The Lessons of Keyes: How Do You Translate The American Dream

Rachel F. Moran
Foreword—The Lessons of *Keyes*: How Do You Translate “The American Dream”?

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The recent controversy over federal intervention in bilingual education has raged since the late 1960's, when Congress enacted the first of several statutes addressing the needs of limited-English-proficient (LEP) and non-English-proficient (NEP) students. Nearly twenty years later, this symposium issue on *Keyes v. School District No. 1,* a major case involving bilingual education and desegregation, permits a reexamination of the ongoing debate about bilingual education. This effort is important

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not only because the number of LEP and NEP children continues to grow, but also because this long-running dialogue undoubtedly reveals a great deal about competing conceptions of the American dream for ethnic, linguistic, and cultural minorities.

This Foreword will begin by putting the current arguments about bilingual education in historical perspective. It will then discuss the challenges of structuring the complex and potentially broad-ranging litigation in Keyes. It will conclude by addressing several important theoretical issues in the bilingual education field that are raised by the symposium contributions.

I.

THE HISTORICAL CONTEXT OF THE DEBATE OVER BILINGUAL EDUCATION

The debate over bilingual education is not new. In fact, disputes over our government's approach to linguistic diversity are as old as our nation. Originally, the Founders decided not to establish an official language in the Constitution. In part, they feared that such a provision would infringe on the religious freedom of numerous churches that conducted services in languages other than English. During the late 1800's and early 1900's, controversy arose primarily over German instruction in public and private schools. Anti-German sentiment during World War I eventually stamped out the 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 to protect linguistic diversity in private schools was consistent with the view that choice of language, like choice of religion and other cultural practices, was a matter best left to the family. Parents could properly decide to send their children to private institutions where the family's linguistic, religious,
The debate over bilingual education from the late 1960's through the mid-1970's was quite different from these earlier legal disputes. Hispanic leaders asked the government not simply to tolerate private familial choices but to shape and subsidize them. Litigation and lobbying resulted in financial support for bilingual education programs and research and, more importantly, in a legal framework that presumed that families would prefer bilingual education to other forms of instruction. Critics argued that these legal requirements actually reduced, rather than enhanced, family autonomy. Applicable statutes and regulations generally provided either that parents had to consent before a child was placed in a bilingual education program or that they could veto the placement afterwards by withdrawing the child from the program. Critics contended, however, that consent or veto provisions did not adequately safeguard parental autonomy because parents had little access to information about the programs and were likely to defer to the school's decisions about their children's placement. According to these opponents, because a bureaucratic and legal structure had been created to provide bilingual education, parental choice was inevitably manipulated by administrators with a vested interest in the programs.

Advocates of governmental intervention in bilingual education questioned whether linguistic minorities had ever enjoyed meaningful choice within the educational system. They contended that those families most in need of assistance had been unable to place their children in bilingual education because of their lack of English competence; frequently, they are the parents and family of children in bilingual education programs.

9. Meyer v. Nebraska, 262 U.S. at 400 ("[The] 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.").


14. N. Epstein, supra note 10, at 63-64 (meaningful parental choice requires that school districts offer a variety of approaches and inform parents fully as to each).

15. Id. at 51 (citing evidence that "bilingual enthusiasts sometimes have misled parents of limited English-speaking students").

16. See National Advisory Council on Bilingual Education, The Fourth Annual Report of the National Advisory Council on Bilingual Education 8-9 (available on Educational Resources Information Center hereinafter cited as ERIC Ed No. 185-827, 1979) (LEP and NEP adults are hindered in employment, promotion, health, and other services by their lack of English competence; frequently, they are the parents and family of children in bilingual education programs).
private schools or pay for special language instruction. These families had relied on the public schools to meet their children's special educational needs, but the public schools had consistently failed them as evidenced by their children's low scores on achievement tests and their high drop-out rates. According to bilingual education proponents, this failure was in part attributable to the public school system's single-minded commitment to assimilation of ethnically, linguistically, and culturally different children. Accordingly, federal intervention in bilingual education was necessary to ensure that linguistically different children enjoyed meaningful access to education and a real opportunity to become fully participatory members of American society. For bilingual education advocates, the issue was not the parental prerogative of reinforcing linguistic, cultural, and religious choices, but the dire necessity of stemming the tide of educational failure for LEP and NEP students.

By the late 1970's and early 1980's, federal intervention to promote bilingual education was under increasing attack. Empirical evidence on the effectiveness of bilingual education programs was mixed, and the programs' capacity to improve educational opportunities for LEP and NEP children was considered increasingly questionable. In the face of growing uncertainty about bilingual education's utility, arguments about the programs began to focus on the allocation of decisionmaking responsibility among federal, state, and local governments. Critics doubted whether the federal government could justify limiting the discretion of state and local governments in designing curricula for linguistic minority children. Bilingual education supporters responded by challenging the pro...
methodological soundness of negative research findings and by contending that a significant number of state and local decisionmakers would exercise their discretion unwisely. Clearly, despite the federal government's lengthy experience with linguistic diversity, its proper role in addressing this phenomenon has remained a hotly contested issue.

II. THE STRUCTURING OF THE Keyes Litigation

As part of their recent reform efforts, bilingual education advocates have brought numerous lawsuits in federal district courts around the country. Keyes is one attempt to implement a bilingual education program through institutional reform litigation. This type of litigation poses unique challenges for the judicial system. In this section, the Foreword will use the contributions by Michael Jackson, attorney for the school board, and Peter Roos, attorney for the Hispanic intervenors, to examine how the Keyes court met the demands of structuring a lawsuit that called for broad reform of a major school district. The discussion will examine three issues: (1) the relationship between bilingual education and desegregation; (2) the effects of the presence of multiple language groups on bilingual education litigation; and (3) the limits of implementing school reform through judicial intervention.

The first challenge presented by Keyes was reconciling the mandate to desegregate the Denver school district with the contemporaneous effort to implement bilingual education programs. The language claims


26. Another issue raised by the Keyes litigation was the degree of control that clients exercise over public interest attorneys. This question was implicated by the school board's claim that the named individual plaintiffs did not take an active role in directing the lawsuit. Post-Trial Brief of Defendant at 41-42, Keyes v. School Dist. No. 1, 576 F. Supp. 1503 (D. Colo. 1983) (on file with the LA RAZA LAW JOURNAL). A related problem was whether CHE, as an organizational plaintiff, overshadowed the individual plaintiffs and dominated the direction of the case. This possibility was hinted at by the school board's argument that CHE was not a proper plaintiff due to its distinctive interests. Id. at 43-47. The district court ultimately rejected both of the school board's contentions. 576 F. Supp. at 1506-07, 1508. For a more detailed description of these issues, see Introduction, supra note 2, at ii. Because none of the contributors addressed these matters, this Foreword will not discuss them.

27. See Roos, Bilingual Education: The Hispanic Response to Unequal Educational Opportunity, 42 LAW & CONTEMP. PROBS. 111, 134-40 (Autumn 1978) (desegregation decree can potentially threaten bilingual education programs by dispersing LEP and NEP children throughout a school
in *Keyes* were brought only after a far-reaching desegregation decree had been issued.\(^{28}\) The litigants mobilized precisely because the decree threatened to destroy bilingual education programs in Denver.\(^{29}\)

The Jackson and Roos contributions differ markedly in their treatment of the relationship between bilingual education and desegregation. Jackson states that the school district was concerned that the court’s evaluation of instructional programs for LEP and NEP children would be prejudiced by a previous adverse holding in the desegregation litigation. According to Jackson, his client believed that:

> [T]he earlier finding that the school district violated the Constitution [in conjunction with the desegregation decree] would weigh heavily in the court’s consideration of the evidence [regarding an entitlement to bilingual education]. Our strategy centered on impressing upon the court the need to consider the language rights issue independently from any prior history of segregation. Ultimately, this proved to be the most crucial and least successful [school board strategy].\(^{30}\)

Jackson concludes that the board did not succeed in dissociating the language issue from the desegregation case, citing the district court’s refusal to speculate on how the language claims would have been resolved if they had not been part of the desegregation case.\(^{31}\)

Roos, by contrast, does not attribute his clients’ success to the lingering stigma of a finding of segregative intent. Instead, Roos emphasizes the intervenors’ strategy of carefully tailoring their presentation to an earlier decision’s advantageous formulation of the requirements for instructing LEP and NEP students under the Equal Educational Opportunity Act (EEOA).\(^{32}\)

Roos addresses the interplay between desegregation and bilingual education only by noting that the court of appeals did not consider bilingual education an adequate substitute for desegregation.\(^{33}\)

These contributions are provocative because they reflect highly disparate views about how the desegregation and bilingual education aspects of the case affected each other. Clearly, further inquiry is necessary to determine whether the judge’s analysis of language issues was signifi-

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\(^{31}\) *Id.* at 256.

\(^{32}\) Roos, *supra* note 29, at 262-63, 265-68.

\(^{33}\) *Id.* at 259, 261.
cantly influenced by the earlier finding of intentional racial discrimina-
tion. If so, it would be interesting to know the methods the school board
employed in Keyes to dissociate these issues, the alternative approaches it
might have used, and their relative chances for success. In further stud-
ies of the relationship between bilingual education and desegregation, it
would also be useful to distinguish between the moral impact of a finding
of segregative intent and the practical limitations imposed by implemen-
tation of a desegregation decree. Especially where a higher court has
ruled that desegregation takes priority over bilingual education, a trial
judge's decision on language issues must be affected by the logistics of
complying with a desegregation order as well as by any stigma associated
with a finding of segregative intent.

Another challenging problem raised by the Keyes case is how to deal
with the presence of multiple language groups. In Denver, a large pro-
portion of the LEP and NEP children spoke Indochinese languages, but
Keyes was brought by Spanish-speaking litigants. The school board
challenged the ability of the Spanish-speaking intervenors to represent all
LEP and NEP children. The district court upheld the propriety of
class representation at the liability phase, although it noted that the lan-
guage groups' interests might diverge at the remedial phase.

Jackson adverts to the problems of class certification created in part
by "the seeming inability on the part of CHE [the Congress of Hispanic
Educators] to determine whether they [sic] truly wanted to represent lan-
guage groups other than Spanish." Rather than address the merits of
the court's disposition of the class certification issue, Roos describes the
provisions for non-Spanish-speaking students that were made in the con-
sent decree. The decree employed a three-pronged approach for meeting
their needs. First, non-Spanish-speaking LEP and NEP students were to
receive one to two hours of intensive English-as-a-Second-Language
(ESL) instruction daily. Second, a bilingual teacher's aide was to be
provided for every fifteen students. Third, an advisory committee with a
full-time staff person was to represent the concerns of Indochinese LEP
and NEP students. Although few trained teachers who spoke English

34. According to the district court, while 55.72% of the school system's NEP and LEP chil-
dren spoke Spanish, 36.48% spoke one of four Indochinese languages: Cambodian, Hmong, Lao-
tian, and Vietnamese. 576 F. Supp. at 1511. Relatively small numbers of children fell into another
37 language groups. Id. For more information on the presence of multiple language groups in the
Denver schools, see Introduction, supra note 2, at ii-iii.
35. Post-Trial Brief of Defendant, supra note 26, at 36-41.
36. 576 F. Supp. at 1506-08.
37. Jackson, supra note 30, at 251.
38. Roos defines an ESL program as one that emphasizes the use of English-intensive instruc-
tion so that LEP and NEP students can participate fully in English-speaking classrooms as quickly
as possible. No native language instruction in substantive courses is included. Roos, supra note 29,
at 265 n. 51.
and the relevant Indochinese languages were available, the district committed itself to recruit such teachers actively. It also promised to provide English-language training for its teacher's aides.\(^3\)

Many interesting questions about litigation involving multiple language groups remain to be investigated. The presence of non-Spanish-speaking LEP and NEP students could enhance the power of Hispanic representatives if meaningful coalitions are formed; on the other hand, their presence could dissipate the authority of Hispanics if non-Spanish-speaking groups either assert or are perceived as having distinctive interests. Moreover, because the judge in *Keyes* indicated that the interests of different language groups could potentially conflict at the remedial phase, it would be informative to know what role, if any, representatives of non-Spanish-speaking LEP and NEP students played in negotiating the consent decree.

A third problem in *Keyes* was the inherent difficulty of implementing broad-ranging changes in a large school bureaucracy. As is true of any major institutional reform case, a finding of liability hardly marks the end of the litigation. In fact, after a violation has been established, the court still faces the complex task of evaluating proposed compliance plans, adopting one, monitoring compliance, and amending the plan if it proves unworkable.\(^4\)

The articles by Jackson and Roos differ strikingly in their emphasis on the liability and remedial phases of the case. Jackson focuses exclusively on the strategies that the board employed in attempting to avoid liability, while Roos sets forth a virtual blueprint for negotiating a consent decree after liability has been established. Perhaps because the school board's defense was unsuccessful, the most significant issue for Jackson is why he lost the case when he and his client "felt comfortable going into trial because of the good faith manner in which the school district programs [for LEP and NEP children] were carried out."\(^5\) By comparison, after describing how he succeeded in establishing liability, Roos demonstrates a deep concern with how to convert a judicial decree into meaningful bureaucratic reforms.\(^6\) Clearly, in *Keyes*, prospective implementation of the legal mandate was as critical for the intervenors as demonstrating past violations.

Although additional investigation will be necessary to substantiate these observations, the disparity in the attorneys' concern with implementation may reflect their differential participation in the remedial phase of the case. The intervenors' counsel undoubtedly played a pivotal

\(^3\) Id. at 275.
\(^5\) Jackson, *supra* note 30, at 252.
\(^6\) Roos, *supra* note 29, at 275-76.
role in negotiating the consent decree\textsuperscript{43} and probably enjoyed enhanced client confidence after a recent courtroom victory. In marked contrast, defense counsel's influence may have diminished at the remedial stage. The defense attorneys had suffered a demoralizing loss that probably undermined their attorney-client relationship. Moreover, they were certainly less familiar with school district affairs than local administrators. School personnel therefore may have played a greater role in the negotiation process than they had at earlier stages of the case.

\textit{Keyes}, like most institutional reform cases, implicates a wide range of divergent interests. The case is far more than a simple dispute between LEP and NEP students and the school district. It illustrates tensions between bilingual education advocates and proponents of desegregation as well as potential conflicts among multiple language groups. Although \textit{Keyes} indicates that the district's willingness to comply with a decree is of concern, it also demonstrates that representatives of LEP and NEP children can overcome this intransigence in part by forging alliances with educators, such as those in CHE, who have an interest in promoting bilingual education programs. To address more comprehensively the multiplicity of interests affected by \textit{Keyes}, future research will have to examine not only the litigators' perspectives but also those of their LEP and NEP clients, the judge, litigators and clients demanding desegregation, and community representatives of other language groups. Only then will the interplay of litigation strategies, judicial responses, and meaningful reform be more fully understood.

III. \textbf{THE THEORETICAL IMPLICATIONS OF \textit{Keyes}}

In addition to illustrating the difficulties of structuring an institutional reform case, the symposium contributions implicate a number of significant theoretical problems in the field of bilingual education. This Foreword will briefly analyze three of these problems: (1) how equality should be defined in evaluating the claims of LEP and NEP children; (2) what role social science evidence should play in formulating bilingual education policy; and (3) whether reliance on local control fosters innovation in bilingual education programs.

\textbf{A. Definitions of Equality}

Advocates have often justified bilingual education as necessary to promote fully equality for LEP and NEP children. Educational equality has been treated as the key to economic, social, and political equality.\textsuperscript{44}

\textsuperscript{43} \textit{Id.} at 269-70.

\textsuperscript{44} See, e.g., Avila, \textit{Equal Educational Opportunities for Language Minority Children}, 55 U.
The statutory and constitutional provisions upon which Jackson and Roos relied in *Keyes* reflect some underlying notions of equality. Similarly, the empirical measures used by educational specialists, such as Keith Baker and Adriana de Kanter, and other social scientists, such as Harriett Romo, derive from theoretical postulates about equality. Because the symposium contributions depend heavily on substantive, but somewhat ill-defined, notions of equality, this Foreword will provide a framework for evaluating several possible approaches to the concept.

One substantive definition of equality would require equal outcomes for LEP and NEP children and their English-speaking counterparts. There are serious obstacles to implementing this conception of equality. First, there is no consensus about what constitutes a desirable outcome. As Baker and de Kanter explain:

The purpose of special educational services for language minority students must be clarified. At times, the goal is described as maximizing the learning of English by students from non-English-speaking homes. At other times the goal is described as developing both English and the non-English native language. These goals reflect weighty and fundamental issues of social philosophy posing the question of whether the school should reflect an America which is the melting-pot or an America of ethnic pluralism.

This perennial disagreement over whether bilingual education should promote assimilation or cultural pluralism makes it extremely difficult to compare the merits of different educational outcomes for LEP and NEP

COLO. L. REV. 559, 559, 569 (1984) (describing Mexican American Legal Defense and Educational Fund's investment of over one million dollars to identify and promote educational programs providing the greatest opportunities for Hispanic students); Roos, supra note 29, at 111-12 ("[F]or the moment and for the foreseeable future bilingual-bicultural education will be seen as the sword for severing the bonds that hold back Hispanic children."); S. SCHNEIDER, supra note 6, at 26-27 (legislative history of Bilingual Education Act of 1968 evinced concern with equal educational and economic opportunity for LEP and NEP children).

45. The arguments in *Keyes* involved the EEOA, Title VI, and the Equal Protection Clause. The intervenors ultimately prevailed under the EEOA, and the trial court did not reach their claims under Title VI and the Equal Protection Clause. See *Introduction*, supra note 2, at ii-iii. Each of these provisions attempts to define the scope of governmental responsibility for rectifying inequality. See infra notes 52-62 and accompanying text.


children. If assimilation is the relevant goal, LEP and NEP students succeed to the extent that they become largely indistinguishable from their English-speaking classmates. By contrast, if cultural pluralism is the objective, LEP and NEP children who emerge from the educational process identical to their English-speaking peers are failures; they succeed only by acknowledging their linguistic and cultural differences and taking pride in them. Clearly, this unresolved value dispute hobbles efforts to define positive educational outcomes for LEP and NEP children.49

Even if some general consensus about the nature of a desirable outcome could be achieved, there might still be disagreement about which characteristics to measure in assessing outcomes.50 For example, if assimilation is the goal, should only English proficiency be measured? What about other characteristics, such as identification with American values or close friendships with English-speaking classmates? If pluralism is the goal, should only English proficiency, native-language proficiency, and awareness of cultural heritage be evaluated? What about self-esteem and respect for other cultures? If a list of relevant characteristics could be established, it is not clear that each could be quantified in a way that would permit trade-offs and comparisons with other relevant factors.51 For example, if a child's self-esteem is enhanced by a bilingual education program, how should this be weighed against reduced social contact with English-speaking peers? If one child develops reading and writing skills in both a native language and English while another develops greater English proficiency but can not read or write a second language, are these outcomes equal? As is undoubtedly obvious by now, the process of implementing a definition of equality based on measurement of outcomes is extremely complicated, if not impossible.

Because of these difficulties, commentators have attempted to measure equality by looking not at outcomes, but at opportunities. For example, the EEOA provides that no child shall be denied equal educational opportunity on the basis of race or national origin through failure to take appropriate action to overcome language barriers.52 However, the process of guaranteeing equal educational opportunity creates many problems similar to those involved in assuring equality of outcome. Again, it is extremely hard to establish which variables are relevant to evaluating whether a child enjoys equal educational opportunity and to ensure that each can be measured and compared to other relevant crite-

49. D. Ravitch, The Troubled Crusade 273 (1983); S. Schneider, supra note 7, at 32. See generally Outcome Equality, supra note 46, at 935-37 (describing inability to achieve judicial or scholarly consensus about a vision of the just society based on outcome equality).

50. See Outcome Equality, supra note 46, at 934-35 (responsible court can at best act strategically to implement those outcomes within judicial reach).


52. See supra note 1.
ria. Consequently, analyses of equal educational opportunity have often focused on a limited set of measurable inputs that are generally accepted as critical to educational performance. When significant disparities in these inputs occur, courts will conclude that schoolchildren have been denied an equal educational opportunity. As the denial of equal educational opportunity becomes increasingly severe, it approximates a violation of the principle of minimum access to education. That is, when courts intervene in the face of gross disparities in centrally important educational resources, they are apt to invoke an access principle, rather than equal educational opportunity. In fact, under such circumstances, the Supreme Court has hinted that students have a constitutionally protected right to minimum access to education.

In lieu of the foregoing, somewhat elusive equality principles, decisionmakers have turned to a much narrower principle of anti-discrimination. The anti-discrimination principle examines whether groups with certain characteristics have been deliberately wronged through exclusionary practices. Groups invoking the principle must establish intentional discrimination on the basis of their identifying characteristic. For example, under Title VI and the Equal Protection Clause, LEP and NEP children must show not only that they were disadvantaged by an educational program but also that the program was deliberately designed to discriminate against them. An intent requirement greatly reduces the theoretical problems of defining equality that confront legislators, judges, and administrators and significantly circumscribes the evidence considered in assessing a claimant's entitlement to relief.

53. For example, in the Keyes case, the district court found that there were only 36 bilingual teachers and 72 tutors to serve a school system with 3,322 NEP and LEP students. The court further found that bilingual teachers were not specifically assigned to bilingual classrooms because of personnel regulations and contractual commitments. 576 F. Supp. at 1515, 1517. Monolingual English-speaking teachers in bilingual classrooms were typically assisted by paraprofessionals who were not required to show any teaching competence and received scant in-service training. Id. at 1517. Noting "the obvious need for the services of competent bilingual teachers" to staff bilingual classrooms, the court concluded that this serious deficiency along with other omissions deprived LEP and NEP students of an equal educational opportunity. Id. at 1516-18.


58. See Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. Rev. 36, 132-33, 139-40 (1977) (ambiguity of disproportionate impact analysis makes resort to motive necessary to vindicate rights of equality); but cf. Margulies, supra note 57,
Although there has been some argument about the kind of evidence relevant to establishing intent, the primary dispute has been over the characteristics that qualify for special treatment under the anti-discrimination principle. Although almost everyone agrees that race and ethnicity should be included, other possibilities, such as gender, illegitimacy, age, class, and alienage, have been much debated. Rather than recognize language and culture as independent bases for applying the anti-discrimination principle in bilingual education cases, decisionmakers have treated these features as proxies for race and ethnicity. In analyzing whether LEP and NEP children suffered racial or ethnic discrimination, decisionmakers have consistently overlooked the complex interaction of language, culture, class, and race or ethnicity. Because of this systematic oversight, declarations of the rights of ethnic, linguistic, and cultural minorities and the forms of relief afforded them have frequently been distorted and inadequate.

Each of these substantive notions of equality suffers from serious deficiencies. If equality is to serve as more than a rhetorical justification for social reform, the concept must be defined with greater analytical clarity. The challenge for lawyers and social scientists is to explain the concept of equality with sufficient rigor to make at least some of its policy implications clear. Otherwise, elusive notions of equality will lend themselves to endless manipulation and add little more than slogans to policy analysis.

B. The Role of Social Science Evidence

The highly influential participation of social scientists in formulating bilingual education policy raises serious questions for legal scholars.
Social scientists have often been regarded as impartial, objective analysts who apply their technical expertise to difficult problems. Yet, ideological bias has inevitably played a part in much social science research. If a decisionmaker requests a policy analysis of selected questions, the research agenda is often skewed by the decisionmaker's ideological beliefs. Moreover, researchers frequently select a field of study because of their pre-existing intellectual predilections. The myth of the unbiased expert may sometimes serve as a convenient crutch that spares decisionmakers from confronting the deep-seated value disputes that underlie a policy dilemma. By leaving problems to the experts, decisionmakers can understate the need for discussion of community values to achieve optimal social policies.

Decisionmakers are further hampered in their use of social science evidence by a lack of technical sophistication. Judges and legislators unfamiliar with social science methodology are unable to evaluate fully the technical merits of such research. Moreover, legal decisionmakers are typically unaware of how a researcher's findings fit into a larger body of work on the subject. In particular, decisionmakers usually do not know whether related studies have been undertaken and whether they produced consistent results. Also, decisionmakers at times overestimate the utility of general research findings for solving specific legal problems.

In their article, Baker and de Kanter thoughtfully describe the troubling relationship between bilingual education research and legal policymaking. They argue that although lawyers have successfully established an entitlement to special assistance for LEP and NEP children, they have failed these students by institutionalizing transitional bilingual education as the only instructional approach available to meet their needs. Baker and de Kanter fault the legal community for uncritically accepting research on transitional bilingual education's effectiveness.

63. Tribe, supra note 51, at 75-78.
64. Id. at 102-05. See also Skutnabb-Kangas, Research and Its Implications for the Swedish Setting—An Immigrant's Point of View, in MULTICULTURAL AND MULTILINGUAL EDUCATION IN IMMIGRANT COUNTRIES 127-28 (T. Husen & S. Opper eds. 1983).
66. Tribe, supra note 51, at 97-98.
69. Levin, supra note 65, at 233-36.
70. Baker & de Kanter, supra note 48, at 308-09. Baker and de Kanter define transitional bilingual education as an instructional program that uses a child's native language in subject matter instruction until English proficiency is adequate to participate in a regular classroom. The student learns to read and write the native language as well as English. Id. at 295 n. 1.
Based on their comprehensive review of empirical studies of bilingual education, Baker and de Kanter urge lawyers to recognize a broader range of alternatives for instructing LEP and NEP students.71

Baker and de Kanter call for deference to a new claim of authoritative expertise, yet they do not explain how attorneys with limited training in the social sciences can adequately assess their arguments. In fact, Baker and de Kanter dismiss many of the complexities of relying on social science evidence by attributing past mistakes to the bad judgment of attorneys and judges.72 By ignoring the roots of the sometimes pathological relationship between law and social science, Baker and de Kanter miss some of the most provocative implications of their historical account of legal intervention in bilingual education.73 More importantly, they fail to assure untutored lawyers that further pitfalls can be avoided by accepting yet another expert analysis of bilingual education research.

Not every social science inquiry will produce findings that the legal system can address. Results that are both statistically and socially significant do not necessarily afford a basis for legal intervention.74 For example, Harriett Romo has documented at length subtle ways in which LEP and NEP children are disadvantaged by traditional institutional procedures and uninformed or indifferent bureaucrats. She has shown how teachers sometimes overlook the needs of quiet, unobtrusive LEP and NEP students. When testing at the end of the school year reveals their underachievement, these students are either perfunctorily promoted to the next grade or retained in the same grade for another year. Neither response results in assessment of their special educational needs.75 In addition, parents of LEP and NEP children are often unable to deal effectively with school administrators in pursuing their children's academic problems. Without vigorous parental advocacy, these children can "slip through the cracks" if their needs are repeatedly ignored while school personnel deal with other pressing problems.76

While this work is of undoubted sociological importance, any legal remedy addressing Romo's observations would be highly intrusive. Government decisionmakers could attempt to remedy these deficiencies by regulating academic promotion or establishing advisory councils to rep-

71. Id. at 324.
72. Id. at 314-15, 323-24.
73. Cf. Rivlin, Forensic Social Science, 43 HARV. EDUC. REV. 61, 62 (1973) (arguing that policy-oriented social science could be a healthy development that reduces the hypocrisy of pseudo-objectivity and hidden bias if rules are established that guard against misrepresentation of facts or findings).
75. Romo, School Organizational Practices, 1 LA RAZA L.J. 277, 285-91 (Fall 1986).
76. Id. at 292-94.
resent parents' interests. Yet, these measures would only partially address Romo's concerns. Valuable school time would be squandered until testing was done at the end of the year and prescribed promotional standards were applied. Significant delays could occur while parents sought redress through advisory councils. Moreover, parents might find themselves as unsuccessful in dealing with a bureaucratic advisory council as with school personnel. Advisory councils could also limit themselves to influencing general policy, rather than intervening on behalf of individual parents. To address Romo's findings fully, the legal system would have to monitor the interactions between teachers and LEP and NEP students or do repeated testing to assess whether the students' needs were largely disregarded in classroom proceedings. The legal system might also have to appoint neutral observers or parental advocates to participate in interactions between school administrators and the parents of LEP and NEP children.  

Before calling for such highly intrusive remedies, lawyers must weigh the potential benefits to LEP and NEP children against the costs of pervasive legal interference in school activities. How significantly would a judicial decree coupled with institutional supervision enhance the quality of bilingual education classes? Would school personnel become demoralized and lose confidence in their ability to exercise discretion in other academic contexts? Would pervasive intrusion to protect LEP and NEP children create a precedent that might later be used to justify broad intervention on other, presumably less sympathetic, grounds? For example, what if the courts engaged in extensive oversight of the schools to ensure that fundamentalists' children were not exposed to the theory of evolution, profanity in English literature, and instruction on human sexuality? Answering these difficult questions is the peculiar (and often thankless) province of the lawyer. Although the social scientist's inquiry can sweep as broadly as imagination and professional ethics permit, governmental decisionmakers must proceed cautiously before

77. Of course, it is entirely possible that parents of LEP and NEP children would not exercise meaningful control over parental advocates. This potential problem is very similar to the difficulties of ensuring that public interest attorneys respond to the needs of their clients, rather than simply implementing their own reform objectives. See S. Olson, Clients and Lawyers 28-34 (1984) (analyzing problems of lawyer domination); see also supra note 26 (describing allegations of lawyer domination in Keyes).


79. See Outcome Equality, supra note 46, at 935-36; see also D. Horowitz, supra note 74, at 297-98.
attempting to remedy all empirically verifiable harms with the powerful machinery of the State.

C. Local Control and Innovation

Based on social science research, some experts, including Keith Baker and Adriana de Kanter, have argued that because no single method of instruction has proven effective in educating LEP and NEP children, school districts should enjoy greater flexibility in choosing among different programs. Even if current research supports the conclusion that a variety of methods should be employed to assist LEP and NEP children, these data say nothing about who can best decide which option to implement. Arguments for greater local control must rest on an assumption that a shift in decisionmaking authority will foster innovation and experimentation. Researchers can not substantiate this assumption by referring exclusively to their work on the effectiveness of bilingual education; instead, they must rely on a theory of federalism in which state and local governments serve as laboratories for social reform.

The predicates of this theory are by no means uncontroverted. Many bilingual education advocates question whether local governments will exercise their discretion wisely because of their historical indifference, if not hostility, to the claims of ethnic, linguistic, and cultural minorities. Even if local governments are fairly responsive to these claims, there are still good reasons to question the relationship between local control and innovation. The mass media and national business and marketing interests have significantly reduced geographic insularity. Regional differences are arguably decreasing in importance, while other distinctions, such as occupation, are becoming increasingly salient bases for social organization. Under these circumstances, heavy reliance on geographical differentiation is not necessarily the best mechanism for assuring experimentation. Moreover, local jurisdictions may simply follow national opinion leaders in implementing educational programs and be reluctant to assume the political risks associated with innovation. In fact, each locality may simply wait to see what other jurisdictions do, hoping to benefit from their risk-taking and avoid costly errors.

In light of the questionable relationship between local control and experimentation, experts can not justify their demand for broad reallocation of decisionmaking authority based solely on studies of the pedagogical value of bilingual education. They must also present convincing evidence that the theory of federalism underlying their views remains viable in the face of changing conditions.

As the foregoing discussion illustrates, bilingual education advocates have had to grapple with defining equality as a goal of reform, evaluating reform through the use of social science evidence, and allocating responsibility for implementing reform. These difficult problems are by no means unique to bilingual education. In fact, similar issues often confront proponents of other broad-ranging social changes. By coming to grips with these questions in the context of bilingual education, analysts will be better able to assess the general limits of social reform efforts.

IV. CONCLUSION

Controversies over our nation’s approach to linguistic diversity have persisted for over 200 years. In Keyes, institutional reform litigation took over a decade to address the needs of LEP and NEP children in Denver. During that lengthy process, the court confronted a variety of challenges in structuring the lawsuit, and the decision implicated a number of important theoretical questions in the bilingual education field. Clearly, coping with language problems is a time-consuming and perplexing process. The debate about bilingual education endures because it requires us to do no less than give shape to the ever-changing conception of the American dream for ethnic, linguistic, and cultural minorities. This conception may be as vicissitudinous as public opinion, but the struggle to discover its ineluctable meaning continues to fascinate us.