The Politics of Discretion: Federal Intervention in Bilingual Education

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Historically, state and local educators have exercised considerable discretion in designing the school curriculum. Only boards of education, which typically represent the values of an electoral majority, traditionally have had authority to constrain that discretion. Beginning with the challenge to segregation in the schools, however, minority communities began to express growing dissatisfaction with pedagogical discretion restrained only by majority will. They demanded more vigorous federal oversight of the schools to ensure that the educational process did not underserve minority groups.

In keeping with these developments, the federal government during the late 1960s began to take a more active role in formulating bilingual education policy. Advocates of federal intervention initially focused on the need to include linguistic minorities fully in the educational system in the face of local prejudice. Upon discovering that state and local educators had failed to meet the needs of linguistic minority students, however, congressional policymakers recast the problem in terms of pedagogical effectiveness rather than civil rights. In light of the uncertainties associated with educating these students, federal policymakers stressed the importance of designing and implementing adequate instructional programs.

Eventually, the federal government endorsed programs that rely heavily on native-language instruction, such as transitional bilingual education (TBE) and bilingual-bicultural programs. TBE programs employ subject-matter instruction in a student’s native language until the child is sufficiently proficient in English to participate in a regular classroom.1 Bilingual-bicultural education programs not only promote mastery of

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1. To facilitate English-acquisition through TBE programs, the child is usually taught to read in both the native language and English. OFFICE FOR CIVIL RIGHTS, TASK-FORCE FINDINGS SPECIFYING REMEDIES AVAILABLE FOR ELIMINATING PAST EDUCATIONAL PRACTICES RULED UNLAWFUL UNDER Lau v. Nichols, § IX, pt. 5 (1975) [hereinafter LAU GUIDELINES], reprinted in

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English but also foster native-language proficiency and preserve respect for a child’s cultural heritage.\(^2\)

Critics have increasingly questioned the federal government’s endorsement of these programs. Some have expressed doubts about the programs’ pedagogical effectiveness; others have argued that the programs fail to socialize children to speak English and acquire “American” values. Opponents of TBE and bilingual-bicultural education programs have urged greater federal support for alternative techniques that emphasize the use of English. One such approach is an English-as-a-Second-Language (ESL) program in which linguistic minority students spend most of the day in regular classes but receive intensive English instruction as well.\(^3\) Another is a structured immersion program in which teachers primarily use English for subject-matter instruction but structure the curriculum in a way that does not assume extensive familiarity with English.\(^4\)

This Article will demonstrate that despite efforts to frame the bilingual education debate as a scientific argument about the appropriate content of the curriculum for linguistic minority students, the controversy actually reflects a battle over the allocation of discretion to make educational policy. Part I of the Article sets forth a framework for analyzing disputes over discretion and describes the parties challenging the discretionary authority of state and local educators. Part II applies the framework to the history of federal intervention in bilingual education to reveal conflicting assertions about the proper allocation of discretion in the educational decisionmaking process. Part III shows how different justifications for federal intervention in bilingual education colored conclusions about the appropriate role of state and local discretion. Finally, Part IV suggests ways in which federal policymakers can strike a better balance between state and local discretionary prerogatives and the requirements of effective bilingual education policy.

\(^2\) BILINGUAL EDUCATION 213, 221 (K. Baker & A. de Kanter eds. 1983); Baker & de Kanter, Federal Policy and the Effectiveness of Bilingual Education, in BILINGUAL EDUCATION, supra, at 33, 35.

\(^1\) LAU GUIDELINES, supra note 1, at § IX, pt. 1, reprinted in BILINGUAL EDUCATION, supra note 1, at 221.

\(^4\) In structured immersion programs, the teacher is fluent in both English and the child’s native language. Children can ask questions about a subject in their native language, but the teacher typically responds only in English. The program may also provide thirty to sixty minutes of native-language instruction each day. Id.
Traditionally, state and local officials have enjoyed broad discretion in designing and implementing the educational curriculum. Officials have been able to select from a wide range of options in constructing a school’s programs, and their decisions have been subject to minimal federal review. Policymakers have justified vesting considerable discretion in state and local officials on the ground that these officials’ experience uniquely equips them to formulate the school curriculum. Their experience includes not just a technical understanding of how children learn but also a sensitivity to local conditions. This sensitivity results from being familiar with the special characteristics of the student body and the surrounding community as well as with budgetary and political constraints.5

Nevertheless, the perceived failure of state and local authorities to meet linguistic minority students’ needs eventually led to federal intervention. Since the federal government first became involved in bilingual education policymaking in 1968, four major groups have challenged state and local educators’ discretionary prerogatives in developing curricula for non-English-proficient (NEP) and limited-English-proficient (LEP) students: (1) linguistic minority parents and community leaders; (2) educational experts; (3) federal officials, especially administrators and judges; and (4) English-only reformers seeking to promote socialization into the American way of life. Each of these groups has shaped federal bilingual education policy. Because each group characterized the problems involved in bilingual education differently, each has offered distinctive justifications for federal intervention and accordingly favored different methods of constraining state and local discretion.

Restraints on discretion can operate either before or after a substantive decision is made. Substantive rules can operate as predecision constraints by limiting the range of acceptable outcomes available to decisionmakers. Alternately, procedural rules can constrain discretion in advance by enhancing access to the decisionmaking process and minimizing the opportunities for any elite faction to monopolize the process. Access can be improved if decisionmakers are required to publicize their deliberations or solicit input from affected constituencies. To deter the entrenchment of a powerful elite, the composition of the decisionmaking

5. For a discussion of the tradition of local control over education, see R. Salomone, Equal Education Under Law 2, 105 (1986).
body can be altered by establishing staggered terms or larger voting bodies. Voting rules can accomplish a similar result, for example, by requiring a supermajority. Once a substantive decision is made, external review can limit discretion. The reviewer’s scrutiny can be either strict or deferential; it can extend to evaluating the decision’s wisdom, its procedural fairness, or both.

The four groups pressing for federal intervention in bilingual education have advocated various approaches to restrict state and local discretion over curricular choices. The following section describes each group’s position in turn, stressing how justifications for federal involvement have influenced the type of intervention favored.

A. Linguistic Minority Parents and Community Leaders

Linguistic minority parents and community leaders have typically argued that the insensitivity, indifference, or hostility of state and local educators has prevented NEP and LEP children from benefiting fully from the school curriculum. These parents and their representatives contend that the failure of state and local officials to educate linguistic minority students, as evidenced by low achievement and high drop-out rates, warrants federal intervention to divest these educators of some decisionmaking prerogatives.


9. 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) [hereinafter 1967 House Hearings] (remarks of Rep. Claude A. Pepper of Florida); 91 (statement of Rep. Augustus F. Hawkins of California); 235-36 (remarks of Dr. Miguel Montes, California State Board of Education); 302-03 (statement of Monroe Sweetland, Legislative Consultant, National Education Association for the Western States); 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) [hereinafter 1967 Senate Hearings] (remarks of Senator Ralph Yarborough); 66 (prepared statement of Dr. Faye L. Bumpass, Professor of Spanish and Director of Dual Language Workshops, Texas Technological College); 250 (remarks of Chester Christian, Director, Inter-American Institute, University of Texas at El Paso); 275 (remarks of Harold R. Dooley, Director, Valley Association for Superior Education); 305 (remarks of Jesse Trevino, Vice President, Board of Trustees, McAllen Consolidated Independent School District); 325 (remarks of Pete Torres, Jr., Member, City Council of San Antonio); 332 (remarks of Dr. Jacques M. P. Wilson, Chairman, Foreign Language Department, Our Lady of the Lake College); 413 (prepared statement...
While linguistic minority parents and community leaders have agreed that past discrimination necessitates federal incursions on state and local discretion, they differ over how federal policy can best redress their grievances. Some seek greater participation by linguistic minority parents and community leaders in decisions that affect the education of NEP and LEP students.\(^\text{10}\) By expanding parental and community input into the decisionmaking process, they hope to limit the ability of school officials to impose curricular choices that are unresponsive to linguistic minority students' needs. Supporters of this view argue that direct participation by parents and community representatives not only would improve the instructional process but also would empower a previously excluded community. This empowerment could confer self-esteem, respect, and dignity on linguistic minority groups.\(^\text{11}\)

By contrast, other parents and community leaders prefer to delegate responsibility for policing school districts to the federal government. Perhaps recognizing that linguistic minority communities command limited resources, these parents and leaders are less interested in a direct role in educational decisionmaking. Instead, they demand that federal agencies and courts devote sufficient resources to ensure that school districts meet NEP and LEP students' needs.\(^\text{12}\) They advocate limiting state and local discretion through federal regulations that restrict the instructional options available to school districts. They also seek strict standards for federal review of state and local decisionmaking. These parents and leaders have been less concerned with the long-term, indirect benefits of empowerment than with the immediate, direct benefits of strong federal enforcement.\(^\text{13}\)

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\(^{11}\) See H. BOYTE, COMMUNITY IS POSSIBLE 125-59 (1984) (describing how grass roots organizing and community empowerment restored a sense of dignity and self-respect to poor Chicano neighborhoods in San Antonio); see also P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 98-101 (1978) (analyzing how "the enlargement of legal participation goes beyond increasing the democratic worth of the legal order" by enhancing institutional competency through cooperative problem-solving systems). The demands for greater participation in the decisionmaking process were not limited to debates over bilingual education; rather, these demands reflected a more general concern during the 1960s with ensuring "full citizenship for all" by developing responsive legal and political systems that would encourage widespread participation. Id. at 5-7.


\(^{13}\) See id. at 507-10 (describing bilingual education advocates' efforts to strengthen the federal role in bilingual education).
B. Educational Experts

Educational experts have justified federal intervention in state and local decisionmaking on grounds of competence. These experts have questioned local officials' ability to make sound curricular decisions regarding NEP and LEP students because school personnel lack sufficient information about the ways in which these children learn. In their view, school districts are apt to be unable or unwilling to undertake the experimentation necessary to overcome pedagogical uncertainties. Moreover, school districts that conduct experiments often do so improperly, analyze the findings incorrectly, or fail to disseminate their results.\(^\text{14}\) Accordingly, educational experts believe that the federal government must intervene to promote experimentation, coordinate research, and share information.

Nevertheless, experts disagree over the proper scope of the federal role. Those who see the federal government as merely facilitating bilingual education research do not favor restricting state and local decisionmakers' prerogatives. Federal experimentation, they suggest, should supplement, not supplant, state and local decisionmaking by giving school districts more information about program effectiveness.

Other educational experts support a more intrusive federal role. They advocate using federally sponsored studies as a means of forcing school districts to meet the needs of NEP and LEP students. Federal studies would form the basis for external review, permitting evaluators to scrutinize a district's decision after the fact. Federal policymakers could use these findings to assess not only a program's effectiveness but also the adequacy of state and local decisionmaking processes.\(^\text{15}\)

Still others claim that once educational experts decide upon an appropriate means of meeting linguistic minority students' needs, the federal government should mandate adoption of such methods.\(^\text{16}\) According to this view, a school official's disregard of definitive expert findings is necessarily an abuse of discretion; under such circumstances, the federal government may dictate curricular choices without infringing on legitimate state and local discretion.


\(^{15}\) See G. Benveniste, *Professionalizing the Organization* 207-11 (1987) (differentiating between evaluations used to promote organizational learning and those designed to reward and punish members of the organization).

\(^{16}\) See Rossell & Ross, *supra* note 14, at 388 (describing how the task force of educational experts responsible for drafting the \textit{Lau} Guidelines was willing to require TBE programs as the best, if not the only, instructional approach to meet NEP and LEP students' needs).
C. Federal Officials

In arguing that school districts should be divested of some of their discretion, some federal officials contend that national decisionmaking processes are superior to those of state and local governments. These officials note that state and local school administrators have systematically neglected NEP and LEP students' needs and claim that the federal government is likely to be more responsive to these concerns. In their view, federal decisionmakers are less susceptible than school districts to pressures exerted by local majorities, making them better able to protect linguistic minorities from biased treatment.\(^{17}\) Moreover, federal decisionmakers have greater access than state and local educators to top educational experts. Therefore, federal officials are better able to amass the technical information necessary to make sound educational policy for NEP and LEP students.\(^{18}\)

Those who understand the federal role as protecting linguistic minorities from discrimination have sought to expand the existing framework of civil rights protections to accommodate NEP and LEP students. This framework employs, in part, centralized control to restrict the options available to state and local decisionmakers. For example, federal law prohibits schools from employing discriminatory techniques that segregate racial and ethnic minorities. Some federal decisionmakers have sought to extend this enforcement regime's protections to linguistic minority students.\(^{19}\) These officials have urged that federal agencies and courts apply the same demanding scrutiny to decisions disadvantaging linguistic minorities as they do to those adversely affecting racial and ethnic minorities.\(^{20}\)

Others who concentrate on amassing pedagogical expertise recommend expanding the national educational bureaucracy, rather than federal civil rights agencies. The federal educational bureaucracy focuses on enhancing the resources available to state and local officials, with whom it has cultivated cooperative, ongoing relationships. Proponents of this approach hope to increase federal funding of programs for NEP and LEP students, coordinate school districts' efforts to provide programs, promote research and experimentation, and disseminate information about effective instructional techniques. The federal educational bureaucracy

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\(^{17}\) See U.S. COMM'N ON CIVIL RIGHTS, A BETTER CHANCE TO LEARN: BILINGUAL-BICULTURAL EDUCATION 14-21 (1975) (describing state and local educators' failure to meet linguistic minority students' needs and nature of federal response).

\(^{18}\) See Rose-Ackerman, Risk Taking and Reelection: Does Federalism Promote Innovation?, 9 J. LEGAL STUD. 593, 614-16 (1980) (analyzing how the federal government can play a critical role in overcoming state and local reluctance to shoulder the risks of innovation).

\(^{19}\) Rabkin, Office for Civil Rights, in THE POLITICS OF REGULATION 326 (J. Wilson ed. 1980).

\(^{20}\) See id. at 331-32, 338-40 (describing the Office for Civil Rights' (OCR) enforcement techniques).
thus can assume a leadership role without seriously jeopardizing the prerogatives of state and local officials or straining long-term working relationships.\textsuperscript{21}

D. English-only Reformers

English-only reformers demand reallocation of discretion because they believe that schools have not properly inculcated English language skills and "American" values in linguistic minority schoolchildren. These reformers fear that the federal government has capitulated to advocates of linguistic and cultural pluralism. In their view, federal endorsement of TBE and bilingual-bicultural education programs threatens the preeminence of the English language and the American way of life. Some even contend that federal support of these programs jeopardizes national unity by encouraging the "balkanization" of language groups and fomenting separatism.\textsuperscript{22}

English-only reformers have thus supported federal laws that encourage programs with a heavy emphasis on English acquisition, such as ESL and structured immersion. English-only reformers do not wish merely to widen the range of instructional techniques available to local educators, thereby resurrecting state and local discretion. They too favor limiting the options available to state and local officials. Indeed, they want to amend the Constitution to establish English as the official language of the United States. The proposed amendment is designed not only to prohibit federal support of linguistic and cultural pluralism but also to constrain school districts' use of programs that detract from the status of English.\textsuperscript{23} After failing to win support for the amendment at the federal level, English-only reformers have turned to state legislation, municipal ordinances, and popular referenda to restrict pedagogical discretion.\textsuperscript{24} Thus, rather than protecting state and local discretion, their attempts to limit schools' choices in socializing students represent a significant incursion on state and local educators' decisionmaking prerogatives. The ongoing dialogue among state and local educators and the


\textsuperscript{22} Note, The Proposed English Language Amendment: Shield or Sword?, 3 YALE L. & POL'Y REV. 519, 527 (1985) (authored by Joseph Leibowicz) (discussing English language amendment supporters' argument that bilingual education encourages separatism).

\textsuperscript{23} The English Language Amendment: Hearing on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 54-56 (1984) (testimony of Senator S.I. Hayakawa of California) (arguing that the official language amendment would counter the divisive effects of bilingual-bicultural education programs).

\textsuperscript{24} Moran, Bilingual Education as a Status Conflict, 75 CALIF. L. REV. 321, 332 (1987).
groups that have challenged their discretion has been important in shaping federal bilingual education policy. In Part II, this Article will chronicle the history of federal intervention in bilingual education. It will describe how state and local educators, parents and community groups, educational experts, federal officials, and English-only reformers presented their claims in the federal arena and how their relative influence has changed over time. This history will demonstrate how factions came into conflict, either open or muted, and how some developed short-term or long-term alliances. This description of the politics of bilingual education will reveal how the interplay among various groups affected the federal government's responses to demands that it limit state and local discretion in formulating programs for NEP and LEP students.

II

THE HISTORICAL DEVELOPMENT OF FEDERAL BILINGUAL EDUCATION POLICY

During our country's early history, federal policy reflected a preference for accommodating private decisions about language use. The Founders refrained from establishing an official language in the Constitution in part because they did not want to infringe on the religious freedom of those who worshiped in languages other than English. In the late 1800s and early 1900s, controversy developed over German instruction in public and private schools. Anti-German sentiment during World War I eventually stamped out these programs, but not before the Supreme Court upheld the right to teach German in private schools despite state statutes making English the exclusive language of instruction in all educational institutions. The Supreme Court's decision reflected the view that families could freely promote their linguistic choices through private institutions, just as they could their religious and cultural choices. However, the Court never suggested that families could demand that public schools alter their curriculum to satisfy a family's linguistic or cultural preferences. Throughout this early period, then,

27. Meyer v. Nebraska, 262 U.S. 390 (1923); see also Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state cannot prohibit satisfaction of compulsory education requirements through attendance at private schools).
28. Meyer, 262 U.S. at 400 ("[T]he right [of a foreign language instructor] thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] Amendment."); see H. KLOSS, supra note 26, at 73-74.
state and local governments enjoyed considerable discretion in designing the public school curriculum. In fact, the Court's protection of foreign-language instruction in private schools was the only significant instance of federal intervention during this time.

Beginning in 1945, massive social changes began to loosen local community ties. Interstate migration and movement from rural to urban areas increased. Rapid transportation and the growth of the mass media also diminished sectional differences. As local and regional influences declined in importance, Americans became increasingly sensitive to national needs and aspirations. Surprisingly, however, the state and local educational system remained in large part untouched by the increasing federal presence that had affected other governmental agencies. According to some analysts, the educational system was insulated from these changes because "professionals dominated policy formation, schools were isolated from other governmental services, and the public generally accepted the idea that school politics should be nonpartisan—in fact, non-political." Not until 1965 did a major federal grant-in-aid program for education undercut this longstanding commitment to state and local control. Although educators had needed help in financing the costs of burgeoning enrollments after World War II, they only sought funding that would not intrude significantly on their traditional decisionmaking prerogatives, such as subsidies for constructing school buildings and increasing teachers' salaries. However, the Elementary and Secondary Education Act of 1965 (ESEA), which was the most significant education measure in President Lyndon Johnson's "Great Society" program, departed radically from prior funding arrangements that vested discretion in a highly decentralized school system. Primarily in response to demands by civil rights activists, Congress imposed numerous restrictions on the use of funds under the ESEA. Moreover, the Office of Education undertook to monitor state and local programs to ensure that funds were used to

31. Id.
promote federal objectives. These objectives included equalizing economic and educational opportunity for disadvantaged students and eliminating racial discrimination.

The expansion of the ESEA in 1968 to include programs for NEP and LEP students was consistent with these developments. The amendments to the ESEA under the Bilingual Education Act of 1968 initiated the creation of a framework of federal statutes, regulations, and judicial decisions that would go beyond merely protecting private familial choices about language and culture. Eventually, this framework not only would restrict state and local discretion but also would shape familial choices by establishing federal presumptions in favor of TBE and bilingual-bicultural education programs in the public schools.

A. Early Federal Initiatives in Bilingual Education: State and Local Discretion Indicted But Intact

In the late 1960s, an enterprising senator catalyzed Hispanic support for federal intervention on behalf of linguistic minority students. Federal civil rights officials reinforced these tentative policy initiatives. Despite these stirrings, however, the federal government's actions were largely symbolic and had little real impact on state and local discretion. The Bilingual Education Act of 1968 specifically addressed NEP and LEP students' needs. However, it did not impinge seriously on state and local decisionmaking because of its structure as a grant-in-aid program and Congress' failure to fund the Act properly. Title VI of the Civil Rights Act of 1964, as interpreted by the Office for Civil Rights (OCR) in a 1970 memorandum, would ultimately prove the more powerful tool for federal intervention in the education field. Nevertheless, OCR's inability to enforce its memorandum in the early 1970s left state and local discretion intact, at least temporarily.

I. The Bilingual Education Act of 1968

The Bilingual Education Act of 1968, or title VII of the ESEA, was the first piece of federal legislation to focus exclusively on NEP and

35. See K. Bailey & E. Mosher, supra note 21, at 72-159 (detailed account of the Office of Education's enforcement efforts); Murphy, supra note 34, at 172-79, 184-88 (detailing the waxing and waning of the Office of Education's efforts to enforce title I between 1965 and 1972).

36. See E. Mosher, A. Hastings & J. Wagener, supra note 29, at 3; see also D. Ravitch, supra note 29, at 149, 159-60, 234 (noting how a broad consensus on the need to improve educational opportunities for poor children made enactment of the ESEA possible and describing some of the difficulties the federal government encountered in attempting to monitor state and local expenditures on compensatory programs for the educationally deprived).

LEP children's special educational needs. Senator Ralph Yarborough and seventeen cosponsors introduced the measure, which established a modest grant-in-aid program to support research and experimentation in the field of bilingual education. Yarborough seems to have been motivated to sponsor the bill not only by his personal concern for NEP and LEP students but also by a desire to enhance his political stature and national visibility. While Yarborough took the lead in initiating Senate consideration, House sponsorship was more splintered. Even though thirty-seven bills resembling Yarborough's measure were introduced in the House, the House Committee on Education and Labor initially did not provide for special assistance to NEP and LEP students. Only after it became clear that the Senate planned to include such a provision did the House address this issue.

Interestingly, although Hispanic advocacy groups were generally concerned with civil rights issues by 1968, they apparently had not concentrated on bilingual education issues before the Act's passage precipi-

38. 1967 Senate Hearings, supra note 9, at 1, 270 (remarks of Sen. Ralph Yarborough).
39. S. Schneider, supra note 26, at 22.

Several pieces of evidence support the view of Yarborough as political entrepreneur. He was widely credited with drafting and promoting the bill, while his co-sponsors received considerably less credit. By contrast, in later years, when amendments to the Act were being considered, no single legislator assumed such a prominent position in the deliberative process. See infra notes 99-100 & 106 and accompanying text (Senators Kennedy and Cranston, who sponsored important amendments to the Bilingual Education Act, did not portray themselves as momentous innovators and were identified with a range of policy issues). Moreover, although the Act was a modest grant-in-aid program, Yarborough consistently hailed it as "landmark legislation," emphasizing that it was the first piece of federal legislation to address NEP and LEP children's needs.

The Senate subcommittee on education held regional hearings on the bill in areas with a high number of NEP and LEP students. These proceedings resulted in far-flung deliberations by a broad range of parents and community leaders, some of whom were poorly informed about the bill. These individuals echoed Yarborough's broad claims for the legislation, thereby reinforcing his self-proclaimed status as an innovative pioneer. See infra notes 43-47 and accompanying text. The hearings, several of which were held in Yarborough's home state of Texas, assured that the bill would garner substantial media attention and also consolidated support among key legislators.

Significantly, the House subcommittee did not conduct comparable regional inquiries, suggesting that its members did not anticipate significant political gains from publicizing their deliberations more extensively. Compare 1967 Senate Hearings, supra note 9, at 2 (seven days of hearings in cities in Texas, California, and New York as well as Washington, D.C.) with 1967 House Hearings, supra note 9, at i (two days of hearings in Washington, D.C.). According to Professor Nelson Polsby, the House is a less hospitable forum than the Senate for political innovation. Because the House has a stricter division of labor, more restrictions on debate, and more members, there is less flexibility to innovate through policy sponsorship and less opportunity to publicize one's initiatives. N. Polsby, supra, at 162-63.
41. S. Schneider, supra note 26, at 24.
tated their mobilization in support of the programs.\footnote{According to one report, the passage of the Bilingual Education Act in 1968 was prompted by: (1) the arrival of large numbers of non-English-speaking Cuban refugees after Fidel Castro assumed power; (2) a growing awareness on the part of several senators, especially Ralph Yarborough, of NEP and LEP students’ educational problems; and (3) the ongoing impact of the civil rights movement. E. MOSHER, A. HASTINGS & J. WAGONER, supra note 29, at 13-14. Another researcher has also cited the importance of research findings on bilingual education and the federal government's earlier decision to aid educationally disadvantaged children from low-income backgrounds. S. SCHNEIDER, supra note 26, at 22. While Hispanics had become newly sensitized to civil rights issues, this evidence does not suggest that they pressed strongly for bilingual education reforms before 1968.} During the hearings, parents and community leaders repeatedly indicated that the Bilingual Education Act was a necessary first step in promoting full participation by linguistic minorities in the nation’s political, social, and economic life. They pointed out that Hispanics in particular had suffered consistent disadvantages in the educational process, as their low achievement scores and high drop-out rates demonstrated. Educational failure in turn prevented Hispanics from obtaining higher-status jobs and gaining political access. According to parents and community leaders, improved education could break this pattern of diminished life chances.\footnote{See, e.g., 1967 Senate Hearings, supra note 9, at 74-77 (remarks of Joseph Monserrat, Director, Migration Division, Department of Labor, Commonwealth of Puerto Rico); 96 (remarks of Monroe Sweetland, Legislative Consultant, Western States, West Coast Regional Office of the National Education Association); 244-45 (remarks of Carlos Truan, Texas State Deputy Director, League of United Latin American Citizens); 425 (statement of Rep. George E. Brown of California); 505 (remarks of Rep. Jacob H. Gilbert of New York).}

Parents and community leaders disagreed, however, about how best to accomplish their educational objectives. At the hearings, many community representatives mistakenly assumed that the Act would restrict the instructional options available to state and local educators. Accordingly, they focused on which options the federal government should endorse.\footnote{See, e.g., id. at 96 (remarks of Monroe Sweetland); 361 (remarks of Father Henry Casso, San Antonio Vicar for Urban Ministry, Archdiocese of San Antonio, Texas); 382 (remarks of Tony Calderon, Federation for the Advancement of Mexican Americans, San Antonio, Texas); 431 (remarks of Ernest A. Debs, Supervisor for Los Angeles County, California); 445 (remarks of Robert E. McKay, Assistant Executive Secretary, California Teachers Association); 497 (opening statement of Sen. Jacob Javits of New York); 517 (prepared statement of Herman Badillo, President of the Borough of the Bronx).} Because these community representatives believed that an English-only, assimilationist curriculum impeded NEP and LEP students’ performance, they favored bilingual programs that would eliminate linguistic and cultural barriers to achievement; moreover, they contended that instruction that was sensitive to cultural heritage could enrich the educational experience of all Hispanic students, regardless of their linguistic background.\footnote{See, e.g., 1967 House Hearings, supra note 9, at 254-55 (prepared statement of John A. Carpenter, Director, Center for International Education, University of Southern California); 1967 Senate Hearings, supra note 9, at 397-98 (remarks of Albert Pena, Jr., County Commissioner, Bexar County, Texas).}
Some parents and community leaders hoped to foster linguistic and cultural diversity through multilingual, multicultural curricula. They sought to promote bilingualism and biculturalism for all students, rather than only Hispanic or linguistic minority students. Under this approach, bilingual education would not be defined as compensatory, or remedial, instruction; rather, bilingualism would be considered a useful skill that could benefit every child. In fact, some even argued that general improvement in the nation's linguistic competencies and tolerance for other cultures could better the United States' international relations, especially with Latin America.

Educational experts and state and local officials largely agreed with parents and community leaders that Hispanics had suffered a tragic history of educational failure. Some of them, however, drew quite different conclusions from this history. In their opinion, Hispanics' low achievement scores and high drop-out rates demonstrated the need for compensatory programs that would integrate Hispanics more effectively into the educational mainstream. These experts and officials therefore supported bilingual education as a means of promoting assimilation through the acquisition of English.

Other educational experts expressed concerns about the effectiveness of bilingual education in dealing with NEP and LEP students' problems. School administrators echoed these concerns and raised questions about how programs would be implemented. At the hear-

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46. See, e.g., 1967 House Hearings, supra note 9, at 306 (remarks of Monroe Sweetland); 1967 Senate Hearings, supra note 9, at 245-25 (remarks of Dr. Joshua A. Fishman, Research Professor of Social Sciences, Yeshiva University); 327 (remarks of Joe Bernal, Texas State Senator from Bexar County); 486-88 (remarks of Marcos de Leon, Board of Directors, Foundation for Mexican-American Studies); 542-43 (remarks of Dr. Frank Cordasco, Professor of Education, Montclair State College); 581-82 (remarks of Louis Cardona, Deputy Commissioner, Manpower Operations, New York City).

47. See, e.g., 1967 House Hearings, supra note 9, at 301-03 (remarks of Monroe Sweetland); 1967 Senate Hearings, supra note 9, at 89-90 (remarks of Dr. William G. Carr, Executive Secretary of the National Education Association and Secretary-General of the World Confederation of Organizations of the Teaching Profession); 225-26 (remarks of Dr. Hector P. Garcia, Founder of the American GI Forum); 253-54 (remarks of Chester Christian, Director, Inter-American Institute, University of Texas at El Paso).

48. See, e.g., 1967 Senate Hearings, supra note 9, at 15-16 (remarks of Sen. Paul J. Fannin of Arizona). Senator Fannin's views were consistent with those of other witnesses who termed the inability to speak English a handicap and sought to assimilate linguistic minority students more effectively into the American mainstream. See, e.g., 1967 House Hearings, supra note 9, at 445 (letter from Sarah Folsom, Arizona State Superintendent of Public Instruction, to Rep. Morris K. Udall of Arizona dated July 17, 1967); 1967 Senate Hearings, supra note 9, at 622 (prepared statement of Claude Ury, Educational Consultant in Berkeley, California).

49. See, e.g., 1967 Senate Hearings, supra note 9, at 217-18 (remarks of Dr. Herschel T. Manuel, Professor Emeritus of Educational Psychology at the University of Texas at Austin).

50. See, e.g., id. at 233 (remarks of Dr. Dana Williams, Superintendent of Public Education,
ings, though, doubtful experts and administrators were outnumbered and overwhelmed by community leaders who touted bilingual education as a panacea for Hispanics' academic difficulties.

Behind the scenes, however, these doubts appear to have had a significant impact on federal policymakers. Although key members of the Senate subcommittee on education were sympathetic to Yarborough's proposal and were strategically positioned to aid greatly in the bill's consideration,\(^1\) the Act's passage required hard political compromises. In order to win political acceptance, the Act left program objectives vague.\(^2\) It did not adopt a clear statement of purpose, nor did it define the term "bilingual education." Instead, it simply 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 imaginative elementary and secondary school programs designed to meet these special educational needs.\(^3\)

This vague statement of purpose masked fundamental differences over whether the programs were designed to promote assimilation by overcoming a language "deficiency" or were intended to foster pluralism by acknowledging a linguistic asset.\(^4\)

Although community representatives optimistically claimed that the bill created a federal mandate for bilingual programs, the Act actually established only a modest grant-in-aid program to support experimental demonstration projects. The Act represented a minimal intrusion on state and local decisionmakers' prerogatives. It did not require districts to provide special programs for NEP and LEP students or to submit grant applications. Moreover, districts enjoyed considerable leeway in

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51. Yarborough himself was the Chair of the Special Subcommittee on Bilingual Education, and Robert F. Kennedy was a member of the Subcommittee. Edward M. Kennedy, a strong supporter of bilingual programs, served on the Senate Committee on Labor and Public Welfare. Id. at ii. See generally A. MAASS, CONGRESS AND THE COMMON GOOD 102 (1983) (noting generally more liberal composition of House Committees on Education and Labor).

52. See generally Ingram, Policy Implementation Through Bargaining: The Case of Federal Grants-In-Aid, 25 PUB. POL'Y 499, 505-09 (1977) (asserting that where grant-in-aid programs need to gain political acceptability, program objectives will be vague and conditions for refusing grants will be indefinite).


designing programs eligible for federal funding.\textsuperscript{55}

This cautious approach reflected congressional concerns about the inconclusiveness of bilingual education research and the costs of bilingual programs. Furthermore, a research orientation permitted legislators to concentrate on pedagogical issues without addressing broader claims about Hispanics' wrongful exclusion from the educational process. Extending the Act's coverage to all language groups, rather than only the Spanish-speaking or groups that had suffered a significant history of discrimination,\textsuperscript{56} reinforced this shift away from a focus on wrongful exclusionary practices. The Act limited grants to districts with a high concentration of NEP and LEP students from low-income families because of their greater need for educational assistance, but Congress did not link this need to past discrimination.\textsuperscript{57}

The dynamics of the appropriations process further attenuated the Act's impact on state and local discretion. Although community leaders dominated hearings on the Act, they had little opportunity to influence less visible administrative decisions about funding. Those who questioned the benefits of bilingual programs could informally press fiscally conservative members of budget and appropriations committees to reduce fiscal support.\textsuperscript{58} This strategy permitted opponents of bilingual programs to accomplish their objectives while avoiding volatile public debate with community representatives.

The actual levels of funding for programs during the first few years after the Act's passage indicate the degree to which the appropriations process undermined the measure's impact. Congress appropriated no funds under the Act in 1968, although $15 million had been authorized. Between 1969 and 1973, appropriations always fell considerably below authorized expenditure levels. In fact, annual funding never exceeded


\textsuperscript{56} See Bilingual Education Act of 1968, § 702, 81 Stat. at 816 (declaring policy of Act is to help meet the educational needs of "children who come from environments where the dominant language is other than English"); \textit{see also} 1967 \textit{House Hearings, supra} note 9, at 11-13 (prepared statement of Rep. William D. Hathaway of Maine) (noting potential eligibility of French-speaking pupils in Maine).

\textsuperscript{57} Bilingual Education Act of 1968, § 704, 81 Stat. at 817.

\textsuperscript{58} \textit{See} S. Schneider, \textit{supra} note 26, at 23, 31 (setting forth legislators' concern over increased appropriations for bilingual education without better monitoring and evaluation, and describing subsequent disputes over funding). \textit{See generally} A. Maass, \textit{supra} note 51, at 101, 130-31, 146 (noting that appropriations committees are composed of "responsible" legislators who endorse a norm of economy; other legislators fuel their enthusiasm for programs by authorizing high levels of funding and support the need for economy by endorsing funding cuts by appropriations committees).
about $35 million, even though up to $135 million had been authorized.\textsuperscript{59} Given the government's own estimate that over three million NEP and LEP children needed special assistance, the amounts allocated between 1968 and 1973 never exceeded about $10 per child in the target population and probably averaged about $5-6 per child.\textsuperscript{60} Interestingly, this consistent underfunding did not provoke any orchestrated outcry among bilingual education advocates.

Despite these limitations, the Act may have indirectly improved the exercise of state and local discretion in making bilingual education policy. Although the Act did not intrude directly on decentralized educational decisionmaking, it perhaps prompted state and local officials to reconsider their curricular choices for NEP and LEP students. Prior to 1968, no state had enacted a bilingual education act, but between 1968 and 1973, at least six states adopted such provisions.\textsuperscript{61} Additionally, a number of states repealed statutes making English the exclusive language of instruction.\textsuperscript{62}


\textsuperscript{60} A. Bruce Gaarder, Chief of the Modern Foreign Language Section in the United States Office of Education, testified that there were about five million children of school age with a mother tongue other than English. Of these, over three million retained the use of their mother tongue. According to Gaarder, this situation had not changed notably between 1960 and 1968. 1967 Senate Hearings, supra note 9, at 46.

\textsuperscript{61} See generally R. IRIZARRY, BILINGUAL EDUCATION: STATE AND FEDERAL LEGISLATIVE MANDATES 45-128 (1978) (collecting data on state bilingual education acts). It is not clear how significant funding levels were under these state acts, however.

2. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 provides 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." Enacted shortly after a brutal assault on civil rights workers in Birmingham, Alabama and the 1963 March on Washington, title VI was an omnibus civil rights bill supported by a broad coalition of civil rights organizations and sympathetic liberals. Not surprisingly, legislative deliberations focused on the problems of segregation and discrimination against blacks in the South. Federal policymakers did not specifically address linguistic minority students' problems.

Only in 1970 did federal policymakers begin to consider the relevance of title VI to providing special instruction for NEP and LEP children. That year, the Office for Civil Rights (OCR) issued a memorandum indicating that under title VI, "[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

Title VI's legislative history did not plainly suggest that its protections extended to linguistic minority children. Although one scholar has argued that Hispanic community leaders lobbied OCR to extend title VI's coverage to protect NEP and LEP children's civil rights, it seems unlikely that these groups had mobilized sufficiently to exert overwhelming pressure on OCR by 1970. Rather, it appears more probable that federal officials at OCR were already receptive to claims that their


65. Office for Civil Rights (OCR), Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (1970); see also Margulies, supra note 64, at 115-16 (setting forth history of administrative interpretations of title VI).
66. San Miguel, supra note 12, at 507. Certainly, bilingual education advocates would have been well-advised to use their limited resources to persuade OCR to address NEP and LEP students' problems. By pursuing lower-profile reform efforts with a receptive administrative agency, these advocates could have avoided widely publicized controversy and obviated the need for compromises that would dilute the impact of federal intervention.
enforcement regime also could rectify school districts' discrimination against linguistic minority students. By expanding a system designed to redress the grievances of racial and ethnic minorities to include those of linguistic minorities, however, OCR conflated the effects of race, ethnicity, language, and culture on NEP and LEP students' academic performance.

OCR's interpretation did not require linguistic minority students to prove discriminatory intent on the part of school officials to show a title VI violation. Rather, these students were entitled to affirmative relief if a school district's program had the effect of excluding them from meaningful participation in the curriculum, regardless of the motivations underlying the program. If OCR or a federal court found a title VI violation, a school district could lose federal funds for programs that were not in compliance; alternatively, OCR or the court could impose binding requirements on the district to ensure compliance with title VI as a condition of receiving federal aid.

OCR's memorandum addressed directly the need for linguistic minority students to gain meaningful access to the educational curriculum, a concern that witnesses had raised repeatedly at the 1968 hearings on the Bilingual Education Act. However, OCR's decision to classify exclusion on the basis of language as national origin discrimination represented a significant shift from the Bilingual Education Act's approach. While the Act had allowed school districts to retain their discretion in devising programs and applying for funds, OCR's memorandum authorized administrative and judicial challenges if districts failed to provide assistance to NEP and LEP children. Special instruction for linguistic minority students thus evolved from an optional curricular choice to a mandatory civil right.

The OCR memorandum represented a far greater threat to state and local discretion than had the Bilingual Education Act. This threat was mitigated in several ways, however. First, OCR's memorandum did not mandate a particular form of instruction. In fact, its reference to rectifying a "language deficiency" suggested that districts were obligated only to provide compensatory programs, not programs that promoted linguistic or cultural pluralism. Second, despite the seemingly momentous nature of OCR's pronouncement, the 1970 memorandum went largely

67. Jeremy Rabkin has contended that OCR was not under serious pressure to expand coverage to these children. Rather, OCR's staff decided to enlarge its enforcement obligations largely out of concern for the plight of NEP and LEP pupils. See Rabkin, supra note 19, at 329-30.
68. See Moran, supra note 24, at 339-40; Moran, supra note 8, at 207.
69. Margulies, supra note 64, at 115.
70. Rabkin, supra note 19, at 307-08.
72. See id. at 11.
unenforced until the 1974 landmark Supreme Court ruling in *Lau v. Nichols* 73 infused it with new vigor. 74 Apparently, OCR frequently committed itself to regulatory protections in principle without considering whether enforcement resources were available. As a consequence, OCR was often unable to enforce its own mandates effectively. 75 OCR’s failure to enforce the 1970 memorandum greatly limited its effect on state and local decisionmaking, and Hispanic lobbyists apparently were not yet powerful enough to overcome this bureaucratic inertia.

### B. Lau and Its Aftermath: State and Local Discretion Under Siege

In the mid-1970s a number of forces combined to increase federal intervention in education on behalf of linguistic minority students. First, the Supreme Court upheld OCR’s 1970 memorandum extending title VI’s coverage to linguistic minorities and ruled that school districts must provide special assistance to NEP and LEP students. In response, state and local governments sought increased federal fiscal support for bilingual education programs. The *Lau* decision strengthened the civil rights rationale for federal intervention endorsed by certain federal officials and Hispanic community leaders. At the same time, it bolstered educational experts who claimed that the needs of NEP and LEP students were not being met; these experts forged an apparent consensus in support of native-language instruction. The confluence of these forces led to legislation increasing the federal role in bilingual education, federal administrative guidelines prescribing ways for school districts to comply with title VI, and some state statutes increasing protection for linguistic minorities.

#### I. Lau v. Nichols

In 1974, the Supreme Court upheld OCR’s interpretation of title VI in *Lau v. Nichols*. *Lau* was a class action brought under title VI and the equal protection clause by non-English-speaking Chinese students in the San Francisco school system. According to the district court’s findings, only slightly over one-third of the 2,856 Chinese NEP and LEP students attending the San Francisco schools were receiving any supplemental instruction in English. 76 The district court nevertheless denied relief, and the court of appeals affirmed. 77 According to the court of appeals, the plaintiffs had no cause of action under either title VI or the equal protection clause because “[e]very student brings to the starting line of

75. Rabkin, *supra* note 19, at 329-33, 338-44.
76. *Lau*, 414 U.S. at 564.
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 system.”

In an opinion written by Justice Douglas, the Supreme Court reversed. The Court noted that “there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.”

The Court further remarked that “[i]mposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired . . . basic [English] skills is to make a mockery of public education.”

Relying on OCR’s memorandum, the Court held that the San Francisco school district was obligated under title VI to provide special assistance to the plaintiffs if its curriculum otherwise would effectively exclude them from participation in the instructional process. No showing of invidious official motivation was necessary to establish a violation. The Court did not specify a particular remedy.

Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, concurred in the result. These Justices noted that the plaintiffs did not contend that school administrators had affirmatively or intentionally contributed to the students’ language deficiency. Rather, the plaintiffs alleged that administrators had simply failed to react to changing social and linguistic patterns. According to the concurrence, “[b]ecause of this laissez-faire attitude on the part of school administrators, it is not entirely clear that § 601 of the Civil Rights Act of 1964, standing alone, would render illegal the expenditure of federal funds on these schools.”

However, in finding for the plaintiffs, the concurrence relied heavily on OCR’s interpretive memorandum, which was “reasonably related” to the purposes of the enabling legislation and entitled to “great weight” in
light of title VI's underlying remedial purposes.\textsuperscript{87}

In a separate concurrence in the result, Justice Blackmun and Chief Justice Burger carefully limited the Court's decision to its facts. In particular, they emphasized that a very substantial group of approximately 1,800 children was being deprived of any meaningful schooling because of an inability to understand English.\textsuperscript{88} For these Justices, "numbers [were] at the heart of this case," and they did not regard the decision as binding where a single child or handful of children spoke a language other than English.\textsuperscript{89}

Although both the Bilingual Education Act and OCR's 1970 memorandum had portended a greater federal role in bilingual education, \textit{Lau} had the most far-reaching impact on state and local discretion. The majority's opinion 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. The Court's decision thus justified limitations on school districts' discretion and triggered a new willingness on the part of Congress and federal administrators to sanction districts that failed to meet NEP and LEP students' needs.

2. The Response to \textit{Lau}

The \textit{Lau} decision provoked reactions by Congress, the Office for Civil Rights, and several states. Congress and federal administrative agencies increased their involvement in bilingual education, thereby reducing state and local discretion. States reasserted their importance by enacting their own protections for linguistic minority students.

\textit{a. Congressional Responses}

Congress responded in two ways to \textit{Lau}. It enacted the Equal Educational Opportunities Act of 1974, which endorsed the opinion's approach to language-based discrimination, and it held hearings to reconsider the Bilingual Education Act's provisions in light of the decision. Initially, the Equal Educational Opportunities Act had only a slight impact on state and local discretion. The congressional hearings on the Bilingual Education Act, however, aired conflicting views about the appropriate role of the federal government in supporting programs for NEP and LEP students. These hearings led to amendments to the Act that significantly restricted local discretion by imposing conditions on access to federal funds, requiring consultation with linguistic minority

\begin{footnotes}
\item \textsuperscript{87} Id. at 570-71.
\item \textsuperscript{88} Id. at 571-72 (Blackmun, J., concurring).
\item \textsuperscript{89} Id. at 572.
\end{footnotes}
parents, and increasing federal supervision of bilingual education programs.

i. The Equal Educational Opportunities Act of 1974

Under President Richard Nixon, the Equal Educational Opportunities Act of 1974 (EEOA)\(^90\) was enacted to substitute "quality" educational programs for hotly controverted busing remedies in school desegregation cases.\(^91\) One such "quality" program was special assistance for NEP and LEP students who were members of a racial or ethnic minority group. Section 204 of the EEOA provided that: "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 by an, educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in the instructional programs."\(^92\) The Act provided that adversely affected individuals or the Attorney General could file civil actions alleging denial of an equal educational opportunity and demanding meaningful access to the curriculum.\(^93\)

Available evidence\(^94\) suggests that Congress sought to create an effects test for discrimination against racial or ethnic minorities due to language barriers; that is, the legislation afforded affirmative relief to NEP and LEP students who were effectively harmed by English-only instruction, regardless of whether they were victims of intentional discrimination.\(^95\) The enactment thus codified the effects test set forth in OCR's 1970 memorandum and approved in Lau.\(^96\)

Probably for several reasons, the EEOA's impact on state and local

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93. See id. §§ 1706, 1712. The Attorney General must notify school districts of their failure to satisfy the EEOA's requirements and provide them with a reasonable opportunity to comply before filing suit. Id. § 1710.
94. Because the EEOA was promulgated as an amendment from the floor of the House, there is little legislative history to guide its interpretation. Consequently, courts and commentators have relied on the history of an identical provision that was considered by Congress in 1972 but failed to receive Senate approval. See United States v. Texas, 506 F. Supp. 405, 431-32 (E.D. Tex. 1981) (discussing § 1703(f)'s legislative history), rev'd, 680 F.2d 356 (5th Cir. 1982); Haft, supra note 91, at 233, 236, 245.
95. Haft, supra note 91, at 234-40.
discretion was slight at first. The EEOA’s provision on language barriers originally received scant attention because state and local educators were primarily concerned about how busing remedies would affect their decisionmaking prerogatives. Moreover, the EEOA initially did little more than reiterate an approach already adopted under title VI as interpreted in OCR’s 1970 memorandum and the *Lau* decision, thereby rendering it a largely symbolic gesture of congressional support. Lastly, because the EEOA did not specify any particular instructional approach, it left state and local decisionmakers with considerable leeway to design and implement programs for NEP and LEP students.

ii. The 1974 Hearings on the Bilingual Education Act

The *Lau* decision also encouraged renewed deliberations on the Bilingual Education Act. Those who supported bilingualism and biculturalism as a means of redressing past discrimination against NEP and LEP students chafed at the Act’s research orientation. *Lau* lent support to groups that hoped to reconstruct the Act as civil rights legislation. In their view, the Act should protect linguistic minorities from abuses of state and local discretion by mandating a commitment to TBE and bilingual-bicultural education programs.

The 1974 hearings on the Bilingual Education Act were precipitated by a variety of factors. First, funding under the Act had only been extended through 1973.97 Second, several studies had found that schools were still failing to meet NEP and LEP children’s needs; moreover, another study, which was presented to a key legislator, Senator Edward Kennedy, substantiated the benefits of some bilingual education programs. Finally, a more effectively organized Hispanic community and states interested in obtaining greater federal assistance brought significant pressure to bear on Congress.98

In light of these developments, Senator Kennedy, along with Senators Alan Cranston and Joseph Montoya, began to formulate bilingual education legislation in 1972 and 1973. Kennedy and Cranston introduced separate bills in 1973 endorsing bilingual-bicultural education as a means of promoting equal educational opportunity.99 These bills sought

98. *S. Schneider, supra note 26, at 40-41.
99. *See S. 2552, 93d Cong., 1st Sess., 119 Cong. Rec. 33,236-37 (1973) (Kennedy’s bill); S. 2553, 93d Cong., 1st Sess., 119 Cong. Rec. 33,244-46 (1973) (Cranston’s bill); see also S. Schneider, supra note 26, at 42. Kennedy’s staff was primarily concerned with training bilingual teachers and ensuring that programs were fully bilingual-bicultural, while Cranston’s staff sought more support for research, enhanced state involvement, and improved data gathering to determine whether the federal government should fund bilingual-bicultural education as a service program or on an entitlement basis. The Kennedy bill also addressed the need for bilingual-bicultural vocational education, adult education, and library services. Montoya’s staff did not play a prominent role at
to upgrade the status of bilingual education administrators within the Office of Education and called for a national advisory council to consult regularly with the Commissioner of Education in implementing the Act's requirements.\footnote{100}{The Kennedy bill provided for a Bureau of Bilingual Education, while the Cranston bill provided for more modest upgrading of the Division of Bilingual Education. S. 2552, 93d Cong., 1st Sess., 119 CONG. REC. 33,236-37 (1973); S. 2553, 93d Cong., 1st Sess., 119 CONG. REC. 33,244-46 (1973).}

During Senate subcommittee hearings on the bills, federal officials and state and local bilingual educators testified in support of bilingual-bicultural education.\footnote{101}{Education Legislation, 1973: Hearings on S. 1539 Before the Subcomm. on Educ. of the Senate Comm. on Labor & Public Welfare, 93d Cong., 1st Sess. 2539 (1973) [hereinafter 1973 Senate Hearings]; S. SCHNEIDER, supra note 26, at 46.} The witnesses addressed the amount of special assistance required, the appropriateness of federal intervention, logistical and administrative concerns, and the importance of research and evaluation to determine the efficacy of various programs.\footnote{102}{1973 Senate Hearings supra note 101, at iii-v; S. SCHNEIDER, supra note 26, at 46.} Several witnesses noted the need for adequate federal funding and guarantees that programs were truly bilingual and bicultural.\footnote{103}{See, e.g., 1973 Senate Hearings, supra note 101, at 2603-05 (prepared statement of Louis Nufiez, Deputy Staff Director, United States Commission on Civil Rights); S. SCHNEIDER, supra note 26, at 47.} Emphasizing the benefits of bilingualism and biculturalism, some witnesses objected to terms implying that linguistic minority students were deficient and required compensatory instruction;\footnote{104}{See, e.g., 1973 Senate Hearings, supra note 101, at 2926 (prepared statement of Gloria Zamora, former Director of the Title VII Program in San Antonio, Texas); S. SCHNEIDER, supra note 26, at 48.} they applauded efforts to broaden the programs to include English-speaking children from middle-class backgrounds.\footnote{105}{Id. at 50-51.}

Following the hearings, Kennedy and Cranston consolidated their bills and incorporated suggestions from Montoya and the United States Commission on Civil Rights.\footnote{106}{See, e.g., 1973 Senate Hearings, supra note 101, at 2926 (prepared statement of Gloria Zamora, former Director of the Title VII Program in San Antonio, Texas); S. SCHNEIDER, supra note 26, at 48.} During mark-ups of the consolidated bill, Senate education subcommittee staff members focused on whether the Act should restrict eligibility exclusively to fully bilingual-bicultural programs in which students' native language and culture are maintained throughout their years in school.\footnote{107}{Id. at 52-54.} Given the limited empirical evi-
dence available, subcommittee staff doubted that the Senate would accept such highly prescriptive legislation; moreover, the Nixon administration was certain to oppose it. Despite these reservations, the composite bill was simply amended to emphasize the importance of learning English; it retained the definition of an acceptable program as fully bilingual and bicultural.\(^{108}\)

By the time the bill reached the full Senate Committee on Labor and Public Welfare, the Supreme Court had decided \textit{Lau}. The \textit{Lau} decision undoubtedly facilitated acceptance of the Kennedy-Cranston proposal among committee members. Kennedy, Cranston, and Montoya asserted that although the \textit{Lau} Court had not mandated a particular remedy, their proposal embodied the best approach to meeting NEP and LEP students’ acknowledged needs.\(^{109}\) Other legislators also adverted to the influence of \textit{Lau} in shaping the debate.\(^{110}\) Moreover, because of the potential financial burden entailed in satisfying \textit{Lau}’s requirements, state and local educational agencies pressed for increased federal support to meet these obligations. Thus, with only a few minor changes, including reduced funding levels, the Committee reported favorably on the bill.\(^{111}\)

The Senate Committee Report sidestepped the controversy over whether federal programs should simply encourage English acquisition or promote bilingualism and biculturalism. According to the Report, programs funded under the Act were to use "both English and the native language as mediums of instruction in the basic school curriculum and includ[e] the study of the history and culture associated with the native language."\(^{112}\) The Report further stated that the programs were designed to "permit a limited English-speaking child to develop the proficiency in English that permits the child to learn as effectively in English as in the child's native language."\(^{113}\) While these provisions reflected a stronger endorsement of native-language instruction than had appeared in the 1968 Act, the drafters purposely kept the object of such instruction ambiguous in order to make the bill politically palatable. The Senate subsequently approved the bill.\(^{114}\)

Preoccupied with other educational issues, the House Committee on Education and Labor initially paid little attention to bills designed to

\(^{108}\) Id.

\(^{109}\) Id. at 54-56.

\(^{110}\) See id. at 55-56, 59.

\(^{111}\) Id. at 57-59.

\(^{112}\) S. REP. No. 763, 93d Cong., 2d Sess. 45 (1974); see S. SCHNEIDER, supra note 26, at 58.

\(^{113}\) S. REP. No. 763, supra note 112, at 45; S. SCHNEIDER, supra note 26, at 58.

\(^{114}\) 120 CONG. REC. 15,444 (1974) (81-5 roll call vote in favor of bill); see S. SCHNEIDER, supra note 26, at 59-61 (describing floor debate that preceded bill’s passage).
extend and modify the Bilingual Education Act. None of the bills’ sponsors was a committee member who could push for more careful consideration of NEP and LEP students’ needs. Not surprisingly, then, although the Committee considered a bill similar to the Kennedy-Cranston proposal, its members opted merely to extend the 1968 Act’s provisions with some minor modifications. The House eventually passed this relatively modest bill.

The House did not fully confront bilingual education issues until after Lau was decided, presumably because of pressure from state and local officials concerned about their compliance obligations and from Hispanic advocacy groups with newfound leverage to press for the Act’s extension and liberalization. In fact, the House Committee Report explicitly acknowledged Lau’s potential effects on school districts and recommended oversight hearings to review existing authorizations and current appropriation levels for bilingual education programs.

The House subsequently held oversight hearings to accomplish three goals: 1) to examine Lau’s impact on state and local educational agencies; 2) to evaluate the effectiveness of various federally sponsored bilingual education programs; and 3) to determine the primary purpose of bilingual education. In assessing Lau’s impact, federal officials and school administrators considered the cost of compliance and its distribution among federal, state, and local governments. Frank C. Carlucci, then Under Secretary of Health, Education, and Welfare, testified that requiring the federal government to “underwrite the entire incremental cost of providing special education services” could not be justified on “historic, conceptual, legal, or fiscal grounds.”

115. S. Schneider, supra note 26, at 78-79. The three bilingual education bills introduced in the House between January and November 1973 were H.R. 1085, H.R. 2490, and H.R. 11464. Id. at 78-83. These modifications included eliminating the focus on districts with high concentrations of low-income families and increasing available funds. Id. at 84.

116. See id. at 78-83. These modifications included eliminating the focus on districts with high concentrations of low-income families and increasing available funds. Id. at 84.


120. See, e.g., id. at 33-35 (remarks of Martin Gerry, Acting Director, Office for Civil Rights of the Department of Health, Education, and Welfare (discussing availability of local resources for programs); 189 (remarks of Herman LaFontaine, Executive Administrator, Office of Bilingual Education for the New York City Board of Education) (noting the need to increase authorizations and monitor actual appropriations). Many participants were especially worried about two legal questions left open by the Court’s decision: the number of NEP and LEP children necessary to trigger coverage under Lau; and the nature of an appropriate remedy. These issues obviously were critical in estimating the costs of compliance. See, e.g., id. at 9 (remarks of Stanley Pottinger, Assistant Attorney General, Civil Rights Division of the Department of Justice); 32-33 (remarks of Martin Gerry).

121. Id. at 312.
The federal role as a temporary one, limited to sponsoring research on bilingual education, disseminating the results, and helping the states develop their long-term capacity to provide bilingual education through curriculum development, teacher training, and technical assistance.  

The House deliberations on Lau's impact suggest that state and local officials had concluded that the civil rights enforcement regime under title VI would intrude substantially on their decisionmaking prerogatives. To allocate the burden of compliance more equitably, they sought increased federal support. Unlike Under Secretary Carlucci, school districts probably did not consider the federal role as merely temporary but instead expected the federal government to subsidize programs for an indefinite period. In fact, because Lau imposed a legal duty to provide assistance to NEP and LEP students, the decision increased state and local educational agencies' dependence on grants under the Bilingual Education Act, thereby further reducing their discretion.

The second issue raised at the House hearings, monitoring and evaluating the effectiveness of federally supported bilingual education programs, assumed new importance after Lau. The compliance requirements in Lau enhanced the federal bilingual education bureaucracy's status by intensifying the need to monitor program effectiveness. Prior to the hearings, the National Advisory Board on Bilingual Education had been operating on a largely ad hoc basis. At the hearings, both educational experts and local school officials emphasized the need to establish a centralized Bureau of Bilingual Education to coordinate numerous programs, avoid duplication of efforts, and publicize research findings on bilingual education. The bill that ultimately passed required the Commissioner of Education to report on the operation of programs "for persons of limited English-speaking ability" and estab-

122. Id. at 311. Carlucci believed that capacity-building could best be accomplished by funding school districts with the greatest need to provide programs to NEP and LEP students or by funding districts during a limited period when they incurred the start-up costs of implementing a Lau compliance plan. Id. at 316.

123. See generally Nathan, State and Local Governments Under Federal Grants: Toward a Predictive Theory, 98 Pol. Sci. Q. 47, 55 (1983) (explaining that the level of dependence on federal aid is a function of the importance placed on the services aided). The evidence that states have used federal grants to supplant, rather than supplement, their own funds further supports an inference of dependency. See infra notes 128 & 267; Nathan, supra, at 51, 53-54.

124. 1974 House Hearings, supra note 119, at 79-82, 91, 93-95 (remarks of Rosa Guas de Inclan, Chair of the National Advisory Committee on the Education of Bilingual Children).

125. Id. at 208 (remarks of James Harris, President-Elect of the National Education Association); 450-57 (remarks and prepared statement of Marco A. Hernandez, Deputy Executive Administrator, Office of Bilingual Education, New York Board of Education).

lished an Office of Bilingual Education. These efforts to assess federal programs more systematically increased the authority of educational experts who would be principally responsible for designing an evaluation paradigm.

It might seem paradoxical that state and local school officials supported an expansion of the federal educational bureaucracy’s role in providing bilingual programs. After all, a stronger federal bureaucracy could threaten their traditional decisionmaking prerogatives. However, state and local support for this expanded role came only after the federal civil rights bureaucracy had circumscribed their discretion. If some federal presence was inevitable, state and local educators could well have preferred the educational bureaucracy to the civil rights bureaucracy. Federal educational bureaucrats were more likely to be sympathetic to state and local educators’ concerns than were federal civil rights lawyers. This was especially true under President Nixon’s administration, which had unsuccessfully supported a generous block grant program that would have greatly enhanced state and local discretion in spending federal funds for education. Moreover, because the federal educational bureaucracy was not narrowly concerned with enforcing minority students’ entitlements but instead dealt with a broad range of educational issues, it had a greater interest in maintaining good working relationships with state and local educational agencies than did civil rights enforcement agencies. State and local educators may have hoped that the federal educational bureaucracy would serve as a buffer between them and the civil rights enforcement regime.

programs, the effectiveness of federally-sponsored programs, and their estimated costs. Id. at 88 Stat. 510.


128. See Palmer, supra note 33, at 28. The proposal sparked strong resistance in Congress and died in committee. Id. In fact, Nixon generally sought to enhance state and local discretion under domestic spending programs, offering increased funding to win over an unreceptive Congress that doubted the propriety of relaxing restrictions on the use of federal aid. However, these fiscal incentives were insufficient to overcome the strong opposition of interest groups that feared the loss of federal protection for categorical programs. Brown, The Politics of Devolution, in THE CHANGING POLITICS OF FEDERAL GRANTS, supra note 33, at 81-84, 94-97.
Finally, the House hearings examined whether bilingual education programs should promote assimilationism or cultural pluralism.\(^{129}\) During the hearings, several representatives made strong statements in support of bilingual-bicultural education. Although the discussion of these issues had no effect on the House bill's provisions, which did little more than extend the 1968 Act,\(^{130}\) the oversight hearings established a favorable record for federal endorsement of bilingual-bicultural education.\(^{131}\)

The House and Senate held a lengthy and difficult conference to reconcile differences in their proposed legislation. With the Nixon administration's support, House conferees successfully moderated some of the Senate bill's provisions, but the final version of the 1974 amendments still provided much stronger support for bilingualism and biculturalism than the 1968 Act.\(^{132}\) The Act's revised policy declaration recognized that NEP and LEP children had distinctive cultural heritages and that their native language and heritage were primary means for instruction. Accordingly, schools could meet these students' needs most effectively through bilingual education programs that fully utilized multiple languages and cultural resources.\(^{133}\) Congress defined a bilingual education program as one in which "there is instruction given in, and study of, English and, to the extent necessary to allow a child to progress effectively through the educational system, the native language of the children of limited English-speaking ability, and such instruction is given with appreciation for the cultural heritage of such children."\(^{134}\) To ensure development of suitable programs, Congress required districts to consult about their proposals with teachers, parents of NEP and LEP children, and, where appropriate, secondary school students.\(^{135}\)

The 1974 amendments to the Bilingual Education Act imposed three types of limitations on state and local discretion. First, Congress limited local decisionmaking by authorizing the Office of Bilingual Education to attach conditions to federal grants. By adopting a more restrictive definition of acceptable programs than the 1968 Act, the amendments narrowed the options available to school districts seeking

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130. S. SCHNEIDER, supra note 26, at 89-90.

131. Id. at 89.


134. Id. at 88 Stat. at 504-05.

135. Id. at 88 Stat. at 505.
federal funding. This restriction was especially influential because state and local educators needed federal support to meet their obligations under Lau. Increased federal funding further magnified this effect. The amendments authorized substantially higher levels of funding from 1974 to 1978 than did the 1968 Act prior to 1974.136 More importantly, actual appropriations during these years approximated more closely the authorized levels of expenditure.137 By making federal grants more widely available, these funding increases encouraged school officials to adopt programs deemed acceptable by the Act and thereby increased federal influence over curricular decisions.

Second, Congress restrained state and local discretion by requiring school districts to consult with parents of NEP and LEP students and, in appropriate circumstances, the students themselves. Broader input from linguistic minorities could mitigate school officials' tendency to make curricular decisions in response to pressures from local political majorities. Because the parents' and students' roles were wholly consultative and rather ill-defined, however, it is unlikely that this provision seriously altered state and local priorities. School officials retained ultimate decisionmaking authority, and their conclusions were not subject to systematic review under the Act to determine how well they had accounted for parental and student concerns.

Third, Congress, through the Office of Bilingual Education, constrained state and local discretion by strengthening the system of monitoring and evaluating bilingual education programs. Faced with extensive monitoring, districts were less able to use federal grants for programs that deviated significantly from those deemed acceptable under the Act. Moreover, the evaluation process could single out districts that consistently failed to meet NEP and LEP students' needs. Such information could prove extremely prejudicial to these districts in civil rights lawsuits and could reduce their chances of receiving additional grants. A

136. The Act authorized $135 million for the fiscal year ending June 30, 1974; $135 million for the fiscal year ending June 30, 1975; $140 million for the fiscal year ending June 30, 1976; $150 million for the fiscal year ending June 30, 1977; and $160 million for the fiscal year ending June 30, 1978. Id. at 88 Stat. at 504. It also authorized $7.75 million for technical assistance in the fiscal year ending June 30, 1976; $8.75 million in the fiscal year ending June 30, 1977; and $9.75 million in the fiscal year ending June 30, 1978. Id.

comprehensive monitoring system therefore bolstered the federal government's ability to restrain state and local discretion through the grant process.

Supporters of the 1974 amendments to the Bilingual Education Act undoubtedly hoped to reinforce the civil rights regime by using the Act to extend additional protections to NEP and LEP students. Ironically, however, the provisions may have diluted the civil rights message by increasing the federal educational bureaucracy's role in bilingual education. This bureaucracy's primary constituency was state and local educators, with whom it had cultivated congenial, ongoing relationships. The adversarial tenor of civil rights enforcement was inconsistent with this general administrative approach. The educational bureaucracy instead favored softening the tone of rights-based appeals to preserve the prerogatives of fellow professionals. Moreover, federal educators differed from civil rights lawyers in evaluating remedies for NEP and LEP students solely on the basis of their empirically verifiable impact on academic achievement. This approach overlooked the symbolic importance of having federal officials acknowledge state and local discrimination. Thus, although Congress enhanced the Office of Bilingual Education's status and charged it with a special mission to protect NEP and LEP students' interests, the Office became isolated from the rest of the educational bureaucracy because of its civil rights orientation.

b. The Administrative Response: OCR Issues the Lau Guidelines

In response to Hispanic advocacy groups' demands, OCR issued a memorandum in 1975 setting forth specific guidelines to help school districts with 20 or more NEP and LEP students comply with Lau.138 Because these Lau Guidelines were informal and advisory, OCR did not follow the procedures for notice-and-comment rulemaking required by the Administrative Procedure Act.139 Instead, OCR appointed a task force composed of bilingual educators, lawyers, and representatives of linguistic minority groups to draft the provisions.140

Already sympathetic to linguistic minority students' claims and

138. Lau Guidelines, supra note 1, reprinted in Bilingual Education, supra note 1, at 213-21. The United States Office of Education also established Lau Centers across the country to provide school districts with technical assistance that would enable them to comply with the decision. Nine Centers, mainly located at universities, were created in 1975. C. Harrington, Bilingual Education in the United States: A View from 1980 6 (1980).


140. D. Ravitch, supra note 29, at 274; Margulies, supra note 64, at 116; San Miguel, supra note 12, at 509. Among other things, the Guidelines addressed: identifying NEP and LEP students and their educational needs, selecting satisfactory programs, providing adequate teachers, eliminating racially or ethnically identifiable schools and classes, disseminating information about the programs to parents, and evaluating the programs and reporting to OCR. Lau Guidelines, supra note 1, reprinted in Bilingual Education, supra note 1, at 213-21.
undoubtedly encouraged by the *Lau* Court's vindication of its 1970 memorandum, OCR staffed its task force with experts who uniformly favored heavy reliance on native-language instruction. The Guidelines clearly reflected this preference. They provided that any one or a combination of three programs was acceptable at the elementary and intermediate levels: a TBE program, a bilingual-bicultural education program, or a multilingual-multicultural education program. All three employed the child's native language and culture in developing academic skills. The TBE program used native-language instruction only until a student was functional in English, while the other two programs continued to employ native-language instruction in order to produce students fully functional in two or more languages or cultures. The Guidelines expressly rejected use of ESL programs in elementary school because these programs, which did not include a native-language component, failed to consider the affective and cognitive development of younger students. The Guidelines, however, permitted ESL and other intensive English instructional programs at the secondary level because of the students' greater maturity and the limited time available for them to learn English.

The Guidelines strictly prohibited racially or ethnically identifiable schools and classes, considering them an educationally unnecessary and legally impermissible response to linguistic differences. The Guidelines stated that the designated programs "d[id] not justify the existence of racially/ethnically isolated or identifiable classes, per se." In fact, the Guidelines suggested that racially or ethnically identifiable elective courses created a presumption of discrimination. They required districts to either eliminate such courses, guarantee that the courses would not remain racially or ethnically identifiable, or justify the racial or ethnic identifiability of the courses.

The Guidelines' thorough review of segregation issues demonstrates how deeply OCR's approach to language discrimination was rooted in a civil rights framework designed to address racial and ethnic discrimination. This approach created some inconsistencies. For example, the Guidelines presumed that racially or ethnically identifiable classes were educationally unjustifiable but at the same time adopted programs that


143. *Id.* at IX, reprinted in BILINGUAL EDUCATION, *supra* note 1, at 221.

144. *Id.* at III, reprinted in BILINGUAL EDUCATION, *supra* note 1, at 215-18.

145. *Id.* at VI, reprinted in BILINGUAL EDUCATION, *supra* note 1, at 219.

146. *Id.* at VI.B., reprinted in BILINGUAL EDUCATION, *supra* note 1, at 220.
created comprehensive alternatives to mainstream, English-speaking classrooms. To reconcile these inconsistencies without abandoning its commitment to TBE and bilingual-bicultural education programs, OCR would have had to label the programs as appropriate for all students, regardless of their race, ethnicity, or language. Yet, such a shift would have moved OCR from the realm of civil rights enforcement to general educational policymaking. Bound by its conception of the programs as compensatory remedies for past discrimination, OCR was unable to take this step. Alternatively, OCR could have continued to limit TBE and bilingual-bicultural education programs primarily to linguistic minority students while openly acknowledging the potential conflicts between these instructional techniques and mainstreaming through full-scale integration. Already deeply committed to integration, however, OCR could not compromise this principle by endorsing bilingual programs as even a partial substitute. Instead, OCR left to school districts the difficult task of evaluating the trade-offs between distinctive means of rectifying past discrimination against NEP and LEP students.

By mandating particular instructional approaches, the Guidelines limited state and local discretion much more than earlier federal measures. OCR could justify these limitations because the experts assembled to draft the Guidelines had established an apparent consensus about the benefits of TBE and bilingual-bicultural education programs for NEP and LEP students. Armed with this pedagogical imperative, OCR could penalize the use of other educational techniques as an abuse of discretion that violated linguistic minority students' civil rights.

The impact of these restrictions on state and local discretion would depend on the vigor with which the Guidelines were enforced and the degree to which school districts attempted to evade federal requirements. After 1975, OCR devoted increased resources to enforcing linguistic minority students' rights under title VI and negotiated hundreds of consent agreements based on the Guidelines. The Guidelines'
effects were amplified when federal courts relied on them in formulating remedies for school districts held in violation of title VI.\textsuperscript{149} Evidently, however, some school districts complied with the Guidelines on paper while evading them in practice.\textsuperscript{150}

c. \textit{State and Local Government Responses}

State and local governments' responses to \textit{Lau} generally improved programs and strengthened legal protections for linguistic minority students. After the 1974 \textit{Lau} decision, the number of states with bilingual education acts more than doubled,\textsuperscript{151} and several more states repealed statutes declaring English the sole language of instruction. States often modeled their bilingual education provisions on the Bilingual Education Act as amended in 1974 and the \textit{Lau} Guidelines. Funding for bilingual education programs under these state provisions seems to have increased after 1974.\textsuperscript{152}

State bilingual education legislation can be understood as either a response to federal leadership or an attempt to reassert the state's primacy in formulating educational policy.\textsuperscript{153} State statutes, although modeled on federal legislation, often contained provisions that purportedly reflected unique state needs. For instance, the Chacon-Moscone Bilingual-Bicultural Education Act, which was passed in California in 1976, stated that the failure to meet NEP and LEP students' needs results in "a tremendous loss in human resources and in potential personal income and tax revenues" and "contribute[s] to the unemployment subjected only 72 districts to compliance reviews. \textit{National Advisory Council on Bilingual Education}, \textit{supra}, at 16-17.


150. See, e.g., P. Berman, \textit{From Compliance to Learning: Implementing Legally-Induced Reform} 17 (1981) (describing how the Guidelines' requirement of integrated classrooms was met by placing Black students with Hispanic students in bilingual classrooms).


152. A. Pifer, \textit{supra} note 55, at 8. \textit{See generally} R. Irizarry, \textit{supra} note 61 (describing in detail various states' bilingual education legislation). In general, state bilingual education acts declare the state's commitment to meeting NEP and LEP students' needs, address the procedures for identifying these students and assessing their linguistic competencies, specify the nature of acceptable programs, describe staffing requirements, provide for parental involvement, establish reporting requirements, and authorize state funding. \textit{See also} Kobrick, \textit{A Model Act Providing for Transitional Bilingual Education Programs in Public Schools}, 9 Harv. J. on Legis. 260, 274-300 (1972).

153. For example, California's bilingual education legislation was touted as a source of leadership for other states. \textit{See Assembly Office of Research, Bilingual Education: Learning English in California} iii-iv (June 1986).
Recognizing the paucity of qualified personnel, the California legislature placed special emphasis on training bilingual educators and administrators. The California act thus attempted to deal with unique state concerns that Congress had not addressed. It relied on economic justifications to generate a political consensus in favor of bilingual education and closely considered the practical problems of implementation that state and local administrators would face.

C. The AIR Evaluation and the Resurrection of State and Local Discretion

State and local decisionmakers began to recover their decisionmaking prerogatives in the late 1970s. Congress became wary of prescribing particular educational techniques in light of the growing disparity of expert opinions regarding the value of native-language instruction. In addition, Congress grew increasingly concerned about the segregative effects of certain bilingual education programs. In the meantime, judicial decisions raised questions about the validity of an effects test for discrimination against linguistic minority students. Finally, OCR withdrew the Lau Guidelines in the face of a procedural attack, and the Department of Education failed to promulgate alternative rules because of widespread disaffection with bilingual programs, pedagogical uncertainty about their effectiveness, and an alliance between state and local educators and English-only reformers who sought to dislodge federal support for TBE and bilingual-bicultural programs.

1. A Sober Second Glance at Bilingual Education: Congress Hears the Evidence

In 1977, Congress again considered amendments to the Bilingual Education Act. The most influential material presented at the hearings was the American Institute for Research (AIR) study of bilingual education programs. The Office of Planning, Budget, and Evaluation

155. See id. §§ 52161, 52163(h)-(i), 52166, 52170(b), 52172, 52177(a)(2), 52178.
commissioned this study in response to a congressional directive that the Office of Education assess the status of federally funded bilingual education projects. The evaluation examined whether these programs were helping NEP and LEP children to acquire English while progressing in other school subjects through use of their native language. With federal financial support, the AIR investigators were able to undertake a comprehensive survey of bilingual education classrooms. The study sampled approximately 286 bilingual education classrooms in 38 Spanish/English projects in operation for at least four years as of 1975.\textsuperscript{158} The evaluation was particularly influential because of its “official” status, and it garnered widespread media attention.\textsuperscript{159}

The AIR evaluation concluded that: 1) on English tests, students in bilingual education programs obtained slightly lower scores than comparable students in regular programs; 2) on mathematics tests, students in bilingual education programs performed somewhat better than comparable students in regular programs; 3) there was no significant difference in the attitudes toward school of children in bilingual education programs and regular programs; and 4) the ability of students in bilingual education programs to read Spanish did improve significantly.\textsuperscript{160} The study also found that although three-quarters of the students in bilingual education classrooms were Hispanic, less than one-third had limited English proficiency. Project directors and staff indicated that over 85 percent of the bilingual education projects retained children in bilingual classrooms after they were sufficiently proficient in English to function in a regular classroom.\textsuperscript{161}

The AIR study met with vigorous criticism. John Molina, the Director of the Office of Bilingual Education, questioned the very utility of the evaluation process. According to Molina:

“You actually can’t evaluate a bilingual education program. It is philosophy and management. You can evaluate courses. For example, evaluation should be limited to reading, mathematics, science and social science. I think we need a tremendous amount of research in order to

\textsuperscript{158} AMERICAN INSTITUTES FOR RESEARCH (AIR), EVALUATION OF THE IMPACT OF ESEA TITLE VII SPANISH/ENGLISH BILINGUAL EDUCATION PROGRAM at II-2 to -7 (1977-78) [hereinafter AIR EVALUATION].

\textsuperscript{159} C. HARRINGTON, supra note 138, at 9-10; AIR EVALUATION, supra note 158, at xxix, I-2; see also D. RAVITCH, supra note 29, at 277; San Miguel, supra note 12, at 510-11. Before sponsoring the AIR evaluation, the federal government had only commissioned planning projects to design future studies and small-scale investigations of bilingual projects funded under title VII. AIR EVALUATION, supra, at I-2 to -3.

\textsuperscript{160} AIR EVALUATION, supra note 158, at VIII-3 to -5.

\textsuperscript{161} Id. at VIII-1 to -2.
determine what are the best methods and if children learn in languages other than English.  

Some witnesses contended that bilingual education programs had been subjected to “the traditional double standard” because “they ha[d] been evaluated, scrutinized and criticized much more harshly than ha[d] any other educational programs which ha[d] been funded by the federal government.” A number of educational experts also criticized the AIR study on methodological grounds. 

At hearings a few months later, the Senate subcommittee on education downplayed the AIR controversy, receiving only a single day’s testimony on bilingual education from a carefully selected panel that uniformly favored native-language instruction. Despite the AIR evaluation’s findings, the panel strongly supported TBE and bilingual-bicultural education programs. Some panel members suggested that research done by the Office of Planning, Budget, and Evaluation, including the AIR evaluation, was inadequate because of a lack of bilingual education experts. Consequently, several witnesses urged Congress to accord a larger research role to the Office of Bilingual Education. Witnesses also recommended that the Office of Bilingual Education exercise greater supervision over programs to ensure that poor results did not stem from faulty implementation. 

The AIR evaluation sparked controversy because of the mixed message that Congress had sent to the federal educational bureaucracy under the Bilingual Education Act. Those who understood the congressional mandate as one of assessing the pedagogical effectiveness of bilingual programs focused on the study’s technical accuracy. They therefore either applauded the findings or attacked them as inadequate on method-

162. 1977 House Hearings, supra note 156, at 69.
163. Id. at 294 (remarks of Ruben Valdez, Vice Chairman of the National Council of La Raza).
166. 1977 Senate Hearings, supra note 10, at 811. These witnesses frequently emphasized bilingualism as an asset, rejecting terminology that stigmatized linguistic minority children as suffering from a language deficiency. See, e.g., id. at 813 (remarks of Sen. Dennis DeConcini of Arizona); 835-36 (remarks of Maria Swanson, National Association for Bilingual Education); 980-81 (remarks of Henry Pascual, Director, Title VII Technical Assistance Unit, State of New Mexico Department of Education).
167. See, e.g., id. at 824 (remarks of Dr. Alfredo de los Santos, Jr., Southwest Educational Development Laboratory, Austin, Texas, Vice-Chairman of the National Advisory Council on Bilingual Education); 929, 931 (remarks and prepared statement of Dr. Arturo Gutierrez, Texas Association for Bilingual Education).
168. See, e.g., id. at 820-22 (remarks of Omer Pickard, Acadia School, Madawaska, Maine, Chairman of the National Advisory Council on Bilingual Education).
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ological grounds. Those who understood the mandate as one of protecting NEP and LEP students' civil rights questioned the very legitimacy of the evaluative process. They believed that the programs could not be judged on empirical criteria alone or that the evaluation was biased to undermine linguistic minority students' civil rights.

The tensions between these perspectives were also behind the dispute over which government authority should direct bilingual research: the Office of Bilingual Education or the Office of Planning, Budget, and Evaluation. The latter was apt to adopt a highly technical approach without much sensitivity to civil rights concerns; the former was far more likely to focus largely on civil rights issues in evaluating programs. By vesting research responsibilities in the Office of Planning, Budget, and Evaluation, the federal government generated findings that undercut efforts to establish an entitlement to TBE or bilingual-bicultural education programs. Without an opportunity to restructure the research agenda, the Office of Bilingual Education could not counter these findings successfully.

Despite considerable criticism of the AIR study, members of Congress were disturbed by its findings. After hearing testimony about the research design, the Minority Senior Education Consultant acknowledged the cogency of the critiques but then remarked: "[Critics] have indicated . . . that we should not use the AIR report to base our judgments on changes. If not, what should we use?" Members of Congress identified three unresolved problems raised by the AIR findings: 1) the failure to define the purpose of bilingual education; 2) the unauthorized conversion of federally funded bilingual education programs from demonstration projects into service programs; and 3) the impermissible segregative effects of bilingual education programs.

The concern about program objectives arose because project directors and staff had retained children in bilingual classrooms after they had achieved English-language proficiency. In doing so, these bilingual educators had arguably embraced a pluralist, rather than an assimilationist, perspective. Moreover, long-term retention of children in bilingual education classes could surreptitiously convert experimental research projects into service programs. Such a shift would subvert the federal government's avowed intent to play only a temporary role in funding bilingual education programs.

169. 1977 House Hearings, supra note 156, at 352 (remarks of Christopher Cross). One member of Congress reportedly lost part of a night's sleep over the AIR findings. Id. at 63.

170. See, e.g., id. at 156-58 (remarks of Dr. Malcolm Danoff, Director, Bilingual Studies Center, American Institutes for Research).

171. Id. at 63-67 (remarks of Rep. William D. Ford of Michigan, Rep. George Miller of California, and Dr. John C. Molina, Director of the Office of Bilingual Education, United States
Retaining minority children in bilingual education programs after they acquired minimum English proficiency also necessarily magnified the programs' segregative effects. Congressional concern about segregation of NEP and LEP students was heightened by the AIR study's conclusion that the programs were of questionable effectiveness. As Gary Orfield, a political science professor and former supporter of bilingual education, explained:

As now operated, I believe the grants [under the Bilingual Education Act] often provide for expensive, highly segregated programs of no proven educational value to children . . . .

Congress began support of bilingual programs without any significant proof that they would work. The history of research on bilingualism is full of ambiguous findings and careless methods. The Canadian experiments often cited as proof that the method works were based on placing predominantly middle-class English-speaking children in a totally French educational setting and then measuring the impact. This research has been cited as justification for a completely different policy of keeping lower-income Hispanic children in an all Spanish-speaking environment when they begin school. There is nothing in the research to suggest that children can effectively learn English without continuous interaction with the children who are native English speakers, yet the Federal money has supported programs with only about one-tenth Anglos in the average class. In a society where Spanish-surname children are now more segregated than blacks, according to some measures, and where the Supreme Court has found such segregation unconstitutional, a program that tends to increase separation[] raises serious questions.172

Orfield concluded by urging Congress to fund a variety of instructional programs but to require that bilingual student bodies be integrated whenever possible. To facilitate integration, he recommended that schools encourage the study of Spanish among English-speaking students.173

These deliberations illustrate how the AIR study alerted Congress to a new problem: that of constraining bilingual educators' discretionary prerogatives. Congress had earlier focused on the problems of discrimination against linguistic minority students; it undoubtedly considered itself an ally of bilingual educators who sought to meet these students' needs. As a consequence, Congress had not perceived the danger that its legislative intent could be subverted by state and local officials who administer bilingual education programs. The AIR study sensitized federal policymakers to the possibility that these officials would expand their

Office of Education); 155-61 (testimony of Dr. Albar Pena, Professor of Education at the University of Texas at San Antonio).
172. Id. at 335-36.
173. Id. at 337.
prerogatives to determine curricular content by embracing long-term programs that promote bilingualism and biculturalism.

Because Congress deemed such long-term programs inconsistent with the Bilingual Education Act's purposes, it moved to constrain bilingual educators' discretion through more explicit legislation. The House Report recommended that the Act clarify, through its grant eligibility requirements, the objective of enabling NEP and LEP students to participate in regular classrooms. Both the House and Senate Reports stated that the Act should not be transformed from an experimental into a service program; instead, the federal government's role should be confined to providing short-term grants to develop state and local capacity to deliver services to NEP and LEP students. Finally, the House Report explicitly addressed the need to minimize segregation of linguistic minority pupils by placing English-speaking children in bilingual classrooms.

As amended, the Act responded to each of these concerns. First, the amendments clarified the Act's objectives. Both its policy declaration and definition of acceptable programs emphasized that a child's native language was to be used "to the extent necessary to allow a child to achieve competence in the English language." Although the Act continued to require that bilingual instruction demonstrate an appreciation of the child's cultural heritage, it was far clearer that the primary goal of such instruction was English-acquisition.

The Act also reinforced its experimental orientation by establishing a research program under the National Institute of Education. Furthermore, the Act called for a system of competitive contracts to fund bilingual education research by institutions of higher education, private and non-profit organizations, state educational agencies, and individual researchers.

In addition, to ensure that the Act did not support service programs,

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175. Id. at 88; S. REP. No. 856, supra note 165, at 68.
176. H.R. REP. No. 1137, supra note 174, at 86.
178. Id. at § 742, 92 Stat. at 2281-82. NIE was to conduct studies that would enhance the effectiveness of bilingual education programs funded under the Act. NIE was also to coordinate general research efforts to establish a coherent national agenda for investigating bilingual education. The Secretary of Education and the Director of NIE were also required to consult periodically with state and local educational agencies as well as other groups involved with bilingual education in carrying out their research responsibilities. Id.
179. Id. Competitive contracts were also to be awarded for the development and dissemination of instructional materials suitable for bilingual education programs. Special attention was to be given to language groups for whom private organizations were unlikely to develop materials. Id.
Congress authorized the Commissioner of Education to terminate grants after a review of program operations. The Commissioner had to provide school districts with notice of the planned termination, the opportunity for a hearing to consider the district’s long-term need, and a chance for appellate review.\textsuperscript{180} The Act relied entirely on the Commissioner’s judgment to limit program length; it established no hard-and-fast rules regarding the duration of grants.\textsuperscript{181}

Lastly, the amendments addressed concerns about segregation. To promote NEP and LEP children’s acquisition of English and to prevent unnecessary segregation, the Act explicitly permitted English-speaking children to participate in bilingual education classes. However, they could not exceed forty percent of the class.\textsuperscript{182} The Act additionally mandated that elective classes, such as art, music, and physical education, not be segregated.\textsuperscript{183}

The Act also responded to demands for increased parental participation in the development and implementation of bilingual education programs, although the AIR controversy did not highlight this concern. At the Senate hearings, two witnesses pressed strongly to involve parents in committees that would play more than an advisory role and would have funds to purchase technical assistance.\textsuperscript{184} Both the House and Senate reports cited the importance of involving parental councils in the design and implementation of bilingual programs.\textsuperscript{185} To improve parent and community participation in the development of bilingual education programs, the Act created formal advisory councils composed primarily of

\begin{footnotesize}
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\item \textit{Id.} at § 721(b)(2)(B), 92 Stat. at 2272. The Commissioner could not terminate a grant if the district demonstrated that its program was adequate, that it lacked the fiscal capacity to carry on the program without federal assistance, and satisfied one of the following conditions: (1) it continued to serve a substantial number of linguistic minority students; (2) it had experienced a recent, substantial increase in the number of linguistic minority students; or (3) it was required to provide a program pursuant to a court order or consent agreement. \textit{Id.} at § 721(b)(2)(A), 92 Stat. at 2272. If the Commissioner ordered a termination of funds, the district could seek review of the decision within sixty days; moreover, the Commissioner was obligated to reassess conditions in the district periodically to determine whether funding was appropriate due to changed circumstances. \textit{Id.} at § 721(b)(2)(C)-(D), 92 Stat. at 2273.
\item \textit{Id.} at § 703, 92 Stat. at 2270.
\item \textit{Id.}
\item \textit{1977 Senate Hearings, supra note 10, at 948-49 (remarks of Paul Sandoval, State Senator from Colorado); 960-61 (prepared statement of Federico Pena). Pena also recommended that a Department of Parental Involvement be created in the Department of Health, Education, and Welfare. \textit{Id.} at 961.}
\item \textit{H.R. REP. NO. 1137, supra note 174, at 89-90; S. REP. NO. 856, supra note 165, at 72.}
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\end{footnotesize}
parents and other representatives of NEP and LEP children. In contrast to the 1974 Act's rather vague directive to seek input from parents, teachers, and secondary students, the 1978 Act mandated that districts consult with these better-established councils in designing programs.86 The Act additionally required that schools inform linguistic minority parents of program goals and their children's progress in meeting them.87

In theory, requiring parental notice and creating advisory councils provided another check on the discretion of bilingual educators and administrators. However, because the councils remained purely advisory and notice could be formalistic, these checks probably did not work well in practice.88 Rather, including parental councils served the symbolic function of reassuring civil rights activists that the federal government retained its commitment to TBE and bilingual-bicultural education programs, even as it emphasized English acquisition and limited federal program support.

In sum, the AIR controversy accentuated the dilemmas posed by the Bilingual Education Act's odd marriage of civil rights rhetoric to the federal educational bureaucracy. The 1978 amendments to the Act reinstated a research and development orientation more consistent with the federal educational bureaucracy's general role. The feature of the civil rights regime that most clearly survived this retrenchment under the Act was the one most firmly established, the principle of desegregation. While the AIR study called into question the federal educational bureaucracy's proper role in the field of bilingual education, it had even more serious implications for the civil rights enforcement regime under title VI. The AIR evaluation severely threatened the regime's vitality by undercutting the apparent consensus regarding TBE and bilingual-bicultural education programs' pedagogical benefits and, by extension, the justification for sanctioning districts that failed to adopt them.

2. The Collapse of the Lau Enforcement Regime

a. The Supreme Court Rethinks Lau's Effects Test

In 1978, the United States Supreme Court reconsidered the scope of title VI's protections against discrimination in Regents of the University of California v. Bakke.89 In Bakke, a white male claimed that minority quotas instituted in a medical school's affirmative action program were unlawful under title VI and the equal protection clause. A majority of

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87. Id., 92 Stat. at 2271.
the Bakke Court seemed willing to treat title VI and the equal protection clause as coextensive, thereby suggesting that plaintiffs may be required to show discriminatory intent as well as an adverse effect to establish a violation under title VI. Even though the Court refrained from overruling Lau, the Bakke decision seriously undercut the viability of an effects test for determining whether linguistic minority students had been excluded from meaningful participation in the curriculum under title VI.

By suggesting that something more than discriminatory effects must be shown in title VI cases, Bakke potentially reduced the instances in which federal officials could constrain state and local discretion on behalf of linguistic minority students. In Lau, the Court had presumed that school districts could reallocate resources to programs for NEP and LEP students without seriously undermining the curriculum for English-speaking students. An effects test that allowed for a broad federal role therefore was relatively palatable because linguistic minority students could be benefited without obviously harming other students. By contrast, affirmative action programs plainly imposed serious burdens on an identifiable class of whites. Under these circumstances, the Court no

190. Id. at 284-87 (opinion of Powell, J.); id. at 325, 328-40 (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.).

191. Id. at 303-05 (opinion of Powell, J.); Margulies, supra note 64, at 130. In 1983, the Court again considered whether discriminatory intent was a necessary element of a title VI violation. In Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983), a class of Black and Hispanic police officers asserted that they had been disproportionately laid off because tests later deemed discriminatory had deprived them of seniority and related benefits. In deciding whether the “last-hired, first-fired” rule impermissibly perpetuated past discrimination, a plurality of four Justices was prepared to overrule Lau and impose an intent requirement. Id. at 610-11 (concurring opinion of Powell, J., joined by Burger, C.J., and Rehnquist, J.); id. at 615 (opinion of O'Connor, J.). However, the remaining Justices split on the issue. Two believed that title VI did not require proof of discriminatory intent. Id. at 589-93 (opinion of White, J.); id. at 616-24 (dissenting opinion of Marshall, J.). The remaining three Justices distinguished title VI's requirements from those under administrative regulations promulgated to enforce it. In their view, intent was essential to establish a violation of title VI itself but was not necessary to prove noncompliance with a regulation that employed an effects test. Id. at 639-45 (dissenting opinion of Stevens, J., joined by Brennan and Blackmun, JJ.); see also Larry P. v. Riles, 793 F.2d 969, 981-82 (9th Cir. 1984) (concluding that under Guardians Ass'n, plaintiffs could rely on an effects test under regulations issued pursuant to title VI that established such a standard, although proof of discriminatory intent was necessary to establish a violation of title VI itself).

192. See generally J. Kimbrough & P. Hill, THE AGGREGATE EFFECTS OF FEDERAL EDUCATION PROGRAMS 4-7 (1981) (federal policy initiatives in education were predicated on assumptions that the regular program would not be affected and that the federal program would provide additional services to beneficiaries without undermining the quality of services or benefits enjoyed by other groups).

longer found broad-ranging federal intervention on behalf of minority students as attractive. Consequently, it sought to circumscribe federal involvement by imposing a higher threshold for finding a title VI violation.

Although the support of a broad coalition of liberals and civil rights activists had been necessary to ensure title VI's passage, *Bakke* demonstrated the liabilities of embedding educational protections for linguistic minorities in an omnibus bill. Title VI's protection covered both linguistic minority students and affirmative action beneficiaries. Once the Court imposed an intent requirement under title VI in affirmative action cases, the legitimacy of linguistic minority students' claims based solely on the effect of English-only instruction was jeopardized. Although the Court did not overrule *Lau*, neither did it openly embrace a different standard of proof under title VI, depending on the nature of the relief to be afforded. This issue remains unresolved with some Justices seeking to create flexibility by distinguishing between violations of title VI and administrative regulations promulgated to enforce it.¹⁹⁴

b. The Demise of the *Lau* Guidelines: The Ongoing Retrenchment of Regulatory Protections

As Congress discussed the AIR evaluation and the Supreme Court reconsidered the effects test under title VI, OCR faced a legal challenge to the *Lau* Guidelines. The State of Alaska and several of its school districts sued to enjoin the Guidelines' enforcement because, among other things, they had not been properly promulgated under the Administrative Procedure Act. According to the plaintiffs, the Guidelines were tantamount to rules because of their rigid application, but the public had never had an opportunity to provide input through the prescribed process of notice-and-comment rulemaking. In September 1978, the Alaska federal district court approved a consent decree requiring that the Guide-

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¹⁹⁴ See *supra* note 191. In fact, "breathing room" and flexibility may be essential if administrative agencies are to respond creatively in different regulatory contexts. See P. NONET & P. SELZNICK, *supra* note 11, at 92, 111-13; see also G. BENVENISTE, *supra* note 15, at 196-97 (citing need for "loosely coupled" systems that allow for the exercise of discretion to encourage risk-taking, experimentation, and organizational learning).
Joseph Califano, then Secretary of Health, Education, and Welfare, was eager to dismantle the Lau regime because it no longer reflected the goals of English-acquisition and rapid assimilation. Although Califano cared about NEP and LEP students’ problems, he believed that federally sponsored programs had “become captive[s] of the professional Hispanic and other ethnic groups, with their understandably emotional but often exaggerated political rhetoric of biculturalism.” As a high-level political appointee, Califano undoubtedly reflected President Jimmy Carter’s views and played a critical role in the decision to attempt to promulgate formal rules. However, Califano may have underestimated the difficulties of replacing the Lau Guidelines with more acceptable enforcement provisions.

The Lau Guidelines were never published as proposed regulations; instead, the newly formed Department of Education issued a Notice of Proposed Rulemaking (NPRM) in August 1980. The NPRM emphasized rapid English-acquisition coupled with native-language instruction to prevent a child from falling behind in required courses; it thereby moved away from the Guidelines’ emphasis on long-term enrichment through bilingualism and biculturalism to a narrower focus on short-term compensatory education. Moreover, the NPRM generally imposed less stringent constraints on state and local discretion to design and implement programs than did the Lau Guidelines.

Before the NPRM’s publication, the Department of Education considered a number of draft proposals that invited comments on a substan-

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197. Id. According to Califano, President Carter endorsed his position, writing in the margin of a memorandum on bilingual education that “I want language taught—not ethnic ‘culture.’” Id. at 314.
198. See id. at 312-14.
200. Levin, supra note 141, at 40.
201. For example, the Lau Guidelines required a district to provide comprehensive programs when its enrollment included at least 20 NEP and LEP students, regardless of grade level; the NPRM only required such programs if there were 25 or more NEP and LEP students within two grade levels. Compare LAU GUIDELINES, supra note 1, at 214 with 45 Fed. Reg. at 52,066, 52,069. The Guidelines required programs to be bicultural, while the NPRM only mandated that programs be operated with respect for a child’s cultural heritage. Compare LAU GUIDELINES, supra note 1, at 215-18 (educational program selection), 221 (definition of programs) with 45 Fed. Reg. at 52,072. The Lau Guidelines also were more demanding with respect to exit criteria, teacher qualifications, and parental notice requirements. The Lau Guidelines made no provision for waivers from their requirements, while the NPRM permitted waivers for districts with unforeseen increases in NEP and LEP student enrollment, districts undertaking pilot programs, and districts with alternative programs designed to meet the NPRM’s objectives. Compare LAU GUIDELINES, supra note 1, at 213-21 with 45 Fed. Reg. at 52,073-74; see Levin, supra note 141, at 42.
tially wider range of program features than the NPRM did. For example, one draft version would have solicited comments on whether students should be classified as NEP or LEP when they scored at or below the twenty-fifth, rather than the fortieth, percentile on English proficiency tests; and whether linguistic minority students could be assigned to a racially or ethnically identifiable class in required subjects, or whether such an assignment for more than fifty percent of the school day was forbidden unless a school district could establish that no alternative method of instruction was effective.\textsuperscript{202}

OCR, the Office for Bilingual Education and Minority Language Affairs, and several Hispanic groups intensely opposed these earlier versions.\textsuperscript{203} In their view, providing options allowed the majority to vote on the minority's civil rights, an outcome considered antithetical to title VI's remedial intent. The Office of Planning, Budget, and Evaluation, however, strongly urged that more options be provided to assure full consideration of the relevant issues. Ultimately, Shirley Hufstedler, then Secretary of Education, decided to limit the options presented.\textsuperscript{204}

The Department also had to determine how the NPRM would affect prior enforcement efforts under the \textit{Lau} Guidelines. Some argued that retreating from the Guidelines would "sell out" Hispanics and would undermine consent agreements and lower court decisions that relied on the Guidelines in evaluating compliance with title VI. Eventually, Hufstedler decided to treat enforcement of the NPRM as consistent with that under the Guidelines and thereby avoided these problems.\textsuperscript{205}

At regional hearings on the NPRM, witnesses typically either supported the regulations or claimed that they did not go far enough in promoting TBE and bilingual-bicultural education programs. In contrast, most written comments submitted to the Department objected to the regulations because they intruded unduly on state and local educators' prerogatives by mandating native-language instruction despite uncertain evidence of its effectiveness. The NPRM's opponents charged that Hispanic advocacy groups had bused in parents to influence the hearings, while proponents alleged that teachers' organizations and other national educational associations had mounted an extensive write-in campaign.\textsuperscript{206}

\begin{itemize}
\item \textsuperscript{202} Levin, \textit{supra} note 141, at 43.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id.
\item \textsuperscript{205} Id. at 43-44. Secretary Hufstedler rejected some other concerns raised by Hispanic groups and certain staff members. These concerns related to waivers for districts undertaking pilot projects or alternative programs with objectives identical to those of the NPRM, exit criteria that were allegedly too lax, the possibility that parents would withdraw their children from programs at the district's urging, the limited services mandated for high school students, and the provision allowing districts to rely exclusively on remedial English instruction where students were comparably limited in English and their native language. Id. at 44-45.
\item \textsuperscript{206} Id. at 39-40.
\end{itemize}
The Department of Education received little support for the NPRM from Congress or the general public. Because the NPRM's publication coincided with heightened congressional concern about the purpose and effectiveness of bilingual programs, the Department faced strong opposition to its native-language instruction requirements. The Department also was unable to counteract a carefully orchestrated media campaign focusing on bilingual education's separatist tendencies launched by the regulations' opponents. Finally the Department encountered additional resistance from the Regulatory Analysis Review Group (RARG) of President Carter's Council on Wage and Price Stability, which made the NPRM one of its early test cases in efforts to trim costly, ineffective regulations. In a period of high inflation, growing unemployment, and energy shortages, the Carter Administration demanded that the NPRM's supporters establish that the regulations were economically feasible.

The Department of Education's inexperience undoubtedly aggravated its difficulties, and the hearings degenerated into a professional turf fight and ideological free-for-all. Eventually, the NPRM was withdrawn. Later, the Lau Guidelines were as well, making OCR's 1970 memorandum, which was the basis for Lau, the controlling administrative statement under title VI. The Lau enforcement regime had come full circle, again providing little specific guidance to school districts regarding their legal obligations to linguistic minority students.

The battle over the NPRM illustrated the tensions between a civil rights imperative and the traditional delegation of discretion to state and local educators. Reinvesting school officials with some discretion to design bilingual education programs seemed justifiable in light of mixed empirical evidence on program effectiveness. In requiring TBE and bilingual-bicultural education, the Lau Guidelines had relied heavily on an apparent consensus about the educational benefits of these programs. The AIR evaluation destroyed this seeming consensus and thus presaged the Guidelines' demise; no longer could a district's choice of alternative

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207. In fact, Congress voted to deny funds for the proposed regulations' implementation for six months to allow further comment. L. ORUM, THE BILINGUAL EDUCATION ACT OF 1984: COMMUNITY INVOLVEMENT IN POLICY DEVELOPMENT (1984).

208. See Levin, supra note 141, at 51-53, 56.

209. Id. at 48-49. RARG demanded that the Department of Education consider a more "flexible" regulation that would consider the cost-effectiveness of a wide variety of approaches to meeting linguistic minority students' needs. Id.

210. See Palmer, supra note 33, at 35, 43 (rising inflation was reflected in Carter's budgetary restraint).

211. Levin, supra note 141, at 52-54, 57-58.

212. Id. at 50. Terrel H. Bell, then Secretary of Education, claims he withdrew the NPRM as an expedient means of reestablishing his credibility with conservatives who were dissatisfied with his politically moderate positions. T. BELL, THE THIRTEENTH MAN 45-47 (1988).

methods be deemed tantamount to an abuse of discretion. The Carter administration's disaffection with OCR's approach stemmed from the emerging view that the Guidelines' preference for TBE and bilingual-bicultural education programs was based on political, not pedagogical, considerations. In response to these concerns, the NPRM accorded somewhat greater discretion to state and local decisionmakers who administered programs for NEP and LEP students.

Yet, the civil rights perspective that underlay Title VI made it difficult to expand state and local prerogatives extensively. Too generous an expansion of discretion would not adequately protect linguistic minority students from potential abuses by biased officials. Such a shift would quickly be labeled a civil rights retreat and a "sell out" of Hispanics. The NPRM therefore retained a relatively strong commitment to TBE and bilingual-bicultural programs, despite the erosion of their empirical justification.

The tensions between the civil rights perspective and traditional educational prerogatives manifested themselves in other ways as well. Civil rights advocates favored limiting the options available for public notice and comment. In their view, federal officials had an obligation to ensure that electoral majorities or powerful special interest groups did not abrogate the rights of linguistic minorities. By contrast, those in the Office of Planning, Budget, and Evaluation believed that the dispute turned on the efficacy of different pedagogical techniques; they favored presenting a wide array of choices without much concern about possible bias against NEP and LEP students.

Similarly, those who viewed TBE and bilingual-bicultural education programs as an entitlement designed to eliminate the vestiges of past discrimination were not preoccupied with enforcement costs. For example, OCR had a history of promulgating protections in principle without considering the feasibility of enforcement. On the other hand, RARG officials treated the NPRM like any other regulation and insisted that it be cost-effective. In effect, RARG was willing to put a price tag on civil rights.214

Efforts to enhance school officials' prerogatives by reducing civil rights protections produced an unlikely alliance between state and local educators and English-only reformers. During deliberations on the NPRM, teachers and administrators who sought to preserve their discretion from intrusive federal regulations allied themselves with critics who decried bilingual programs as an ideological threat to national unity. These groups had a common interest in eliminating federal support of TBE and bilingual-bicultural programs. This coalition would survive,

214. Levin, supra note 141, at 48, 56; see Rabkin, supra note 19, at 330-31.
however, only as long as English-only reformers did not attempt to impose their own philosophical agenda on state and local educators.

c. The Increasing Importance of the Equal Educational Opportunities Act

Confronted with doubts about Lau's continued vitality after Bakke and the Guidelines' withdrawal, litigators and courts turned increasingly to the EEOA in lawsuits alleging that school districts had failed to provide adequate services for NEP and LEP children.\textsuperscript{215} Without requiring proof of discriminatory intent, the EEOA mandates that districts take "appropriate action" to meet NEP and LEP students' needs.\textsuperscript{216} In Castaneda v. Pickard,\textsuperscript{217} the Fifth Circuit Court of Appeals employed a three-pronged test to determine whether a school's program for linguistic minority students constitutes "appropriate action" under the EEOA. First, the court must determine that the school district has selected a program based on sound educational theory. Next, the court examines whether the district has implemented the theory effectively through its choice of programs and practices. Finally, the court must evaluate whether the district has carefully monitored the program's results and modified it as necessary.\textsuperscript{218} While the Lau Guidelines provided school districts and courts with fairly comprehensive standards for compliance, the EEOA accords school administrators and judges more flexibility in devising remedies. In this regard, the EEOA has proved consistent with efforts in the late 1970s and early 1980s to enhance state and local discretion in designing and implementing curricula for linguistic minority students.

D. Federal Policy Initiatives in the Face of Pedagogical Uncertainty: The Continuing Vitality of State and Local Discretion

In the 1980s, conflicting pedagogical evidence about how to meet

\textsuperscript{215} See Haft, supra note 91, at 214-15 (advocating that the EEOA become a primary vehicle for lawsuits on behalf of linguistic minority students); Margulies, supra note 64, at 108-09 (same).

\textsuperscript{216} Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, tit. II, § 204(f), 88 Stat. 484, 515 (codified at 20 U.S.C. § 1703 (1982)); see Castaneda v. Pickard, 648 F.2d 989, 1008-09 (5th Cir. Unit A June 1981) ("Congress' use of the less specific term 'appropriate action,' 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.") But see Haft, supra note 91, at 263 (arguing that Congress enacted the EEOA to advance already existing legislative and administrative policies endorsing bilingual-bicultural methods).

\textsuperscript{217} 648 F.2d 989 (5th Cir. Unit A June 1981).

\textsuperscript{218} Id. at 1009-10. This test was cited with approval and applied in Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1040-42 (7th Cir. 1987). Interestingly, on remand in Castaneda, the trial court found the district in compliance with the EEOA's requirements, largely because the plaintiffs adopted the view that the district's liability should be determined on the basis of its conformity with state bilingual education laws. Castaneda v. Pickard, 781 F.2d 456, 470-72 (5th Cir. 1986).
NEP and LEP students' needs and the Reagan administration's endorsement of "new federalism" ideals gave added support to those who favored limiting federal involvement in bilingual education. Although advocates of a civil rights perspective succeeded in maintaining some federal support for native-language instruction, the reauthorizations of the Bilingual Education Act in 1984 and 1988 delegated increasing discretion to state and local decisionmakers.


In 1980, the Office of Planning, Budget, and Evaluation issued a series of studies challenging the empirical basis for continued primary reliance on TBE programs. RARG requested the studies shortly before it lodged its opposition to the NPRM. The Office of Planning, Budget, and Evaluation released a final draft of the report by Beatrice F. Birman and Alan L. Ginsburg in October 1981. Like the AIR evaluation, Birman and Ginsburg's report was subjected to scathing criticism but nevertheless remained highly influential.

The 1981 report conceded that linguistic minority students required some form of educational assistance but raised questions about the type of assistance needed and the rationale for federal intervention. The authors concluded that the educational problems of linguistic minority students stemmed from poverty as well as language. Bilingual programs therefore provided only a partial solution, especially where children from economically deprived homes lacked proficiency in both English and their native language. By arguing that linguistic minority students' academic problems derived as much from poverty as from minority status, the report undercut the civil rights rationale for requiring TBE and bilingual-bicultural education programs.

The report strongly supported the exercise of greater discretion by state and local educators. The report found that the federal government's heavy reliance on TBE programs was unwarranted because there

219. San Miguel, supra note 12, at 514.


221. B. BIRMAN & A. GINSBURG, ADDRESSING THE NEEDS OF LANGUAGE-MINORITY CHILDREN: ISSUES FOR FEDERAL POLICY (1981); see Birman & Ginsburg, Introduction: Addressing the Needs of Language-Minority Children, in BILINGUAL EDUCATION, supra note 1, at ix (outlining the content of the report); San Miguel, supra note 12, at 514-16 (same).

222. For one example of such criticism of the report's analysis of transitional bilingual education's utility, see E. HERNANDEZ-CHAVEZ, J. LLANES, R. ALVAREZ & S. ARVIZU, THE FEDERAL POLICY TOWARD LANGUAGE AND EDUCATION: PENDULUM OR PROGRESS? — A RESPONSE TO THE DE KANTER/BAKER REPORT (1982); see also San Miguel, supra note 12, at 514 (describing the report's critical impact on "the future of bilingual education policy at the federal level").

223. Birman & Ginsburg, supra note 221, at xv-xvi; San Miguel, supra note 12, at 515.
was little evidence to support their superiority over alternative approaches.\(^{224}\) Birman and Ginsburg therefore recommended that the federal government consider promising alternatives to TBE programs, such as structured immersion. The report also criticized the federal government for demanding that local districts provide TBE programs when schools lacked sufficient funding, qualified personnel, and adequate language assessment tests.\(^{225}\) In light of the uncertainty surrounding program effectiveness, the report suggested that state and local educators were in a better position to allocate scarce resources to meet NEP and LEP students' needs. Birman and Ginsburg consequently recommended that the federal government accord more discretion to state and local officials in program design and implementation, demonstrate sensitivity to resource constraints facing these officials, and promote better research on bilingual education programs.\(^{226}\)

The Office of Planning, Budget, and Evaluation thus continued to produce research that undermined efforts by the Office of Bilingual Education and OCR to portray TBE and bilingual-bicultural education programs as appropriate remedies for past discrimination. In fact, the Office of Planning, Budget, and Evaluation was the source of consistently negative findings on these programs, and there is some evidence that it systematically overstated the possible benefits of alternative instructional techniques.\(^{227}\) Perhaps, this overenthusiasm for other techniques reflected the federal educational bureaucracy's tendency to preserve professional educators' prerogatives against challenges by outsiders, such as civil rights advocates, and its desire to maintain good working relationships with state and local educators.

2. The 1982 Senate Hearings on the Bilingual Education Act

In 1982, Congress again considered amendments to the Bilingual Education Act.\(^{228}\) These hearings dealt with two principal issues: 1)
whether bilingual education programs promote separatism; and 2) how responsibility for designing and financing bilingual education programs should be allocated among federal, state, and local governments. Congress also considered decreasing funds for bilingual education programs.

a. Bilingual Education and Separatism

At the 1982 Senate subcommittee hearings, English-only reformers raised concerns about the divisive nature of bilingual programs. These reformers primarily sought to limit the ability of federal officials and bilingual educators to promote programs that rely heavily on native-language instruction. A leading reformer, Senator S.I. Hayakawa, charged that programs promoting bilingualism and biculturalism were part of a separatist movement that threatened a unified sense of national identity in the United States. He raised the specter of permanently and officially bilingual states within the next ten to twenty years when a majority of those states' residents would be of "Spanish background." He feared that the bilingual education movement was the prelude to "another language... becom[ing] an official language alongside English" as had happened in Quebec. Hayakawa went on to assert that:

Learning English has been the primary task of every immigrant group for two centuries. Participation in the common language has rapidly made the political and economic benefits of American society available to every new group as they came in, and those who have mastered English have overcome the major hurdles to participation in our democracy.

In a similar vein, Senator Walter D. Huddleston stated that Congress should ensure that "we are indeed helping non-native-born students achieve proficiency in our common language and are helping to rapidly assimilate them into our society." According to Huddleston, Congress intended to support programs that promptly mainstreamed pupils who mastered English, not programs that fostered linguistic or cultural pluralism. Huddleston contended that any provision for foreign lan-
language training should be embodied in separate legislation.233

English-only reformers relied not on pedagogical evidence but on their commitment to assimilating linguistic minorities into the American mainstream. As a result, their views were attacked as thinly veiled racism that would require NEP and LEP students to treat their own language and culture as inferior to English and "American" customs. For example, Arnoldo S. Torres, National Executive Director of the League of United Latin American Citizens (LULAC), attributed attacks on bilingual education to increasing anti-immigrant sentiment. He contended that this sentiment correlated with an economic downswing and that immigrants had historically been scapegoats for America's financial woes.234 He forcefully rejected the claim that bilingual education engendered separatist tendencies, stating that:

[O]ur purpose in supporting these programs is precisely that of helping students be better contributors to mainstream American society. Those who insist on relegating minority-language students to an inferior status by placing them in situations where they are doomed to lag behind or fail are those who are actually promoting a continued separation due to lack of communication and achievement.235

Other witnesses echoed these views.236

Although the Senate considered claims that bilingual programs were divisive, the influence of English-only reformers on federal policymakers had diminished after the NPRM hearings. During the NPRM hearings, English-only reformers had allied themselves with state and local officials to eliminate federal restrictions on designing a curriculum for NEP and LEP students under title VI. At the 1982 hearings, however, these groups' interests diverged when efforts by English-only reformers to limit the choice of instructional methods threatened state and local decision-making prerogatives. Perhaps due to the breakdown of this alliance, English-only reformers became less involved in deliberations about the Bilingual Education Act after 1982; instead, they redirected their energies to promoting a constitutional amendment that would make English the official language of the United States.237

b. The Allocation of Responsibility for Bilingual Education Programs Among Federal, State, and Local Governments

During the 1982 Senate hearings, Terrel H. Bell, then Secretary of Education, analyzed the federal government’s role in supporting bilin-

233. Id. at 44-45.
234. Id. at 111-12.
235. Id. at 111.
236. See, e.g., id. at 188 (statement of Phyllis Blaunstein, Executive Director of the National Association of State Boards of Education).
237. See supra note 231.
gual programs. According to Bell, this “catalytic” role primarily required that the federal government provide short-term grants to school districts and state educational agencies to cover the start-up costs of special programs for NEP and LEP students. Once the programs were operational, however, state and local governments would bear the burden.\(^\text{238}\) In keeping with Birman and Ginsburg’s recommendations, Bell stated that the federal government should assume some responsibility for teacher training and bilingual education research but should not prescribe any particular teaching methodology.\(^\text{239}\) The only restrictions on local flexibility would be a requirement that the programs effectively “prepare students to transfer into all English classrooms as quickly as possible without falling behind in other subject matter areas.”\(^\text{240}\)

Although some participants agreed with Bell that local officials should enjoy greater flexibility in designing bilingual education programs, others worried that local officials might choose instructional methods based on budgetary, rather than pedagogical, considerations. Cost cutting seemed especially likely because of the federal government’s push to reduce program funding despite rapid growth in the number of NEP and LEP students.\(^\text{241}\)

According state and local decisionmakers greater curricular discretion was part of a broader push under President Ronald Reagan to minimize the federal government’s role in social welfare programs, a movement labeled the “new federalism.”\(^\text{242}\) One justification for reduced

\(^{238}\) 1982 Senate Hearings, supra note 228, at 2-3. Somewhat ironically, Bell was the Commissioner of Education when OCR assembled the task force that drafted the Lau Guidelines.

\(^{239}\) 1982 Senate Hearings, supra note 228, at 3-5.

\(^{240}\) Id. at 4.

\(^{241}\) For example, Senator Hayakawa approved of Secretary Bell’s efforts to increase local flexibility, id. at 14, as did Esther Eisenhower, English-as-a-Second-Language Coordinator in the Fairfax County, Virginia public schools, id. at 165-66, and Phyllis Blaunstein, Executive Director of the National Association of State Boards of Education, id. at 180-82. On the other hand, Delia Pompa, Executive Director of Bilingual Education for the Houston Independent School District, argued that local discretion had to be limited to prevent “economic efficiency and other considerations” from dictating curriculum. Id. at 171-72. These concerns were aggravated by the executive branch’s recommended funding cutbacks despite evidence that the linguistic minority student population was growing 2 1/2 times more rapidly than the general school-age population. Id. at 1-2 (remarks of Sen. Robert T. Stafford of Vermont). There were also concerns that because TBE programs were relatively expensive, districts might select alternative approaches simply because they were cheaper. See id. at 214 (remarks of Sen. Stafford).

\(^{242}\) During his inaugural address in 1981, President Ronald Reagan stated:

It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people. All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government.

Inaugural Address of President Ronald Reagan, 17 WEEKLY COMP. PRES. DOC. 2 (Jan. 20, 1981). In later statements, President Reagan continued to press for cutbacks in federal programs. See e.g.
intervention under the new federalism was that state and local control would foster greater experimentation. Ironically, though, the Bilingual Education Act originally had been passed precisely because of the paucity of state and local innovation and the perceived need for federal leadership in bilingual education research.

New federalists could argue that conditions had changed since the Act's passage in 1968; that is, state and local decisionmakers now were less biased against linguistic minority students after fourteen years of federal intervention and therefore more apt to support studies on these students' behalf. Moreover, state and local educational agencies were better equipped to undertake experimentation after lengthy experience with federally sponsored programs.

By contrast, those who favored retention of federal civil rights protections feared that state and local officials remained indifferent, if not hostile, to NEP and LEP students' needs. In addition, proposed cutbacks in federal funding made it less likely that districts would command the resources necessary to do research on costly programs for NEP and LEP students. Instead, school administrators would likely be forced to adopt the least expensive approaches, which typically relied heavily on English. Moreover, the emerging ideological controversy surrounding bilingual education programs reduced the chances that state and local officials would be willing to shoulder the political risks of innovation. These decisionmakers would be tempted to await the results of other districts' programs, thereby minimizing the potential for costly errors.

Despite these analytical limitations, the new federalism remained a powerful force in bilingual education policymaking. This approach attracted federal decisionmakers weary of dealing with the intractable problems of NEP and LEP students and eager to scale down their involvement in this area. It also appealed to state and local educators.

The State of the Union, 18 WEEKLY COMP. PRES. DOC. 80 (Jan. 26, 1982) (suggesting that many federal programs be returned to state control). The push for the new federalism rests on a belief that the federal government has grown too unwieldy and that states are ready to assume more responsibility for social programs. It also rests on an assumption that "grass roots" government can best address many problems. Weisert, 1981: A Threshold Year for Federalism, INTERGOVERNMENTAL PERSP., Winter 1982, at 4. Reagan's version of the new federalism, which called for federal budget cuts, differed from Nixon's push, which expanded federal support while enhancing state and local discretion. Perhaps, this difference derived from the fact that Reagan commanded congressional support for his agenda, while Nixon did not. Brown, supra note 128, at 102-04.

243. See Moran, supra note 8, at 211.
244. See, e.g., 1982 Senate Hearings, supra 228, at 171-72 (remarks of Delia Pompa, Executive Director of Bilingual Education for the Houston Independent School District) (explaining that lack of resources caused her district to adopt programs that use primarily English); see also id. at 214 (remarks of Sen. Robert T. Stafford).
245. Moran, supra note 8, at 211-12; Rose-Ackerman, supra note 18, at 610-11.
246. The desire to reduce federal involvement in the programs is reflected in the drop in appropriations under the Act that began in 1981.
by reinvesting them with discretion to make curricular choices. These educators allied themselves with the new federalists in support of state and local control; however, their interests diverged with respect to funding cutbacks. State and local educators sought federal resources to expand their capacity to provide programs, while those hoping to minimize the federal role advocated reductions in program appropriations.

c. The Bilingual Education Improvement Act of 1983

In 1983, the Bilingual Education Improvement Act was introduced in the House of Representatives, and a similar bill was considered in the Senate. Secretary Bell described the Act's major purposes as: (1) affording school districts greater latitude in choosing among instructional approaches available to meet NEP and LEP children's needs; (2) limiting federal grants to five-year periods while enhancing school districts' capacity to carry on programs after grants were terminated; (3) strengthening the role of state educational agencies in bilingual education policymaking and implementation; and (4) defining the target population of NEP and LEP children more stringently to facilitate the effective allocation of federal funds.

The House subcommittee on education held hearings on the Act, which focused on encouraging program flexibility and decreasing federal funding. The substance of these hearings closely approximated the 1982 deliberations on the appropriate allocation of responsibility for bilingual education programs among federal, state, and local governments. Several school administrators and House members expressed approval of efforts to broaden the scope of programs supported under the Act. By contrast, bilingual educators objected that in its drive to
allow greater flexibility, the federal government would leave school districts with no meaningful guidelines.\textsuperscript{251}

At the hearings, Secretary Bell favored limiting the federal government's responsibility to provision of short-term grants, which would reduce costs under the Act.\textsuperscript{252} In addition, he supported confining assistance to students "whose usual language is other than English," thereby reducing the size of the target population under the Act from 3.6 million to 1.2 million students.\textsuperscript{253} Again, witnesses who advocated greater local flexibility voiced doubts about the proposed funding cutbacks and redefinition of the Act's target population.\textsuperscript{254} Despite strong support from the Reagan administration, the Bilingual Education Improvement Act was not enacted into law.\textsuperscript{255}

The new federalism was invoked to justify the Bilingual Education Improvement Act just as it had been during the 1982 Senate hearings on the Bilingual Education Act. Despite the new federalism's powerful appeal, it could not carry the legislation. Apparently, federal policymakers were not yet prepared to abandon completely the civil rights regime that had produced restrictions on the choice of instructional methods for NEP and LEP students. Any reallocation of discretion to state and local officials would have to be tempered by at least some recognition of the possibility of wrongful discrimination. Under this view, the Reagan administration's policy initiative represented too radical a departure from earlier protections for linguistic minority students under the Bilingual Education Act.

d. The Reauthorization of the Bilingual Education Act in 1984

Spurred by the Reagan Administration's efforts to pass the Bilingual Education Improvement Act, proponents of TBE and bilingual-bicultural education programs introduced alternative legislation. Carl Perkins, Chair of the House Education and Labor Committee, introduced a

\textsuperscript{251} See, e.g., \textit{id.} at 97 (remarks of Awilda Orta, Director, Bilingual Education Programs, New York City Board of Education); 115-16, 122, 124 (remarks of Linda Tarr-Whelan, Director of Government Relations, National Education Association); 131 (statement of James E. Alatis, President, Joint National Committee for Languages); 151 (remarks of Sau-Lim Tsang, Executive Director, ARC Associates, Inc., Oakland, California). See generally Fix \& Eads, \textit{The Prospects for Regulatory Reform: The Legacy of Reagan's First Term}, 2 \textit{YALE J. ON REG.} 293, 309-10 (1985) (describing situations in which states and public interest groups have opposed delegations of authority that appear to be smoke screens for the abdication of federal regulatory responsibility).

\textsuperscript{252} \textit{id.} at 25.

\textsuperscript{253} \textit{id.} at 131-32 (prepared statement of James E. Alatis, President, Joint National Committee for Languages). Also, because structured immersion and ESL programs were potentially cheaper than TBE and bilingual-bicultural programs, according districts greater flexibility in choosing programs could cut costs even further. \textit{See} Birman \& Ginsburg, \textit{supra} note 221, at xv-xvii.

\textsuperscript{254} See, e.g., 1983 \textit{House Hearings}, \textit{supra} note 248, at 67, 79 (remarks of Diane Ravitch); 79 (remarks of Albert Shanker).

\textsuperscript{255} R. SALOMONE, \textit{supra} note 5, at 92-93.
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A moderate measure that simply reauthorized the Bilingual Education Act for another four years.\textsuperscript{256} Collaborating with the National Association for Bilingual Education and the National Council of La Raza, Representatives Dale Kildee of Michigan and Baltasar Corrada of Puerto Rico drafted an alternative bill that sought to strengthen the federal commitment to programs that relied on native-language instruction in educating NEP and LEP students.\textsuperscript{257}

At hearings held by the House subcommittee on education,\textsuperscript{258} witnesses who sought to declare English the official language of the United States urged that the Act make explicit its assimilative purpose.\textsuperscript{259} However, most of the discussion centered on three issues: the appropriate level of federal funding, the degree of flexibility that local school districts should enjoy in selecting instructional programs for NEP and LEP children, and the need for teacher training.\textsuperscript{260}

Several witnesses argued that funding under the Act should not be reduced because of the high growth rate in the NEP and LEP student population. Noting that NEP and LEP children were currently underserved, they contended that state and local educational agencies would not be able to allocate sufficient funds to bilingual programs. Witnesses also cited the excessive fiscal burden on a few states with high concentrations of NEP and LEP children absent federal assistance.\textsuperscript{261}

Some House members and state and local educators stressed the need for flexibility at the local level to permit school districts to respond to the special needs of language groups other than the Spanish-speaking. The by-now familiar dispute over the relative merits of various teaching techniques for NEP and LEP students took place.\textsuperscript{262} All of the witnesses

\textsuperscript{256} Id. at 93.
\textsuperscript{257} Id. at 93-94.
\textsuperscript{259} See, e.g., 1984 House Hearings, supra note 258, at 63-66 (remarks of Sen. Hayakawa); 69 (prepared statement of Gerda Bikales, Executive Director, U.S. English).
\textsuperscript{260} The House Report emphasized these concerns as well as the need for improved technical assistance and evaluation programs. \textit{H.R. REP. No. 748,-98th Cong., 2d Sess. 4-11, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 4036, 4039-46.}
\textsuperscript{261} See, e.g., 1984 House Hearings, supra note 258, at 77-78 (statement of Nguyen Ngoc Binh, President-Elect, National Association for Vietnamese American Education); 124-27 (statement of Dr. M. Joan Parent, President, National School Boards Association).
\textsuperscript{262} See, e.g., \textit{id.} at 94 (remarks of Rep. Dale Kildee of Michigan); 111-12 (statement of Guillermo Lopez, Chief, Bilingual Education Office, California Department of Education); 127 (prepared statement of Dr. M. Joan Parent, President, National School Boards Association); 131-32
agreed that there was a shortage of qualified bilingual education teachers. They recommended funding for training programs and fellowships.263

In response to calls for a new federalism, the 1984 amendments to the Act vested greater discretion in state and local decisionmakers by expanding the definition of acceptable instructional techniques and enlarging the states’ role in the grant and policymaking processes. The Act recognized not only programs that rely heavily on native-language instruction but also “special alternative instructional programs,” which use structured English language instruction and other special services to “allow a child to achieve competence in the English language and to meet grade-promotion and graduation standards.”264 The Act reserved 4% of the first $140 million appropriated and 50% of additional appropriations to fund special alternative instructional programs with a proviso that not more than 10% of the total funds appropriated under the Act be allocated to these programs.265 Local educational agencies seeking funding for alternative instructional programs also could receive priority in the grant application process.266

The Act expressly indicated that the federal government’s role was to enhance state and local agencies’ capacity to provide bilingual education services on their own. Federal funds were intended to supplement, not supplant, state and local monies.267 To this end, the Act limited

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263. See, e.g., id. at 56-57 (prepared statement of Gumecindo Salas, Chairperson, Michigan State Board of Education); 72 (prepared statement of Dr. Gloria Zamora, President, National Association for Bilingual Education); 80 (prepared statement of Nguyen Ngoc Binh); 113 (prepared statement of Guillermo Lopez).


265. Id. § 3222(b)(3). The Act did not specify funding levels but instead simply authorized “such sums as may be necessary” during fiscal years 1985 through 1988. Id. § 3222(b)(1)-(2). However, the Act limited the appropriation in 1985 to a maximum of $176 million. Id. § 3222(b)(7).

266. Id. § 3231(g). To receive priority, the applicant must demonstrate the impracticality of establishing bilingual programs due to the small number of students of a particular native language, the unavailability of qualified instructors, or efforts to establish bilingual programs. Id. § 3231(c)(3).

267. Id. § 3242(e) (Supp. IV 1986). Even before the 1984 Act was passed, the Office of the Inspector General in the Department of Education conducted an audit of seven Texas school districts in 1982 to determine whether they had used federal bilingual education funds to supplant, rather than supplement, their own efforts to build long-term capacity to serve NEP and LEP students. Based on the audit, the Inspector General recommended that the seven districts and the Texas Education Agency repay $5.85 million to the federal government, or 42% of their cumulative grants under the Act. Texas school officials challenged the findings, and members of Congress conducted an oversight hearing on the reports. Oversight on Texas Bilingual Education Audits: Hearing Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the House Comm. on Educ. & Labor, 97th Cong., 2d Sess. (1982). The hearing dispelled negative publicity about the
grants to a three-year period with the possibility of no more than two additional years of funding upon reapplication. The Act also integrated state educational agencies more fully into the process of developing programs by requiring that these agencies receive notice of grant applications and be given an opportunity to offer recommendations on them.

In addition, the Act funded state research efforts and supported state plans to build local districts' capacity to deliver bilingual education services. State and local educational agencies also assumed a more prominent role than they previously had in consulting with the Secretary of Education and the Director of Bilingual Education and Minority Language Affairs on federal bilingual education policy.

Besides vesting greater discretion in state and local officials, the Act devoted considerably more attention to teacher training and technical assistance. It funded training programs and resource centers that provide technical assistance in specified areas of bilingual education. The Act also established fellowships for advanced study of bilingual education with priorities in certain specialized fields.

The increased concern with teacher training and technical assistance was consistent with the broader goal of vesting greater discretion in state and local decisionmakers. Training would help to ensure that these educators and administrators were well-qualified and well-informed, thereby maximizing the probability that they would exercise their discretion wisely. This focus on training and technical assistance presumed that state and local officials were basically sympathetic to linguistic minority students' needs but unaware of how to meet them. Civil rights advocates understandably questioned whether assistance designed to build state and local capacity would overcome NEP and LEP students' discriminatory exclusion from meaningful participation in the curriculum.

Despite inroads by the new federalists, the 1984 amendments con-

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269. Id. § 3231(e)(4). While state educational agencies were given a larger role, the Act continued to require that districts consult with advisory councils composed mainly of parents and other representatives of linguistic minority students. Id. § 3231(e)(l). This requirement was consistent with the Act's declaration "that parent and community participation in bilingual education programs contributes to program effectiveness." Id. § 3222(a)(13). The Act also continued to require that parents be notified of program objectives and their children's progress in meeting them. Id. § 3223(c).
270. Id. § 3242(a)-(c).
271. Id. §§ 3223(b)(l), 3245(c).
272. Id. §§ 3251-3253 (Supp. IV 1986).
continued to reflect a commitment to protecting NEP and LEP students’ civil rights. The most significant source of protection was the ceiling on funding for special alternative instructional programs, a limit that indicated a continuing preference for TBE and bilingual-bicultural education programs. Not surprisingly, this funding constraint generated the most disaffection among proponents of the new federalism. The Department of Education continually chafed at the funding cap and suggested that it would seek increased appropriations only if the cap were lifted.\(^{273}\)

To thwart civil rights advocates who favored federal support for native-language instruction, the new federalists thus sought to subvert the appropriations process, much as opponents of bilingual programs had when the Act was first passed in 1968.\(^{274}\)

The new federalists’ alliance with state and local educators made the funding process a particularly attractive way to influence policymaking. While the new federalists were content to reduce appropriations and thereby minimize federal involvement, state and local officials sought continued program funding. The new federalists thus enlisted the ongoing support of educators by agreeing to seek increased appropriations in exchange for even more drastic reductions in federal guidance.

e. The Reauthorization of the Bilingual Education Act in 1988

Aware that the Bilingual Education Act would have to be reauthorized in 1988, the House Committee on Education and Labor, in conjunction with the Hispanic Caucus, held a hearing on bilingual education in early 1987.\(^{275}\) According to Committee Chairman Augustus F. Hawkins, the hearing would “put the [Reagan] Administration . . . on notice that our country cannot be competitive without a system of education which assures that all of our nation’s children receive an equal educational opportunity.”\(^{276}\) Responding to the Office of Planning, Budget, and Evaluation’s negative findings on TBE and bilingual-bicultural education programs, the House committee commissioned a General

\(^{273}\). Orum & Yzaguirre, Secretary Bennett’s Bilingual Education Initiative: Historical Perspectives and Implications, 1 LA RAZA L.J. 225, 238-39 (1986). According to Secretary of Education William J. Bennett, the Department had to turn down large numbers of applications for alternative instructional programs in 1985 because of funding restrictions. Id. In 1986, legislation was introduced in the Senate to eliminate restrictions on funding for alternative instructional programs, and the Subcommittee on Education, Arts, and Humanities held hearings on the bill. Bilingual Education Act Amendments of 1986: Hearings on S. 2256 Before the Subcomm. on Educ., Arts, and Humanities of the Senate Comm. on Labor & Human Resources, 99th Cong., 2d Sess. (1986) [hereinafter 1986 Senate Hearings].

\(^{274}\). L. ORUM, supra note 207, at 2-3.

\(^{275}\). The hearing was held in Los Angeles, California. Oversight Hearing on the Educational, Literacy and Social Needs of the Hispanic Community: Hearing Before the House Comm. on Educ. & Labor, 100th Cong., 1st Sess. 1 (1987) [hereinafter 1987 House Hearing].

\(^{276}\). Id.
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Accounting Office (GAO) study to assess that research's validity. The GAO surveyed a panel of ten educational experts, which concluded that the government's research had consistently understated the benefits of programs that rely heavily on native-language instruction. The experts also found that this research overstated the potential benefits of alternative techniques that utilize more English-language instruction.

The GAO research findings generated considerable controversy. One witness, who supported programs employing native-language instruction, praised the House committee for "generating independent authority in the field . . . particularly when the Secretary of Education and others within the Department of Education continue to distort the research evidence available on the effectiveness of bilingual instruction." The Department of Education responded by challenging the GAO survey's methodology and charging that the study had been politically motivated to embarrass the Reagan Administration.

In 1988, Congress reauthorized the Bilingual Education Act. Despite the 1987 GAO survey's findings, the Act accords greater discretion to state and local educators in their choice of instructional methods by raising the cap on funds for special alternative instructional techniques to 25% of total program grant appropriations. The federal government continues to restrict its program involvement by limiting grants to a three- to five-year period.

To justify the increase in funding for special alternative instructional programs, legislators cited reports by the GAO and the American Association of School Administrators (AASA), which found that diverse NEP and LEP student populations were widely dispersed throughout the United States. Released one month after the 1987 GAO survey on program effectiveness, both studies indicated that a significant number of school districts served a broad array of small language groups, rather than a large number of children from a single language group. The

277. GENERAL ACCOUNTING OFFICE (GAO), supra note 227, at 1.
278. Id. at 2-3, 14-15, 17.
279. Id. at 18-19.
279. 1987 House Hearing, supra note 275, at 46 (statement of Dr. Reynaldo Macias, Author, The Tomas Rivera Center, Claremont, CA).
280. GENERAL ACCOUNTING OFFICE (GAO), supra note 227, at 63-65.
283. Id. at 77 (citing GAO and AASA results).
AASA survey also found that 78% of the schools used TBE programs, while 22% had only ESL programs. According to the AASA, each school district had an average of 3.5 bilingual education teachers.\textsuperscript{287} The AASA report concluded:

\begin{quote}
[M]ost of the reporting [local educational agencies] do not have sufficient ability to handle large numbers of LEP students of many diverse languages. . . . [T]here are many languages in schools and there are not enough teachers to instruct in these languages. . . . [N]o one single approach can fit all of the situations[,] therefore, it is necessary to do what's best for each district.\textsuperscript{288}
\end{quote}

Congress responded by specifying that special alternative instructional programs are appropriate in districts with a small number of students from a particular language group and in those with no qualified personnel available to provide bilingual instructional services.\textsuperscript{289}

To counter the increased emphasis on special alternative instructional programs, some proponents of native-language instruction sought to enhance support for “developmental bilingual education” programs, which could include bilingual-bicultural education programs. Developmental bilingual education programs “provide[ ] . . . structured English language instruction and instruction in a second language” and are “designed to help children achieve competence in English and a second language, while mastering subject matter skills.”\textsuperscript{290} While such programs had been eligible for funding under the 1984 Act, they had received minimal federal support.\textsuperscript{291} According to the House Report, the inclusion of developmental bilingual education programs in the 1988 bill was designed “to add flexibility” by “increas[ing] available support for bilingual education programs which optimize the benefits of dual language education.”\textsuperscript{292} Describing these programs as “one of the strongest features in the proposed legislation,” Gordon M. Ambach, President of the University of the State of New York and Commissioner of Education, explained that giving them additional support “signals to school districts that this Nation believes that ethnolinguistic roots of our limited English proficient population are a valuable natural resource which must be nurtured and allowed to grow within the educational system.”\textsuperscript{293} Thus, advocates of native-language instruction cited the benefits of

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{287} Id.
\textsuperscript{288} Id.
\textsuperscript{289} Bilingual Education Act of 1988, § 7021(c)(3), 102 Stat. at 280.
\textsuperscript{290} Id. § 7003(a)(5)(A), 102 Stat. at 277.
\textsuperscript{291} See SUBCOMMITTEE ON ELEMENTARY, SECONDARY, AND VOCATIONAL EDUCATION OF THE HOUSE COMMITTEE ON EDUCATION AND LABOR, supra note 246, at 174 (for fiscal year 1985, only $250,000 was distributed for use in developmental bilingual education programs).
\textsuperscript{292} H.R. REP. No. 95, 100th Cong., 1st Sess. 79 (1987).
\textsuperscript{293} Reauthorization of Expiring Federal Elementary and Secondary Education Programs, Bilingual Education: Hearing on H.R. 5, H.R. 1755, and H.R. 1448 Before the Subcomm. on
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broader state and local program choice to preserve potential funding for bilingual-bicultural education programs.

The 1988 Act continues to accord a central role to state and local educational agencies in formulating and implementing national bilingual education policy. Their role is counterbalanced to some extent by provisions that allow for participation by linguistic minority representatives and bilingual education program personnel. For example, the Act mandates that in prescribing bilingual education regulations, the Secretary of Education consult not only with state and local educational agencies but also with "organizations representing persons of limited English proficiency and organizations representing teachers and other personnel involved in bilingual education." In addition, while the Act requires grant applicants to notify state educational agencies of their program proposals and to afford them an opportunity to make recommendations, applicants also must consult with parental advisory councils and provide them with technical support upon request.

State educational agencies also continue to play a central role in gathering and disseminating data on programs for NEP and LEP students. Moreover, the Act requires the National Center for Education Statistics to rely on information submitted by state and local educational agencies as well as institutions of higher education whenever feasible. Perhaps because of the increasing importance of state and local assessments, the Act directs the Secretary of Education to promulgate regulations setting forth a comprehensive design for program evaluation. The Act also authorizes state and local educational agencies, individuals, institutions of higher education, and private profit and non-profit organizations to seek competitive contracts for research and development in bilingual education.

The 1988 reauthorization accords considerable weight to teacher training and technical assistance, setting aside 25% of total appropriations under the Act for such purposes. In emphasizing training programs, Congress relied on research that suggested that despite the mixed

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294. However, the 1988 reauthorization eliminated the National Advisory and Coordinating Council on Bilingual Education. H.R. REP. No. 95, supra note 292, at 79; S. REP. No. 222, supra note 285, at 81.


296. Id. § 7021(e)(9), (f)(9), 102 Stat. at 282, 284.

297. See id. § 7021(e)(1)-(4), 102 Stat. at 282.

298. Id. § 7032(a)-(b), 102 Stat. at 286.

299. Id. § 7037(b), 102 Stat. at 289.

300. Id. § 7033, 102 Stat. at 287.

301. Id. § 7035(a)-(b), 102 Stat. at 287-88.

302. Id. § 7002(b)(5), 102 Stat. at 276.
evidence on program effectiveness, "sensitive 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." According to this research, "the critical factors in successful programs for LEP students seem to be how teachers use language and instruct their LEP students, rather than how much English they use." Based on these findings, the latest version of the Bilingual Education Act emphasizes the development of qualified personnel who are capable of exercising their discretion to make wise curricular choices in the classroom.

Thus, by 1988, the new federalists had made significant progress in expanding the instructional options available to state and local educators. To facilitate state and local decisionmaking, the new federalists pressed for capacity-building programs that would emphasize teacher training and technical assistance. Although linguistic minority students continued to enjoy some civil rights protections, state and local educators regained considerable discretion in designing programs for them. Growing pedagogical uncertainty undermined the basis for federal restrictions on curricular content. Critics, including English-only reformers, vociferously attacked federal support for TBE and bilingual-bicultural education programs as an unjustified concession to Hispanic activists, who allegedly were motivated by self-interest and ideological bias. In 1988, then, the bilingual education debate was as emotionally charged and politically volatile as it had been in 1968. To fully understand this longstanding controversy, it is now necessary to explore more closely the competing claims that have shaped federal policy.

III
THE LESSONS OF HISTORY: TAKING STOCK OF THE POLITICS OF DISCRETION

The battle over the allocation of discretion to structure the curriculum for linguistic minority students has reflected three distinctive approaches: (1) constraining the discretion of state and local educators in order to remedy past abuses; (2) enabling state and local educators to exercise their discretion more satisfactorily; and (3) limiting the discretion of bilingual educators who promote bilingualism and biculturalism. Linguistic minority parents and community leaders, federal officials in the civil rights bureaucracy, and educational experts convinced of the superiority of TBE and bilingual-bicultural education programs have favored the first approach. State and local educators, federal officials in

303. Subcommittee on Elementary, Secondary, and Vocational Education of the House Committee on Education and Labor, supra note 246, at 179.
304. Id. at 178.
the traditional educational bureaucracy, and educational experts concerned about conflicting evidence of pedagogical effectiveness have supported the second view. English-only reformers fearful of threats to a sense of national identity have adopted the third method to ensure assimilation and prevent the balkanization of language groups.

This Part will examine the assumptions underlying these three approaches and assess how they have shaped proposals for federal intervention. The analysis will focus on perceptions of uncertainty in educational decisionmaking about NEP and LEP students, characterizations of state and local failures as either isolated instances of official misconduct or systemic deficiencies, and choices between retrospective relief and prospective reform.

A. Doing Justice: Remediying Discrimination Through Constraints on Discretion

For state and local educators to exercise their discretion properly, they must be both willing and able to make sound decisions. Those who believe that constraints on state and local discretion are necessary to remedy abuses have assumed that these officials are unwilling to engage in judicious decisionmaking to meet NEP and LEP students' needs. Linguistic minority parents and community leaders, federal civil rights officials, and experts advocating native-language instruction—all have questioned the good faith and sensitivity of state and local educators. These groups have assumed that abuses of discretion are readily identifiable, that instances of misconduct arise through official malfeasance in an otherwise adequate school system, and that such wrongs can be ameliorated after the fact by limiting discretion. Under this view, discretion must be curbed to achieve corrective justice; that is, the wrongdoer must be punished and the victim's harm rectified through the constraints imposed.

Title VI and the EEOA have been the primary vehicles for advancing the corrective justice rationale. Both title VI and the EEOA are civil rights statutes designed to punish state and local educational agencies that discriminate against minority students on the basis of race or ethnicity by cutting off federal funds or subjecting the offending school districts to pervasive regulation and extensive monitoring. The harshness of

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305. See P. Berman, supra note 150, at 10-15.
306. See Moran, supra note 8, at 197-98, 211.
307. For general statements of the paradigm of corrective justice in reverse discrimination cases, see R. Barrow, Injustice, Inequality and Ethics 78-81 (1982); N. Bowie & R. Simon, The Individual and the Political Order 206 (2d ed. 1986); Katzner, Reverse Discrimination, in And Justice for All 64, 73-76 (T. Regan & D. VanDeVeer eds. 1982).
the potential sanctions reflects the moral egregiousness of the wrong. School officials are not being punished for a mere lapse of judgment; they are guilty of a serious abuse of discretion.

The corrective justice rationale underlying title VI and the EEOA creates several difficulties in formulating appropriate bilingual education policy. First, the corrective justice perspective presumes sufficient certainty about effective teaching techniques for NEP and LEP students to label some curricular choices as an abuse of discretion. Yet, because of ambiguity regarding the purposes of bilingual education and conflicting evidence on program effectiveness, it is often difficult to classify decisions as improper.

Second, the corrective justice approach emphasizes that bias or insensitivity has tainted school policy and practices in ways that have impaired the education of linguistic minority students. Proponents of the corrective justice rationale contend that because discrimination against minority students is pervasive, federal intervention is justified. This implies, however, that state and local discretion would be appropriate in a school system free of invidious prejudice. Thus, the proponents fail to consider whether even unbiased state and local decisionmaking processes exhibit systemic deficiencies that disadvantage NEP and LEP students.

Third, a corrective justice model narrowly focuses on retrospective reforms. This approach does not explicitly acknowledge the need for prospective policies to improve decisionmaking; rather, constraints are imposed only after past discrimination has been demonstrated and are intended to rectify some instance of official wrongdoing. Each of these shortcomings has created problems in applying the corrective justice perspective to bilingual education policymaking.

1. The Problems of Identifying an Abuse of Discretion in the Face of Pedagogical Uncertainty

To justify federal intervention, proponents of the corrective justice rationale have relied on an apparent consensus about the benefits of native-language instruction for NEP and LEP students. Based on this consensus, corrective justice advocates have established a presumption that other curricular choices are necessarily inferior and therefore discriminatory. Oddly enough, however, this view has coexisted with the Bilingual Education Act, which has recognized the considerable uncertainty associated with evaluating programs to educate linguistic minorities. Thus, the corrective justice perspective and the experimental orientation of the Act make diametrically opposite assumptions about the extent of pedagogical uncertainty. As a result, program requirements

under the Bilingual Education Act have shifted according to which viewpoint was more powerful. For example, in 1974, civil rights advocates pressing for corrective justice moved to limit curricular choices under the Act. These advocates argued that such limits were appropriate because of the proven benefits of TBE and bilingual-bicultural education programs. Selecting ESL or structured immersion programs therefore amounted to an impermissible abuse of discretion and should be prohibited. When the highly influential AIR evaluation and Birman and Ginsburg's report accentuated the uncertainties associated with the education of NEP and LEP children, these efforts to limit curricular choices under the Act failed.\textsuperscript{310}

The breakdown of pedagogical consensus deeply eroded the corrective justice rationale. First, pedagogical uncertainty undercut prescriptive devices, such as the \textit{Lau} Guidelines, that forced state and local educators to adopt particular instructional techniques. More importantly, though, this uncertainty vitiated the moral force of federal intervention by making proof of wrongdoing more difficult. In the face of considerable uncertainty, federal policymakers could no longer easily identify a particular curricular choice as an abuse of discretion meriting strong federal sanctions. After all, there was at least some pedagogical authority for a wide array of instructional programs.\textsuperscript{311}

The adoption of an effects test under title VI and the EEOA has mitigated somewhat the erosion of the definition of an abuse of discretion. This test examines whether an educational curriculum effectively excludes NEP and LEP students from meaningful participation in the curriculum. Such exclusion can be demonstrated initially by showing that NEP and LEP students have significantly lower scores on achievement tests and higher drop-out rates than their English-speaking peers.

Nominally, the effects test is consistent with a corrective justice rationale because adverse effects serve as circumstantial evidence of an abuse of discretion, or wrongful discriminatory intent.\textsuperscript{312} In fact, however, under conditions of pedagogical uncertainty, state and local officials could reasonably choose a program that nevertheless fails to address adequately the needs of NEP and LEP students. Under an effects test, the program's failure would constitute prima facie evidence of official wrong-

\textsuperscript{310} See supra notes 160-164 & 223-226 and accompanying text.

\textsuperscript{311} See T. WEYR, HISPANIC U.S.A. 67-68 (1988) (describing how the Baker and de Kanter study undermined "bilingual education [as] a civil right" by emphasizing that a wide array of programs could prove effective under different circumstances).

doing, regardless of the reasonableness of the selection process. An effects test then merely masks, rather than resolves, the problems that uncertainty has created in identifying an abuse of discretion.

2. The Difficulties of Focusing on Particularized Instances of Official Misconduct

Because the corrective justice approach makes state and local abuses the theoretical linchpin of federal intervention, it should require particularized determinations of wrongdoing before imposing constraints on discretion. Case-by-case evaluation, however, is extremely time-consuming and expensive. Impoverished, underrepresented linguistic minority communities do not command the resources necessary to undertake extensive policing. Overworked federal civil rights officials are also ill-equipped to shoulder this burden.

Consequently, OCR drafted the Lau Guidelines to simplify its policing obligations. Without regard to unique local circumstances, the Guidelines created standards for compliance with title VI in school districts with significant numbers of NEP and LEP students. By divorcing remedies from specific instances of official wrongdoing, the Guidelines shifted the federal government's approach from rectifying particular abuses to alleviating systematic deficiencies in meeting linguistic minority students' needs. The Guidelines thus departed from a corrective justice rationale that treated wrongdoing as particularized misconduct; instead, they embraced a perspective that presupposed a systemic failure of state and local decisionmaking processes.

As this shift in perspective suggests, the preoccupation with official wrongdoing under a corrective justice rationale fails to account fully for widespread structural inadequacies in local decisionmaking processes. During the 1968 hearings on the Bilingual Education Act, for example, parents and community leaders complained about their exclusion from

313. Cf. Fullinwider, supra note 312, at 6 (discussing dangers of an effects test in employment discrimination settings); Greenberg, Reflections on Leading Issues in Civil Rights, Then and Now, 57 Notre Dame Law. 625, 641 (1982) (noting that an effects test may serve redistributive objectives as well as correcting racial stigma).


316. See Hart, supra note 314, at 28-31 (adoption of administrative enforcement scheme under title VI permitted systematic monitoring and more stringent enforcement from 1964 to 1969, although subsequent enforcement efforts were less successful); Larson, supra note 314, at 479 (citing the benefits of systematic administrative enforcement of civil rights laws); Rabkin, supra note 19, at 331-32 (noting differences between case-by-case adjudication of civil rights violations and formulation of general guidelines).
school policymaking. In their view, this lack of access constituted a pervasive, fundamental flaw in state and local decisionmaking processes. A corrective justice approach cannot address such complaints unless the exclusion is due to discrimination and results in identifiable harms. If parents generally play little, if any, direct role in educational decisionmaking, linguistic minority parents cannot successfully allege that they have been subjected to biased, differential treatment by the school district. Moreover, if the district has adopted sound programs, they cannot claim that their exclusion produced a remediable harm to linguistic minority students that would justify federal intervention. Thus, the corrective justice rationale does not address systematic deficiencies, such as the disempowerment of certain minority groups, that are not otherwise tied to official discrimination.

3. The Limits of a Retrospective Orientation

Because the corrective justice rationale presumes that state and local decisionmaking processes are generally adequate, it requires a showing of past discrimination to justify imposing constraints on discretion. A retrospective orientation thus serves two functions: limiting the occasions for federal intervention and providing a basis for properly tailoring relief. In the area of bilingual education, however, the retrospective orientation has failed to accomplish either of these objectives.

As previously noted, pedagogical uncertainty has made it difficult to condemn a curricular choice for NEP and LEP students as an abuse of discretion. While an effects test lessens these difficulties, it simultaneously increases the risk of federal overreaching. The effects test may trigger federal action even in many instances where state and local educators have acted reasonably. Judicial opinions suggest that the potentially broad-ranging impact of an effects test may be mitigated by federal courts' persistence in requiring some abuse of discretion by the school board. In *Lau*, for example, the Supreme Court found a violation of title VI only after noting that the San Francisco school district had taken no steps whatsoever to meet the special needs of a substantial number of Chinese-speaking students. The district's conduct not only had the effect of excluding these students from the educational curriculum, but it also reflected the kind of complete indifference tantamount to an abuse of discretion.  

In interpreting the standard for finding a violation of the EEOA, the

317. *See supra* notes 10-11 and accompanying text.

Fifth Circuit in *Castaneda v. Pickard*\(^{319}\) also focused on ferreting out abuses of discretion, rather than concentrating solely on effects. It adopted a “good faith” test to determine whether a school district selected a program based on sound educational theory, implemented it effectively, and carefully monitored its results to modify it as necessary.\(^{320}\) The first two requirements clearly emphasize the reasonableness of program choice and implementation, rather than actual outcome. Only the requirement of ongoing monitoring and modification potentially creates an obligation for school districts to insure adequate program results. Alternatively, this provision can be understood as simply mandating reasonable steps to follow up on program success. The latter interpretation seems more consistent with *Castaneda*’s treatment of program choice and implementation.\(^{321}\) This distinction remains unclear, however, and may prove a slender reed in checking federal intervention.

Likewise, advocates of the corrective justice model have encountered obstacles to devising appropriate relief. First, there remains ambiguity about the primary purpose of relief: Is it to punish the wrongdoer, to compensate the victim, or to accomplish other desirable social objectives as well? For example, one possible sanction under title VI and the EEOA is cutting off federal funds. Unfortunately, although such a sanction may punish the wrongdoer, it is unlikely to rectify the students’ harms. If anything, such steps are apt to penalize, rather than benefit, the victims of past discrimination. Therefore, federal enforcement officers have created alternative devices, such as the *Lau* Guidelines, which are better calculated to meet NEP and LEP students’ needs. These techniques, however, may not adequately punish the wrongdoer because although they constrain a school district’s discretion, they also provide a substantial source of federal aid.\(^{322}\)

Even when a remedy is designed to compensate a class of victims, the courts have grappled with intractable difficulties in tailoring relief to fit the wrongdoing. When courts conclude that a school district has abused its discretion in designing the curriculum for NEP and LEP students, they typically find it impossible to discern the actual consequences

\(^{319}\) 648 F.2d 989 (5th Cir. Unit A June 1981).

\(^{320}\) *Id.* at 1009-10.

\(^{321}\) Unfortunately, later litigation of the dispute did not clarify the Fifth Circuit’s views on this point. Because the plaintiffs asserted that whether the defendant school district had taken “appropriate action” to meet NEP and LEP students’ needs should be determined by assessing whether the district was in compliance with Texas bilingual education laws, the Fifth Circuit restricted its review to this issue. *Castaneda v. Pickard*, 781 F.2d 456, 470-72 (5th Cir. 1986).

\(^{322}\) *See G. Hale & M. Palley, The Politics of Federal Grants* 91-92 (1981) (noting that federal enforcement agencies seldom withhold funds because of the harm to intended beneficiaries; instead, they rely on informal bargaining and negotiation); *see also J. Hope, Minority Access to Federal Grants-In-Aid* 36-37 (1976) (describing reluctance to impose sanctions under title VI during the late 1960s and early 1970’s).
of this misconduct. For example, if a district has not provided meaningful assistance to NEP and LEP students, how much has a child's educational development been hindered? How can this disadvantage be overcome? How long should a remedy be imposed to rectify these adverse consequences? Not surprisingly, courts are unable to answer these questions, and title VI and the EEOA currently provide little guidance in devising remedies.323

In practice, courts generally have to rely on school districts to formulate programs that promise to provide meaningful access to the curriculum for all linguistic minority students. Although these plans must satisfy experts and attorneys who represent the interests of linguistic minority students,324 this process is still paradoxical from the standpoint of corrective justice. In effect, a district guilty of abusing its discretion is invited to exercise its discretion to craft the relief. Significantly, the school district's forte is making general educational policy, not doing corrective justice. In keeping with its organizational competency, a school district typically promulgates standards for meeting the needs of linguistic minority students as a whole; the plan does not attempt to classify victims based on the degree to which they have been injured by past discrimination.325 Thus, the remedial process ultimately fails to compensate commensurate with harm, instead promoting more general social objectives.

B. Lending a Helping Hand: Revitalizing Discretion Through the Infusion of Resources

Those who seek to constrain state and local discretion have assumed that school officials are unwilling to address fully NEP and LEP students' problems. By contrast, those who want to facilitate the exercise of state and local discretion have assumed that these officials are willing but


325. See, e.g., Roos, supra note 147, at 257, 270-75 (describing the content of the Keyes plan); Denver Public Schools, Report to the Board of Education: A Program for Limited English Proficient Students (June 1984) (setting forth terms of consent agreement in Keyes v. School District No. 1) (on file with author).
unable to meet linguistic minority children's needs. Receptive to state and local educators' concerns about pedagogical uncertainties, some experts and federal officials in the educational bureaucracy have contended that school districts cannot work scholastic miracles with inadequate information, funding, and personnel. Under their view, devising a curriculum for NEP and LEP students requires school officials to weigh competing purposes and conflicting evidence about program effectiveness; state and local educators must inevitably exercise considerable discretion in fashioning a program. Precisely because the task is complex, decisionmakers need ample resources; yet, school districts often lack the data, financial support, and staff necessary to exercise discretion effectively. The federal government can provide resources to alleviate these impediments. The object of federal intervention under this revitalization rationale is not to do corrective justice, but to facilitate wise state and local policymaking.

Although some civil rights advocates have tried to cast the Bilingual Education Act as a corrective measure intended to constrain state and local discretion, many of the Act's features reflect the revitalization perspective. The Act originally provided grants-in-aid to school districts for research and experimentation in the field of bilingual education. Later, the Act funded teacher training, technical assistance, and resource centers. Grants under the Act have been designed to develop state and local capacity to deliver sound educational services to NEP and LEP students. Federal grants have therefore been treated as short-term investments, rather than as long-term commitments.

This goal of state and local revitalization stands in marked contrast to the corrective justice perspective. The corrective justice model presumes sufficient certainty to identify an abuse of discretion, but the revitalization approach asserts that there is so little certainty about the impact of bilingual education programs that it is counterproductive to promulgate hard-and-fast rules to limit state and local discretion. Moreover, while a corrective justice model treats instances of discrimination as particularized wrongdoing, a revitalization orientation treats resource limitations as a systemic problem for state and local officials. Finally, the corrective justice perspective adopts a retrospective orientation designed to remedy past wrongs; in contrast, the revitalization approach seeks prospective improvement of state and local decisionmaking.

326. See P. Berman, supra note 150, at 9-15 (discussing state and local authorities' willingness to comply with the law).
327. The best example of this perspective is Birman and Ginsburg's 1981 report on bilingual education. See supra notes 221-227 and accompanying text.
328. See supra notes 39 & 53 and accompanying text.
329. See supra notes 122, 239, 270 & 272 and accompanying text.
330. See supra notes 121, 175, 238, 252 & 267 and accompanying text.
processes. Nevertheless, the assumptions underlying the revitalization perspective also pose problems that distort the formulation of bilingual education law.

1. The Problem of Uncertainty in Determining Whether State and Local Discretion Has Been Revitalized

Because devising a curriculum for linguistic minority students involves uncertainty about program goals and effectiveness, the revitalization perspective concludes that broad state and local discretion is inevitable. Under this view, federal attempts to exercise centralized control over the curriculum through regulations like the *Lau* Guidelines are misguided and harmful. While rejecting such prescriptive program requirements, the revitalization perspective asserts that the federal government can aid the exercise of state and local discretion by contributing crucial resources. Having identified shortages in state and local resources, federal policymakers seek to provide support only until these deficiencies have been overcome. Unfortunately, it is difficult to determine whether federal efforts have successfully enhanced the schools' ability to meet NEP and LEP students' needs because of pedagogical uncertainty. Ultimately, if there is no consensus about program objectives and efficacy, how can the federal government evaluate the soundness of state and local decisions?

The controversy that surrounded the AIR evaluation of federally funded programs illustrates the difficulties of measuring state and local performance under the revitalization approach. Without a clear consensus about program objectives, educational experts could not agree on the empirical measures to employ in evaluating "success." Those who considered the programs a means of promoting rapid English-acquisition emphasized English achievement test results. Others who treated the programs as a way of both promoting English-acquisition and preventing children from falling behind in other subjects examined results on both English achievement tests and achievement tests in other areas, such as mathematics. Those who viewed the programs as a means of enhancing a child's familiarity with and pride in native language and culture were concerned with native-language proficiency, self-esteem, and adjustment to school as well as academic achievement.

Even when experts agreed about the relevance of a particular pro-

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331. See supra notes 160-164 and accompanying text.
gram objective, they often disagreed about the appropriate methodology for assessing whether a program achieved the objective. For example, witnesses uniformly agreed that linguistic minority students should acquire English. Yet, when the AIR evaluation and Birman and Ginsburg's report suggested that TBE and bilingual-bicultural education programs did not promote English-acquisition effectively, the methodology of these investigations was rigorously criticized.\textsuperscript{333} These disputes over empirical techniques further hampered efforts to determine whether federal grants had successfully revitalized state and local educational decisionmaking.

2. The Limits of Focusing on Resource Deficiencies

The revitalization perspective presumes that state and local decisionmaking processes are sound, but their results are distorted by a lack of resources. By providing additional funding, information, and personnel, these systematic deficiencies can be overcome. This view, however, overlooks a fundamental dilemma: Why do state and local policymakers consistently undersupport programs designed to meet NEP and LEP students' needs? A consistent failure to allocate sufficient resources to this group may well indicate problems in state and local decisionmaking processes.

Federal policymakers have tacitly acknowledged these underlying difficulties by insisting that the Bilingual Education Act remain a categorical grant-in-aid program, rather than being merged into a block grant program. The categorical grant earmarks funds for programs for NEP and LEP students; a block grant would permit state and local decisionmakers to allocate funds among a variety of other programs as well as those for linguistic minority children.\textsuperscript{334} Apparently, federal policymakers have feared that state and local officials would not devote sufficient resources to NEP and LEP pupils under a block grant.\textsuperscript{335} If such fears are well-founded, then short-term federal efforts to develop state and local capacity appear quixotic because they fail to address the deeper dysfunction of the educational decisionmaking process.

The revitalization rationale raises other theoretical inconsistencies. If the federal government provides unconditional grants to state and local officials for a wide array of programs for NEP and LEP students, it merely enhances officials' ability to exercise discretion. If, however, the

\textsuperscript{333} See supra notes 164 & 222 and accompanying text.

\textsuperscript{334} For descriptions of how categorical and block grants reflect differing conceptions of the relative competencies of federal, state, and local governments, see M. Derthick, The Influence of Federal Grants 229-37 (1970); G. Hale & M. Pally, supra note 322, at 11-14; Brown, supra note 128, at 54, 59-66; Hanus, Authority Costs in Intergovernmental Relations, in The Nationalization of State Government, supra note 308, at 1, 9-11.

\textsuperscript{335} T. Weyr, supra note 311, at 66.
federal government offers funding with significant qualifications, it may influence and possibly control how state and local educators exercise their discretion. The revitalization perspective thus faces a perplexing problem: Can the federal government develop state and local capacity to exercise discretion without influencing unduly the substance of decisions? When the federal government provides state and local governments with technical assistance or trained personnel, this aid necessarily colors their decisions. In screening the information disseminated to state and local officials, federal officials make value judgments about what points of view should be weighed in the decisionmaking process. Similarly, when the federal government supports resource centers for state and local educators, its choice of acceptable materials and qualified staff sends a message about the appropriate structure of programs for NEP and LEP students.

In sum, then, although designed to preserve state and local discretion, revitalization may in fact socialize officials to make decisions in accordance with federally acceptable values that limit state and local autonomy.

3. The Problem of Limiting Prospective Reform

The revitalization approach seeks prospectively to improve state and local officials’ ability to make sound educational decisions about NEP and LEP students. The revitalization approach is premised upon federal support remaining temporary so that state and local capacity can be developed without creating undue dependency on outside funds. After all, if state and local officials rely too heavily on federal funding, their ability to exercise their discretion independently will be undermined. Rather than enhancing discretion, then, the revitalization approach could well destroy state and local autonomy.

Nevertheless, because uncertainty about program objectives and effectiveness makes defining measures of “success” difficult, determining when state and local decisionmaking capacities have been restored sufficiently to permit withdrawal of federal support becomes speculative. This problem is aggravated because the revitalization approach makes no attempt to analyze why state and local decisionmakers have persistently underfunded programs for NEP and LEP students. Consequently, it is impossible to predict whether such programs will command adequate funding and staffing after federal support is withdrawn.

336. To the extent that the federal government imposes restrictions under the Bilingual Education Act to protect the civil rights of linguistic minority students, it certainly seeks to influence, rather than merely enhance, state and local decisionmaking. For example, by adopting a preference for TBE and bilingual-bicultural education programs under the Act in 1974, Congress plainly indicated to school officials its views on acceptable curricular choices.

337. Cf. J. Fossett, Federal Aid to Big Cities: The Politics of Dependence 9-12 (1983) (arguing that local officials are unlikely to rely on uncertain or short-term federal funding because of political risks).
Debates over when grants under the Bilingual Education Act should terminate exemplify this predicament. Federal officials in the educational bureaucracy typically have favored short-term grants, which generally provide funding for three to five years. Limits on the grants' duration have derived from a desire to avoid excessive federal involvement in state and local programs and a need to spread scarce funds equitably among a large number of eligible school districts.\textsuperscript{338} Lacking a principled method of setting the length of grants, national policymakers have drawn arbitrary lines to protect the federal government from a long-term commitment of resources and to reduce the dangers of excessive state and local reliance on federal monies. The grants' duration has not been carefully linked to any showing that state and local officials will no longer require assistance after the prescribed period.\textsuperscript{339}

C. Pledging Allegiance: Sending Ideological Messages Through Constraints on Discretion

English-only reformers have sought to constrain the discretion of bilingual educators as well as that of federal officials who support TBE and bilingual-bicultural education programs. In their view, these educators and officials have embraced a vision of bilingualism and biculturalism that undermines the stature of English as the national language.\textsuperscript{340} These reformers believe that there is sufficient agreement about the propriety of keeping English preeminent in the schools to conclude that implementation of programs that rely heavily on native-language instruction is an abuse of discretion. English-only reformers have alleged that such abuses are widespread enough to threaten national unity and foment separatist tendencies. As a consequence, the English-only movement has advocated prospective, system-wide changes in the curriculum that would reestablish the singular importance of English and the American way of life.

English-only reformers have proposed an English language amendment to the Constitution to accomplish their goals. The amendment would declare English the official language and prohibit governmental

\textsuperscript{338} See supra notes 121-122, 170-171 & 175 and accompanying text.

\textsuperscript{339} The three- to five-year limit might be justified on the ground that successful bilingual education programs place linguistic minority students in English-speaking classrooms by the end of this period. This argument is, however, inconsistent with claims that the educational process for linguistic minority students is so complex that no hard-and-fast rules can be established. Moreover, this rationale addresses only the needs of students who have been in the program for a significant period; it says nothing about the school district's ability to meet the needs of the general linguistic minority student population, which may not have participated fully in any program.

action inconsistent with its status. State and local educators would thus be obligated to respect the importance of English in devising programs for NEP and LEP students. Like proponents of a corrective justice paradigm, English-only reformers believe that abuses of discretion are identifiable. Like advocates of a revitalization perspective, they have concluded that the problems of educating NEP and LEP students are generalized and require prospective reform. Like both the corrective justice and revitalization models, the assumptions underlying the English-only approach have produced shortcomings in fashioning federal policy initiatives.

I. The Difficulties of Substituting Ideological Certainty for Pedagogical Uncertainty

English-only reformers argue that because English is widely accepted as the national language, an amendment should be enacted to constrain the ability of bilingual educators and federal officials to promote programs that rely extensively on a child's native language. By focusing on an alleged consensus about the paramount importance of English in American life, these reformers have attempted to sidestep the difficulties of identifying an abuse of discretion in the face of pedagogical uncertainty. Their efforts have not been particularly successful. Even if English is generally accepted as the national language in the United States, significant ideological controversy over the proper role of other languages in the educational process still can persist. For example, some parents, educators, and activists may focus exclusively on enabling children to acquire English, while others seek to promote proficiency in both English and a child's native language. Neither approach appears inconsistent with the acknowledged prominence of English in American life.

Similarly, conflicting evidence about program effectiveness complicates efforts to promote English acquisition, even if its central importance is accepted. For example, experts disagree on the relative utility of structured immersion, ESL, TBE, and bilingual-bicultural education programs in promoting English proficiency. In light of these doubts about program benefits, English-only reformers will not necessarily optimize the role of English simply by endorsing instructional methods that rely heavily on English, rather than native languages. In fact, after pas-

341. See supra notes 231 & 237 and accompanying text.
344. See supra notes 158-164, 222 & 277-281 and accompanying text.
sage of an English language amendment in California, the State Department of Education indicated that its use of TBE and bilingual-bicultural education programs was entirely consistent with the status of English as the official language. In the Department's view, these programs had always demonstrated respect for English by fostering its acquisition.\(^\text{345}\) Thus, in the face of uncertainty about effective methods of teaching English, an ideological consensus about the ultimate goal of English acquisition may do little to constrain state and local educators' discretion.

2. The Difficulties of Alleging Generalized Abuses by Bilingual Educators

English-only reformers have contended that despite adverse effects on linguistic minority students, bilingual educators, especially Hispanics, have supported TBE and bilingual-bicultural education programs to promote their own professional or political agendas. According to this view, these educators have pressed for a federal mandate endorsing native-language instruction to preserve their own jobs.\(^\text{346}\) Moreover, supporters of such programs allegedly have used the school system to elevate Spanish and Hispanic culture to a position equal in importance to that of English and the American way of life. Such views, it is feared, jeopardize national harmony and threaten to balkanize language groups.\(^\text{347}\)

While bilingual educators undoubtedly have an interest in upholding the worth and dignity of their professional undertaking, it seems entirely plausible that in the face of uncertainty about program goals and effectiveness, they genuinely believe that TBE and bilingual-bicultural education programs are best suited to meet NEP and LEP students' needs. Moreover, it is doubtful that Hispanic educators have enhanced significantly their employment opportunities by supporting such politically volatile programs. Indeed, despite a federal commitment to TBE and bilingual-bicultural education programs, English-speaking teachers with little or no special training have taught the programs because of a

\(^{345}\) Memorandum from Joseph R. Symkowick, Chief Counsel to Bill Honig, Superintendent of Public Instruction, re Proposition 63 (Nov. 5, 1986) (on file with author) (bilingual programs "coincide" with Proposition 63); Program Advisory from James R. Smith, Deputy Superintendent, Curriculum and Instructional Leadership Branch to All District and County Superintendents re Implications of Proposition 63 for Bilingual Education Programs and Other Educational Services for LEP Pupils (Feb. 17, 1987) (on file with author).

\(^{346}\) N. Epstein, supra note 55, at 38 (remarks of A. Bruce Gaarder, former Chief of the United States Office of Education's Modern Foreign Language Section); T. Weyr, supra note 311, at 73-74; see also Bethell, Against Bilingual Education: Why Johnny Can't Speak English, Harper's, Feb. 1979, at 30 (stating that bilingual education is "more or less the Hispanic equivalent of affirmative action, creating jobs for thousands of Spanish teachers").

perennial shortage of qualified bilingual teachers. This suggests that the number of teaching jobs actually generated for Hispanics has been lower than critics have suggested.\footnote{348} Moreover, ESL or structured immersion programs would not reduce demand for instructors with native-language proficiency and training in language acquisition.\footnote{349} Fully qualified bilingual teachers meet both criteria and therefore would still enjoy an advantage over English-speaking teachers when competing for such positions. In addition, national teachers organizations and school districts have consistently bemoaned the paucity of qualified minority teachers and administrators.\footnote{350} This suggests that even in the absence of a mandate for TBE and bilingual-bicultural programs, Hispanic teachers and administrators would still be in demand in the school system.

Little evidence supports the claim that bilingual educators and sympathetic federal officials are attempting to promote Spanish and Hispanic culture to the detriment of English and traditional American values. Bilingual educators have hardly been the source of separatist rhetoric. If anything, because they are better educated and more affluent than other members of linguistic minority groups, they demonstrate the opportunity for upward mobility through integration into American institutions.\footnote{351} While these educators have consistently tried to create a curriculum that values the child's native language and culture, they justify this approach as a means of promoting the child's sense of self-worth and encouraging a positive adjustment to school, not as a way to denigrate English and the American way of life.\footnote{352}

English-only reformers, however, assert that efforts to instill regard for native language and history must inevitably detract from linguistic

\footnote{348} Moran, \textit{supra} note 24, at 322-24; see also National Education Association, Teacher Shortage Grows as Student Enrollment Soars, NEA Survey Finds (July 4, 1987) (in secondary schools, 84\% of the positions for bilingual education teachers will be vacant in the fall of 1987).


\footnote{351} See T. WEYR, \textit{supra} note 311, at 74 (the teaching profession is a vehicle of upward mobility for Hispanics).

\footnote{352} K. HAKUTA, \textit{supra} note 332, at 208.
minority students' ability to develop strong bonds to the United States. Their concern reflects a fundamental disagreement with bilingual educators about the process through which children forge a sense of national identity and loyalty. Bilingual educators assert that respect for ethnic loyalties can enhance national loyalties, while English-only reformers claim that ethnic loyalties must necessarily displace national loyalties. Such assertions about the relationships among language, culture, and national identity are highly conjectural; under these circumstances, English-reformers lack an objective basis for attributing illicit political motives to bilingual educators.

3. The Curious Puzzle of Reform by Prospective Command

English-only reformers have contended that a constitutional amendment that declares English the official language can constrain bilingual educators who systematically abuse their discretion by divesting them of federal support. The amendment's declaration is nothing more than a prospective command to respect the integrity of English without much detail about how to accomplish this objective. English-only reformers may have chosen the English language amendment as a remedy because they believe, perhaps erroneously, that schools are hierarchical organizations in which subordinates respond to commands from the top. Consequently, if these organizations are ordered to advance the status of English, they will readily comply by instituting regulations that limit teachers' discretion to minimize the English language's role. Under this view, federal officials have simply misdirected school organizations by endorsing TBE and bilingual-bicultural education programs. By substituting a different directive, English-only reformers believe that federal officials can readily correct these misguided efforts.

Even if school systems are hierarchical, the proposed English language amendment is so vague that it may not place any effective limits on bilingual teachers and administrators. If bilingual educators are indeed politically motivated to promote Spanish and Hispanic culture, it is hard to understand why such a highly abstract, general directive would radically alter their behavior. In fact, even if they simply adhere to mistaken beliefs about the utility of TBE and bilingual-bicultural education programs, the amendment would not be likely to alter their practices. Instead, as previously noted, they could treat their curricular choices as

353. See N. GLAZER, ETHNIC DILEMMAS 1964-1982, at 141-44 (1983) (discussing different groups' desires and requirements with respect to bilingual and bicultural education and the implications that such variety may have on attaining "pluralistic integration").

354. For helpful analyses of hierarchical conceptions of the organization and comparisons with competing models, see Elmore, Organizational Models of Social Program Implementation, 26 PUB. POL'Y 185 (1978).

355. Marshall, supra note 342, at 36-37; see also Moran, supra note 24, at 354-55.
entirely consistent with promoting English. Moreover, if schools are not tightly hierarchical organizations,\textsuperscript{356} commands from the top about the educational curriculum for NEP and LEP students are even less likely to constrain the discretion of bilingual teachers and school administrators.

An English language amendment therefore may not have a strong effect on day-to-day school practices. In analyzing the impact of California's official language provision in another context, a federal court of appeals described the measure as “primarily a symbolic statement concerning the importance of preserving, protecting, and strengthening the English language.”\textsuperscript{357} Whether English-only reformers will be satisfied with a purely symbolic victory in the classroom remains to be seen. If they simply underestimated the bureaucratic obstacles to meaningful reform, they may press for additional measures that promote the status of English. If, on the other hand, they were primarily interested in a clearcut, highly visible vindication of the continuing dominance of English and the American way of life, symbols should suffice.\textsuperscript{358}

In sum, then, each of the models used to justify federal intervention in bilingual education has made different assumptions about the nature of state and local decisionmaking regarding NEP and LEP students. These contrasting assumptions have yielded distinct policy recommendations. Unfortunately, however, all three models suffer from serious flaws in converting a theory of state and local failure into a concrete agenda for federal reform. To fashion effective bilingual education policy, federal officials must understand the reasons for these persistent shortcomings.

IV
COMING TO GRIPS WITH DISCRETION: THE FUTURE OF FEDERAL BILINGUAL EDUCATION POLICY

Advocates of the corrective justice paradigm, the revitalization perspective, and the English-only approach have to surmount the federal government's traditional reluctance to intervene in state and local educational decisionmaking. Federal policymakers generally presume that state and local educators are uniquely able to respond to students' needs in a flexible, innovative way. To overcome this presumption in favor of state and local competency, the corrective justice paradigm, the revitalization perspective, and the English-only approach all have provided competing explanations for the failure to meet NEP and LEP students' needs. Each model has tailored federal intervention to address these pre-

\textsuperscript{356} See infra notes 378-382 and accompanying text.

\textsuperscript{357} Gutierrez v. Municipal Court, 838 F.2d 1031, 1044 (9th Cir. 1988) (analyzing English language amendment's effect on use of Spanish in the workplace).

\textsuperscript{358} See Moran, supra note 24, at 355-57 (employing status conflict analysis to speculate about future bilingual education policymaking).
sumed sources of failure while otherwise leaving state and local discretion intact. To win federal support, each model has evoked a monolithic, compelling image of deficient educational decisionmaking; consequently, these models have ignored the diversity of problems that school districts confront and the richness of their organizational structures. This oversight has undermined the prospects for successful implementation of federal reforms designed to constrain state and local discretion.

A. Federal Deference and the Disarray of Bilingual Education Policy

Deference to state and local discretion is a significant feature of all of the federal government’s bilingual education policy initiatives. The corrective justice paradigm defers to state and local autonomy by confining federal intervention to instances in which officials have abused their discretion. Where an abuse of discretion has been stringently defined by requiring proof of discriminatory intent, the corrective justice rationale imposes a high threshold for federal intervention. To the extent, however, that the definition of an abuse of discretion allows plaintiffs to rely on a showing of adverse effects, this check on federal intervention is weakened.359

The revitalization perspective constrains the federal role by characterizing it as passively supportive, rather than aggressively reformist. However, attaching conditions to the provision of federal aid can substantially undermine this restriction on potential federal overreaching. Not surprisingly, the more elaborate the conditions, the more vehemently state and local decisionmakers have attacked the provisions as an assault on their autonomy.360

At present, the English-only perspective has raised the fewest concerns about excessive federal involvement. Most importantly, the proposed English language amendment has enjoyed little success at the federal level. Instead, similar reforms have been promulgated in states and municipalities through majoritarian political measures, such as legislative resolutions, initiatives, and referenda.361 At present, there is little reason to believe that an English language amendment will be adopted at the federal level. If the federal government eventually were to embrace such a proposal, its endorsement could be explained as nothing more than an acknowledgement of burgeoning state and local support. Moreover, given the vague wording of English language amendments proffered

359. See supra notes 311-313 & 318-321 and accompanying text.
360. See generally G. HALE & M. PALLEY, supra note 322, at 54 (subnational governments seek federal grants that provide the most generous funding with the fewest restrictions attached); J. KALAS, THE GRANT SYSTEM 43-46 (1987) (describing resistance to federal programs that attempted to bypass state and local authority in the 1960s).
361. See supra note 231.
to date, a similarly general federal provision would be unlikely to pose any significant threat to state and local discretion. However, if the English-only perspective did manage to generate all-inclusive, rigid constraints on schools' decisions regarding the inculcation of language and culture, it could pose a greater threat to state and local autonomy than either the corrective justice paradigm or the revitalization perspective.

Whatever the approach adopted, national policymakers worry about the trade-off between the preservation of state and local autonomy and effective federal intervention on behalf of NEP and LEP students. Although federal policymakers have questioned the soundness of state and local decisionmaking regarding linguistic minority students, two important considerations have prompted them to be cautious about abrogating state and local discretion. First, state and local educators' sympathy for linguistic minority claims is typically secondary to a concern for their own decisionmaking prerogatives. They view their autonomy to structure curricula as important not only for NEP and LEP students but for all students. Moreover, these state and local educators are well-organized, command considerable resources, and have established ongoing relationships with federal officials. By contrast, linguistic minority communities tend to be politically disorganized with low rates of voter registration and turn-out; they are also socioeconomically disadvantaged with comparatively low levels of education and income. Consequently, the relative political pressures exerted by the two groups most directly affected by federal intervention generally work in favor of preserving state and local educators' prerogatives.

Second, federal decisionmakers are more certain about the measures needed to preserve state and local autonomy than they are about those necessary to promote linguistic minority students' educational achievement. Academics, lawyers, and government officials have long debated the merits of different approaches to federalism, and they consider themselves experts on how policy proposals will affect state and local autonomy. Decisionmakers have been less successful in assessing the

362. See supra note 355 and accompanying text.
363. See G. HALE & M. PALLEY, supra note 322, at 53, 165-66 (arguing that program specialists are more powerful lobbyists than elected officials in the intergovernmental grant process and citing the National Education Association's central role in the development of federal education policy).
365. See, e.g., G. HALE & M. PALLEY, supra note 322, at 7-21 (analyzing the history and politics of the grant process with a concern for federalism issues); Brown, supra note 128, at 81-84 (describing how education groups defended categorical grant-in-aid programs on the ground that
characteristics of effective bilingual education policy; indeed, the energy
devoted to this subject has produced a frustrating array of conflicting
pedagogical opinions. Thus, federal decisionmakers may be tempted to
accord greater weight to the traditionally valued preservation of state
and local discretion than to the formulation of an educational agenda
that at most promises highly speculative benefits.\textsuperscript{366}

Even when federal policymakers find that involvement is entirely
appropriate, their ongoing concern about preserving state and local dis-
cretion has often resulted in inattention to practical problems involved in
implementing reforms. Federal intervention is merited where a consen-
sus exists concerning national values, such as the elimination of racial or
ethnic discrimination, or where the federal government is demonstrably
better-equipped to execute a task, such as the coordination and dissemi-
nation of bilingual education research. Yet, even in these situations,
implementation problems can stymie federal reform initiatives, leaving
state and local discretion largely intact.

Implementation concerns may be especially acute where national
values conflict with state and local priorities. For example, there appears
to be national agreement regarding the importance of parental access to
educational decisionmaking processes, especially for underrepresented,
disadvantaged minorities. At hearings on the Bilingual Education Act,
numerous witnesses stressed the importance of greater parental participa-
tion in designing and implementing an effective curriculum for linguistic
minority students.\textsuperscript{367} In response to these views, federal policymakers
created mechanisms for parental participation that were ancillary to the
schools' bureaucratic structure, such as purely consultative parental
advisory committees with little clout. In light of their marginal position
in the decisionmaking process, these councils were unlikely to produce
effective parental participation. While paying lip service to participatory
values, federal policymakers in fact continued to defer to state and local
prerogatives by ignoring implementation problems.\textsuperscript{368} To ensure that

Cases}, 74 \textit{Calif. L. Rev.} 603, 629-32 (1986) (arguing that judges asked to devise comprehensive,
rational solutions in the face of high levels of indeterminacy will employ avoidance devices,
including restatement of the issues in narrow legal terms).

\textsuperscript{367} See \textit{supra} notes 10-11, 184-188 & 317 and accompanying text.

\textsuperscript{368} The reluctance to implement effective mechanisms for parental participation may be
predicated on earlier negative experiences with “community control” in federal and other programs.
For example, the community action programs of the 1960s, which sought “maximum feasible
national values are not vitiated by implementation failures, federal policymakers must openly confront the trade-off between effective intervention and state and local discretion by increasing their sensitivity to problems involved in realizing reforms.

B. Feasible Bilingual Education Policy and Its Potential Intrusiveness on State and Local Discretion

To appreciate fully the trade-off between protecting state and local discretion and advancing the interests of linguistic minority students, federal decisionmakers must understand the nature of particular policy problems and the extent of federal intervention required. In justifying federal intervention, however, the corrective justice paradigm, the revitalization perspective, and the English-only approach have constructed unique (and often conflicting) images of school districts that fail to meet NEP and LEP students' needs. Although these monolithic images may be necessary to win federal support, they simultaneously hinder a proper analysis of implementation problems. To better address implementation concerns, federal policymakers must consider the variability of tasks that school districts face and the resulting richness of their bureaucratic structures.

participation of the residents of the areas and the members of the [affected] groups," became mired in controversy when critics charged that the programs had become fronts for militant, radical activities. D. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING 87, 128-64 (1969). Similarly, community control experiments in predominantly Black, urban schools generated confrontational political encounters. Teachers' unions and centralized educational bureaucracies vehemently opposed the experiments, often questioning community leaders' motivations. See generally CONFRONTATION AT OCEAN HILL-BROWNSVILLE (M. Berube & M. Gittell eds. 1969) (collecting essays on the polarization that resulted from efforts to establish community control in the Ocean Hill-Brownsville school district); COMMUNITY CONTROL OF SCHOOLS (H. Levin ed. 1970) (collecting essays on the practical and theoretical implications of community control of the schools).

Arguably, these experiments have failed in part because community leaders sought to exploit the programs for political advantage. M. FANTINI, M. GITTELL & R. MAGAT, COMMUNITY CONTROL AND THE URBAN SCHOOL 76 (1970). These strategies in turn have provoked resistance from state and local officials who felt that their decisionmaking prerogatives were threatened. For example, when the federal government mandated "maximum feasible participation" in antipoverty programs, Mayor Richard Daley of Chicago demanded immediate revision of relevant federal legislation to guarantee city control of the distribution of resources and assure maintenance of the existing local power structure. M. GITTELL, supra note 188, at 31. The United Federation of Teachers launched a hard-fought campaign against community control experiments in New York City because it feared that decentralization would undermine its effectiveness as a bargaining agent. M. FANTINI, M. GITTELL & R. MAGAT, supra, at 150-52. Although attempts to improve community participation foundered in the cross fire between community leaders and state and local politicians, some thoughtful commentators have suggested that these efforts will be more prone to succeed where officials and community representatives acknowledge shared objectives and values. See M. DERTHICK, supra note 334, at 238. There is at least some empirical evidence that where school administrators, teachers, and parents emphasize their common interest in students' academic success, parental participation in the decisionmaking process can be a fruitful enterprise. J. HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY 89-94 (1986) (describing cooperative relations between school administrators, teachers, and parents of handicapped children in the Madison, Wisconsin school district).
tures. In this way, federal reformers can tailor both the degree and method of restricting local discretion to the particular characteristics of the problem addressed.

I. Confronting the Variability of School Decisionmaking

The corrective justice paradigm and English-only approach suggest that the issues involved in developing programs for linguistic minority students are sufficiently clear to permit easy identification of abuses of discretion. On the other hand, the revitalization perspective suggests that due to uncertainty about program objectives and effectiveness, the federal government must largely accede to state and local discretion. Each view ignores the wide range of questions concerning the education of NEP and LEP students. Federal decisionmakers must recognize that some areas of policymaking are more straightforward than others. For example, while designing an optimal curriculum for linguistic minority students is a complicated and uncertain venture, all would agree that a punitive "no Spanish" rule forbidding children from using this language in the classroom or on the playground is harmful to linguistic minority students.369

Extensive federal regulations regarding curricular content and instructional methods make sense only where there is a high degree of consensus about program goals and effectiveness. Under these circumstances, a federal mandate can guide state and local officials without infringing on their ability to meet NEP and LEP students’ needs.370 Moreover, such substantive rules can provide state and local officials with a welcome means of countering unjustified, parochial opposition. For example, if experts uniformly condemn harsh "no Spanish" rules and OCR declares such rules discriminatory under title VI or the EEOA,

369. For a description of how schools applied harsh “no Spanish” rules in the late 1960s, see U.S. COMM’N ON CIVIL RIGHTS, THE EXCLUDED STUDENT 14-20 (1972). More recently, school officials in a Texas school district asked parents to discipline their children if the school reported that they were speaking Spanish at school. School administrators sought parental assistance to circumvent federal and state laws that prohibited schools from punishing children for speaking a language other than English. Parents Asked to Curb Students’ Use of Spanish, L.A. Times, Apr. 23, 1987, § I, at 22, col. 1.

370. G. BENVENISTE, supra note 15, at 3 (routinization is appropriate only for tasks that are predictive and repetitive); R. ELMORE, COMPLEXITY AND CONTROL: WHAT LEGISLATORS AND ADMINISTRATORS CAN DO ABOUT IMPLEMENTATION 29 (1979)(hierarchical rule-oriented decisionmaking is proper for simple organizational tasks); Elmore, Backward Mapping: Implementation Research and Policy Decisions, 94 Pol. Sci. Q. 601, 610 (1979-80) (centralized control through rules and regulations is only effective in hierarchical organizations with clear lines of authority); Weick, Administering Education in Loosely Coupled Schools, 63 Phi Delta Kappan 673, 674 (1982)(rules are appropriate to a rational bureaucratic model, but not to loosely coupled school systems facing uncertainty); Weick, Educational Organizations as Loosely Coupled Systems, 21 Adm. Sci. Q., Mar. 1976, at 1, 1 (only part of an educational system is apt to be rationalized through the specification of goals, means, and evaluation).
state and local officials can refer to this federal action in resisting pressure to adopt such measures.\(^{371}\)

However, even when there is a high degree of consensus, substantive federal regulations may imply unfairly that absent such steps, state and local decisionmakers would utilize wholly inappropriate approaches. The tacit message that state and local officials might ignore overwhelming pedagogical evidence about the value of specific policies for NEP and LEP students could strain federal-state relations. Thus, it may be counterproductive to impose these mandates unless state and local decisionmakers actually prove to be seriously remiss in developing sound programs for NEP and LEP students.\(^{372}\)

In the face of substantial uncertainty regarding program objectives and effectiveness, comprehensive regulations are unworkable; they will accomplish little and merely limit state and local decisionmakers’ ability to experiment and respond to new developments.\(^{373}\) Instead, the federal government should attempt to guarantee that state and local decisionmakers deal fairly with conflicts about program objectives. Federal policymakers can accomplish this task by establishing procedural rules that ensure that parents and community representatives have access to state and local decisionmaking processes and by providing for independent review of these parents’ or representatives’ complaints about exclusion.\(^{374}\) In this vein, the Bilingual Education Act requires districts that receive federal grants to consult with parental councils in designing and implementing programs for NEP and LEP students.\(^{375}\) To further guarantee procedural fairness, the federal government could require broader consultation with affected community groups as well as parental advisory councils, develop more specific guidelines about the consultative process, and create a mechanism to review the adequacy of parental and community involvement. These measures would ensure that state and local deci-

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371. See Berman & McLaughlin, Federal Support for Improved Educational Practice, in THE FEDERAL INTEREST IN FINANCING SCHOOLING 209, 210-24 (M. Timpane ed. 1978) (describing federal government’s role in distributing title I funds and school officials’ appreciation of categorical grants that legitimated the allocation of funds to the educationally disadvantaged).

372. See Elmore, supra note 354, at 210 (professionalization of the workforce has made the traditional hierarchical allocation of discretion less defensible); Simon, Legality, Bureaucracy, and Class in the Welfare System, 92 YALE L.J. 1198, 1223-26 (1983) (centralization of discretionary powers in the welfare system may not have furthered goals of reform and had the added effect of reducing trust in welfare officials).


374. See Shapiro, Administrative Discretion: The Next Stage, 92 YALE L.J. 1487, 1507-09 (1983) (under conditions of great uncertainty, procedural and reason-giving requirements may be the only available limits on discretion, but such limits may prove illusory).

sionmakers fully consider competing values in formulating programs for NEP and LEP students.

To reach school districts that have not received funding under the Act, the federal government could impose similar procedural requirements under title VI and the EEOA. For example, federal courts and administrators could examine the degree to which a school district sought input on programs for NEP and LEP students, the care used in evaluating this information, and the adequacy of the district's justifications for selecting a program. Moreover, remedial decrees could mandate more meaningful parental access to the decisionmaking process. The orders could clarify the role that individual parents play in devising programs and could afford advisory councils and other community groups more than a purely consultative role in curriculum development. For example, the approval of parental or community groups might be required for adoption of a program, or a supermajority vote of the school board might be required to override their disapproval. Again, these steps would prevent schools found guilty of discrimination from discounting linguistic minority parents' values in their decisionmaking processes.

In addition, the federal government should attempt to reduce uncertainty about program effectiveness through further research and evaluation. Before undertaking such an investigation, however, federal officials must ascertain whether the uncertainties in question are methodological in nature or derive from conflicting values. For example, research under the Bilingual Education Act was designed to identify instructional techniques that promote English acquisition and other academic skills for NEP and LEP students. Much of the debate on the subsequent findings addressed whether programs should promote English acquisition alone or maintain the child's native language and culture as well. These uncertainties about normative objectives are not susceptible to empirical resolution.376

The federal government can also encourage the sound exercise of discretion by providing training for state and local personnel who make decisions in the face of uncertainty. Ideally, such training would alert educators to the range of instructional techniques available, their purported benefits, methods of tailoring the programs to different students' problems, and the importance of monitoring results and modifying programs accordingly. These measures would ensure that state and local educators are optimally equipped to resolve conflicting claims about various instructional techniques.

This analysis suggests that the greater the uncertainty regarding

376. For a discussion of theoretical techniques of resolving indeterminacy about values, means, and implementation, see Moran, supra note 366, at 619.
program goals and methods, the less intrusive federal substantive regulation should be. In the absence of clear consensus on the underlying objectives and pedagogical benefits of bilingual programs, the federal government will be able to promulgate few useful programmatic rules. Instead, it should rely on improving state and local decisionmaking processes. While procedural constraints may be somewhat burdensome, they nevertheless allow state and local officials to wield legitimate discretion.377 Similarly, other methods, such as training bilingual educators, leave state and local discretion intact but alter the context in which it is exercised. These methods of federal intervention can help to protect linguistic minority students' interests without impairing local experimentation or the ability to tailor programs to unique local conditions.

2. Accounting for Bureaucratic Structure in Addressing Failed Decisionmaking

In justifying federal intervention, the corrective justice paradigm, the revitalization perspective, and the English-only approach make different assumptions about whether deficiencies in state and local decisionmaking processes are particularized or systemic. For example, the corrective justice paradigm assumes that because discrimination involves particularized misconduct, intrusions on state and local prerogatives can be carefully limited. The revitalization perspective, by contrast, characterizes problems of underfunding as systemic to emphasize the pressing need for federal intervention to supplement state and local efforts. The English-only approach cites the insular philosophy and inappropriate teaching methods of bilingual educators as a basis for constraining their program choices.

From the standpoint of effective federal intervention, however, the distinction between particularized and systemic failings may be less important than an understanding of the schools' bureaucratic operations. Organizational structures may affect significantly the potential for successful reform. To address these issues properly, federal decisionmakers must consider the school's functions and the bureaucratic structures developed to perform these tasks. In making curricular decisions, for example, the bureaucratic structure of schools is designed to accommodate the completion of a complex, irregular task: specifically, educating children with varying needs and skills. Schools have been characterized as "loosely coupled" systems, in which there is a lack of consensus about policies and procedures and little systematic control over the discretion exercised by classroom teachers. A loosely coupled system is well-suited to tasks involving high degrees of uncertainty because it encourages flexi-

377. See Shapiro, supra note 374, at 1519-20 (concluding that many procedural constraints will increase decisionmaking costs but do little to curtail administrative discretion).
bility and experimentation by delegating discretion to subordinates. In the bilingual education field, where uncertainty about program goals and effectiveness is rife, loose coupling appears preferable to a more tightly hierarchical, rule-oriented model of curricular decisionmaking that is best-suited to completion of straightforward, unambiguous tasks.

Organizations facing complex tasks rely on the exercise of either formal or informal discretion. The bureaucracy's formal structure can provide expressly for official delegation of decisionmaking authority to certain personnel. Formal discretion is most appropriate where the staff consists of professionals selected for their special expertise and sound judgment. For instance, specially trained bilingual education teachers, as qualified professionals, may be given formal discretion to devise instructional programs that meet the unique needs of different NEP and LEP students.

Alternatively, if a bureaucracy establishes standards that staff cannot possibly meet, it forces them to exercise discretion informally to reach workable solutions. Informal discretion is likely to exist where the failure to allocate adequate resources is perceived as illegitimate and therefore cannot be acknowledged openly. For example, high-level school officials who endorse norms of equal educational opportunity may be unwilling to acknowledge systematic underfunding of programs for NEP and LEP students. If so, when these officials confront burgeoning numbers of linguistic minority students and limited program resources, they may force teachers to make do with inadequate materials and training. Under these circumstances, teachers must tacitly redefine their organizational mission: they will exercise their discretion to minimize

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378. R. Elmore, supra note 370, at 26-28; Weick, Administering Education in Loosely Coupled Schools, supra note 370, at 673-74; Weick, Educational Organizations as Loosely Coupled Systems, supra note 370, at 3-9; see also Weatherly & Lipsky, Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform, 47 HARV. EDUC. REV. 171, 194 (1977) (noting that teachers and administrators exercised their discretion “to routinize, ration resources, control uncertainties, and define the task to derive satisfactory solutions to the new demands” when Massachusetts implemented new legislation regarding special education for handicapped children).


381. See, e.g., M. Lipsky, STREET-LEVEL BUREAUCRACY 13-16 (1980) ("street-level bureaucrats" like police officers face such a proliferation of rules that they are expected to invoke the law selectively); Elmore, supra note 354, at 199-208; Weatherly & Lipsky, supra note 378, at 190-91, 195; see also Simon, supra note 372, at 1243 (a suggested model of decentralized decisionmaking by professionals acknowledges that the indeterminacy of substantive rules requires case-by-case elaboration of the rules).
obvious educational failures that jeopardize the appearance of commitment to lofty official goals. Informal discretion also may exist when decisionmaking authority is delegated to individuals who lack strong qualifications to exercise discretion.\textsuperscript{382} Thus, office clerks and secretaries, who have no special training in evaluating grievances about the educational process, may wield informal discretion in “screening out” complaints from linguistic minority parents by making it difficult for them to make appointments or obtain relevant documentation.

In a hierarchical school organization where high-level administrators formulate regulations that subordinates are expected to obey, federal intervention is appropriate if state and local elites consistently generate ill-advised policies or neglect to promulgate necessary regulations regarding linguistic minority students. Under these circumstances, state and local elites are abusing their formal discretion. Federal intervention is also proper when superiors generate adequate regulations that subordinates consistently disregard with impunity; here, state and local elites are improperly delegating informal discretion to lower-level officials. By contrast, federal intervention is inappropriate where state and local elites promptly amend erroneous policy mandates and successfully enforce compliance with applicable rules.

In a loosely coupled system, where success depends on sound choices made independently by a number of subordinates, it is appropriate for the federal government to intervene where state and local elites fail to foster conditions that enable subordinates to exercise their discretion wisely. Policymaking elites can promote these conditions by hiring qualified personnel, affording them the resources necessary to engage in informed, thoughtful decisionmaking, and providing feedback through reasonable monitoring and evaluation.\textsuperscript{383} By contrast, federal intervention is not appropriate simply because state and local elites delegate discretion to subordinates and refrain from promulgating regulations. Such action may be entirely proper when a school system confronts a high degree of pedagogical uncertainty. Nor is federal intervention necessary merely because state and local elites refuse to penalize every mistaken judgment by subordinates. Given the complexity of designing a class-

\textsuperscript{382} M. Lipsky, supra note 381, at 38-39; see also R. Weatherly, Reforming Special Education: Policy Implementation From State Level to Street Level 73-74, 86 (1979) (noting informal rationing techniques that developed during the implementation of a new special education law); Romo, School Organizational Practices, 1 La Raza L.J. 277, 284-91 (1986) (describing how school staff’s organizational practices made it difficult for parents of NEP and LEP students to garner information about their children’s educational problems); Smith, Discretionary Decision-Making in Social Work, in DISCRETION AND WELFARE, supra note 379, at 47, 48-49 (noting that secretaries, receptionists, and other administrative staff play a critical, though largely unacknowledged, role in screening applicants for social services).

\textsuperscript{383} For a general discussion of techniques for managing and motivating professional subordinates, see G. Benveniste, supra note 15, at 134-93.
room program for NEP and LEP students, even well-qualified teachers can select techniques that fail on occasion. Presumably, federal involvement is warranted only where subordinates' poor discretionary choices persist uncorrected on a significant scale.\textsuperscript{384}

In determining whether to intervene, federal policymakers should recognize that schools can operate hierarchically for some purposes, such as budgetary allocation, while delegating significant amounts of discretion to subordinates in other contexts, such as curriculum development.\textsuperscript{385} Where discretion is allocated hierarchically, federal reforms should focus on altering the behavior of high-level state and local officials. For example, state educational agencies and local school boards may determine how many NEP and LEP students will be in a classroom and how much money will be available for their special needs. Under these circumstances, federal agencies could make high-level state and local officials more generous by carefully earmarking funds for programs directed at LEP and NEP students. On the other hand, where subordinates enjoy considerable discretion in a loosely coupled system, federal reforms aimed solely at elite decisionmakers are apt to fail. For instance, classroom teachers may exercise substantial autonomy in deciding how to structure and implement their lesson plans. Where this is so, curricular reforms directed at classroom teachers are more likely to have a meaningful impact than reforms directed solely at state and local educational agencies. Such reforms might include training programs, workshops, or special grants to teachers of NEP and LEP students.\textsuperscript{386}

Federal reforms aimed at curtailing the exercise of formal discretion by state and local policymaking elites are apt to seem highly intrusive. These officials enjoy a great deal of autonomy, which is deemed appropriate to their positions of prestige and power. Incursions on their roles are sure to meet with strong resistance. Thus, federal policymakers must adopt a cooperative relationship with state and local elites to promote their reforms successfully.\textsuperscript{387}

\textsuperscript{384} See id. at 53, 209-11.

\textsuperscript{385} See M. Lipsky, supra note 381, at 13-14 (social service workers who deal directly with clients exercise discretion in determining the nature, amount, and quality of services but are significantly constrained by rules, regulations, and policy directives issued by policy elites and political and administrative officials); Elmore, supra note 354, at 227-28 (different organizational models can co-exist within a bureaucracy and are probably suited to different types of problems).

\textsuperscript{386} See G. Benveniste, supra note 15, at 185-93 (describing how to create incentive plans to improve teacher performance); R. Elmore, supra note 370, at 26-27 (citing benefits of workshops and training programs that allow for interaction among teachers); Sugarman, Education Reform at the Margin—Two Ideas, 59 Phi Delta Kappan 154, 155 (1977) (suggesting a decentralization plan in which teachers are “trustees” of accounts to be spent for their students’ benefit).

\textsuperscript{387} Moreover, according to Ingram, supra note 52, at 501-04, 524-26, the usual rationale for grants-in-aid to states is based on a hierarchy in which the federal government dominates. It is doubtful, however, that the federal government can effectively control the states through the award
Federal initiatives aimed at subordinates who wield considerable discretion may in some instances appear less intrusive and provoke less opposition than reforms aimed at higher-level functionaries. For example, teachers may welcome federal efforts to correct the delegation of informal discretion when state and local elites have foisted problems of inadequate resources on subordinates. Where formal discretion is at issue, teachers will be receptive to reforms that seem to vindicate their importance in the school system’s operations. On the other hand, if teachers conclude that federal policy will divest them of hard-won and jealously guarded decisionmaking prerogatives, they will vigorously oppose reform efforts. Higher-level officials will subvert reforms directed at subordinates if they infer that federal policy is calculated to circumvent their supervisory authority. To ensure the support of state and local policymaking elites, federal officials may have to solicit their input in formulating reforms, even when the measures ultimately are directed at subordinates.

3. Determining the Scope of Prospective Reforms

In light of pedagogical uncertainties and turnover in the student population, the possibilities for properly tailoring retrospective relief by tracing the consequences of state and local lapses appear remote. If the federal government is to intervene effectively in the area of bilingual

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388. Teachers have sought to protect and expand their discretionary prerogatives through the collective bargaining process. See R. Eberts and J. Stone, Unions and Public Schools 21-22 (1984) (collective bargaining has been extended to cover professional issues, including in-service training, instructional policy, student grading and promotion, and teacher evaluation); M. Lieberman & M. Moskow, Collective Negotiations for Teachers 8-9, 241-45 (1966) (as professionals, teachers have used collective negotiations to express their interest in curriculum, methods, instructional supplies and services, and in-service education); D. Lortie, Schoolteacher: A Sociological Survey 205-07 (1977) (describing efforts to restrict managerial discretion through collective bargaining agreements); W. Webster, Effective Collective Bargaining in Public Education 30-32 (1985) (teachers believe that expansion of collective bargaining to cover curricular and instructional matters would benefit the educational process). But cf. L. McDonnell & A. Pascal, Organized Teachers in American Schools 78-81 (1979) (noting wide-ranging differences in the degree to which collective bargaining agreements have accorded teachers a role in curriculum development and the determination of working conditions). Discretionary prerogatives are important in defining teachers as professionals; in fact, of those who consider leaving or actually leave teaching, a significant number cite lack of respect as professionals as a reason. See National Education Association (NEA), Research on the Teacher Shortage (n.d.) (a 1985 Metropolitan Life survey found that of those who quit teaching, 17% cited a lack of respect as professionals; of those seriously contemplating quitting, 25% cited lack of respect as a reason).


390. Cf. Chayes, Foreword: Public Law Litigation and the Burger Court, supra note 323, at 4, 46 (noting that in public law litigation, “the tight linkage between right and remedy is lost”).
education, it must rely on prospective reform measures. The revitalization perspective and the English-only approach have openly embraced prospective measures, while the corrective justice model has been forced to rely on such measures despite its commitment to retrospective remedies. The real question, then, is what the scope of prospective measures should be. In particular, federal policymakers must determine whether to effect short-term, incremental changes or long-term, comprehensive ones.  

To choose among prospective measures, federal policymakers must anticipate their impact by considering the schools' bureaucratic characteristics. Federal officials should assess whether incremental reforms will be ineffective or threaten the development of long-range solutions to NEP and LEP students' problems. For instance, bolstering the qualifications of teachers may be ineffective if there is no strong institutional support and teachers are unable to garner the resources necessary to institute effective classroom programs. Providing institutional support to unqualified teachers is equally likely to yield disappointing results. As a consequence, the foundation for a more far-reaching program will never develop, and the momentum behind federal reform efforts will dissipate. On the other hand, federal policymakers must consider whether a long-term, comprehensive reform initiative will stir deep-seated resistance. State and local decisionmakers will undermine comprehensive initiatives if they fear that these reforms intrude excessively on their discretionary prerogatives.

391. For descriptions contrasting comprehensive rationality, or synopticism, with incrementalism, see Diver, Policymaking Paradigms in Administrative Law, 95 Harv. L. Rev. 393, 396-401 (1981); Shapiro, Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?, 2 Law In Transition Q. 134 (1965).

392. For an example of the vulnerability of innovative attempts to restructure the educational process, see Peter Janssen's account of the troubled history of the Office of Economic Opportunity's experiments with school reform. Janssen, OEO as Innovator: No More Rabbits Out of Hats, Saturday Rev., Feb. 5, 1972, at 40, reprinted in Education Vouchers: From Theory to Alum Rock 405 (J. Mecklenburger & R. Hostrop eds. 1972); see also H. Broudy, The Real World of the Public Schools 37-38 (1972) (schools are unresponsive and self-protective; systemic reform will be necessary if schools are to abandon their commitment to dominant social ideologies); Center for the Study of Public Policy, Education Vouchers 138-40 (1970) (concluding that voucher plans limited to low-income families would not generate new educational alternatives because in the face of such an isolated reform measure, schools would continue to cater to their traditional constituencies).

393. Cf. Bradshaw, supra note 379, at 135, 145, 146 (describing how social workers' dissatisfaction with rules that excessively intruded on their discretion eventually led to departure from the agency). For descriptions of educators' strong resistance to voucher plans that threatened their traditional decisionmaking prerogatives, see Boardmen Can't Think of One Good Thing to Say About Voucher Plans, 158 Am. School Board J. 33-37 (1970), reprinted in Education Vouchers: From Theory to Alum Rock, supra note 392, at 71-79; Cohen & Farrar, Power to the Parents? — The Story of Education Vouchers, 48 Pub. Int. 72, 74-75, 96 (1977); Janssen, supra note 392, at 408-10; Selden, Vouchers — Solution or Sop?, 72 Teachers' College Record 365-71
Thus, federal decisionmakers must perform the delicate task of formulating prospective reforms that are sufficiently comprehensive to avoid being stifled by the state and local educational bureaucracy's inertia, indifference, or hostility while not unduly threatening its autonomy. Because federal reforms directed at the formal discretionary prerogatives of state and local elites are perceived as particularly intrusive, a long-term, comprehensive agenda may meet with especially strong resistance here. Incremental, short-term reforms could be a more realistic federal policy option for constraining state and local policy elites' mandates. Resistance can be mitigated if state and local educational agencies play a substantial role in formulating federal reforms designed to alter high-level policymaking.\textsuperscript{394} By contrast, federal measures directed at the informal delegation of discretion by state and local elites may encounter less resistance. Typically, state and local educational agencies have burdened teachers with unacknowledged, unacceptable responsibility for coping with inadequate program resources. Consequently, long-term, comprehensive intervention may be welcomed—at least if the federal government provides additional resources to meet the formal standards it enforces.

In a loosely coupled system, when the federal government aims to facilitate the exercise of discretion by subordinates, it should first experiment with short-term, incremental reforms. Federal policymakers can, for example, concentrate on well-qualified, experienced teachers who are most likely to introduce successful innovations if provided with short-term grants. If these initial efforts succeed, the federal government can attempt to introduce these advances throughout the system by disseminating information to other teachers at conferences and providing in-service training at workshops.

As federal reform efforts become more comprehensive in the long term, they are apt to encounter more resistance, especially from state and local elites who fear that their authority is being eroded. Again, this resistance can be reduced by expanding federal efforts gradually or by involving state and local educational agencies in long-range reform. Federal policymakers can check resistance among teachers who fear incur-

\textsuperscript{394} Interestingly, the Bilingual Education Act has expanded the role of state and local educational agencies in the policymaking process. Bilingual Education Act of 1988, §§ 7002(a)(10), 7003(b), 7021(c)(5), 7021(f)(9), 7032, 102 Stat. at 274, 278, 282, 284, 286. However, this expanded role for state and local decisionmakers has coincided with less extensive federal incursions on state and local decisionmaking prerogatives. If state and local policy elites are incorporated into the federal policymaking process, they may block meaningful reform initiatives to preserve their discretion. Before including state and local policy elites in this process, federal decisionmakers must carefully assess the trade-off between elites' enhanced receptivity to reform measures and the diminished possibilities for wide-ranging intervention.
sions on their discretion by emphasizing that federal reforms are based on innovations developed by their peers. This approach will highlight the degree to which the federal government has respected teachers' judgments in developing its proposals for change. The federal government can also capitalize on the competing interests of various factions within a loosely coupled school system. For example, if a comprehensive reform package provides strategic benefits to principals as well as bilingual educators, they can develop a coalition that dampens opposition from other school personnel.

If federal policymakers decide that long-range intervention is needed, they should assess carefully whether this need stems from the program's comprehensiveness or its lack of reformist aspirations. For example, the federal government should examine why programs for NEP and LEP students are perennially underfunded before providing resources to state and local educators on a long-term basis. Underallocation may be the product of disorganization and political ineffectiveness among linguistic minority groups at the state and local level. If an infusion of federal resources does not directly promote the political mobilization of linguistic minorities, problems of state and local underfunding are apt to persist. The federal role in this instance will be long term because intervention does nothing to reform deficiencies in state and local decisionmaking processes; rather, the federal government acquiesces in these processes by providing additional funds.

Such long-term federal involvement with no clear reform agenda creates significant risks. Federal policymakers may fear a seemingly endless commitment of resources. Moreover, to the extent that funding is justified as a means of improving state and local processes, critics can attack the federal role for failing to correct the defects endemic to state and local decisionmaking.

C. Parental Participation: Illustrating How Task Variability, School Organizational Characteristics, and the Scope of Intervention Can Be Used To Analyze a Potential Reform Measure

This section illustrates how federal policymakers can design initiatives that account for the variability of tasks that school districts perform and their corresponding bureaucratic features. As noted earlier, federal policymakers have frequently affirmed the value of linguistic minority

395. See Note, supra note 324, at 434 (suggesting that coincidence of federal objectives with interests of some administrative officials can be used to strengthen properly structured reform efforts); cf. Diver, The Judge as Political Powerbroker: Superintending Structural Changes in Public Institutions, 65 VA. L. REV. 43, 70-75 (1979) (assessing divergent interests of defendants in institutional reform litigation).

parents' participation in state and local educational decisionmaking. To promote parental participation, Congress has established parental advisory councils and parental notice requirements under the Bilingual Education Act. These reforms often have yielded little more than formalistic parental participation. The approach set forth here suggests the need for flexibility in the implementation of parental participation programs, rather than a uniform program for all districts.

Attempts to increase parental participation in the educational decisionmaking process are complicated by the diverse situations that school districts face. Teachers and administrators have different attitudes toward parental involvement, and school decisionmaking processes operate in distinctive ways. Some districts have considerable experience in soliciting parental input, while others have taken few, if any, steps to encourage parental participation. Partly as a result of these different school practices, parents have varying levels of familiarity with school operations. Parents are also apt to harbor diverse expectations for their children's education. Their aspirations may differ significantly from those of school personnel. The strength of community organizations, which could support linguistic minority parents' efforts to participate, undoubtedly varies among districts. Under these circumstances, the federal government should not promulgate rigid requirements regarding parental participation but should experiment with different procedural reforms tailored to the characteristics of different school districts.

In districts where schools enjoy generally good relationships with parents, teachers and administrators are apt to share linguistic minority parents' vision of their participatory role in the educational process. State and local educators already may have taken steps to promote parental participation; linguistic minority parents are apt to voice their complaints through the schools' internal processes, rather than seeking external review through OCR or the federal courts. Partly as a result of

397. See supra notes 186-187, 269 & 297 and accompanying text.
398. See, e.g., Denver Public Schools, supra note 325, at 19-20 (establishing district-wide advisory committee composed of parent representatives as well as school advisory committees).
401. See P. Berman, supra note 150, at 21-25 (arguing that reform strategies must reflect different school district characteristics).
this ongoing dialogue between school personnel and parents, they are likely to have common instructional goals for NEP and LEP students. Under these circumstances, the federal government should facilitate state and local efforts to enhance parental involvement by providing supplementary resources and disseminating information about successful programs. Where state and local educational agencies generally have established policies conducive to parental participation, the federal government can provide incentives to principals and teachers to include linguistic minority parents fully in the decisionmaking process. Federal agencies can also provide teachers and school administrators with training to improve the solicitation of parental input. Finally, federal resources can assist state and local policy elites to construct effective systems for monitoring and evaluating parental participation programs.402

In districts with a less positive history of school-parent relations, teachers, administrators, and parents probably have not reached a consensus about the appropriate role of parents in the educational process. In schools that have not made any significant attempts to seek parental input, linguistic minority parents are generally unfamiliar with school decisionmaking processes. Partly because of a continuing lack of contact, schools and parents may have quite different pedagogical objectives for NEP and LEP children. Under these circumstances, districts are apt to comply with rules regarding parental participation in a rigid, formalistic manner; parents are likely to voice their dissent through channels other than the schools' internal complaint mechanisms. For example, these linguistic minority parents will resort to lobbying, media campaigns, and litigation against the district.

The federal government faces a formidable task in ensuring meaningful parental participation in these districts.403 In selecting reform initiatives, federal officials should consider how intrusive they will appear to state and local decisionmakers. If federal reforms greatly enhance parents' ability to participate but fail to allay school officials' doubts about parental involvement, state and local educators will object that these reforms undermine the exercise of their professional judgment. To avoid such resistance, federal policymakers should build an official consensus about the value of parental participation while cultivating parents' capacity to get involved.

402. For an example of how one district implemented a program of parental participation in special education, see J. Handler, supra note 368, at 86-103. But cf. R. Weatherly, supra note 382, at 70-72 (noting that considerations of efficiency, resources, and predictability tend to inhibit teachers from promoting parental involvement).

403. In light of the political vulnerability of innovative educational reform efforts, the federal government may want to focus first on school districts with a less troubled history of relationships with parents. These districts can become model "success stories" that fuel enthusiasm for the programs and influence practices in less successful districts. G. Benveniste, supra note 15, at 240.
Thus, federal reforms must first aim at building a consensus about the nature and degree of parental participation required for designing a program for NEP and LEP students. One useful technique may be to encourage state and local educational agencies to issue pronouncements that affirm the value of parental participation. If the federal government simply establishes these mandates itself, it will create strong tensions by interfering with state and local elites' formal decisionmaking prerogatives. Preferably, federal, state, and local policymakers should arrive at such statements through a cooperative process. Even in a loosely coupled system, these policy pronouncements would legitimate the views of subordinates who favor participation by linguistic minority parents and would help to resocialize those who resist such involvement.

Next, federal reforms should create strong incentives for teachers and school administrators to encourage parental involvement. The federal government could make funding available to districts willing to undertake a parental participation program. Based on its close monitoring and evaluation of program results, the federal government could identify and reward successful schools with additional funding and favorable publicity. Survey data on parental participation in schools that do not receive federal grants could be used to identify schools with unusually poor records. Federal officials could then sanction these schools through negative publicity and intensified scrutiny. As school district performance improved, federal review would diminish.

As a supplement to federal oversight, Congress could establish funding for state and local educational agencies to create their own systems of program monitoring and evaluation. These systems could gradually supplant federal oversight mechanisms. Federal officials would then limit themselves to random monitoring to ensure the quality of state and local review processes. Gradual delegation of oversight responsibilities to state and local officials would be valuable because it would reinforce policy elites' pronouncements on the value of parental participation and perhaps reduce school personnel's resistance.

To overcome resistance among school staff, the federal government should present its proposals as peer-generated innovation rather than federal coercion. The federal government could promote the resocialization of teachers and school administrators through locally run workshops, conferences, and symposia on the benefits of parental participation and successful techniques to encourage it. 404 By focusing on teachers' and administrators' successful experiences in promoting parental partici-

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404. Weatherly & Lipsky, supra note 378, at 195 (stressing importance of careful preparation of local personnel before implementation of special education reforms). But cf. M. Lipsky, supra note 381, at 71-156, 204 (the effects of training personnel to pursue professional ideals will be short-lived if staff confront unfavorable working conditions and must adopt less desirable coping behaviors); see
pation, these training programs would be more appealing to school personnel. The resocialization efforts would in effect emphasize the importance of the teachers’ and administrators’ roles in soliciting parental input, rather than denigrate the staff as incompetent or reluctant to deal with linguistic minority parents. To link the programs with state and local pronouncements favoring participation, federal officials could consult state and local policy elites in administering the workshops, conferences, and symposia. In fact, the federal government might encourage state and local educational agencies to sponsor similar programs of their own.

In addition to focusing on school officials, federal policymakers must develop linguistic minority parents’ skills to allow them to participate more fully in educational decisionmaking. In districts where linguistic minority parents have relied primarily on community organizations for representation, reforms could be aimed at improving both parental and organizational access to information about existing school practices as well as data on successful parental participation programs in other districts. By ensuring that parents and community representatives are well-informed, federal policymakers can reduce school officials’ skepticism about the value of parental involvement.\(^405\)

In districts where linguistic minority parents have been poorly organized, federal policymakers must decide whether to focus exclusively on enhancing individual parents’ participatory skills or whether to support the development of community organizations as well. This determination will turn in part on the characteristics of the linguistic minority population in the district. For instance, if linguistic minority parents are poorly organized because of rapid turnover in the population, an exclusive focus on individual parents may fail because newly arriving parents require a continual investment in expensive training and technical assistance,\(^406\) and departing parents derive few ongoing benefits from their brief participatory experience.

Providing federal support to develop viable community organizations would then be a more efficient way to solicit parental input, assuming that the organizations could provide adequate representation despite rapid changes in the population. Representativeness might be improved by fostering pluralism in the community service system; that is, federal officials would permit a variety of organizations to assist linguistic minor-

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\(^{405}\) See M. Lipsky, supra note 381, at 208-10.

\(^{406}\) These efforts could include providing trained professionals to assist linguistic minority parents as well as providing them information through handbooks, brochures, or hotlines. See J. Handler, supra note 368, at 103-09; M. Lipsky, supra note 381, at 195.
ity parents, rather than create a single advisory committee that monopolizes access to the decisionmaking process. To achieve diverse representation, the federal government not only should support organizations exclusively devoted to serving linguistic minorities, but also must encourage general public service organizations to expand their activities by including parental participation programs.

If training individual parents is not feasible, these organizations could provide parental advocates to assist linguistic minority parents who must deal with the school bureaucracy. Based on their experience in representing parents, the organizations could provide valuable input when schools contemplate policy changes that affect NEP and LEP students. By creating a pluralistic support network, the federal government would rely on competition among the organizations to improve their representativeness, enhance their long-term resiliency, and ensure their continuing vitality in the school policymaking process.

In sum, then, even if a national consensus about the value of parental participation exists, there is no simple answer to how the federal government should promote such participation. Federal policymakers must undertake a closer analysis of the characteristics of school districts and the linguistic minority populations they serve to determine what types of measures are most likely to succeed.

CONCLUSION

This Article first described the nature of disputes over discretion and identified the primary groups that have challenged the discretion of state and local officials to formulate policies affecting linguistic minority students. After reviewing the history of federal intervention in bilingual education, the Article discussed how the corrective justice paradigm, the revitalization perspective, and the English-only approach have influenced ongoing debates over the allocation of discretion. Based on deficiencies in each of these approaches, the Article suggested an alternative framework that carefully examines the nature of the task, the organizational structure of schools, and the necessary comprehensiveness of reforms. Applying this framework will demand a significant investment of time, money, and thought. Its effective utilization will also depend on flexibility and candor in dealing with linguistic minority students' problems.

The chances that such an approach will emerge in the federal policy arena are hampered by the polarization of the bilingual education debate. Participants hoping to influence federal policy have often been intent on

407. See J. Handler, supra note 368, at 227-58 (citing need to involve parent advocates from community organizations to promote meaningful parental participation in special education programs); M. Lipsky, supra note 381, at 195 (same).
finding villains to explain the plight of NEP and LEP children. Propo-
nents of a corrective justice perspective have cited the insensitivity and
hostility of school administrators and teachers; English-only reformers
have impugned the motives of those who advocate TBE and bilingual-
bicultural education programs. Unfortunately, pointing fingers does not
help solve NEP and LEP students' problems.

Amid the charges and countercharges, it may be difficult to assert
that problems can exist without villains, and that even when villains are
ferreted out, solutions will not necessarily be forthcoming. The more
polarized the decisionmaking process, the less likely that those involved
will be sufficiently flexible and forthright to engage in effective policy
formulation. Hopefully, for the sake of linguistic minority children, par-
tisans will set aside some of their differences to engage in a more fruitful
dialogue that produces responsive bilingual education policy.