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Who Should Decide What is Best for California's LEP Students?
Proposition 227, Structural Equal Protection, and Local Decision-Making Power

Elizabeth T. Bangs

INTRODUCTION

"No single tradition in public education is more deeply rooted than local control over the operation of schools." 1

When California voters enacted Proposition 227 in June 1998,2 they undermined that central tenet of education jurisprudence. Furthermore, the initiative violates the Fourteenth Amendment guarantee of structural equal protection. This theory prohibits states from "plac[ing] special burdens on racial minorities within the governmental process ... making it more difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest." 3 Proposition 227 makes it more difficult for national origin minority children and their parents than for other children to obtain appropriate educational programs.

Proposition 227 results in "the near elimination of bilingual education programs" in California,4 by "require[ing] that all children be placed in English language classrooms." 5 The proposition contradicts the last twelve years of California's history, during which the state's governors and legislature have granted

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1 Law Clerk to the Hon. Richard A. Paez, Ninth Circuit Court of Appeals, Pasadena, California; J.D., Harvard Law School, 2000; A.B., Harvard College, 1997. I would like to thank Professor Christopher Edley, Jr., and his assistant, Marilyn Byrne, ACLU attorneys Rocio L. Cordoba, for her invaluable assistance with documents and information, and Daniel P. Tokaji; the Bangs family; and Sarah J. Cooper. I was employed by the ACLU Foundation of Southern California as a legal intern from June 1998 through May 1999. I was not involved in Valeria G. v. Wilson, but I worked with Rocio Cordoba in preparing for the hearing on the motion for a temporary restraining order in the as-applied challenge to Proposition 227 in Los Angeles, Diana Doe v. Los Angeles Unified School District.

2. See 1998 Cal. Legis. Serv. Prop. 227 (codified at CAL. EDUC. CODE § 300 et seq. (Deering 1999)).


5. CAL. EDUC. CODE § 305 (emphasis added).
local school districts be granted wide discretion over the education of limited English proficient ("LEP") students. Additionally, the proposition is exceedingly difficult to overturn or change, requiring a new popular referendum or a supermajority vote of the legislature. In response to Proposition 227, civil rights advocates filed a number of initial lawsuits, including a facial challenge to the law in federal district court in Northern California, alleging that the State could "[not possibly comply with Proposition 227's state-level mandates consistent with [its] own obligations under federal law," as well as a more specific challenge to the Los Angeles Unified School District's hastily-conceived implementation plan. In Valeria G. v. Wilson, the Northern California case, the federal district court denied the plaintiffs' motion for a preliminary injunction. The district court in Diana Doe v. Los Angeles Unified School District [hereinafter Diana Doe], the Los Angeles case, similarly denied a motion for a temporary restraining order. The cases are still active, with civil rights activists continuing to seek a ruling that Proposition 227 is unconstitutional. But in the meantime, hundreds of schools across the state have been forced to implement the initiative's English-only mandate.

The opinion denying the motion for preliminary injunction in Valeria G. failed to consider seriously the constitutional repercussions of removing control over the education of LEP students from local decisionmakers, moving it to the state level, and nearly insulating it from repeal or amendment. This article will demonstrate why the basic argument adopted by plaintiffs in both Valeria G. and Diana Doe, that the denial of bilingual education violated children's rights, was bound to fail. But I will further argue that Proposition 227 does violate the

6. See infra notes 313-341 and accompanying text.


13. See infra notes 68-77 and accompanying text.
Fourteenth Amendment equal protection guarantee by removing control over curricular decisions from local government and adding extra burdens to the legislative process, solely on the basis of race and national origin. Finally, I will point out some of the more serious drawbacks to the structural equal protection argument, but conclude that continuing support for bilingual education makes this argument the most promising.

In the winter of 1998, at least one commentator argued, like the plaintiffs in Valeria G., that Proposition 227 was clearly unconstitutional. I will argue in the second section of this article that such analysis simply ignores how federal courts have dealt with the education of LEP students in the last 25 years. Another author concluded that Proposition 227 is constitutional and, moreover, good policy. And a third recognized that “[r]ather than correcting the problem of limited ability English-speakers, Proposition 227 exacerbates it.... [But if] Valeria G. is any indication, courts will be unwilling ... to strike down such measures....” Even if the fight to preserve the bilingual education option in California ultimately fails, Ron Unz, the leader of the pro-227 campaign, and his many supporters are taking their initiative to other states. A similar proposition is likely to appear on the Arizona ballot in November 2000. We can also predict similar controversy in other areas with significant LEP populations, such as Florida and New York City. I hope the constitutional argument presented in this article will prove useful in those debates by shedding light on what is wrong with eliminating bilingual education as an option across the board and by providing one legal defense to opponents of measures like Proposition 227.

II.
BILINGUAL EDUCATION AND THE IMPACT OF PROPOSITION 227

A. Background on Bilingual Education

Bilingual education in America’s public schools began as an experiment in Florida and the Southwest in response to evidence that English-only instruction was


15. See Joseph A. Santosuosso, Note: When in California ... In Defense of the Abolishment of Bilingual Education, 33 NEW ENG. L. REV. 837, 840 (1999) (“Bilingual education does not work and must be abolished.”).


17. See, e.g., id. (“The result of California’s action could be the introduction of similar measures across the country.”).

not successfully educating limited English proficient ("LEP") students. Bilingual education can take a number of different forms, but all programs involve teaching children in both their native language and in English. Children are usually taught to read first in their native language, but teachers' use of the native language decreases until students are ready for mainstream, English-only classrooms.

According to the National Association for Bilingual Education ("NABE"), "Bilingual education is based on three premises:

1. Knowledge is more easily acquired if a teacher communicates with a student in a language the student understands.
2. Concepts and academic content learned through a student's native language don't need to be relearned in English. Two plus two equals four in any language.
3. Language skills such as literacy transfer between a student's native language and English."

Proponents of bilingual education argue it is preferable to English-only models because the bilingual approach ensures that all children understand the substantive material they are exposed to in their classrooms: "Quantity of exposure is not enough. In an English-only submersion classroom, what LEP students hear is mostly 'noise'.... Quality of exposure is key. To acquire English, children must have 'comprehensible input' in English." During the 1994-95 school year, there were 3.2 million LEP students in American elementary and secondary schools, or seven percent of the total enrollment. In California, almost one-quarter of students, or nearly 1.4 million, are

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19. See National Association for Bilingual Education, Bilingual Education: Building on What Children Know to Reach High Standards (accessed June 19, 1999) <http://www.nabe.org/unz/BE.html#EEO> [hereinafter NABE, Bilingual Education]. For example, according to the National Association for Bilingual Education ("NABE"), half of all Mexican-American children were failing to complete 8th grade in 1968. NABE points out, though, that children have been successfully educated bilingually since the colonial period. See id.


21. See id.

22. NABE is a professional and advocacy organization that "pursues implementation of educational policies and practices which ensure equality of educational opportunity for the increasingly diverse students of America." NABE, What is NABE? (accessed Oct. 7, 1999) <http://www.nabe.org/about/index.html>. NABE "advocat[es] for bilingual education programs which enable all students to become proficient in English and at least one additional language ... [and] for language-minority students to have equal opportunities for learning in both the first language and English...." NABE's Mission, id.

23. NABE, Bilingual Education, supra note 19.

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designated LEP. But, prior to the implementation of Proposition 227, only 30 percent of those students were enrolled in "full-fledged bilingual education programs, taught by a certified teacher who [spoke] their native language." Seventy percent of California's LEP students are of elementary-school age, and 80 percent are native Spanish speakers. Twenty-two percent of California's entire population, or nearly the same proportion as the number of students designated LEP, is foreign-born. More than one million of California's LEP students are Spanish-speaking national origin minorities; and along with students of Asian national origin, they make up 95 percent of the State's LEP student population.

There is an ongoing debate over the validity of bilingual education as a method for addressing the language deficiencies of LEP students. Commentator James Crawford has argued that the most successful programs continue through sixth grade, with the effects of bilingual instruction not necessarily evident until the last two years. According to a 1991 study commissioned by the federal Department of Education, "in both immersion and early-exit classrooms, student achievement leveled off well below national norms," while in "late exit programs...progress in student achievement accelerated over time approaching national norms by the 6th grade." Crawford notes that sheltered English immersion has had "excellent results," when it is "incorporated into bilingual education programs" and is "tailor[ed] to LEP students' proficiency in English." In

25. See id.; see also PIs.' Mem. of Points & Authorities in Supp. of Mot. for Prelim. Inj. at 1, Valeria G. v. Wilson, 12 F.Supp. 2d 1007 (N.D. Cal. 1998) (No. C 98-2252 CAL) [hereinafter Valeria G., PIs.' Mem.].

26. NABE, Bilingual Education, supra note 19. Eleven percent of California LEP students were enrolled in ESL programs; 20 percent in ESL and immersion programs; 22 percent in ESL and immersion, with native language support; and 16 percent were apparently receiving no help. See id. (citing CALIFORNIA DEPARTMENT OF EDUCATION, 1997 LANGUAGE CENSUS). See also Valeria G., PIs.' Mem., supra note 25, at 4.

27. See id. at 3.


29. See Valeria G., PIs.' Mem., supra note 25, at 51.

30. See JAMES CRAWFORD, BILINGUAL EDUCATION: HISTORY, POLITICS, THEORY, AND PRACTICE 131 (3rd ed. 1995) [hereinafter Crawford, 3d edition]. This late-exit bilingual model calls for developing [students'] native language skills -- not only in reading, but in other conceptually demanding subjects -- while students are receiving communication-based ESL and sheltered English classes.... [T]he payoff takes time. Yet because of the interdependence of the two languages...the late exit should entail 'no cost to English.' Id. at 130.

31. Id. at 150. In that study, "[w]hile children clearly excelled in the late-exit classrooms, for technical reasons their performance was not directly compared with that of students in immersion and early-exit classes. Id. See also MARIA ESTELA BRISK, BILINGUAL EDUCATION: FROM COMPENSATORY TO QUALITY SCHOOLING 28 (1998) ("Students who attend bilingual programs for more than 3 years show better academic performance, mastery of English, and diminished drop-out rates.").

contrast, Proposition 227, which imposes sheltered English immersion on California's students, does not provide for incorporation into existing bilingual programs or tailoring to individual needs.\(^3\)

Crawford recognizes that his conclusions "are not universally accepted by other researchers. Disagreements persist, for example, about the transferability of literacy skills from one language to another."\(^3\) During the Proposition 227 campaign, Unz focused on the reassignment rate of LEP students to mainstream classes:

Too often, young immigrant children are taught little or no English — in Los Angeles, only 30 minutes a day.... Of the 1.3 million California schoolchildren ... who begin each year classified as not knowing English, only about 5% learn English by year's end, implying an annual failure rate of 95% for existing programs.\(^3\)

In particular, the campaign disputed that a successful language program takes six or seven years to complete. The pro-227 argument that appeared on the ballot declared: "Learning a new language is easier the younger the age of the child. Learning a language is much easier if the child is immersed in that language. Immigrant children already know their native language, they need the public schools to teach them English."\(^3\) But at least one expert, Stanford Professor Kenji Hakuta, has argued that none of the contradictory data cited by proponents and opponents of Proposition 227 is particularly useful because "studies quickly ... become politicized by advocacy groups selectively promoting research findings to support their positions."\(^3\)

B. History of Proposition 227

Proposition 227 has virtually eliminated bilingual education in California. The initiative was spearheaded by Ron Unz, a California millionaire and

33. See CAL. EDUC. CODE § 300 et seq.

34. CRAWFORD, 3rd edition, supra note 30, at 132.


37. Peter Schrag, Language Barrier, NEW REPUBLIC, Mar. 9, 1998, at 14. Maria Estela Brisk has described two studies that "classified outcomes from bilingual education programs based on students' performance: where students performed better than, worse than, or comparable to students in mainstream classes." BRISK, supra note 31, at 30. The first study found "bilingual programs inherently advantageous because students were learning two languages 'without impeding their educational progress.'" Id. The second study, though, "concluded that bilingual programs that offered comparable results to monolingual programs were 'doing nothing' for their students." Id. Brisk observes that the outcomes of these studies resulted from the researchers' political biases. The authors of the first study believed that "having an extra language was educationally superior." Id. But for the other researchers, "learning two languages was a waste of time and money." Id.
businessman, who decided that California was doing "a poor job of educating immigrant children, wasting financial resources on costly experimental language programs whose failure over the past two decades is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children."  

Almost a year before Proposition 227 appeared on the ballot, Ron Unz began making public appearances to insist that the initiative was "neither ‘anti-immigrant’ nor ‘anti-Latino.’" In particular, Unz attempted to distance himself from Proposition 187, the 1994 "crackdown on undocumented immigrants ... [that] would have thrown their children out of public schools." Commentator James Crawford has included an analysis of the victory of Proposition 227 in the latest edition of his book, *Bilingual Education: History, Politics, Theory, and Practice*. He concludes that "[i]nstead of warning about the menace of ‘bilingualism,’ [the campaign] stress[ed] the importance of ‘English for the Children.’... This strategy proved an unqualified success."  

The Proposition 227 campaign had its roots in a boycott of the Ninth Street School in Los Angeles by parents allegedly dissatisfied with the school's bilingual education program. Crawford argues that few of the parents actually had genuine complaints about the program and the walkout was actually "a drama ... staged precisely to generate sensational headlines" by the director of a local community center. Regardless, Unz capitalized on the media attention the boycott received and made it the centerpiece of the campaign. "Unz crafted a strong story line. It went like this:

Bilingual education is an experiment of the 1960s that was tried and has failed; 95 percent of all English learners in California fail every year to learn English; parents feel so trapped by the ‘bilingual bureaucracy’ that in one Los Angeles school they had to carry picket signs to get the school to teach their children English.... No matter that it was at least half fiction. It was a story that sold well to both the media and the public.

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38. CAL. EDUC. CODE § 300(d).
41. *Id.*
42. *Id.*
43. *Id.*
And commentators seem to agree that opponents of the proposition failed to respond effectively.

Several commentators have pointed out that the opponents of Proposition 227 made a number of crucial mistakes. Their own campaign was too slow to get underway.45 Once it started, the campaign was “too general, too laced with education jargon and so often focused on tangential issues that it strained credibility.”46 The campaign lost “ties to the grassroots.... Parents, once its strongest political base, were reduced to a passive role—as consumers of bilingual education rather than participants.”47 And perhaps most importantly, the opposition refused to defend bilingual education as a valid teaching method.48 The anti-227 campaign did not attempt to correct misperceptions or broadcast data about positive outcomes. Of course, “Unz cited the ‘Don’t Defend’ strategy as evidence that the program was indefensible.”49

Proposition 227 replaces the bilingual education option – and the flexibility it granted school districts – with an inflexible, statewide “sheltered English immersion” system. Children are to spend one year in a sheltered English immersion classroom, where they are “taught English by being taught in English.”50 After that year, they are to be mainstreamed into ordinary English language classrooms.51 The curriculum in the sheltered classrooms is to be “designed for children who are learning the language.”52 But “local schools [are] permitted to place in the same classroom English learners of different ages but whose degree of

45. See CRAWFORD, Disaster at the Polls, supra note 40 (reporting that the Citizens for an Educated America did not hold its first press conference until four months after Unz launched his campaign).

46. Shultz, Lessons of 227, supra note 44 (“Voters are moved by what they can conjure up as pictures in their minds.... The key was to use real examples about real kids and real families (not general characterizations) to show how authentically goofy 227 really is, especially on the issue of parent choice.”).

47. CRAWFORD, Disaster at the Polls, supra note 40. See also Shultz, Lessons of 227, supra note 44 (“The professionals and their jargon played right into Unz’s portrait of a self-protecting bilingual bureaucracy.”).

48. See CRAWFORD, Disaster at the Polls, supra note 40 (reporting that consultants to the opposition advised that “the No campaign ... target ‘Republican women over 50.’ A winning message ... could not claim success for programs that were widely perceived to be failing.”).

49. Id.

50. Id.; CAL. EDUC. CODE § 305.

51. See id. In the last several weeks, the California legislature has attempted to insert some flexibility into the mainstreaming procedure by requiring local schools to consider a variety of factors before reclassifying a student as English-proficient. See 1999 Cal. A.L.S. 678 (Deering). Those factors include assessment of proficiency using a standardized test, teacher evaluations, parental desire, and assessment of ability in basic skills. See id. at § 1.

52. CAL. EDUC. CODE § 306(d).
English proficiency is similar,"\(^{53}\) regardless of where the students are in their mastery of substantive material, such as math and social studies. The National Association for Bilingual Education objects to this "sheltered instruction" type of program because students "are provided little or no support in the native language. Academic content is inevitably watered-down.... [And] [l]iteracy development is complicated by the double burden of learning to read in a language the student has yet to master."\(^{54}\)

Proposition 227 does allow for waivers in several limited circumstances. Students can be transferred to bilingual education programs

(i) where a student already knows English; (ii) where the student is ten years or older and the school agrees that an alternative course of study would be a better way for the student to learn English; [or] (iii) where the student [with special needs] has tried the immersion program for at least thirty days and the school agrees that in light of his or her particular needs an alternative course of educational study would be better suited to the student's overall educational development.\(^{55}\)

The circumstances in which waivers will even be considered are obviously quite limited. That is, the first is irrelevant to the LEP population, the second does not apply to the majority of LEP students who are of elementary school-age, and the third only applies to children with special needs. Thus, most LEP students are not even eligible to apply for waivers. Nevertheless, if more than 20 students in a single grade level are granted waivers, schools must offer full-fledged bilingual classes.\(^{56}\)

But in order to obtain a waiver, parents must "personally visit" the school and apply. Even then, though the parent requesting a waiver has been "provided a full description of the educational materials to be used in the different educational program choices,"\(^{57}\) the waiver is not automatically granted. The school could still refuse to transfer a child who clearly meets one of the three waiver categories to a

\(^{53}\) Id. at § 305.

\(^{54}\) NABE, Bilingual Education, supra note 19; see also Mexican American Legal Defense and Education Fund, MALDEF Questions & Answers on the Unz Initiative (accessed Oct. 26, 1999) <http://www.onenation.org/maldefqa.html> [hereinafter MALDEF Q&A] ("Normally, Sheltered English immersion is used for intermediate level English learners to help them get up to speed.... This initiative eliminates the current flexibility of determining how fast or slow to transfer an individual child to classes taught solely in English.").

\(^{55}\) Valeria G., 12 F. Supp. 2d at 1013 (paraphrasing CAL. EDUC. CODE §§ 310 – 311).

\(^{56}\) CAL. EDUC. CODE § 310.

\(^{57}\) Id.

\(^{58}\) Id.
bilingual program. In fact, the State Board of Education has explicitly restricted access to waivers:

Previously, the board had voted that any parent could get their child excepted from the initiative’s terms unless educators had ‘substantial evidence’ that the request was not in the student’s interest. But the board [on July 31, 1998] changed the wording..., striking the requirement that there be ‘substantial evidence’ before a waiver is denied.60

So a school can now deny any waiver, virtually regardless of a student’s best interests. NABE and the Mexican American Legal Defense and Education Fund ("MALDEF") are particularly concerned with this denial of parental choice.61 And according to the Los Angeles Times, many parents might not be willing to question Proposition 227’s requirements even if doing so would be in the best interests of their own children. As the first post-227 school year got underway, “few parents were immediately inclined to take the defiant step back to bilingual education. Most seemed to follow a cultural tendency of their native countries to trust the advice of school authorities.”62 That is, parents deferred to local officials despite the fact that school authorities did not necessarily believe the advice they were giving those parents.

Proposition 227 also gives parents and guardians the right to sue a “public school teacher ... who willfully and repeatedly refuses to implement the terms of this statute”63 even though public school teachers are exempt from personal liability in all other cases.64 The initiative also specifies the limited circumstances in which it

59. See id. at § 311 (“waiver may be granted”) (emphasis added); see also MALDEF Q&A, supra note 54 (“Schools can deny a waiver for any reason, even if one of the grounds is met.”).


61. See National Association for Bilingual Education, The Un: Initiative: Extreme, Irresponsible, and Hazardous to California’s Future (accessed June 19, 1999) <http://www.nabe.org/unz/Unz.html> [hereinafter NABE, Un: Initiative] (“Parents seeking waivers would have to put their children through this [30-day] ordeal every Fall.... Parents whose own English is limited would find it very difficult to negotiate this process.”); see also MALDEF Q&A, supra note 54.


63. CAL. EDUC. CODE § 320.

64. See Farquharson, 8 B.U. PUB. INT. L.J. at 171-172 (citing CAL. GOV’T CODE § 825; CAL. EDUC. CODE § 35208). See also MALDEF Q&A, supra note 54 (“Penalizing teachers in this way may discourage people from pursuing teaching careers precisely at a time when California schools face a severe teacher shortage. It also undermines parental involvement by creating an adversarial relationship between teachers and parents. This is a unique intrusion of government into every classroom.”); NABE, Un: Initiative, supra note 61 (arguing that Proposition 227 will “[o]verwhelm, intimidate, and demoralize teachers”). Last month, a federal district court judge upheld that specific provision of Proposition 227. See Parents’ Right to Sue Over Prop. 227 Violations Upheld, L.A. TIMES, Sept. 16, 1999, at B4. U.S. District Judge Edward M. Rafeedie wrote that “[t]eachers do not have a [First]
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can be altered, by including particularly burdensome requirements for amendment or repeal — only by another voter proposition or by "a statute to further the act's purpose passed by a two-thirds vote of each house of the Legislature and signed by the Governor." All voter propositions in California automatically can be amended or repealed only by a second initiative, unless the original proposition specifies otherwise. But this is the only curriculum decision subject to such a requirement.

One of the biggest concerns about the initiative, which formed the basis of the complaint in Diana Doe v. LAUSD, was that the initiative was scheduled to go into effect only sixty days after its June 1998 passage. All public school districts scheduled to begin new terms on or after August 2, 1998, had to scramble during the summer months to implement all-new curricula for their LEP students. On July 31, 1998, just two days before Proposition 227 went into effect and just three days before 47 Los Angeles schools actually became the first to implement its mandate, the State Board of Education met with a group of educators to discuss "some real-world tips on how to build an 'immersion' program." These schools were forced to toss out their old curricula, but were given nothing concrete to replace it. "Teachers must be given a curricula to follow soon," Patrice Abarca, a teacher at Heliotrope Elementary School in Maywood, told the state board. "Please don't make thousands of teachers develop their own English language development program." There was so little time between the election and the implementation date that "[d]istrict and school administrators spent the first few days trying to ... answer questions and

Amendment right to be free of regulations which tell them to follow a method of instruction or a curriculum," but that teachers can use another language to communicate with students on the playground and in emergencies. Id.

65. CAL. EDUC. CODE § 335 (emphasis added).
66. CAL. CONST. art. II, § 10.
67. See generally CAL. EDUC. CODE.
68. See CAL. EDUC. CODE § 330. The Los Angeles Unified School District planned to implement Proposition 227 in 214 schools during August 1998, just two months after the initiative passed. In Diana Doe v. LAUSD, plaintiffs alleged that "a huge proportion of LAUSD's LEP students will imminently face a dramatic and unprecedented change in their educational program ... that LAUSD is not prepared to implement ... in such a short period of time." PIs.' Mem. of Points & Authorities in Supp. of T.R.O. & Prelim. Inj., Diana Doe v. LAUSD, No. 98-6154 LGB (RZx) (C.D. Cal. July 31, 1998) (order denying T.R.O.).
69. A small number of school managed to avoid the first year of implementation by pushing up the start of the school year. They beat the August 2 deadline by calling a July 31 teacher-training day the opening day of the fall term. See Tina Nguyen, Loophole Lets Schools Delay Prop. 227, L.A. TIMES, July 30, 1998, at A3. But unlike these schools, which had to implement Proposition 227 in 1999, the Department of Education permanently exempted the State's 150-plus charter schools from the initiative's mandate. See Duke Helfand, Charter Schools Exempt from Prop. 227, State Says, L.A. TIMES, July 28, 1998, at A1.
71. Id.
make policies on the fly." Teachers reported that they were "scrounging" to find materials to use in English.

It has been difficult to assess the impact of the first year of "sheltered immersion." After the first day of classes in Los Angeles, however, the Los Angeles Times reported that things had gone "surprisingly smoothly" in the seven schools its reporters had visited. There was "none of the chaos predicted by apprehensive educators." But the standardized test, popularly called the "Stanford 9," administered to all students in Spring 1999 "failed to show a major impact from [the] change" after Proposition 227. LEP scores were up 1.8 percentile points from the year before, while fluent speakers improved their scores by 1.9 percentile points. If anything, then, the achievement gap was slightly bigger after the implementation of Proposition 227.

C. Civil Rights Activists' Support for Bilingual Education Programs

As early as 1981, a federal district court observed that there was "almost total disagreement amongst ... experts and lay persons[] as to the benefits of bilingual education and as to the proper method of implementing a bilingual education program if determined to be in the best interests of the students." Given this longstanding and genuine disagreement over the validity of a pro-bilingual education policy, it especially important to explain why this is a civil rights issue. As a civil rights activist, I do not oppose Proposition 227 because I know more than


73. Id.


75. Id.


In the fall of 1999, the California legislature passed a bill requiring "an independent evaluation of the effects of the implementation of [Proposition 227] on the education of pupils attending ... California public schools." A.B. 56 § 1, 1999-00 Regular Sess. (Cal. 1999) (enacted). Two interim reports are due in October 2000 and May 2002 and must include "preliminary findings and recommendations, if any, regarding modifications and revisions to Proposition 227." Id. A final report, due in October 2005, must "[i]dentify programs that are effective in teaching pupils the English language [and] [i]dentify programs, if any, that are not effective...." Id.

77. Smith & Groves, supra note 76.

78. Castaneda v. Pickard, 648 F.2d 989, 1011 n.10 (5th Cir. 1981).
educators or even the California electorate, but because Proposition 227 takes that decision away from those who do know best: the parents, teachers, and local administrators. And it takes that decision away solely on the basis of race and national origin. The education of LEP students is a "race issue," as evidenced by the significant proportion of California's LEP population who are national origin minorities. No other curricular issue, and certainly none as critical as the ability of children to speak English, is so removed from local control. Additionally, bilingual education is about native language retention, which involves deeply-rooted issues of culture, identity, and freedom of expression, as well as English language acquisition. And finally, supporting bilingual education is about promoting tolerance and diversity. As one commentator noted in the Latino-focused Vista Magazine, "Ultimately the vote on Proposition 227 reflected less the debate over whether a teaching method is effective than the attitudes of different groups throughout the United States toward language."

And those attitudes reflect a fear of multilingualism on behalf of native English speakers. "[N]o item against bilingualism has ever been defeated in the United States." Despite Ron Unz's effort to distance the campaign from accusations of racism, Proposition 227 undoubtedly reflects the racism and anti-immigrant sentiment that has historically been connected to English-only initiatives. Nearly 20 years ago, in a hearing on amendments to the Bilingual Education Act, "Senator S.I. Hayakawa[] charged that programs promoting bilingual education were part of a separatist movement.... 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.'" Earlier this year, Rep. Bob Stump of Arizona picked up this theme in his remarks introducing House Bill 50, the "Declaration of Official Language Act." He declared that "[w]e can be a one-

79. I recognize that this is a controversial position to take. One commentator who opposed Proposition 227, also criticized the opponents of the initiative for making the campaign about race. See Shultz, Lessons of 227, supra note 44 ("In the wake of Proposition 187 and Proposition 209 (immigration and affirmative action), all issues with a racial slant have become so politically charged that bilingual education was turned into a civil rights issue.... The problem is that bilingual education was in fact a legitimate educational issue as well.").

80. See infra notes 328-329 and accompanying text.


82. See id. According to one study, "among middle-class Americans ... only homosexuality was less tolerated than bilingualism." Id.


language country or a Balkanized ruin.” These statements sound like more than just ensuring that schoolchildren can speak English; they suggest eradicating our diversity of tongues. Stump also drew contrasts between yesterday’s (largely white and European) immigrants and today’s immigrants (of color). Historically, he said, “United States citizenship was something that immigrants took justifiable pride in earning. They carried their English workbooks with them everywhere.” But today’s immigrants, he suggested, have no interest in assimilation. Despite his claims that the initiative was not anti-immigrant, Ron Unz used similar rhetoric in the Proposition 227 campaign. The 227 campaign also targeted California’s Latino population in particular. The proponents’ official statement, appearing in the California election pamphlet, read:

For most of California’s non-English speaking students, bilingual education actually means monolingual, Spanish-only education for the first 4 to 7 years of school.... Latino immigrant children are the principal victims.... They have the lowest test scores and highest dropout rates of any immigrant group.... Most Latino parents ... know that Spanish-only bilingual education is preventing their children from learning English....

While there is some debate about whether Proposition 227 can be characterized as an anti-Latino measure in the face of Unz’s claims to be helping California’s LEP students, there is no question that this initiative was targeted at California’s Latino population. With such a racial focus, it is certainly deserving of the attention of civil rights activists.


86. 145 CONG. REC. E5, *E5.

87. See id.

88. The Los Angeles Times quoted him as saying “that bilingual education, along with affirmative action and multiculturalism, are ‘ethnic, separatist’ programs that could turn California into another Bosnia.” Jenifer Warren, Hooked on Politics, L.A. TIMES, July 16, 1998, at A3. Unz also drew comparisons between old and new generations of immigrants, telling the story of his mother, “who spoke only Yiddish in her family home [and] learned English at school -- with no bilingual program to help her out.” Id. He also said, in a fundraising letter, that his grandparents “came to California in the 1920s and 1930s as poor European immigrants. They came to WORK and become successful ... not to sit back and be a burden on those who were already here!” NABE, Unz Initiative, supra note 61. But see Ron K. Unz, Bilingual is a Damaging Myth, L.A. TIMES, Oct. 19, 1997, at M5 (“As each new microchip and fiber-optic cable shrinks the circumference of our world, more and more Americans recognize the practical importance of bilingualism.”).

As noted above, a coalition of civil rights groups filed two lawsuits almost immediately after the proponents of Proposition 227 declared victory in June 1998. In those cases, a motion for preliminary injunction and a motion for a temporary restraining order were heard and denied. These motions had two primary goals: to postpone implementation of the initiative until an acceptable curriculum – if such a thing exists – for sheltered English immersion could be developed; and to postpone implementation until Proposition 227 could be struck down on summary judgment or at trial. It is perhaps slightly misleading to say that these lawsuits have already failed. The Ninth Circuit rejected a petition for an emergency appeal of the denial of the preliminary injunction in Valeria G., but the lawsuits are still active. The suits did, though, fail to the extent that most California districts did have to implement Proposition 227 in the fall of 1998, and the rest (those with school years starting prior to August 2, 1998) had to implement the program in the fall of 1999.

In large part, these suits were doomed from the start. The plaintiffs made fairly conventional arguments that have already been rejected by extensive precedent establishing that while schools are obligated to meaningfully educate LEP students – to teach them English – those students do not have a right to be educated bilingually. To the extent that plaintiffs argued that the denial of bilingual education violated some right of the students or would “inevitably result in ...
violations of" federal law, it is not surprising that the courts denied the motions. This section will trace the traditional arguments and show that the laws on which they are based demand virtually nothing of school districts.

The federal courts began hearing modern bilingual education cases in 1974. There is now a fairly extensive and well-known body of case law on the issue. Unfortunately it imposes only minimal requirements on the states, and the plaintiffs in the two lawsuits had essentially no hope of defeating Proposition 227 by relying on that precedent. The plaintiffs in Valeria G. made four primary arguments: that Proposition 227 violates the Equal Educational Opportunities Act, the Supremacy Clause of the United States Constitution, Title VI of the Civil Rights Act, and the Equal Protection Clause of the United States Constitution. The Valeria G. judge concluded that the plaintiffs had a "low

98. Marilyn Farquharson has argued that Proposition 227 "fails to provide to LEP students the equal educational opportunity guaranteed under federal law." 8 B.U. PUB. INT. L.J. at 335.
99. The first major case in modern bilingual education case law was Lau v. Nichols, 414 U.S. 563 (1974). However there was one earlier case in which the Supreme Court held that a state could not ban the teaching of languages other than English in schools. For a discussion of Meyer v. Nebraska, 252 U.S. 390 (1923), see infra notes 293-301 and accompanying text.
100. See Valeria G., Pls.' Mem., supra note 25.
101. 20 U.S.C. § 1701 et seq. The as-applied challenge only made an EEOA argument.
102. U.S. CONST. art. VI, cl. 2.
104. U.S. CONST. amend. XIV, § X. The Equal Protection claim was the plaintiffs' only truly novel argument. I will expand on this argument in the next section, show that it is the strongest of the plaintiffs' claims, and argue that it was wrongly rejected. The claim is different from the Equal Protection argument rejected by the Ninth Circuit in Guadalupe Org., Inc. v. Tempe Elem. Sch. Dist., 587 F.2d 1022 (9th Cir. 1978). In Guadalupe, the court rejected a claim that the Tempe Elementary School District was required to provide all non-English-speaking Mexican-American or Yaqui Indian students with "bilingual-bicultural" education. See id. at 1024. The plaintiffs wanted a curriculum that had as its goal having a child graduate at each grade level from kindergarten to fourth year in high school competent and functional in reading, writing, and comprehension both in the child's own language, Spanish, and the language of the majority culture, English... All courses of instruction, testing procedures, instructional materials [should be] bilingual and bicultural. Id. at 1024-25. Because education is not a fundamental right guaranteed by the Constitution, "[d]ifferences in treatment of students in the educational process... do not violate the Fourteenth Amendment's Equal Protection Clause if such differences are rationally related to legitimate state interests." Id. at 1026 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973)). The court concluded that the school district had an interest in promoting "the social compact... which attenuates as it crosses linguistic and cultural lines." Id. at 1027. The district's monolingual educational system was rationally related to that goal as long as it "provide[s] each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." Id. at 1026 (quoting Rodriguez, 411 U.S. at 37). The plaintiffs conceded that the existing curriculum was adequately instructing LEP students in English. See id. at 1024. The court did, though, leave room for states or school districts to provide bilingual education if they chose: "[T]he Constitution neither requires nor prohibits the bilingual and bicultural education...
probability of success on the merits." This is hardly a surprise, given the low standard imposed on school districts and states by federal law with regard to educating LEP students. Any program that will, its proponents can claim with a straight face, provide "all students [with] instruction designed to teach English and reduce barriers to schools' instructional programs," will pass constitutional and statutory muster.

A. **The Title VI of the Civil Rights Act Claim**

Title VI prohibits discrimination in federally-assisted programs:

No 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.

In 1970, the Department of Education issued a memorandum, *Identification of Discrimination and Denial of Services on the Basis of National Origin*, that interpreted Title VI as requiring school districts to "take affirmative steps to rectify the language deficiency" of LEP students whose "inability to speak and understand the English language excludes [them] from effective participation in the educational program." The Supreme Court upheld the memorandum in *Lau v. Nichols*, its first — and to this day, only — decision on the education of LEP students.

In the mid-1970s, 3,457 children of Chinese ancestry were enrolled in the San Francisco public school system. At most, 1,707 of those students were receiving special English instruction. In *Lau*, the Supreme Court held 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 instruction." But the Court did not sought by the [plaintiffs]. Such matters are for the people to decide." *Id.* at 1027 (emphasis added). The argument I make in this article does nothing to address the fact that *Guadalupe* means that parents cannot demand that any individual school district implement a bilingual curriculum. See infra Section V.

105. Valeria G., 12 F. Supp. 2d at 1027.

106. *Id.*


110. *See id.* at 564.

111. *Id.* at 566.
fashion any specific relief or detail standards for an appropriate English-language instruction program. 112 The Court relied on Title VI of the Civil Rights Act of 1964 and regulations promulgated by the Department of Health, Education, and Welfare ("HEW") 113 to reach its decision. 114 HEW defined discrimination against students on the basis of race as including "discrimination ... in the availability or use of any academic ... or other facilities of the grantee or other recipient." 115 But the Court's reliance on Title VI undermines the continuing validity of the decision. The Court concluded that

[d]iscrimination is barred which has that effect even though no purposeful design is present.... It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system[,] which denies them a meaningful opportunity to participate in the educational program. 116

As a result, the Court did not look to see if there were any intent on behalf of the school district to discriminate against the Chinese students and did not establish any standards for determining such intent. 117 Unfortunately, the Lau decision, which meant so much to the many LEP students who were essentially receiving no education 25 years ago, is of little use to school children today. The Court stopped short of setting any standards for measuring the appropriateness and constitutionality of curricula subsequently enacted for LEP students. 118 And later decisions have made it more difficult to prove that school districts are violating Title VI. The Supreme Court has overruled its earlier holding that intent is not required to prove racial discrimination. In Washington v. Davis, 119 the Supreme Court held that a racially disparate impact is not unconstitutional under the Fourteenth Amendment's Equal Protection clause unless it can "ultimately be traced to a racially discriminatory purpose." 120 Under the Court's decision two years later in Regents of

112. See id. at 565 ("Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others.").

113. Now the U.S. Department of Education.

114. See Lau, 414 U.S. at 566. The Court did not reach the plaintiffs' equal protection claim.

See id.

115. Id. at 567-68 (quoting 45 C.F.R. § 80.5(b)) (omissions in original).

116. Id. at 568 (emphasis in original).


118. Id.


120. Id. at 240.
Title VI and equal protection require the same analysis for the purpose of the intent requirement. Like equal protection, Title VI requires a showing of discriminatory intent if a classification is not facially racial. It is thus much harder to prove a violation of Title VI with regard to the treatment of LEP students than it was when the Lau Court issued its decision.

On the other hand, the Supreme Court has suggested, and the Ninth Circuit has held, that a disparate impact on a racial minority group is enough to make out a claim under Title VI's implementing regulations. The Valeria G. plaintiffs relied on 34 C.F.R. 100.3(b)(2), a Department of Education regulation, which prohibits the "utiliz[ation] of criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." The Valeria G. court was willing to consider a discriminatory effects argument, but went on to show that it does not really have any teeth. The court denied the preliminary injunction, in part because "[s]ome experts in the field, as well as the California electorate, believe that the initiative will have a beneficial, rather than a detrimental effect on LEP students." The judge ignored the obvious problems facing LEP students under Proposition 227: untrained teachers and undeveloped and untested curricula. He simply did not think methods adopted by schools "will inevitably result in an adverse effect, exclusion, denial of benefits, or discrimination." In effect, then, students will have to suffer irreparable harm before a federal court will admit that an untested curriculum is an illegal curriculum. "Despite the central role of Title VI in the Lau case ... this civil rights statute has limited value for LEP ... plaintiffs today."

B. The Equal Educational Opportunities Act Claim

The Equal Educational Opportunities Act of 1974 ("EEOA") prohibits six specific actions that deny students equal opportunity on the basis of race, color,

122. See Guardians Ass’n v. Civil Serv. Comm’n of N.Y., 463 U.S. 582, 608 n.1 (1983); Castaneda, 648 F.2d at 1007.
123. See Guardians, 463 U.S. at 584, 602-03, 608 n.1; Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984).
124. 34 C.F.R. §100.3(b)(2) (1999) (emphasis added); see also Valeria G., Pls.’ Mem., supra note 25, at 41.
125. 12 F. Supp. 2d at 1023.
126. Id. at 1007.
127. Id. at 1023 (emphasis added).
sex, or national origin. In particular, section 1703(f) requires states "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." The argument that Proposition 227 violates the EEOA is based on a starting line principle. Suppose two students, one a native-English speaker and one classified as LEP, are placed in an English-only math class. The LEP student will be behind his English-speaking peer, even if they are at the same grade and ability level in mathematics. The theory is that the LEP student will not learn as much math as fast if he cannot understand the language of instruction. So limited proficiency in English places him behind from the beginning, regardless of his substantive knowledge base.

There is virtually no legislative history with regard to Section 1703(f). Its mandate does not seem to fit with the general purposes of the EEOA, which was designed "to specify appropriate remedies for the orderly removal of the vestiges of the dual school system." None of the Congressional findings included in the statute relate to the problems faced by LEP students. Courts have concluded, though, that Section 1703(f) probably does not have an intent requirement, which gives it a slight advantage over an equal protection or Title VI claim. As a result, even unintentional negligence resulting in LEP students' failure to overcome language barriers, or an unintentional choice of an ineffective program for LEP students (such as, perhaps, sheltered English immersion) should violate the EEOA's mandate.

According to the Fifth Circuit, the one court to analyze the provision at some length, the EEOA requires school districts to both provide English language instruction and assistance in other substantive areas where deficits have occurred because of limited English proficiency. But in reality, substantive areas of the curriculum, such as math and science, can be ignored, for long periods of time, as long as students are apparently learning English. The Fifth Circuit, concluded in Castaneda v. Pickard, leaves schools free to determine whether they wish to discharge these obligations simultaneously, by implementing a program designed to keep limited English speaking students at grade level in other areas of the curriculum ..., or to address these

130. See id. § 1703.

131. Id. at § 1703(f).

132. See, e.g., Guadalupe, 587 F.2d at 1030; Castaneda v. Pickard, 648 F.2d 989, 1009 (5th Cir. 1981).

133. 20 U.S.C. § 1701(b).

134. See id. at § 1702.

135. See Castaneda, 648 F.2d at 1008–09.

136. 648 F.2d 989.
problems in sequence, by focusing first on the development of
English language skills.

As a result, the EEOA does little more than codify the holding of Lau v. Nichols. So in my hypothetical, putting the LEP student in an English-only math class would seem to violate the EEOA because the school is doing nothing to remedy his language deficit. But the EEOA does not mandate what the school should be doing for him.

In Castaneda, the seminal case on bilingual education, the Fifth Circuit articulated a three-part test for evaluating Section 1703(f) claims, but it is a test that makes the EEOA an almost meaningless law. The Castaneda court concluded that in enacting the EEOA, Congress did not intend[] to go beyond the essential requirement of Lau, that the schools do something, and impose, through the use of the term 'appropriate action' a more specific obligation on state and local educational authorities.... We think 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 ... use.

The Raymondville Independent School District ("RISD") in southern Texas had a student population which was 85 percent Mexican-American, one-third of whom were the children of migrant farm workers, and three-quarters of whom were eligible for the federal free lunch program. The district provided all children in kindergarten through third grade with a bilingual program, the goal of which was to teach reading and writing skills, as well as other substantive areas, in both Spanish and English. In grades four and five, all classroom teaching was in English, but Spanish-speaking classroom aides helped those students having language difficulties. Finally, special tutoring in English was available in all grades after grade three. The plaintiffs alleged this program was inadequate, and in violation

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137. Castaneda, 648 F.2d at 1011. Note that Castaneda suggests that these decisions are being made at the local level.


139. 648 F.2d at 1008-09. The Castaneda court briefly addressed the plaintiffs' Title VI claim and concluded that an intent to discriminate was required to prevail. See id. at 1007 ("[W]e do not think it can seriously be asserted that this program was intended or designed to discriminate against Mexican-American students in the district."). The court also refused to follow HEW's "Lau Guidelines," a suggested compliance plan for those schools failing to provide any special instruction for LEP students. See id. at 1007 ("The Lau Guidelines were never published in the Federal Register.... [W]e do not think that these guidelines are the sort of administrative document to which we customarily give great deference in our determinations of compliance with a statute.").

140. See id. at 993.

141. See id. at 1004-05.
of Title VI and the EEOA, because it "overemphasize[d] the development of English language skills to the detriment of the child's overall cognitive development."  

In answering this question, the Castaneda court adopted a three-part test to "insure that schools ma[k]e a genuine and good faith effort ... to remedy the language deficiencies of their students." Under this standard, the court

1. "must examine carefully the evidence the record contains concerning the soundness of the educational theory ... upon which the challenged program is based";  

2. must examine "whether the programs and practices actually used by a school system are reasonably calculated to implement effectively th[at] educational theory";  

3. and must determine if the program has "produce[d] results indicating that the language barriers confronting students are actually being overcome."  

But even as the Fifth Circuit adopted this test, it admitted it was not intended to be an especially rigorous standard. The federal court system does not serve as "a Supreme Board of Education." So a "court's responsibility ... is only to ascertain that a school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field, or at least, deemed a legitimate experimental strategy." The court concluded that with the leeway allowed school districts in addressing the needs of LEP students, "provision of a program placing primary emphasis on the development of English language skills would constitute 'appropriate action'," and rejected the plaintiffs' demands for substantive education in the students' native language.

The closest the court came to imposing requirements under section 1703(f) was mandating that teachers be qualified to work with LEP students: "[A]ny school district that chooses to fulfill its obligations under § 1703 by means of a bilingual

142. Id. at 1006.  
143. Id. at 1009.  
144. Id.  
145. Id. at 1010.  
146. Id.  
147. Valeria G., 12 F. Supp. 2d at 1015. The argument in the second half of this article suggests that the states should not always serve as Supreme Boards of Education either. Instead, curricular decisions for groups of minority students should be made at the local level, if similar curricular decisions for other groups of students are also made there.  
148. Castaneda, 648 F.2d at 1009 (emphasis added).  
149. Id. at 1011.
education program has undertaken a responsibility to provide teachers who are able competently to teach in such a program.” But the court did not specify what made a teacher qualified to teach a bilingual instructional program: “We are requiring only that RISD undertake further measures to improve the ability of any teacher, whether now or hereafter employed, to teach effectively in a bilingual classroom.”

Lastly, the court required the state and district “to implement an adequate achievement test program” because “these students cannot be permitted to incur irreparable academic deficits.”

The Valeria G. decision makes clear how meaningless the three-part Castaneda test has become. Although sheltered English immersion is essentially untested in the United States, and the “court [did] not yet know how much substantive education [would] be taught in the immersion classes during the transition period,” the judge concluded that Proposition 227 presented a sound educational theory. Following Castaneda, the court refused “to go beyond that conclusion and determine whether it is the better theory.”

Under the second prong of Castaneda, “[b]ecause Proposition 227 ha[d] not yet been implemented, there [were] no programs or practices ‘actually used’ in California schools for the court to analyze.” So the court essentially discarded this part of the test, “find[ing] that it is unlikely that there is no set of circumstances under which California’s schools can adopt programs reasonably calculated to implement the educational theory of Proposition 227.” Of course, the court did not impose any guidelines for schools to use in determining which circumstances could and should be used to ensure that LEP students receive equal educational opportunity.

Lastly, the court disregarded the last prong of Castaneda “because Proposition 227 ha[d] not yet been implemented[ so] there [we]re not yet any ‘results’ to evaluate.” The court thus subjected California’s many LEP students to an untested educational curriculum without any specific guidelines for implementation with the hope that school districts or the state “can[] later evaluate

150. Id. at 1012.
151. Id. at 1013.
152. Id. at 1014. But the court did qualify that order by repeating that “we do not believe these students must necessarily be continuously maintained at grade level in other areas of instruction during the period in which they are mastering English.” Id.
153. Valeria G., 12 F. Supp. 2d at 1019. This conclusion was based in part on testimony that sheltered immersion “is the predominant method of teaching immigrant children in many countries in Western Europe, Canada and Israel.” Id. at 1018.
154. Id. at 1019.
155. Id. at 1020.
156. Id. at 1020-21.
157. Id. at 1021.
its results.\textsuperscript{158} The court, however, did not explain what results would be adequate to determine that Proposition 227 continues to constitute "appropriate action" for the education of LEP children.

In the hands of the \textit{Valeria G.} court, the \textit{Castaneda} three-part test turned into a one-part test. With regard to the EEOA, the lesson of \textit{Castaneda} and \textit{Valeria G.} is that virtually any program for LEP students will survive as long as some group of experts is willing to defend it. Proposition 227 survives an EEOA challenge because "sheltered immersion" qualifies as an attempt to remedy language deficits.\textsuperscript{159} Despite several federal laws requiring provision of equal education for LEP students, curricula selected for them merely has to pass a "laugh test." The State or school must simply make a colorable claim that its program will remedy language deficiencies.

\section*{C. \textbf{The Bilingual Education Act Claim}}

The Bilingual Education Act\textsuperscript{160} ("BEA") is a grant program, funding "the development and implementation of exemplary bilingual education programs and special alternative instruction programs."\textsuperscript{161} The \textit{Valeria G.} court acknowledged that the BEA does reflect an intent on the part of Congress to \textit{encourage} bilingual education,\textsuperscript{162} but it does not mandate bilingual education across the board.\textsuperscript{163} It does not even require that grant recipients utilize bilingual methods. Grant recipients are simply expected to "develop and enhance their capacity to provide high-quality instruction through bilingual education or special alternative instruction programs to children and youth of limited English proficiency."\textsuperscript{164} Native language proficiency is only to be encouraged "to the extent possible."\textsuperscript{165}

The \textit{Valeria G.} plaintiffs attempted to expand the reach of the BEA in asking the court to strike down Proposition 227. The plaintiffs grounded their argument in the Supremacy Clause of the United States Constitution,\textsuperscript{166} which

\begin{itemize}
\item 158. \textit{Id.}
\item 159. \textit{Id.} at 1019.
\item 160. 20 U.S.C. \textsection 7401 \textit{et seq.} (1999) (originally codified at 1974, 20 U.S.C. \textsection 880(b) \textit{et seq.}).
\item 161. \textit{Id.} at \textsection 7402(c)(1).
\item 162. \textit{See} 12 F. Supp. 2d at 1022 (emphasis added).
\item 163. The BEA does not even require grant recipients to adopt one of the model bilingual education programs developed by the Department of Education. \textit{See} Castaneda, 648 F.2d at 1009 ("Congress expressly directed that the state and local agencies receiving funds under the Act were not required to adopt one of these model programs but were free to develop their own ").
\item 164. 20 U.S.C. \textsection 7421(1) (emphasis added).
\item 165. \textit{Id.} at \textsection 7421(2)(A).
\item 166. U.S. CONST. art VI, cl. 2.
\end{itemize}
prohibits "any state law ... which interferes with or is contrary to federal law."\(^{167}\)
The plaintiffs argued that Proposition 227 unconstitutionally prevents the state of California from following the "congressionally-favored option" of bilingual education for LEP students.\(^{168}\) But the court concluded that in enacting the BEA, Congress "made a deliberate choice not to mandate [native language] programs."\(^{169}\) If the BEA itself does not require bilingual education, then the Supremacy Clause cannot either.

As the one federal court asked to consider the question was unwilling to strengthen the effects of the BEA, we could turn to Congress to add some meat to the statute's provisions. Along with the rest of the Elementary and Secondary Schools Act, funding for the BEA is set to expire in 1999. Unfortunately, some members of Congress seem inclined to end support for bilingual education altogether. Three English-only bills were introduced into the House of Representatives in the spring of 1999, the Bill Emerson Language Empowerment Act,\(^ {171}\) the Declaration of Official Language Act of 1999,\(^ {172}\) and the National Language Act of 1999.\(^ {173}\) All three bills have as their goal the declaration of English as the official language of the federal government and require English to be used for all official purposes. One of the bills, the Emerson Act, does not appear to affect bilingual programs,\(^ {174}\) but the other two would repeal the Bilingual Education Act and end all federal funding for bilingual education programs.\(^ {175}\) The only real difference between these two bills is that H.R. 1005, sponsored by Rep. King of New York, purports to eliminate 20 U.S.C. § 3281 et seq.\(^ {176}\) Unfortunately for the

\(^{167}\) Valeria G., 12 F. Supp. 2d at 1021 (quoting Frey v. Bland, 369 U.S. 663, 666 (1962)).

\(^{168}\) Id. at 1022. The plaintiffs made a second Supremacy Clause argument, that Proposition 227 unconstitutionally interfered with the state's ability to comply with the EEOA. See id. But the court rejected this claim, basically concluding that if denying students access to bilingual education does not violate the EEOA, it cannot violate the Supremacy Clause either. See id. at 1021-22.

\(^{169}\) Id. at 1022.

\(^{170}\) See id.


\(^{172}\) H.R. 50, 106\(^{th}\) Cong., 1\(^{st}\) Sess. (1999).


\(^{174}\) See supra note 171.

\(^{175}\) See supra notes 172-173. Other representatives have taken a more subtle approach to killing bilingual education. A bill titled the "Parents Know Best Act" would require that parents consent before their children are ever placed in bilingual classes. H.R. 1933, 106\(^{th}\) Cong., 1\(^{st}\) Sess. (1999). The default would be, I assume, placing LEP students in mainstream classes, regardless of the actual needs of the children. I suspect this proposal could result in a true violation of Lau v. Nichols. The three bills discussed in the text of this paper would also eliminate the bilingual guarantees of the Voting Rights Act, 42 U.S.C. § 1973aa-1a (1999). A discussion of those provisions is beyond the scope of this paper.

\(^{176}\) H.R. 1005
sponsors of H.R. 1005, these sections of the United States Code are no longer the Bilingual Education Act. H.R. 50, on the other hand, would actually repeal the BEA, except for the provisions that support foreign language classes and emergency immigrant education programs.

Because the Bilingual Education Act does not mandate bilingual education in the country’s schools, the effect of these English-only bills will be primarily monetary. Schools will no longer receive grants for model programs, but they can probably maintain their bilingual education programs if their state laws allow.

The Clinton administration has proposed its own modifications to the Bilingual Education act, as part of its “Educational Excellence for All Children Act of 1999.” The proposals do not add much to the current BEA in terms of requiring LEP students to be taught in their native language, and in fact may detract from what little positive effect it has. According to a summary published by the Department of Education, the bill would continue to encourage bilingual education programs, but the only significant changes would be to require more reporting from the grant recipients. In particular, grantees would have to provide the federal government “specific, baseline data” on students’ abilities, administer annual tests of student progress, and provide the results of those annual assessments to the government. The bill would encourage schools to administer tests of substantive subjects in students’ native language if it is more “likely to yield accurate and

177. H.R. 50.

178. H.R. 1005 specifically does “not preempt any law of any State.” H.R. 1005, § 6. H.R. 50 actually explicitly does “preempt[] any State or Federal law which is inconsistent with this chapter.” H.R. 50, § 167. But it is not clear from the face of the statute that a state-mandated bilingual education program would violate its provisions. The bill requires that “[a]ll United States citizens ... be encouraged to read, write, and speak English to the extent of their physical and mental abilities.” Id. Bilingual education programs should be doing just that – along with maintaining fluency in the native tongue and maintaining grade level in substantive subjects. I would argue, of course, that these state programs should not be preempted. I am sure, however, that if H.R. 50 should pass, this issue will be litigated in federal court. But in the area of educational policy, the federalism cases I discuss later in this article would surely dictate that state and local laws would trump the federal one.


180. The President’s report to Congress on the bill makes no mention of what will be required of bilingual education programs at all. See 145 CONG. REC. H3478, *H3479 (May 24, 1999) (“[T]he Title VII Bilingual Education proposal would help ensure that all teachers are well-trained.”). Rep. Clay’s remarks introducing the bill likewise made no mention of bilingual education. See 145 CONG. REC. E1107 (May 26, 1999).


182. See Title VII: The Bilingual Education Act, supra note 164.
reliable information on what those students know, and can do...." Proof that bilingual education programs are working, that students are learning both English and other substantive material, which would be available under the 1999 bill's reporting provisions, would undoubtedly help civil rights activists fight English-only groups like those led by Ron Unz. But reporting requirements do not encourage schools to provide students with native language instruction.

The Department of Education summary also fails to mention the subtle ways in which the Clinton administration's proposal would actually undermine the mandate of the BEA and cater to the protests of the anti-bilingual activists. The bill would not require grant recipients to administer bilingual curricula, but just "innovative instructional programs for limited English proficient students." And in some instances, the bill goes so far as to eliminate the words "bilingual education" from the BEA altogether. In one case, for example, "bilingual education" is replaced with "instructional programs for children and youth with limited English proficiency."

It is vitally important that the funds authorized by the BEA be preserved should local districts in California, and elsewhere, retain control over curricular decisions for LEP students. Local districts will rely on those funds to implement their programs. Civil rights activists should undoubtedly concern themselves with the bills discussed in this section. But I think it is unreasonable to expect that bilingual education will be mandated at the federal level. As evidenced by the multiple "English-only" proposals in Congress over the last several years, the climate of Congress is not conducive to such a mandate. And, as will be shown below, it would be inconsistent with the traditional structure of educational decision-making.

IV.

PROPOSITION 227: A VIOLATION OF THE STRUCTURAL EQUAL PROTECTION GUARANTEE

In the previous section, I demonstrated that to the extent that the Valeria G. motion for preliminary injunction depended on traditional constitutional and statutory arguments, it was bound to fail. The plaintiffs did, however, introduce one more novel argument – that Proposition 227 is a violation of the Fourteenth Amendment's guarantee of structural equal protection. This guarantee requires equal access to the political process without regard to race or national origin. By removing curricular choice over programs for LEP students from local school districts and imposing a nearly insurmountable amendment process, the state introduced additional burdens that national origin minority students and their parents have to overcome to obtain beneficial educational programs. Non-minority parents,

183. H.R. 1960 § 701(2).
184. Id. at § 703(2).
185. Id. at § 705(1).
186. Valeria G., Pls.' Mem., supra note 25, at 46–53.
who can still appeal to local schools and school boards for beneficial programs, do not face this additional burden. Similarly, non-minority parents who want to challenge a state-wide provision can petition the legislature or the State Board of Education. But in order to effect a change in the curriculum provided for LEP students, minority students and their parents have to launch a new statewide ballot initiative. Because the hurdles minority parents have to overcome are so much higher, access to the political process that governs education in the state of California is no longer equal.

The plaintiffs relied on the Hunter-Seattle principle, which prohibits states from "redraw[ing] decision-making authority over racial matters – and only over racial matters – in such a way as to place comparative burdens on minorities." Statutes that violate the Hunter-Seattle rule are subject to strict scrutiny. In defense, in order to have the statute upheld, the state must show that the statute is narrowly tailored to a compelling governmental interest. Because the standard it sets is so high, strict scrutiny in effect creates a presumption of invalidity. In the case of Proposition 227, the state has restructured control over curricular decisions with regard to LEP students – clearly immigrants and national origin minorities – without restructuring control over other curricular decisions, making it more difficult for minority parents to influence the education of their children. The Valeria G. court rejected this argument with little analysis of its own, relying mostly on the Ninth Circuit's largely inapposite decision in Coalition for Economic Equity v. Wilson [hereinafter CEE], which had rejected a similar structural equal protection challenge to Proposition 209. The court ignored clear ways in which Proposition 227 differs from Proposition 209, not the least of which is the powerful tradition, repeatedly recognized by the Supreme Court, of local control over education.

In this section, I will argue that Proposition 227 is actually a better case than Proposition 209 for making a structural equal protection argument, due to the historical pattern of control over schools at the local, rather than the state or federal, level. Proposition 227 is unconstitutional because it places additional burdens on


190. See Valeria G., 12 F. Supp. 2d at 1023–25 ("Since there is no requirement in the federal constitution for bilingual education, the voters of California were free to reject bilingual education.").

191. 122 F.3d 692 (9th Cir. 1997). Proposition 209, now codified at CAL. CONST. art. 1, § 31(a), provides that "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." As one commentary has argued, "the only real impact of Proposition 209 is to eliminate affirmative action programs designed to enhance gender, racial, and ethnic integration." Daniel P. Tokaji & Mark D. Rosenbaum, Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans, 10 STAN. L. & POL'Y REV. 129, 131 (1999). Tokaji and Rosenbaum have argued that Proposition 209 is unconstitutional under Hunter-Seattle despite the Ninth Circuit's decision. See id. at 130.
national origin minority parents with regard to access to the political process which
governs education by removing education of LEP students from local control. I
present this argument in three parts. First, I explain how the Hunter-Seattle
doctrine applies to Proposition 227. Then, I demonstrate that the traditionally local nature of
educational decision-making makes it obvious that this one, racially-focused, curricular issue has been removed from local control in a constitutionally-suspect manner. Finally, I argue that Proposition 227 cannot survive strict scrutiny.

A. The Hunter-Seattle doctrine

Professor Erwin Chemerinsky has explained that “[h]eighted scrutiny for
government actions discriminating against racial and national origin minorities is
justified because of the relative political powerlessness of these groups.”
This principle dates to the Supreme Court’s 1938 decision in United States v. Carolene
Products. In Carolene Products, the Court held that rational basis review would
generally apply when “legislative judgment is drawn in question.” But in the
now-famous footnote 4, Justice Stone established two categories of legislation which
might demand heightened scrutiny: “legislation which restricts those political
processes which can ordinarily be expected to bring about repeal of undesirable
legislation” and legislation that reflects “prejudice against discrete and insular
minorities...tend[ing] seriously to curtail the operation of those political processes
ordinarily to be relied upon to protect minorities....” The Carolene Products
footnote “stress[es] the need for courts to check defects in pluralist democracy...by
clearing direct obstacles to participation and by paying close attention to laws that
target groups most likely to be excluded from ordinary pluralistic bargaining.”
Proposition 227 triggers heightened scrutiny under both of the Carolene Products
categories. By removing control over the education of LEP students to the state
level, then subjecting it to a heightened amendment or repeal process, Proposition
227 has restricted the normal legislative process. Furthermore, it has done so on the
basis of race and national origin. That LEP students and their families are a
discrete minority is evidenced by the fears expressed by proponents of anti-bilingual
and English-only legislation in that they can be singled out for attack. Further,
national origin minorities are insular, in that language and cultural barriers isolate
them from other groups. As Nowak and Rotunda have explained the Hunter-Seattle
principle, it reflects the Carolene Products concerns: “A state may not place ‘in the
way of the racial minority’s attaining its political goal any barriers which, within the

193. 304 U.S. 144 (1938).
194. Id. at 154.
195. Id. at 153 n.4.
196. Tokaji & Rosenbaum, supra note 191, at 136.
197. See supra notes 27-29 (discussing the national origin and ethnic makeup of California’s
LEP student population).
state’s political system taken as a whole are especially difficult of surmounting, by comparison with those barriers that normally stand in the way.” Proposition 227 does just that.

1. The Hunter-Seattle Line of Cases

In Hunter v. Erickson, the Supreme Court struck down an amendment to the Akron, Ohio, city charter, which required any fair housing ordinances prohibiting discrimination “on the basis of race, color, religion, national origin or ancestry ... be approved by a majority of the electors voting on the question at a regular or general election.” The amendment, which had been approved in a popular vote in the city of Akron, effectively repealed a fair housing ordinance that had already been passed by the City Council, in addition to requiring popular approval for any new protective ordinance. The Court concluded that the amendment “was an explicitly racial classification treating racial housing matters differently from other racial and housing matters.” The Court explained that the amendment made it more difficult for citizens to seek relief from racial discrimination in the housing market than from other, non-racial abuses in the market:

Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule: the ordinance would become effective 30 days after passage by the City Council ... and would be subject to referendum only if 10% of electors so requested by filing a proper and timely petition.... But for those who sought protection against racial bias,

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198. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 660 (1995) (quoting Charles Black, Foreword, “State Action,” Equal Protection, and California’s Proposition 14, 81 HARV. L. REV. 69, 82 (1967)). In general, according to Nowak and Rotunda, “requiring racial minorities to take their problems to public referenda rather than to the normal legislative process will ... violate equal protection.” Id. at 659-60.


200. Id. at 387 (quoting AKRON CITY CHARTER § 137). In its entirety, the amendment read:

Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.

AKRON CITY CHARTER § 137.

201. See 393 U.S. at 387-90.

202. Id. at 389.
the approval of the City Council was not enough. A referendum was required by charter at a general or regular election.\footnote{203}

Relying on its prior holdings that "racial classifications are 'constitutionally suspect,' and subject to the 'most rigid scrutiny,'"\footnote{204} the Court struck down the charter amendment because it "place[d] special burdens on racial minorities within the governmental process."\footnote{205}

Thirteen years later, in \textit{Washington v. Seattle School District, No. 1}\footnote{206} [hereinafter \textit{Seattle}], the Supreme Court relied on its \textit{Hunter} decision to strike down a Washington state initiative that provided that "no school board ... shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence ... and which offers the course of study pursued by such student...."\footnote{207} The initiative passed in November 1978, with almost 66 percent of the vote, and "terminate[d] the use of mandatory busing for the purposes of racial integration."\footnote{208} The district court had found that "[except] for the assignment of students to effect racial balancing, the drafters of Initiative 350 attempted to preserve to school districts the maximum flexibility in the assignment of students,"\footnote{209} and that the initiative permitted students to be assigned to more distant schools "for most, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools."\footnote{210}

\footnote{203. \textit{Id.} at 390.}

\footnote{204. \textit{Id.} at 392 (quoting \textit{Bolling v. Sharpe}, 347 U.S. 497, 499 (1954); \textit{Korematsu v. United States}, 323 U.S. 214, 216 (1944)).}

\footnote{205. \textit{Id.} at 391. The Court recognized that "the law on its face treats Negro and white, Jew and gentile in an identical manner," but concluded that "the reality is that the law's impact falls on the minority." \textit{Id}. After \textit{Washington v. Davis}, 426 U.S. 229 (1976), such a disparate impact would not receive the same strict scrutiny. "[L]aws that are facially neutral as to race and national origin will receive more than rational basis review only if there is proof of a discriminatory purpose." CHEMERINSKY, supra note 192, at 565. But the \textit{Hunter} holding is still good because the charter amendment referred explicitly to antidiscrimination provisions regulating "on the basis of race." \textit{See} 393 U.S. at 391 (comparing the charter amendment to "the law requiring specification of candidates' race on the ballot, \textit{Anderson v. Martin}, 375 U.S. 399 (1964)"); \textit{Seattle}, 458 U.S. at 485 (rejecting argument that \textit{Hunter} was based on a "disparate impact" on minorities because the amendment "dealt in explicitly racial terms with legislation designed to benefit minorities 'as minorities')." Furthermore, the \textit{Valeria G.} plaintiffs argued that the \textit{Hunter-Seattle} doctrine is an exception to the rule that a classification must be facially racial or motivated by discriminatory intent to be subject to strict scrutiny. \textit{See infra} notes 230-244 and accompanying text.}

\footnote{206. 458 U.S. 457 (1982).}


\footnote{208. \textit{Id.} at 462.}


\footnote{210. \textit{Id.} at 1010.}
The initiative implicated the principle expressed in *Hunter* that "the Fourteenth Amendment ... [prohibits] 'a political structure that treats all individuals as equals,' yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." The Court explained that the initiative "worked a major reordering of the State’s educational decision-making process":

> Those favoring the elimination of de facto segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board.

This "comparative burden ... impose[d] on minority participation in the political process" – the burden of achieving statewide legislative or popular action rather than simply going and speaking at a monthly school board meeting in order to achieve a change in educational policy – the Court held, violated the Fourteenth Amendment’s guarantee of structural equal protection.

In its decision that Proposition 209 did not violate the Fourteenth Amendment guarantee of structural equal protection, however, the Ninth Circuit suggested that *Hunter-Seattle* is no longer a viable precedent:

> [T]he Fourteenth Amendment affords individuals, not groups, the right to demand equal protection.... No one contends that individuals have a constitutional right to preferential treatment solely on the basis of their race or gender.... What, then, is the personal injury that members of a group suffer when they cannot seek preferential treatment on the basis of their race or gender from local government?

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211. 458 U.S. at 467 (quoting Mobile v. Bolden, 446 U.S. 55, 84 (1980) (Stevens, J., concurring in judgment)).

212. Id. at 479.

213. Id. at 474. Likewise, parents seeking relief from denial of equal educational opportunity because of language deficiencies must seek a supermajority vote by the legislature or electorate, but all other curricular decisions remain with local school boards because school districts can apply for exemptions from the California Education Code. The State Board of Education is generally obligated to approve those applications. See infra notes 328-329 and accompanying text.

214. See 458 U.S. at 480 n.23.

215. CEE, 122 F.3d at 704; see also id. at 705 (questioning whether *Hunter* can be "reconcile[d] [with] 'the long line of cases understanding equal protection as a personal right"’) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 230 (1995)). If the Ninth Circuit’s reasoning holds, it might likewise defeat a *Hunter-Seattle* claim against Proposition 227. Because individual children do not have a constitutional right to bilingual education, the argument would go, they are not harmed when they cannot seek it from their local government. But the Ninth Circuit decision does not necessarily undermine the key concern "[i]n *Seattle* [that] the lawmaking procedure made it more difficult for minority students to obtain protection against unequal treatment in education." Id. at 707.
But Daniel Tokaji and Mark Rosenbaum have argued, in their critique of the CEE decision, that Hunter-Seattle has been reinforced by the Court’s recent affirmative action jurisprudence because it reflects “basic principles of federalism”: “[T]he Hunter-Seattle doctrine, by preserving the authority of local and state governments to decide for themselves how best to remedy discrimination, preserves the constitutional authority of the political branches to act without the need for judicial intervention.”

Without Hunter-Seattle, local governments would be paralyzed in the face of complaints of discrimination from minority citizens. “[T]he only way that an aggrieved person could obtain a class-based remedy for proved discrimination against a particular racial group is to file a class-action lawsuit.”

But Hunter-Seattle protects local decisionmakers from such state-imposed impotence and preserves the ability of minority citizens to seek, like all other citizens, refuge from discrimination at the most local level. This is especially true in education context, where the Supreme Court has repeatedly emphasized the importance of local authority.

The Supreme Court itself implicitly endorsed the continuing viability of Hunter-Seattle, as a broader principle, in its 1996 decision in Romer v. Evans, which struck down Colorado’s Amendment 2. The popular referendum “prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians.” The Colorado Supreme Court had struck down the amendment by relying, in part, on the Hunter-Seattle principle.

216. Tokaji & Rosenbaum, supra note 191, at 143.

217. Id. at 142.

218. See infra Section IV.B.1.


220. Id. at 624. The amendment read:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

COLO. CONST. art. II, § 30b, quoted in Romer, 517 U.S. at 624.

221. See Evans v. Romer, 854 P.2d 1270, 1285 (Colo. 1993) (“Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate .... Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes.”).
The Supreme Court affirmed, but disavowed any reliance on structural equal protection.

Nevertheless, the Hunter-Seattle line of argument comes through in the Court’s reasoning in striking down the amendment, whose “‘ultimate effect’ ... [wa]s to prohibit any governmental entity from adopting ... protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures.” Like the initiatives in Hunter and Seattle with regard to racial minorities, Colorado’s Amendment 2 “withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and ... forbids reinstatement of these laws and policies” without going through a far more rigorous legislative process than others seeking similar protection. As the Hunter and Seattle Courts had previously, the Romer Court held that

[c]entral both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.... A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

As Tokaji and Rosenbaum have argued, the “central statement of principle [in Romer] unmistakably echoes that contained in Hunter and Seattle.... Romer reaffirms the central constitutional requirement that the political process must remain open on equal terms to all....”

Even the Ninth Circuit, in CEE, which rejected the application of the Hunter-Seattle principle to Proposition 209, identified Romer as “the most recent ‘political structure’ case.”

Seattle and Hunter also reflect the principles established more than 60 years ago in Carolene Products. “[W]hen the State’s allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the ‘special condition’ of prejudice,” the Seattle Court said, quoting Carolene Products, “the government action seriously ‘curtail[s] the operation of

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222. See Romer, 517 U.S. at 625 (“We ... now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.”); see also id. at 642 n.1 (Scalia, J., dissenting) (“[T]he Court implicitly rejects the Supreme Court of Colorado’s holding, Evans v. Romer, 834 P.2d 1270, 1282 (1993), that Amendment 2 infringes upon a ‘fundamental right’ of ‘independently identifiable class[es]’ to ‘participate equally in the political process.’”).

223. Evans, 854 P.2d at 1284-85 & n.26, quoted in Romer, 517 U.S. at 627.

224. Romer, 517 U.S. at 627.

225. Id. at 633.

226. Tokaji & Rosenbaum, supra note 191, at 137.

227. 122 F.3d at 704.
those political processes ordinarily to be relied upon to protect minorities.'

The Hunter-Seattle doctrine may be the only equal protection principle which responds to both of "Carolene Products' twin concerns – ... a fair political process and ... protection of disfavored groups."229

2. Hunter-Seattle Strict Scrutiny Does Not Require a Showing of Discriminatory Intent

Under "conventional" equal protection analysis, plaintiffs must demonstrate that a legislative classification is facially racial or motivated by animus against a "discrete and insular" racial minority group in order to subject the classification to strict scrutiny. Both Hunter and Seattle, involved racial minorities, members of a suspect class.231 Likewise, the parties affected by Proposition 227 could claim suspect status on the basis of race, national origin, or alienage. But the Supreme Court did not demand a showing that the propositions at issue in Hunter or Seattle were facially racial or motivated by a discriminatory intent. The political process cannot be restructured in a manner that has a racially disparate impact, regardless of any showing of an intent to discriminate.

Nevertheless, the charter amendment at issue in Hunter did explicitly refer to race.232 This alone was enough to subject it to strict scrutiny. Likewise, the findings of Proposition 227 refer to "immigrant children" and "ethnicity."233 The referendum clearly targeted the educational experience of national origin minorities. But the operative provisions of the proposition itself are racially neutral. Unlike the charter amendment in Hunter, however, the initiative at issue in Seattle was not facially racial either. In order to prohibit school districts from busing for racial integration, the initiative banned all busing, but "then set out ... a number of broad exceptions to this requirement."234 The Court concluded that these exceptions

228. 458 U.S. at 486 (quoting Carolene Products, 304 U.S. at 153 n.4).

229. Tokaji & Rosenbaum, supra note 191, at 137. For another recent defense of the continuing validity of the Hunter-Seattle doctrine, see Keith E. Sealing, Proposition 209 as Proposition 14 (As Amendment 2): The Unremarked Death of Political Structure Equal Protection, 27 CAP. U. L. REV. 337, 382 (1999) ("The right to equal access to the political process ... can be seen as either an analogous fundamental right, a subcategory of the fundamental right to vote, or ... a hybrid of the two. The fundamental right to vote has been interpreted broadly and prohibits a great many impediments to the right to have one's vote count equally.").

230. See CEE, 122 F.3d at 701.

231. In Seattle, Seattle School District No. 1 sued the State to preserve its desegregation program. The 37 percent of the student body who were black, Asian, Native American, or Hispanic had become racially isolated in the district's schools. 458 U.S. 457. In Hunter, plaintiff Nellie Hunter was black. 393 U.S. at 386.

232. See supra note 200.

233. CAL. EDUC. CODE § 300.

234. 458 U.S. at 462; see also id. at 471 ("Initiative 350 nowhere mentions 'race' or 'integration'"). But see id. at 463 ("the initiative was directed solely at desegregative busing").
resulted in a particular impact on minorities because "desegregation of the public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority, and is designed for that purpose." Recognizing that Washington v. Davis requires evidence of discriminatory purpose in order to get strict scrutiny of a facially neutral provision, the Court examined the intent underlying the exceptions to the no-busing rule and held that "the initiative was carefully tailored to interfere only with desegregative busing." But this conclusion did not depend on any evidentiary showing by the plaintiffs.

The debate over the value of bilingual education could make it too difficult for plaintiffs challenging Proposition 227 to prove that the law "can only be understood ... as being based upon a desire to differentiate citizens by race...." Furthermore, as James Crawford has reported, the pro-227 effort "[a]void[ed] the rhetoric of ethnic bigotry, ... evok[ing] the principles of equal opportunity, parental choice, and pedagogical effectiveness.... Anti-immigrant bias was an obvious factor in the initiative's popularity; yet Unz ... immunized his campaign from the charge of racism." As noted above, though, the Seattle Court suggested that a lesser standard of proof of intent or animus is required to take advantage of strict scrutiny under a structural equal protection claim than for other claims. The Court inferred a discriminatory purpose from the language of the initiative, not from any evidence of intent. But the Court went further and suggested that even such an inference of purpose would not be required to trigger strict scrutiny. The Court established:

[because] the desirability and efficacy of school desegregation are matters to be resolved through the political process[, for present purposes it is enough that minorities may consider busing for integration to be 'legislation that is in their interest.' Given the racial focus of Initiative 350, this suffices to trigger application of the Hunter doctrine.

235. Id. at 472.

236. See supra notes 119-122 and accompanying text.

237. 458 U.S. at 471; see also id. ("Proponents of the initiative candidly 'represented that there would be no loss of school district flexibility other than in busing for desegregation purposes.' 473 F. Supp. at 1008.... It is beyond reasonable dispute, then, that the initiative was enacted 'because of,' not merely 'in spite of' its adverse effects upon' busing for integration. Personnel Administrator of Mass v. Feeney, 442 U.S. 256, 279 (1979."). A similar argument, with plenty of support in the Supreme Court's jurisprudence, is that "the law cannot be explained in any terms other than race." Nowak & Rotunda, supra note 198, at 661.

238. Id.

239. Crawford, Disaster at the Polls, supra note 40.

240. See supra note 237.

241. Id. at 474 (quoting Hunter, 393 U.S. at 395 (Harlan, J., concurring)).
Decided after *Washington v. Davis*, *Seattle* establishes an exception to the intent requirement. Demanding an evidentiary showing of intent, in fact, would undermine the purpose of the *Hunter-Seattle* doctrine. "The judiciary must compensate for these process defects. It must serve as the first line of defense for minority interests.... The absence of structural safeguards [in a popular vote] demands that the judge take a harder look." As a result, "any attempt to infringe on any independently identifiable group's ability to exercise the right to participate equally in the political process is subject to strict judicial scrutiny." The *Valeria G.* court wrongly dismissed the argument that the plaintiffs did not need to make a showing of discriminatory purpose.

3. **Proposition 209 and the Coalition for Economic Equity Decision**

In the facial challenge to Proposition 209, the plaintiffs argued that the referendum violated *Hunter-Seattle* and the guarantee of structural equal protection by "strip[ping] local and state government of their ability to remedy discrimination and segregation ... [and] non-neutrally restructur[ing] the political process." The Ninth Circuit, in *CEE*, rejected this challenge, relying on two primary arguments. First, the court concluded that "[i]t would seem to make little sense to apply 'political structure' equal protection principles where the group alleged to face special political burdens itself constitutes a majority of the electorate." That is, because women and racial minorities make up the majority of California's citizenry, the passage of Proposition 209 meant they were restricting their own ability to seek affirmative action programs. Undoubtedly, this conclusion flies in the face of the *Hunter Court's* declaration that the passage of the charter amendment by popular referendum fails to immunize it from constitutional scrutiny: "The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed."

Secondly, the *CEE* court concluded that Proposition 209 did not reorder the decision-making process in a discriminatory manner: "It does not isolate race or


243. Evans, 854 P.2d at 1276 (emphasis added).

244. 12 F. Supp. 2d at 1025 ("Of course, the majority cannot impose a restriction upon the minority if there is intentional discrimination against the minority. But it is the plaintiffs' burden to establish that intention.").

245. Tokaji & Rosenbaum, *supra* note 191, at 130. Tokaji and Rosenbaum, as attorneys at the ACLU Foundation of Southern California, "were part of a team of attorneys [who] represented the plaintiffs in *CEE.*" *Id.* at 143 n.1.

246. *CEE*, 122 F.3d at 704.

247. 393 U.S. at 392.
gender antidiscrimination laws from any specific area over which the state has
delegated authority to a local entity. Nor does it treat race and gender
antidiscrimination laws in one area differently from race and gender
antidiscrimination laws in another. This analysis misses the constitutional issue.
The problem with Proposition 227 is not that it treats bilingualism differently in the
educational context than in other contexts, such as printing ballots in multiple
languages (though it does do that as well), but that it treats minority citizens
differently from others. Proposition 209 suffered from the same constitutional flaw,
but the concerns are clearly more evident in the context Proposition 227 because it is
so limited to the education of LEP students.

4. Proposition 227 Violates the Hunter-Seattle Doctrine

Proposition 227 “strips parents, local school boards, and teachers of the
power to choose an appropriate English language development (ELD) program and
dicts one rigid instructional approach.” This rearrangement of decision-making
authority presents two constitutional problems which reflect the concerns of the
Hunter and Seattle courts. First, curriculum control is removed from the school
board so that national origin-minority parents, unlike other parents, are forced to
go to the state level to seek appropriate educational policy for their children (the
Seattle problem). Secondly, once at the state level, minority parents must surmount
far greater obstacles then other parents, obtaining a supermajority vote or new
popular referendum (the Hunter problem). All California initiatives can only be
overturned by a second voter proposition unless the original initiative specifies
otherwise. The Hunter-Seattle problem is revealed, though, by comparing this
initiative to other educational legislation, not other referenda. Proposition 227 is
distinguished from other educational provisions by the burden it places on minority
students and their parents.

248. 122 F.3d at 707. Tokaji and Rosenbaum have argued that the Ninth Circuit’s decision “is
irreconcilable with both the holding and the result of Seattle.” Tokaji & Rosenbaum, supra at 191, at 139.
For their critique of the Ninth Circuit’s analysis, see id. at 138–39.

249. MALDEF Q&A, supra note 54.

250. The term “race” includes color, ethnicity, and national origin. See Coalition for
Economic Equity v. Wilson, 110 F.3d 1431, 1434 n.1 (9th Cir. 1997).

251. CAL. CONST. art. II, § 10.

252. “By contrast, parents and others seeking changes in educational areas unrelated to LEP
instruction may do so by securing a simple majority vote of the Legislature or, where policy is delegated
by the State to school districts, merely by advocating before their school board.” Valeria G., PIs.’ Mem.,
(1994)).

253. Additionally, any statute passed by a supermajority of the Legislature must “further the
act’s purpose.” CAL. EDUC. CODE § 335. This suggests that even a supermajority vote of the Legislature
could not repeal 227.
As argued above, 227 plaintiffs do not need to show the initiative was facially racial or motivated by animus in order to subject it to strict scrutiny. Proposition 227 meets the alternative standard explicated by the Seattle Court. Like the minority children in Seattle, Latinos, and other national origin minorities, consider bilingual education "legislation that is in their interest." A study by the Spanish-language television station Univision found that 83 percent of Latinos polled either strongly or somewhat supported bilingual education. Fifty-three percent of those surveyed were opposed to Proposition 227 in particular. Additionally, the findings included in Proposition 227 and the arguments used by the initiatives proponents suggest a "racial focus." Under Hunter-Seattle, any legislative action that restricts minority access to the political process is subject to strict scrutiny, regardless of whether challengers can show an intent to discriminate. This standard is especially appropriate in the setting of state-wide voter initiatives because showing animus on the part of the entire electorate will be impossible and, more importantly, minority groups simply cannot compete effectively in the process. When the decision-making authority for the education of racial and national origin minority children – and only minority children – is altered, that action is subject to strict scrutiny.

5. Proposition 227 is Easily Distinguished from Decisions That Have Refused to Apply the Hunter-Seattle Doctrine

The Valeria G. court did not undertake any serious analysis to determine if the CEE court’s decision that Proposition 209 did not violate structural equal protection should apply with equal force to Proposition 227. The court, as a result, ignored the easy ways in which 227 is distinguishable from 209. The CEE court’s primary concern was that the majority could not deprive itself of equal protection. But in the case of Proposition 227, the LEP population is just a fraction

254. See Bennett Roth, Survey Says Most Hispanics Support Bilingual Education, HOUSTON CHRON., Apr. 23, 1998, reprinted in League of United Latin American Citizens (accessed July 11, 1999) <http://www.lulac.org/issues/Educate/UnzSurv.html>. Adela de la Tortes, the director of Mexican American Studies & Research Center at the University of Arizona, has explained that "[u]nderstanding Spanish would provide [children] not only with a link to our roots, but also with an entry point to traversing more than one culture. . . . [Latinos exhibit an] unwillingness to completely cede our identity to a dominant culture that has viewed us as marginal." Adela de la Torres, Perspective on Bilingual Education: Language is a Bridge to Culture, L.A. TIMES, Mar. 22, 1998, at M5.

255. Id.

256. Ballot initiatives "reflect[] all too accurately the conservative, even intolerant, attitudes citizens display when given the chance to vote their fears and prejudices, especially when exposed to expensive media campaigns. The security of minority rights and the value of racial equality . . . are endangered by the possibility of popular repeal." Derrick A. Bell, Jr., The Referendum: Democracy's Barrier to Racial Equality, 54 WASH. L. REV. 1, 20-21 (1978-79). While Latinos comprise more than one quarter of California’s population, they make up only 12 percent of the electorate. See Max J. Castro, Bilingual Education and Proposition 227: What Really Happened?, VISTA MAG., Aug. 1998, reprinted in UCLA Department of Linguistics (accessed October 8, 1999) <http:/Iwww.humnet.ucla.edu/humnet/linguistics/people/grads/macs/\v I .htm>.

257. See Valeria G., 12 F. Supp. 2d at 1024 ("this same argument has recently been rejected by the Ninth Circuit").
of the total population. Additionally, we should be particularly concerned that immigrants who are not yet citizens, but whose children are being educated in the public schools, could not vote in the election.

The CEE court also said that the plaintiffs in 209 were demanding a right to preferential treatment: “It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment.” Just as minority citizens and women do not have a “right” to preferential treatment, LEP children do not have a “right” to bilingual education. But they are guaranteed an equal educational opportunity. And to the extent that a statewide sheltered immersion program could, and likely will, deny individual children equal education - because a one-year sheltered program is not enough to learn English or because it denies the child substantive education in that year - Proposition 227 should be considered a political obstruction to equal treatment. “[S]trict scrutiny applies whenever there is a restructuring of the political process which has a ‘racial focus.’” The restructuring in this case means that minority students cannot demand, through the normal channels, a better English-language development program if it turns out that Proposition 227 does deny them equal educational opportunity. The minority students would not necessarily demand a bilingual program as a remedy, but simply a more appropriate curriculum than that mandated by Proposition 227. Practically speaking, Proposition 227 keeps them from seeking any remedy at all.

In Crawford v. Board of Education of the City of Los Angeles, decided the same day as Seattle, the Supreme Court refused to strike down a California voter proposition, which like the initiative in Washington, restricted the availability of mandatory busing to integrate schools. But unlike the Washington initiative, which prohibited any busing on the basis of race by local school districts, the California proposition provided that “no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or public transportation, except to remedy a specific ...violation of the Equal Protection Clause of the 14th Amendment....” This provision served to repeal a section of the state constitution.

258. The Valeria G. court held that “the starting presumption must be in favor of the right of California voters to impose upon themselves requirements that are applicable to all citizens.” 12 F. Supp. 2d at 1025, thus ignoring the mandate imposed by the Hunter and Seattle Courts to look beyond the facial neutrality of a statute to determine who it actually impacts. The majority of California’s students, white and/or native English speakers, are not affected by Proposition 227’s English-only mandate. They are already receiving an English-only education.

259. 122 F.3d at 708.


261. Valeria G., PIs.’ Reply Br., supra note 9, at 35.


263. Proposition 1, codified at CAL. CONST. art. 1, § 7(a), quoted in 458 U.S. at 532 (emphasis added). The court held that the proposition did not create an unconstitutional “dual court system” because
which had mandated busing in some cases. The Court distinguished Crawford from Seattle on the basis of California school districts’ continuing “obligation to take reasonably feasible steps to desegregate ... [including the use of] reassignment and busing plans....”

California’s Proposition 1 did not remove from the school districts the power to make student assignments on the basis of race. In contrast, that was the very authority that the Washington initiative had taken away, resulting in a violation of Hunter. Minority students and their parents could still seek protection from the lowest level of government, just like their nonminority peers. More importantly, state courts would not necessarily have had the jurisdiction to fashion remedies to complaints by nonminority students. In this respect, Proposition 227 is more like Seattle than Crawford: the decision-making authority is removed from the local school districts. LEP students and their parents can no longer go to the district level to get an appropriate educational program, while their nonminority neighbors can.

The core holding in Crawford was that “mere repeal” of a law designed to protect against racial discrimination is not unconstitutional. But Proposition 227 does more than repeal bilingual education. In fact, bilingual education ceased to be mandatory many years ago. Instead, Proposition 227 makes it markedly more difficult to obtain bilingual education in an individual school, for an individual child if such a curriculum is the best option for overcoming language deficits.

B. Proposition 227 Undermines the Tradition of Local Control Over Education

In this section, I argue that the Supreme Court’s insistence on local control over education makes Proposition 227 the strongest context for using the Hunter-Seattle principle. I draw on Professor David Barron’s argument in favor of local constitutionalism. Local governments, Barron contends, “are often uniquely well positioned to give content to the substantive constitutional principles that should inform the consideration of ... public questions.” Federal constitutional law should “free local governments from state law constraints that preclude them from exercising their discretion.” In no other area is this as appropriate as in the formation of educational policy. I am not, however, taking Barron’s argument to its extreme. My claim is not that the State cannot ever limit a local district’s discretion.

264. 458 U.S. at 535 & n.12. The court also rejected the argument that the California proposition was motivated by discriminatory animus. See id. at 545.


266. See infra notes 334-330.


268. Id.
with regard to constitutional questions. Rather, my argument is limited to the context of racially disparate treatment. But I do conclude that the local nature of educational policy, which Barron argues is the true basis of the Seattle decision, \(^{269}\) is instead precisely what makes it clear that political decision-making had been restructured on the basis of race, and in violation of *Hunter*. In *Hunter*,

Initiative 350 ... work[ed] something more than the 'mere repeal' of a desegregation law by the political entity that created it. It burden[ed] all future attempts to integrate Washington schools in districts throughout the State, by lodging decision-making authority over the question at a new and remote level of government.\(^{270}\)

Proposition 227 would not necessarily have been a violation of *Hunter* if not for the tradition of local control over education, and all the remaining issues still left to local control. "*Hunter* and *Seattle* relied expressly on the states' existing educational and housing decision-making processes to find that they had reallocated authority in a racially discriminatory manner."\(^{271}\) It is the local issues in Proposition 227 that make this initiative a violation of *Hunter-Seattle*. As Professor Rachel Moran has explained:

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.... 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.\(^{272}\)

The Supreme Court has long recognized this tradition, observing: "In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived.... No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education."\(^{273}\)

\(^{269}\) See id. at 571.

\(^{270}\) 458 U.S. at 483.

\(^{271}\) CEE, 122 F.3d at 706.


\(^{273}\) San Antonio, 411 U.S. at 49-50.
1. The Localism Cases

As noted above, the California proposition at issue in *Crawford* left local districts with an "obligation to take reasonably feasible steps to desegregate, and ... free[dom] to adopt reassignment and busing plans to effectuate desegregation." But the Washington initiative at issue in *Seattle* took away that freedom, because it was written in response to specific busing plans. The initiative served to repeal the mandatory busing programs to which the proponents of the initiative were opposed. In response, the Court relied on the long tradition of local control over educational policy. Justice Powell's dissenting opinion in *Seattle* emphasizes the localist thread in the majority's decision. As Powell reads the majority opinion, the decision "holds that the adoption of such a policy at the state level — rather than at the local level — violates the Equal Protection Clause of the Fourteenth Amendment." This interpretation is a bit extreme, but the majority's decision was firmly grounded in Washington statutory law that "established the local school board, rather than the State, as the entity charged with making decisions of the type at issue here.... Washington has chosen to meet its educational responsibilities primarily through 'state and local officials, boards and committees.'" The holding of *Hunter* was that the State may not alter that governmental structure solely on the basis of race. And it was this local nature of education in the State of Washington which made it obvious that the State had done just that: "After passage of Initiative 350, authority over all but one of those areas remained in the hands of the local board." The one area removed from local control was racial desegregation.

The Supreme Court’s jurisprudence on local control of education spans a wide range of constitutional provisions. Professor Barron suggests we reread two much-criticized decisions, *San Antonio Independent School District v. Rodriguez* and *Milliken v. Bradley*, in light of *Seattle*. *San Antonio* and *Milliken*, he argues, do not rely on "an abstract respect for majoritarian will...or a respect for private suburban interests," the usual bases for critique. Instead, the cases are a statement

274. 458 U.S. at 535-36.

275. 458 U.S. 457, 488 (Powell, J., dissenting). Powell disagreed with this conclusion. See *id.* at 489 ("In my view, that Amendment leaves the States equally free to decide matters of concern at the State, rather than local, level of government."). Powell's problem with the majority opinion is that "if such a policy had been adopted by any one of the School Districts in this litigation there could have been no question that the policy was constitutional." *Id.* at 494 (Powell, J., dissenting). I share that concern with him, but for a different reason: What good does it do LEP students to say that the State cannot ban bilingual education, if a local district can turn around and do it? See *infra* Section V.


277. *Id.* at 480.


280. 147 U. PA. L. REV. at 559.
that "public education excellence depends, at least in part, upon local community control." In San Antonio, the Supreme Court upheld Texas' school financing system against charges that it violated equal protection by discriminating among local districts on the basis of wealth or by infringing on students' fundamental right to education. But in concluding that students did not have such a fundamental right to education, the Court recognized the great historical tradition of local authority in the educational process. In the area of educational policy, the Court said, its own "lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.'" And the Texas school financing system, the Court held, fostered just the sort of local control the educational policy arena needed: The State's "efforts were devoted to establishing a means of guaranteeing a minimum statewide educational program without sacrificing the vital element of local participation." Local districts were free to support their own independent projects to improve the programs provided to their students. As Professor Barron writes, "[T]he Court devoted much of its opinion to a demonstration that judicial deference to localism served to protect the very right to an adequate public education that the plaintiffs claimed."

In Milliken, the Court struck down a District Court's 3-county, metropolitan-wide plan for desegregating Detroit's public schools. The result was that the nearly all-black inner city schools and nearly all-white suburban schools remained segregated. The Court held that "the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country.... [L]ocal autonomy has long been

281. Id.

282. The Court held that "where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." 411 U.S. at 24. The Court also held that education is not a fundamental constitutional right: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." Id. at 35.

283. Id. at 42.

284. Id. at 48 (emphasis added).

285. 147 U. PA. L. REV. at 583.

286. The Court reversed the District Court's decision because it had been made absent any finding that the other included school districts have failed to operate unitary school systems within their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any finding that the included districts committed acts which effected segregation within the other districts, and absent a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multidistrict remedy or on the question of constitutional violations by those neighboring districts.

418 U.S. at 72-22.
thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process." 287

Barron acknowledges that San Antonio and Milliken "have been legitimately criticized for defending localism in order to protect a privatized conception of local political life from federal judicial intervention." 288 But, he argues, those cases should be read in light of Seattle, "in which the Supreme Court enforced public constitutional values by striking down [a] state attempt[,] to control the political discretion of towns and cities." 289 We can see in the Supreme Court's decisions a fairly consistent thread: There is a limit to the amount of control the federal government and the states can take away from local school districts. "[T]he cases demonstrate the Court's unwillingness to insulate from judicial review state laws respecting local affairs when such laws trench on the federal constitutional rights of local residents." 290 Proposition 227 threatens the right of minority students and parents to equal access to the educational process. If that process takes place on the local level, one area of the curriculum, particularly important to racial minorities, cannot be removed. As Professor Barron suggests, the Court might well strike down "a state's direct attempt to inequitably burden a local government's ability to educate its citizens...." 291

The Court has relied on the tradition of local control in a number of other cases. 292 In its 1923 decision in Meyer v. Nebraska, 293 for example, the Supreme Court struck down a Nebraska statute which provided that "[n]o person, individually or as a teacher, shall in any private, denominational or public school, teach any subject to any person in any language other than the English language." 294 Teachers who violated the provision were subject to fines or confinement in the county jail. 295

287. Id. at 741-42. The Court relied in part on its decision in Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969). See 418 U.S. at 746 n.21 ("Since the Court has held that a resident of a school district has a fundamental right protected by the Federal Constitution to vote in a district election, it would seem incongruous to disparage the importance of the school district in a different context.").

288. 147 U. PA. L. REV. at 493.

289. Id.

290. Id. at 568.

291. Id. at 585.

292. In San Antonio, the Court quoted both the majority and dissenting opinions in a case decided the previous term, Wright v. Council of the City of Emporia, 407 U.S. 451 (1972). See San Antonio, 411 U.S. at 49 (quoting 407 U.S. at 469 ("Direct control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society."); id. at 478 (Burger, C.J., dissenting) ("Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well.")).

293. 262 U.S. 390 (1923).


295. See id. at § 3.
That the statute was based on animus toward immigrants was made clear by the State Supreme Court's explanation that "[t]he Legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land." 296

The Supreme Court applied rational basis review, 297 and held that the statute violated the Fourteenth Amendment due process rights of the defendant teacher who had been convicted of intentionally teaching German in a parochial school. 298 That the Supreme Court held that subjecting a teacher to criminal prosecution for teaching bilingually infringes on the rights of that teacher suggests that the provisions of Proposition 227 which allow for private lawsuits against teachers are unconstitutional. 299 But more importantly for this article is the Supreme Court's focus on the particularly local nature of the educational process: "Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment." 300 The State, the Court suggests, cannot interfere in the relationship between parents and local schools in the selection of educational curricula for children. And in particular, according to the Court, the State cannot "interfere only with teaching which involves a modern language, leaving complete freedom as to other matters." 301 This is the same conclusion that the Seattle Court came to 60 years later, when it again held that a State may not remove from local control school assignment decisions with regard to race, but not with regard to other factors.

Much more recently, in United States v. Lopez, 302 the Supreme Court struck down the Gun-Free School Zones Act of 1990 303 as outside Congress' Commerce Clause power. 304 The Gun-Free School Zones Act made it a federal offense

296. Meyer, 262 U.S. at 397 – 98 (quoting Meyer v. State, 187 N.W. 100, 102 (Neb. 1922)).

297. See id. at 403 ("the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State").

298. See id. at 397.


300. Meyer, 262 U.S. at 400.

301. Id. at 403.


304. U.S. CONST. art. 1, § 8, cl. 3.
“knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.”

The Court concluded that this was beyond Congress’ power to regulate, in part, because of the historically local nature of education: the defendant “was a local student at a local school.”

A useful analogy can be made to the Individuals with Disabilities Education Act (“IDEA”). In *Board of Education v. Rowley*, the Supreme Court made clear that it would accord great deference to decisions of local agencies about the proper educational placement for disabled students: “The very importance which Congress has attached to compliance with certain procedures in the preparation of an [Individualized Education Program] would be frustrated if a court were permitted simply to set state decisions at naught.” The Fourth Circuit has also explained that “[l]ocal educators deserve latitude in determining the individualized education program most appropriate for a disabled child.” Similarly, local officials are in the best position to decide what curricular program is best for LEP students. And if bilingual education is most appropriate, those local officials should be able to make that choice.

Lastly, and most relevant for this paper, the Fifth Circuit in *Castaneda* refused to mandate a bilingual-bicultural education program so that “schools...consistent with local circumstances and resources [could] remedy the language deficiencies of their students....” Federal courts, the Fifth Circuit said, are “ill-equipped” to determine whether particular curricula are appropriate. The responsibility for “prescribing substantive standards and policies...is properly reserved to other levels and branches of our government (i.e., state and local educational agencies) which are better able to assimilate and assess the knowledge of professionals in the field.”

Even though the courts often defer to state decisions in this area, they imply these decisions should be made in conjunction with local officials and in consideration of particular local circumstances.

2. *California’s Mixed History of Local Control Over Bilingual Education*

As the *Castaneda* court recognized, local control is especially important in the area of bilingual education. Professor Rachel Moran has criticized both


306. 514 U.S. at 567.


310. 648 F.2d at 1009.

311. *See id.*

312. *Id.*

313. *See supra* note 310.
national bilingual education activists and English-only activists, like the proponents of Proposition 227, for attempting to constrain local decision-making authority. Moran disagreed with the argument “that school districts should be divested of some of their discretion,” with authority for making curriculum decisions for LEP children moved to the federal level. But she also took English-only advocates to task:

English-only reformers ... too favor limiting the options available to state and local officials.... After failing to win support for [an English as the official language] amendment at the federal level, English-only reformers have turned to state legislation, municipal ordinances, and popular referenda to restrict pedagogical discretion.

Moran has said that legislation regarding LEP children that limits the decision-making authority of local education officials, regardless of whether it mandates or prohibits bilingual education, “ignore[s] the diversity of problems that school districts confront.” In 1988, Moran argued that federal programs should be designed to foster discretion at the local level.

The value of local decision-making authority in this area is evidenced in a proposal by one commentator to extend to LEP children “the same educational rights enjoyed by physically and mentally disabled students under the IDEA [Individuals with Disabilities Education Act].” The IDEA provides grants to states for the education of children with disabilities. The statute requires that children be provided “[a] free appropriate public education” on the basis of an individualized

314. See Moran, 76 CAL. L. REV. 1249.

315. Id. at 1325. Since that time she has stepped back from the position. See Moran, 2 J. GENDER, RACE & JUST. at 164 (“I must conclude that vesting discretion in state and local authorities has neither mitigated ideological conflict nor led to a clearer picture of which programmatic strategies work and why.”). But Moran’s original observation remains correct: Bilingual education is the primary area removed from the control of local school districts.


317. Id. at 1332.

318. See id. at 1249.


321. See 20 U.S.C. § 1401(3)(A) (defining “child with a disability” as a child “with mental retardation, hearing impairments, speech or language impairments, visual impairments ..., serious emotional disturbance..., orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services”).
education program ("IEP"), a written plan that includes "a statement of the child’s present levels of educational performance, ... a statement of measurable annual goals, ... a statement of the special education and related services and supplementary aids and services to be provided to the child...." Limited English proficiency is not a covered disability. Peter Hahn suggests enacting legislation similar to the IDEA to protect LEP students. The legislation would emphasize the individual, localized decisions necessary to education LEP children well:

Such legislation should require a careful evaluation of LEP students’ abilities, a carefully prepared education plan, a yearly monitoring process, and a goal of assimilation into the traditional classroom environment.

This program would not function effectively if one method – in this case bilingual education – for teaching these children was removed from the options available to local schools and districts. In that case, Proposition 227 would undermine the intent of the federal legislation. Such legislation is highly unlikely to come to fruition, but it reveals that Proposition 227 prevents schools from responding to the wide variation in students’ English-language proficiency and learning styles in the same manner that they respond to other disabilities that impair students’ learning.

California’s own history with regard to education of LEP children is mixed. For the most part, the State grants local districts extensive control over education decision-making:

[T]here is a need to establish a common state curriculum for the public schools, but ... because of the economic, geographic, physical, political and social diversity, there is a need for the development of educational programs at the local level.... [I]t is the intent of the legislature to set broad minimum standards and guidelines for educational programs, and to encourage local districts to develop programs that will best fit the needs and interests of the pupils.


323. Linguistic disabilities are eligible disabilities. See supra note 321. That this does not include LEP students is not entirely clear from the face of the statute. But the statute’s Congressional findings distinguish between LEP students and LEP students with covered disabilities. See 20 U.S.C. § 1400(c)(7)(F) ("Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education .... These trends pose special challenges for special education in the referral, assessment, and services for our Nation’s students from non-English language backgrounds.").

324. See Hahn, 53 WASH. U. J. URBAN & CONTEMP. L. at 273–74 (LEP “students’ disability is similar to the disabilities of handicapped children who qualify for protection: [LEP] students’ access to public education is restricted by something beyond their immediate control.”).


326. CAL. EDUC. CODE § 51002 (Deering 1999).
The local discretion afforded California's school districts is not absolute. School funding is controlled centrally, at the State level. Additionally, the Department of Education administers a series of statewide standardized tests to ensure that students in all districts are learning the same material. But California Education Code § 33050 allows school districts to "request the State Board of Education to waive all or part of any section of this code or any regulation adopted by the State Board of Education." In general, "the State Board is required to approve" such applications. Regardless of the extent of centralized funding, local districts have a great deal of freedom to reject state-mandated programs.

The State Education Code provides that "English shall be the basic language of instruction in all schools [but the] governing board of any school district ... may determine when and under what circumstances instruction may be given bilingually." For 20 years, local districts theoretically did not have any discretion with regard to bilingual instruction. Under the Chacon-Moscone Bilingual-Bicultural Act of 1976, school districts with 15 LEP students speaking the same primary language were required to provide "full bilingual instruction" and "bilingual-bicultural education," while school districts with 10 LEP students speaking the same primary language were required to provide "partial bilingual education." Even then, bilingual education was only optional for individual children. "[S]tudents were placed in bilingual programs on the basis of an


328. CAL. EDUC. CODE § 33050(a) (Deering 1999). The statute specifies 15 areas for which local districts cannot obtain waivers. Most of these involve school funding and standardized testing. See id.


330. CAL. EDUC. CODE § 30 (Deering 1999).


(a) 'Partial bilingual instruction' means listening, speaking, reading and writing skills developed in both languages. Material related to culture and history is taught in the language the pupil understands better.

(b) 'Full bilingual instruction' means basic language skills developed and maintained in both language. Instruction in required subject matter or classes is provided in both languages in addition to culture and history.

(c) 'Bilingual-bicultural education' is a system of instruction which uses two languages, one of which is English, as a means of instruction. It is a means of instruction which builds upon and expands the existing language skills of each participating pupil, which will enable the pupil to achieve competency in both languages.

CAL. EDUC. CODE § 52163 (Deering 1987), cited in Biegl, 14 CHICANO-LATINO L. REV. at 53 n.36.
assessment conducted by local districts, using locally devised criteria. The individual assessment determined whether it was necessary to provide each student with substantial academic instruction through the use of her primary language....  

But entire school districts could not obtain Section 33050 waivers.  

In 1987, however then-Governor George Deukmajian vetoed legislation that would have extended the Chacon-Mascone Act, saying that local school districts should have the freedom to “fashion their own programs.” The State legislature passed a modified version of the Chacon-Mascone Act in 1992, requiring public schools with more than 100 students speaking the same primary language to teach substantive material in that language until the students became familiar with English. But like Deukmajian had before him, then-Governor Pete Wilson vetoed the bill, saying it did not provide enough flexibility to local administrators. The result of those vetoes and the “Sunset Statutes” in the California Education Code has been that local districts have had extensive discretion in educating LEP children. The Sunset Statutes have provided continuing funds for bilingual education programs in the districts which have chosen to continue to administer them. The State has required schools “to continue providing services that [a]re consistent with the general purposes of the old bilingual-bicultural requirements” in order to continue to receive funds. But school districts could choose to reject the funds by applying for Section 33050 waivers.  

Most recently, just before Proposition 227 was adopted, California granted its school districts almost total discretion over whether or not to educate their students bilingually. In March 1998, the California State Board of Education voted to eliminate the rule requiring districts to petition for a waiver to end their native language programs. The result is that, had Proposition 227 not passed, school districts would have been allowed to implement any program based on “sound educational theory.”  


337. See Biegel, 14 CHICANO-LATINO L. REV. at 55 & n.44 (citing Bill Honig, Cal. State Dep’t of Educ., Program Advisory to County and District Superintendent and Selected Program Directors, regarding Options Available to Districts for Achieving Compliance with the Staffing and Instructional Requirements of the State Program for Students of Limited English Proficiency, May 20, 1988, at 1).  

338. See McLaughlin, 1999 Cal. App. LEXIS 871, at *10 (“[S]chool districts continued to request waivers from the State Board under section 33050 seeking to opt out of their bilingual programs.... [T]he State Board continued to grant waivers.”).  

Proposition 227 changes the structure that the last two governors were so adamant about establishing. It replaces this wide discretion that local districts have had to design the optimal program for their students, and to choose whether or not to accept state funds for bilingual education, with a mandatory sheltered immersion program. The sheltered immersion program does not take into account the needs of individual or small groups of students, the sentiment of the community, or the resources of the schools. The Valeria G. court based its decision, however, on the continuing ability of districts to come up with their own ways of implementing its mandate, leaving them with plenty of discretion. This conclusion is simply not realistic. The districts can only make choices within the sheltered immersion context. They are not free to reject sheltered immersion as an appropriate model. Once the choice between sheltered immersion and other options has been made, there is not room for local flexibility. This lack of flexibility should doom Proposition 227. By removing local control over this one racially-focused issue and not over other curricular decisions, the initiative is subject to strict scrutiny under the Fourteenth Amendment.

C. Proposition 227 Cannot Survive Strict Scrutiny

In order to survive strict scrutiny, a racially discriminatory classification must be narrowly tailored to a compelling state interest. I am prepared to acknowledge that the need to teach our children to speak, read, and write in English, our de facto national language, is a compelling interest. But it has been clear since the Supreme Court spoke in Meyer v. Nebraska that barring the use of native languages in schools is not adequately tailored to that end. As that Court


340. The McLaughlin court, in refusing to allow district-wide waivers, said that Proposition 227 "give[s] choice to parents, not administrators." 1999 Cal. App. LEXIS 871, at *44. This conclusion is clearly incorrect, as parents can only request waivers in very limited circumstances. Furthermore, the waiver provisions in Proposition 227 do not undermine my argument that the initiative unconstitutionally limits local control. While school districts admittedly can choose whether or not to approve parents' requests for exemptions, the vast majority of LEP students are not even eligible to apply. School districts have no discretion in deciding what curriculum applies to them.

341. See Valeria G., 12 F. Supp. 2d at 1019 ("The initiative leaves room for different educational choices, and this court can not conclude that no possible choice could constitute 'appropriate action.'...").


343. See, e.g., Meyer, 262 U.S. at 401 ("It is also affirmed that the foreign-born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type ....").

344. See id. at 403 ("No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.").
recognized, "proficiency in a foreign language ... is not injurious to the health, morals, or understanding of the ordinary child."\textsuperscript{345} In the case of Proposition 227 in particular, strict scrutiny demands that sheltered English immersion be a highly effective method of teaching children English in order to be constitutional. Evidence demonstrating the effectiveness of sheltered English immersion, however, has not been produced. At best, it is effective if paired with a late-exit bilingual program.\textsuperscript{346} Proposition 227, then, is not narrowly tailored to teaching California's LEP population English.

**CONCLUSION**

When making the Hunter-Seattle argument to challenge Proposition 227, we must consider the potential remedies. They would not include a state-wide imposition of bilingual education. First, because LEP students do not have a right to a bilingual program, the plaintiffs in a lawsuit could not demand it. Second, mandatory bilingual education would suffer from the same constitutional flaw as Proposition 227 does — it would restructure the political process in a racially disparate manner by removing the education of LEP students from local control. If we accept the Hunter-Seattle argument, we must accept that a huge district like Los Angeles Unified could choose to end bilingual education. If we accept that a state may not prohibit a local district from doing more than the federal law requires, then the state also cannot interfere when a school district does the minimum that federal law requires. To challenge a district's policies in court, LEP students would need to resort to the nearly insurmountable tests of *Lau* and *Castaneda*. As long as the district has some special program for English-language development, it is not violating Title VI or the Equal Educational Opportunities Act. To the extent that civil rights activists believe that bilingual education is the most effective and empowering method of teaching immigrant children to speak English, the Hunter-Seattle argument has a significant flaw.

But it is a flaw I am prepared to accept. Realistically, most districts are likely to have programs with at least some bilingual components. Prior to the implementation of Proposition 227, only five school districts — all in conservative Orange County — requested waivers to institute English-only education of their LEP students.\textsuperscript{347} Additionally, many teachers were opposed to Proposition 227.\textsuperscript{348} They believe bilingual education is the most effective instructional method. And lastly, because of the time and money involved in mounting a successful campaign, it should be far easier to rally minority parents to lobby their local schools and school boards than to run a state-wide initiative campaign. Local lobbying can obviously be achieved with less expense and effort. Far more Latinos voted in the last several

\textsuperscript{345} Id.

\textsuperscript{346} See supra note 32 and accompanying text.

\textsuperscript{347} See CRAWFORD, Disaster at the Polls, supra note 40. Additionally, "[v]irtually none" of the parents encouraged to pull their children out of bilingual program by the leader of the Ninth Street School boycott actually did so. Id.

\textsuperscript{348} The California Teachers Association and the Association of California School Administrators opposed Proposition 227. See id.
California elections than ever before. Civil rights activists can capitalize on this new political involvement to make significant changes on the local level. Hunter-Seattle, applied in the education context, does reflect core values of our national system of public education. Parents and teachers should be involved in shaping curricula, and that curricula should be responsive to local concerns, needs, and challenges. In a state as populous and diverse as California, in particular, it makes sense that one size simply will not fit all. And when one size is determined to fit all minorities, while nonminority students receive tailored educational program, that conflicts with our usual understanding of education rises to the level of a constitutional violation. LEP students and their parents should not, indeed, cannot, be deprived of the opportunity to participate in the decision-making process.

349. See, e.g., Brook Larmer, Latino America, NEWSWEEK, July 12, 1999, at 48; Amy Pyle et al., Latino Voter Participation Doubled Since ’94, L.A. TIMES, June 4, 1998, at A1; Ted Rohrlich, Latino Voting in State Surged in 1996 Election, L.A. TIMES, Dec. 31, 1997, at A1 ("[T]he Latino surge ... was given a high-powered boost by a series of legislative initiatives beginning with Proposition 187 in 1994, that sought to strip government assistance from illegal and, in some cases, legal immigrants. These initiatives were perceived by many Latinos as an assault on their ethnic group.").