Notes

Discretion and Destruction: The Debate Over Language in California's Schools

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The debate over bilingual education[1] began long before the federal government asserted its initial commitment to limited English speaking students with the Bilingual Education Act of 1968;[2] the controversy predates the nation.[3] From its inception on the federal level, however, the issues surrounding bilingual education have grown ever more complex. Federal recognition of bilingual education has been viewed as a remedial measure for the non-English speaking poor,[4] a response to civil rights activism,[5] and a step toward equality for minorities.[6] At the same time, a number of cultural observers have labeled the educational approach an obstruction to assimilation,[7] a state-mandated form of segregation,[8] and a hindrance on the discretion of educators and local school boards.[9]

The cultural and political observers that debate the propriety of various methods of bilingual education point to research that is immediately deemed inconclusive by the other side of the debate.[10] Further, educators and linguistics experts disagree over the role, if any, that native-language instruction should play in the education of limited English speaking students.[11] In short, the

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1. The debate over bilingual education suffers from a lack of universally accepted definitions for its most basic of concepts. Unless otherwise noted, the definition of bilingual education in this note is that employed by Norman Gold, California State Manager of Bilingual Compliance: "bilingual education is an umbrella term for an array of programs intended to help non-English speakers learn English without compromising their academics." Nanette Asimov, *Bilingual Education's Many Translations: Several Choices Have Been Available to State's School Districts*, S.F. CHRON., Mar. 17, 1998, at A1. For purposes of this paper, a bilingual education program includes any supplemental program for children with limited English proficiency, including those that employ little or no native-language instruction. Proposition 227 (the initiative that is the focus of this paper) contains a different definition of bilingual education, which will be noted. *See infra* note 17.

2. Bilingual Education Act of 1968, Pub. L. No. 90-247, 81 Stat. 816 (codified as amended at 20 U.S.C. §§ 7401-7601) (1994)), amended by Bilingual Education Act of 1994, Pub. L. No. 103-382, 108 Stat. 3716.

3. For a short history of bilingual education since the colonial period see JAMES CRAWFORD, BILINGUAL EDUCATION: HISTORY, POLITICS, THEORY, AND PRACTICE 19-38 (3d ed. 1995).

4. *See infra* text accompanying notes 92-94.

5. *See infra* text accompanying note 143.

6. *See infra* text accompanying note 89.

7. *See infra* text accompanying notes 26, 188-195.

8. *See infra* text accompanying note 175.

9. *See infra* text accompanying note 140.

10. *See infra* text accompanying notes 185, 367.

11. *See infra* text accompanying notes 41-46, 326-330.

controversy invokes the emotion tied to matters regarding civil rights and cultural pride, while research so far provides little substantial basis for resolution.

Because of the maelstrom of emotion and lack of clear cut evidence supporting a specific form of bilingual education, any imminent national resolution of the issue appears unlikely. In California, however, a multi-millionaire and an elementary school teacher have launched an initiative (Proposition 227) that they believe will resolve the debate within the state by ending native-language instruction in California's classrooms.[12] The initiative not only bans forms of bilingual education that involve utilizing a child's native language, but Proposition 227 prescribes the specific method for instruction. Basically, the initiative calls for the implementation of sheltered English immersion instruction[13] normally not to exceed a year for those students described as English learners.[14] Further, the initiative creates an arduous waiver process for parents unhappy with the sheltered English immersion system.[15] Finally, the initiative provides parents with standing to file suit against teachers who do not comply with its constraints.[16]

By banning native-language instruction,[17] prescribing the teaching method to be used, defining the circumstances when parents can remove their children from the decreed method of schooling, and granting parents the ability to sue, the initiative is intended to create a specific system with little room for deviation. It not only imposes a single resolution to an extremely complex issue, it institutes a method of instruction for thousands of local school districts. The development and evolution of federal and California bilingual education law, however, point toward an expansion, not a constriction, of local discretion. Because of concerns attending empirical research, an increased respect for the difficult choices a school district and immigrant parents must make, and a pattern of resistance to constraints by educators, the past suggests that the initiative is vulnerable to the same problems it hopes to remedy.

This note will demonstrate that school districts in California should retain their discretion in determining the proper method of instruction. Part I of the note examines the motivations and pasts of the creators and a chairperson of the initiative. The circumstances in which the three examinees came to the conclusion that Proposition 227 is the answer to the bilingual education debate brings to light some of the problems that the initiative contains. Part II will

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12. Ron K. Unz & Gloria Matta Tuchman, English Language Education for Children in Public Schools, (visited Sept. 17, 1998) <http://primary98.ss.ca.gov/VoterGuide/Propositions/227text.htm> [hereinafter Proposition 227].

13. Proposition 227, *supra* note 12, at § 306(d). The initiative defines sheltered English immersion or structured English immersion as an "English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language." *Id.*

14. *Id.* at § 305. The initiative defines an English learner as "a child who does not speak English or whose native language is not English and who is not currently able to perform ordinary classroom work in English, also known as a Limited English Proficiency or LEP child." *Id.* at § 306(a).

15. *Id.* at §§ 310-11.

16. *Id.* at § 320.

17. The initiative equates bilingual education with native-language instruction and defines both as "a language acquisition process for pupils in which much or all instruction, textbooks, and teaching materials are in the child's native language." *Id.* at 306(e). This paper will refer to native-language instruction when meaning a program that teaches at least two subjects in a child's native language.

track the evolution of bilingual education, especially as it pertains to local discretion. Part III will contrast what the initiative proposes to do against what California law currently prescribes. Part IV applies the history of bilingual education to the initiative, and Part V examines the lessons that can be learned from California's current controversy over bilingual education.

I. Three Perspectives Provided By Three Proponents of the Unz Initiative

The primary spokesman for the Initiative is Ron Unz, an unsuccessful candidate for the Republican gubernatorial nomination four years ago.[18] Gloria Matta Tuchman acts as the co-sponsor of the Initiative, labeled "English for the Children" by the pair, and teaches a first grade classroom.[19] Jamie Escalante, the subject of the 1988 movie "Stand and Deliver" and celebrated educator, acts as honorary chairman of the Initiative.[20] Each person provides a different perspective concerning the passage of Proposition 227; at the same time, each inadvertently exposes problems with the system they hope will be passed by California voters.

Ron Unz points to a number of reasons for wanting to end native-language instruction. His direct inspiration, according to his account, was a demonstration by the parents of a Los Angeles elementary school.[21] The Ninth Street Elementary School protest occurred in February of 1996, when parents of many Latino students kept their youngsters out of school until the bilingual education program was improved.[22] Unz insists that his desire to have the Initiative passed is a result of observing a failed educational program harm California's children. His interest in the lives of immigrants is not a new-found phenomenon, as he strenuously opposed Proposition 187 during his attempt to garner the governorship.[23] Unz's opposition to the anti-immigrant measure restricting the ability of illegal immigrants to garner state benefits stemmed from a belief that proposed restrictions on immigrant labor would adversely effect the American economy.[24] Furthermore, in Unz's opinion, punishing immigrants for trying to elevate their status in America is unfair.[25] Unz's prior positions suggest that he does not view immigrants as a threat.

While his concern for the lives of immigrants and their children may be genuine, Unz's motivations also rest in a disdain for multiculturalism and a preference for swift immigrant assimilation. During the Republican gubernatorial nomination election he was quoted as saying, "[t]he poisonous

18. Phil Garcia, *Unz Keeps Focus on Bilingual Issue*, SACRAMENTO BEE, Jan. 19, 1998, at A1.

19. John Gittelsohn, *Teacher Hopes to Set Standard for English Instruction // EDUCATION: Gloria Matta Tuchman's Santa Ana Class Is a Model for Her Anti-Bilingual Campaign*, ORANGE COUNTY REG., Dec. 28, 1997, at A1.

20. George Skelton, *In Any Language, Escalante's Stand is Clear*, L.A. TIMES, Nov. 13, 1997, at A3.

21. Garcia, *supra* note 18, at A1.

22. *Gain for English-Only Classes-LAUSD Deserves Praise in an Effort That's Far from Complete*, L.A. TIMES, Dec. 4, 1996, at B8.

23. *See* Garcia, *supra* note 18, at A1.

24. Tia O'Brien, *Taking the Initiative: What Does a Software Millionaire With a Degree In Physics and Ancient History Know About Bilingual Education? More Than Enough, Says Ron Unz, and That's Why He's Out to Get Rid Of It*, SAN JOSE MERCURY NEWS, Jan. 11, 1998, at 8.

25. *Id.*

brew of bilingual education, multiculturalism and other ethnic-separatism policies . . . threatens to destroy the tradition of American assimilation."[26] Moreover, his pro-immigrant stand against Proposition 187 is undercut by other statements he has made that can be read as less than immigrant friendly. In a fund-raising letter for the English for the Children initiative, Unz wrote that his grandparents, "who came to California in the 1920s and 1930s as poor European immigrants . . . came to WORK and become successful . . . not to sit back and be a burden on those who were already here!"[27] Unz's letter only mentions Spanish and the only ethnic group referred to is Latinos.[28] His motivations do not seem to lie in a hatred of foreigners, but rather in a specific view of what it means to be an American. Unz statements reflect the cultural ramifications that have always been part of the bilingual education debate[29] and display how questions of culture are employed as political tools.[30]

While Unz may be concerned about the welfare of immigrants, he appears somewhat distracted by political issues that reach far beyond the education of children. Political ripples of the Initiative are not lost to Unz. He claims to find political campaigning unappealing and corrupted by form over substance;[31] nonetheless, he admits to finding a Senate seat an enticing possibility.[32]

Perhaps the most compelling argument from an educational standpoint is Unz's assertion that native-language instruction should be discontinued as a matter of law because it does not work. He points to California's five percent annual rate of reclassifying[33] LEP students, which he interprets as a ninety-five percent failure rate.[34] Opponents of the Initiative are quick to assert that this is an inaccurate assessment of native-language instruction's effectiveness.[35] Because few classes actually offer bilingual education classes in a child's native-language, first-language advocates assert that Unz's initiative promotes

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26. *See* Garcia, *supra* note 18, at A1.

27. Mark Z. Barabak, *GOP Bid to Mend Rift With Latinos Still Strained Politics: Attempt to End Bilingual Education, Animosity Toward Wilson Cloud Party's Planned 'Hispanic Summit' in L.A.*, L.A. TIMES, Aug. 31, 1997, at B8 (emphasis in original).

28. *Id.*

29. *See infra* text accompanying notes 89, 192.

30. *See infra* text accompanying notes 89, 188-195.

31. John Gittelsohn, *Unz Crusades to End Bilingual Education // POLITICS: The 'Genius' Former Candidate for Governor Could Make—or Break—the English-Only Initiative*, ORANGE COUNTY REG., Dec. 29, 1997, at A1.

32. O'Brien, *supra* note 24, at 8.

33. Reclassification of an LEP student is the practice of removing a student from a bilingual education program and into a mainstream classroom when the child has acquired a degree of English proficiency.

34. Gittelsohn, *supra* note 31, at A1.

35. Less than a third of California's LEP students are taught in their native tongues. The other two-thirds of LEP students "receive more sporadic native-language instruction, are taught academic subjects in English geared toward their proficiency level, or receive no special language help at all." Lynn Schnaiberg, *Plan to Curb Bilingual Education Progresses in Calif.*, EDUC. WK., Oct. 15, 1997, at 20. A large scale study of English immersion suggests the method did not fair any better than Unz interpretation of reclassification rates: less than 4% of LEP students in immersion programs were reclassified as fluent in English after one year; 21% after two years; 38% after three years; and 67% after four years. J. David Ramirez et. al., Aguirre International, Executive Summary Final Report: Longitudinal Study of Structured English Immersion Strategy, Early-Exit and Late-Exit Transitional Bilingual Education Programs for Language Minority Children 15 (1991) [hereinafter Executive Report].

the very programs that have caused such a low reclassification rate.[36] Moreover, Unz decided on a one year target[37] for moving a child from the sheltered immersion classroom to a English language mainstream classroom[38] on the basis of an informal poll of friends. He simply asked them how long it took them to learn English and inserted the most common response in his initiative.[39] Unz explains that he discounted the research of experts, because as he explains, "it's funded by pro- or anti-bilingual supporters."[40] Unz's statement is partially correct, the research on bilingual education has unearthed few definite answers. However, such a cavalier poll would not seem the proper basis for constructing a state's educational policy.

The co-author of the Initiative, Gloria Matta Tuchman, a first grade teacher in Santa Ana, California, appears a more qualified creator of an initiative defining the method of instruction for students. Tuchman has developed a form of English immersion for LEP students, which she implements in her own classroom.[41] The program consists of a "simplified vocabulary, broad gestures and visual props. Spelling lists focus on phonics and common letter sounds."[42] While Tuchman believes that communicating in English with the children provides the most effective means of education, Tuchman admits to occasionally lapsing into Spanish or allowing a teacher's aide to communicate with children in Vietnamese.[43] "'We speak Spanish or Vietnamese if they need to answer a question," Tuchman explains, "[t]here's no language police here."[44] Tuchman's critics are quick to point that the teacher's method of instruction defies the spirit of the Initiative,[45] which states that "[a]ll children shall be taught English by being taught in English."[46] Tuchman does not bind herself to any hard and fast rules, but bases her instructional method on a philosophy of keeping native-language teaching to a minimum, while maintaining the flexibility necessary to teach as she sees fit. The technique has garnered her praise from school administration and parents of her students.[47]

Support by school administrators was not always forthcoming. In 1985, Tuchman and three other instructors were charged with insubordination when

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36. Gittelsohn, *supra* note 31, at A1.

37. Many researchers maintain that it takes many more years than the one the initiative prescribes to learn the second-language skills required for the type of learning that LEP need to succeed in an academic setting. *See, e.g.*, JAMES CUMMINS, THE ROLE OF PRIMARY LANGUAGE DEVELOPMENT IN PROMOTING EDUCATIONAL SUCCESS FOR LANGUAGE MINORITY STUDENTS, IN SCHOOLING AND LANGUAGE MINORITY STUDENTS: A THEORETICAL FRAMEWORK 3-49 (1981); STEPHEN D. KRASHEN, UNDER ATTACK: THE CASE AGAINST BILINGUAL EDUCATION 60-61 (1996).

38. § 306(c) defines an English language mainstream classroom as "a classroom in which the pupils either are native English language speakers or already have acquired reasonable fluency in English." Proposition 227, *supra* note 12.

39. O'Brien, *supra* note 24, at 8.

40. *Id.*

41. John Gittelsohn, *supra* note 19, at A1.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* The phrase can be found in Proposition 227, *supra* note 12, at § 305. However, § 306(d) defines a sheltered English immersion "as a process for young children in which nearly all classroom instruction is in English . . ." *Id.* The language of the initiative may allow Tuchman's form of instruction.

47. John Gittelsohn, *supra* note 19, at A1.

they refused to teach their classes bilingually.[48] Parents of students rallied behind the charged faculty, the principal rescinded the reproach, and district officials allowed the immersion program to continue.[49] Teachers have long been attacked for not conforming to the bilingual education guidelines established by school officials despite the best of intentions and even success.[50] The English for the Children Initiative, co-written by an instructor who has been subject to inflexibility herself, proposes to define the way every teacher and every school district teaches their LEP students.[51] Moreover, under the Initiative, an instructor can be found legally liable for not teaching his class under the guidelines established by the proposal.[52]

Tuchman has established a program that her school has successfully utilized to reclassify students as fluent at a much higher rate than the rest of her school district,[53] and she should be congratulated on devising such a program. However, Tuchman is not solely concerned with the best way to teach LEP students. She, like Unz, has political aspirations. In 1994, Tuchman finished fifth out of 12 participants for State Superintendent of Public Instruction.[54] Since the commencement of the Initiative campaign, Tuchman has distributed a press kit containing a three page autobiography written in the third person and a black-and-white photograph of herself.[55] In February of 1998, after the Initiative drive was well on its way, Tuchman announced her re-candidacy for the state superintendent position.[56] In an interview concerning her candidacy she expressed a hope that the public would refer to the initiative as the Unz/Tuchman Initiative, instead of the moniker usually ascribed to the proposition: the "Unz Initiative."[57] Tuchman appears to care about the education of children. She has taught for more than twenty years, but her political inclinations are difficult to ignore.

While the motivations of Unz and Tuchman appeared to be at least slightly shaded by political aspirations, the honorary chairperson of the Initiative, Jaime Escalante has acted decidedly apolitical. A native of Bolivia who immigrated to California at age 33, Escalante maintained that English is the language of negotiation in America and a mastery of the tongue leads to success.[58] The assertion can hardly be debated. Escalante largely bases his belief in the Initiative on two of his sons' educational experiences.[59] One son was seven years old when introduced to America and was not given any

48. David Hill, *English Spoken Here*, EDUC. WK., Jan. 14, 1998, at 42.

49. *Id.*

50. *See, e.g.*, ROSALIE PEDALINO PORTER, FORKED TONGUE 14-58 (1990).

51. *See supra* text accompanying notes 13-16.

52. *See* Proposition 227, *supra* note 12, at § 320.

53. Gittelsohn, *supra* note 19, at A1. In the past year, 16 percent of Taft's (Tuchman's school) LEP students were reclassified as fluent in English, while only about 4 percent of Santa Ana (Taft's school district) LEP students were reclassified. *Id.* However, the author was not able to ascertain what programs the rest of the schools in the district implemented. Moreover, Taft also enrolls fewer low-income students, fewer LEP students and has "a lower transiency rate than the Santa Ana average." *Id.*

54. Schnaiberg, *supra* note 35, at 20.

55. Hill, *supra* note 48, at 45.

56. Nanette Asimov, *Bilingual Education Foe on Ballot for Top Schools Post / She Challenged Eastin in 1994*, S.F. CHRON., Feb. 6, 1998, at A21.

57. *Id.*

58. Skelton, *supra* note 20, at A3.

59. *Id.*

bilingual education instruction.[60] He became fluent within three years.[61] Escalante's second son entered school speaking English, but school officials placed him in a native-language program to maintain cultural identity.[62]

As the first son's educational experience displays, learners of a new language can acquire the second tongue without bilingual education; generations of immigrants are evidence of the fact. However, the Initiative does not distinguish between successful bilingual education programs and those that are not properly implemented. The Initiative is intended to strip school districts from the option of implementing or maintaining a bilingual education program involving native-language instruction; consequently, the Initiative nearly obliterates a parents ability to choose a native-language program.[63] Escalante was able to have his second son placed in a mainstream classroom. Under Proposition 227, a parent who believes as strongly in native-language instruction as Escalante's conviction against it may loose the opportunity to place his child in a classroom utilizing the student's first language.

Unz, Tuchman, and Escalante have viable reasons for preferring English only classrooms. The situations they have faced and the conclusions they have drawn may all point to an English immersion program. Their experiences and views are not indicative of many of the school districts and people the Initiative will affect. Different school districts maintain different opinions regarding native-language instruction, and the history of bilingual education suggests that school districts should maintain the discretion to decide.

II. The Evolution of Bilingual Education and School Discretion

A. *Ambivalence*

Title VII of the Elementary and Secondary Education Act (ESEA) became the Bilingual Education Act of 1968.[64] The Act marked the first instance of federal legislation aimed exclusively at limited English proficient (LEP) students.[65] The legislation authorized funds to support educational programs, train instructors, and develop teaching materials.[66] The original Act did not require the use of native languages, impose an affirmative duty on educators to create a program for LEP students, or establish a goal for bilingual education; instead, the Act declared that:

> In recognition of the special educational needs of the large numbers of children of limited English-speaking ability in the United States, Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies to develop and carry out new and

60. *Id.*
61. *Id.*
62. *Id.*
63. *See supra* text accompanying notes 13-16.
64. Pub. L. No. 90-247, 81 Stat. 783, 817 (1967).
65. Crawford, *supra* note 3, at 40.
66. Bilingual Education Act of 1968, Pub. L. No. 90-247, 81 Stat. 783, 816 (1967).

> imaginative elementary and secondary school programs designed to meet these special educational needs.[67]

The House of Representative and Senate hearings on bilingual education reflect the multiple purposes that commentators believed bilingual education could perform.[68] Some community representatives believed that bilingual education programs could instill a respect for cultural heritage in Hispanic students, regardless of their English fluency.[69] Other community leaders wanted the Act to extend beyond LEP students and teach second languages to all children.[70] On the other hand, some experts and officials supported bilingual education as solely a means to assimilation for children who were not fluent in English.[71] Still other educational experts worried bilingual education would not effectively address the problems of LEP students.[72] However, community leaders "who touted bilingual education as a panacea for Hispanics' academic difficulties" thoroughly outnumbered skeptics of bilingual education.[73] Education historian Diane Ravitch writes:

> Four assumptions, which were usually stated as facts rather than as assumptions, dominated the hearings: first, that Hispanic children did poorly in school because they had a "damaged self-concept"; second, that this negative self-appraisal occurred because the child's native tongue was not the language of instruction; third, that the appropriate remedy for this program was bilingual instruction; and fourth, that children who were taught their native language (or their parents' native language) and their cultural heritage would acquire a positive self-concept, high self-esteem, better attitudes toward school, increased motivation, and improved educational achievement.[74]

The reasons for such dogmatic belief in native-language instruction were complex, but part of the answer rested in the treatment of Mexican-Americans by the nation's educational system. Prior to *Brown v. Board of Education*,[75] the segregation of Mexican-American students went unchecked. In 1930, eighty-five percent of Mexican-American children in the Southwest were segregated

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67. § 702, 81 Stat. at 816.

68. *See, e.g.*, Bilingual Education: Hearings on H.R. 9840 and H.R. 10224 Before the General Subcomm. on Educ. of the House Comm. on Educ. & Labor, 90th Cong., 1st Sess. 15 (1967); Bilingual Education: Hearings on S. 428 Before the Special Subcomm. on Bilingual Educ. of the Senate Comm. on Labor & Public Welfare, 90th Cong., 1st Sess. 1, 1-2 (1967).

69. Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1261 (1988).

70. *Id.* at 1262.

71. *Id.* at 1262.

72. *Id.*

73. *Id.* At 1263.

74. LINDA CHAVEZ, OUT OF THE BARRIO 13 (1991) (quoting Diane Ravitch, THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945-1980, at 272 (1983)) (emphasis omitted).

75. 347 U.S. 483 (1954).

into different classrooms or entirely separate schools.[76] Some educators and policymakers believed the segregation was necessary because Mexican-American students could not be expected to compete with their white counterparts.[77] Others simply claimed that children of Mexican descent were too "dishonest, immoral, and violent" to share a classroom with white students.[78] After *Brown,* a change to facially desegregated schools came slowly, but educators found still other ways to inhibit the educational opportunities of Mexican-American students. Traditionally, they have been tracked[79] into less challenging classes and overlooked for high-ability courses.[80] Moreover, many Mexican children were placed in vocational education programs because some educators believed "they possessed a natural capacity for the manual arts."[81] A dual educational system had developed in American schools--first by segregation and followed by a funneling of students toward lower class status.

Despite a Mexican-American population in the Southwest that numbered more than five million by the late 1960s, little recognition was given to their problems by the majority population.[82] A large percentage of Latinos dealt with poor housing, and low employment and educational attainment.[83] Inspired by the social movements of the civil rights era, Mexican-Americans became politically active in the 1960s.[84] While activism extended to larger issues of social justice, many activists focused their attention to the quality of their schools.[85] Such attention was certainly necessary. In 1968, according to a report by the National Advisory Committee on Mexican-American Education, 80% of Mexican-American children in Texas fell two grades behind their Anglo class mates, most were leaving school in their junior high school years, and 89 percent were not completing high school. In California, 50 percent of Mexican American youth dropped out by the tenth and eleventh grades and, although they made up 14 percent of school enrollments in the state, they represented 40 percent of enrollments in 'mentally handicapped' classes.[86]

While the causes of such dismal statistics cannot begin to be unearthed within the context of this note, many Mexican-American activists blamed their children's educational problems on negative teacher attitudes, culturally insensitive curriculum, and the limited ability of their children to speak English.[87] Further, many activists believed public schools were directed toward the white middle-class community.[88] Bilingual instruction became part of the much larger debate for Latino equal educational opportunities. It became viewed as "a civil rights issue for Mexican Americans and a means to obtain

76. RUBEN DONATO, THE OTHER STRUGGLE FOR EQUAL SCHOOLS: MEXICAN AMERICANS DURING THE CIVIL RIGHTS ERA 13 (1997) [hereinafter DONATO].

77. *Id.* at 14.

78. *Id.* at 16.

79. Tracking is defined "as a process whereby students are sorted into categories to assign them into taking certain types of classes." *Id.* at 126.

80. *Id.* at 127.

81. *Id.* at 20-21.

82. DONATO, *supra* note 76, at 60.

83. *Id.*

84. *Id.* at 57.

85. *Id.* at 58.

86. *Id.* at 61 (citing National Advisory Committee on Mexican American Education, U.S. Department of Education, The Mexican American: Quest for Equality 5 (1968)).

87. *Id.* at 104-05.

88. DONATO, *supra* note 76, at 58.

respect for their culture, an instrument to fight discrimination against the non-English-speaking, and a device to integrate themselves into the educational profession."[89] In effect, bilingual education became a symbol for the Mexican values and language that had previously been suppressed and ignored.[90] Because of such previous widespread discrimination, it is understandable that the federal recognition of Latino problems reflected in the Bilingual Education Act meant far more than support for an educational tool. What began as a form of educational instruction became to be viewed by Latino activists as a civil rights imperative.

Despite the overall endorsement of native-language instruction by the speakers at the Congressional hearings, the legislators that crafted the Bilingual Education Act were not ready to completely embrace bilingual education. By providing no established purpose and not requiring programs for LEP children, legislators limited the program to a means of support for experimental demonstration projects.[91] The discretion to implement or not implement any program directed at LEP students remained solely in the discretion of local educators; furthermore, if a program was implemented at all, school officials did not have to include native-language instruction in the program.

Congress meant the Act to be compensatory. It was directed at low income families and those "who come from environments where the dominant language is other than English."[92] The political environment of the late 1960s recognized that problems faced by Latinos had been largely ignored by the majority population,[93] which may explain the compensatory language of the Act.[94] It stopped short, however, of addressing claims that bilingual education could act as means to remedy past discrimination for groups with a history of exclusion from the educational process.[95] By extending the coverage of the Act to all language groups, rather than those with claims of past educational exclusion, the Act remained out of the realm of civil rights.

Bilingual education would not remain separate from the civil rights debate for very long. On May 25, 1970, the Office for Civil Rights (OCR) of the United States Department of Education sent a memorandum to school districts with student populations comprised of more than five percent LEP children.[96] OCR based the memorandum on Title VI of the Civil Rights Act of 1964, which states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[97] The OCR memorandum provided that "[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the

89. *Id.* at 104.

90. Rodolfo de la Garza, *As American as Tamale Pie: Mexican-American Political Mobilization and the Loyalty Question*, *in* MEXICAN-AMERICANS IN COMPARATIVE PERSPECTIVE 227, 239 (Walker Conner ed., 1985).

91. Chavez, *supra* note 74, at 12.

92. BILINGUAL EDUCATION ACT OF 1968, § 702, 81 Stat. at 816.

93. Donato, *supra* note 76, at 60.

94. Crawford, *supra* note 3, at 41.

95. Moran, *supra* note 69, at 1264.

96. Office for Civil Rights (OCR) Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (1970) [hereinafter Memo].

97. 42 U.S.C. § 2000(d) (1994).

educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."[98] OCR's reading of Title VI did not require a linguistic minority student to prove discriminatory intent; motivations were not taken into account. LEP students only had to show that a school district's program had the effect of excluding them from effective participation in the curriculum to receive affirmative relief.[99] Upon either an OCR or federal court finding of a Title VI violation, the offending school district could lose federal funding.[100] Alternatively, the school district could be forced to abide by the guidelines established by the OCR as a condition for continued federal funding.[101]

For the first time, in regard to linguistic minority students, school districts had theoretically lost a degree of discretion. However, the memo had little practical effect. The "effective participation" mentioned in OCR's memorandum required that some sort of assistance be provided for LEP students, but a school district still retained the right to choose a program designed and implemented to its liking.[102] As long as some sort of compensatory instruction was giving to LEP students, the requirements of the memo would likely be met.[103] Perhaps more importantly, the OCR rarely enforced the regulations established by the memo due to a lack of resources.[104] While the memorandum had small effect on local discretion, the Supreme Court case that followed OCR's memorandum led to major changes.

B. *Reaction to* Lau v. Nichols *and a Loss of Discretion*

The ineffectiveness of the OCR memorandum of 1970 would soon be replaced by the fervor created by *Lau v. Nichols*.[105] In 1970, a San Francisco poverty lawyer, Edward Steinman, filed the class action suit on behalf of about 1,800 students of Chinese ancestry.[106] The children did not receive any supplemental courses of English language instruction.[107] The Ninth Circuit was hardly sympathetic to English-limited students. The court reasoned that "(e)very student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school district."[108]

98. Memo, *supra* note 96, at 11,595.

99. Moran, *supra* note 69, at 1267 (citing Peter Margulies, *Bilingual Education, Remedial Language Instruction, Title VI, and Proof of Discriminatory Purpose: A Suggested Approach*, 17 COLUM. J.L. & SOC. PROBS. 99, 115 (1981)).

100. Moran, *supra* note 69, at 1267.

101. *Id.*

102. *See* Marguerite Malakoff & Kenji Hakuta, *History of Language Minority Education in the United States*, *in* BILINGUAL EDUCATION: ISSUES AND STRATEGIES 33 (Amado M. Padilla et al. eds., 1990).

103. *See* Moran, *supra* note 69, at 1267.

104. Moran, *supra* note 69, at 1268.

105. 414 U.S. 563 (1974).

106. *Id.* at 564.

107. *Id.*

108. *Id.* at 565 (quoting Lau v. Nichols, 483 F.2d 791, 797 (9th Cir. 1973), *rev'd* 414 U.S. 563 (1974)).

The Supreme Court overruled the Ninth Circuit based on the Civil Rights Act of 1964[109] and the 1970 OCR memorandum.[110] The Court construed basic English skills as the core of public education and held that "[i]mposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic [English] skills is to make a mockery of public education."[111] The Court held that in light of the OCR memorandum, Title VI required that the school district provide special assistance to non-English speaking students who would be effectively excluded from partaking in the educational process.[112]

While the Court ruled that some sort of additional instruction would be necessary to uphold the specifications provided by the OCR memorandum, it also noted that "[t]eaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others."[113] The Court did not insist on any particular form of instruction, but remanded the case to the district court.[114] The District Court, in turn, gave the San Francisco Unified School District school board the opportunity to remedy the situation.[115]

The Supreme Court did not arrest a significant amount of discretion from the local school board; the court simply required that something be done. While the ruling itself did not interfere with local discretion, *Lau* had far reaching ramifications. According to bilingual education scholar Rachel Moran, by citing both Title VI of the Civil Rights Act of 1964 and the OCR memorandum, the Court "vindicated OCR's view that the federal civil rights framework was well-suited to deal with discrimination that, intentionally or otherwise, excluded linguistic minority children from the educational curriculum."[116] The opinion did little to directly affect local discretion, but the decision stimulated a willingness on the part of Congress and federal administrators to challenge local discretion.[117]

Congress enacted the Equal Educational Opportunities Act of 1974 (EEOA)[118] as a response to *Lau*.[119] The provision regarding LEP students provided: "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . (f) the failure of an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in the instructional programs."[120] While the language of the statute appears weighty, the section on educational language instruction did little more than ratify the *Lau* decision. Moreover, like the Supreme Court opinion, the statute did not endorse any method of instruction.[121] The EEOA's importance would not be realized until

109. *See supra* text accompanying note 97.
110. *See Lau*, 414 U.S. at 568-69.
111. *Id.* at 566.
112. *See id.* at 568.
113. *Id.* at 565.
114. *Id.* at 569.
115. Moran, *supra* note 69, at 1269.
116. *Id.* at 1270.
117. *Id.*
118. 20 U.S.C. § 1703 (1994).
119. Moran, *supra* note 69, at 1270.
120. 20 U.S.C. § 1703(f) (1994).
121. 20 U.S.C. § 1703 (1994).

1981 when interpreted by the Fifth Circuit in *Castaneda v. Pickard*,[122] which will be discussed further below.

Between the time of the *Lau* decision and the *Castaneda* opinion, local discretion faced an immense challenge. The Bilingual Education Act was amended in 1974, and the changes reflected a shift in federal congressional thought concerning bilingual education.[123] The compensatory aspects that drove the Bilingual Education Act of 1968 were largely excluded, as the poverty criterion was gone.[124] The amendments altered the policy declaration of the Act. The new declaration recognized native languages and the teaching of heritage as the primary means of instruction for LEP children due to the unique cultural differences between limited English speaking children and the rest of society; therefore, the declaration continued, bilingual education programs that used both native languages and cultural resources would meet the students' needs most effectively.[125] Congress defined a bilingual program as one that involved instruction in English, and as much native-language instruction as effective progress through the educational process required.[126] Additionally, appreciation of cultural heritage was to be given within such instruction.[127] The Congressional understanding of bilingual education involved a development of "the child's self-esteem and legitimate pride in both cultures. Accordingly, bilingual education normally includes a study of the history and culture associated with the mother tongue."[128]

The amendments imposed some significant restrictions on local discretion. Because *Lau* imposed a duty on school districts to provide some additional instruction, funding under the Act became more necessary. With the definition of acceptable programs under the funding act involving some sort of native instruction, the ability of local districts to teach entirely in English became limited to their ability to provide extra guidance without federal assistance.[129] The amendments imposed a duty on school districts to confer with teachers and parents concerning the programs.[130] Finally, the newly created Office of Bilingual Education was to evaluate bilingual education programs.[131] The effect of negative evaluations could be disastrous--funding could be adversely affected and derogatory information could establish liability if a civil rights claim arose.[132] While the Act placed the first real limitations on local discretion, a Tenth Circuit decision displayed the extent to which the federal government would become involved.

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122. 648 F.2d 989 (5th Cir. 1981).

123. *See* BILINGUAL EDUCATION ACT OF 1974, Pub. L. No. 93-380, 88 Stat. 503 (codified as amended at 20 U.S.C. §§ 7401-7601 (1994)), amended by Bilingual Education Act of 1994, Pub. L. No. 103-382, 108 Stat. 3716.

124. Crawford, *supra* note 3, at 47.

125. BILINGUAL EDUCATION ACT OF 1974, § 702(a), 88 Stat. at 503; Moran, *supra* note 69, at 1278.

126. § 703(a)(4), 88 Stat. at 504-05.

127. *Id.*

128. H.R. Rep. No. 93-805, at 53 (1974) *reprinted in* 1974 U.S.C.C.A.N. 4093, 4148.

129. *See* Moran, *supra* note 69, at 1278-79.

130. BILINGUAL EDUCATION ACT OF 1974, § 703(4)(E), 88 Stat. at 505.

131. § 731, 88 Stat. at 509-10.

132. Moran, *supra* note 69, at 1279.

In the 1974 case, *Serna v. Portales Municipal Schools,*[133] the Tenth Circuit found that a school district's proposed English as a Second Language[134] (ESL) remedy was inadequate and ordered school officials to establish a bilingual-bicultural program.[135] Prior to the circuit decision, the district court had ruled that Spanish surnamed children did not have an equal educational opportunity; therefore, the district court ordered the Portales School District to reassess and expand the program it had established at one of the schools in its district (an ESL program) and establish programs in other elementary schools where no bilingual education programs existed.[136] Through expert opinion, the court found evidence:

> that when Spanish surnamed children come to school and find that their language and culture are totally rejected and that only English is acceptable, feelings of inadequacy and lowed self esteem develop .... If a child can be made to feel worthwhile in school then he will learn even with a poor English program.[137]

The school district proposed an educational structure but the district court found that the proposed program, which included some (although very little) native-language instruction, would not provide enough first language schooling to effectively teach LEP students.[138] Instead, the district court adopted a program that greatly extended native-language instruction beyond that proposed by the school district and included an emphasis on a bicultural outlook.[139] Despite the New Mexico State Board of Education's assertion that "the relief granted [by the district court] constitute[d] [an] unwarranted and improper judicial interference in the internal affairs of the Portales school district,"[140] the Tenth Circuit upheld the program created by the district court.[141] Moreover, the circuit court noted, "that the appellants' proposed program was only a token plan that would not benefit" the students of the Portales school district.[142] Not only was the discretion of school district challenged by the lawsuit, the school district had little voice in determining the method that would be implemented.

The *Serna* decision and its preclusion of local discretion can be seen as the precursor to perhaps the most stringent measure contrary to local control during the bilingual education debate. Largely in response to Hispanic advocacy

133. 499 F.2d 1147, 1154 (10th Cir. 1974).

134. In ESL programs, a LEP student will spend most of the day in mainstream classrooms but receive additional instruction in English. Keith A. Baker & Adriana A. de Kanter, *Federal Policy and the Effectiveness of Bilingual Education, in* BILINGUAL EDUCATION 34 (Keith A. Baker & Adriana A. de Kanter eds., 1983).

135. 499 F.2d 1147 (10th Cir. 1974). More specifically, the court ordered that native-language instruction be given for at least an hour a day for the school district's younger students. *Id.* at 1151. A bicultural outlook was to be given in as many subjects as practical. *Id.*

136. Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D.N.M. 1972), *aff'd* on other grounds, 499 F.2d at 1150.

137. 499 F.2d at 1150.

138. *Id.* at 1151.

139. *Id.*

140. *Id.* at 1154.

141. *Id.*

142. *Id.*

groups' demands,[143] OCR issued guidelines (often referred to as the Lau Guidelines) meant to enable schools with twenty or more LEP students to conform to mandates of the *Lau* decision.[144] The task force that created the guidelines was almost entirely composed of bilingual education supporters.[145] The guidelines declared that any one of three specific programs would be acceptable in elementary schools.[146] All three programs for elementary and intermediate levels, which included transitional bilingual education (TBE),[147] bilingual/bicultural education programs, and multilingual/multicultural education programs, involved utilizing native-language and culture in the instruction.[148] Furthermore, the Guidelines deemed ESL programs unacceptable because of their failure to "consider the affective nor cognitive development of students."[149] In instances where OCR found civil rights infractions, the Lau Guidelines provided a basis to negotiate consent agreements--some 500 Lau plans were implemented from 1975 to 1980.[150] The reaction to *Lau* was not limited to the administrative arm of the federal government; many states responded by creating bilingual education acts of their own.[151] Accordingly, subsequent to the *Lau* decision, the number of states with bilingual education acts more than doubled.[152]

California was among the states that implemented a bilingual education act following the *Lau* decision. The California Legislature passed the Chacon-Moscone Bilingual-Bicultural Education Act in 1976.[153] The Act noted that LEP students faced "an obstacle" to equal educational opportunity that could be "removed by instruction and training in the pupils' primary languages while such pupils are learning English."[154] For grades kindergarten through six the Act mandated that public schools with more than fifteen LEP pupils who spoke the same primary language in the same grade were to offer "full bilingual instruction" and "bilingual-bicultural education."[155] Junior high and high school pupils had to be individually evaluated if not offered at least "partial bilingual

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143. Moran, *supra* note 69, at 1280.

144. Office for Civil Rights, Task-Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under *Lau v. Nichols* (1975) [hereinafter Lau Guidelines], *reprinted in* BILINGUAL EDUCATION 213 (Keith A. Baker & Adriana A. de Kanter eds., 1983).

145. Chavez, *supra* note 74, at 15.

146. Lau Guidelines, *supra* note 144, at III.

147. The child is usually taught in both English and his/her native language and once the student is functional in English, native-language instruction decreases. Lau Guidelines, *supra* note 144, at § IX, 5.

148. Lau Guidelines, *supra* note 144, at III, IX.

149. *Id.* at III.

150. Chavez, *supra* note 74, at 15-16.

151. Moran, *supra* note 69, at 1283.

152. *Id.*

153. CAL. EDUC. CODE §§ 52160-52179 (West 1989).

154. CAL. EDUC. CODE § 52161 (West 1989).

155. Stuart Biegel, *The Parameters of the Bilingual Education Debate in California Twenty Years After Lau v. Nichols*, 14 CHICANO-LATINO L. REV. 48, 54 (1994). Prior to 1980 amendments, § 52163(b) defined "full bilingual instruction" as "basic language skills developed and maintained in both languages. Instruction in required subject matter or classes is provided in both languages in addition to culture and history." *Id.* at 55 n.36. § 52163(c) defined "bilingual-bicultural education" as "a system of instruction which uses two languages, one of which is English, as a means of instruction. *Id.* It is means of instruction which builds upon and expands the existing language skills of each participating pupil, which will enable the pupil to achieve competency in both languages." *Id.*

education" and be given additional educational instruction "in a manner consistent" with *Lau*, the EEOA, and other federal guidelines.[156] Initially, California's bilingual education act mandated very particular forms of additional instruction, which allowed little deviation and constrained discretion.

With federal courts, OCR, and states recognizing native-language instruction as the most efficient means to acquiring educational acquisition, civil rights lawsuits ensued. Claims arose against school districts that provided supplemental education for LEP students, such as intensive English-language instruction, yet did not meet the specific guidelines that OCR prescribed.[157] Two cases out of a federal district court in New York displayed the lack of deference given to local discretion. In *Cintron v. Brentwood Union Free School District*,[158] the court found that a school district's program, which employed an ESL approach, was unacceptable and in violation of the Equal Educational Opportunities Act of 1974,[159] the Bilingual Education Act, and Title VI of the Civil Rights Act of 1964.[160] The school district intended to implement a plan in which all students would attend classes where substantive courses (i.e. reading, math, and social studies) would be taught in English.[161] LEP students would then be required to spend up to one and one-half hours in classrooms where a bilingual teacher would offer remedial instruction by explaining the substantive material in Spanish.[162] The court remarked that "if a child cannot comprehend principles of math or science taught in the English homeroom, he will not be able to explain her problem to the bilingual teacher in the Spanish basic skills room who is expected to provide remedial help."[163] Moreover, the court cited the expert opinions in *Serna v. Portales Municipal Schools* concerning the importance of culture in an educational program.[164] The court required the school district to submit a plan in compliance with the strict constructs of the Lau Guidelines.[165]

In *Rios v. Reid*,[166] a federal court found that the Patchogue-Medford School District failed to provide its LEP students with an equal educational opportunity based on Title VI of the Civil Rights Act of 1964, the Equal Educational Opportunities Act, and the Bilingual Education Act.[167] As in the other cases previously discussed, the school district had instituted an ESL program that the court found inadequate. The court ordered the school district to propose a plan for a bilingual education program that included bicultural

156. *Id.* at 54.

157. Chavez, *supra* note 74, at 16.

158. 455 F. Supp. 57 (E.D.N.Y. 1978).

159. 20 U.S.C. § 1703(a) (1994). The section provides that schools shall be deemed to discriminate by the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools. *Id.* The Lau Guidelines provide that "[i]n such courses or subjects of study as art, music, and physical education a program of bilingual education shall make provisions for the participation of the children of limited speaking ability in regular classes." *Cintron*, 455 F. Supp. at 63 n.9. The school district did not integrate the children in the non-substantive classes. *Id.* at 63.

160. *Cintron*, 455 F. Supp. at 63.

161. *Id.* at 59.

162. *Id.*

163. *Id.* at 63.

164. *Id.* at 62; *see supra* text accompanying note 137.

165. *Id.* at 64.

166. 480 F. Supp. 14 (E.D.N.Y. 1978).

167. *See id.* at 23-24.

education under the Lau Guidelines.[168] The bicultural dimension was only mandatory as long as was necessary to enhance the children's learning ability.[169] Despite the limited duration of the bicultural aspect to the instruction, the court asserted that the legislative history of the Bilingual Education Act required that an effective program "must also be bi-cultural as a psychological support to the subject matter instruction."[170] The court noted that the program established by the school district prior to the ruling was designed to "mainstream the student as soon as he or she indicates some comprehension of spoken English."[171] The court continued with language that native-language instruction advocates would find especially compelling:[172] "A denial of educational opportunities to a child in the first years of schooling is not justified by demonstrating that the educational program employed will teach the child English sooner than programs comprised of more extensive Spanish instruction."[173]

While bodies of the federal government, especially the courts, seemed to be suggesting an expansion of native-language instruction, disgruntled voices began to be raised. The bicultural aspect of bilingual education was the first element of the instructional method to be attacked. Noel Epstein, education editor of the *Washington Post,* published an influential discourse on bilingual education that attacked federally funded educational programs that fostered devotion toward minority languages and heritages.[174] Perhaps more important was a breakdown of the virtually unanimous support that bilingual education had garnered from Hispanic leaders. Some leaders began to worry that bilingual education was becoming a de facto form of segregation.[175] Even though courts recognized the necessity of an exit process for children that had acquired a measure of English acquisition[176] required by the Equal Educational Opportunity Act,[177] evidence appeared showing that some children spent time in bilingual education classes after they had acquired sufficient proficiency in English.[178]

Evidence of lengthy stays in bilingual education classrooms emerged in a study by the American Institute for Research (AIR).[179] The study was presented at the 1977 hearings conducted to amend the Bilingual Education Act.[180] It proved extremely influential because of its beginnings as an extension of

168. *Id.* at 24.

169. *Id.* at 23.

170. *Id.* at 22.

171. *Id.*

172. Bilingual education advocates argue that English acquisition should not overshadow the necessity of detainment in a bilingual program for the purpose of achieving an "academic" understanding of English. *See supra* note 37.

173. *Rios,* 480 F. Supp. at 23.

174. NOEL EPSTEIN, LANGUAGE, ETHNICITY, AND THE SCHOOLS: POLICY ALTERNATIVES FOR BILINGUAL-BICULTURAL EDUCATION 1-3 (1977). *But cf. Rios,* 480 F. Supp. at 21 (declining to interpret the Lau Guidelines as supporting "maintenance" bilingual programs; instead, the Guidelines set "standards for determining compliance with the statutory obligations relating to bilingual education").

175. Crawford, *supra* note 3, at 50.

176. *See Cintron,* 455 F. Supp. at 63; *Rios,* 480 F. Supp. at 23.

177. 20 U.S.C. § 1703(a) (1994) (state cannot deny equal education opportunity by deliberate segregation).

178. American Institutes For Research (AIR), Evaluation of the Impact of ESEA Title VII Spanish/English Bilingual Education Program 12 (1978) [hereinafter AIR].

179. *Id.*

180. Moran, *supra* note 69, at 1284.

governmental research;[181] accordingly, it garnered extensive media attention.[182] The study concluded that there was no demonstrative difference in test scores between LEP students enrolled in native-language programs and LEP students without such instruction.[183] Perhaps more importantly, only fourteen percent of project directors transferred students after they had acquired enough English to function in mainstream classrooms.[184] Bilingual education advocates and other researchers criticized the study severely because, among other factors, it failed to consider variances in quality between schools, among teaching methods, and the socioeconomic status of pupils.[185] However, the damage was already done to a strong federal belief in native-language instruction.

The 1978 amendments to the Bilingual Education Act clarified that the Act's objective was to provide a means to English acquisition. A student's native language was to be used "to the extent necessary to allow a child to achieve competence in the English language."[186] For the most part, only transitional English programs would be federally funded. Congress attempted to respond to the concerns about segregation by permitting English-speaking children to attend bilingual education programs and mandating that non-substantive classes be desegregated.[187]

Soon after, native-language instruction was attacked on another level. This time, the threat was not based on a claim of educational ineffectiveness, but on a belief that bilingual education threatened to splinter America into cultural sects.[188] Senator S.I. Hayakawa, a California Republican, proposed a bill to limit bilingual education as well as introducing proposals designating English as the official language of the nation.[189] Congress declined to act on either measure.[190] Senator Hayakawa remained unfazed and formed U.S. English.[191] Upon the Senator's failure to amend the Constitution, U.S. English took to state and local governments in an attempt to persuade them to declare English the official language of the nation.

According to U.S. English, failure to take affirmative steps to protect English would "lead to institutionalized language segregation and a gradual loss of national unity"; therefore, the group was founded "to organize and support a citizens' movement to maintain our common linguistic heritage."[192] The movement to maintain a certain linguistic heritage grew from a desire to protect the "American" way of life from intrusion by linguistic minorities.[193] The membership of U.S. English and other English Only groups consists of both

181. The Office of Planning, Budget and Evaluation commissioned American Institute for Research to conduct the study. *Id.* at 1285.

182. *Id.*

183. AIR, *supra* note 178, at 17.

184. *Id.* at 12.

185. Crawford, *supra* note 3, at 49.

186. BILINGUAL EDUCATION ACT OF 1978, Pub. L. No. 95-561, § 703, 92 Stat. 2268, 2270 (1978).

187. § 703, 92 Stat. at 2270.

188. Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321, 331-32 (1987).

189. Crawford, *supra* note 3, at 54.

190. *Id.*

191. U.S. English, *In Defense of Our Common Language*, *in* LANGUAGE LOYALTIES 143, 144 (James Crawford ed., 1992) [hereinafter U.S. English].

192. *Id.*

193. Moran, *supra* note 188, at 349.

established citizens who hope to curb immigration in an effort to preserve American resources and newer immigrants who believe that adopting English and American values leads to upward social mobility.[194] In the view of English Only proponents, native-language instruction disturbs a swift adoption of American language and values.[195]

C. *Discretion Back Into the Hands of School Districts*

While Congress began to rethink its position on bilingual education specifically, the Supreme Court rethought its position on discrimination in general. The scope of Title VI's defenses against discrimination was redefined in *Regents of the University of California v. Bakke.*[196] A white male sought the protections of Title VI and the Equal Protection Clause of the Fourteenth Amendment from an affirmative action system established by the university's medical school.[197] The Court seemed to suggest that the standard for a Title VI violation should be the same standard for an equal protection violation.[198] That is to say, a showing of a discriminatory intent may be necessary, as opposed to the effects test relied upon in the *Lau* decision. While the Court did not expressly overrule *Lau*, the decision undermined the applicability of the effects test that LEP plaintiffs generally, and often successfully, employed when making Title VI claims.[199] Because of confusion over the extent to which *Bakke* affected *Lau,* plaintiffs increasingly sought the protection of the Equal Education Opportunity Act.[200]

The Equal Education Opportunity Act (EEOA),[201] which had formerly been thought of as ineffective,[202] contained a broad mandate[203] that called for judicial interpretations concerning which groups were protected, which programs would be deemed acceptable, and whether the "equal protection" language of the EEOA is synonymous with the "effective participation" language of prior court decisions.[204] The Fifth Circuit decided on an interpretation of the EEOA as it pertains to bilingual education in *Castaneda v. Pickard.*[205] The opinion is still employed to decide most bilingual education litigation issues in federal courts.[206] Mexican-American children brought suit alleging violations of their equal protection rights, Title VI, and the EEOA.[207] The district court ruled that the ESL program did not violate the mandates of any

194. *Id.*
195. U.S. English, *supra* note 191, at 144.
196. 438 U.S. 265 (1978).
197. *Id.* at 266.
198. *See id.* at 287.
199. *See* Moran, *supra* note 188, at 330.
200. Biegel, *supra* note 155, at 51.
201. 20 U.S.C. § 1703 (1994).
202. *See supra* text accompanying notes 119-121.
203. *See supra* text accompanying note 120.
204. *See* Biegel, *supra* note 155, at 52 (citing MARK YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 793-809 (3d ed. 1992)).
205. 648 F.2d 989 (5th Cir. 1981).
206. *See* Biegel, *supra* note 155, at 53.
207. *Castaneda*, 648 F.2d at 992.

of the plaintiff's claims regarding the effectiveness of the school's program.[208] The court of appeals affirmed and responded to the alleged EEOA violation by creating a test to determine when school districts violated the statute's mandates.[209]

Before establishing the test, however, the court noted a few significant problems with claims regarding the effectiveness of bilingual education. The Supreme Court handed down *Lau* prior to *Washington v. Davis*,[210] which held "that a discriminatory purpose, and not simply a disparate impact, must be shown to establish a violation of the Equal Protection Clause."[211] Coupled with the *Bakke* decision,[212] the Fifth Circuit found that Title VI "is violated only by conduct animated by an intent to discriminate and not by conduct which, although benignly motivated, has a differential impact on persons of different races."[213] This opinion, which is controlling in most cases involving bilingual education litigation, refused to apply the effects test of *Lau*.[214] Equally important, the court noted that the Lau Guidelines (the most restrictive prescription of federal power over local discretion) "were not developed through the usual administrative procedures employed to draft administrative rules or regulations. The Lau Guidelines were never published in the Federal Register."[215] They were merely advisory because the OCR did not follow the procedures mandated by the Administrative Procedure Act.[216] The remedies lacked the legal status of federal regulations.[217] They were withdrawn within a year,[218] thereby making OCR's 1970 memorandum the controlling administrative statement in regard to Title VI.[219] As previously noted, the memorandum allowed school districts to implement any supplemental program that allowed LEP participation.[220]

Local discretion would further be bolstered by the test established by the court to determine whether the EEOA had been violated. Unlike Title VI claims, the EEOA "looks only at whether a program has the effect of excluding NEP [non-English speaking pupils] and LEP students from the educational program and does not require proof of discriminatory intent."[221] In considering a test to verify compliance with the EEOA, the court recognized that the 1974 amendments to the Bilingual Education Act provided that state and local agencies receiving funds were not restricted to specifically mandated

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208. *Id.*

209. *Id.* at 1009.

210. 426 U.S. 229 (1976).

211. *Castaneda*, 648 F.2d at 1007.

212. *See supra* text accompanying notes 196-198.

213. *Castaneda*, 648 F.2d at 1007.

214. While the 9th Circuit has adopted the test regarding EEOA complaints, it follows *Lau* in regard to Title VI claims. *See* Teresa v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 715-16 (N.D. Cal. 1989).

215. *Castaneda*, 648 F.2d. at 1007.

216. *See* 5 U.S.C. § 553 et. seq. (1994).

217. *Castaneda*, 648 F.2d at 1007.

218. A federal district court approved a consent decree mandating that the Lau Guidelines be published according to the Administrative Procedure Act. Moran, *supra* note 69, at 1293-94 (citing Northwest Arctic Sch. Dist. v. Califano, No. A-77-216 (D. Alaska Sept. 29, 1978)).

219. *See supra* text accompanying notes 96-101.

220. *See supra* text accompanying note 102.

221. Moran, *supra* note 188, at 331.

programs.[222] Further, the court asserted that "Congress' use of the less specific term, 'appropriate action,' [in the EEOA] rather than 'bilingual education,' indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA."[223] The court interpreted Congress' actions as only demanding a good faith effort that reflects the circumstances and resources of the relevant school district.[224]

With a permissive view of what the EEOA mandated, as well as the notion that the Lau Guidelines had no formal authority, the court created a three prong test that afforded substantial discretion to local districts. First, a court must decide whether a school's program for LEP students relies on "an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy."[225] Second, the school system must effectively implement the selected program.[226] Finally, the court must determine whether the implemented program, even if based on established educational theory and properly implemented, generates "results indicating that the language barriers confronting students are actually being overcome."[227] In summary, despite the fact that the EEOA utilizes the more plaintiff friendly effects test, the three prong test determining "appropriate action" may encompass both ESL and structured immersion programs.[228] The court's test created a system whereby school districts may implement almost any type of program as long as it effectively meets the needs of LEP students.

In *Teresa v. Berkeley Unified School District*,[229] a California federal court employed the *Castaneda* test to decide whether a school district violated the EEOA.[230] The court noted and agreed with the "warnings stated by the *Castaneda* Court itself that courts should not substitute their educational values and theories for the educational and political decisions properly reserved to local school authorities and the expert knowledge of educators, since [courts] are ill-equipped to do so."[231] Recognizing the variety of educational opinion regarding the ESL program established by the school district, the court found the program as sound as any native-language approach proposed by the claimants.[232]

The claimants also alleged a violation of Title VI.[233] The district court clarified the effect of the *Bakke* decision in the context of bilingual education within the Ninth Circuit. The court noted that since *Bakke*, "a majority of the Supreme Court held that a violation of Title VI requires proof of discriminatory intent. A different majority held, however, that under the regulations to Title VI, proof of discriminatory effect may suffice to establish liability."[234] While

222 *Castaneda*, 648 F.2d at 1008-09.
223. *Id.* at 1009.
224. *Id.*
225. *Id.*
226. *Id.* at 1010.
227. *Id.*
228. Moran, *supra* note 188, at 331.
229. 724 F. Supp. 698 (N.D. Cal. 1989).
230. *Id.* at 712-15.
231. *Id.* at 713 (citing *Castaneda*, 648 F.2d at 1009).
232. *Id.* at 714.
233. *Id.* at 712.
234. *Id.* at 716 (citing Guardians Ass'n v. Civil Service Comm. of New York, 463 U.S. 582 (1983)).

the Supreme Court's ambivalence appeared to clarify little, the district court continued by stating that despite the confusion, the Ninth Circuit followed *Lau v. Nichols.*[235] *Lau* stated that "discrimination which had the effect of depriving students equal educational opportunity" was barred by Title VI, even "if no purposeful design is present."[236] While proving a discriminatory effect is easier than proving discriminatory intent, *Lau* imposed no duty to establish any sort of native-language instruction.[237] It only mandated that some form of additional help be implemented for the sake of LEP students.[238] As long as a district implements some sort of additional program, a Title VI action's chances of success are extremely limited by the broad approach established by *Lau* and followed by California federal courts.

D. Funding Patterns Allowing Discretion

However, because the scope of local discretion not only depends on the mandates of civil rights statutes but also on the funding that state and federal governments are willing to allocate, an examination of federal and state funding practices is necessary. Following Ronald Reagan's election in 1980, the President made a push to minimize federal intervention in social welfare programs.[239] The "new federalism" advocated by the Reagan administration was reflected in the 1984 amendments of the Bilingual Education Act.[240] The Act increased local and state discretion by expanding the definition of acceptable educational methods. The Act recognized programs that employed intensive native-language instruction as well as alternative programs that used structured English language instruction.[241] Apparently, the view that "appropriate action" may involve programs utilizing English language almost exclusively was expressly approved by legislation. Furthermore, federal funds were only meant to provide temporary means to create and finance programs along with state and local allocations; federal grants could only be extended up to five years.[242] The Act also placed heavy emphasis on teacher and administration training to better ensure that the greater discretion granted to these decision makers would be properly exercised.[243]

In 1988, a second heavily touted government report by the General Accounting Office (GAO) reached conclusions contrary to the AIR report.[244] The report concluded that there was sufficient evidence to demonstrate the effectiveness of native-language instruction and reliance on alternative methods

235. 724 F. Supp. 698, 716 (N.D. Cal.)

236. *Teresa*, 724 F. Supp. at 716 (citing *Lau*, 414 U.S. at 568).

237. *See supra* text accompanying notes 113-115.

238. *Lau*, 414 U.S. at 565.

239. Moran, *supra* note 69, at 1303.

240. *See* BILINGUAL EDUCATION ACT OF 1984, Pub. L. No. 98-5111, § 721, 98 Stat. 2370, 2374 (codified as amended at 20 U.S.C. §§ 7401-7601 (1994)), amended by BILINGUAL EDUCATION ACT OF 1994, Pub. L. No. 103-382, 108 Stat. 3716.

241. BILINGUAL EDUCATION ACT OF 1984, § 721, 98 Stat. at 2374.

242. § 721(c)(5)(A)-(B), 98 Stat. at 2376.

243. Moran, *supra* note 69, at 1309.

244. *See* General Accounting Office (GAO), Bilingual Education: A New Look at the Research Evidence 3 (1987).

was unfounded.[245] Despite the results of the study, the 1988 amendments to the Bilingual Education Act of 1988[246] elevated funding for special alternative instructional techniques, with a cap of twenty-five percent of total allocations under the Act,[247] thereby increasing the discretion of local decision-makers. The reauthorization also continued the 1984 amendments' example of placing significant emphasis on teacher training and technical assistance.[248] Congress relied on research that found regardless of the amount of English involved in the program, implementing teachers "who individualize their instructional approach and program setting to meet the needs of their particular LEP students are successful in improving the academic achievement of LEP students."[249] In 1994, the Bilingual Education Act was re-authorized for five years.[250] The Act does little to change the amount of discretion afforded local districts. The most significant amendment regards a waiver process for the twenty-five percent cap for special alternative programs.[251] The cap can be waived if an applicant demonstrates that bilingual education is impractical due to an absence of qualified teachers or if the student population employs more languages than a school district can reasonably teach.[252]

California's bilingual education act paralleled the expansion of local discretion that occurred on the federal level. However, for a time it appeared that native-language instruction would lose not only a preference by the state's government, but availability altogether. In 1986, California voters approved Proposition 63.[253] The Initiative advised public officials "to insure that the rule of English as the common language of the State of California is preserved and enhanced."[254] However, as even bilingual education involving a native language is based on the theory that LEP students learn English while studying other subjects in their first language, the Initiative was deemed compatible with native-language instruction.[255]

Following the sunset of the Chacon-Moscone Act[256] in 1987, legislation ensued to reenact its provisions, but the legislation was vetoed by Governor George Deukmejian.[257] Since that time, bilingual education in California has been in a state of flux. While schools are no longer required by state law to

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245. *Id.* at 3.

246. BILINGUAL EDUCATION ACT OF 1988, Pub. L. No. 100-297, 102 Stat. 274 (codified as amended at 20 U.S.C. §§ 7401-7601 (1994)), amended by BILINGUAL EDUCATION ACT OF 1994, Pub. L. No. 103-382, 108 Stat. 3716.

247. § 7002(b)(3), 102 Stat. at 275-76.

248. § 7002(b)(5), 102 Stat. at 276.

249. Moran, *supra* note 69, at 1314 (quoting Federal Assistance for Elementary and Secondary Education: Background Information on Selected Programs Likely to be Considered for Reauthorization by the 100th Congress, 100th Cong., 1st Sess. 179 (1987)).

250. BILINGUAL EDUCATION ACT OF 1994, Pub. L. No. 103-382, 108 Stat. 3716, 3718 (1994).

251. § 7116, 108 Stat. at 3726.

252. § 7116(i)(3), 108 Stat. at 3726-27.

253. Crawford, *supra* note 3, at 62.

254. *Id.*

255. *Id.* at 63; Moran, *supra* note 69, at 1328 (citing Memorandum from Joseph R. Symkowick, Chief Counsel to Bill Honig, Superintendent of Public Instruction, re: Proposition 63 (Nov. 5, 1986)).

256. CAL. EDUC. CODE §§ 52160-52179 (West 1989).

257. Biegel, *supra* note 155, at 54.

offer mandatory bilingual education classes,[258] they are still mandated by federal law to offer some sort of supplemental aid.[259]

Under the Sunset Statutes of the California Education Code,[260] schools may continue to offer programs for LEP students and receive state funds if the programs follow the general purposes of the act.[261] The point of contention has been which programs are considered acceptable. Under the Sunset Statutes, the State Department of Education is in charge of disbursing funds of the Act,[262] so its interpretation has been controlling.[263] A program acceptable for funding after the Act expired was originally interpreted very strictly to include some aspects of the Chacon-Moscone bilingual-bicultural requirements.[264] However, as questions have developed over the effectiveness of intensive native-language programs, the scope of acceptable methods has greatly expanded. The "general purposes" of the Act require that native language should be utilized "when necessary"[265] and when feasible.[266] However, feasibility became an enormous problem. Between 1980 and 1993, the number of LEP children in kindergarten through twelfth grade increased 254%.[267] Necessity forced many instructors to receive bilingual certification waivers, and districts to hire paraprofessionals.[268] The necessary aspect of utilizing a child's native language became rather ambiguous as different instructional programs, relying on different levels of native-language instruction, progressed and evolved. By late 1994, twenty school districts had received waivers to opt out of any amount of native-language instruction based on a showing that their LEP students could successfully learn English.[269] According to a periodical specializing in educational issues, "[d]uring the 1993-1994 school year, only 28 percent of the state's 1.2 million [LEP] students were being taught in their native-language in at least two subjects." [270] Many students in other districts learned through native-language instruction for very short periods of time.[271] Other students simply received no help at all.[272] Despite the general purposes of the expired Chacon-Moscone Act, school districts had almost free reign to implement almost any program they saw fit but were generally expected to provide some amount of native-language instruction to students with the least English proficiency, if possible.[273]

In 1995, the California State Board of Education allowed even more local administrative freedom. Formerly, the Board allowed discretion as to the form of instruction with a preference for some amount of native-language

258. *Id.* at 55.
259. *Id.* at 60.
260. CAL. EDUC. CODE §§ 62000-62002.5 (West 1989).
261. CAL. EDUC. CODE § 62003 (West 1989).
262. *Id.*
263. *See* Biegel, *supra* note 155, at 55.
264. *Id.*
265. CAL. EDUC. CODE § 52161 (West 1989).
266. *See* CAL. EDUC. CODE § 52163, § 52165 (West 1989); Crawford, *supra* note 3, at 196-198.
267. Crawford, *supra* note 3, at 198.
268. *Id.* at 197.
269. Lynn Schnaiberg, *Advocates Assail Calif. Bilingual-Education Proposal*, EDUC. WK., December 14, 1994, at 14.
270. *Id.*
271. Crawford, *supra* note 3, at 197.
272. *Id.*
273. Schnaiberg, *supra* note 269, at 14.

education.[274] It expanded the scope of local discretion even further by creating a new policy regarding LEP students.[275] They created a process by which the general purposes of the Chacon-Moscone Education could be waived regardless of a school district's ability to provide any amount of native-language instruction to LEP students.[276] The Board would decide on waivers based on the *Castaneda* test,[277] which is broad enough to include supplemental methods that include no native-language instruction at all.[278] From the time of that change in policy, the state Board of Education approved all five of the waivers submitted by California school districts.[279] The formerly broad bilingual mandate of California state law merged into the permissive realm of federal law.

In February of 1998, Sacramento Superior Court Judge Ronald B. Robie struck down a waiver issued to an applicant seeking permission to end all native-language instruction.[280] A final judgment and order remain pending as of this writing. While the ultimate effects of the ruling remain unknown, the executive director of the State Board of Education interpreted it as meaning that because state and federal law do not require native-language instruction, the board does not have the authority to grant or deny waivers.[281] In March of 1998, the Board responded by retracting their previous policy and handing over total discretion to school districts.[282] School districts can now alter programs that include native-language instruction and can construct English-only programs without requesting waivers by the state School Board.[283] According to Bill Lucia, executive director of the Board, the new policy does not favor "any approach. It's saying a local school board knows best and is accountable, ultimately, under federal law."[284] A formal new policy declaration and rules regarding any limitations on the rather broad new approach were not released by the time of this writing.[285]

Many California local school boards were, predictably, pleased by the change of policy. School districts that desire to scale down or eliminate native-language instruction programs are pleased that they will not be required to follow a waiver process.[286] Those local school boards who expressed distress concerning the policy shift worry about the fate of native-language instruction in

274. *See supra* text accompanying notes 265-266.

275. California State Board of Education, Program Advisory for Programs for English Learners, (visited Sept. 17, 1998) <http://www.cde.ca.gov/ccpdiv/bilingual/advisory.htm>.

276. *Id.* at 6.

277. *Id.* at 3.

278. *See supra* text accompanying note 228.

279. Nick Anderson, *State Overhauls Rules on Bilingual Education Schools: Districts No Longer Need Waiver to Abolish Programs But Board Does Not Rule on Such Instruction*, L.A. TIMES, March 13, 1998, at A1.

280. *Id.*

281. *Id.*

282. *Id.*

283. Janine DeFao, *State Revokes Bilingual Mandate: Let Districts Decide, Education Panel Says*, SACRAMENTO BEE, March 13, 1998, at A1.

284. *Id.*

285. The Board has asserted, however, that the decision will not be reversed. *Id.*

286. Capistrano Unified School District's voted to shorten a bilingual program from one that can last for six years to one lasting one year. Westiminster School District looked forward to less interference from the state school board as they continue their English-immersion plan. *See, e.g.*, Nick Anderson, *Reaction to Bilingual Education Decision Varies Schools: State Board's Move to Loosen Requirements Fails to End Dispute. Some Districts Plan No Changes; Others Applaud Action*, L.A. TIMES, March 14, 1998, at A21.

program that will suit their needs.[287] Those school districts that favor some form of native-language instruction plan to continue offering those services.[288]

The state School Board decision pleased major figures in education legislation. Democrats attempted to push a bill through legislation that would essentially codify the decision of the state School Board.[289] As of mid-April 1998, state Senator Deirdre Alpert undertook the task of trying to garner support for her bill, which would require some form of additional support for LEP students but not necessarily native-language instruction.[290] Governor Pete Wilson, whose policies are often regarded as anti-immigrant, applauded the new policy. A Wilson spokesman expressed Wilson's approval with the statement, "[w]hat we support is the acquisition of English language skills as quickly as possible and the reality that there may be a way in Calexico that works much better than the way you may be using in Elk Grove or Humboldt County."[291] Wilson had previously vetoed legislation that would have reinstated the strict mandates of California's original bilingual education act because, as he argued in 1992, such exacting legislation "would limit the flexibility of local school boards."[292]

Despite overall approval by educators responding to the state Board decision, which gave school boards the discretion not to implement programs with native-language instruction, the Unz Initiative remains on the June 1998 ballot. Sherri Annis, a spokeswoman for the initiative (Proposition 227), asserted that the change in policy did not go far enough for supporters of the Unz Initiative.[293] Not only do the Initiative supporters want to allow schools the ability to teach with little or no native-language instruction, they want to mandate the form of instruction that all schools employ. Annis explained, "School districts that have entrenched bilingual [education] programs [those that use extensive native-language instruction] will simply maintain them" with no incentive to dismantle those programs; therefore, she continued, "the practical effect [of this ruling] is really negligible." [294]

III. California Meets The Unz Initiative

Before an observer can accurately determine the effect of the California State Board's alteration of policy, she must determine the state of bilingual education in the state. California public schools instruct 1.4 million LEP students--by far the largest concentration of non-fluent English speakers in the

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287. *Id.*

288. Santa Ana Unified (largest district in Orange County), Los Angeles Unified School District (approximately 680,000 LEP students are enrolled in the district), San Francisco and Ventura Unified School Districts all plan to continue to offer bilingual education programs. *Id.*

289. *See* Steven A. Capps, *Assembly Panel OKs Bilingual Standards: Measure Seen as Democrats' Bid to Deter Prop. 227*, SACRAMENTO BEE, April 2, 1998, at A3.

290. *Id.*

291. Anderson, *supra* note 286, at A21.

292. Biegel, *supra* note 155, at 56 (citing Lonnie Harp, *Wilson Vetoes Richmond, Bilingual-Education Bills*, EDUC. WK., Oct. 14, 1992, at 16).

293. Anderson, *supra* note 279, at A1.

294. *Id.*

nation.[295] Despite the legions of LEP students in California, non-English communication does not predominate in California LEP classrooms. According to the University of California's Linguistic Minority Research Institute, "[f]ewer than half of the 47,669 teachers assigned to teach immigrant children even speak a second language."[296] Additionally, very few students receive extensive native-language instruction.[297] The breakdown of programs that teach LEP students points to a definite propensity toward English instruction.

According to Norman Gold, State Manager of Bilingual Compliance, slightly less than thirty percent of LEP students receive primary language instruction.[298] Primary language programs are defined by the state as involving instruction in at least two subjects in a child's native language.[299] Tests are taken in the students' first language, and English is studied in English.[300] About twenty-two percent of LEP students are enrolled in specially designed academic instruction with primary language support.[301] Subjects are taught in English in the "sheltered [immersion] method" that involves "speaking slowly and using repetition, visual aids and vocabulary that English learners are likely to understand."[302] Additionally, teachers' assistants provide support in the child's first language. Almost twenty percent of LEP students are enrolled in specially designed academic instruction without primary language support programs.[303] The sheltered immersion method is employed, but no extra tutoring is involved.[304]

About sixteen percent of LEP students receive no extra instruction at all.[305] School districts that do not provide any assistance are out of compliance with federal law.[306] Additionally, twelve percent of LEP students are taught in English as a Second Language classes;[307] these children in mainstream classrooms attend extra English lessons apart from their regular classes.[308] Finally, less than two percent of LEP students are withdrawn from bilingual education classrooms by their parents.[309]

The Unz Initiative proposes to implement a very specific program that the authors of the proposition believe will most efficiently teach children English. The Initiative calls for all LEP students to be placed in sheltered English immersion programs.[310] It defines a sheltered English immersion program as "an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation

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295. Nick Anderson, *Debate Loud as Vote Nears on Bilingual Ban*, L.A. TIMES, Mar. 23, 1998, at A1. The total number of LEP students in public school exceeds three million. *Id.*
296. Asimov, *supra* note 1, at A1.
297. *See infra* text accompanying notes 299-301.
298. Asimov, *supra* note 1, at A1.
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. Asimov, *supra* note 1, at A1.
305. *Id.*
306. *See supra* text accompanying notes 258-259.
307. Asimov, *supra* note 1, at A1.
308. *Id.*
309. *Id.*
310. Proposition 227, *supra* note 12, at § 305.

designed for children who are learning the language."[311] The method appears to be similar to the specially designed academic instruction without primary language support programs that currently serve nearly twenty percent of LEP students. Moreover, students with limited English skills would be taught, in most cases, for no more than a year in the sheltered classes.[312] Schools will be allowed to place students of different ages, with similar levels of proficiency, in the same classrooms.[313]

The Initiative creates a system for parents of LEP students to choose a bilingual education program for their children.[314] However, a parent attempting to place his child in a bilingual education program faces a difficult challenge. Twenty parents at a school must be granted a waiver before a bilingual education program will be implemented.[315] A waiver will only be granted in situations where a child's English skills are equal to "or above the state average for his grade level or at or above the 5th grade average, whichever is lower."[316] The second classification of waiver would be granted in cases when the child is ten years or older and school officials believe that different instruction (other than sheltered English immersion) would be better suited for the child,[317] and when school officials believe a child has special "physical, emotional, psychological, or educational needs" and a parent concurs.[318] If fewer than twenty parents are granted a waiver, a parent can transfer his child to a school that offers a native-language program.[319] Moreover, the parent or legal guardian must personally visit the school to learn about program choices available before receiving a waiver.[320]

The measure also allocates fifty million dollars a year to free or subsidized programs provided by schools and community organizations that furnish English classes for adults, who pledge to tutor LEP children.[321] Finally, the Initiative contains a section that gives a parent or legal guardian standing to sue school board members, school administrators, or teachers who "willfully and repeatedly" refuse to abide by the Initiative.[322]

While most school districts and many legislators support the freedom of school districts to implement programs of their choice, the general populace appears to believe otherwise.[323] A few months before voters proceed to the

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311. *Id.* at § 306(d).
312. *Id.* at § 305.
313. *Id.*
314. *Id.* at § 310.
315. Proposition 227, supra note 12, at § 310.
316. *Id.* at § 311(a).
317. *Id.* at § 311(b).
318. *Id.* at § 311(c).
319. *Id.* at §310.
320. Proposition 227, supra note 12, at § 310.
321. *Id.* at §§ 315-16.
322. *Id.* at § 320.
323. A poll conducted by three bilingual education advocates suggests that voters are not completely aware of what they are voting to implement. Stephen Krashen, James Crawford, & Haeyoung Kim, Bias in Polls on Bilingual Education: A Demonstration (visited April 5, 1998) <http://ourworld.compuserve.com/homepages/JWCRAWFORD/USCpoll.htm>. The poll compared the affirmative responses of two different characterizations of the initiative. *Id.* at 1. The first characterization that was used in a Los Angeles Times poll asked whether a voter would support a initiative that "would require all public school instruction to be conducted in English and for students not fluent in English to be placed in a short-term English immersion program." *Id.* at 1. 57% of respondents answered they would support such an initiative. *Id.* at 2. The second

polls, the Initiative enjoys widespread support. A Field Poll found the seventy percent of voters favor Proposition 227, twenty percent of voters are opposed, and ten percent are undecided.[324] Surprisingly, considering the prior widespread support of bilingual education by Hispanics, sixty-one percent of Latinos maintain that they support the measure three months prior to the election.[325] All indications suggest that the Initiative will pass and the instructional method proposed by Unz will be executed. However, the past suggests that school discretion should be defended. Research involving bilingual education certainly does not indicate that the Initiative is the solution to this very complex debate. Past law regarding civil rights and funding indicate that the Initiative should be resisted. Further, teachers and school boards will resist the change. Finally, immigrant parents may lose a substantial amount of choice regarding their child's form of instruction.

IV. Lessons Learned From the Debate Prior to Proposition 227

Opposing sides of the Initiative debate frame the controversy quite differently. Opponents of the Initiative argue 1) that native-language instruction is the preferred method of teaching LEP students and 2) school boards need the discretion to choose the method of instruction.[326] Some opponents of the Initiative debate Proposition 227 employing both arguments, but even those who are skeptical of native-language instruction strongly believe the validity of the second argument.[327] Proponents of the Initiative that are in the public-eye put forth one argument: native-language instruction simply does not work. While campaigning for the program, Unz "has steadfastly cast the measure as a fight against a failed educational program that has crippled thousands of immigrant children."[328] He has avoided making the debate a question of culture in order to build coalitions among different ethnic groups.[329] Those that argue on either side of the debate proclaiming they know the best way to teach all LEP children do not base their opinion on unequivocal scientific findings.[330] Research has yet to provide a definite solution to this complicated issue.

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characterization asked if the voter would support the initiative that "would limit special help [for LEP students] for one year (180 days). After this time, limited English proficient children would be expected to know enough English to do school work at the same level as native speakers of English their age. This initiative would dismantle many current programs that have been demonstrated to be successful in helping children acquire English . . . ." *Id.* at 1-2. Only 15% supported the initiative under the second characterization. *Id.* at 2.

324. Phil Garcia, *Bid to Bar Bilingual Teaching Keeps Big Lead*, SACRAMENTO BEE, March 20, 1998, at A3.

325. *Id.*

326. *See* Anderson, *supra* note 295, at A1.

327. *See id.*

328. Garcia, *supra* note 18, at A1.

329. *Id.*

330. *See infra* text accompanying notes 351, 360.

A. Research

Examining past research on bilingual instruction is not likely to determine the issue for an observer of the debate. The AIR report, the first broad governmental examination of bilingual education, found that native-language instruction reaped few benefits.[331] A second governmental examination noted earlier in this note found that bilingual education involving native instruction was superior to programs based largely on English instruction.[332] Research has been slow to point to a particular form of instruction because there are many factors involved. An accurate study must take into account such variables as the socioeconomic status of the children, funding by the school district and the quality of teachers, to name a few of many very intricate factors that must be considered in an accurate study of public school programs.[333]

Bilingual education programs involving varying degrees of English instruction are inherently difficult to evaluate on a large scale because of the difficulty involved in comparing them to each other and to mainstream classes.[334] Special care must be taken to ensure that the groups that analysts compare are properly delineated. The groups compared to determine the success of a program often include the children involved in bilingual education programs and mainstream children.[335] With former LEP students leaving bilingual education classes and joining mainstream classrooms, they may be factored into an analysis of the mainstream group.[336] At the same time, children with limited English ability continually enter bilingual education programs.[337] Both of these factors may counteract a statistical showing of the benefits of bilingual education classes.[338] Furthermore, comparisons between classes that utilize native-language instruction and those that use to use little or none of a child's first language are often inaccurate. These sorts of comparisons are often imprecise because programs that purport to rely on English often use varying amounts of native-language, and those programs that depend on a child's first language vary on the amount of English used.[339] These are only a few of the obstacles that make proper comparisons difficult.[340] In fact, in 1983, a major longitudinal evaluation of primary program studies[341] found that only 39 of 300 program evaluations met the standards of sound research methodology.[342] This secondary evaluation[343] found that "the case for the effectiveness of [transitional bilingual education] is called into question by studies that found no difference in

331. *See supra* text accompanying note 183.

332. *See supra* text accompanying notes 244-245.

333. Telephone Interview with Dr. Hugo Rodriguez, Professor of Education, University of Texas—Brownsville, (Apr. 15, 1998).

334. FRED GENESEE, LEARNING THROUGH TWO LANGUAGES 145 (1987).

335. *Id.*

336. *Id.* at 146.

337. *Id.*

338. *Id.*

339. *See id.* at 146.

340. *Id.* at 145-46.

341. Primary evaluations "include both studies of single programs in particular school districts and studies of programs nationwide." *Id.* at 144.

342. *Id.* at 147.

343. A review of primary evaluations is termed a secondary evaluation. *Id.* at 145.

second-language performance between treatment and comparison groups."[344] However, while this program took into account proper comparisons, it failed to take into account the quality or nature of the programs in question.[345] The number of qualified bilingual teachers, quality of instructional materials and facility conditions affect comparisons between bilingual education programs.[346]

By 1987, only one meta-analysis[347] based on long-term evaluations had been carried out to assess the effects of variations between programs.[348] Relying on most of the same primary evaluations[349] that the 1983 analysis utilized, the meta-analysis found that students in native-language programs scored higher than students in non-bilingual programs in reading, language, mathematics, and total achievement.[350] However, by factoring in variances between programs such as teacher and instructional material quality, such findings display the difficulty of implementing a successful native-language instruction program. In summary, research has shown that native-language instruction works, as long as it is properly implemented.[351]

Considering the explosion of LEP students and the lack of qualified bilingual teachers,[352] it appears that implementing a native-language method requires both school and teacher dedication. In fact, in reaction to criticism by those that favor little or no native-language instruction on the grounds that native-language instruction is ineffective, primary language advocates often assert that the method appears unsuccessful because it is not properly implemented in many schools.[353] There are number of narrative reviews[354] that show that native-language instruction is far more effective than programs based on English immersion.[355] However, these studies often examine only limited sets of schools that are carefully selected by the researchers.[356] It would appear that the researchers choose particular schools in large part due to the carefully created program already established by the individual school.[357] While native-language instruction obviously has an empirical support, its limitations are clear.

Proponents of the Unz Initiative cannot point to any long-term American study that has closely follows the success of English immersion with minority

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344. Baker & de Kanter, *supra* note 134, at 42-43.

345. Genesee, *supra* note 334 , at 148.

346. *Id.* at 146.

347. *Id.* at 145. A meta-analysis "is a procedure that compares the results of primary studies using statistical procedures." *Id.*

348. Ann C. Willig, *A Meta-analysis of Selected Studies on the Effectiveness of Bilingual Education*, 55 REV. EDUC. RES. 269 (1985).

349. The researcher excluded some evaluations from programs that were conducted outside the United States. Genesee, *supra* note 334, at 148.

350. *Id.* at 148.

351. Dr. Hugo Rodriguez, *supra* note 333. Components that are necessary to the proper implementation of a native-language method include: high quality subject matter teaching in the first language (a competent bilingual teacher and quality materials), development of literacy in the first language, and an ESL component. *Id.*

352. *See supra* text accompanying notes 267, 296.

353. *See, e.g.*, Lily Wong Fillmore, *Against Our Best Interest: The Attempt to Sabotage Bilingual Education, in* LANGUAGE LOYALTIES 367-76 (James Crawford ed., 1992).

354. Narrative reviews are "systematic but non-statistical analyses of selected primary evaluations." Genesee, *supra* note 334, at 145.

355. *See, e.g.* STEPHEN KRASHEN & DOUGLAS BIBER, ON COURSE: BILINGUAL EDUCATION'S SUCCESS IN CALIFORNIA, at 32-56 (1988).

356. Genesee, *supra* note 334, at 147.

357. *Id.*

language students. Sherri Annis, spokeswoman for the Initiative cites a book,[358] which, in her words, " focuses on the educational polices of a dozen European and other countries containing large immigrant populations, including Canada, Australia, France, Germany, and Britain."[359] However, because the variances in bilingual education classes from school district to school district determine their success or failure, it is difficult to argue that a successful program from a foreign country would certainly be successful in the United States. While there has been research conducted that shows majority language students in America were able to learn a second language successfully in immersion classes, there has yet to be long-term research showing that minority language students can learn English more quickly in English immersion classes than in native-language classes.[360] Equating the two groups without further research would be unfair because of societal and psychological factors that influence a minority child's ability to acquire English.[361] Support provided by other countries should be viewed as a blueprint for programs that California schools may implement in the event they cannot or refuse to institute a proper native-language program. The research from other nations, however, is certainly not a prescription for mandatory change. Moreover, in a recent nationwide primary evaluation conducted by independent researchers and released by the U.S. Department of Education,[362] analysts found that the reclassification[363] rates of LEP students in English immersion classes to be lower than those of students in early-exit native-language programs.[364] Further, the study found that native-language instruction did not impede them from learning English.[365] The Department of Education "promptly asserted its position that no one method could be upheld as superior to another."[366] Not surprisingly, both proponents and opponents of native-language instruction asserted that the study was flawed because it did not examine enough programs. U.S. English claimed the study did not compare the "relative effectiveness of the program models," while native-language instruction advocates claimed that study downplayed the effectiveness of utilizing long-term bilingual instruction.[367]

Out of this confusion arises a proposition that purports to contain the answer to this quandary. While native-language instruction cannot be defended solely on the strength of past results because of the difficulty of implementing a proper program, neither can the Initiative's mandates. About seventy percent of

358. CHARLES GLENN, EDUCATING IMMIGRANT CHILDREN (1996).

359. E-mail from Sherri Annis, Spokeswoman for English for the Children (Feb 27, 1998) (on file with author).

360. Dr. Hugo Rodriguez, *supra* note 333.

361. These factors are rather complex but generally surround theories that a minority child is not surrounded by the same quality of first language speakers that majority children are due to the relative prestige of English. *Id.* The relative prestige theory is an acknowledgment that minority language children may regard their first language with disdain due to the derogatory messages from society about their primary language, which affects their ability to learn their native language. *Id.* The ability to continue to develop communication skills in a first language while learning English is the premise. *Id.*

362. Executive Report, *supra* note 35.

363. *See supra* note 33 for definition of reclassification.

364. DAVID W. STEWART, IMMIGRATION AND EDUCATION 152 (1993). The study released was Executive Report, *supra* note 35, at 15.

365. Executive Report, *supra* note 35, at 40.

366. Stewart, *supra* note 364, at 153.

367. *Id.* at 153-54.

children are currently enrolled in programs that do not use significant amounts of native-language instruction.[368] According to state records, these programs, much like the one that Unz proposes to implement, perform no better than those that employ native-language instruction.[369]

An alternative to trying to find a blanket method meant to be the definitive answer in teaching LEP students is to recognize schools that have implemented successful programs. San Franciso schools, which use native-language instruction, produce LEP students that often fair better on tests than native English speakers. According to the *San Francisco Chronicle*, "[s]tudents in the city's bilingual education programs greatly outperformed native English speakers on math tests in middle and high school. On reading tests, middle school bilingual students outperformed the native speakers, and in high school, they were close behind . . . ."[370] On the other hand, the program that Gloria Tuchman employs in her classroom, which the Initiative uses as a model for its guidelines, has a higher reclassification rate than the rest of her district.[371] Research relied on by Congress in its 1988 amendments of the Bilingual Education Act found that teachers who individualized their approach to meet the particular needs of their students would likely produce effective results regardless of the amount of English involved in the program.[372] Present successful models for instruction are not uniformly based on native-language instruction nor are they based on English immersion.

Despite the lack of evidence that Proposition 227 will produce results any better than presently established native-language programs, the Unz Initiative dismantles all programs (excluding those substantially similar to the proposition's) regardless of their past success or amount of English involved in the method. While it would seem that native-language instruction is more difficult to successfully implement and maintain, it has been proven to work successfully. At the very least, English immersion suffers from a lack of positive research. The mixed messages provided by the research does not mean that the exploration and innovation of instructional methods should cease. In fact, it points to an expansion of support for schools that are able to implement successful programs regardless of the amount of English spoken. Research shows that native-language instruction can work, but success is difficult to achieve. The lack of research showing that Unz's initiative will be successful should halt an immediate change in California schools. At some point, research may develop ways to make success in native-language instruction less difficult. Research may provide a basis for reliance on immersion or it may eventually display that several methods work toward satisfactory results. Until that time, legal constraints only hinder the attainment of that knowledge; such constraints should be avoided.

368. *See supra* text accompanying note 301.
369. Anderson, *supra* note 295, at A1.
370. Asimov, *supra* note 1, at A1.
371. *See supra* note 53.
372. *See supra* text accompanying notes 248-249.

B. Legal Issues

Litigation will likely ensue upon the seemingly inevitable passage of Proposition 227. While the tests established by the federal courts to determine whether civil rights statutes have been violated seem to suggest that the judiciary will ultimately approve the Initiative's mandates, the evolution of civil rights laws display a great deal of deference to local districts.

To view the development of civil rights law one need only examine the present state of bilingual education litigation through the 1997 case, *Quiroz v. State Board of Education*.[373] Plaintiffs brought an action to halt the implementation of a program taught entirely in English based on Title VI and the EEOA.[374] A California federal district court did not find a violation of the either statute.[375] The court did not analyze the Title VI complaint because the plaintiffs produced no evidence of discriminatory intent or effect.[376] Because California interpretations of federal law follow *Lau*, a school district not in violation of the EEOA would not be found to violate Title VI because they share the same effects test.[377] The court strictly followed the three prong test established in *Castaneda v. Pickard* [378] used to determine whether states have taken "appropriate action to overcome language barriers that impede equal participation" mandated by the EEOA. [379] Under the first prong,[380] the *Quiroz* court found that a program substantially based on English immersion did not violate the EEOA because the "the District's English language-based instruction is within the mainstream of academic and professional theory and research in the field."[381] Presumably, the English sheltered immersion program established by Unz and utilized by nearly twenty percent of California schools[382] would be considered to be within the mainstream of professional theory and research. The second prong basically requires that allocations be made and teachers be sufficiently trained.[383] The third prong requires that the effectiveness of programs be evaluated.[384] The second and third prongs are generally regarded as retrospective examinations concerning the implementation and effectiveness of the established programs.[385] Because the Initiative has not yet passed, an examination utilizing the prongs prospectively would be very difficult and largely impractical. However, the *Quiroz* court looked prospectively and found acts of designing a program, purchasing educational material, and creating a process to gauge the success of the plan met the prescriptions of the test.[386] Upon passage of the Initiative, as long as proper steps are taken to train teachers and create a state wide system of evaluation, Proposition 227 would be lawful.

373. No. CIV.S-97-1600WBS/GGH, 1997 WL 661163 (E.D. Cal. Sept. 10, 1997).
374. *Id.* at *1.
375. *Id.* at *3, *6.
376. *Id.* at *3.
377. *See supra* text accompanying notes 221, 235-237.
378. 648 F.2d 989, 1009 (5th Cir. 1981).
379. 20 U.S.C. § 1703(f) (1994).
380. *See supra* text accompanying note 225.
381. *Quiroz*, 1997 WL 661163, at *5.
382. *See supra* text accompanying note 303.
383. *Castaneda*, 648 F.2d at 1010.
384. *Id.*
385. *Quiroz*, 1997 WL 66163, at *5-*6; *see supra* text accompanying notes 226-227.
386. *Quiroz*, 1997 WL 66163, at *5-*6.

The low standard of "appropriate action" created by *Castaneda* can itself be viewed as a display of judicial deference to local school districts. Its retrospective nature restricts the ability of courts to interfere in the decisions of a school district, unless it completely fails to act. Implementation of most systems to teach LEP children is viewed as a remedy under current federal law, not as grounds for a complaint. Under an effects test, the harm must take place before judicial intervention occurs. Current federal law simply does not encompass the sort of protections that LEP students and school districts require in this case. The harm in the instance of the initiative is not indifference, but the destruction of discretion.

While the *Castaneda* test likely allows the implementation of Proposition 227, the development of the test suggests that local discretion should be protected. The *Quiroz* decision partially upholds school districts discretion based on the "lack of judicial expertise and the traditionally broad discretion of localities to formulate educational polices."[387] This sort of language is taken directly from *Castaneda*.[388] In 1981, the *Castaneda* court observed that the *Lau* court did not require relief in the form of native instruction,[389] the Lau Guidelines had no administrative authority,[390] and that by the use of the phrase "appropriate action," Congress "intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA."[391] In light of the amount of discretion given to school districts by the Supreme Court in *Lau* and by Congress in the language of the EEOA, the courts sought to fulfill their obligations as interpreters of the law, "without unduly substituting [their] educational values and theories for the educational and political decisions reserved to state or local school authorities or the expert knowledge of educators."[392] The *Castaneda* test contains such broad language in order for schools to implement a method of instruction that fulfills the needs of its students.[393] Educators were to examine the circumstances and resources that they had at their disposal and make a good faith effort to meet the needs of their students.[394] This deference applies just as strongly to school districts who examine their circumstances and conclude their students could best be served through native-language instruction. Just as the Supreme Court in *Lau* placed the decision on how to educate children in the hands of local officials, California federal courts have consistently recognized that a substantial amount of discretion should be afforded to school districts, as in *Teresa v. Berkeley Unified School District*[395] and *Quiroz*.

387. *Id.* at *4.
388. *See Castaneda*, 648 F.2d. at 1009.
389. *Id.* at 1006.
390. *Id.*
391. *Castaneda*, 648 F.2d at 1009.
392. *Id.*
393. *Id.* at 1009-10.
394. *Id.* at 1009.
395. 724 F. Supp. 698, 713 (N.D. Cal. 1989); *see supra* text accompanying notes 231-232.

C. Educator's Reactions

The fact that civil rights statutes may not provide protection for plaintiffs claiming civil rights violations, does not translate into a general acceptance by local educational authorities. The proposition has virtually no support from California's education establishment.[396] This occurrence is not only a reaction from school boards who hope to avoid losing the ability to decide which program belongs in their school, but equally as importantly, from teachers who believe in the system their school presently has in place. James Lyons, executive director of the National Association for Bilingual Education, remarked that he "sense[d] that teachers are in a fighting mood," and they would break the mandates of the Initiative if it became law.[397] The Initiative provides a means for instructors and educators to be found legally liable,[398] so such a threat carries tangible consequences.

Educators' responses to the Initiative are not surprising. In *Forked Tongue,* Rosalie Pedalino Porter wrote of the difficulty she encountered while attempting to change the strictly defined bilingual education guidelines established by bilingual education advocates.[399] Further, Tuchman herself has recounted her struggle to implement a method of instruction she found effective and that has produced commendable results.[400] The same frustration that the two teachers met while trying to improve the education of LEP students will be felt by teachers who are now part of successful programs. Tuchman was able to persevere under a system that allowed some flexibility for school districts.[401] Although administrators initially opposed her method of instruction, she proved that the method was effective for her school's situation.[402] The flexibility of the system in place, even before the last shift in state School Board policy, allowed an innovative program to continue. Proposition 227 is not intended to allow the same opportunity for any school district that does not currently have a program similar to that of the Unz Initiative.

D. Parental Concerns

Despite an increasing shift toward English instruction, there are cases where the parents of immigrant children have expressed a desire that their offspring be taught in classes that utilize English instruction. The authors of the Initiative point to the demonstration of immigrant parents at Los Angeles' Ninth Street Elementary school as an example of that desire.[403] The Initiative spokespersons also persuaded Jaime Escalante to join the Initiative. Escalante acts as a model for immigrants whose beliefs opposing native-language instruction are so strong as to remove their children from native-language

396. *See, e.g.*, Anderson, *supra* note 295, at A1.
397. *Id.*.
398. *See supra* text accompanying note 52.
399. Porter, *supra* note 50, at 14-58.
400. *See supra* text accompanying notes 48-49.
401. *See supra* text accompanying notes 48-53.
402. *See supra* text accompanying notes 47-53.
403. *See supra* text accompanying note 21.

instruction programs.[404] In the cases involving Escalante and the demonstrators, however, the immigrant parents had the option of removing their children from bilingual education classes.[405] The final threat against discretion proposed by the Initiative is in the form of an immigrant parent's choice of programs.

In an effort to give parents a slight choice in programs, the Initiative provides a waiver process that may allow a child to be taught in a classroom utilizing native-language instruction.[406] In actuality, however, the waiver process provides little alternative to the Initiative's program. The situations when a waiver will be granted are limited to cases where a child either reads at a fifth grade or at the average level for his grade, when schools officials believe that a child over 10 years old would be better suited by a different type of program, or when the child has special educational needs.[407] The first two waivers hardly apply to younger children because a child who reads at his grade level is, by definition, not an LEP student.[408] Further, most LEP students enter school at the kindergarten or first grade level.[409] The third waiver only applies in cases where a child needs special assistance for reasons beyond their lack of ability to speak English.[410] Twenty other parents must obtain a waiver in a particular school before a native-language program will be created. Otherwise, the parents will be forced to transfer their child to another school.[411] Unless a school district's administration is amenable to granting waivers and interprets waiver conditions very broadly (and contrary to the intentions of the authors), receiving a waiver would be difficult enough for a lone immigrant child, let alone twenty. A waiver guarantees little, as in most cases a parent would have to rely on many other parents to receive a waiver before a native-language classroom will be created.

The second problem arises in the context of a parent who believes her child is not ready for a mainstream classroom. Although the Initiative contains no language concerning parental consultation on whether a child will join a mainstream classroom, Sherri Annis, spokesman for the Initiative, asserted that "the teacher and parent would decide jointly to move the child into a mainstream classroom . . . . If the child is not ready, s(he) can stay in an immersion class at the next grade level."[412] Even in this best case scenario, which the Initiative does not mention, a child who is not ready to enter a mainstream classroom will be placed in a room with different aged learners whose knowledge of English is comparable.[413] The option to leave a child in a classroom that provides some level of extra assistance becomes an unfavorable election when the ability to speak and read English is the only consideration behind the child's placement. The student can either flounder in a mainstream classroom or remain in an English sheltered immersion classroom performing non-English work below his or her ability.

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404. *See supra* text accompanying notes 61-63.
405. CAL. EDUC. CODE § 52173 (West 1989).
406. *See supra* text accompanying notes 314-320.
407. *See supra* text accompanying notes 315-318.
408. *See supra* note 14.
409. Sherri Annis, *supra* note 359.
410. *See supra* text accompanying note 318.
411. *See supra* text accompanying note 319.
412. Sherri Annis, *supra* note 359.
413. *See supra* text accompany note 313.

In both instances that Initiative leaders cite for the proposition that immigrant parents want their children to be taught in English, the parents of the children were able to have their children placed in a classroom of their choice—a mainstream classroom. A parent who is unhappy with a method utilizing native instruction can remove her child from that program and place him in a mainstream classroom.[414] After the passage of the Initiative, a parent who is unhappy with a mainstream classroom may have great difficulty finding a program where the child's first language is spoken.

V. Lessons to be Learned From the Unz Initiative

History and a careful examination of Proposition 227 suggest that despite the likely passage of the Initiative, California LEP students should be spared its mandates. Nonetheless, its strong popular support demands an examination of lessons that can be learned from its creation and likely implementation. A recent response, or lack thereof, from President Clinton regarding the Initiative is a helpful tool to ponder the Initiative's teachings.

As early as January of 1998, President Clinton expressed a desire to analyze the Initiative and its potential effects.[415] Despite having supported native-language programs in the past, he took a cautious approach and declined to immediately spring into the debate.[416] Meetings with several people, including senior aids and the Vice President have been held, and Ron Unz has discussed the measure with the President.[417] As of mid-March 1998, President Clinton has refrained from opposing or endorsing Proposition 227.[418]

At a meeting with civil rights leaders in December of 1997, Clinton discussed the Initiative and elucidated his thinking on the subject.[419] The President explained that immigrant parents "are concerned about whether their children stay in programs for too long, or whether the programs are sufficiently effective to let them learn everything else as well as they need to learn."[420] The President's statement is particularly apt regarding California and its immigrant parents. The Initiative has shed light on the fact that many immigrant parents believe their children remain in bilingual programs longer than they should. The reported catalyst of the Initiative was a demonstration against the bilingual education program in a Los Angeles school by immigrant parents.[421] If school districts are to be granted the wide discretion that federal courts and the state School Board allow, they must remain responsive to the parents they serve. Appropriately, after the Ninth Street School demonstration, changes were made to improve the bilingual education program and shorten the time period from initial enrollment to transfer to mainstream classes.[422] However, recognition of

414. CAL. EDUC. CODE § 52173 (West 1989).

415. Louis Freedberg, *Clinton's Silence Alarms State's Bilingual Ed Backers*, S.F. CHRON., Mar. 17, 1998, at A10.

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *See supra* text accompanying notes 21-22.

422. Gain for English-Only Classes-LAUSD Deserves Praise in an Effort That's Far From Complete, *supra* note 22, at B8.

some immigrant parents' desire to place their children in English classrooms does not necessarily demand the complete overhauling of California's educational system. It simply means that schools should consider the desires and goals of the parents whose children the schools serve.

Secondly, a White House aide explained the President's lack of immediate opposition as indicative of his desire to formulate an approach that would both express objection with the Initiative as too excessive and assert the need for the reform of the present system.[423] The President's approach to the controversy and the Initiative exhibited the need for reform of a system without clear legislative guidelines. In reaction to the Initiative, members of the California legislature are attempting to pass a bill that would basically codify the policy change of the state Board and hold districts accountable for not producing positive results.[424] There are presently few penalties for districts that do not effectively teach LEP children English while demonstrating progress in other subjects.[425] This sort of legislation ensures that school districts maintain discretion but effectively meet the needs of their students regardless of the program they choose to implement. Because rather permissive federal law holds school districts accountable, more regulation of program effectiveness is necessary. It is difficult to determine what effect this legislation would have on the electorate if passed before polling occurred, but the Initiative has forced lawmakers to seriously consider the problems with the current system.

Finally, the President noted that Latino voters are in favor of the Initiative.[426] Speculation abounds that the President may be withholding opposition because he does not want to harm the current high approval ratings Democrats hold among California Latinos, a majority of whom support the Initiative—meaning that the President may be allowing politics to interfere with any judgment (or a decision to withhold judgment) in the name of politics.[427] This is not a new phenomenon in the controversy involving bilingual education. What began as a small program to support children who could not speak English became a symbol of federal government recognition of the Hispanic community. A backlash ensued that turned a process of learning into a representation of anti-American impulses. Ron Unz and Gloria Tuchman, despite their claims to be solely concerned with the educational aspects of the debate, are at least partially concerned about political life after the Initiative.[428] The politicization of bilingual education demotes the importance of its goal—namely, finding the best way to educate children.

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423. Freedberg, *supra* note 415, at A10.

424. Eric Bailey & Nick Anderson, *California and the West Democrats Seek New Bilingual Education Plan Reform: Facing Drive to Virtually Ban Such Instruction, Leaders Back Bill to Give Districts a Freer Hand in Picking Best Way to Teach Pupils Who Aren't Fluent in English. Initiative Co-Sponsor Unz Assails Effort*, L.A. TIMES, Jan. 27, 1998, at A3.

425. *Id.*

426. Freedberg, *supra* note 415, at A10.

427. *See id.*

VI. Conclusion

The bilingual education debate has been anything but static. Bilingual education has been transformed from a civil rights imperative to a symbol of radicalism and finally into a representation of school district autonomy. The lack of concrete evidence pointing to a particular method of instruction adds to bilingual education's anomalous and often frustrating nature. Perhaps, however, America expected too much of it at its inception. When research suggested that it was not the panacea for language minorities' ills, a backlash of frustration ensued that was just as unfounded as the almost immediate adoption of the teaching method without sufficient recognition of its difficult implementation. This frustration has reached such a titanic level that an entire state is willing to place immigrant children in the hands of an unproven system of education.

Over a long period of time, the law and scientific investigation have merged to produce a scheme for bilingual education that is far from perfect. Its permissiveness often allows ineffective programs to continue. Destroying many successful programs in the name of frustration, however, is not the answer. The system needs reform, not dissolution. The Unz Initiative brings bilingual education's problems to the forefront of national awareness, and for that immigrant children and parents should be grateful. Nevertheless, that is the extent of the Initiative's usefulness. The stakes are too high, and the past suggests that adopting the Initiative would be unwise and potentially harmful.

AFTERWORD

On June 2, 1998, sixty-one percent of the California electorate voted in favor of Proposition 227.[429] Despite claims by supporters of the Initiative and earlier polls suggesting that the mandate enjoyed widespread support by minorities, in the aggregate, the proposition was not supported by immigrant groups. Exit polls conducted by CNN and the Los Angles Times revealed that Latinos overwhelmingly rejected the ban on native-language instruction.[430] While a majority of Asian Americans voted for the measure, in locations of highly concentrated non-English-speaking Asian Americans, the minority group also voted against its imposition.[431] Regardless of opposition by the groups most affected by its implementation, Proposition 227 went into effect August 2, 1998.[432] However, the consequences of its passage were not what Unz had hoped for, nor what its opponents feared. The Initiative, as passed, has undergone changes that have limited its efficacy as a mechanism for drastic change. Further, school districts learned to use a significant loophole within the Initiative, with which districts have protected their native-language programs.

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428. *See supra* text accompanying notes 31-32, 56-57.

429. *See* Ramon G. McLeod & Maria Alicia Guara, *Prop. 227 Got Few Latino Votes / Early Polls Had Claimed More Minority Support*, S.F. CHRON., June 5, 1998, at A19.

430. *Id.*

431. *Id.*

432. 1998: YEAR IN REVIEW Bilingual Education Prop. 227's Effects Varied by District, PRESS-ENTERPRISE, Dec. 27, 1998, at B03, *available in* 1998 WL 19816828.

The Initiative's creators' objective of dictating the system of instruction for all LEP students has gone unrealized.

A degree of relief was provided for detractors of the law when the California State Board passed temporary emergency regulations in July 1998, which, with a few minor changes, were made permanent in early October 1998.[433] Proposition 227 defined the new programs as being taught "nearly all in English." However, the Board refused to limit the extent to which school districts could employ native-language instruction by delineating a percentage for the phrase, thereby, granting school districts a degree of discretion.[434] According to board President Yvonne Larsen, "If there's a number, it could be misconstrued as a mandate. We want local districts to have as much flexibility and local control (as possible)."[435] "Nearly all in English" has been defined in a variety of ways.[436] Additionally, the board allowed school districts to retain a LEP child in special immersion classes for a second year if she is not ready for mainstream classes.[437] This allows for flexibility, but retaining a child for a second year in an immersion class is, as previously noted, problematic.[438]

Despite the board's actions of instilling a degree of flexibility to the law, reactions to the execution of the Initiative have not been overwhelmingly positive. Administrators[439] and teachers[440] were involved in protests involving the passage of the Initiative; student protests[441] ensued as well. California's largest teachers' union filed suit to negate the section of the law that provides parents with standing to file suit against teachers, administrators and school boards who do not comply with the law.[442] Further, three school districts sued the state in an effort to force the state Board of Education to consider entire school district waivers from the regulations.[443] While Alameda County Superior Court Judge Henry Needham ruled that the state Board of Education must consider the petitions,[444] the Board has refused to grant any district-wide

433. State Board of Education, English Language Education for Immigrant Children -- Proposition 227 Regulations, (visited Jan. 24, 1999) <http://www.cde.ca.gov/prop227.html> [hereinafter Permanent Regulations]; Lori Aratani, Prop. *227 Guidelines Finalized English Use: State Board Leaves School Districts Some Latitude*, SAN JOSE MERCURY NEWS, Oct. 9, 1998, at 3B.

434. Aratani, *supra* note 433, at 3B.

435. *Id.*

436. *See infra* text accompanying notes 477-469.

437. Permanent Regulations, *supra* note 433, at § 11301(a),(c); Aratani, *supra* note 433, at 3B.

438. *See supra* text accompanying notes 412-414.

439. Jennifer Hamm, *Assistant Principal Quits, Says School Promotes Racism Education: Former Channel Islands High Administrator Says He May Sue District. Trustees Have Previously Rejected Similar Charges*, L.A. TIMES, Dec. 11, 1998, at B1; *Superintendent as Jailbird Bill Rojas Says He Prefers Incarceration to Enforcing Prop. 227, Suggesting That Students Should Defy the Law Whenever They Want*, S.F. EXAMINER, June 9, 1998, at A16.

440. James Crawford, What Now for Bilingual Education?, Vol. 13, No. 2 Rethinking Schools 1 (Winter 1998/1999) <http://www.rethinkingschools.org/Archives/13_02/bimain.htm>.

441. Hamm, *supra* note 439, at B1; Tanya Schevitz, *Students Mobilize for Change / Youth Group Has Concord Teens Become Activists*, S.F. CHRON., Dec. 17, 1998, at A25.

442. Nick Anderson, *California and West Teachers Sue to Block Liability in Bilingual Education Law Schools: Union Lawsuit Asks Judge to Strike Portion of Prop. 227 That Holds Staff Personally Responsible for Repeated Violations*, L.A. TIMES, Dec. 4, 1998, at A3. Additional plaintiffs to the suit include the Association of Mexican American Educators, the California Association for Asian-Pacific Bilingual Education, the National Association for Bilingual Education, the Association of California Adminstrators, as well as three individual teachers. *Id.*

443. Nanette Asimov, *Judge Delivers Large Bilingual Education Win / School Districts Can Request Waivers from Proposition 227*, S.F. CHRON., Aug. 28, 1998, at A21.

444. *Id.*

waivers.[445] Further, federal courts shunned efforts to block the implementation of the Initiative.[446] In *Valeria v. Wilson*,[447] the plaintiffs requested an injunction barring the initial implementation of the law based on probable EEOA, Title VI and equal protection violations,[448] and brought a Supremacy Clause challenge.[449]

The court denied the injunction request, finding the challenges unpersuasive.[450] First, the court examined the EEOA claim through the *Castaneda* test.[451] As predicted previously in this note, the EEOA does not provide adequate protection because the *Castaneda* test looks at the actions of offenders retrospectively.[452] Schools had not yet started applying the proposition's model in July of 1998 (when the court released its opinion), thus two of the three test's prongs were inapplicable.[453] Similarly, the court rejected the Title VI claim because the plaintiffs' could not provide evidence of past or inevitable disparate impact created by execution of the yet to be implemented law.[454] The plaintiffs also made the argument that the section of the Initiative delineating methods to have the Initiative amended violated equal protection doctrine because such amendments would necessitate higher requirements than most legislation.[455] The court dismissed the equal protection claim based on the assertion that because bilingual education is not guaranteed by the federal constitution, the California electorate was free to reject it.[456] Additionally, the court noted that Section 325 of Proposition 227 allows for the severance of any constitutionally invalid portion of the law. According to the court, "even if Section 335 [section regarding methods to overturn law] of Proposition 227 does violate the equal protection clause, that alone would not entitle plaintiffs to an injunction restraining all of Proposition 227 from being put into effect."[457] Finally, the court discarded the Supremacy Clause contention by reasoning that because federal law (namely the EEOA and the Bilingual Education Act) does not require native-language instruction, then California's law does not conflict with prior federal legislation.[458] Despite the court's dismissal of the plaintiffs' complaints, lawsuits based on EEOA claims will likely continue as plaintiffs acquire evidence of Proposition 227's results.

While the courts have been largely unsympathetic to opponents of the new law, many school districts and parents have taken it upon themselves to decide the extent that the new law will affect their students' educational programs. Because Proposition 227 allows for the creation of native instruction classes when twenty LEP children are granted waivers,[459] districts may preserve

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445. Anderson, *supra* note 442, at A3.
446. Asimov, *supra* note 443, at A21.
447. 12 F. Supp.2d 1007 (N.D. Cal. 1998).
448. *Id.* at 1015.
449. *Id.* at 1021.
450. *See id.* at 1027-28.
451. *Id.* at 1017-21.
452. *See supra* text accompanying notes 378-386.
453. *See* Valeria v. Wilson, 12 F. Supp. at 1020-21.
454. *Id.* at 1023.
455. *Id.* at 1024. "Section 335 provides that Proposition 227 can be amended only upon approval by the electorate, or by a statute passed by two-thirds vote by each house of the legislature and signed by the governor." *Id.*
456. *Id.* at 1025.
457. *Id.* at 1025.
458. *Id.* at 1021-22.
459. Proposition 227, *supra* note 12, at § 310.

their primary language classes by conferring the exceptions.[460] Many districts have gone to great lengths to inform parents of the possibility of obtaining waivers. Some districts' administrators held meetings with parents to familiarize them with the waiver process,[461] some districts made an affirmative effort to encourage parents to request waivers,[462] and at least one school board president has taken it upon himself to make personal visits with immigrant parents.[463] These efforts have led to many waiver requests, thereby allowing native-language instruction to continue.[464] It should be noted, however, that the waiver process contains significant restrictions.[465]

Moreover, even in school districts where few waivers have been requested, it is disingenuous to assume that parents and school districts do not support native-language instruction. Because the state board left school districts to interpret what the law requires in terms of the amount of native language spoken,[466] districts have implemented programs with various levels of primary language imparted.[467] Although many school districts have interpreted the law very strictly and have virtually eliminated native- language instruction,[468] many others allow for significant primary language communication.[469] Because children are taught in native languages in many of California's classrooms despite the new law, parents may not feel the need to request waivers from programs that they view as non-objectional.

On balance, it appears that California school districts have retained significant discretion as to the programs they may decide to implement. However, what occurred subsequent to the passage of the Initiative was not what the creators and supporters of the Initiative foresaw while campaigning for and creating the new law. The co-author of the Initiative, Ron Unz, has made statements critical of the ways school districts have devised programs under the Initiative. He charged that a many districts have "blatantly ignor[ed] the law" and considered suing districts to force compliance with the proposition.[470] Moreover, supporters of Proposition 227 criticized districts that allow the use of

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460. *See* Gigi Hanna, *Fresno Unified Grants 2,400 Prop. 227 Waivers, Most non-English Speaking Students Will Remain in Bilingual Classes*, FRESNO BEE, Nov. 20, 1998, at B2; Elizabeth Chey, *Santa Ana Unified Reigns as Prop. 227 Waiver King // EDUCATION: The District Accounts for 80 Percent of Requests to Opt Out of English Immersion*, ORANGE COUNTY REGISTER, Nov. 20, 1998, at A01; Jennifer Leuer, *Waivers Translate to Bilingual Support, Parents at a Corona School Have Exempted 156 Children from New English-Only Requirements*, PRESS-ENTERPRISE, Dec. 30, 1998, at B01, *available in* 1998 WL 19816951.

461. Leuer, *supra* note 460, at B01.

462. Hanna, *supra* note 460, at B2.

463. Chey, *supra* note 460, at A01.

464. *See, e.g.*, Hanna *supra* note 460, at B2; Chey *supra* note, at A01; Leuer, *supra* note 460, at B01.

465. *See supra* text accompanying notes 406-414.

466. *See supra* text accompanying note 434.

467. Aratani, *supra* note 433, at 3B; 1998: Year in Review, *supra* note 432, at B03; Leuer, *supra* note 460, at B01; Janine DeFao, *School Districts Far Apart on Prop. 227: Bilingual Education Still Taught*, SACRAMENTO BEE, Dec. 6, 1998, at A1.

468. 1998: Year in Review, *supra* note 432, at B03; Sherry Joe Crosby, *Immersion Pupils Progressing; Programs Get Passing Grade*, L.A. DAILY NEWS, Jan. 17, 1999, at N3; DeFao, *supra* note 467, at A1.

469. Aratani, *supra* note 433, at 3B; 1998: Year in Review, *supra* note 432, at B03; Leuer, *supra* note 460, at B01; DeFao, *supra* note 467, at A1.

470. DeFao, *supra* note 467, at A1.

native languages and grant too many waivers.[471] These critics are ignoring the flexibility created by the state school board's emergency regulations and waiver loophole within the Initiative itself. Perhaps the clearest expression of the intent of the proponents of the Unz occurred prior to the passage of the Initiative but after the state school board gave districts the unfettered discretion to choose a program without native-language instruction.[472] At that point in California education history, school districts retained the ability to use one of any number of programs, including sheltered immersion. Nonetheless, a spokesman for the yet to passed Initiative suggested that allowing a school district to choose between programs was unacceptable.[473] The goal was the elimination of certain forms of instruction. Regardless of native-language instruction's detractors' view of what Proposition 227 meant to do as opposed to what the law currently mandates, primary language instruction is still allowed in California's schools. Discretion, at least for now, has survived due to the actions of activist administrators and concerned parents.

Despite the Initiative's failure to destroy school district discretion, its legacy looms portentously. Ron Unz complained that the proposition is being ignored in California because English is not the only language spoken in classrooms. The waiver process, according to opponents of primary language instruction, is being misused to allow circumvention of the Initiative's mandates. The real danger to school district discretion, therefore, may not exist in an Initiative that has become somewhat ineffectual, but in what Unz and his backers have learned in drafting and propagating Proposition 227.

Already a movement has begun to pass a similar proposition in Arizona, which, like California, allows for the creation of law through the Initiative process.[474] Ron Unz joined the creators of the proposition as they filed the ballot Initiative at the Arizona Secretary of State's Office.[475] English for the Children Arizona hopes to acquire the 112,000 signatures necessary to place the Initiative on the 2000 ballot.[476] This group of potential education reformers seems to have a learned from their California counterparts. While English for the Children Arizona's "English Language Education for Children in Public Schools" parallels Proposition 227 in its primary goal (one-year English immersion classes followed by a transfer to mainstream classroom), the new Initiative attempts to solidify the ambiguities that California school districts utilized to retain their discretion.[477] The immersion classes are again described as taught "nearly all in English," however, the section describing the immersion classes continues on to state that, "Although teachers may use a minimal amount of the child's native language when necessary, no subject matter shall be taught in any language other than English . . . ."[478] This language appears to be crafted in response to many California's school districts' decision to interpret "nearly all English" as any amount they deem appropriate. Moreover, the Arizona waiver

471. Crosby, *supra* note 468, at N3.

472. *See supra* text accompanying note 293.

473. *See supra* text accompanying note 294.

474. *Bilingual Education Targeted*, FRESNO BEE, Jan. 7, 1999, at A4.

475. *Id.*

476. Sarah Tully Tapia, *Rowdy Group Disrupts Anti-Bilingual Education Event*, ARIZ. DAILY STAR, Jan. 7, 1999, at 1A.

477. *See* English for the Children Arizona, English Language Education for Children in Public Schools, (visited Mar. 2, 1999) <http://www.onenation.org/aztext.html>.

478. *Id.* at § 15-751(5).

process is more restrictive and requires school districts to complete more steps before granting a waiver to children with special individual needs[479] than does Proposition 227.[480] Again, this seems an attempt to rectify the waiver loophole that California districts exercised in order to protect their native-language programs. Ron Unz and those that agree with his sweeping educational reformations are learning how to draft Initiatives that could destroy school districts' ability to chose primary and other language programs that diverge from their view.

The decades long debate over bilingual education has yet to provide a definite solution to the difficulty that school districts face when providing special instruction to immigrant children. What it has provided, however, is evidence that stripping discretion away from school districts is not the answer to a complex situation. It is too early to rule on or even predict the effects of California's experiment, but Unz and his supporters are insuring that an unproven system of education will alter the schooling of countless children in California and perhaps other states. Whether this is wise or not has yet to be seen, but its consequences are to be reflected on those who do not deserve to confront the risk.

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479. *See id.* at § 15-753.

480. *See* Proposition 227 *supra* note 12, at § 311.