily would have to decide whether the minimal bilingual provisions satisfy all of the statutory and constitutional violations alleged by the plaintiffs, thereby establishing precedent for future court challenges.

program in California).


252. See id. (quoting legislative assistants stating that Proposition 227-like measures are unlikely in Massachusetts or Texas). But see Jordana Hart, State Board Vote Worries Bilingual Education Advocates, BOSTON GLOBE, Nov. 12, 1998, at B1 (citing Massachusetts Board of Education approval of a proposal to limit bilingual education to one year and allow local school districts determine the teaching methodology), available in 1998 WL 22235384.


254. See supra Part III.C-D (discussing the lawsuit challenging Proposition 227 and court actions brought by schools and school districts requesting waivers from the implementation of Proposition 227); cf. Rachel F. Moran, Bilingual Education as a Status Conflict, 75 CAL. L. REV. 321, 357-360 (1987) (stating that historically, bilingual education proponents have relied on litigation to ensure adequate funding, but that tensions between various minority language groups can result in inefficient litigation).

255. See Tully Tapia, supra note 244, at 1B (observing that the Ninth Circuit upheld the Northern District's denial of an injunction).

256. See generally Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1015 (N.D. Cal. 1998) (listing the plaintiffs' claims under the EEOA, the Supremacy Clause, Title VI, and the Equal Protection Clause). Traditionally, bilingual education claims have arisen from the Equal Protection Clause, Title VI, the EEOA, and the Bilingual Education Act. See Hyun An, supra note 7, at 135-36. Valeria G. addressed these bases plus the Supremacy Clause, and held that the plaintiffs were unlikely to succeed in proving that the language of Proposition 227 violated any of them. See Valeria G., 12 F. Supp. 2d at 1021-25. In so doing, Valeria G. tied together what, in caselaw, had been previously presented as separate arguments in favor of bilingual education (EEOA, Title VI, and Equal Protection). The court upheld Castaneda I, which said the EEOA does not mandate bilingual education,
The possibility of further litigation on the validity of the measure exists because the Valeria G. court did not reach the merits of Proposition 227. In addition to the attacks on the legality of Proposition 227 itself and the legal challenges to obtain waivers, Proposition 227 has a provision allowing parents to sue teachers, administrators, and school board members for denying instruction in the English language. The threat of suits is potentially acute because the language of the statute is unclear in its requirement that students be taught "nearly all . . . in English." Consequently, school districts have interpreted the statute to require anywhere from 60% to 90% English instruction.

Suits also could arise after the first year of the Proposition's implementation, because the measure calls for the mainstreaming of bilingual students into classes with English-speaking students after they acquire a working grasp of English, ideally within one year. The definitional section of Proposition 227 does not define "working knowledge"; therefore, but instead requires only "appropriate action." See id. at 1016-18. The court also applied the Castaneda I test to determine whether Proposition 227's language provided "appropriate action." See id. at 1018-21. The Valeria G. court also followed Castaneda I, Washington, and Bakke in stating that a showing of discriminatory intent probably is necessary to find discrimination under Title VI. See id. at 1022-23. The court also noted that the students' Equal Protection claim attacked only the amending process of the Proposition, not its substantive provisions. See id. at 1023-24.

Notwithstanding the holding in Valeria G., the Supreme Court has shown its own reluctance to use the Equal Protection Clause in the education realm. See, e.g., Plyler v. Doe, 457 U.S. 202, 224 (1982) (reaching the equal protection issue, but refusing to state a level of review higher than rationality); Lau v. Nichols, 414 U.S. 563, 566 (1974) (refusing to reach the Equal Protection claim when a basis could be found in Title VI).

257. See Valeria G. 12 F. Supp. 2d at 1026. The court pointed out that once Proposition 227 was implemented, plaintiffs could challenge the measure for the same statutory and constitutional violations alleged in the injunction request only under an "as-applied" theory. See id.

258. See CAL. EDUC. CODE § 320 (West Supp. 1999) (providing standing for parents to sue to enforce Proposition 227). The measure further provides personal liability for violations, but limits recovery to actual damages and attorney's costs. See id.

259. See id. §§ 305-06 (requiring that students who are not native English speakers be placed in "sheltered English immersion" classes where "nearly all classroom instruction is in English").

260. See Schools Use Bilingual-Education Law's Flexibility, FRESNO BEE, Sept. 3, 1998, at A3 (citing specific school districts that have interpreted the "nearly all" requirement differently); Michelle Locke, An AP California Centerpiece, AP POL. SERV., Oct. 11, 1998 (citing similar statistics), available in 1998 WL 7453731. Alice Callaghan, a proponent of the measure, stated that no school districts were complying with Proposition 227 and that "It's going to take the California Supreme Court to make school districts in California comply." See id.

261. See CAL. EDUC. CODE § 305.

262. See id. § 306 (defining various terms including "English learner" and "English language classroom," but not "working knowledge").
fore, the interpretation of that language could lead to suits under the measure’s parental enforcement provision.\textsuperscript{263}

If Proposition 227 ultimately is upheld,\textsuperscript{264} it will serve as a model for states that want limited bilingual programs; this phenomenon may result in similar uncertainties around the country that will require court intervention to decide.\textsuperscript{265} Ironically, such court intervention in education is exactly what the Fifth Circuit was trying to avoid in establishing the \textit{Castaneda I} guidelines, which defer to determinations made by local school officials.\textsuperscript{266}

\textbf{C. Effects on Students}

One potential effect of Proposition 227 may be higher dropout rates.\textsuperscript{267} Studies cited by courts have shown that when a student is taught in a language different from that used at home, a tendency exists for the student to begin to feel that one language is inferior.\textsuperscript{268} If the home language becomes the inferior language, this belief may manifest itself in rebellion against learning or using the new language.\textsuperscript{269}

\begin{itemize}
  \item \textsuperscript{263} See Dennis Love, \textit{Prop. 227 Poses Questions Even for the Old Pros}, ORANGE COUNTY REG., Aug. 19, 1998, at Metro p.1 (quoting a school official as saying the current program in his school fits a liberal definition of mainstreaming). The assistant superintendent for the Orange Unified School District expressed confidence that the district’s current program complied with Proposition 227. \textit{See id.} He was less certain about next year when the mainstreaming provision takes effect, questioning what the measure’s language meant. \textit{See id.}
  \item \textsuperscript{264} See Tully Tapia, \textit{supra} note 244, at 1B (observing that the Ninth Circuit upheld the Northern District’s denial of an injunction).
  \item \textsuperscript{265} See generally Karen Lam, \textit{Rethinking Bilingual Education}, A. MAG., Sept. 30, 1998, at 35, (citing fears of bilingual education supporters, that California could be a bellwether state) available in 1998 WL 12447162; Schnaiberg, \textit{Will Calif.’s Bellwether Reputation Ring True?}, \textit{supra} note 23, at 6 (discussing California’s influence on other states).
  \item \textsuperscript{266} See \textit{Castaneda v. Pickard}, 648 F.2d 989, 1009 (5th Cir. 1981) (\textit{Castaneda I}) (stating that courts are not equipped to analyze educational policy and that in applying the guidelines, courts should determine only soundness of a theory, not its merits).
  \item \textsuperscript{267} See Schnaiberg, \textit{In Battle Over Prop. 227, Both Sides Command Armies of Statistics}, \textit{supra} note 13, at 17 (stating that critics of bilingual education point to high dropout rates under traditional bilingual education programs as evidence that such programs do not work); \textit{Lopez, supra} note 179, at 5 (arguing that most LEP students are not in bilingual education programs; therefore, such programs cannot be the cause of the high dropout rates).
  \item \textsuperscript{268} See Martin Luther King Jr. Elem. Sch. Children v. Ann Arbor Sch. Dist. Bd., 473 F. Supp. 1371, 1377-78 (E.D. Mich. 1979) (citing studies that show that a barrier develops when the students’ home language is not considered in teaching a different language, especially if the student feels the home language is inferior); \textit{see also} Hyun An, \textit{supra} note 7, at 152-53 (stating that English-only classes may result in children feeling that either their home language or English is inferior).
  \item \textsuperscript{269} See Martin Luther King Jr. Elem. Sch. Children, 473 F. Supp. at 1377.
\end{itemize}
As students grow up and become involved in extracurricular activities, boredom may set in, as the benefits of learning a new language become less apparent. Additionally, even if LEP students graduate from the immersion program into mainstream classes, research indicates that one year of immersion instruction is not enough. Consequently, students may be unable to continue in school due to a lack of understanding, or may graduate without the skills needed to succeed in the economy. Such results are the exact opposite of the ones promised by Proposition 227 supporters.

Another effect of more segregated immersion classes is that less understanding will develop between English-speaking students and LEP students. Proposition 227 establishes that LEP students will be placed in immersion classes for up to one year. During that time, students in the immersion classes will be taught English, as well as their substantive courses, within the confines of the immersion class. After acquiring a "working knowledge of English," students will be mainstreamed into

270. See id. (citing an expert witness's testimony that after fourth grade, extracurricular activities begin to compete with coursework for a student's time, which may result in loss of interest in developing reading skills).


272. See id. (stating that as students fall behind they may not develop needed skills and may be placed in other programs for remedial learning, while never being mainstreamed); Virginia P. Collier, Acquiring a Second Language for School, DIRECTIONS IN LANG. & EDUC. (Nat'l Clearinghouse for Bilingual Educ., Washington, D.C.), Fall 1995, at 6 (stating that if students do not achieve literacy in their primary language, the students may also have difficulties in the secondary language).

273. See CAL. EDUC. CODE § 300(d), (f) (West Supp. 1999) (stating that the current bilingual system is failing and resulting in high dropout rates, and therefore should be replaced). Mid-year interviews conducted with teachers and school administrators have yielded guardedly optimistic reports. See, e.g., John Gittelsohn & Elizabeth Chey, True-blue Believers Now in English-only Schools, ORANGE COUNTY REG., Feb. 3, 1999 at A1, available in 1999 WL 428724; Louis Sahagun, L.A. Students Take to English Immersion, LOS ANGELES TIMES, Jan. 13, 1999, at A1, available in 1999 WL 2120212 (reporting positive reports from teachers implementing Prop. 227). However, administrators have expressed concerns that students may need more than the one-year immersion class and the threat of mass student retentions. See Gittelsohn & Chey, supra. Final opinions are being held until California administers its standardized tests in the Spring of 1999. See id.; Sahagun, supra.

274. See Marcus, supra note 235, at 503-04 (discussing the benefit of interaction between students of different cultures and the effect of limiting that interaction).

275. See CAL. EDUC. CODE § 305 (providing a temporary transition period not to exceed one year in normal circumstances for students learning English).

276. See id. §§ 305, 306(d).

277. Id. § 305.
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In these immersion classes, students will be less exposed to other cultures. If the purpose of teaching English is assimilation into the American culture, separating non-native English speakers from American students hinders that process by failing to provide cultural role models. Likewise, as the world community becomes smaller and the economy becomes global, Americans need to learn how to conduct business and interact with persons of other cultures. Integrated classes that do not subvert foreign cultures would better prepare students for such dealings.

Proposition 227 also could damage dual-language immersion programs, despite schools' ability to receive waivers for such programs. While English-speaking students likely will be able to continue learning in the highly successful two-way programs under Proposition 227, LEP students will have to seek waivers annually to remain in the programs. In addition, educators claim that the mandatory thirty-day, pre-waiver

278. See id.
279. See Marcus, supra note 235, at 492, 503-04. Immersion classes segregate students by their language background. See id. at 492. By segregating students, interaction is limited, resulting in less contact between, for example, a Spanish-speaker with a Mexican background and an English-speaker from the United States. See id. at 503-04.
280. See id. at 503.
281. See id. at 504.
282. See Hyun An, supra note 7, at 155-56 (stating that individuals who speak more than one language have an advantage in the economic sphere); Marcus, supra note 235, at 504. Agreements such as NAFTA and the GATT will increase the likelihood of conducting business and economic affairs in countries where English is not the primary language, or even spoken. See Hyun An, supra note 7, at 155. Therefore, to be successful, individuals will need to know more than one language. See id. at 156. The known value of foreign language classes can be demonstrated through the existence of the traditional school curriculum that offers foreign language instruction. See id. at 156 (calling the policy of encouraging native English-speaking American students to learn a second language, but not encouraging non-English-speaking students to maintain their primary language, "absurd").
284. See CAL. EDUC. CODE §§ 310-11 (West Supp. 1999) (waiver provisions); see also Schnaiberg, Prop. 227 Could Torpedo 'Two Way' Language Programs, supra note 283, at 6; Wilkie, supra note 283, at A-3 (stating that under Proposition 227, annual waivers are required and that at least one month of each year must be taught entirely in English); supra notes 174-85 and accompanying text (discussing the waiver provisions).
English-only provision will hinder students that do receive waivers into the dual-language immersion by reducing the amount of time available to learn the second language. This loss will affect both native and non-native English-speaking students because, by losing a month of instruction, the students may lose some of the language basics and may need to reacquire those basics.

V. CONCLUSION

Current studies reveal that bilingual education programs are not working as effectively as they should. Most experts, however, agree that this fact is not due to an inherent flaw in the teaching methodology, but to a lack of funds and qualified teachers. Proposition 227, however, virtually eliminates all bilingual education from the California school system and replaces it with a one-year immersion program. Rather than correcting the problem of limited ability English-speakers, Proposition 227 exacerbates it by providing only limited English instruction before mainstreaming LEP students and by reducing the amount of cultural interaction that can lead to better understanding and learning. The result of California's action could be the introduction of similar measures across the country. If Valeria G. is any indication, courts will be unwilling, or unable due to the vagaries of the language, to strike down such measures until an injury can be shown. Until that injury exists, school systems are likely to face confusion and lawsuits due to the interpretational differences of the ambiguous language. Many states thus may find themselves needing relief from California's so-called "fix."


286. See id.