¿Educación solamente en Inglés? ¡No gracias! Protecting Bilingual Education in Georgia in the Wake of the No Child Left Behind Act and the Anti-Bilingual Education Movement*

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I. Introduction

Writing for the majority in Mendez v. Westminster School District\(^1\) in 1946, Justice McCormick stated: “[a] paramount requisite in the American system of public education is social equality . . . [a] commingling of the entire student body instills and develops a common cultural attitude among the school children which is imperative for the perpetuation of American institutions and ideals.”\(^2\) Though the Mendez decision proved to be highly influential\(^3\) in overturning Plessy v. Ferguson,\(^4\) its call for the integration of Mexican American students in the nation’s public schools\(^5\) is no less important today, more than fifty years since the United States Supreme Court pronounced an end to segregated education in Brown v. Board of Education.\(^6\) Notwithstanding Justice McCormick’s appeals for integration and the removal of legal barriers for non-white students to attend public schools with their white classmates, the continued integration of United States’ schools cannot be taken for granted, and is instead being threatened by current movements to end bilingual education in the country’s public schools.\(^7\)

\(^1\) Mendez v. Westminster School Dist., 64 F. Supp. 544 (S.D. Cal. 1946), aff’d, 161 F.2d 774 (9th Cir. 1947).
\(^2\) Id. at 549.
\(^3\) See Juan Perea, Buscando America: Why Integration and Equal Protection Fail to Protect Latinos, 117 Harv. L. Rev. 1420, 1421 (2004) (stating that “[t]he federal district court’s opinion in the [Mendez] case was remarkable in that it rejected for the first time the basic premises of the Plessy opinion and anticipated closely the reasoning in Brown v. Board of Education.”).
\(^4\) Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that a Louisiana law that required separate but equal facilities for railroad passengers was valid under the 14th Amendment to the U.S. Constitution).
\(^5\) The Mendez case originated when Gonzalo Mendez filed suit against the school district in Westminster, CA to end the segregation of schools in the district; eventually, several Mexican-American families joined the suit to bring an end to the segregation of schools that placed their children in educational facilities inferior to neighboring White schools. See 64 F. Supp. at 544; see also Perea, supra note 3, at 1420-1422 (discussing the facts and implications of the court’s holding).
\(^6\) Brown v. Board of Education, 347 U.S. 483, 495 (1954) (stating that “in the field of public education the doctrine of ‘separate but equal’ has no place.”).
\(^7\) See Thomas Felton, Sink or Swim?: The State of Bilingual Education in the Wake of California Proposition 227, 48 Cath. U. L. Rev. 843, 844 (1999) (noting that when grassroots movements for bilingual education were beginning in the 1960’s, proponents of bilingual education frequently made the
debates over bilingual education implicate a myriad of different racial and ethnic groups in the United States, this paper will limit its focus to the Latino student population in the United States and the unique obstacles the anti-bilingual education movement presents to these students.

Admittedly, schools in the United States and the broader American society have undergone profound changes since the Mendez and Brown cases were decided in the mid-1900’s. Perhaps nowhere is this more evident than in the evolving composition of the nation’s population. Due in large part to modifications in United States immigration policy, today nearly twelve percent of the American population is comprised of foreign born peoples. A majority of this group is from the Latin American region, with the Latino segment of the United States population reaching record levels in 2003 and on pace to become the nation’s largest minority group by the end of the present decade.

Not surprisingly, these demographic variations have been reflected in the changing composition of the nation’s schools. For example, a recent Senate Committee report indicated that nationwide, the Latino student population grew by nearly sixty percent since 1991, with nearly half of all school age Latino students hailing from

argument that “teaching students only in a language that they did not understand, English, was equivalent to not teaching.”).
10 Id.
immigrant families.\textsuperscript{12} Given that a large percentage of Latino students come from immigrant families where English is not spoken at home,\textsuperscript{13} many of these students face an additional language barrier, which has resulted in a large percentage of Latino students being labeled as “limited English proficient” or LEP.\textsuperscript{14} Statistics suggest that in 1994-1995 school year, seven percent of the enrollment of school age population in U.S. public schools were LEP students, or nearly 3.2 million pupils.\textsuperscript{15} In California, this rate is even higher with LEP students comprising twenty-five percent of the student body, and native Spanish speakers accounting for over eighty percent of the LEP student population.\textsuperscript{16}

This increasing concentration of Latino LEP students in American classrooms has not gone unnoticed. Instead, the fight over bilingual education has recently been renewed in the U.S. as the combination of rising immigration flows and a perceived strain on public resources have again made the language and citizenship debate an urgent political issue.\textsuperscript{17} At present, there is strong movement to ban bilingual education as witnessed by the introduction of English-only education measures in Arizona, California, Colorado, and Massachusetts, and the fact that voters approved the measures in every state besides

\textsuperscript{13} See Perea, supra note 3, at 1425 (stating that “[t]he Spanish language lies at the heart of the Latino experience in the United States . . . Latinos account for 70.9% of school age children who do not speak English at home.”).
\textsuperscript{14}“Limited English Proficient or LEP is the term used by the federal government, most states, and local school districts to identify those students who have insufficient English to succeed in English-only classrooms. LEP refers to students who are limited in their ability to speak, read, comprehend, or write English proficiently as determined by objective assessments.” Academy School District, English as a Second Language Definitions, available at http://www.d20.co.edu/ls/ess/esl/ESLdefinitions.html (last visited Apr. 17, 2005).
\textsuperscript{16} Id.
\textsuperscript{17} Luis Rodriguez, Discretion and Destruction: The Debate over Language in California’s Schools, 4 Tex. F. on C.L. & C.R. 189, 194 (1999) [hereinafter Luis Rodriguez].
Colorado.\textsuperscript{18} Given the success of these initiatives and the drive of Ron Unz to build on his successes in Arizona, California, and Massachusetts and to spread his efforts into ever more states,\textsuperscript{19} it appears that the anti-bilingual education movement will continue to proceed throughout the country and the state of Georgia is likely to be no exception.

Though not currently within Ron Unz’s line of sight\textsuperscript{20} and not generally considered to be one of the nation’s top immigrant receiving states, the state of Georgia has seen a surge in its Latino immigrant population, which increased by three hundred percent between 1990 and 2000.\textsuperscript{21} Not surprisingly, this has had an effect on Georgia’s schools, which have witnessed a large growth in their Latino population\textsuperscript{22} and have consequently experienced a profound increase in the enrollment of LEP students.\textsuperscript{23} Given these dramatic demographic changes taking place within Georgia, the potential exists for an anti-bilingual education movement that must be avoided despite its current political appeal.

This paper thus examines the status of bilingual education in the four states that have been presented with Unz initiatives, and argues that despite the apparent lack of

\textsuperscript{18} For a discussion of these states’ anti-bilingual education proposals, see Galindo and Vigil, supra note 12, at 27-30.
\textsuperscript{20} Id.
\textsuperscript{22} A recent Georgia Department of Education survey indicated that in 2004, there were approximately 106,124 students in pre-K to 12th grade in Georgia’s public schools, which represents nearly 14% of the student body population. Center for Latino Achievement and Success in Education, Latino Education in Georgia 6, available at www.coe.uga.edu/clase/ Latino\%20Education\%20in\%20Georgia\%20presentation.ppt (last visited Mar. 16, 2005).
\textsuperscript{23} Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students, Georgia: Rate of LEP Growth (Oct. 2002), available at http://www.ncela.gwu/policy/states/ reports/statedata/2001/pdf (providing data that indicates since 1992, the growth in the LEP population in Georgia was 670.7%, and that the bulk of this population was made up of native Spanish speakers.).
constitutional or legal barriers at either the federal or local level, the anti-bilingual education measures in place in Arizona, California, and Massachusetts should not be adopted. Instead, it advances that Georgia should keep its current legal framework because English-only laws have not proven to be more effective than bilingual education. Moreover, even if there were slight improvements in test scores, this paper argues that these modest improvements would not be able to compensate for the severe restrictions on parental and educator choice anti-bilingual education programs pose and the nativist ideals that such programs represent.

To make this argument, the paper will begin with a background section which first discusses the federal law framework governing bilingual education in the United States. In the second part of the background section, the California, Arizona, Massachusetts, and Colorado, approaches to bilingual education will be briefly examined. In the analysis section, there will then be a more detailed discussion of the current status of bilingual education in Georgia and it will be argued that, in light of the deficiencies of the anti-bilingual education measures, Georgia voters should follow the lead of the Colorado electorate and reject attempts to adopt English-only education in Georgia. Lastly, the paper will conclude with a consideration of policy issues involved in the bilingual education debate.

II. Background: The Federal and State Approaches to Bilingual Education

A. Bilingual Education from a Federal Law Perspective
Notwithstanding its 1974 decision in **Lau v. Nichols**\(^24\) and later decisions which recognize the importance of education,\(^25\) the United States Supreme Court has refrained from providing much guidance on the subject of bilingual education and the treatment of LEP students as it has been hesitant to interfere with local control over education policy.\(^26\) Given this deference to the States, the regulation of bilingual education has remained largely a matter of state, rather than federal law.\(^27\) Nevertheless, federal law does provide important guidance with such pieces of legislation as the Bilingual Education Act (BEA)\(^28\) and the English Language Acquisition, Language Enhancement, and Academic Achievement Act, (ELAA), which was passed as part of the No Child Left Behind Act in 2001.\(^29\) These Acts, combined with federal court decisions in **Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3**\(^30\) and **Castaneda v. Pickard**,\(^31\) which clarified the constitutionality of state action in this field, provide a necessary framework for understanding the current status of bilingual education in the United States. In sum, while federal law does complement state action in this area, recent...

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\(^{25}\) Although the United States Supreme Court has recognized the importance of education, holding in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) that “education is perhaps the most important function of state and local governments,” the Court has refrained from recognizing a fundamental right to education. Instead, in *San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1, 35 (1973) the Court held that “[e]ducation . . . [was] not among the rights afforded explicit protection under our Federal Constitution,” nor did it “find any basis for saying it [was] implicitly so protected.”

\(^{26}\) *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (stating that “[n]o single tradition in public education is more firmly rooted than local control over the operation of public schools [and that] local autonomy has long been thought to be essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”).

\(^{27}\) See, e.g., 20 U.S.C § 3401(4) (2005) (“The Congress finds that . . . in our federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the States.”).


\(^{30}\) Guadalupe Org. v. Tempe Elementary School Dist. No. 3, 587 F.2d 1022 (9th Cir. 1978).

\(^{31}\) *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981).
legislation and case law demonstrate an absence of strong legal barriers to the passage of English-only educational measures in the United States.

Influenced largely by the ongoing civil rights movement, Congress first addressed the treatment of LEP students with the passage of the Bilingual Education Act of 1968 (BEA). Although the Act did not require the use of native languages or impose an affirmative duty on educators to establish a program for LEP students, it did authorize funds to support educational programs and to train instructors and develop teaching materials to support LEP students. Despite its failure to set any strict guidelines and its modest funding, the Act nevertheless played an important, though largely symbolic, role in initiating the federal involvement in bilingual education.

The federal government took a more direct role in 1970 when the Office for Civil Rights (OCR) of the United States Department of Education issued a memo relating the relevance of Title VI of the Civil Rights Act of 1964 to linguistic minority students. Directed at schools that were composed of five percent or more LEP students, the OCR memo stated: “where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program provided by a school district, the district must take affirmative steps to rectify

32 See William Ryan, The Unz Initiatives and the Abolition of Bilingual Education, 43 B.C. L. Rev. 487, 492 (2002) (noting that bilingual education came to renewed prominence in the 1960’s and 1970’s, and that the passage of the Bilingual Education Act coincided with the civil rights movement); see also Luis Rodriguez, supra note 17, at 198 (suggesting that in the late 1960’s Latino activists viewed the Bilingual Education Act more than merely an educational tool, and instead looked at it as a “civil rights imperative”).
34 Luis Rodriguez, supra note 17, at 195.
35 Rachel Moran, Bilingual Education, Immigration, and the Culture of Disinvestment, 2 J. Gender Race & Just. 163, 166-67 (1999) (noting that the act was significant for putting bilingual education “on the national reform agenda”).
36 42 U.S.C. § 2000(d) (2005) (stating that: “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.”).
the language deficiency in order to open its instructional program to these students.”

In doing so, the OCR memorandum essentially created a cause of action for LEP students premised on the theory that a school’s failure to provide English language education amounted to an exclusion from the educational process on the basis of their race or national origin. Despite its apparent potential, the new OCR guidelines had only a minimal impact on LEP students and the overall status of bilingual education remained relatively unchanged until 1974 and the Supreme Court’s decision in *Lau v. Nichols*.

Basing its decision on Title VI of the Civil Rights Act and the OCR’s 1970 memorandum, in *Lau*, the Supreme Court struck down a San Francisco school district’s decision not to provide non-English speaking Chinese students with supplemental education in English. Finding that “those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful,” the Court concluded that “it seems obvious the Chinese-speaking minority receive fewer benefits than the English-speaking majority . . . which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination

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38 See Luis Rodriguez, supra note 17, at 199 (explaining that to prove a claim under this regulation, LEP students merely had to show that a school district’s program had the effect of excluding them from effective participation in an educational program sponsored by the school and upon a finding by either the OCR or a federal court that such provisions were violated the school would lose funding or would be forced to abide by the new guidelines as a condition for maintaining its federal funding).

39 Id.


42 OCR Memo, supra note 37.

43 See Felton, supra note 7, at 855-856 (describing the facts in *Lau*: “In 1971, the San Francisco, California school system enrolled 2,856 students of Chinese descent who did not speak English. In 1974, a class of Chinese students sued the school system claiming violations of both the Equal Protection Clause and Title VI, and demanding that the Board of Education develop a solution to the lack of English instruction.”).

44 414 U.S. at 566.
banned by the regulations,” and therefore that “the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.” Although the Supreme Court failed to provide more specific guidelines to schools, the decision is significant for mandating that school districts must take some action to eliminate language barriers facing LEP students out of a recognition that a failure to do so would amount to an exclusion of these students from the educational process.

Not surprisingly, the Lau decision proved to be highly influential and paved the way for greater federal involvement in the field of bilingual education. At the Congressional level, there were two immediate responses. First, Congress adopted the Equal Educational Opportunities Act (EEOA) in 1974. Though this act codified the Lau decision, the essential purpose of the EEOA was to address remaining desegregation issues following from the Brown decision, and as such it prohibited the States from discriminating against children in the education sphere on the basis of race, color, sex or national origin. Importantly, the EEOA also required schools to overcome language barriers to allow for the participation of LEP students.

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45 414 U.S. at 568.
46 Id.
47 See Moran, supra note 35, at 166 (stating that: “Following Lau, the federal government adopted a far more aggressive stance in setting programmatic guidelines for linguistic minority students than it had before.”).
49 See Moran, supra note 35, at 166
50 See Felton, supra note 7, at 858 (citing H.R. Conf. Rep. No. 93-1211, at 154 (1974), which states: “The purpose . . . is to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.”).
52 20 U.S.C. § 1703(f) (2005); but see Luis Rodriguez, supra note 17, at 200 (arguing that: “[w]hile the language of the statute appears weighty, the section on educational language instruction did little more than to ratify the Lau decision.”).
In addition to adopting the EEOA in 1974, Congress amended the Bilingual Education Act (BEA), which later became the Bilingual Education Act of 1974.\footnote{20 U.S.C. §§ 7401-91 (1994) (repealed 2001); see also H.R. Rep. No. 105-587 at 11-12 (1998) (providing a history of the Bilingual Education Act).} With these amendments, Congress openly celebrated bilingual education\footnote{See Luis Rodriguez, supra note 17, at 201 (stating that “[t]he new declaration recognized native languages and the teaching of heritage was the primary means of instruction for LEP children due to the unique cultural differences between limited English speaking children and the rest of society.”).} and changed course by specifying that a particular teaching methodology, transitional bilingual education, be used.\footnote{See Felton, supra note 7, at 858 (suggesting that the move to attach funding to a particular teaching methodology marked a departure from the traditional approach taken by Congress, which before had provided funding for bilingual education without specifying a particular teaching methodology).} Although these amendments allowed for a significant increase of funding for bilingual education,\footnote{See Moran, supra note 35, at 211 n.20 (stating that “in 1968 [with the Bilingual Education Act of 1968], Congress authorized $15 million . . . but appropriated no funds. In 1973, Congress authorized $135 million, but appropriated only a little more than $35 million. In 1974, Congress again authorized $135 million, and it appropriated an amount close to that figure.”).} they also had the effect of undermining local control by limiting a school’s ability to refuse to offer bilingual education.\footnote{See Luis Rodriguez, supra note 17, at 201 (explaining that because the act provided that an acceptable bilingual education program required some instruction in the native language, a school district who opted not to provide such instruction would lose its federal funding).} In addition, the amendments made a school district’s bilingual education program, and ultimately its federal funding, dependent on a successful review by the newly created Office of Bilingual Education.\footnote{Id. (stating that “the newly created Office of Bilingual Education was to evaluate bilingual education programs. The effect of negative evaluations could be disastrous—funding could be adversely affected and derogatory information could establish liability if a civil rights claim arose.”).} Despite changes in policy which eventually led to the abandonment of instruction in native languages,\footnote{See Galindo and Vigil, supra note 12, at 44 (stating that “increasing concern about rising immigration from 1980 to 1990 led to revisions of the BEA [and that] [w]hile the BEA had previously mandated only bilingual programs, the 1984 reauthorization . . . shifted toward utilizing English as a Second Language (ESL) programs, which do not include native language instruction.”).} the BEA nevertheless remained the central piece of federal legislation.

governing bilingual education until President Bush signed into law the No Child Left Behind Act of 2001.\textsuperscript{60}

In addition to Congress, the OCR responded to the \textit{Lau} decision by setting forth guidelines, which became known as the “Lau Guidelines,”\textsuperscript{61} to schools with LEP students to come into compliance with the Supreme Court’s decision. Influenced largely by Latino advocacy groups,\textsuperscript{62} the Lau Guidelines expressed a strong preference for education models which relied on some degree of instruction in the native language.\textsuperscript{63} In particular, the guidelines set forth appropriate models for bilingual education at the elementary and secondary education levels,\textsuperscript{64} and declared that English as a Second Language (ESL) and other structured English immersion programs would be acceptable only under limited conditions.\textsuperscript{65} Thus by the mid-1970’s, these Guidelines combined with Congress’ passage of the EEOA and its amendments to the Bilingual Education Act, represented the height of federal involvement in the bilingual education debate.\textsuperscript{66} Nevertheless, there remained a great degree of uncertainty regarding the appropriate

\textsuperscript{60} Id. at 44-45 (noting that the No Child Left Behind Act of 2001 replaced the BEA with the English Language Acquisition, Language Enhancement, and Academic Achievement Act (ELAA)).
\textsuperscript{62} See Luis Rodriguez, supra note 17, at 202-03 (stating that the guidelines were issued “largely in response to Hispanic advocacy groups’ demands.”).
\textsuperscript{63} See Moran, supra note 35, at 166 (indicating that that the Lau Guidelines placed a preference on transitional bilingual education and bilingual-bicultural education).
\textsuperscript{64} See Luis Rodriguez, supra note 17, at 203 (describing the actual bilingual education models recommended by the Lau Guidelines for elementary and secondary schools).
\textsuperscript{65} Id. at 203 (stating that: “the [Lau] Guidelines deemed ESL programs unacceptable because …they fail[ed] to ‘consider [either] the affective or cognitive development of students.’”); but see Moran, supra note 35, at 166 (explaining that “[u]nder the Guidelines, intensive English instruction, such as English as a Second Language (ESL) programs and structured immersion, were to be used only when a child had an urgent need to learn English rapidly . . . for example, when an older student had only a short time remaining to learn English before high school graduation.”).
\textsuperscript{66} See Moran, supra note 35, at 167 (stating that “in the late 1970’s and early 1980’s . . . federal leadership in the field of bilingual education began to falter.”).
treatment of LEP students that would not be clarified until later decisions by the federal circuit courts.

The first of these decisions came in 1978 with the Ninth Circuit’s decision in Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3. At issue in Guadalupe were claims brought by Mexican American children and their families that the school district’s failure to provide a bilingual-bicultural education constituted an Equal Protection violation. The court rejected the petitioners’ argument, finding that there was “no constitutional duty imposed by the Equal Protection Clause to provide bilingual-bicultural education,” and holding instead that “[d]ifferences in [the] treatment of students in the educational process, which in themselves do not violate specific constitutional guarantees, do not violate the Fourteenth Amendment’s Equal Protection Clause if such differences are rationally related to a legitimate state interest.” Ultimately, the court concluded that the provision of bilingual education was a political issue for voters to decide, rather than a constitutional one for the courts to consider.

Taking the Guadalupe decision a step further and providing additional clarification of the Lau decision, the Fifth Circuit decided Castaneda v. Pickard in

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68 Id. at 1027.
69 Id. at 1026.
70 Id. at 1027 (holding that “[w]hatever may be the consequences, good or bad . . . whether the children of the Nation are taught in one tongue and about primarily one culture or in many tongues and about many cultures cannot be determined by reference to the Constitution . . . such matters are for the people to decide.”).
71 See Joseph A. Santosuosso, When in California…In Defense of the Abolishment of Bilingual Education, 33 New Eng. L. Rev. 837, 856 (1999) (noting that the Guadalupe court held that ““appropriate action” [under the EEOA] need not include a bilingual-bicultural program,” but that it did not provide a legal framework for assessing what constituted an “appropriate action.”). In issuing its decision, the Castaneda court noted several problems with Lau and with the Lau Guidelines, in light of later decisions, noting that the Guidelines could not be considered binding because appropriate procedures were never followed. For a further elaboration of these issues, see Luis Rodriguez, supra note 17, at 208.
72 Castenada v Pickard, 648 F.2d 989 (5th Cir. 1981).
1981. At issue in Castaneda, was the appropriateness of an English as a second language (ESL) program under federal law.\textsuperscript{74} To decide the case, the court articulated a three-prong test to assess whether a given bilingual education constituted an appropriate program under the EEOA.\textsuperscript{75} Ultimately, the court concluded that the school’s program was sufficient\textsuperscript{76} and that the Lau Guidelines did not establish the teaching of English as the primary goal of remedial English programs.\textsuperscript{77} Instead, the court found that the EEOA imposes a duty on schools to overcome the obstacles that language barriers pose and “to provide limited English speaking ability students with assistance in other areas of the curriculum.”\textsuperscript{78} Nevertheless, the court reasoned that because Congress used the term “appropriate action” in the place of “bilingual education” in the EEOA, it intended to vest local jurisdictions with a “substantial amount of latitude”\textsuperscript{79} and that, therefore, the EEOA had to be interpreted as leaving “schools free to determine the order in which these [bilingual education] obligations must be discharged.”\textsuperscript{80} Though the Castaneda court did recognize some duty on schools to overcome the language barrier facing LEP students,\textsuperscript{81} and did return a large degree of discretion back to state and local authorities, because the decision only required schools to “design programs reasonably calculated to enable the

\textsuperscript{74} Id. at 992.
\textsuperscript{75} The court must first examine “the soundness of the educational theory or principles upon which the challenged program is based.” Second, it must consider “whether the programs and practices actually used by the school system are reasonably calculated to implement effectively the educational theory adopted by the school.” Lastly, the court must be able to conclude that the program will “produce results indicating that the language barriers confronting the students are actually being overcome.” Id. at 1009-10.
\textsuperscript{76} See Cristina Rodriguez, Accommodating Linguistic Difference: Towards a Comprehensive Theory of Language Rights in the United States, 36 Harv. C.R.-C.L. L. Rev. 133, 213 (2001) (stating that in upholding the ESL program, “the Fifth Circuit rejected a challenge to a bilingual education program on the argument that overemphasis on the acquisition of English-language skills adversely affected the student’s cognitive development.”).
\textsuperscript{77} Castaneda, 648 F.2d at 1015.
\textsuperscript{78} Id. at 1011.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} See supra note 78, and accompanying text.
student to attain parity of participation in the standard instructional program,”

it imposed very minimal requirements on states with regards to their treatment of LEP
students. The decision, therefore, allows for a wide range of bilingual education
programs, including those programs which virtually eliminate instruction in native
languages. 83 Although this case is not technically binding outside of the Fifth Circuit,
more than twenty years later, it still stands as the seminal case on bilingual education in
the federal courts, 84 and it thus arguably paves the way for further erosion of bilingual
education programs in the United States.

Against the backdrop of the Castaneda decision, President Bush ushered in the
most recent change in federal law with the passage of the No Child Left Behind Act of
2001, which replaced the Bilingual Education Act (BEA) with the English Language
Acquisition, Language Enhancement, and Academic Achievement Act (ELAA). 85
Moving away from the BEA which recognized a role for native languages other than
English in the instruction of LEP students, 86 the ELAA places a significant emphasis on
the promotion of English-only education. 87 This is witnessed by the Overview to Title III
of the ELAA, which states that “[e]nsuring that all children, regardless of background,

82 Castaneda, 648 F.2d at 1011.
83 See Santosuosso, supra note 71, at 858 (noting that “the outcome of the [Castaneda] case seems to allow
for proposals such as the ‘English for the Children Initiative’ [also known as Proposition 227, the
California initiative which virtually ended instruction in native language].
84 See Luis Rodriguez, supra note 17, at 207 (stating that “[the Castaneda] opinion is still employed to
declare most bilingual education litigation issues in federal courts.”).
85 English Language Acquisition, Language Enhancement, and Academic Achievement Act, 20 USC §§
6811 et seq. (2005) [hereinafter ELAA].
86 Galindo and Vigil, supra note 12, at 44.
87 Id. (citing James Crawford, Obituary: The Bilingual Education Act, 1968-2002, 16 Rethinking Sch. 5, 6
(2002).)
have the chance to succeed is the central purpose of the federal role in education . . . [and for millions of LEP students], this means learning English in school.”

Notwithstanding this policy statement and the fact that the NCLB does require LEP students to demonstrate “measurable yearly progress in acquiring English language skills,” bilingual education is not technically dead under the NCLB. Instead, federal funding directed at LEP students has increased dramatically under the Act, and some education of LEP students in native languages is permitted, though such approaches are no longer officially embraced as an effective tool for LEP education. Though the NCLB does allow for some bilingual education to continue, it is also true that the Act “does little to encourage the development of new bilingual education programs or the improvement of those already in existence.”

Taking this current attitude of ambivalence on the part of the federal government in conjunction with the movement in several states to end bilingual education, the conclusion can be drawn that the “NCLB may indeed contribute to the disappearance of bilingual education in the United States.” Making the assumption that bilingual education needs to be preserved to promote the educational attainment of English learners, this paper thus takes the position that more needs to be done at the state level to ensure that bilingual education remains a feature of the American educational system.

89 Id.
90 Id. at 511 (noting that “[m]any advocates nonetheless view NCLB as a victory for bilingual education.”).
91 Id. (stating that “[f]ederal funding for the education of LEP children under Title III, [went] from $265 million under the previous BEA to $665 million allocated for 2002, resulting in an average increase to state and local education agencies of 10-17% this year.”). See also 20 U.S.C. § 6801 (2005) (providing for appropriation of federal funds for instruction of immigrant and non-English speaking students).
92 See 20 USC § 6848 (2005) (forbidding the official preclusion of any particular form of education directed at LEP students).
93 Brunner, supra note 88, at 520.
94 Id.
Hence the next section of this paper will address the current status of bilingual education in states where the method and language of instruction was recently challenged by Ron Unz’s initiatives.

B. Bilingual Education at the State Level: The Unz Initiatives

Notwithstanding the aforementioned federal framework, educational policy has traditionally been left to the states. At present, most states use at least some form of bilingual education as a way to integrate non-English speaking children into their school systems, and eventually into society. The educational method, however, largely varies by state. For example some programs mainstream students after two years of bilingual education, while others continue to provide some teaching in the native language even as proficiency in English is attained. The National Association for Bilingual Education summarizes the best state methods:

The best bilingual education programs include all of these characteristics: ESL instruction, sheltered subject matter teaching, and instruction in the first language. Non-English-speaking children initially receive core instruction in the primary language along with ESL.

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97 Greatschools.net Staff, Bilingual Education: Overview and Online Resources (2005), at http://www.greatschools.net/cgi-bin/showarticle/wa/67/?page=1.
instruction. As children grow more proficient in English, they learn subjects using more contextualized language (e.g., math and science) in sheltered classes taught in English, and eventually in mainstream classes. In this way, the sheltered classes function as a bridge between instruction in the first language and in the mainstream. In advanced levels, the only subjects done in the first language are those demanding the most abstract use of language (social studies and language arts).

Once full mainstreaming is complete, advanced first language development is available as an option. Gradual exit plans, such as these, avoid problems associated with exiting children too early (before the English they encounter is comprehensible) and provide instruction in the first language where it is most needed. These plans also allow children to have the advantages of advanced first language development.99

Despite these apparent benefits, bilingual education has recently come under attack from legislation aimed at its suppression in several states.100 Four states have addressed the issue, and have done so by popular vote. Popularly known as Proposition 227, the first “English-only” initiative for immigrant children was sponsored in California by Ron Unz. Spearheading the Proposition 227 campaign, Unz vowed to “end bilingual education in California by 1998.”101 He then proceeded to fund similar provisions in Arizona (Proposition 203), Massachusetts (Question 2), and Colorado (Amendment

100 See, e.g., Ariz. Rev. Stat 15-751 (2005) (establishing that “no subject matter shall be taught in any language other than English, and children in this program learn to read and write solely in English”).
All these propositions sought in effect to eliminate bilingual education for students whose mother tongue is not English, and replace it with intensive English programs.  

1. Proposition 227 and Bilingual Education in California

With the passage of Proposition 227 in 1998, California voters seemingly brought an end to their state’s twenty-six year experiment with bilingual education. By the terms of the statute, Proposition 227 required that LEP, or limited English proficient students be placed in limited English immersion programs in which nearly all instruction was provided in the English language. Although the goal of Proposition 227 was to remove all traces of education in a student’s native language, largely this result has not been achieved due in large part to later court opinions which have narrowed the construction of the statute and the efforts of parents and school officials alike who have been active in resisting Proposition 227’s English immersion mandate.

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102 See Ryan, supra note 32, at 487.
105 See also James Crawford, English-only vs. English-only A Tale of Two Initiatives: California and Arizona, available at http://ourworld.compuserve.com/homepages/JWCRAWFORD/203-227.htm (last visited Apr. 18, 2005) (stating that “[Proposition 227’s] vagueness—featuring terms like ‘special educational needs’ and ‘overwhelmingly in English’—gave school districts plenty of leeway, and many took advantage of it . . . relying on these and other loopholes, numerous districts continued to offer a range of educational options from bilingual to English-only instruction.”) [hereinafter English-only vs. English-only].
California courts have been active in limiting the apparent reach of Proposition 227. For example, in *McLaughlin v State Board of Education*, a California Appeals Court held that parents, rather than the state, had the sole authority to decide whether to impose English-only education on their children and that Proposition 227, standing alone, could not deprive students of bilingual education. Following this decision, California’s Attorney General issued a clarifying opinion in which he stated that notwithstanding Proposition 227’s apparent bar on bilingual education, school districts were required to provide bilingual education to LEP students when parents requested it through a parental waiver. Outside of the judicial arena, Proposition 227’s ban on bilingual education has been further eroded by the practices of school teachers and administrators. For example, teachers will retain students in bilingual education programs even if they do not have the necessary parental waivers, and in many cases, the requirement of placing LEP students in intensive English classes during the first thirty days of every school year is circumvented by school officials by requiring that LEP students be placed in such classes only during those students’ first year of school. Much to the consternation of Ron Unz and thanks in large part to the activities of the aforementioned groups, bilingual education programs remain a feature of public school education in the state of California.

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107 *Id.* at 202 (stating that “[t]o the extent there is any ambiguity as to the intent of Proposition 227, the legislative history clarifies that the Chapter was designed to wrest from school boards and administrators decision making authority for selecting between LEP educational options, and repose this power exclusively in parents of LEP students.”).
108 Op. Att’y Gen. no. 99-802, 1 (Feb. 25, 2000), available at http://www.usc.edu/dept/education/CMMR/227/AGopinion227.pdf (concluding that “a school district may not deny a parental request for an individual waiver from the statutory mandate that all students be instructed in English on the sole ground that the district has no alternative program.”).
109 *Rossell*, *supra* note 104, at i.
110 *English-only vs. English-only*, *supra* note 105, at 1 (stating that “bilingual education programs have survived in many (though still not all) California districts where parents want them.”).
2. Proposition 203 and Bilingual Education in Arizona

Largely undeterred by his experience with Proposition 227, Ron Unz introduced Proposition 203 on the Arizona ballots in November of 2000.\(^1\) Learning from his experiences with Proposition 227, Unz sought to close many of the loopholes that allowed for the circumvention of Proposition 227, and Proposition 203’s language is thus far more restrictive.\(^2\) In particular, although both Proposition 227 and Arizona’s Proposition 203 provide for parental waivers which allow children to continue to receive bilingual education upon a formal request, the Arizona statute adds a further provision that enables school officials to deny the waiver for any or no reason.\(^3\) In addition, the Arizona statute goes a step further than California in providing that school board members who violate the mandate to teach solely in English and who are then “found so liable shall be immediately removed from office, and shall be barred from holding any position of authority anywhere within the Arizona public school system for an additional period of five years.”\(^4\) Despite the restrictiveness of the Arizona approach, Arizona voters overwhelmingly approved the measure and thus threatened the continued viability of bilingual education in that state.\(^5\)

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\(^2\) English-only vs. English-only, supra note 105, at 1 (comparing the Arizona and California proposals and illustrating the greater restrictions imposed on parents and school officials under the Arizona proposal).

\(^3\) Ariz. Rev. Stat. § 15-753 (B)(3) (2005) (“Teachers and local school districts may reject waiver requests without explanation or legal consequence, the existence of . . . special individual needs shall not compel issuance of a waiver.”).


3. **Question 2 and Bilingual Education in Massachusetts**

Following his success in California and Arizona, Ron Unz spearheaded a move to ban bilingual education in Massachusetts. Despite its history of being the first state to pass bilingual education options in 1971, in 2002, Massachusetts voters embraced Unz’s English-only measure by a thirty-six percent margin. The English-only initiative, Question 2, mandates that LEP students be placed in English immersion classes for one year before being mainstreamed into classes with the general school population. In a provision similar to Arizona’s Proposition 203, parental waivers to English-only education are available in Massachusetts, but may be granted only upon favorable discretion by the local school board. Though it is too early to assess what effect Question 2 will have on the education of Massachusetts’ LEP students, this provision passed by such a large majority in one of the nation’s most liberal states that its success will likely be characterized as a political victory for the anti-bilingual education movement, and it therefore could pave the way for future initiatives in ever more states.

4. **Colorado and the Successful Defeat of English-only Education**

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118 Id.

119 Mass. Gen. Ann. Laws ch. 71A, § 5(b)(3) (West 2005) (“Any decision to issue . . . an individual waiver is to be made subject to the examination and approval of the local school superintendent . . . [t]he existence of . . . individual needs shall not compel issuance of a waiver.”).

120 Colgan, supra note 117, at 2 (quoting Unz: “But the fact that we did win by a large margin in Massachusetts, possibly the most liberal state in the union, I would think that would get the attention of Congress.”).
Despite Unz’s success in California, Arizona, and Massachusetts and his desire to transform his movement into a national cause to end bilingual education, Unz was handed his first defeat in Colorado in 2002.\textsuperscript{121} Although Colorado’s Supreme Court had previously struck down an English-only initiative in 2000,\textsuperscript{122} Colorado voters became the first in the country to strike down an Unz initiative that would ban or at least significantly curtail bilingual education.\textsuperscript{123} Similar to the provisions which passed in California, Arizona, and Massachusetts, the Colorado initiative would have mandated that LEP students be placed in mainstream English classes following one year of English immersion programs.\textsuperscript{124} The Colorado proposal also allowed for a limited parental waiver that would exempt eligible students from English-immersion classes.\textsuperscript{125} Embracing bilingual education, Colorado schools continue to use a model which employs three years of education in both English and Spanish before transitioning LEP students into mainstream classes.\textsuperscript{126} Though the Colorado electorate’s resounding defeat of the Unz initiative in 2002 stands in marked contrast to the Massachusetts embrace of a similar English-only education plan in the same year, it remains to be seen whether bilingual education will continue to be embraced on a national level or whether the English-only movement will continue its spread through states with high Latino student populations.

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\textsuperscript{122} Garcia v. Chavez, 4 P.3d 1094, 1097 (Colo. 2000) (holding the proposed initiative \# 258(A) was misleading).
\textsuperscript{123} Padres Unidos, \textit{supra} note 121 (noting that the proposal was rejected by over fifty-six percent of Colorado’s voters).
\textsuperscript{125} The text conditioning parental waiver on school superintendent approval is identical to the Arizona statute. See \textit{id.} at 4.
\textsuperscript{126} Galingo and Vigil, \textit{supra} note 12, at 47.
\end{footnotesize}
Although not presently faced with an Unz initiative, such a movement is probably not far behind in Georgia given the recent explosion the state has witnessed in its Latino student population.\(^{127}\) Thus, in the following analysis section, this paper takes the view that despite the current political appeal of English-only educational measures, such a ballot proposal should be rejected by Georgia lawmakers and voters alike, and that Georgia should instead embrace bilingual education as a means of boosting the educational attainment of its growing LEP student body.

III. Analysis: Problems Presented by English-only Education and Why Georgia Should Keep Bilingual Education as a Real Option for Minority Children

Though there are several competing teaching models,\(^{128}\) at present the debate over bilingual education can be characterized as follows. On one side are advocates that maintain instruction in the native language must continue because “students learn best in the language they understand best.”\(^{129}\) Moreover, they contend that the elimination of the Spanish language through English immersion works a form of forced assimilation that not only undermines cultural pride in Latino students, but also results in a “loss of educational opportunities for linguistic minority populations by eliminating education options.”\(^{130}\) On the other side, proponents of English-only or English immersion education argue that LEP students must be immersed in the new language to acquire

\(^{127}\) See supra notes 21-23 and accompanying text.


\(^{129}\) Perea, supra note 3, at 1424.

\(^{130}\) Galindo and Vigil, supra note 12, at 29.
language skills, and that since these children already know their native language, they need to be taught English (and not Spanish or any other language) in the public schools.\textsuperscript{131}

\textbf{A. Bilingual Education in Georgia}

Unlike California, Arizona, and Massachusetts, there are no English-only education statutes on the books in Georgia and bilingual education is allowed. For example, the State Board of Education is mandated by statute to create programs to assist students whose native language is not English.\textsuperscript{132} While not specifically provided for, bilingual education is accepted as a method of teaching LEP students, and the Georgia Department of Education has adopted a regulation to that end.\textsuperscript{133} Importantly, this regulation provides schools with great flexibility by allowing the existence of an array of programs aimed at providing assistance to LEP students.\textsuperscript{134}

Thus, the State of Georgia has been careful to leave schools and parents free to determine the proper course for educating its students. While opponents of bilingual education would argue that leaving such a high degree of discretion in the state

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\textsuperscript{131} Bangs, \textit{supra} note 15, at 118 (citing to pro-227 argument that was printed on California ballots: “Learning a language is easier the younger the age of the child. Learning a language is much easier if the child is immersed in that language. Immigrant children already know their native language, they need the public schools to teach them English.”).

\textsuperscript{132} \textit{Ga. Code Ann.} § 20-2-156 (2004) (stating that “[t]he State Board of Education shall create a program for limited-English-proficient students whose native language is not English, subject to appropriation by the General Assembly. The purpose of this program is to assist such students to develop proficiency in the English language, including listening, speaking, reading, and writing, sufficient to perform effectively at the currently assigned grade level.”).

\textsuperscript{133} \textit{Ga. Comp. R. & Regs.} r. 160-4-5-.02 (2005).

\textsuperscript{134} \textit{Ga. Comp. R. & Regs.} r. 160-4-5-.02(a) (2005) (providing that “a pull-out program, a cluster centers to which students are transported, a resource center/English to Speakers of Other Languages (ESOL) laboratory, a scheduled class period or an alternative approved in advance by the department” are all allowable under the regulation).
\end{footnotesize}
educational system fails LEP students by not providing them with mandatory English immersion programs, for the foregoing reasons such an argument should be rejected and instead, the Georgia legislature and electorate should resist the urge to adopt an English-only approach to the education of LEP students.

**B. English-only Laws Are Not More Effective Than Bilingual Education Programs**

One of the main reasons why Georgia should not adopt English-only education is that studies have failed to show that it is more effective than bilingual education at instructing LEP students. Despite the rhetoric employed by English-only advocates lamenting the failure of bilingual education, and claiming the success of English immersion, most research shows that no significant learning advantage accrues to LEP students under an English-only model. Instead, comprehensive studies show that students in bilingual education perform as well, if not better than those in English-only classes.

One of the strongest arguments made by English-only advocates derives from the California experience with Proposition 227. In pointing to the modest improvement in test scores that LEP students had in California following that state’s adoption of a limited English immersion approach, advocates claimed that this demonstrated the success of

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135 See Bangs, supra note 15, at 118 (relating the arguments used by Pro-227 advocates in California: “Of the 1.3 million California schoolchildren . . . who begin each year classified as not knowing English, only about 5% learn English by year’s end, implying an annual failure rate of 95% existing programs.”).
136 See English for the Children, supra note 111.
138 Id. at 124 (citing a Los Angeles Times report from August 4, 1999: “LEP scores were up 1.8 percentile points from the year before, while fluent speakers improved their scores by 1.9 percentile points. If anything, then, the achievement gap was slightly bigger after the implementation of Proposition 227.”).
shifting to English-only education. Though compelling, this argument is not convincing because as previously noted, California’s Proposition 227 was well-circumvented by school officials and parents alike.\footnote{See supra notes 105-110 and accompanying text.} Success of LEP students following the passage of Proposition 227 can therefore be attributed as much to retaining, rather than eliminating, bilingual education programs, not to mention other parallel improvements in the state school system that likely contributed to the improved student performances.\footnote{See Jacques Steinberg, Increase in Test Scores Counters Dire Forecasts for Bilingual Ban, \textit{N.Y. Times}, Aug. 20, 2000, at 1, available at http://www.onenation.org/0008/082000.html (claiming that students “are improving in reading and other subjects at often striking rates” since adoption of Proposition 227, but acknowledging that class sizes have been reduced over the same period, that the approach to teaching reading had been modernized, and that there have been no measure of school compliance with the new legislation); see also Jennifer Evelyn Orr et al., What Can we Learn About the Impact of Proposition 227 from SAT-9 Scores?: An Analysis of Results from 2000 (Aug. 15, 2000), available at http://www.stanford.edu/%7Ehakuta/SAT9/SAT9_2000/analysis2000.htm (comparing the SAT-9 scores pre and post Proposition 227 in California, and explaining that any positive change in the scores cannot be explained by the effectiveness of English-only education.)}

A further argument against English-only advocates is that their studies tend to be highly politicized such that they distort the true academic performance of students educated under bilingual education models. For instance, Jay Greene, a researcher specializing on education policy,\footnote{Manhattan Institute for Policy Research website, Jay P. Greene homepage, at http://www.manhattan-institute.org/html/greene.htm (last visited Apr. 24, 2005).} reveals that once the research is stripped from bias, distortion, and altering extraneous variables, bilingual education comes out as being far more effective, and permits students to perform better on standardized tests, than English-only education.\footnote{Jay P. Greene, A Meta-Analysis of the Effectiveness of Bilingual Education (Mar. 2, 1998), available at http://ourworld.compuserve.com/homepages/JWCRAWFORD/greene.htm. The author compared eleven studies published between 1968 and 1991, which were the only methodologically acceptable studies for his analysis.} Stephen Krashen and Grace Park, both professors in the University of California system, reviewed several studies done in Arizona, concluding as well that bilingual education students are at a “clear advantage” compared to their English-only
counterparts.\textsuperscript{143} Moreover, Kenji Hakuta, a prominent professor of Education at Stanford, in his testimony in front of the United States Commission on Civil Rights, argued that “the best research (i.e., research that investigates programs that are representative of their “bilingual” label and that are properly implemented) suggests that bilingual education is a successful model and does produce measurably better outcomes in academic achievement.”\textsuperscript{144}

English-only advocates may be able to prove in the future that their studies are based on sound methods and moreover, that such studies, validly conducted, do indicate that English-immersion education can be an effective method. The fact remains, however, that differences between bilingual education and English immersion are not likely to be the sole factors explaining student performances,\textsuperscript{145} and that in the end, no amount of research on this issue will ever be conclusive. The determination whether to adopt an English-only education approach should therefore not be based solely on analytical studies, but instead, policy makers and voters alike should look to the policy issues involved in this debate. It is when such policy topics as parental choice and nativism come into view that the decision to reject English-only education becomes all the more necessary.

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C. English-only Laws Undermine Parental, Teacher, and School Board Choice
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\textsuperscript{143} Stephen Krashen and Grace K. Park, supra note 137.
\textsuperscript{145} See Ovando, supra note 98, at 14 (citing “poverty, racism, an unempowering school culture . . . school tracking practices . . . a dearth of successfully schooled Latino role models, and a lack of engaging reading materials in the home and school environment” as factors impeding student progress); see also Steinberg, supra note 140.
In addition to studies which indicate that bilingual education is at least as effective at educating LEP students, a second factor that counsels against the adoption of an English-only approach is that English-only laws fundamentally restrict the pool of educational options available to parents and teachers of LEP students.\footnote{146}

Although the argument is frequently made that “[i]mmigrant parents are eager to have their children acquire a good knowledge of English,”\footnote{147} English-only laws are not well suited to meet this goal despite the claims of English-only advocates to that effect. Specifically, even though waiver programs are offered, they are frequently too narrow to enable a parent to successfully exempt his or her child from English-only education.\footnote{148} Thus, in a world with English-only laws, a parent has little to no control over whether his or her child will be placed in a bilingual or an English-only classroom regardless of what the parent’s wishes may be.

In \textit{Pierce v. Society of Sisters}, the United States Supreme Court recognized a parent’s fundamental right to control the education of their children by holding that states could not require public education.\footnote{149} Extending this analysis to the debate over bilingual education, it becomes evident that parental choice cannot be readily ignored and instead, must be vigorously protected to remain consistent with constitutional principles.

\footnote{146}{The statutes are indeed drafted in such a way as to create a head-to-head conflict between parents and schools personnel. Those parents who want to ensure compliance with English immersion may sue the school and its personnel for damages, following which those liable may be fired for several years. And school boards eager to provide for English immersion and entirely abolish bilingual education may refuse to provide parental waivers without providing a reason. \textit{See Ariz. Rev. Stat.} §§ 15-753 & 15-754 (2005).}
\footnote{147}{\textit{Cal. Ed. Code} § 300(b) (2005).}
\footnote{148}{\textit{See supra} note 113 and accompanying text. California’s Proposition 227, as interpreted by the courts and the schools, provides a relatively broad basis for obtaining a waiver, and the fact that the text has been interpreted so liberally shows that parents and schools do want choice. \textit{See supra} notes 106-110 and accompanying text. Unz, however, largely closed off the possibility of interpreting the law in favor of waivers in his later resolutions.}
\footnote{149}{\textit{Pierce v. Society of Sisters}, 268 U.S. 510 (1925).}
Even conceding that some or even most Latino parents do want to see their children in English-only classrooms, the state of the law as it existed before the initiatives best served parental choice because it allowed parents to place their children in the education programs they deemed appropriate. For example, in both California and Arizona, before the Unz initiatives were passed, the law gave parents the option to place their children in bilingual education or in English immersion classes. In California, in the year before adoption of Proposition 227, thirty percent of LEP Students were in bilingual education classrooms, with the balance receiving English-only instruction. In Arizona, offered a choice between English as a Second Language (ESL) and Bilingual Education, with ESL students, representing sixty-seven percent of limited English proficiency students, being entirely taught in English. In order to be consistent with the goal of accommodating parental freedom, Georgia should refrain from adopting a strict English-only approach in line with the Unz initiatives. Instead, it should maintain its flexible system, which enables parents to choose from a broad area of educational opportunities for their children to best meet each child’s specific needs.

In addition to circumscribing parental choice, English-only regimes have the further disadvantage of curtailing educator discretion. For example, if Georgia were to adopt an English-only program modeled after an Unz initiative, this would likely require school boards and teachers to follow a “one size fits all” method of teaching. Though

152 Though it is certainly possible that a more carefully drafted statute, allowing for meaningful parental choice, could be presented to Georgia voters, this would still not present the best option. Importantly, no matter how carefully drafted, any English-only statute represents a serious threat to parental choice because a parent’s ability to successfully exempt his or her child from English immersion is ultimately dependent on achieving a favorable ruling on his or her waiver petition.
such an approach may work well for a majority of students, there will inevitably be students to whom the program should not be applied. Ordinarily, school officials would be able to get around such a situation, but as most English-only education laws have been written, school officials have been stripped of this discretion and instead are placed at risk of being sued and fired if they do not comply with the letter of the law.\textsuperscript{153} Such drastic measures can hardly be found adequate from a pedagogical point of view and have been criticized by opponents of English-only and judges alike.\textsuperscript{154} Moreover, in California, the state that has arguably the least-restrictive English-only statute, there has been significant negative feedback from school officials. Indeed, studies conducted in California uncovered that teachers “encountered fear, confusion, frustration and demoralization as a consequence of having to conform to a forced educational policy crafted by outsiders with little nuanced understanding of the needs of LEP students,” and were more likely to resign.\textsuperscript{155}

In sum, even assuming arguendo that test scores have slightly improved following the adoption of English-only laws, this has been achieved at a terrific cost by severely curtailing parental and educator discretion that is traditionally considered central to the educational process. While this factor alone should be sufficient to warrant the abandonment of an English-only approach, one final consideration militates in favor of preserving bilingual education and that is the need to avoid policies premised on nativism.

\textsuperscript{154} See Ryan, supra note 102, at 514.
D. English-only Laws are Nativist and Should Therefore be Rejected

Apart from debates about their relative effectiveness and the limitations on parental choice and school official discretion that the Unz initiatives present, English-only plans entail the additional drawback of reflecting an animus towards immigration or a nativist ideal on the part of the voters who approved them. This is demonstrated by the fact that these statutes were frequently accompanied by other acts which disproportionately burdened Latino and new immigrant populations and because such initiatives garnered widespread opposition by Latino groups.

Nativism can be defined as “the practice of favoring native-born citizens over immigrants or an intense opposition to an internal minority on the ground of its foreign connections.” While a first glance at English-only initiatives may not reveal an antagonistic posture towards immigrant groups, a closer look at the larger historical context in which many of these initiatives were passed reveals that anti-immigrant sentiment was often a motivating force behind the passage of these laws. This point is further underscored by the fact that although English-only laws by their nature directly implicate the Latino populations in these states and other new immigrant groups, such groups have tended not to support these measures.

As noted previously, English-only education laws were not passed in a vacuum. Instead, they were first introduced and enacted in the late 1990’s, early 2000’s, at a time when the Latino population exploded in the country. Partly in response to these rising immigration flows and parallel to the passage of English-only initiatives, several laws

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156 Galindo and Vigil, supra note 12, at 29-30.
157 See supra notes 8-11.
were passed in this time period that significantly burdened the Latino immigrant population.\textsuperscript{158} While it could be argued that there was no connection between laws targeting new immigrant communities and laws which aim to cut back on bilingual education for LEP students, in reality this is not likely to be the case if for no other reason than the fact that both laws tended to burden the same class of people—new immigrants. Instead, the more plausible argument is that voters were motivated by the same anti-immigrant sentiment when they voted for English-only measures as when they voted for other statutes that were aimed at reducing immigrant rights.\textsuperscript{159}

That there is a connection between English-only measures and nativist impulses is further supported by history. In particular, the “wave” of exclusionary laws experienced in the past twenty years is not new, but is instead reminiscent past laws that were targeted at foreign groups who were similarly viewed as a threat to the American way of life. For example, at the beginning of the twentieth century, in response to rising immigration levels from Europe, nativism took the form of anti-Irish and anti-Catholic campaigns.\textsuperscript{160}

In addition to targeting religion, nativism has manifested itself in earlier attempts to remove the use of native languages in schools. In particular, in 1864, the use of Native American languages was outlawed in schools, and by the end of World War I, teaching


\textsuperscript{159} See, e.g., Rethinking Schools Online Editorial, \textit{Bilingual Education is a Human and Civil Right}, 17 \textbf{Rethinking Sch. Online} 2 (2002), at http://www.rethinkingschools.org/archive/17_02/Bili172.shtml (arguing that “[t]he current xenophobic policies in our schools and communities are the newest chapter in a long, predictable book.”) [hereinafter Rethinking Schools].

\textsuperscript{160} Galindo and Vigil, supra note 12, at 31.
German in school had likewise been made illegal. Fast forward to the present, in a pattern that closely resembles past exclusionary laws, today’s English-only laws disproportionately affect Latinos groups within the United States and reflect a nativist impulse that has existed within the country for centuries.

While it can hardly be argued that for some, English-only education is advocated as a means to improve the performance of LEP students, the fact remains that among the groups most directly affected, notably Latino groups, there is a considerable lack of support for these initiatives. Latino advocacy groups have lobbied to maintain bilingual education programs. For example, in California, Latino groups largely opposed Proposition 227. Likewise, in Arizona, groups advocating in favor of keeping Bilingual Education included such entities as The Mexican American Political Association, Arizona Teachers of English to Speakers of Other Languages, and The Navajo Nation Council. Moreover, even assuming that some Latino parents would support English-only measures for their children, these parents did not represent the majority of voters passing these initiatives, and it is arguably the case that such voters were not looking out for the best interests of LEP students when they passed measures to

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161 Rethinking School, supra note 159.
162 See Crawford, supra note 101 (stating that Unz became famous by strongly opposing an anti-immigrant Proposition in California and therefore is not motivated by ill feelings toward immigrants).
163 In California, following a CNN/Los Angeles Times exit poll, sixty-three percent of Latinos voted against the Initiative. Mikal Muharrar, Pulls Apart: Manufacturing an Anti-Bilingual Latino Majority, Extra! (Nov./Dec. 1998), available at http://www.fair.org/extra/9811/latino.html. The article also mentions that this was the third time in recent past that Latino and White voters voted against each other – the previous times when Whites approved the anti-immigration Proposition 187 and the anti-affirmative action Proposition 207. Id.
164 See Official Ballot Arguments Against Proposition 203, available at http://www.englishfirst.org/be/arizona/az203anti.htm (last visited Apr. 20, 2005); see also Julie Cart, Tribal Languages Unintended Target in English-Only Drive, L.A. Times, Nov. 4, 2000, at http://www.englishfirst.org/be/arizona/azbevotelatimes11700.htm (mentioning that “[t]he initiative has drawn fierce opposition from both Latino and Native American groups.”).
ban bilingual education and instead interpreted these initiatives through nativist frameworks or as part of larger effort to cut down on immigrant benefits and rights.\textsuperscript{165}

Given the overlaps that English-only measures share with legislative efforts aimed at curtailing immigrant rights and the historical treatment of foreign groups within the United States, and considering the widespread rejection of these measures by Latino groups, it would seem that the English-only education measures reflect nativist ideals, rather than legitimate pedagogical purposes. Though this matter is obviously open to debate, the mere risk that these programs could reflect such an animus to foreign born populations should ideally be enough to counsel Georgia legislators and voters away from the adoption of an English-only approach to education. Nevertheless, even if avoiding nativism is not a sufficient motivator alone, this concern combined with questionable effectiveness of English immersion education and the limitations on parental choice and school official discretion such programs impose, should decisively shift the scales in favor of maintaining bilingual education in Georgia.

IV. Conclusion: Georgia Should Keep Bilingual Education

Although the controversy over the appropriate model of education for Latino LEP students is not likely to die out any time soon, one fact remains uncontested: the Latino student population continues to lag behind in all education levels, with Latino students

\textsuperscript{165} James Crawford, \textit{the Campaign Against Proposition 227: A Post Mortem}, 21(1) \textit{Bilingual Res. J.} (1997), available at http://brj.asu.edu/archives/1v21/articles/Issue1Crawford.html (claiming that “approaching the minority status for the first time since the Gold Rush, many white Californians feel threatened by the impending shift in political power and resentful about paying taxes to benefit ‘other’ people’s children ” and that “[p]ublic schools have become a special point of concern.”).
having the lowest rank among major U.S. racial groups for educational attainment, and only 56% of Latino students graduating from high school in 2000.\textsuperscript{166}

Though English-only seems the only solution for its proponents, given concerns about the limited success of the state initiatives, the significant inroads that such proposals make into parental and school board choice, and the nativist context in which they were enacted, it becomes evident that the restrictive approach argued for by the likes of Ron Unz makes little sense for the State of Georgia.

That bilingual education may not be completely effective should not mean that it be completely abandoned. Rather, given that the Supreme Court has recognized the obligation of the schools to provide adequate education for LEP students in \textit{Lau},\textsuperscript{167} and taking into account the need to preserve parental choice and avoid policies premised on nativism, Georgia should not embrace the anti-bilingual education movement.

Ideally, maintaining bilingual education would boost the educational attainment of LEP students, but at the very minimum, it would preserve parental choice and avoid the appearance of nativism that pervades the English-only measures currently in place throughout the country. All told, these factors should guide the Georgia legislature and electorate to stay course and reaffirm its commitment to bilingual education.

\textsuperscript{166} Perea, \textit{supra} note 3, at 1423.

\textsuperscript{167} \textit{Lau v. Nichols}, 414 U.S. 563 (1974); see also \textit{supra} notes 43-45.
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