

Education Federalism in Action: English Learner Education Policy

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Author's Note: my interest in this topic is intensely personal. After college and before law school, I taught fourth grade at a public elementary school in Oakland, California. Over three-quarters of my students spoke a language other than English at home. Though the plurality spoke Spanish at home, my students collectively spoke over a dozen languages. Most learned their home language from parents who had immigrated from seemingly every corner of the world to Oakland's San Antonio neighborhood. Some of my students were immigrants themselves, with stories of heartbreaking loss and harrowing journeys from Mexico, Guatemala, El Salvador, Myanmar, and Yemen. The school's administration worked hard to support English Learners by offering families bilingual and immigrant teachers, English Learner specialists, and trauma counselors. While I hope we lessened the burden, I know that the onus largely fell on the students themselves to help families navigate everything from grocery shopping to applying for public benefits. My students demonstrated incredible resilience, strength, determination, humor, and empathy. They deserve better than what the U.S. currently affords them. I hope that this Note contributes to existing efforts to improve opportunities for English Learners, immigrant families, and their communities.

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Immigrant labor, intellect, and ingenuity has shaped and continues to shape our nation. However, the United States largely does not reciprocate their contributions. Although the legal academy and popular media have extensively documented the plight of immigrants and the inequities they face, one area of need has largely escaped attention. I am referring to English Learner (EL) education policy, which immigrant children and the children of immigrants rely on to access opportunities, services, and almost all aspects of American culture and life. This Note endeavors to explain why EL education policy matters, what has prevented its success, and how the federal government, states, and localities can rectify the situation.

A few key themes are integral to this effort and therefore worth noting upfront. First, I assert that bilingualism and bilingual education should feature prominently in EL education policy. Second, I show how federal deference to state and local authorities, recently referred to as education federalism, has severely hindered the nation's ability to adequately serve EL students.

California and Texas also feature prominently in this Note because they have the country's two largest EL public-school student populations, and their historical and current approaches to EL education policy will be deeply interrogated. Finally, this Note offers potential solutions to the current approach. These changes include federal oversight, state action, community-oriented local efforts, and a special emphasis on bilingual education. Federal oversight, state action, and local efforts will all be crucial to the future of EL education.

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INTRODUCTION

While the history of EL education policy resembles other efforts by marginalized communities to secure equal educational opportunities, it still merits distinct analysis. So too does the current status quo for EL students, which leaves many students unsupported and unprepared to access academic and professional opportunities. As EL populations expand across the country, so too does the imperative to provide these students with equal educational opportunities. EL education has and continues to become an increasingly urgent issue.

One similarity between EL education policy and other fights for equal educational opportunity is a shared opponent: local control of education policy. Education law expert and law professor Kimberly Jenkins Robinson has explored how local control undermines American efforts to create equal opportunities and outcomes for students regardless of class, race, and language background. Robinson refers to the phenomenon as education federalism. Though the term is relatively new, its history is easy to trace. Since the very origin of this country, the federal government has deferred to state authorities, who in turn have deferred to local authorities over matters of curriculum, instruction, and achievement standards. Even the most aggressive efforts at federal oversight have ended in reversions to a wholly unequal status quo. Deference to local authorities often means deference to the very persons who

purposefully instituted discriminatory and unequal policies. This Note applies the education federalism framework to a previously untapped area: EL education policy.

I hope that this Note will accomplish three things. First, it should demonstrate the soundness of Professor Robinson's theory of education federalism. Second, it should reveal some distinct issues and opportunities in the specific area of EL education policy. Third, it should hopefully provide lessons and recommendations which scholars, advocates, and policymakers can use in their efforts to combat all forms of educational inequity.

This Note proceeds as follows. Part I explains why EL outcomes matter for all stakeholders. Part II summarizes current scholarship on education federalism and traces the history of local control over education, as well as efforts to disrupt that established tradition. Ultimately, this Section also shows how modern education policy is deeply entrenched in the harmful tradition of local control. Part III explores how education federalism has shaped the development of EL education in federal law and policy. Part IV traces the development of EL policies in California and Texas. Finally, Part V offers suggestions for actors at every level of decision-making for improving EL education in the United States. I conclude by revisiting the major points of the previous sections.

I.

EL OUTCOMES ARE A MATTER OF NATIONAL IMPORTANCE

Part I explains why all Americans should care about and advocate for better EL educational opportunities generally, and bilingual education specifically. Part I.A begins with an overview of the scope of the issue and an introduction to some trends and features of EL populations across the country. Then, it explains the importance of English fluency for students and its ripple effect benefits for families, immigrant communities, and the entire country. Part I.B zeroes in on a particular form of EL education which multiplies the benefits of English fluency: bilingual education. This Section focuses on recent data showing the advantages of bilingualism for students, families, and the United States as a whole.

EL populations are large and continue to grow. According to the most recent available data from the National Center for Education Statistics, 10.1 percent of public school students, or roughly five million children in U.S. schools, were ELs as of 2017.¹ This represents an increase of 1.2 million, or 2 percent, from 2000.² EL students live in every state and speak many different languages at home.³ The data also show that most are U.S. citizens⁴ and more

1. NAT'L CTR. FOR EDUC. STAT., ENGLISH LANGUAGE LEARNERS IN PUBLIC SCHOOLS 1, (2020), https://nces.ed.gov/programs/coe/pdf/coe_cgf.pdf [<https://perma.cc/T9SA-PZYB>].

2. *Id.*

3. *Id.*

4. Kristen Bialik, Alissa Scheller & Kristi Walker, *6 Facts About English Language Learners in U.S. Public Schools*, PEW RSCH. CTR. (Oct. 25, 2018), <https://www.pewresearch.org/fact->

live in cities than in suburbs or in rural areas.⁵ They are more likely to speak Spanish at home than any other language.⁶ EL populations are highest in southwestern and western states; California and Texas have the largest EL populations and the largest percentages of ELs in public schools.⁷ While there are many EL populations who are not Spanish-speaking and who live outside of California and Texas, this Note will most directly address the needs of that dominant group. Thus, the sources I cite and research I reference most often address the needs and challenges of Spanish-speaking EL students.

A. English Mastery Creates Opportunities for Students, Families, Communities, and the Entire Nation

EL education is a civil rights issue that impacts students, their families, and the communities they belong to. Academic and professional opportunities, financial stability, and social cohesion all hang in the balance. As the rate of immigration to the U.S. from Latin America surges, so too does the number of individuals, families, neighborhoods, and cities who feel the most acute impact of EL education.

For students, the benefits of English mastery are clear. English mastery opens doors to academic, professional, and social opportunities. For example, ELs who become proficient in English are more likely to graduate high school and attend college.⁸ English mastery also increases confidence and self-esteem.⁹ Finally, English mastery allows non-native English speakers to access social and networking opportunities outside of their language group communities.

Immigrant families likewise benefit when their children enjoy quality EL education that leads to English mastery. Many immigrants from Latin America fill “low-paying, labor-intensive jobs in manufacturing and services industries.”¹⁰ Without English or access to translation, immigrants may not be able to pursue other opportunities because other job postings might be written in English or only accessible through English-language resources. English-proficient EL students can help their family members pursue otherwise inaccessible opportunities. However, jobs are far from the only commodity

tank/2018/10/25/6-facts-about-english-language-learners-in-u-s-public-schools/ [https://perma.cc/48Y2-424D].

5. *Id.*

6. *Id.* This is not true in every state, but nationwide 77 percent of ELs speak Spanish at home. *Id.*

7. NAT’L CTR. FOR EDUC. STAT., *supra* note 1.

8. Albert H. Kauffman, *Latino Education in Texas: A History of Systematic Recycling Discrimination*, 50 ST. MARY’S L.J. 861, 895 (2019).

9. See generally Cristian R. Aquino-Sterling & Fernando Rodríguez-Valls, *Developing Teaching-Specific Spanish Competencies in Bilingual Teacher Education: Toward a Culturally, Linguistically, and Professionally Relevant Approach*, 2 MULTICULTURAL PERSPS. 73 (2016) (outlining the pedagogical advantages of bilingual teachers having Spanish language competencies).

10. Pete Farruggio, *Latino Immigrant Parents’ Views of Bilingual Education as a Vehicle for Heritage Preservation*, 9 J. LATINOS & EDUC. 3, 5 (2010).

which might exclude non-English speakers. Public benefits, community resources, housing, legal services, and many other necessities default to English, and may not be translated into a person's native language. As a result, an English-speaking child can help their family access all manner of resources.

When schools successfully serve their EL students, communities benefit from the advantages described above. English mastery can combat cycles of poverty and segregation impacting entire neighborhoods. In some places, this impact is incredibly broad. Los Angeles, California for example, is home to almost a million individuals with limited English proficiency.¹¹ In Houston, Texas, the equivalent number was close to 500,000 in 2011—nearly a quarter of the city's population.¹²

The United States as a whole cannot maintain this status quo. First and foremost, pursuing better outcomes for EL students is a moral duty that the country owes to its immigrant communities. Second, the U.S. EL population represents untold and untapped potential. The country's next great intellectuals, scientists, teachers, doctors, and leaders could be languishing in inadequately resourced EL classrooms across the country.

B. Bilingualism Amplifies the Benefits of English Mastery and Creates Additional Positive Impacts for Students, Families, and the Country

For every benefit that English mastery offers, mastery of both English and a child's home language offers more. In addition to the advantages of English mastery, "students whose home languages are supported and built upon in school are likely to outperform their counterparts in English-only programs and experience greater academic success."¹³ In California, a student's mastery over both English and their home language "contributed to higher scores" on state academic assessments.¹⁴ Further studies indicate that "bilingual children have higher test scores, better problem-solving skills, sharper mental perceptions, and greater empathy."¹⁵ Compared to peers who have lost their native language,

11. U.S. CENSUS BUREAU, CENSUS 2020 CALIFORNIA HARD TO COUNT FACT SHEET: LOS ANGELES CITY IN LOS ANGELES COUNTY (2020), <http://web.archive.org/web/20210503190745/https://census.ca.gov/wp-content/uploads/sites/4/2019/06/Los-Angeles.pdf>.

12. CITY OF HOUS. PLAN. & DEV. DEP'T, LIMITED ENGLISH PROFICIENCY: 5 YEARS AND OLDER (2013), http://www.houstontx.gov/planning/Demographics/docs_pdfs/Cy/Limited_English_Proficiency.pdf [<https://perma.cc/TBB6-75WP>].

13. Kate Menken, *Restrictive Language Education Policies and Emergent Bilingual Youth: A Perfect Storm with Imperfect Outcomes*, 52 THEORY INTO PRAC. 160, 161 (2013); see Sandra A. Butvilofsky, Susan Hopewell, Kathy Escamilla & Wendy Sparrow, *Shifting Deficit Paradigms of Latino Emerging Bilingual Students' Literacy Achievement: Documenting Biliterate Trajectories*, 16 J. LATINOS & EDUC. 85, 94 (2017) (finding that bilingual programs can accelerate the acquisition of English literacy development).

14. Marilyn Gilroy, *Bilingual Education on the Edge*, EDUC. DIG., Jan. 2002, at 50, 53.

15. M. Ray Perryman, *Bilingualism in Texas*, PERRYMAN GRP. (Oct. 19, 2016), <https://www.perrymangroup.com/publications/column/2016/10/24/bilingualism-in-texas/>

bilingual and biliterate young adults “have higher status jobs and earn more.”¹⁶ In fact, “sustained use and development of both languages is associated with a range of academic, linguistic, and cognitive advantages.”¹⁷

Bilingualism additionally offers cultural and social advantages for EL students. First, Spanish is crucial to maintaining relationships with family members in the United States and abroad.¹⁸ Without a common tongue, parents and children may struggle to communicate.¹⁹ Parents may also lose the advantages associated with a bilingual child, including translation services necessary to access basic services and programs.²⁰ Second, bilingualism also helps first-generation American students and young immigrants “know and appreciate the culture and values of the parents’ home countries.”²¹

Finally, current patterns of segregation mean that many Latinx immigrants owe their survival “to participation in large, ethnically based job networks in which Spanish remains the lingua franca and Latino cultural patterns persist.”²² Without Spanish, children will not be able to enjoy the full advantages of that network. Parents often cannot bear the burden of cultural and linguistic education alone. Bilingual programs in public schools, for example, can serve “as a vehicle” for maintaining language,²³ heritage, and culture.²⁴

Creating a pipeline of bilingual students will also advantage the country as a whole. Fascism, nationalism, and other isolationist political ideologies are on the rise,²⁵ and cross-cultural understanding can undermine those dangerous beliefs. EL students already belong to two cultures. By empowering EL students with two languages, the United States can lead an effort to combat divisions

[<https://perma.cc/U4MA-KZ7F>]; see Evangelina Brignoni & Sandra Wetig, *Bilingual Education – Meeting the Needs of Multilingual Learners*, DELTA KAPPA GAMMA BULL., Summer 2009, at 29, 32 (“When both languages have equal status, all students leave highly biliterate and bilingual. Learning another language and knowing two equally well helps students become bicultural and learn from other perspectives.”).

16. Perryman, *supra* note 15.

17. Menken, *supra* note 13, at 161. See generally Ingrid K. Christoffels, Annelies M. de Haan, Laura Steenbergen, Wery P.M. van den Wildenberg & Lorenza S. Colzato, *Two Is Better than One: Bilingual Education Promotes the Flexible Mind*, 79 PSYCH. RSCH. 371 (2015) (finding that bilingual education promotes cognitive flexibility and a bias towards a more focused “scope” of attention).

18. See Farruggio, *supra* note 10, at 11.

19. See Giang Pham & Timothy Tipton, *Internal and External Factors That Support Children’s Minority First Language and English*, 49 LANGUAGE, SPEECH, & HEARING SERVS. SCHS. 595, 605 (2018).

20. See Farruggio, *supra* note 10, at 8.

21. *Id.* at 10.

22. *Id.* at 6.

23. *Id.* at 8.

24. *Id.* at 4.

25. See, e.g., Christianna Silva & James Doubek, *Fascism Scholar Says the U.S. is ‘Losing Its Democratic Status,’* NAT’L PUB. RADIO (Sept. 6, 2020), <https://www.npr.org/2020/09/06/910320018/fascism-scholar-says-u-s-is-losing-its-democratic-status> [<https://perma.cc/36QS-NXSE>]; *Europe and Right-wing Nationalism: A Country-by-Country Guide*, BBC NEWS (Nov. 13, 2019), <https://www.bbc.com/news/world-europe-36130006> [<https://perma.cc/V66S-SRBF>].

between countries. Ultimately, bilingual and bicultural students may help “bridge the gaps between cultures . . . around the world.”²⁶

Further, EL students may hold the key to the United States’s continued economic competitiveness. Our world’s economy is increasingly globalized. Other countries produce more students equipped to participate in this economy through multiple language proficiencies.²⁷ Therefore, a bilingual talent pipeline will allow the United States to stay competitive. For example, an American entrepreneur or lawyer with multiple language proficiencies can better compete with multilingual European counterparts.²⁸ Bilingualism could also help American companies access previously inaccessible markets. Finally, increased linguistic and cultural competency will help American ventures understand the diverse and nuanced needs of cultures and communities across the world.

Despite the strong imperatives to prioritize EL education in general and bilingual education in particular, we largely fail to do so. High school graduation rates for EL students hover around 67 percent, compared to 84 percent for English-speakers.²⁹ In addition, EL students are more likely than their native English-speaking peers to drop out of high school and are less likely to attend college.³⁰

By failing to see the value in bilingual education, the United States is failing five million students, their families, communities, and the country as a whole.

II.

EDUCATION FEDERALISM

American education policy allocates most decision-making power to state and local authorities. Historically, this has been seen as a good thing; it theoretically allows for experimentation and customization to a community’s unique needs. Local control has not, however, lived up to this potential. The negative consequences of local control have been especially severe for marginalized students. This Section introduces a relatively new concept that connects American deference to state and local authorities to poor educational outcomes for students and civil rights violations throughout the twentieth and twenty-first centuries: education federalism. In order to do so, some background is needed. This Section will first trace the history of local control over education

26. Perryman, *supra* note 15.

27. See, e.g., Francois Grosjean, *Bilingualism’s Best Kept Secret: More than Half of the World’s Population Is Bilingual*, PSYCH. TODAY (Nov. 1, 2010), <https://www.psychologytoday.com/us/blog/life-bilingual/201011/bilingualisms-best-kept-secret> [<https://perma.cc/XH8N-Y25N>].

28. See Christoffels et al., *supra* note 17, at 371 (“[A]bout 56% of all Europeans consider themselves a functional bilingual or multilingual.”).

29. U.S. DEP’T OF EDUC., ACADEMIC PERFORMANCE AND OUTCOMES FOR ENGLISH LEARNERS: PERFORMANCE ON NATIONAL ASSESSMENTS AND ON-TIME GRADUATION RATES, <https://www.ed.gov/datastory/el-outcomes/index.html> [<https://perma.cc/EM7R-A489>].

30. See Kauffman, *supra* note 8, at 909–10.

policy in America and show that legacy's impact through explaining the current allocation of power between federal, state, and local education authorities. Second, it will undermine traditional assumptions about the benefits of local control. Third, this Section will expand on the harms associated with local control by using Professor Robinson's concept of education federalism.

A. Local Control over Education: A Brief Overview

American allegiance to local control over education policy is as old as the country itself. Locally controlled school districts in the United States emerged in colonial Massachusetts and spread across the country.³¹ Religion, geography, and urban development contributed to the development of school districts, sometimes multiple within a single city, in the Massachusetts colony.³² In early nineteenth century Boston, city leadership turned to schools to fix the perceived problem of increased immigration.³³ The city created a centralized body outside of its existing leadership structure to oversee public education—the colonial equivalent of the modern school board.³⁴ As the new country expanded across the continent, so did locally controlled school districts.³⁵ The timing of expansion coincided with the popularity of “Jacksonian ideas of popular self-determination,” which in turn strengthened arguments for hyper-local education policy.³⁶

Each school district's authority varies, as states determine which powers to allocate to school districts and other forms of local education authorities.³⁷ Generally, school districts are responsible for making and maintaining budgets, hiring teachers, and setting and enforcing school policies.³⁸ They can also prescribe teacher salaries,³⁹ open and close public schools, and assign students to school sites.⁴⁰ School district boundaries can coincide with city boundaries, but they do not necessarily.⁴¹ For example, Houston Independent School District includes parts of Houston and parts of other cities.⁴² In short, local school districts have the most direct and daily impact on students' educational experiences. Traditionally, this has been seen as a good thing.

31. Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 NW. U. L. REV. 945, 963 (2017).

32. *See id.* at 969–71.

33. *Id.* at 976.

34. *Id.* at 977–78.

35. *See id.* at 978–79.

36. *Id.* at 981.

37. *Id.* at 956.

38. *See, e.g., School Districts: In Charge of Most Local Schools*, ED100, (Dec. 2020), <https://ed100.org/lessons/districts> [<https://perma.cc/BG7S-UGGP>] (discussing the powers of California school districts).

39. Shoked, *supra* note 31, at 956.

40. *Id.* at 957.

41. *Id.* at 958.

42. *Id.*

Support for the continued existence of school districts is nearly unanimous.⁴³ Americans tend to agree that local and state authorities, as opposed to federal actors, should control education.⁴⁴ The reasons for such agreement can be generally sorted into three buckets. First, tradition dictates that the country maintain its commitment to local education control.⁴⁵ Second, and stemming from the general philosophy of localism, school districts can “produce more effective policy reforms because those most affected by the decision shape the reform.”⁴⁶ Underlying this argument are assumptions that local control attracts higher parent and community involvement,⁴⁷ which in turn results in local education authorities being held accountable by those who put them in power.⁴⁸ Third, local education authorities allow for experimentation.⁴⁹ These experiments allow parents to “shop for” the schools that best serve their children’s educational needs.⁵⁰ Experimentation also serves the “larger society” by comparing results across districts.⁵¹ Of course, this assumes that “school districts are similar enough” to be comparable.⁵²

B. *Undermining Positive Assumptions about Local Control*

Recent scholarship has undermined this rosy vision of local control. Professor Justin Long at Wayne State University School of Law has disrupted the narrative regarding accountability and participation in a local control model. As a baseline, Long notes that voters know less about local politics and political candidates than about state and national counterparts.⁵³ The situation is even more dire when those local politicians are school board candidates.⁵⁴ Further, despite the popular belief that local government is “the most accountable layer” of representative democracy, voter turnout in municipal elections is dismally low.⁵⁵ In fact, an average school board election draws only 18 percent of eligible

43. Thorough research yielded only two sources advocating for the complete abolition of school districts. See Shoked, *supra* note 31; Kevin Carey, Editorial, *No More School Districts!*, DEMOCRACY, Winter 2020, <https://democracyjournal.org/magazine/55/no-more-school-districts/> [https://perma.cc/4FSV-VJBF].

44. Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 971 (2015).

45. See Justin R. Long, *Democratic Education and Local School Governance*, 50 WILLAMETTE L. REV. 401, 427 (2014).

46. Robinson, *supra* note 44, at 971.

47. Long, *supra* note 45, at 437.

48. *Id.* at 439; Robinson, *supra* note 44 at 971.

49. Robinson, *supra* note 44, at 971 (“[D]ecentralization also allows state and local governments to adopt a variety of curricula, teaching, and learning approaches.”).

50. *Id.*

51. Long, *supra* note 45, at 422.

52. *Id.*

53. *Id.* at 444.

54. *Id.* at 444–45.

55. *Id.* at 444.

voters.⁵⁶ Voters lack adequate information about their choices for local educational leadership. Maybe in part because of this lack of information, many fail to participate.⁵⁷ Local control has not achieved the populist, self-deterministic vision espoused by its early supporters.

Instead, local control has made school districts vulnerable to the whims of the very involved few. According to Professor Nadav Shoked at Northwestern University School of Law, a lack of voter participation “creates an opening for concentrated groups invested in school board elections’ subject matter to dominate elections.”⁵⁸ These groups include teachers’ unions,⁵⁹ political parties,⁶⁰ and other groups whose power and income depend on local education policy. These groups press for policies that fail to reflect most citizens’ preferences.⁶¹ The harms associated with this status quo, as the next Section will demonstrate, have historically impacted marginalized students and communities.

C. Local Control and Education Federalism

Local control, compounded with federal deference to state authorities, has harmed the most vulnerable students in the United States. Professor Kimberly Robinson, who concurrently holds posts at University of Virginia’s Schools of Law, Education, and Public Policy,⁶² calls the phenomenon education federalism. Professor Robinson explains at length how increased deference to state and local education authorities in the twentieth and twenty-first centuries negatively impacted students’ education and civil rights.⁶³

This Section explores how all three branches of federal government have engaged with issues regarding education federalism. The Supreme Court has “privileged” local control schemas, even when it jeopardizes “equal educational opportunity.”⁶⁴ The executive and legislative branches’ efforts to undermine local control over education have failed to create lasting and impactful change.

1. The Judiciary Privileges Local Control over Equal Educational Opportunity

Robinson explained how the Supreme Court repeatedly declined to support desegregation efforts on the basis of education federalism, beginning with *Brown*

56. Shoked, *supra* note 31, at 998–99 (“In modern America, voting rates decrease, dramatically, the lower the level of the government holding the elections.”).

57. See *School Districts: In Charge of Most Local Schools*, *supra* note 38.

58. Shoked, *supra* note 31, at 1000.

59. *Id.*

60. *Id.*

61. *Id.* at 998.

62. Faculty: Kimberly J. Robinson, UNIV. OF VA., <https://www.law.virginia.edu/faculty/profile/kjj9w/1466822> [<https://perma.cc/4J6X-VTMY>].

63. See Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287 (2013).

64. *Id.* at 294–95.

v. Board of Education (“*Brown I*”), which mandated equal access to educational opportunity.⁶⁵ The *Brown I* opinion granted violative school districts an opportunity to maintain de facto segregation because the Court did not describe exact processes for compliance. Instead, the Court recognized the “complexity” of the situation, restored the case to the docket, and requested the “full assistance of the parties in formulating decrees.”⁶⁶ In fact, *Brown I* gave school districts a full year to formulate new arguments against the new, vague mandate to integrate.⁶⁷

A year later, the Court addressed the issue of relief in *Brown II*.⁶⁸ *Brown II* required “a prompt and reasonable start” towards integration but ultimately left the details up to school districts.⁶⁹ The opinion enumerated a number of considerations that could slow down a district’s plan:

[P]roblems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.⁷⁰

Finally, the Court assigned the issue to district courts because of their proximity “to local conditions.”⁷¹ By assigning local school boards and local courts the task of overseeing integration, the *Brown II* court left the issue of integration to the very group of individuals who had vehemently opposed it. By enumerating reasons that a district might be delayed in its implementation of the integration mandate, the Court created a blueprint for segregationists to maintain the status quo.

Robinson elaborated on the lesser-known cases following *Brown I* and *II* that sanctified local control at the expense of education equity. In *Milliken v. Bradley*, the Court struck down an effective integration plan because it encroached upon a school district’s autonomy.⁷² Robinson noted *Milliken*’s “near-fatal impact” on desegregation.⁷³ In *Board of Education v. Dowell*, the Court “privileged” the interests of states and municipalities in maintaining their power over the interest of students in accessing equal education.⁷⁴ In *Freeman v. Pitts*, the Court made clear that “the value of local control of schools outweighed

65. *Id.*; *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

66. *Brown I*, 347 U.S. at 495.

67. *See id.*

68. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 298 (1955).

69. *Id.* at 300.

70. *Id.* at 300–01.

71. *Id.* at 299.

72. *Milliken v. Bradley*, 418 U.S. 717, 744–47 (1974).

73. Robinson, *supra* note 63, at 298.

74. *Id.*; *see Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237 (1991) (holding that in assessing desegregation efforts, courts should consider good faith efforts of the school districts and the practicalities of implementation).

the need to hold the school district responsible for the effects of its discrimination.”⁷⁵ Finally, in *Missouri v. Jenkins*, the Court “emphasized the importance of local control of education rather than lasting and meaningful desegregation.”⁷⁶

Education federalism and deference to local expertise have equally undermined other efforts to secure education equity through litigation. In *San Antonio Independent School District v. Rodriguez*, the Court notably rejected the notion of a constitutional right to education.⁷⁷ The case stands for the Court’s continued respect for local control of schools even when it creates inequality.⁷⁸ The *Rodriguez* court explained its rationale for supporting local control; it provides “some opportunity for experimentation, innovation, and a healthy competition for educational excellence,” and it is a hallmark of the American education system.⁷⁹

The Supreme Court’s support for local educational control at the very least enforces local control’s status as a static, unchallengeable aspect of American public education. Scholars have debated whether the Court’s respect for local control reflected its priorities or if the Court used local control as a façade for its real motive, which was opposing integration and equality. Regardless, Robinson’s thesis stands: education federalism, which encompasses the American tradition of deferring to local authorities over education policy, has hindered progress towards education equity.

2. *The Executive and Legislative Take One Step Forward and Two Steps Back*

The executive and legislative branches have occasionally attempted to confront issues of educational equity by asserting a more robust federal presence in education policy. These efforts, proposed by the executive and enacted by Congress, have failed to create meaningful change. The result each time is an ultimate reversion to the norm of federal deference to states and to the privileging of local control over other priorities, including equal educational opportunity.

In 1965, President Lyndon B. Johnson signed the Elementary and Secondary Education Act (ESEA) into law.⁸⁰ President Johnson saw ESEA as a crucial part of his “War on Poverty” because he recognized the potential of

75. Robinson, *supra* note 63, at 302; see *Freeman v. Pitts*, 503 U.S. 467 (1992) (holding that district courts may relinquish supervision and control over school districts in incremental stages before the districts were completely desegregated).

76. Robinson, *supra* note 63, at 303; see *Missouri v. Jenkins*, 515 U.S. 70 (1995) (holding that the remedial programs and efforts to improve schools and students’ test scores were invalid and that district courts must reinstate state and local authority over school systems).

77. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

78. See Robinson, *supra* note 63, at 310.

79. See *Rodriguez*, 411 U.S. at 50.

80. *Every Student Succeeds Act (ESSA)*, U.S. DEP’T OF EDUC., <https://www.ed.gov/essa?src=m> [<https://perma.cc/Z7KV-TW4K>].

education to provide opportunities for social and economic mobility.⁸¹ The law's primary purpose was to create a mechanism for increasing federal spending on public education.⁸² That mechanism came in the form of direct funding for schools, with eligibility conditioned on adherence to federal nondiscrimination laws.⁸³ In 1965, this specifically meant school desegregation, which the executive branch had chosen not to enforce in the decade after *Brown I*.⁸⁴ President Johnson's vision for equal educational opportunity regardless of socioeconomic status never came to fruition. Neither did ESEA's potential as an accelerant of desegregation. While it did greatly increase the federal government's "investment in primary and secondary education,"⁸⁵ ESEA did not fundamentally change the status quo of local control in education.

Federalism advocates started whittling down what they perceived as ESEA's federal overreach beginning in the 1970s. The Office of Program Planning and Evaluation commissioned a report on ESEA's impact, which was published in 1972.⁸⁶ The report found that educational inequities had not "materially" improved and had "in some cases . . . worsened."⁸⁷ A 1983 report further emboldened ESEA's detractors by highlighting "the lagging results of United States students."⁸⁸ Proponents of state and local control used such reports to argue that the problem was the federal government's issuance of education policy mandates, not states' failure to meet those mandates.⁸⁹ Subsequent ESEA reauthorizations severely diminished federal mandates and oversight. For example, while the original law required states to spend nearly the same amount on all schools, regardless of their eligibility for federal grants, later versions loosened that requirement.⁹⁰ And while the 1965 law specifically targeted "poor

81. See Kimberly Jenkins Robinson, *Restructuring the Elementary and Secondary Education Act's Approach to Equity*, 103 MINN. L. REV. 915, 926 (2018).

82. See Alyson Klein, *ESEA's 50-Year Legacy a Blend of Idealism, Policy Tensions*, EDUC. WEEK (Mar. 31, 2015), <https://www.edweek.org/policy-politics/eseas-50-year-legacy-a-blend-of-idealism-policy-tensions/2015/03> [<https://perma.cc/FBV5-7D4G>]; Betheny Gross & Paul T. Hill, *The State Role in K-12 Education: From Issuing Mandates to Experimentation*, 10 HARV. L. & POL'Y REV. 299, 305–06 (2016).

83. Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 336 (2010).

84. See generally Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847 (2018) (elaborating on the structural and cultural features of the Office of Education—the precursor to the modern Department of Education—that explain its failure to enforce *Brown I*'s mandate and suggesting that a deep devotion to federalism was among the reasons for this failure).

85. Lance D. Fusarelli & Jennifer B. Ayscue, *Is ESSA a Retreat from Equity?*, PHI DELTA KAPPAN, Oct. 2019, at 32.

86. MICHAEL J. WARGO, G. KASTEN TALLMADGE, DEBBRA D. MICHAELS, DEWEY LIPE & SARAH J. MORRIS, AM. INSTS. FOR RSCH., *ESEA TITLE I: A REANALYSIS AND SYNTHESIS OF EVALUATION DATA FROM FISCAL YEAR 1965 THROUGH 1970*, at 2 (1972).

87. *Id.* at 73. Interestingly, the same report also found that thirty-seven states were out of compliance with ESEA's mandates and that the law had never been implemented as intended. *Id.*

88. Gross & Hill, *supra* note 82, at 307.

89. See *id.* at 307–08.

90. Black, *supra* note 83, at 339.

children living in areas of concentrated poverty” for Title I grants,⁹¹ more lenient guidelines now allow 90 percent of U.S. school districts to receive them.⁹² Presidents Reagan, Bush, and Clinton all oversaw Departments of Education that diminished federal education regulations.⁹³ Professor Derek W. Black, a noted education law scholar, describes ESEA’s evolution as a watering down of Title I “to the point of ineffectiveness.”⁹⁴

The next attempt at federal oversight was the now infamous No Child Left Behind (NCLB), an ESEA reauthorization bill signed into law by President George W. Bush.⁹⁵ NCLB’s signature effort was a harsh pivot towards accountability. Up until that point, the Department of Education had not imposed “negative consequences on states for not complying” with federal mandates.⁹⁶ Instead of offering support states needed to meet those mandates, NCLB expanded the Department of Education’s role in “how states measured student achievement and intervened in failing schools.”⁹⁷ The new law targeted teachers, rather than “severe poverty, a tattered safety net and inequitable funding” as the source of unequal educational outcomes.⁹⁸ Where the original Title I created a proverbial “carrot,” NCLB added a “stick.”⁹⁹ This “stick” was a combination of punitive measures, which included firing teachers and closing schools.¹⁰⁰ While the federal government exposed existing inequities through NCLB, it did not offer support to schools in addressing them. Many detractors argue that the law actually exacerbated existing inequities.¹⁰¹ As one critic put it, “[i]t is impossible to punish schools that are struggling without punishing the children they serve.”¹⁰²

NCLB’s botched attempt at federal intervention set the stage for a near-total return to state and local control. President Barack Obama oversaw the next ESEA reauthorization, the Every Student Succeeds Act (ESSA).¹⁰³ Former Republican Senator Lamar Alexander celebrated the ESSA as “the single biggest

91. *Id.* at 336.

92. *Id.* at 341.

93. Gross & Hill, *supra* note 82, at 307.

94. Black, *supra* note 83, at 319.

95. Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WEEK (Apr. 10, 2015), <https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04> [<https://perma.cc/K96H-NF7J>].

96. Benton Martin, *An Increased Role for the Department of Education in Addressing Federalism Concerns*, 1 B.Y.U. EDUC. & L.J. 79, 89 (2012).

97. Klein, *supra* note 82.

98. Linda Darling-Hammond, *Redlining Our Schools: Why Is Congress Writing Off Poor Children?*, NATION, Jan. 30, 2012, at 11, 14.

99. Black, *supra* note 83, at 336.

100. *See* Darling-Hammond, *supra* note 98, at 12.

101. *See id.* at 14 (explaining that NCLB’s school “reconstitutions” resulted in high-needs students being taught by unqualified teachers and schools pushing low-performing students out, expanding the school-to-prison pipeline).

102. *Id.*

103. *Every Student Succeeds Act (ESSA)*, *supra* note 80.

step toward local control of public schools in 25 years.”¹⁰⁴ The ESSA did away with NCLB’s punitive measures.¹⁰⁵ It also prohibited the Department of Education from exerting influence over states in decisions related to achievement standards, curriculum, instruction, and assessment.¹⁰⁶ The ESSA did establish a requirement that states establish and submit standards of achievement to the Department of Education, but the Department routinely approves plans that fail to “address equity in meaningful and impactful ways.”¹⁰⁷ Professor Robinson, an outspoken ESSA critic, complained that the law charges “the district that created and tolerated the inequities . . . with addressing them.”¹⁰⁸

While President Donald Trump did not oversee a major ESEA overhaul, his administration clearly indicated their priorities through words and actions. Secretary of Education Betsy DeVos explained her philosophy thusly: “I trust parents, I trust teachers, and I trust local school leaders to do what’s right for the children they serve.”¹⁰⁹ A February 2020 press release announcing Trump’s proposed 2021 Department of Education budget called for “reducing the outsized Federal role in education, and returning control over education decisions to whom it belongs—States and local leaders.”¹¹⁰ Education law and policy experts criticized the Trump administration’s hands-off approach to federal education policy implementation.¹¹¹

104. Gross & Hill, *supra* note 82, at 311.

105. *See id.*

106. *See* Robinson, *supra* note 81, at 937–38.

107. Fusarelli & Ayscue, *supra* note 85, at 36.

108. Robinson, *supra* note 81, at 965.

109. Press Release, U.S. DEP’T OF EDUC., U.S. Secretary of Education Betsy DeVos Announces Release of Updated ESSA Consolidated State Plan Template (Mar. 13, 2017), <http://web.archive.org/web/20210108024803/https://www.ed.gov/news/press-releases/us-secretary-education-betsy-devos-announces-release-updated-essa-consolidated-state-plan-template>.

110. Press Release, U.S. DEP’T OF EDUC., President Trump Proposes Transformative, Student-First Budget to Return Power to States, Limit Federal Control of Education (Feb. 10, 2020), <http://web.archive.org/web/20201207232739/https://www.ed.gov/news/press-releases/president-trump-proposes-transformative-student-first-budget-return-power-states-limit-federal-control-education>.

111. *See, e.g.,* Megan Duff & Priscilla Wohlstetter, *How the Trump Administration Is Falling Short on ESSA*, EDUC. WEEK (July 15, 2019), <https://www.edweek.org/policy-politics/opinion-how-the-trump-administration-is-falling-short-on-essa/2019/07> [<https://perma.cc/2L4J-Y4BR>]; Kenneth K. Wong, *Education Policy Trump Style: The Administrative Presidency and Deference to States in ESSA Implementation*, 50 PUBLIUS 423 (2020) [hereinafter *Education Policy Trump Style*]; Kenneth K. Wong, *Trump’s Administrative Presidency and Its Effort to Weaken Federal Oversight in Public Education*, BROOKINGS INST. (Oct. 12, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/10/12/trumps-administrative-presidency-and-its-effort-to-weaken-federal-oversight-in-public-education/> [<https://perma.cc/BL35-UPSD>] [hereinafter *Trump’s Administrative Presidency*]; Kara Arundel, *Ed Experts Reflect on Long-term Impact of Trump K-12 Policies*, K-12 DIVE (Nov. 6, 2020), <https://www.k12dive.com/news/education-experts-reflect-on-trumps-first-term-k-12-policies/588544/> [<https://perma.cc/RX23-D5ES>] (quoting Liz King, director of education equity programs at the Leadership Conference on Civil and Human Rights, referring to Trump’s education priorities as “a parade of horrors”); Andrew Ujifusa, *Imagine a World With an ESSA Statute—But No Accountability Regulations*, EDUC. WEEK (Feb. 14, 2017), <https://www.edweek.org/policy->

The Trump administration's Department of Education acted in accordance with the above statements, generally "weakening federal oversight and reversing Obama's commitment on civil and student rights in public schools."¹¹² Under Trump, the Department rescinded Obama-era regulations on state academic standards under the ESSA.¹¹³ The Trump administration also "scaled back investigations into civil rights violations"¹¹⁴ and cut the Office of Civil Rights' budget by 22.6 percent.¹¹⁵ Trump also oversaw a retreat from "federal oversight over local use of federal Title I funds."¹¹⁶ This extreme deference to state and local authorities allowed for "significant differences" in "plans for meeting ESSA requirements on accountability, use of evidence-based school improvement strategies, and commitment to equity."¹¹⁷ While the ESSA may have kindled a reversion to greater state and local autonomy, the Trump administration's interpretation and implementation of the Obama law nearly finalized the reversion.¹¹⁸

One area that has not yet been explored in the context of local control failure and education federalism is that of EL education. As the population of ELs in American public schools grows, so too must our attention to their needs. The next Section will shine a light on the intertwined histories of EL education policy, local control, and education federalism.

III.

DEFERENCE TO STATE AND LOCAL AUTHORITIES HAS UNDERMINED FEDERAL EFFORTS TO OVERSEE EL POLICY

In this Section, I will explore the major legal and policy decisions that created our country's approach to educating EL students. As in the previous Section, this Section addresses each branch of federal government and their role in creating a leadership vacuum that harms EL students. This Section will proceed chronologically. Part III.A recounts legislative and judicial actions between 1968 to 1981, which remain important to this day. Part III.B explains how NCLB provided an opportunity for the Court to re-examine its EL education policy jurisprudence. Part III.C introduces the reader to the current landscape of federal policies, regulation, and guidance around EL education policy.

politics/imagine-a-world-with-an-essa-statute-but-no-accountability-regulations/2017/02 [https://perma.cc/BX3C-49V8].

112. Wong, *Trump's Administrative Presidency*, *supra* note 111.

113. Duff & Wohlstetter, *supra* note 111.

114. Kenneth K. Wong, *Obama, Trump, and Education Policy in US Federalism*, OXFORD UNIV. PRESS BLOG (Dec. 10, 2020), <https://blog.oup.com/2020/12/obama-trump-and-education-policy-in-us-federalism/> [https://perma.cc/QC3U-KGSF].

115. Devin Leonard & Shahien Nasiripour, *Betsy DeVos Is the Best Secretary of Education Ever*, BLOOMBERG BUSINESSWEEK, July 22, 2019, at 52, 55.

116. Wong, *Education Policy Trump Style*, *supra* note 111, at 430.

117. *Id.* at 434.

118. See Wong, *Trump's Administrative Presidency*, *supra* note 111.

A. 1968–1981: An Early Attempt at Federal Oversight and Its Demise

The history of modern English learner policy originates in the 1960s, with legislative and judicial actors seemingly aligned on the need for more robust rights and protections for EL students. These efforts ended with a landmark case giving local education authorities broad discretion over EL education policy.¹¹⁹ That decision made it much harder to pursue the goals of federal policies enacted soon before it.

The same impulse that inspired the federal government to create the Department of Education and pass the original version of the ESEA also inspired Congress to take a more active role in EL education policy specifically.¹²⁰ The Bilingual Education Act of 1968 (BEA) “was the first piece of federal legislation to focus exclusively” on EL student needs.¹²¹

The Act minimally intruded on local control of education according to University of California, Irvine School of Law Professor Rachel Moran.¹²² It also reflected a cultural conflict of its time: whether programs should “promote assimilation by overcoming a language deficiency” or “foster pluralism by acknowledging a linguistic asset.”¹²³ At the time, parents of bilingual learners hoped to “eliminate linguistic and cultural barriers to achievement.”¹²⁴ They still saw value in promoting culturally relevant curriculum, as it “could enrich the educational experience” of more than just EL learners.¹²⁵ Many native English speakers considered bilingualism a “useful skill that could benefit every child” and even improve “the nation’s linguistic competencies and tolerance for other cultures,” which could in turn improve the United States’ standing among world nations.¹²⁶ According to reports from the passage of the BEA, legislators recognized a few different purposes of bilingual education specifically, including “instill[ing] a respect for cultural heritage,” “teach[ing] . . . languages to all children,” and “assimilation.”¹²⁷

The Supreme Court weighed in on the issue of EL education in 1974, with *Lau v. Nichols*.¹²⁸ Chinese immigrant parents sued San Francisco Unified School District (SFUSD or San Francisco) for failing to provide supplemental English instruction to their children.¹²⁹ The Court found that San Francisco’s practices violated Title VI of the Civil Rights Act of 1964 (Title VI), which bans

119. *Castañeda v. Pickard*, 648 F.2d 989 (1981).

120. See Rachel Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CALIF. L. REV. 1249, 1249 (1988).

121. *Id.* at 1259.

122. *Id.* at 1263.

123. *Id.*

124. *Id.* at 1261.

125. *Id.*

126. *Id.* at 1262.

127. Luis Rodriguez, Note, *Discretion and Destruction: The Debate Over Language in California’s Schools*, 4 TEX. F. ON C.L. & C.R. 189, 196 (1999).

128. *Lau v. Nichols*, 414 U.S. 563 (1974).

129. *Id.* at 564–65.

“discrimination based ‘on the ground of race, color, or national origin,’ in ‘any program or activity receiving Federal financial assistance.’”¹³⁰ SFUSD, like most U.S. school districts, received federal funding.¹³¹ The Department of Health, Education, and Welfare (HEW) issued guidelines in 1970 requiring federally funded school districts “to rectify the language deficiency” of English Learners in order to “open . . . instruction” to those students.¹³² HEW further specified that recipients of federal funding could not discriminate “in the availability or use of any academic . . . facilities.”¹³³ It seemed “obvious” to the *Lau* Court that the plaintiffs received fewer benefits and were denied “a meaningful opportunity to participate.”¹³⁴ While the Court held that SFUSD had violated Title VI and the associated HEW guidelines, it did not prescribe any particular form of relief.¹³⁵ It did offer a few suggestions: “[t]eaching English,” “[g]iving instructions . . . in Chinese,” and whatever other solutions SFUSD found.¹³⁶ The Court directed SFUSD to “apply its expertise to the problem and rectify the situation.”¹³⁷ Notably, after *Lau*, “the number of states with bilingual education acts more than doubled, and several more states repealed statutes declaring English the sole language of instruction.”¹³⁸

Congress incorporated the *Lau* decision into the Equal Education Opportunity Act of 1974. The Equal Education Opportunity Act (EEOA) entitles “children enrolled in public schools” to “equal educational opportunity without regard to race, color, sex, or national origin.”¹³⁹ It “defined the responsibility of state and local agencies to provide equal educational opportunity” and recognized a private right of action for students to ensure that agencies fulfilled that responsibility.¹⁴⁰ The Act additionally increased educational agencies’ dependence on the federal government for EL education support by establishing eligibility requirements for grants under the Bilingual Education Act.¹⁴¹ Congress assembled a group of “bilingual educators, lawyers, and representatives of linguistic minority groups” to create “guidelines to help school districts.”¹⁴² These guidelines, combined with increased availability of BEA

130. *Id.* at 566 (quoting 42 U.S.C. § 2000d).

131. *Id.*

132. *Id.* at 567 (citation omitted).

133. *Id.* at 567–68 (citation omitted).

134. *Id.* at 568.

135. *Id.* at 569.

136. *Id.* at 564–65.

137. *Id.* at 565.

138. Moran, *supra* note 120, at 1283.

139. 20 U.S.C. § 1701(a).

140. Jeffrey Mongiello, *The Future of the Equal Educational Opportunities Act § 1703(f) After Horne v. Flores: Using No Child Left Behind Proficiency Levels to Define Appropriate Action Towards Meaningful Educational Opportunity*, 14 HARV. LATINO L. REV. 211, 219 (2011).

141. Moran, *supra* note 120, at 1276, 1278–79.

142. *Id.* at 1280.

grants, “increased federal influence over curricular decisions,” according to Moran.¹⁴³

The EEOA’s vague language prevented Congress from maintaining its supremacy over EL education. For example, the EEOA adopted *Lau*’s definition of discrimination into § 1703(f),¹⁴⁴ which requires educational agencies to “take appropriate action to overcome language barriers that impede equal participation,”¹⁴⁵ but declined to take a stance on what appropriate action meant.¹⁴⁶ Additionally, the EEOA did not endorse a particular pedagogy.¹⁴⁷ It emphasized “assimilation”¹⁴⁸ and required efforts to remove language barriers, but it did not even require access to bilingual education.¹⁴⁹ Legislative history indicates that President Nixon supported the EEOA in part to prevent judges from “defining and shaping” EL education in the same way they had defined and shaped desegregation.¹⁵⁰ Ironically, despite Nixon’s desire to avoid judicial lawmaking, the EEOA’s broad language required interpretation, so the judiciary got involved.¹⁵¹

The Fifth Circuit created a still-relevant “three-prong test” in *Castañeda v. Pickard* that looked at a EL program’s basis in sound educational theory, how the program was put in place, and the actual effect of the program after a trial period to evaluate if there was a violation of § 1703(f).¹⁵² In *Castañeda*, Mexican-American families brought a class action lawsuit against a Texas school district and alleged that the district had violated Title VI and the EEOA by “failing to implement adequate bilingual education to overcome . . . linguistic barriers.”¹⁵³ The district, which served a predominantly Mexican-American population,¹⁵⁴ only offered bilingual classes from kindergarten through third grade.¹⁵⁵ After third grade, classes were conducted exclusively in English, with “Spanish-speaking teacher aides” to assist students whose language “difficulties” impaired “their ability to participate in classroom activities.”¹⁵⁶

143. *Id.* at 1279, 1276 (“[T]he decision increased state and local educational agencies’ dependence on grants under the Bilingual Education Act, thereby further reducing their discretion.”).

144. *See id.* at 1270–71.

145. *Id.* at 1271.

146. *See id.* at 1274 (“[A]lthough the *Lau* Court had not mandated a particular remedy, their proposal embodied the best approach to meeting [EL] students’ acknowledged needs.”); Mongiello, *supra* note 140, at 219 (“[C]onsistent with *Lau*, Congress never required nor mandated that a student have access to a bilingual program.”).

147. *See Moran, supra* note 120, at 1263.

148. *Id.* at 1263.

149. Mongiello, *supra* note 140, at 218–19. This is important because it endorses an assimilationist, rather than multicultural, approach to teaching ELs.

150. *Id.* at 219.

151. *Id.* at 212, 219.

152. *Castañeda v. Pickard*, 648 F.2d 989, 1009–10 (1981).

153. *Id.* at 992.

154. *Id.* at 993.

155. *Id.* at 1004–05.

156. *Id.* at 1005.

One third of the district's students received additional language support after third grade through school-specific "learning centers."¹⁵⁷ The plaintiffs sought a language program that emphasized development of English and Spanish language skills equally.¹⁵⁸

The court applied its factors to the district's curriculum choice and teacher preparation efforts. The first factor—basis in sound educational theory—was not at stake in the case. The district's curriculum emphasized English proficiency, sometimes sacrificing "learning in other areas."¹⁵⁹ The court found that this approach fulfilled the second factor's mandate. It held that the EEOA left school districts "free to determine the sequence and manner" in which ELs "tackle this dual challenge" of developing English proficiency and other academic area skills and knowledge.¹⁶⁰

The court was not so forgiving on the issue of teacher preparation. The record indicated that some bilingual teachers had a "very limited command of Spanish" and were not required to demonstrate objective mastery of even the district's Spanish requirements, which imposed a minimum vocabulary of only seven hundred words.¹⁶¹ The court found that teacher preparation failed to pass the second factor because "deficiencies in the in-service training of teachers for bilingual classrooms seriously undermine the promise of the district's bilingual education program."¹⁶² The Fifth Circuit remanded the issue of teacher training to the district court to determine the precise origin of the failure.¹⁶³ The court acknowledged that the teachers' incompetence could be alternatively attributed to training program inadequacies, insufficient requirements (such as the 700-word requirement) or individual failure to master material.¹⁶⁴

Castañeda, in addition to further cementing the supremacy of local control, made alarming statements regarding Title VI, *Lau*, and *University of California Regents v. Bakke*. The *Castañeda* court found that under *Lau*'s interpretation of Title VI, only school districts that "failed to provide *any* English language assistance" to EL students violated federal civil rights law.¹⁶⁵ Further, the court noted that *Bakke* had created a discriminatory purpose or intent requirement for a Title VI violation.¹⁶⁶

Ultimately, *Castañeda* contributed to federal EL education policy in two major ways. First, it created a three-prong test that gave school districts the

157. *Id.*

158. *Id.* at 1006.

159. *Id.* at 1011.

160. *Id.*

161. *Id.* at 1012.

162. *Id.* at 1013.

163. *Id.*

164. *Id.*

165. *Id.* at 1006.

166. *Id.* at 1007.

benefit of the doubt and significant autonomy.¹⁶⁷ Second, it expressed a heightened standard for finding a Title VI violation.¹⁶⁸ *Castañeda* ultimately “restricts the ability of courts to interfere in the decisions of a school district, unless [the district] completely fails to act.”¹⁶⁹

B. 2009–2015: The Supreme Court Re-Examines EL Education

This Section introduces and analyzes *Horne v. Flores*, in which the Supreme Court considered the issue of EL education policy.¹⁷⁰ NCLB’s passage provided the Court with the opportunity to reconsider local education authorities’ implementation of federal mandates regarding EL students. The result should not surprise the reader; the Court found that local education authorities had broad authority and discretion over EL policy.

In 1992, a group of EL students sued an Arizona school district for “providing inadequate EL[] instruction” under the EEOA.¹⁷¹ In January 2000, a U.S. District Court found that the school district had violated the EEOA.¹⁷² That case led the court to scrutinize the entire state’s EL funding system and impose various orders and injunctions related to the system.¹⁷³ In 2006, the State took a new approach: it argued that the passage of NCLB in 2001 constituted “changed circumstances” that warranted lifting the earlier sanctions imposed on the state.¹⁷⁴ State Superintendent of Public Instruction Tom Horne asserted that compliance with NCLB “established compliance with the EEOA.”¹⁷⁵ The Court disagreed.

The Court found that NCLB compliance did not require “a determination that [EL] programming results in equal educational opportunity.”¹⁷⁶ Still, the Court found NCLB “probative” to the issue of EL instruction effectiveness.¹⁷⁷ Most notably, NCLB disentangled the issues of funding and effective instruction. The Court held that the school district in question could now show EEOA compliance “by means other than increased funding—for example, through . . . structural, curricular, and accountability-based reforms.”¹⁷⁸ The Court also rejected the relevance of “persistent achievement gaps” between EL and native

167. See Rodriguez, *supra* note 127, at 223.

168. See *id.* at 208 (citing *Castañeda*, 648 F.2d at 1007).

169. *Id.* at 223.

170. *Horne v. Flores*, 557 U.S. 433 (2009).

171. *Id.* at 440.

172. *Id.* at 441.

173. *Id.*

174. *Id.* at 461.

175. *Id.* at 462.

176. *Id.*

177. *Id.* at 463.

178. *Id.* at 467.

English speaker students.¹⁷⁹ It held that the EEOA only requires “appropriate action,” not “equalization of results between native and nonnative speakers.”¹⁸⁰

Under *Horne*, EL students and their advocates can demand neither increased financial support nor equal outcomes. *Horne* only requires appropriate action, and lets local authorities define that term.¹⁸¹ *Horne* encourages courts to “give great deference to states and school districts” because of these entities’ expertise in the areas of budget, policy, and educational programming.¹⁸² Some have argued that *Horne* even foreclosed the possibility of using the EEOA to advocate for quality EL education.¹⁸³

As a result of *Horne*, EL education advocates had weak legal ground for advocacy efforts until 2015. NCLB, however, provided a useful tool for EL education advocates. From 2002 to 2015, NCLB tied student outcomes to school funding. NCLB utilized “high-stakes testing” “to prove that students are making what the law terms ‘adequate yearly progress’ toward achieving ‘annual measurable achievement objectives.’”¹⁸⁴ The law required states to show that ELs made “yearly progress” towards proficiency in math and English.¹⁸⁵ A state report, which showed a failure to meet that goal, could form the basis of a complaint under the EEOA *if a district or state also failed to take appropriate action*. NCLB was not without consequences. While NCLB provided federal accountability, the means of doing so unfairly penalized EL students. For EL students, tests inevitably assessed language proficiency rather than “academic content knowledge” because all tests were conducted in English, thus limiting the potential for students who were not yet English-proficient to demonstrate their knowledge.¹⁸⁶ Furthermore, schools with high numbers of EL students were “disproportionately likely to face sanctions under the accountability mandates of NCLB.”¹⁸⁷ In 2015, the federal government eliminated much of NCLB’s federal accountability aspects by enacting the ESSA.

C. 2015–2021: Deference to States and Localities, with Gentle Federal Guidance

This Section provides an overview of current federal policy on EL education. While the Department of Education under Obama attempted to provide non-binding guidance to states and localities, these efforts stagnated under President Trump.

179. *Id.*

180. *Id.*

181. *Id.* at 454.

182. Elizabeth Fenner, Note, *The Future of English Language Learner Education: The Need for Dedicated Advocacy through Litigation and Legislation*, 18 TEX. HISPANIC J. L. & POL’Y, 81, 96 (2012).

183. *Id.*; see Mongiello, *supra* note 140, at 225.

184. Menken, *supra* note 13, at 163.

185. Mongiello, *supra* note 140, at 212.

186. Menken, *supra* note 13, at 163.

187. *Id.*

The ESSA cemented the federal government's commitment to education federalism. This commitment extends to its guidelines regarding EL students. The ESSA requires states to adopt "English language proficiency standards" in "speaking, listening, reading, and writing."¹⁸⁸ These standards must align with "challenging State academic content standards."¹⁸⁹ States must assess all EL students every year, and must establish long-term goals for increasing the percentage of students "achieving English language proficiency."¹⁹⁰ However, the proficiency standards, academic standards, contents of the assessment, and long-term goals are all to be determined by the state. States determine when a learner qualifies as an EL student, benchmarks for progress towards proficiency, and when students have achieved English proficiency.¹⁹¹

The Department of Education provides additional guidance through fact sheets, manuals, and Dear Colleague letters, all available on its Office of Civil Rights website. Fact sheets explain states' and districts' legal obligations to ELs and their families and expectations for statewide assessments.¹⁹² A collection of short documents explains key elements of the federal government's expectations for state EL initiatives.¹⁹³ These expand upon a 2015 Dear Colleague letter, which summarized, in lay terms, components of the ESSA, EEOA, and Title VI defining EL rights.¹⁹⁴ The letter, published jointly by the Department of Education's Office of Civil Rights and the Department of Justice's Civil Rights Division (the Departments), emphasizes supporting compliance. It identifies ten "Common Civil Rights Issues" associated with state EL programs:

- (1) Identifying and Assessing All Potential EL students,
- (2) Providing EL Students with a Language Assistance Program
- (3) Staffing and Supporting an EL program
- (4) Providing Meaningful Access to All Curricular and Extracurricular Programs
- (5) Avoiding Unnecessary Segregation of EL Students
- (6) Evaluating EL Students for Special Education Services and Providing Special Education and English Language Services
- (7) Meeting the Needs of EL Students Who Opt Out of EL Programs or Particular EL Services
- (8) Monitoring and Exiting EL Students from EL Programs and Services
- (9) Evaluating the Effectiveness of a District's EL Program,
- (10) Ensuring Meaningful

188. 20 U.S.C. § 6311.

189. *Id.*

190. *Id.*

191. *See id.*

192. *See, e.g.*, U.S. DEP'T OF EDUC., EVERY STUDENT SUCCEEDS ACT: ACCOUNTABILITY, STATE PLANS, AND DATA REPORTING: SUMMARY OF FINAL REGULATIONS, <https://www2.ed.gov/policy/elsec/leg/essa/essafactsheet1127.pdf> [<https://perma.cc/BB3K-2ST7>].

193. Off. of Eng. Language Acquisition, *English Learner Tool Kit*, DEP'T OF EDUC. (Jan 14, 2018), <https://www2.ed.gov/about/offices/list/oela/english-learner-toolkit/index.html> [<https://perma.cc/7M3R-METB>].

194. Catherine E. Lhamon, Assistant Sec'y for C.R., U.S. Dep't of Just., & Vanita Gupta, Acting Assistant Att'y Gen. for C.R., U.S. Dep't of Educ., Dear Colleague Letter: English Learner Students and Limited English Proficient Parents 4 (Jan. 7, 2015).

Communication with Limited English Proficient Parents.¹⁹⁵

However, the letter assures readers that “there is more than one way to comply with the Federal obligations.”¹⁹⁶ The letter goes on to discuss each of the ten identified issues, including general examples of compliant practices, noncompliant practices, and elements the Departments consider when investigating district practices. Even this forty-page letter uses vague language, leaving definitions of words like “effective,” “adequate,” and “meaningfully participate” up to state and local officials to interpret.

In addition to the Department’s authoring of the letter, the Department of Education Office of English Language “provides national leadership” on supporting students’ English language acquisition.¹⁹⁷ The Office of English Language provides some of the manuals discussed above. It also links to the National Clearinghouse for English Language Acquisition, which disseminates “information about educational research, practices, and policies for English Learners.”¹⁹⁸ The Clearinghouse features an online resources library targeting “stakeholders” who want to learn more about EL education.¹⁹⁹ For teachers, the Clearinghouse promises “practice briefs and podcast episodes on instructional approaches and strategies.”²⁰⁰

The ESSA and the associated guidelines show the dominance of education federalism, which is, as discussed previously, a dramatic shift from the egalitarian intentions of laws governing EL education. The Bilingual Education Act, which reflected a belief in multiculturalism and equal opportunity, was the first law to recognize the special needs of EL learners. *Lau* asserted that American public schools were responsible for their EL students’ outcomes and afforded the students additional protections under federal law.

However, ensuing cases and legislation undid much of the progress gained in the mid-twentieth century. *Castañeda* prescribed a vague, state-friendly framework for EL curriculum, and indicated that EL education could no longer be pursued as a civil rights issue. NCLB offered the possibility of enforcing EL education standards, but *Horne* foreclosed this possibility while also strengthening the hold of education federalism within EL policy. *Horne* gave states and school districts broad discretion over their approach to educating EL students. ESSA affirmed this approach and even broadened state autonomy. Now, EL education is almost exclusively left to state and local entities. The next

195. *Id.*

196. *Id.* at 9.

197. Off. of Eng. Language Acquisition, *Home Page*, U.S. DEP’T OF EDUC. (June 1, 2021) <https://www2.ed.gov/about/offices/list/oela/index.html> [<https://perma.cc/2NXJ-GZ9A>].

198. *Id.*

199. *Resource Library*, NAT’L CLEARINGHOUSE FOR ENG. LANGUAGE ACQUISITION, <https://www.nclae.org/resource-library> [<https://perma.cc/9DDU-3XZ4>].

200. *Teacher Resources*, NAT’L CLEARINGHOUSE FOR ENG. LANGUAGE ACQUISITION, <https://www.nclae.org/teacher-resources> [<https://perma.cc/LV37-2X84>].

Section will explore how California and Texas adapted to their increasingly great responsibility with regards to educating EL students.

IV.

STATE EFFORTS TO STANDARDIZE EL EDUCATION HAVE NOT GONE FAR ENOUGH TO COMBAT LOCAL CONTROL

California and Texas have the highest percentages and largest populations of EL learners in the United States. Their EL education policies have impacted millions of Americans, and their successes and failures in this area are influential and instructive. Because of their large EL student populations, these states have more occasion than others to deeply consider their approach towards EL education. Also, their relationships with EL education are as old as their statehoods. This means that their opportunity to address EL needs is not only constant, but also integral to their identity. Each of their markedly different approaches to EL education offer lessons for legal advocates and policymakers alike.

A. California's Long-Standing Antipathy Towards Immigrants and Minority Language Speakers Still Affects Students and Families

California's EL policy parallels the state's history of anti-immigrant sentiment and action. While major laws in the late twentieth century severely curtailed opportunities and services available to ELs, recent changes reflect the state's willingness to course correct.

California's modern EL education regime arguably begins with the passage of California Proposition 63 (Prop 63) in 1986, which made English the official language of the State of California. Prop 63 "advised public officials 'to insure that the rule of English as the common language of the State of California is preserved and enhanced.'"²⁰¹ The same anti-immigrant views that propelled Prop 63 to 74 percent voter approval led to an equally overwhelming passage of California Proposition 227 (Prop 227). Prop 227 all but eliminated all forms of EL education other than "sheltered English immersion,"²⁰² where EL students are isolated in remedial English Language courses until they attain proficiency. Sheltered English immersion existed before Prop 227 but became the almost universal method of educating EL students after its passage.²⁰³ Prop 227's most

201. Rodriguez, *supra* note 127, at 211.

202. *Id.* at 190.

203. *California Proposition 58, Non-English Languages Allowed in Public Education (2016)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_58,_Non-English_Languages_Allowed_in_Public_Education_\(2016\)#Campaign_finance](https://ballotpedia.org/California_Proposition_58,_Non-English_Languages_Allowed_in_Public_Education_(2016)#Campaign_finance) [https://perma.cc/MZX5-Z22A]. Prop 227 required classes be taught predominantly in English and shortened the time that ELs spent in "special classes before moving to regular classes." *Id.* Parents could "opt their children into bilingual programs by signing a waiver. The waiver is approved if one of three conditions is met. First, the student must have 'attended an English-only classroom for at least 30 days'" and their "teachers, principal, and district superintendent" must "all agree [they] would learn better in a

prominent proponent, Ron Unz, held a “disdain for multiculturalism and a preference for swift immigrant assimilation.”²⁰⁴ Other proponents of both Prop 227 and Prop 63 feared the erosion of “national unity” and believed that English immersion would enforce a “common linguistic heritage.”²⁰⁵ Prop 227’s passage reflected widespread racism against Mexican-American and other Latinx communities.²⁰⁶

Prop 227 harmed students, teachers, and immigrant communities, and it destroyed “programmatically, educational, and sociopolitical advances” towards EL educational equity.²⁰⁷ Immediately, the percentage of EL students enrolled in bilingual programs dropped from 29 percent to 8 percent,²⁰⁸ and the achievement gap between native English speakers and EL students widened in the first year of Prop 227’s implementation.²⁰⁹ Jennifer Chacón, an immigration law professor at UC Berkeley, noted in 2008 that Latinx students were severely underrepresented in California institutions of higher education.²¹⁰ She blamed this underrepresentation in part on the impossibility of meeting matriculation requirements while in isolated English immersion classes.²¹¹

Some of the above harm to students arose from Prop 227’s effect on teachers in non-English immersion programs. Educators in bilingual programs were especially disadvantaged. They became “legally liable for not teaching . . . under the guidelines established by the proposal.”²¹² In practice, this meant that teachers could face legal consequences for translating even classroom directions or rules into a student’s native language. To make matters worse, the State never provided these teachers with the resources necessary to make the shift: for at least a year after Prop 227’s implementation, there was no associated

bilingual program.” *Id.* Second, the “student must be at least 10 years old. Third, the student is already a fluent English speaker.” *Id.*; see also Ashley Hopkinson, *A New Era for Bilingual Education: Explaining California’s Proposition 58*, EDSOURCE (Jan. 6, 2017), <https://edsources.org/2017/a-new-era-for-bilingual-education-explaining-californias-proposition-58/574852> [<https://perma.cc/R579-CRTN>] (“[I]f more than 20 parents or guardians from any one grade level or 30 parents or guardians from an entire school make a collective request for a dual language or bilingual program, the school site is required to at least explore the possibility of creating one.”).

204. Rodríguez, *supra* note 127, at 191.

205. *Id.* at 206.

206. Elsa O. Valdez, *Winning the Battle, Losing the War: Bilingual Teachers and Post-Proposition 227*, 33 URB. REV. 237, 240, 247 (2001); see Rodríguez, *supra* note 127, at 197.

207. Nena M. Tórréz, *Incoherent English Immersion and California Proposition 227*, 33 URB. REV. 207, 209 (2001).

208. Menken, *supra* note 13, at 162.

209. Elizabeth T. Bangs, *Who Should Decide What is Best for California’s LEP Students? Proposition 227, Structural Equal Protection, and Local Decision-Making Power*, 11 LA RAZA L.J. 113, 124 (2000); Menken, *supra* note 13, at 165.

210. Jennifer M. Chacón, *Race as a Diagnostic Tool: Latinas/os and Higher Education in California, Post-209*, 96 CALIF. L. REV. 1215, 1223 (2008).

211. *Id.* at 1240.

212. Rodríguez, *supra* note 127, at 194.

curriculum.²¹³ The challenges teachers faced under Prop 227 contributed to its harmful impact on students and families.

Instead of helping immigrant communities integrate into English-speaking society, Prop 227 amplified animus. As a baseline matter, the law itself was a form of discrimination, since it restricted parents' decision-making power over their children's education solely on the basis of race and national origin.²¹⁴ It also reinforced the fallacy of English language superiority.²¹⁵ This in turn bolstered antagonism towards Latinx communities, especially when those communities advocated for their rights to equal educational opportunity.²¹⁶

Despite the law's negative consequences on students, teachers, and immigrant communities, legal challenges to Prop 227 failed on the basis of education federalism. In *Teresa P. v. Berkeley Unified School District*, the federal district court for the Northern District of California found that Prop 227 did not violate the EEOA because it constituted a "good faith effort[]." ²¹⁷ Under *Castañeda*, California was not required to "implement an ideal academic program," or require school districts to provide "bilingual, primary language" programs favored by many EL students' parents.²¹⁸ State and local authority over education resulted, once again, in unequal opportunities for marginalized students.

Soon after the passage of the ESSA, California changed course. In 2016, California voters overwhelmingly approved California Proposition 58 (Prop 58), which implemented the California Multilingual Education Act.²¹⁹ Then-state senator Ricardo Lara, now the California Insurance Commissioner, developed the legislation. It rescinded the de facto ban on English-only instruction. Under Prop 58, schools may "utilize multiple programs, including bilingual education."²²⁰ Prop 58 does not require schools to create new programs.²²¹ It does require that schools and districts "solicit parent/community input in developing language acquisition programs."²²² This means that, "to the extent possible," schools and districts must include parents and community members in

213. Bangs, *supra* note 209, at 123; *see* Valdez, *supra* note 206, at 246.

214. Bangs, *supra* note 209, at 125; Valdez, *supra* note 206, at 248.

215. Rodriguez, *supra* note 127, at 194 ("[Jaime] Escalante maintained that English is the language of negotiation in America and a mastery of the tongue leads to success.").

216. *See* Valdez, *supra* note 206, at 238 ("Proposition 227 intensified animosity between bilingual advocates and antibilingual supporters."); *id.* at 240 ("[A]nti-Spanish attitudes flourish when Latino language and culture is viewed as unequal and undemocratic, and monolithic."); *see also* Chacón, *supra* note 210, at 1256 ("[V]oters may have seen the interests of a growing, largely Latina/o immigrant population as antithetical to their own.").

217. *Teresa P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 714 (N.D. Cal. 1989).

218. *Id.* at 702, 713.

219. Hopkinson, *supra* note 203.

220. *California Proposition 58, Non-English Languages Allowed in Public Education (2016)*, *supra* note 203.

221. *See id.*

222. *Id.*

discussions around changes to EL education.²²³ Prop 58 supporters included the California Teachers Association and its Political Action Committee, the California Democratic Party, the California Chamber of Commerce, and the Service Employees International Union. The California Republican Party opposed the measure.

Prop 58's passage indicates a shift in attitude with regard to California's 1.4 million Spanish-speaking EL learners.²²⁴ Notably, its proponents also touted it as a restoration of local control in addition to its value as a vehicle for "intercultural interactions and empathy."²²⁵ Before Prop 58, only 425 California public schools had bilingual programs.²²⁶ Since Prop 58's passage, this number has grown to 493.²²⁷ For context, there are over ten thousand public schools in California.

One challenge facing bilingual expansionists is a lack of qualified teachers. Though districts and schools have increased their demand for bilingual educators, the need is not being met. The State government addressed the demand for bilingual programs with a \$5 million grant distributed across "four school districts and four county offices of education."²²⁸ These local authorities included Sacramento County and Los Angeles County.²²⁹ The latter administers an annual educational programs budget of \$170 million.²³⁰

The State retains authority over directing compliance with the ESSA. California promotes compliance with the ESSA through state English Language Development (ELD) standards and online guidance. California's ELD standards are thorough and aligned with state and Common Core academic standards. The standards sort ELs into three categories of proficiency: "Emerging," "Expanding," and "Bridging."²³¹ They divide academic work products into three "modes of communication:" "Collaborative," "Interpretive," and "Productive."²³² They also distinguish between two forms of language acquisition: "Metalinguistic Awareness" and "Accuracy of Production."²³³ The

223. Hopkinson, *supra* note 203.

224. *Id.*

225. *California Proposition 58, Non-English Languages Allowed in Public Education (2016)*, *supra* note 203.

226. Hopkinson, *supra* note 203.

227. *See, e.g., Dual Language Schools: California*, DUALLANGUAGESCHOOLS.ORG, <https://duallanguageschools.org/schools/ca/> [<https://perma.cc/32FU-XN4K>].

228. Ashley Hopkinson, *Amidst Teacher Shortage New Funds Help Districts Train More Bilingual Teachers*, EDSOURCE (Oct 2, 2018), <https://edsource.org/2018/amidst-teacher-shortage-new-funds-help-districts-train-more-bilingual-teachers/603005> [<https://perma.cc/8L4M-R7JH>].

229. *Id.*

230. L.A. CNTY. OFF. OF EDUC., FACTS & STATISTICS 1 (2017), http://prekkid.org/wp-content/uploads/2017/04/HS-FACTS-2017_WEB.pdf [<https://perma.cc/KM8C-A5HE>].

231. CAL. DEP'T OF EDUC., CALIFORNIA ENGLISH LANGUAGE DEVELOPMENT STANDARDS: KINDERGARTEN THROUGH GRADE 12 11 (Faye Ong & John McClean eds., 2014).

232. *Id.* at 19.

233. *Id.* Metalinguistics involves control over parts of speech, whereas accuracy of production refers to the ability to express a concept through language. *See id.*

standards, which can be found on the California Department of Education (CDE) website, include standards for grade levels K-12, subdivided by each of the categories named above.²³⁴ The State mostly delegates attainment of the standards and interpretation of the terms to schools and school districts. Schools and districts are also responsible for program and curriculum design, professional development, and benchmark assessment creation to individual schools and districts.²³⁵

California imposes a few general mandates and expectations on districts beyond compliance with federal law. The CDE requires schools to provide both designated and integrated ELD in classrooms with ELs.²³⁶ Designated ELD is a protected part of the academic day devoted to acquiring English language. Integrated ELD encompasses mainstream classroom practices, which incorporate standards and principles of language development. The State expects districts to work towards two goals: (1) supporting ELs in achieving “parity” with native English speakers and (2) supporting ELs in achieving “the same rigorous grade-level academic standards” as their peers.²³⁷ CDE suggests three models for teaching ELs but notes that these are not the only possible effective options.²³⁸ The models are dual-language immersion, transitional immersion, and structured English immersion.²³⁹

California provides its schools with a robust structure of standards and laudable goals. Prop 58’s passage represents a significant and important step toward providing equal educational opportunity to ELs in California. Its impact is hard to discern, both because of its relative newness and because California transitioned to a new form of EL progress assessment in the 2017–2018 school year.²⁴⁰ This makes data for the last two school years impossible to compare to prior years. In 2018, 48.3 percent of ELs made progress towards English proficiency.²⁴¹ That same year, 70.9 percent of ELs graduated from high school.²⁴² The next year, this number increased by 1.7 percent.²⁴³

234. *See id.*

235. *See California English Learner Roadmap State Board of Education Policy: Educational Programs and Services for English Learners*, CAL. DEP’T OF EDUC., (Dec. 4, 2020), <https://www.cde.ca.gov/sp/el/rm/elroadmappolicy.asp> [<https://perma.cc/ZQ97-CGNZ>].

236. *Id.*

237. *Facts About English Learners in California – CalEd*, CAL. DEP’T OF EDUC. (Apr. 29, 2021), <https://www.cde.ca.gov/ds/ad/cefelfacts.asp> [<https://perma.cc/X5MU-FFV6>].

238. *Id.*

239. *Id.*

240. Laura Hill, *K-12 Reforms and California’s English Learner Achievement Gap*, PUB. POL’Y INST. OF CAL. (May 2018), <https://www.ppic.org/publication/k-12-reforms-and-californias-english-learner-achievement-gap/> [<https://perma.cc/WQJ7-Y47G>].

241. *State of California*, CAL. SCH. DASHBOARD (2019), <https://www.caschooldashboard.org/reports/ca/2019/academic-performance#english-learner-progress> [<https://perma.cc/FHF3-7P3E>].

242. *Id.*

243. *Id.*

Progress in the State still faces significant hurdles. Prop 227's demise is so recent that many current ELs still feel its impact. Further, a shortage of qualified teachers and a heavy reliance on local control yields inconsistent opportunities, experiences, and outcomes for California's 1.4 million ELs.²⁴⁴

B. Inadequate Spending Undermines Centralized Efforts to Improve EL Education in Texas

Despite longstanding statewide mandates regarding EL education, Texas largely fails its EL population. This Section explains the major reasons for that failure: broadly, inadequate funding and deference to local educational authorities.

Texas is now a “national epicenter” for bilingual education, but that has not always been the case.²⁴⁵ In the first half of the twentieth century, school districts enlisted an arsenal of tools to perpetuate the segregation of EL learners.²⁴⁶ Native English speaker Texans justified this segregation by labeling Mexican-American students, who were the primary victims of segregation, as “‘linguistically’ or ‘educationally’ handicapped.”²⁴⁷

As early as the 1950s, parents and advocates started bringing legal action against Texas schools.²⁴⁸ Following the *Lau* decision, Latinx advocacy groups, particularly the Mexican American Legal Defense and Education Fund (MALDEF), brought a slew of desegregation cases based on national origin and language ability.²⁴⁹ Bilingual education became the advocates' goal as early as the 1970s because of its potential as a tool for cultural maintenance and a potent tool in English acquisition.²⁵⁰ A 1968 law “remov[ed] a prohibition” on bilingual programs in public schools, paving the way for MALDEF's efforts throughout the next decade.²⁵¹

MALDEF and its allies, including the League of United Latin American Citizens (LULAC) won significant victories for the bilingual education movement in Texas. In 1971, a U.S. district court required a Texas school district to establish a bilingual program, in *United States v. Texas*.²⁵² The case had two

244. Hopkinson, *supra* note 228.

245. Kauffman, *supra* note 8, at 862.

246. *Id.* at 871 (“[In the first half of the twentieth century,] [s]chools used freedom-of-choice plans, gerrymandered zones, option zones, transfer policies, construction of neighborhood schools, and public transportation plans to perpetuate segregation.”).

247. Guadalupe San Miguel, Jr., *Mexican American Organizations and the Changing Politics of School Desegregation in Texas, 1945 to 1980*, 63 SOC. SCI. Q. 701, 702 (1982).

248. *Id.* at 708.

249. Kauffman, *supra* note 8, at 875.

250. San Miguel, *supra* note 247, at 711; Kauffman, *supra* note 8, at 876.

251. Albert Cortez & Roy L. Johnson, *Bilingual Education in Texas – Where It Is Now, and What Is Still Needed*, IDRA NEWSLETTER (Intercultural Dev. Rsch. Ass'n., San Antonio, Tex.), Nov.–Dec. 2008, at 3, 3, http://www.idra.org/wp-content/uploads/2018/01/Newsltr_NovDec2008.pdf [<https://perma.cc/7YU6-SMD3>].

252. San Miguel, *supra* note 247, at 711–12.

important consequences. First, it “led to a comprehensive order against the entire State of Texas requiring school districts to make significant improvements in Texas’s bilingual education program, including changes in the curriculum, faculty, materials, and protocols for implementation.”²⁵³ Second, it “became a model for how to design and implement a proper program of instruction for non-English speakers.”²⁵⁴ The case desegregated all Texas schools by requiring the state “to offer a constitutional system of bilingual education to all qualified students.”²⁵⁵ Though ultimately overturned by the Fifth Circuit Court of Appeals, *United States v. Texas* provided state Senator Carlos Truan with a blueprint for what would eventually become the state’s bilingual education mandate, Senate Bill (S.B.) 477.²⁵⁶ Passed in 1981, S.B. 477 prescribed “uniform procedures for student identification and placement, [and] established exit criteria for students to be transitioned out of the mandated program.”²⁵⁷ It required any district with an enrollment of twenty or more EL students to offer targeted language instruction,²⁵⁸ and established a 10 percent increase in funding for each student enrolled in a bilingual program.²⁵⁹

Texas continues to impose some statewide requirements for EL education programs. Districts with bilingual programs must establish Language Proficiency Assessment Committees (LPAC).²⁶⁰ Each LPAC must include (1) a bilingual educator, (2) a transitional language educator, (3) a parent of an EL student, and (4) a campus administrator.²⁶¹ LPACs help districts comply with the State’s mandates, which include achieving ELD standards.²⁶²

The State also has a heavy hand in ensuring compliance. Through periodic evaluations, Texas measures school districts on their program content, design, and coverage; identification and classification procedures; staffing; learning and testing materials; reclassification; and LPAC activities.²⁶³ For aspiring bilingual and transitional program teachers, the State has strict credentialing requirements.²⁶⁴ For current teachers, the State provides online resources on curriculum development and lesson planning, as well as links to regional professional development opportunities.²⁶⁵

253. Kauffman, *supra* note 8, at 891.

254. *Id.*

255. *Id.* at 879.

256. *Id.* at 891.

257. Cortez & Johnson, *supra* note 251, at 3.

258. TEX. EDUC. CODE ANN. § 29.053(c) (West 2018).

259. Kauffman, *supra* note 8, at 893.

260. TEX. EDUC. CODE § 29.063 (West 2018).

261. *Id.*

262. 19 TEX. ADMIN. CODE § 74.4 (2021). Unlike California and Nevada, Texas’s ELD standards are codified into state law.

263. TEX. EDUC. CODE § 29.062 (West 2018).

264. *Id.* § 29.061.

265. *Supporting English Learners in Texas: Teachers*, TEX. EDUC. AGENCY, <https://www.txel.org/teachers/> [<https://perma.cc/UH2X-KBN2>].

Despite early victories and robust structure, EL education in Texas is hardly a success story. While 70 percent of Texas EL students graduate high school, only 24 percent progressed towards English proficiency in 2013–2014, and only 25 percent attained proficiency.²⁶⁶ These failures can in large part be attributed to the State’s failure to financially support education and the disproportionate impact that decision has on school districts with large EL populations.

Texas’s underfunding of education is not specific to EL programming.²⁶⁷ EL students feel the impact more severely because of the high cost of EL education²⁶⁸ and Texas’s reliance on local tax bases to fund education.²⁶⁹ EL programs require “significantly more per-pupil funding.”²⁷⁰ The problem is that Mexican-Americans, who make up the bulk of Texas’s EL population, “are concentrated in the very poorest districts.”²⁷¹ Education funding in Texas relies overwhelmingly on local property taxes.²⁷² This creates a few problems. First, property values in poor areas are lower.²⁷³ Even when these districts set taxes at the maximum rate of \$1.17 per \$100 of property value,²⁷⁴ they cannot fund even “adequate” educational opportunities for their students.²⁷⁵ EL programs in particular are “significantly underfunded.”²⁷⁶ The State’s 10 percent contribution is insufficient. In 2016, before the Texas Supreme Court overruled it, a Texas court found that the State should increase its contribution to 40 percent.²⁷⁷ Other education advocates have pushed the state to cover 50 percent of all public education costs.²⁷⁸ Neither proposal seems poised to succeed in the Legislature, which cut education spending drastically during the Great Recession²⁷⁹ and has still yet to return to its 2009–2010 school year peak.²⁸⁰ The State’s decision to rely overwhelmingly on local property taxes to fund education got a seal of

266. *Texas State Profile*, NAT’L CLEARINGHOUSE FOR ENG. LANGUAGE ACQUISITION, <https://ncela.ed.gov/t3sis/Texas.php> [<https://perma.cc/UH2X-KBN2>].

267. *See, e.g.*, Kauffman, *supra* note 8, at 888.

268. *See, e.g., id.* at 887.

269. *See id.* at 882 (“[T]he system allows districts to raise funds from their own tax bases . . . leading to wildly varying yields of funding per student for the same tax rates.”).

270. *Id.* at 887.

271. *Id.* at 881, 887.

272. Aliyya Swaby, *Texas’ School Finance System Is Unpopular and Complex. Here’s How It Works*, TEX. TRIB. (Feb. 15, 2019), <https://www.texastribune.org/2019/02/15/texas-school-funding-how-it-works/> [<https://perma.cc/RQ64-GKYJ>].

273. *Id.*

274. *Id.*

275. Kauffmann, *supra* note 8, at 882.

276. *Id.* at 888.

277. *Id.* at 894.

278. Swaby, *supra* note 272.

279. AM. FED’N OF TCHRS., *A DECADE OF NEGLECT: PUBLIC EDUCATION FUNDING IN THE AFTERMATH OF THE GREAT RECESSION* app. (2018), <https://www.aft.org/sites/default/files/decade-of-neglect-2018.pdf> [<https://perma.cc/D9NE-NQ75>].

280. *Per-Student Spending and State Funding Are Lagging in Texas. Meanwhile, the Window Is Closing on an Accurate Census Count*, KINDER INST. FOR URB. RSCH. (Aug. 13, 2020), <https://kinder.rice.edu/urbanedge/2020/08/13/census-count-spending-per-student-state-funding-schools-Texas> [<https://perma.cc/33KT-X4NE>].

approval from the Supreme Court in *San Antonio Independent School District v. Rodriguez*, discussed in Part I²⁸¹ That case ratified Texas's system on the basis of "local control"²⁸² and federalism.

The results of Texas's failure to adequately fund EL education are severe. Schools cannot provide "materials, and curriculum to offer a quality program fit to the students' needs."²⁸³ In Houston, the State spends "less than half of what would be needed to achieve national-average outcomes."²⁸⁴ One issue exemplifies this failure: teacher training. Texas fails to recruit, train, and retain enough qualified bilingual teachers. In fact, despite its growing EL student population, Texas has a "diminishing number of certified bilingual instructors."²⁸⁵

Texas also pushes policy decisions to districts, further exacerbating the State's failure to ensure educational equity to EL learners. Since S.B. 477, the State has allowed districts "significantly more flexibility in adopting either transitional bilingual education programs, immersion programs, or some other program."²⁸⁶ Now, the State only requires bilingual education in grades K-5. Further, it defines bilingual education as an instruction program "in the primary language of the students enrolled in the program and for carefully structured and sequenced mastery of English language skills."²⁸⁷ The emphasis on English mastery, rather than bilingualism, is antithetical to S.B. 477's civil rights goals. Though the State's law may have evolved, local attitudes have not kept up. Before S.B. 477, English-speaking Texans resisted bilingual education in reaction "to the forced integration of the schools and the significant increase in the number and percentage of Latino students in the schools."²⁸⁸ Now, those

281. *Rodriguez*, 411 U.S. 1 (1973).

282. *Rodriguez*, *supra* note 127; see Kauffman, *supra* note 8, at 886.

283. Kauffman, *supra* note 8, at 893; see Cortez, *supra* note 251.

284. *Per-Student Spending and State Funding Are Lagging in Texas. Meanwhile, the Window Is Closing on an Accurate Census Count*, *supra* note 280.

285. Emmakate Few, *Lack of Access to Bilingual Education Puts Future of Texas at Stake*, DAILY CAMPUS (Feb. 8, 2018), <https://www.smudailycampus.com/news/lack-of-access-to-bilingual-education-puts-future-of-texas-at-stake> [<https://perma.cc/7EXV-BU2H>]; see Eva-Marie Ayala, *Texas Is Desperate for Bilingual Teachers, so Why Aren't More Answering the Call?*, DALLAS MORNING NEWS (Sept. 28, 2016), <https://www.dallasnews.com/news/education/2016/09/28/texas-is-desperate-for-bilingual-teachers-so-why-arent-more-answering-the-call/> [<https://perma.cc/SB2M-A3XH>]; Aliyya Swaby, *Texas School Districts Struggle to Recruit Bilingual Certified Teachers*, TEX. TRIB. (Feb. 21, 2017), <https://www.texastribune.org/2017/02/21/texas-school-districts-struggle-bilingual-certified-teachers> [<https://perma.cc/E3GA-SZAZ>]; Grace Leake, *Texas Needs to Invest in More Bilingual Teachers*, DAILY TEXAN (Mar. 18, 2018), <https://thedailytexan.com/2018/03/18/texas-needs-to-invest-in-more-bilingual-teachers> [<https://perma.cc/ZQ6E-29UL>].

286. Kauffman, *supra* note 8, at 892.

287. TEX. EDUC. CODE § 29.055 (West 2018).

288. Kauffman, *supra* note 8, at 915.

same attitudes fuel local English-only movements²⁸⁹ and a persistently high level of segregation in public schools.²⁹⁰

IV.

IMPROVING OUTCOMES FOR EL LEARNERS REQUIRES EFFORTS ON THE FEDERAL, STATE, AND LOCAL LEVELS

Education federalism has replaced equal educational opportunity as the guiding philosophy in EL education policy. Reverence for local control in the federal courts undermined efforts to enforce federal laws, which aim to protect EL students' rights. State efforts fared only marginally better than federal efforts. In California, a twenty-year ban on bilingual education left the state starving for resources necessary to create successful EL programs. In Texas, a discriminatory funding structure leaves the neediest schools with the fewest resources. Though research on the advantages of bilingual education abounds, politics on the local, state, and national stages make implementation nearly impossible. Without drastic shifts in allocations of power and in approaches to programming, the U.S. will continue to fail its EL learners.

Progress in this area requires re-allocating power between federal, state, and local authorities. The current emphasis on local control yields poor results, which fail to meet the mandates of *Lau v. Nichols* and the Bilingual Education Act. Given the oppositional relationship between local control and education federalism, this is unsurprising. The solution is also unsurprising: a more robust federal role in EL education policy with state and local agencies remaining as crucial players in this new paradigm.

A. Federal Government

The federal government is best positioned to lead the effort to improve outcomes for EL learners, as it has the financial and personnel resources to lead a national effort.²⁹¹ This makes it the best equipped for research, policymaking, information dissemination, and resource redistribution.²⁹² Historically, the federal government has intervened in order to address civil rights issues such as educational equity.²⁹³ The crisis in EL education requires such intervention.

Federal efforts feature advantages beyond their historical importance and relative power. The prominence and composition of the federal legislature also favor it to lead this effort. More voters turn out for federal elections than state or

289. *Id.* at 890, 895 (“Spanish-speaking students need to learn to speak English and be a proper American’ has imbued much of the state’s resistance to bilingual education with a clear anti-Mexican animus.”).

290. *Id.* at 880, 887.

291. Robinson, *supra* note 44, at 963, 998, 1003 (“[T]he federal government possesses an unparalleled ability to mobilize national, state, and local reform . . .”).

292. *See id.* at 995–96, 998, 1003.

293. *Id.* at 1002; Robinson, *supra* note 63, at 304, 311.

local ones, and voters are more likely to inform themselves on matters of federal politics and policy than state or local issues.²⁹⁴ The federal government therefore represents a greater diversity of backgrounds and viewpoints than state or local government.²⁹⁵ Federal laws have symbolic power in that they create shared experiences between very different individuals and communities. Scholars recognize that creating a shared experience leads to broader coalition building by yoking the fates of disparate pockets of Americans.²⁹⁶

The federal government should expand its influence over EL education by creating federal ELD standards, federal entry and exit benchmarks, and by increasing awareness and enforcement of EL rights. California and Texas both demonstrate the importance of robust ELD standards as a baseline. Standards provide advocates with a way to measure curriculum, program, and policy success. There is no need for these standards to be state-specific. In fact, inconsistencies in standards between states harm ELs by masking student proficiency and growth under vague language. Though this Note compared states earlier, doing so presents inherent challenges: states define “progress” and “English proficiency” differently, making cross-state comparisons indefinite at best. The federal government has successfully released learning standards before,²⁹⁷ and can and should follow up on the success of Common Core by developing ELD standards and incentivizing states to adopt them. For much the same reasons, the federal government should define entry and exit standards for EL programs.²⁹⁸ Universal benchmarks and standards will facilitate federal monitoring of state progress.²⁹⁹ Historically, more federal accountability supports help equalize educational opportunity.³⁰⁰

Federal action must extend beyond the implementation of standards and benchmarks and empower students, parents, educators, and administrators with more specific knowledge of their rights. There are relatively few federal enforcement actions for EL civil rights violations. It is unlikely that the low number of federal enforcement actions corresponds to the number of civil rights violations over this issue; it is likelier that impacted parties do not know their rights, do not have access to the legal system, fear or distrust the government, or

294. See Long, *supra* note 45, at 444.

295. See *id.* at 445 (suggesting that more centralized state and federal governments are more likely to include diverse populations).

296. *Id.* at 462; see *id.* at 459 (“[Change] requires establishing governance of public schools at a level broad enough to compel citizens to form coalitions with strangers.”). See generally Derick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

297. Robinson, *supra* note 44, at 990.

298. See *id.* at 991. See generally Ana A. Núñez Cárdenas, *Every English Learner Succeeds: The Need for Uniform Entry and Exit Requirements*, 83 BROOK. L. REV. 755 (2018) (proposing the federal government should create and enforce federal requirements for defining an EL and English fluency, for example).

299. See Robinson, *supra* note 44, at 1000.

300. See *id.* at 1016.

face any other of a multitude of barriers to seeking legal remedies. The federal government should publicize EL rights in all forms of media and in as many languages as possible. By increasing community awareness, federal agents can ensure that they are not the only enforcing agents; parents, students, and teachers will also hold states and districts accountable.³⁰¹

B. State Governments

Despite the need for a more robust federal role in EL education policy, state governments maintain a crucial role in this new paradigm. States should leverage their resources to increase the number and quality of bilingual teachers and continue to provide these educators with the tools they need to succeed.

States can best serve their students, EL and native English speaking alike, by prioritizing *bilingual* education. These programs are not only beneficial to all students, but they are also popular among native English speaker parents.³⁰² California and Texas both demonstrate that allowing or even requiring bilingual education is insufficient. Though universal bilingualism may be the goal, an unfunded mandate cannot be the vehicle for achieving that goal. States can prioritize developing their bilingual programs through the tools they retain even in the current paradigm of education federalism.

State governments have the closest relationships with community colleges, public universities, and other teacher pipelines. In order to meet their statutory burden under the BEA and the ESSA, states must ensure adequate training for teachers bound for classrooms with EL students. Texas offers one example of thorough bilingual teacher training requirements. In addition to requiring linguistic competency, states should require cultural competency. Too many teachers currently enter classrooms assuming their EL students possess a linguistic challenge or deficit. Teacher preparation programs can counter assumptions of deficits by emphasizing the benefits of learning two languages at once. For example, EL students often possess strong lexical knowledge.³⁰³ Spanish-speaking EL students are well equipped to learn academic vocabulary because of the Latinate origins of many of these words.³⁰⁴ Finally, even “code-switching” between English and Spanish demonstrates a mastery of subtle language skills such as tone, audience, and “shades of meaning.”³⁰⁵ Notably, the

301. See, e.g., Menken, *supra* note 13, at 165–67; Brignoni & Wetig, *supra* note 15, at 31–32.

302. See, e.g., Clément Thiery, *Ruée sur les Classes D’Immersion Français au Texas* [*The Boom in French Immersion Classes in Texas*], FRANCE-AMÉRIQUE, Mar. 2017, at 19, 25 (Alexander Uff trans.).

303. Ramón Antonio Martínez, *Beyond the English Learner Label: Recognizing the Richness of Bi/Multilingual Students’ Linguistic Repertoires*, 71 READING TCHR. 515, 517 (2018).

304. *Id.*

305. *Id.*

“bundle”³⁰⁶ of language tools which EL students already have at their disposal overlap with both Common Core standards and with many states’ standards.³⁰⁷

States should ensure that teacher preparation does not end when teachers pass credentialing exams and enter classrooms. Ongoing professional development requirements keep teachers’ knowledge current, as pedagogy and curriculum evolve quickly and constantly. States should at least require educators and administrators to stay current on these topics and on other key topics, which are particularly relevant to the state’s EL student population. Currently, much professional development takes place on a local level. States can shoulder more of that burden by providing statewide and regional trainings, which include multiple school districts.³⁰⁸ This will ensure greater uniformity across states and provide educators with more opportunities to improve their approach.

C. Local Educational Agencies and Communities

Local educational agencies also maintain important functions in the new paradigm. Foremost is curriculum development. *Castañeda* likely prevents state or federal entities from encroaching on school districts’ autonomy over EL curriculum, and most states still grant school districts the power to select curriculum and teaching tools.³⁰⁹ In these cases, districts should look to each other and to their most successful school programs for inspiration.³¹⁰ Two recent studies of EL education programs in California show how curriculum and program structure can be tailored to fit the needs of specific communities and language groups.

Westminster School District in Orange County, California has successfully implemented dual-immersion programs in both Spanish and Vietnamese.³¹¹ The district’s goal is bilingualism and biliteracy for all students, EL and native English speakers alike.³¹² The district implemented its programs to serve the needs of its student population, 40 percent of whom are ELs, and “in response to the growing research base suggesting that dual language immersion is one of the most effective instructional approaches for promoting . . . linguistic and academic development.”³¹³ Westminster followed research indicating that ELs in bilingual programs enjoy higher levels of academic achievement and higher

306. *Id.* at 515.

307. *Id.* at 517.

308. Another idea, inspired by the COVID-19 crisis, would be state-led online trainings. Just remember to put everyone on mute!

309. Shoked, *supra* note 31, at 956–57.

310. Rodriguez, *supra* note 127, at 221.

311. Amaya Garcia, *A New Era for Bilingual Education in California*, PHI DELTA KAPPAN (Jan. 27, 2020), <https://kappanonline.org/a-new-era-for-bilingual-education-in-california/> [https://perma.cc/R6QB-9D3S]; see Hopkinson, *supra* note 203.

312. Garcia, *supra* note 311.

313. *Id.*

rates of reclassification.³¹⁴ An approach inspired by Westminster would therefore heavily incorporate the latest in language acquisition research.

Westminster's success also relies on a strong partnership with the local community. Teachers work with classroom parents to find academically appropriate, culturally relevant materials.³¹⁵ District officials promoted the program on the local Vietnamese news station.³¹⁶ Leaders drew on community resource such as "heritage language schools" for additional resources.³¹⁷ The district also looked far beyond its boundaries, forming a relationship with a district in Washington state, which also has a Vietnamese dual immersion program.³¹⁸

Westminster's community engagement efforts serve important functions beyond improving students' outcomes. Of course, culturally relevant, academically appropriate material empowers students and engages families.³¹⁹ It also empowers families against "dominant political and social forces[,] which ignore and marginalize immigrant and language minority communities. This is especially crucial when many minority language speakers "lack the basic right to cast a vote."³²⁰ Involving language minority families is key to successful bilingual education³²¹ and extends democratic and civic engagement opportunities to those who are often overlooked by government.

Involving communities also realizes some of the original goals of the American school district. It allows a local education authority to maintain community values through public education.³²² These values include those inherent to the language of minority groups served and those inherent to the project of teaching diverse classrooms. Schools containing many language groups and cultures expose students to a variety of ideas and principles.³²³ Cultural and philosophical diversity emphasizes the importance of democratic decision-making across lines of difference.³²⁴ It shows language minority and native English-speaking communities alike that a plethora of experiences and practices are relevant and worthy of understanding. Westminster School District's experience with bilingual education shows that investing community members in creating culturally competent schools benefits all students and their families.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* Language heritage schools are after school or weekend-targeted cultural and language classes.

318. *Id.*

319. *See, e.g.,* Aquino-Sterling & Rodríguez-Valls, *supra* note 9, at 74–75.

320. Kip Téllez & Manka Varghese, *Teachers as Intellectuals and Advocates: Professional Development for Bilingual Education Teachers*, 52 THEORY INTO PRAC. 128, 132 (2013).

321. *See id.*

322. Shoked, *supra* note 31, at 968.

323. Long, *supra* note 45, at 411.

324. *Id.*

Another study by nonprofit ASCD assessed the efficacy of EL programs in an unnamed California school district.³²⁵ The authors compared various models of EL instruction over twelve years.³²⁶ This district offered its ELs four different options: English immersion, transitional bilingual, maintenance bilingual, and dual immersion. Researchers found that while students in the dual immersion program took the longest to attain English proficiency, more of them met that goal than the students in other programs.³²⁷ Additionally, more students reclassified in the dual immersion program.³²⁸ Over the long term, dual immersion students surpassed peers in other programs in ELA skills.³²⁹ This study contains a warning for all levels of government and advocacy: don't rely solely on short-term goals and assessments. Bilingualism takes time. Its benefits are clear. The ASCD study cautions against sacrificing those benefits at the expense of yearly state assessments.

The above school district's experience presents a complication to this Note's emphasis on urgency. While the United States cannot afford to fail any more EL students, neither can it afford to jump to conclusions about programs and curriculum based on annual data. EL education requires longitudinal studies and long-term investments. Patience, determination, and confidence are all key to improving outcomes for EL students. In other words, adults must practice the very qualities they preach to students.

CONCLUSION

EL students have always been in American public schools. As their population grows, so does the imperative to better serve their needs. The country's failure on EL education policy has harmed students, families, communities, and the United States broadly.

The legal history of EL education shows that education federalism has hindered progress towards the above goals. Contrary to popular belief, local control has not produced more accountable and community-oriented schooling. It has historically served anti-immigrant, oppressive, and segregationist ends. Federal court cases have prioritized local control over efforts to increase equal educational opportunity for EL students, which has narrowed the ways in which the federal government may intervene on behalf of these students' rights.

California and Texas have both grappled with the issue of EL education for Spanish speakers for their entire statehood. California's EL policy directly reflects its long opposition to multiculturalism, immigration, and, by association, EL learners themselves. The end of the State's ban on bilingual education is a

325. Ilana M. Umansky, Rachel A. Valentino, & Sean F. Reardon, *The Promise of Two-Language Education*, EDUC. LEADERSHIP, Feb. 2016, at 11, 11–12.

326. *Id.* at 11.

327. *Id.* at 14.

328. *Id.*

329. *Id.* at 15.

hopeful sign of what is to come. However, the State still faces challenges associated with a long-term de-prioritization of bilingual teaching and learning. Texas faces similar challenges, though for slightly different reasons. Though Texas has required bilingual education for much longer, its students have not fared any better. Hopefully, this Note contains enough evidence for the advantages of good bilingual education for advocates in Texas to continue to push their legislature to adequately support the state's bilingual mandate.

Even without additional spending by state governments, the United States still has some options moving forward. The federal government can work around its self-imposed limitations or create new frameworks to guide EL education efforts across the nation. The federal government should establish guidelines and proficiency benchmarks. Historically, this kind of federal oversight benefits students and marginalized communities. It will also facilitate interstate collaboration and comparison. States, for their part, must take a more active role in recruiting and training bilingual and culturally competent teachers. Training cannot end when teachers enter the classroom; ongoing professional development should incorporate the best in linguistic and pedagogical research. Districts can look to each other for inspiration. Successful districts have shown that cultural competency, community involvement, and consistency produce the best results for EL learners.