

Notes

LABORATORIES FOR INEQUALITY: STATE EXPERIMENTATION AND EDUCATIONAL ACCESS FOR ENGLISH- LANGUAGE LEARNERS

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ABSTRACT

Given increased state hostility to minority-language use and states’ ever-changing, though at times inadequate, methods of accommodating English-language learners, federal intervention is necessary to protect vulnerable linguistic minorities. But, fueled by the Supreme Court and Congress since the early 2000s, the federal government has increasingly accorded greater deference to state legislatures and local school districts in the area of English-language-learner (ELL) education. This growing acceptance of “deference not deserved” ignores evidence of state failure in education of ELLs and irresponsible state experimentation with the rights of students with limited English proficiency. It also marks a decided departure from historical practice in the area of ELL education, though federal involvement in funding and shaping state education policy is more firmly entrenched than ever.

Vindicating the ability of ELLs to access a meaningful education may undercut traditional notions of state control over education policy generally. But historical practice strongly supports the federal government’s ability to protect vulnerable linguistic groups by conditioning federal dollars on the satisfaction of federal education standards. The spirit of the Equal Educational Opportunities Act, Supreme Court precedent regarding access to education, and the Common Core State Standards Initiative’s federalization of school

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curricula all suggest that Congress should leverage its control over state education funds to protect ELLs.

INTRODUCTION

Since the 1980s, the states have served as a battleground in a policy war to establish English as the official language of the United States. Neither the U.S. Constitution nor any federal statute declares English as the nation's official language, even though over 230 million Americans speak English within the home.¹ This absence of an officially declared language stands in stark contrast to the United States's neighbor countries of Canada² and Mexico,³ as well as most of Europe.⁴ Though Congress has repeatedly failed to make English the national language of the United States, upwards of thirty states have sought to preserve English as the language of their governments through constitutional amendments, referenda, and statutes. Although the content of these state policies differs, some have disadvantaged recent immigrants to the United States, and have stripped away from non-English speakers the ability to complete even the most basic exercises, such as voting⁵ or driving cars.⁶

The federal government, however, has come to the aid of a certain subset of non-English speakers. Thanks to the Equal Educational Opportunities Act of 1974 (EEOA),⁷ which allows for actions against a state for failure to accommodate non-English-language students, primary- and secondary-school students have traditionally benefited from federal oversight of state action targeted at inhibiting their educational access. Yet interpretations of the

1. CAMILLE RYAN, U.S. CENSUS BUREAU, LANGUAGE USE IN THE UNITED STATES: 2011, AMERICAN COMMUNITY SURVEY REPORTS 3 tbl.1 (2013), available at <http://www.census.gov/prod/2013pubs/acs-22.pdf>.

2. Cristina M. Rodríguez, *Language and Participation*, 94 CALIF. L. REV. 687, 745 (2006).

3. See Ley General de Derechos Lingüísticos de los Pueblos Indígenas [General Law of Linguistic Rights of Indigenous Peoples], Diario Oficial de la Federación [DO], 13 de Marzo de 2003 (Mex.) (placing the indigenous languages of Mexico on the same plane as Spanish, calling them "lenguas nacionales" [national languages]). Mexico does not explicitly declare Spanish as its official language anywhere in its laws.

4. See Robert Huntington, Note, *European Unity and the Tower of Babel*, 9 B.U. INT'L L.J. 321, 324 n.14 (1991) (surveying European laws that create official national languages).

5. Cristina M. Rodríguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689, 1716 n.108 (2006).

6. *Alexander v. Sandoval*, 532 U.S. 275, 278–79 (2001).

7. 20 U.S.C. § 1703(f) (2012).

EEOA and the No Child Left Behind Act (NCLBA)⁸ have allowed the promise of adequate access to education to go unsupervised, permitting the states to adopt sweeping reforms as part of their control over education. Recently, in *Horne v. Flores*,⁹ the Supreme Court further approved of this delegation to the states of the power to determine the appropriate means of accommodating English-language-learner (ELL) students.¹⁰ In doing so, the Court severely eroded one of the principal means of protection for non-English-speaking residents of this country: federal intervention to prevent harmful or ill-informed state policies.

This Note argues that the federal government has given the state governments a great deal of deference—a deference undeserved in the face of state failure—in setting policy for ELL students. Potential animus toward these groups, coupled with the dangers of experimentation in this area, forecast a bleak future for ELLs if the status quo prevails. As a result, this Note proposes that increased federal control or oversight is both necessary and appropriate to ensure universal access to a meaningful education for all children in the United States, regardless of language capacity. Whereas scholars have discussed the subject of adequate accommodations for ELLs and the impact of *Horne* on this group, this Note is the first piece in the academic literature to tie shifts in education policy to the greater English-only movement, and to reflect upon the ways in which states have experimented in this area.

Part I of this Note discusses the history of immigration and multilingualism in the United States. Part II addresses early case law and also legislation designed to protect access to education, focusing particularly on Congress's passage of the EEOA. Part III addresses the English-only movement as a reaction to the increasingly diverse makeup of the American people. Part IV considers the growing acceptance of experimentation following the passage of the NCLBA and the Supreme Court's decision in *Horne*. Part V discusses the danger of state experimentation and the additional fear of state

8. No Child Left Behind Act of 2001, Pub L. No. 107-110, 115 Stat. 1425 (2002) (codified primarily in 20 U.S.C. § 6311 (2012)).

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

10. The academic and legal literature on this topic employs a variety of labels for students with below-average English proficiency, using interchangeably the terms Limited-English Proficient (LEP), English as a Second Language (ESL), or English-Language Learner (ELL). Because *Flores*—the seminal Supreme Court case exploring this topic—employs the term “English-language learner,” this Note does so as well.

animus toward ELLs, and explains why Congress both can and should intervene to protect this group. Finally, Part VI suggests methods the federal government can adopt to counterbalance the need for state experimentation in educating ELLs with the need to provide adequate education to students whose native language is not English.

I. THE CHANGING DEMOGRAPHICS OF THE UNITED STATES

Despite the ubiquity of English-language use in the United States, the United States has a long history of multilingualism. In the Colonial period and the Early Republic, language diversity was prevalent among American settlers.¹¹ Bilingualism and multilingualism “existed in public and private schools, newspapers, and religious and social institutions” well into the first half of the twentieth century.¹² Publishers produced documents as important as the Articles of Confederation in German, and the federal government printed other legislative or governmental papers in French, Dutch, and Swedish.¹³ Translations of the Federal Constitution into German and Dutch likewise played an important role in ensuring its ratification in New York and Pennsylvania, respectively.¹⁴

As the states formed, and later established the United States, vestiges of European colonialism shaped language use in the states’ early histories. French culture and language dominated the political and social scenes of early New Orleans, and the Louisiana legislature enacted laws in French well into the 1900s.¹⁵ California and New Mexico both recognized the utility of publishing official documents in Spanish long after coming under U.S. control in the mid-nineteenth century, signaling the importance of the language to a sizeable—and powerful—part of its population.¹⁶ Before Texas began its long process of independence and annexation into the United States, the

11. Shirley Brice Heath, *English in Our Language Heritage*, in LANGUAGE IN THE USA 6, 7 (Charles A. Ferguson, Shirley Brice Heath & David Hwang eds., 1981).

12. *Id.*

13. Yuval Merin, *The Case Against Official Monolingualism: The Idiosyncrasies of Minority Language Rights in Israel and the United States*, 6 ILSA J. INT’L & COMP. L. 1, 10 (1999).

14. Christina Mulligan, Michael Douma, Hans Lind & Brian Patrick Quinn, *Founding-Era Translations of the United States Constitution* 6, 10 (Aug. 24, 2014) (unpublished manuscript) (papers.ssrn.com/sol3/papers.cfm?abstract_id=2486301).

15. Adriana Resendez, *The Spanish Predominant Language Ordinance: Is Spanish on the Way In and English on the Way Out?*, 32 ST. MARY’S L.J. 317, 326, 328 (2001).

16. *Id.* at 328 n.37.

Mexican government recognized the language rights of American settlers by declaring English as a co-official language alongside Spanish in the territory.¹⁷ After declaring independence, the Republic of Texas continued this tradition by providing governmental services in English, German, and Czech, among other languages.¹⁸

Yet the language panorama of the United States has changed in recent years due to an increase of non-English-speaking individuals and their children within the country. Restrictions on immigration policy originating around the time of World War I made it so that, by the 1960s, the United States was a “more uniformly English-speaking country than it had been at any time since the 1840s.”¹⁹ This demographic uniformity changed with immigration reform in 1965,²⁰ however, more definitively opening the United States’s doors to immigrants from Asia and Latin America. This shift in immigration policy caused an explosion of immigration by non-English-speakers—half of the thirty million newcomers arriving in the United States between the 1960s and 1990s hailed from Latin America alone.²¹

The increasing diversity of the United States’s new residents following the 1965 immigration reform has continued to the present day. As the 2010 Census notes, of the 27.3 million new people since the last census, the “vast majority of the growth . . . came from increases in those who reported their race(s) as something other than White alone and those who reported their ethnicity as Hispanic or Latino.”²² Since the last census in 2000, “Hispanics or Latinos of any race”²³ have grown from comprising about 13 percent of the total

17. José Roberto Juárez, Jr., *The American Tradition of Language Rights: The Forgotten Right to Government in a “Known Tongue,”* 13 LAW & INEQ. 443, 458–59 (1995).

18. *Id.* at 459.

19. DAVID FRUM, HOW WE GOT HERE: THE 70s: THE DECADE THAT BROUGHT YOU MODERN LIFE (FOR BETTER OR WORSE) 268 (2000).

20. *Id.*

21. *Id.* at 269.

22. KAREN R. HUMES, NICHOLAS A. JONES & ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 3 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

23. This Note employs the term Hispanic going forward. The U.S. Census Bureau defines “Hispanic” or “Latino” as “a person of Cuban, Mexican, Puerto Rican, South or Central American, or other culture or origin regardless of race.” SHARON R. ENNIS, MERARYS RÍOS-VARGAS, AND NORA G. ALBERT, U.S. CENSUS BUREAU, THE HISPANIC POPULATION: 2010, at 2 (May 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>. Although the use of this terminology to describe those who are either Spanish-speaking or Portuguese-speaking, or who trace their ancestry to countries that predominantly speak Spanish or

United States population to now making up roughly 16 percent.²⁴ Asian Americans, for their part, are one of the fastest-growing groups in the United States, numbering more than fourteen million people, or nearly 5 percent of the population.²⁵ This number marks an increase from 3.6 percent in 2000.²⁶

Importantly, not only has the number of Hispanic and Asian Americans increased, but they now live in states with historically low numbers of Hispanics and Asians.²⁷ Gone are the days when California, Texas, New York, and Florida were the only places where these two groups settled. Utah and Nevada, for instance, have seen a growth in the Hispanic population within their borders far outstripping the national average, with increases in the total number of Hispanics by 84 percent and 89 percent, respectively, from 2000 to 2010.²⁸ The percentage of the nationwide Hispanic population living in California, Texas, Florida, Arizona, New Mexico, New York, New Jersey, and Illinois, moreover, has decreased in recent years.²⁹ In 1990, 83 percent of Hispanics lived in these eight states alone, while today roughly 74 percent do.³⁰

Interestingly, the states with the highest proportions of *foreign-born* Hispanics are Maryland, Florida, Georgia, North Carolina, Virginia, Alabama, Tennessee, Louisiana, and South Carolina.³¹ Excluding Florida, none of these states have historically witnessed a significant Hispanic presence, nor do they currently have large or robust Hispanic populations.³² Although all states chafe under the burden of providing services to non-English speakers, the states to

Portuguese, is controversial, the fact that the U.S. Census uses this term guides this Note when referring to this group.

24. *Id.* at 4 tbl.1.

25. *Id.* at 4.

26. *Id.*

27. PEW HISPANIC CTR., THE NEW LATINO SOUTH: THE CONTEXT AND CONSEQUENCES OF RAPID POPULATION GROWTH i-ii (2005), available at <http://pewhispanic.org/files/reports/50.1.pdf>.

28. Stephen E. Reil, *Who Gets Counted? Jury List Representativeness for Hispanics in Areas with Growing Hispanic Populations Under Duren v. Missouri*, 2007 BYU L. REV. 201, 201 (2007).

29. ANNA BROWN & MARK HUGO LOPEZ, PEW RESEARCH CTR., MAPPING THE LATINO POPULATION, BY STATE, COUNTY, AND CITY 4 (2013), available at http://www.pewhispanic.org/files/2013/08/latino_populations_in_the_states_counties_and_cities_FINAL.pdf.

30. *Id.*

31. *Id.* at 10 tbl.5.

32. *See id.* at 4 (listing those states to which Hispanic immigrants traditionally moved and settled after arrival in the United States).

which new Latin American immigrants are moving are especially ill-equipped to respond to their needs.³³

Merely looking to the number of Hispanic Americans and Asian Americans living in the United States to determine the number of non-English speakers within the country is, admittedly, problematic. It goes without saying that a great number of Asian and Hispanic Americans not only speak English, but speak English well.³⁴ The U.S. Census Bureau's statistics related to non-English speakers, collected since 1890,³⁵ are likewise misleading. Of the over sixty million people in the United States who speak a language other than English at home, thirty-seven million speak Spanish and roughly eight million speak an Asian or Pacific Islander language.³⁶ Not all of those who primarily speak languages other than English need English-language instruction, however. Over 55 percent of those the Census Bureau surveyed who spoke Spanish at home reported that they spoke English "very well."³⁷ Among Asian-language speakers, the ability to speak English "very well" ranged from a low of 39 percent among Vietnamese-Americans to a high of 69 percent among speakers of "other Asian languages."³⁸

The number of students who require assistance learning English is at least partially ascertainable. In 2002, 8.7 percent of all students participated in English-language assistance programs in American public elementary and secondary schools.³⁹ This percentage of the population has grown in recent years, as 9.8 percent required such

33. JERRY JOHNSON, THE RURAL SCH. & CMTY. TRUST, WHY RURAL MATTERS 2007: THE REALITIES OF RURAL EDUCATION GROWTH vi, 32 (Oct. 2007), available at <http://files.eric.ed.gov/fulltext/ED498859.pdf> (noting that ELL populations are growing disproportionately in the rural Southeast, where they face "less than favorable policy environments"); SERVE, ENGLISH LANGUAGE LEARNERS IN THE SOUTHEAST, RESEARCH, POLICY, & PRACTICE 1, 81 (2004), available at <http://files.eric.ed.gov/fulltext/ED485206.pdf> (discussing the potential difficulties facing ELLs in the Southeast, where the "rapid increase in the ELL population" faces a "paucity of resources, such as certified ESL and bilingual teachers, funding, and research").

34. For a breakdown of the English-speaking ability of people who speak languages other than English at home, see RYAN, *supra* note 1, at 5 tbl.2.

35. *Id.* at 1.

36. *Id.* at 3 tbl.1.

37. *Id.*

38. *Id.*

39. Table 47. Number and Percentage of Public School Students Participating in Programs for English Language Learners, by State: Selected Years, 2002-03 through 2010-11, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/digest/d12/tables/dt12_047.asp (last visited Nov. 29, 2014).

assistance in 2009.⁴⁰ There has been an increased presence in some states of these students, similar to the shift in the states in which Hispanics live generally. For example, roughly 4 percent of North Carolina students received English-language assistance in schools in 2003.⁴¹ In 2011, this number had increased to just over 7 percent.⁴² South Carolina, for its part, saw an increase from 1 percent of its students in such programs to 5 percent in the same eight-year span.⁴³

Considered alone, these statistics are staggering. We must also ask, however, about those people who live in the United States but who the Census may not necessarily capture. In January 2011, the Department of Homeland Security estimated the number of unauthorized immigrants living in the United States as 11.6 million,⁴⁴ and previous nongovernmental estimates suggest that the number may be even higher.⁴⁵ Many members of this population presumably avoid being counted in the Census, though they still access American educational facilities.⁴⁶ What is definitively known, however, is that ELLs have entered the nation's public schools in ever-increasing numbers, despite the misgivings of many state governments about the changing ethnic and linguistic backgrounds of the students they are responsible for educating.

II. EDUCATION AND THE COURTS

Though the United States's early history of diverse language patterns often goes overlooked, education has been an area of both historical and current legislative attention. This Part examines various

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. MICHAEL HOEFER, NANCY RYTINA & BRYAN BAKER, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 3 (2012), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf.

45. See, e.g., Fred Elbel, *How Many Illegal Aliens Are in the U.S.?*, SOCIAL CONTRACT 241, 248 (Summer 2007) (critiquing the government's estimation methods and providing data suggesting that "it is likely that up to 20 million illegal aliens presently reside in the United States"); ROBERT JUSTICH & BETTY NG, BEAR STEARNS, THE UNDERGROUND LABOR FORCE IS RISING TO THE SURFACE 1 (2005) ("The number of illegal immigrants in the United States may be as high as 20 million people . . .").

46. See Jennifer Galassi, *Dare to Dream? A Review of the Development, Relief, and Education for Alien Minors (DREAM) Act*, 24 CHICANO-LATINO L. REV. 79, 81 (2003) (noting that at least fifty thousand undocumented students graduate from American public high schools every year).

Supreme Court cases dealing with the critical question of access to education in the United States. It likewise discusses federal intervention into education, a realm traditionally occupied by the state governments.

A. *Supreme Court Precedent Regarding the Importance of Universal Access to Education*

The existence (or nonexistence) of a constitutional right to a meaningful education is complex, to say the least. In a 1973 case, *San Antonio Independent School District v. Rodriguez*,⁴⁷ the Supreme Court seemed to dismiss the possibility that such a right exists. Texas had allotted funding to schools partially on the basis of local property taxes,⁴⁸ meaning that students attending schools in wealthier areas received access to greater potential sources for education expenditures than students in poorer districts.⁴⁹ The petitioner argued that this discrepancy denied some students the same education as others.⁵⁰ The Court, however, did not find the funding scheme unconstitutional. The majority first conceded that “education is perhaps the most important function of state and local governments.”⁵¹ Despite this assertion, the Court added that a citizen’s meaningful education “is not among the rights afforded explicit protection under our Federal Constitution. Nor . . . [is there] any basis for saying it is implicitly so protected.”⁵²

But *Rodriguez* and its conception of the role played by education do not exist in a case-law vacuum. Both earlier and later Court opinions have added context to its meaning and impact. In *Meyer v. Nebraska*,⁵³ for example, the Court simultaneously extolled the value of education and the importance of the freedom to both speak and teach in a foreign language.⁵⁴ In this case, a state law—passed in the

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

48. Most states use this model to determine school funding. See John Dayton & Anne Dupre, *School Funding Litigation: Who’s Winning the War?*, 57 VAND. L. REV. 2351, 2356 (2004).

49. *Rodriguez*, 411 U.S. at 14–16.

50. *Id.*

51. *Id.* at 29 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

52. *Id.* at 35.

53. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

54. *Id.* at 403.

midst of World War I anti-German hysteria⁵⁵—forbade any “person, individually or as a teacher, . . . [to] teach any subject to any person in any language [other] than the English language.”⁵⁶ Finding that this law did not permit “foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land,”⁵⁷ the Court struck down the policy as a violation of the Fourteenth Amendment’s due-process guarantee.⁵⁸ More importantly, the Court also asserted that “[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.”⁵⁹

The Court later downplayed the key language in *Rodriguez* when it decided *Plyler v. Doe*⁶⁰ in 1982. The majority found unconstitutional a Texas law that defunded education for undocumented children.⁶¹ The Court held that access to education, while not a right protected by the Fourteenth Amendment, stands for something much greater than a “benefit indistinguishable from other forms of social welfare legislation.”⁶² Legislation that shuts undocumented children out of schools “foreclose[s] any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”⁶³ Because of the potentially momentous impact illegal-alien exclusionary laws could have on education, the Court concluded that the state could have no rational basis for implementing them.⁶⁴ The Court also discussed the tenuous place occupied by undocumented immigrants within American society as a whole: without education, this “shadow population” would forever be excluded from opportunity and success in the United States.⁶⁵ Such a situation would present “most difficult

55. Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 5 J.L. & FAM. STUD. 345, 350 n.17 (2003).

56. *Meyer*, 262 U.S. at 397.

57. *Id.* at 397–98.

58. *Id.* at 399 (“Without doubt, [the liberty guaranteed by the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”).

59. *Id.* at 400.

60. *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

61. *Id.* at 205–06, 229–30.

62. *Id.* at 221 (quotation marks omitted).

63. *Id.* at 223.

64. *Id.* at 240.

65. *Id.* at 218.

problems for a Nation that prides itself on adherence to the principles of equality under law.”⁶⁶

These cases therefore depict education as something akin to a quasi-right.⁶⁷ Even absent legislation, the federal judiciary has promoted and celebrated the role of education in American society. It is on this bedrock principle—the importance of education for *all* persons living in the United States—that the federal government has chipped away at state control over schools through its use of aggressive legislation.

B. Federal Intervention, Statutory Rights, and the Response of the Courts

Though the courts have played a pivotal role in clarifying the importance of education, federal legislation has complemented and advanced these efforts. The traditional conception that states, uniquely, hold the power to dictate education policy is a well-established norm of American federalism.⁶⁸ Massachusetts first enacted a regime of mandatory public education beginning in 1640. The Old Deluder Satan Act—named after its memorable opening line—sought to require colony-wide education so that children would be able to resist the “inducements of Satan.”⁶⁹ As the nation formed, it became the general rule that local and state governments would prescribe the educational methods and goals of their respective citizens.⁷⁰ Although the federal Constitution makes no mention of education, all fifty state constitutions include clauses related to state control over the power to instruct children.⁷¹

66. *Id.* at 218–19.

67. See Jeffrey D. Straussman, *Rights Based Budgeting*, in *NEW DIRECTIONS IN BUDGET THEORY* 103–04 (Irene Rubin ed., 1988) (noting that “[a]t the local level, public education is a quasi-right,” because although public education is not constitutionally guaranteed, it enjoys significant protection through federal use of conditioned grants to the states); Sarah G. Boyce, Note, *The Obsolescence of San Antonio v. Rodriguez in the Wake of the Federal Government’s Quest to Leave No Child Behind*, 61 *DUKE L.J.* 1025, 1051–52 (2012) (noting that the precedential value of cases declaring that education is not a right protected by the Constitution is “unclear,” and suggesting that it is an implicitly protected right).

68. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2628 (2012) (Ginsburg, J., dissenting) (noting that education is an area “where States historically have been sovereign” (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995))).

69. Massachusetts School Law of 1647 (Old Deluder Satan Act), reprinted in *EDUCATION IN THE UNITED STATES: A DOCUMENTARY HISTORY* 393 (Sol Cohen ed., 1974).

70. *Lopez*, 514 U.S. at 564 (1995).

71. Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 *GEO. WASH. L. REV.* 92, 129 (2013).

Despite this history of state control over education, a monumental shift toward federal intervention occurred with the passage of the Civil Rights Act of 1964.⁷² In relevant part, Title VI of the Civil Rights Act guaranteed that all Americans would live free from discrimination based on “race, color or national origin . . . [in] program[s] or activit[ies] receiving Federal financial assistance.”⁷³ Congress intended that the Act’s regulation over “program[s] or activit[ies]” would cover race and national-origin discrimination in state public schools, forcing the hand of many states that had not yet complied with judicial desegregation orders.⁷⁴ This federal regulation shattered the racially bifurcated school system that had developed within parts of the country, and inserted the federal government into oversight of state control in a manner never before experienced.⁷⁵

The use of the Civil Rights Act to promote the interests of ELLs was short-lived, though its legacy shaped later legislation that aided this group. The first and only Supreme Court case to deal with ELLs as a protected group under the Civil Rights Act was *Lau v. Nichols*.⁷⁶ In *Lau*, the U.S. Department of Health, Education, and Welfare (HEW) had issued a memorandum, which purported to “clarify . . . [its] policy” regarding discrimination under the Civil Rights Act, extending that policy’s protection to students with limited English proficiency.⁷⁷ In particular, the memorandum required “affirmative steps to rectify the language deficiency” of ELL students.⁷⁸

A group of Chinese-speaking ELL students in a San Francisco school brought suit against the school district in 1974,⁷⁹ possibly conscious of the agency’s purported clarification of the Civil Rights Act. These ELLs claimed that subjecting them to an English-only education alongside English-fluent peers denied them a meaningful education, violating the Fourteenth Amendment and other relevant

72. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5 U.S.C., 28 U.S.C., and 42 U.S.C.).

73. Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d–2000d-4a (2012)).

74. Deborah Mayo-Jeffries, *Discrimination in the Education Process Based on Race*, 21 N.C. CENT. L.J. 21, 22 (1995).

75. Lino A. Graglia, *The Busing Disaster*, 2 KAN. J.L. & PUB. POL’Y 13, 14 (1992).

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

77. Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970).

78. *Id.*

79. *Lau*, 414 U.S. at 564–65.

law.⁸⁰ In its analysis, the Supreme Court declined to address the Fourteenth Amendment issue and instead focused on the Civil Rights Act.⁸¹ Though language ability or preference is not a protected characteristic under the Civil Rights Act, the Supreme Court allowed for the implementation and enforcement of HEW's new policy to "rectify the language deficiency [of ELL students] in order to open . . . [academic] instruction" to this ignored subset of students.⁸² Although ordering no specific remedy itself, the Court's decision allowed for the implementation of bilingual education for these students.⁸³

C. *The EEOA and Appropriate Action*

Congress partially codified the holding in *Lau* by passing the EEOA mere months after the decision. The EEOA, in § 1703(f), specified that state educational agencies must "take appropriate action to overcome language barriers that impede [the] equal participation" of non-English-speaking students.⁸⁴ Failure to do so leaves a state or school authority liable "only [for] such remedies as are essential to correct" the denials of the educational opportunity.⁸⁵ Importantly, as part of this legislation, Congress also authorized students to vindicate their rights under the EEOA in federal court.⁸⁶ The Attorney General, similarly, may bring suit on behalf of the United States when it appears that a state has violated the statute.⁸⁷

The EEOA, as crafted, poorly protects ELLs from state harm. To begin with, the EEOA seems almost entirely concerned with the eradication of school segregation and the vestiges of the dual school

80. *Id.*

81. *Id.* at 566.

82. *Id.* at 566–67.

83. The Court noted that "[n]o specific remedy [was] urged" to rectify the district's failure, *id.* at 564, and "remand[ed] the case for the fashioning of appropriate relief," *id.* at 569. Still, California law provided that the accommodation for an ELL would be "instruction . . . given bilingually." *See id.* at 565 (quotation mark omitted). The Ninth Circuit, too, stated that the students requested "bilingual compensatory education" as relief when it heard the case. *Lau v. Nichols*, 483 F.2d 791, 793 (9th Cir. 1973).

84. 20 U.S.C. § 1703(f) (2012).

85. *Id.* § 1712.

86. *See id.* § 1706 ("An individual denied an equal educational opportunity . . . may institute a civil action in an appropriate district court of the United States . . .").

87. *Id.*

system in the United States.⁸⁸ The text of the EEOA, moreover, says nothing about the form that “appropriate action” must take. Two proposed methods dominate the debate in this area: bilingual education and structured English immersion. Bilingual education involves teaching students in both English and their native language.⁸⁹ Structured English immersion, a more recent alternative, entails teaching English rapidly and dedicating a great deal of time to that end.⁹⁰ Finally, the penalty available for a failure to accommodate ELLs is the imposition of “only such remedies . . . essential to correct” the particular denials of equal educational facilities.⁹¹ The absence of a stronger punishment, such as the removal of all funds for states that fail to accommodate ELLs, differs from the punitive scheme provided for violations of Title VI.⁹² This likewise means that state governments face far greater punishment for discrimination on the basis of race than they do for national-origin discrimination.

The legislative history surrounding the law⁹³ suggests that Congress did not intend to allow the judiciary to fashion its own interpretation of the EEOA.⁹⁴ Instead, the scant evidence indicates that Congress envisioned bilingual education as the form of accommodation that the states would adopt.⁹⁵ Earlier legislation, for instance, suggests this trend. Congress had passed the Bilingual Education Act only six years earlier, evincing its preference for this

88. The Congressional findings associated with the EEOA, for instance, reference dual school systems five times, transportation (busing) five times, and desegregation one time. *See id.* § 1702. Discriminatory policy against ELLs is directly referenced only once in the entire EEOA. *See id.* § 1703(f) (referencing “the failure by an educational agency to take appropriate action to overcome language barriers”).

89. Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911, 923 (2010).

90. *Id.* at 977 n.329.

91. 20 U.S.C. § 1712.

92. *See* 28 C.F.R. § 50.3 (2015) (noting that the “ultimate sanctions under title VI” include the “termination of assistance being rendered”).

93. Little legislative history exists for the bill passed by Congress in 1974. A greater body of legislative history exists for the bill’s earlier iteration, which failed to pass in 1972. Most scholars cite the history of the 1972 bill when referencing the 1974 act. For a longer discussion of this trend, see, for example, 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, 218–19 (2011).

94. *Martin Luther King Jr. Elementary Sch. Children in Green Rd. Hous. Project v. Mich. Bd. of Educ.*, 451 F. Supp. 1324, 1331–32 (E.D. Mich. 1978).

95. Mongiello, *supra* note 93, at 219.

method of education.⁹⁶ The first iteration of the Bilingual Education Act provided additional financial assistance to “States and areas within States having the greatest need for [bilingual] programs” that “develop and carry out new and imaginative elementary and secondary school programs designed to meet . . . [the] needs” of children with limited English-speaking ability.⁹⁷ Contemporary studies, moreover, suggested that the bilingual-education model not only aided Mexican-American students in succeeding academically, but also improved self-esteem in the classroom.⁹⁸ Congress’s approval of bilingual education was a reaction to the English-only education policies developed in the post–World War I environment.⁹⁹ And most importantly, pursuant to the decision in *Lau*, the Office of Civil Rights released a series of guidelines that “essentially promoted transitional bilingual programs” for the following six years.¹⁰⁰ The threatened withholding of federal funds for a failure to adopt such programs prompted over five hundred school districts to implement bilingual education.¹⁰¹

Yet despite any nontextual or background indications of Congress’s will, the term “appropriate action” is still so ill-defined that a district court must fashion its own meaning of these words to adjudicate an EEOA claim.¹⁰² Lacking guidance, the circuits therefore differ somewhat on the standard to be applied in determining whether a state or locality has created suitable accommodations for ELLs. Importantly, for instance, the Ninth Circuit has interpreted the EEOA to hold state governments directly responsible for their failure to ensure that local school districts have adequately accommodated ELLs.¹⁰³ In *Idaho Migrant Council v. Board of Education*,¹⁰⁴ the Ninth

96. Sandra Cortes, Note, *A Good Lesson for Texas: Learning How to Adequately Assist Language-Minorities To Learn English*, 13 TEX. WESLEYAN L. REV. 95, 104 (2006).

97. Bilingual Education Act of 1968, Pub. L. No. 90-247, 81 Stat. 783, 816–18 (1968).

98. Bethany Li, Note, *From Bilingual Education to OELALEAALEPS: How the No Child Left Behind Act Has Undermined English Language Learners’ Access to a Meaningful Education*, 14 GEO. J. ON POVERTY L. & POL’Y 539, 549 (2007).

99. Cortes, *supra* note 96, at 104.

100. David Nieto, Commentary, *A Brief History of Bilingual Education in the United States*, PERSPECTIVES ON URBAN EDUC., Spring 2009, at 61, 64, available at http://www.urbanedjournal.org/sites/urbanedjournal.org/files/pdf_archive/61-72--Nieto.pdf.

101. DOUGLAS S. REED, BUILDING THE FEDERAL SCHOOLHOUSE: LOCALISM AND THE AMERICAN EDUCATION 166 (2014).

102. Jessica R. Berenyi, Note, “Appropriate Action,” *Inappropriately Defined: Amending the Equal Educational Opportunities Act of 1974*, 65 WASH. & LEE L. REV. 639, 657–58 (2008).

103. *Idaho Migrant Council v. Bd. of Educ.*, 647 F.2d 69, 70 (9th Cir. 1981).

Circuit found that although Idaho's constitution already required such state supervision of local compliance, the EEOA separately imposed a burden upon state governments to ensure school-district adherence to its strictures even when a state constitutional provision does not so require.¹⁰⁵ This decision greatly expanded state liability under the EEOA, as the only court to have previously considered the issue imposed state liability after considering state entrenchment in education policy as a factual matter.¹⁰⁶ Other courts seeking to piece together the meaning of the statute found the *Idaho Migrant Council* interpretation useful.¹⁰⁷

One case stands above all others, however, in guiding lower court interpretation of the appropriate action states must take under the law for ELLs. In *Castaneda v. Pickard*,¹⁰⁸ the Fifth Circuit adopted a three-prong test to adjudicate claims under the EEOA.¹⁰⁹ First, a court must determine whether the state's educational theory is sound, though the *Castaneda* judges expressly noted that Congress did not intend to mandate which method of education would be the most appropriate.¹¹⁰ Second, the court must review the policy to ensure that it is not a dead letter, but that the state has instead dedicated adequate "practices, resources and personnel."¹¹¹ Third, even if these first two prongs are met, the court can consider the actual achievement record of students in determining whether or not a state plan has produced the desired educational access for ELLs.¹¹²

In addition to providing a structure to judicially review EEOA cases, the *Castaneda* decision decidedly allowed for *state* control over

104. *Idaho Migrant Council*, 647 F.2d 69.

105. *Id.* at 70–71.

106. See *United States v. Sch. Dist. of Ferndale, Mich.*, 577 F.2d 1339, 1347 (6th Cir. 1978) (holding that "the State can[not] escape liability under the Act merely because its support for the proscribed actions was indirect" when there existed "substantial control exerted by Michigan officials over local school operations").

107. *United States v. Texas*, 601 F.3d 354, 365 (5th Cir. 2010) ("Both state and local educational agencies are responsible for taking 'appropriate action' under the statute"); *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1042–43 (7th Cir. 1987) ("[T]he obligation to take 'appropriate action' falls on both state and local educational authorities."); *United States v. City of Yonkers*, 880 F. Supp. 212, 239 (S.D.N.Y. 1995) ("[T]he plain language of the [EEOA] seems to provide a basis for holding a state vicariously liable for the discriminatory acts of local educational authorities").

108. *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981).

109. *Id.* at 1009–10.

110. *Id.* at 1009.

111. *Id.* at 1010 (emphasis added).

112. *Id.*

the type of accommodations ELLs receive.¹¹³ The second prong of the court's test, however, targeted state allocation of resources as a method to invalidate legislative or local policy. As such, *Castaneda* at least theoretically allowed a court to forestall an inadequately funded plan for educating ELLs before it goes into effect, and allows resources to serve as a benchmark for the appropriateness of state action.¹¹⁴ *Castaneda* gained approbation from at least one other circuit¹¹⁵ and multiple district courts¹¹⁶ before being discussed by the Supreme Court in its analysis in *Horne*.¹¹⁷

III. ENGLISH: THE OFFICIAL LANGUAGE OF THE UNITED STATES?

Although the United States has a long history of both multiculturalism and multilingualism,¹¹⁸ the state and federal governments have frequently sought to limit the impact of “non-American” influences on American society generally. The English-only movement is one such reaction to increasing immigration and multilingualism; it seeks to promote the use and acceptance of the English language by newly arrived immigrant groups. The next Section details the birth of the modern English-only movement, as well as the role the federal government has played in limiting its reach.

A. *The States React: The English-Only Movement*

A significant backlash has manifested itself within the states in response to the growing population of Asian and Hispanic immigrants in the United States, and to the concomitant (though smaller) growth in the use of Spanish and other languages. Today, as

113. *Id.* at 1009.

114. *Id.* at 1010.

115. See *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1041–42 (7th Cir. 1987) (noting that the inquiry includes the pre-implementation evaluation of “whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory advanced by the school”).

116. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1017–21 (E.D. Cal. 1998); *Quiroz v. State Bd. of Ed.*, 1997 WL 661163 1, at *4–5 (E.D. Cal. Sept. 10, 1997); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1510 (D. Colo. 1983).

117. *Horne v. Flores*, 557 U.S. 433, 477–78 (2009) (Breyer, J., dissenting) (“Courts in other Circuits have followed *Castaneda*’s approach. No Circuit Court has denied its validity.” (citations omitted)).

118. See *supra* notes 12–18 and accompanying text.

one incarnation of this hostility, a great many states have declared English as the official language of their governments.¹¹⁹

The earliest anti-minority-language laws date back to World War I.¹²⁰ German Americans, the largest immigrant group in the United States at that time, came under suspicion following the commencement of hostilities against the German Empire.¹²¹ State laws, like the one in *Meyer*, attacked the use of the German language as part of nativist paranoia over the loyalty of these Americans.¹²² Equating English-speaking with patriotism following a time of war and ongoing hostility meant that only one language—English—could safely be used in arenas of public discourse, and particularly in schools.¹²³ After a brief period during which language restrictions did not frequently appear, nativism again resurged after fifteen million aliens, mostly of Hispanic or Asian descent, entered the country between 1980 and the mid-1990s.¹²⁴ When the growth of the immigrant population in urban areas exploded, native-born Americans flocked to suburban and rural areas.¹²⁵ But apart from engaging in this so-called “white flight,” some native-born Americans also began a lobbying movement to pass legislation to ensure that Anglo-American culture and the English language remained dominant in the face of the United States’s changing demographic composition.

The modern English-only, or official-English,¹²⁶ movement began in 1981 when Senator Samuel Ichiye Hayakawa¹²⁷ introduced a

119. Hunter Schwarz, *States Where English Is the Official Language*, WASH. POST, Aug. 12, 2014, <http://www.washingtonpost.com/blogs/govbeat/wp/2014/08/12/states-where-english-is-the-official-language>.

120. Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 329–30 (1992).

121. *Id.*

122. *Id.*

123. *Id.* at 330.

124. Thomas Muller, *Nativism in the Mid-1990s: Why Now?*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 105, 105–06 (Juan F. Perea ed., 1997).

125. *Id.*

126. Both “English-only” and “official English” have been employed, depending on the terms and purpose of the statute or constitutional amendment. This Note uses the term “English-only” laws to describe those enactments that officially promote English-language use. Not only is this terminology more dominant in the literature, but it also better captures that even the most innocuous pieces of legislation at times precede more restrictive laws.

127. Senator Hayakawa was born in Canada to Japanese parents. Before serving as a U.S. senator from California, he was an English professor in the United States. After leaving office,

constitutional amendment to establish English as the official language of the United States.¹²⁸ In a speech to Congress, Senator Hayakawa noted that declaring English as the sole language of the United States was necessary because “separate languages can fracture and fragment a society.”¹²⁹ His vision of the proposed amendment would likewise prevent the government from “requir[ing] multilingual signs,” though he expressly noted that communities would be free to provide services in languages other than English where necessary.¹³⁰ Senator Hayakawa also made it clear that “Yiddish schools, Hispanic schools, Japanese, and Chinese schools” would be permitted in an official-English America, but only if they derived support from outside of the public coffers.¹³¹ Although this amendment ultimately failed at the federal level, the state governments took matters into their own hands. As of 2014, thirty-one states have enacted such official-English laws.¹³² In various bills and constitutional amendments, many states have brought into reality Senator Hayakawa’s vision of an official-English polity, some going even further than he envisioned in restricting foreign-language use.¹³³

B. Variance in State Legislation Regarding English-Only Policies

The nature of these state laws, and the attitude they evince toward the use of languages other than English, range from innocuous and vague to nefarious and incredibly restrictive. Some of these laws are largely symbolic and have few practical impacts, while others designate English as the language of official government documents, procedures, and hearings.¹³⁴ California’s constitution, for instance, declares that “English is the common language of the people of the United States and in the State of California,” and insists that California pass “no law which diminishes or ignores the role of

he cofounded U.S. English, the organization responsible for many of the state laws discussed below. See *About U.S. English*, U.S. ENGLISH, <http://www.us-english.org/view/6> (last visited Nov. 29, 2014).

128. See Josh Hill, Devin Ross & Brad Serafine, *Watch Your Language! The Kansas Law Review Survey of Official-English and English-Only Laws and Policies*, 57 U. KAN. L. REV. 669, 674 (2009).

129. 127 CONG. REC. 7444 (1981).

130. *Id.*

131. *Id.*

132. Hill et al., *supra* note 128, at 673.

133. *Id.* at 674.

134. *Id.* at 673–74.

English as [its] common language.”¹³⁵ Kentucky demonstrates less hostility toward languages other than English. Its law merely designates “English . . . as the official language of Kentucky,” and says nothing more.¹³⁶ Arizona’s English-only law is more forceful than these examples in its stance toward official use of the English language, however. Its constitution addresses English-language primacy extensively, requiring that all government actions, with few limitations, be “conducted in English.”¹³⁷ The violation of Arizona’s law by officials enables an individual to bring suit, under the terms of the amendment, to enforce this policy.¹³⁸

Moreover, even when the enabling statutes are fairly toothless, follow-up legislation may strengthen the force of language restrictions within the initial law so as to more severely limit non-English speakers’ ability to live and work freely within their communities. For example, Kentucky’s relatively permissive law predated later legislation that required that “[e]very writing contemplated by the laws . . . be in the English language.”¹³⁹ This more restrictive law, in turn, prompted an attempt by the Kentucky Board of Elections to ban the publishing of all election materials in any language other than English.¹⁴⁰

Missouri serves as a further example of this trend. Missouri’s English-adoption statute merely states that “English is the common language used in Missouri . . . [and therefore] fluency in English is necessary for full integration into our common American culture.”¹⁴¹ In 2008, however, voters amended the state’s constitution to require that all official government proceedings be conducted in English.¹⁴² In 2012, moreover, the Missouri House of Representatives approved additional legislation requiring that driver’s-license examinations “only be administered in the English language.”¹⁴³ The proposed legislation would have similarly forbidden officials from allowing “the use of spoken language interpreters in connection with the written

135. CAL. CONST. art. III, § 6.

136. KY. REV. STAT. ANN. § 2.013 (West 2010).

137. ARIZ. CONST. art. 28, §§ 1–6.

138. *Id.* § 6.

139. KY. REV. STAT. § 446.060 (West 2006).

140. Mark Flores, Note, *English Only? The “Power” of Kentucky’s Official Language Statute*, 98 KY. L.J. 855, 859–60 (2010).

141. MO. ANN. STAT. § 1.028 (West 1999).

142. MO. CONST. art. I, § 34.

143. H.B. 1186, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012).

and driving tests.”¹⁴⁴ Passed by a wide margin in the lower house, this proposed bill was sent to the senate for approval, though it apparently failed to take further action.¹⁴⁵

C. Exemptions for English-Language-Learner Programs

Despite this shift toward English-only state policies, even those jurisdictions with the strictest laws allow foreign languages to be used in the instruction of students with limited capacity in English. Georgia’s law, for instance, states that “[t]he English language is designated as the official language of the state,” but expressly allows foreign-language use for “instruction designed to aid students with limited English proficiency.”¹⁴⁶ Idaho’s strict prohibition on the use of foreign languages is likewise tempered by allowing public schools to educate in a foreign language so that “[n]on-English speaking children and adults . . . [may] read, write and understand English as quickly as possible.”¹⁴⁷ Arkansas, too, clarifies that its English-only law “shall not prohibit the public schools from performing their duty to provide equal educational opportunities to all children.”¹⁴⁸

The reason for these exceptions presumably lies in the EEOA.¹⁴⁹ Though many states have attempted to champion the English language, the requirements of federal law have limited their ability to promote it too vigorously, and have induced them to provide at least partial accommodation for ELLs. Every state now provides *some* form of ELL access, with the vast majority using the language students speak at home to ensure they understand the curriculum.¹⁵⁰

Although the demographic figures discussed above may provide only rough approximations of the great number of Americans who speak a language other than English, they help explain why the federal government has insisted on access to a meaningful education

144. *Id.*

145. *Activity History for HB 1186*, MISSOURI HOUSE OF REPRESENTATIVES, <http://house.mo.gov/BillActions.aspx?bill=HB1186&year=2012&code=R> (last visited Nov. 29, 2014).

146. GA. CODE ANN. § 50-3-100 (2013).

147. IDAHO CODE ANN. § 73-121 (2006 & Supp. 2014).

148. ARK. CODE ANN. § 1-4-117 (2008).

149. 20 U.S.C. §§ 1701–1758 (2012).

150. OFFICE OF ENGLISH LANGUAGE ACQUISITION, LANGUAGE ENHANCEMENT AND ACADEMIC ACHIEVEMENT FOR LIMITED ENGLISH PROFICIENT STUDENTS, BIENNIAL EVALUATION REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE STATE FORMULA GRANT PROGRAM iv (2005).

for these groups. Yet the federal government has not done enough. As diversity in the United States continues to grow, and the hostility toward these populations seemingly intensifies, Congress should not allow the states to dictate what accommodations they will provide to ELLs.

IV. THE NO CHILD LEFT BEHIND ACT, *HORNE V. FLORES*, AND INCREASED ACCEPTANCE OF STATE EXPERIMENTATION

A. *The No Child Left Behind Act and its Impact on English-Language Learners*

Since the passage of the EEOA in 1974, the next major change in the area of ELL accommodation came with the passage of the No Child Left Behind Act (NCLBA) in 2001. Enacting the NCLBA to “close the achievement gap with accountability, flexibility, and choice, so that no child is left behind,”¹⁵¹ Congress spoke specifically to English language acquisition by ELLs. As part of this overhaul, Congress replaced the Office of Bilingual Education and Minority Language Affairs with the Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students.¹⁵² The NCLBA likewise granted states substantial federal monies only if ELLs met “annual measurable achievement objectives . . . [by] making yearly progress for limited English proficient children.”¹⁵³

Importantly, the NCLBA replaced the earlier Bilingual Education Act,¹⁵⁴ which up to that point had been reauthorized four times.¹⁵⁵ Despite this undercutting of federal support for bilingual education, however, the NCLBA did not strictly prohibit state adoption of bilingual-education programs; in fact, Congress declined to include such provisions, though some legislators attempted to include such language.¹⁵⁶ The NCLBA did, however, signal an approval of state determination of the appropriate method of educating ELLs.

151. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. § 6301 (2012)).

152. Cortes, *supra* note 96, at 107–08.

153. 20 U.S.C. § 6842 (2012).

154. Li, *supra* note 98, at 554.

155. Cortes, *supra* note 96, at 104–06.

156. Li, *supra* note 98, at 557.

Apart from the NCLBA's mandatory evaluations to ensure students' continued educational progress, and the vague requirement that states' methods of instruction be "scientifically based," the NCLBA explicitly states that it neither "mandate[s] nor preclude[s] the use of a particular curricular or pedagogical approach to educating limited English proficient children."¹⁵⁷ It likewise fails to mandate a clear definition of which students qualify as ELLs, as well as when such students should be deemed English-proficient.¹⁵⁸ Thus, although state creativity in the area of English-language instruction was at one time cabined due to executive action that conditioned compliance with federal law on the use of *one* model, as well as a nationwide norm of bilingual education generally,¹⁵⁹ Congress and the courts have since retreated and allowed greater state experimentation in this area. The impact of this move is potentially catastrophic, as states can change accommodation without proper prior investigation. ELL welfare may be sacrificed in favor of cheaper alternatives that emphasize promotion of dominant culture in place of ensuring a decent chance of educational success for this vulnerable subgroup.

B. Horne v. Flores: State Empowerment at English-Language-Learner Expense

Although the NCLBA overhauled numerous aspects of federal intervention into state educational policies, its interaction with and impact upon the earlier EEOA remained an open question. The Supreme Court decided this issue in 2009 in *Horne*.

Miriam Flores, a student at Coronado Elementary School in Nogales, Arizona, could not speak English.¹⁶⁰ Placed in an English-only classroom, she was forced to ask other Spanish-speaking students to translate the lessons so she could understand their meaning.¹⁶¹ Miriam's teacher viewed these side-conversations as a disruption to the class, and punished Miriam accordingly.¹⁶² After

157. 20 U.S.C. § 6849 (2012).

158. U.S. DEPT OF EDUC., MEETING THE NEEDS OF ENGLISH LEARNERS AND OTHER DIVERSE LEARNERS 6 (2010), available at <http://www2.ed.gov/policy/elsec/leg/blueprint/english-learners-diverse-learners.pdf>.

159. See Cortes, *supra* note 96, at 103–04 (“Federal legislation . . . began to express support for bilingual education.”).

160. Tamar Lewin, *End Is Near in a Fight on Teaching of English*, N.Y. TIMES, May 20, 2009, at A16, available at <http://www.nytimes.com/2009/05/20/education/20flores.html>.

161. *Id.*

162. *Id.*

learning of the lack of resources for Spanish-speaking children in Nogales School District, Miriam's mother banded together with parents of other Nogales students to demand adequate accommodation.¹⁶³

In Arizona, every child, regardless of the district in which he or she lived, received the same base level of funding so as to guarantee a minimum standard of education throughout the state.¹⁶⁴ In addition to the base-level funds, Arizona allocated additional yearly funds per student to pay for resources to address the needs of ELLs.¹⁶⁵ The town of Nogales, located along the Mexican border,¹⁶⁶ educated ELL students with far less exposure to English and familiarity with the language than students living in other areas of the state.¹⁶⁷ These especially high needs, coupled with a lack of adequate funding, meant that the only way to rectify the ELL disadvantages in Nogales was to shift state money away from non-ELL students.¹⁶⁸ Although the state had adjusted the base-level funding for all students to track inflation on a yearly basis, albeit imperfectly and inadequately,¹⁶⁹ it ignored inflation for its ELLs by basing funding for their educational enhancements on a 1987–1988 estimate.¹⁷⁰

The *Flores* plaintiffs, armed with this information, brought a complaint against the state of Arizona and key state officials in the federal court for the District of Arizona. The procedural history of the case is complex. It involved a series of remands,¹⁷¹ a question of changed circumstances due to a shift in state policy, and legislation whose legality was being challenged on appeal.¹⁷² That history also included the imposition of statewide injunctions to remedy an issue

163. *Id.*

164. *See Flores v. Arizona*, 172 F. Supp. 2d 1225, 1227 (D. Ariz. 2000). Still, districts could vote to pass “overrides,” which allow for up to 10 percent more funding collected via additional taxes. *Id.* at 1229. Wealthier districts fund overrides more often than less wealthy ones. *Id.* at 1230.

165. *Id.* at 1228.

166. *Flores v. Arizona*, 516 F.3d 1140, 1145 (9th Cir. 2008).

167. *Flores*, 172 F. Supp. 2d at 1228.

168. *Id.* at 1230.

169. *Id.* at 1227.

170. *Id.* at 1238. The 1987–1988 estimate suggested that the average amount of additional funding for ELLs should have been \$450 per year. The state fell well below that number; as of 2000, it was only granting an additional \$150 per ELL. *Id.* at 1239.

171. *Flores v. Rzeslawski*, 204 Fed. App'x 580, 582 (9th Cir. 2006) (unpublished).

172. *Id.*

raised by only one school district.¹⁷³ The most essential facts are as follows: in 2000, an Arizona district court found that the state's allocation of funding for ELLs was "arbitrary and not related to the actual funding needed to cover the costs of [their] instruction."¹⁷⁴ On remand to the district court after the Arizona legislature introduced a new bill to change the standards and funding for ELLs, the district-court judge observed that the "No Child Left Behind Act . . . has to some extent significantly changed State educators [*sic*] approach to educating students in Arizona."¹⁷⁵

Still, the law under consideration by the Arizona legislature, House Bill 2064, provided that any student "classified as an English Language Learner for more than two years" would lose additional funds dedicated to ELLs for accommodation.¹⁷⁶ The district court, therefore, held that Arizona's policy violated the EEOA.¹⁷⁷ Specifically, the court found that the bill's two-year window to fund ELLs was arbitrarily determined, especially given that such students may take more than two years to become sufficiently skilled in English.¹⁷⁸ When the case reached its final appeal before the case reached the Supreme Court, Arizona attempted to argue that "state compliance with [No Child Left Behind] benchmarks" satisfied the appropriate-action requirement of the EEOA, or even replaced it altogether.¹⁷⁹ The argument failed to convince the United States Court of Appeals for the Ninth Circuit, which found that the statutes performed functionally different roles—one guaranteed access to education, whereas the other dealt uniquely with funding and evaluating school programs.¹⁸⁰ The panel likewise found that the two-year cutoff was inconsistent with the EEOA.¹⁸¹

After the Supreme Court finally heard the case of the Nogales ELLs in *Horne*, its decision substantially weakened the holding of *Castaneda* while it simultaneously emphasized the NCLBA's approval of experimentation. First, in a 5–4 holding, the Supreme

173. *Horne v. Flores*, 557 U.S. 433, 470–71 (2009).

174. *Id.* at 433.

175. *See Flores v. Arizona*, 480 F. Supp. 2d 1157, 1160–61 (D. Ariz. 2007).

176. H.B. 2064, 47th Leg. 2d Reg. Sess. (Ariz. 2006) (codified at ARIZ. REV. STAT. § 15-756.01(1)–(5)).

177. *Flores*, 480 F. Supp. 2d at 1167.

178. *Id.* at 1166–67.

179. *Flores v. Arizona*, 516 F.3d 1140, 1172 (9th Cir. 2008).

180. *Id.*

181. *Id.* at 1180.

Court agreed with the Ninth Circuit that the NCLBA did not completely replace the EEOA, mainly due to the private right of action the EEOA created.¹⁸² The majority also held unequivocally that “appropriate action” does not require the “equalization of results between native and nonnative speakers on tests administered in English.”¹⁸³ Finally, and most importantly, the Court noted that the NCLBA “marks a shift in federal education policy . . . [r]eflecting a growing consensus in education research that increased funding alone does not improve student achievement.”¹⁸⁴ As a result of *Flores*, the states are free to experiment with accommodation, with the only means of invalidating a state’s educational scheme being a look backward at “demonstrated progress of students through accountability reforms” to determine whether a school’s curriculum has satisfied the strictures of the EEOA.¹⁸⁵

The dissent, however, found consideration of state funding to ELLs to be one of three potentially dispositive means of evaluating whether the state had undertaken appropriate action. Paralleling the *Castaneda* analysis, Justice Breyer noted that the “resource issue that the District Court focused upon [regarding funding ELL curricula] . . . and the statutory subsection (f) issue that lies at the heart of the court’s original judgment . . . are not different issues.”¹⁸⁶ At the very least, then, Justice Breyer’s vision of the *Castaneda* analysis would allow a state’s proposed experiment to be invalidated with some attention focused proactively. After the Supreme Court reversed the Ninth Circuit’s decision, the Court remanded for further factual findings as to whether Arizona’s new program adequately met the EEOA benchmarks.¹⁸⁷

Flores’s impact is substantial. In dicta, the Court strongly endorsed a move away from the second prong of the *Castaneda* test, shifting the focus of judicial review from funding inputs to student results and achievements.¹⁸⁸ The Court also only made a few vague references to whether Arizona’s mode of instructing ELLs was based on sound educational theory, as required under the first *Castaneda*

182. *Horne v. Flores*, 557 U.S. 433, 462–63 (2009).

183. *Id.* at 467.

184. *Id.* at 464.

185. *Id.* at 465.

186. *Id.* at 485 (Breyer, J., dissenting) (quotations omitted) (emphases omitted).

187. *Id.* at 472.

188. *Id.* at 463–64.

prong.¹⁸⁹ In undercutting *Castaneda*'s resources prong, the Court has left the states ample room to experiment with accommodations for ELLs. Disadvantaged students can only attain relief after an experiment has detracted from their education.

In March of 2013, the District Court of Arizona dismissed the *Flores* class's claims, citing *Horne v. Flores* as affirmation that the EEOA and NCLBA afford states "tremendous discretion and flexibility" in determining how to adequately accommodate ELLs.¹⁹⁰ The district court's decision on remand followed an additional change in Arizona's education policy that required ELLs to be segregated from the rest of their classmates and instructed purely in English for four hours each day, with little time left for academic instruction in other subjects.¹⁹¹

The *Flores* class appealed this decision to the Ninth Circuit in April of 2013.¹⁹² Notably, the Civil Rights Division of the Department of Justice filed an amicus brief on the side of the appellants, essentially attacking the district court's application of the second and third prongs of *Castaneda* and decrying Arizona's practice of segregating ELLs.¹⁹³ The Civil Rights Division also noted that the Supreme Court's decision in *Flores* gave such "substantial discretion . . . [to] the State" that it did not even address the issue of

189. *Id.* at 461 n.11. Justice Alito declared in the majority opinion that structured English immersion, Arizona's current method of educating ELLs, is "significantly more effective than bilingual education." *Id.* at 460–61. This portion of the opinion has engendered a significant amount of controversy. See Maria-Daniel Asturias, *Burden Shifting and Faulty Assumptions: The Impact of Horne v. Flores on State Obligations to Adolescent ELLs under the EEOA*, 55 *How. L.J.* 607, 624–25 (2012) (observing that the majority opinion's only citation supporting the superiority of Structured English Immersion came from Arizona's legal briefing, which, in turn, cited the Arizona school superintendent's own testimony). The dissent, for its part, noted that although there is significant support for finding structured English immersion to be the better model, "there was considerable evidence the other way." *Horne*, 557 U.S. at 500 (Breyer, J. dissenting). For a comparative discussion of these models, see generally Cortes, *supra* note 96.

190. Press Release, Ariz. Dep't of Educ. Office of Superintendent of Pub. Instruction John Huppenthal, Court Rules in Favor of Superintendent in Flores Case (Mar. 29, 2013), available at <http://www.azed.gov/public-relations/files/2013/04/press-release-court-rules-in-favor-of-superintendent-in-flores-case.pdf>.

191. Opening Brief for Plaintiffs-Appellants at 54, *Flores v. Arizona*, No. 13-15805 (9th Cir. Sept. 5, 2013).

192. Anne Ryman, *Appeal Filed vs. Decision on Arizona's English Language Learner Programs*, ARIZONA REPUBLIC (Apr. 25, 2013, 5:48 PM), <http://www.azcentral.com/news/arizona/articles/20130425appeal-filed-vs-decision-arizona-english-language-learner-program.html>.

193. Brief for United States as Amicus Curiae Supporting Plaintiffs-Appellants at 19–29, *Flores v. Huppenthal*, No. 13-15805 (9th Cir. Sept. 13, 2013).

the scientific bases the state used in promulgating its ELL education standards.¹⁹⁴ Although the *Flores* litigation is still pending, the case demonstrates the uncertainties that ELLs face as to the accommodations they will receive from the states. This uncertainty alone is troubling. But given the states' potentially hostile attitudes toward these students, the potential results become even more alarming.

V. THE TROUBLE WITH STATE EXPERIMENTATION

A. *Laboratories of Democracy and Experimentation Gone Awry*

“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁹⁵ With these words, Justice Brandeis first expounded the now-standard notion that the states are “laboratories of democracy.”¹⁹⁶ State innovations, trials, and even failures can serve the important purpose of aiding and informing Congress as to how best to enhance the welfare of the American people nationwide.

And the states have indeed experimented. Throughout history, state law and legal theory have frequently influenced the federal government as it seeks to produce the best policies for the American people as a whole. For example, the Texas Constitution of 1845 allowed governors to sit for no more than two consecutive terms.¹⁹⁷ The federal government did not impose such a limit on its executive branch until 1947—a full one hundred years later.¹⁹⁸ States themselves have also originated and developed the practice of imposing legislative term limits, helping to curb the political reality of the entrenchment of elected incumbents and creating greater turnover

194. *Id.* at 20 n.3.

195. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

196. Although Justice Brandeis never used the precise terminology quoted, the literature has adopted it to describe the proposition put forward in the preceding sentence. *See, e.g.*, Brian Gale & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1335 (2009) (noting that “Justice Louis Brandeis famously praised state and local governments as the ‘laboratories’ of democracy”).

197. TEX. CONST. art. V, § 4 (1845) (“The Governor . . . shall not be eligible [to serve in office] for more than four years in any term of six years.”).

198. U.S. CONST. amend. XXII, § 1.

within their representative bodies.¹⁹⁹ The first states to adopt term limits were Colorado, California, and Oklahoma in 1990.²⁰⁰ As of 2014, fifteen states have followed suit.²⁰¹ Several federal legislators seriously considered amending the U.S. Constitution so as to allow for a similar cap on politicians in Washington D.C., but ultimately failed to gain the necessary support in 1997.²⁰² More recently, Massachusetts's healthcare legislation served as a model for the Affordable Care Act, passed by Congress in 2010.²⁰³

Not all experimentation, however, has so positively influenced political discourse. Some of the topics with which the states have experimented impact more than the continued presence of incumbents in the state legislature. Many of these “experiments” have been ill-conceived, and have instead hampered citizens’ access to their most basic needs. When faced with the question of accommodating disabled Americans, for example, the states failed to provide equal access for this group.²⁰⁴ Congress forced their hand by passing the Americans with Disabilities Act of 1990.²⁰⁵ Racial segregation is another example of states exercising their plenary powers, which ultimately required federal intervention to ameliorate state-level wrongs. Throughout the Jim Crow era, for instance, states “experimented” with the educational facilities provided to African-American youth by separating them into segregated schools and cutting state funding to nonwhite institutions.²⁰⁶ The legacy of such policies remains, with white students outperforming nonwhite students in great numbers even after federal intervention ended this practice.²⁰⁷

199. *The Term Limited States*, NAT'L CONF. STATE LEGISLATURES, <http://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx> (last visited Nov. 29, 2014).

200. *Id.*

201. *Id.*

202. Susan Heavey, *Term Limits Take Effect*, WASH. POST, Mar. 5, 1999, <http://www.washingtonpost.com/wp-srv/politics/special/termlimits/termlimits.htm>.

203. See Jonathan H. Adler, *Interstate Competition and the Race to the Top*, 35 HARV. J.L. & PUB. POL'Y 89, 95 n.33 (2012) (“[S]uch a federal program [that adopts state policy] is the Affordable Care Act.”).

204. Timothy M. Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 408–09 (1991).

205. *Id.* at 415.

206. Charles S. Bullock III & Janna Deitz, *Transforming the South: The Role of the Federal Government*, in *THE AMERICAN SOUTH IN THE TWENTIETH CENTURY* 250 (Craig S. Pascoe, Karen Trahan Leathem & Andy Ambrose eds., 2005)

207. Kimberly Jade Norwood, *Blackthink's™ Acting White Stigma in Education and How It Fosters Academic Paralysis in Black Youth*, 50 HOW. L.J. 711, 713–14 (2007).

In failing to limit state experimentation in the area of ELL education, Congress and the Supreme Court have invited potentially disastrous results. Education of those with limited English-language proficiency is an especially challenging area. Allowing state education programs to rely too much on a student's native language might undermine the student's ability to learn English.²⁰⁸ This will almost certainly undercut the student's ability to achieve career success and participate civically. Allowing state education programs to demand that classes be predominantly taught in English might force English upon children too strongly, making them unable to meaningfully participate in classes, as with the student plaintiffs in *Lau*.²⁰⁹ A more skilled body, one with greater distance from the people and that does not directly bear the actual cost of ELL education, may be better equipped to evaluate the accommodations given to ELLs. At least a partial answer to these concerns rests with the federal government mandating the accommodations these students receive. Education, unlike legislative term limits or other areas in which the states experiment, "is necessary to prepare citizens to participate effectively and intelligently in our open political system...[to] preserve freedom and independence."²¹⁰ At stake is whether these children will be able to achieve success and self-dependence, and integrate into the greater American society.

B. California: English-Language Experimentation Gone Wrong

Even before the states were armed with the NCLBA and the Supreme Court's decision in *Horne*, they experimented in their "implementation" of appropriate action under the EEOA. By affording the states leverage to conduct these experiments, Congress allowed the adoption of new and untested policies at a statewide level, which put millions of students in danger of losing their access to education.²¹¹ California, which educates more ELLs than any other

208. U.S. DEP'T OF EDUC., *supra* note 158, at 3–6.

209. *See supra* notes 76–83 and accompanying text.

210. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

211. *See Digest of Education Statistics Table 204.20 Number and Percentage of English Language Learners, By State: Selected Years, 2002–03 through 2011–12*, NAT'L CTR. FOR EDUC. STATISTICS, http://www.nces.ed.gov/programs/digest/d13/tables/dt13_204.20.asp (last visited Nov. 29, 2014) (noting that from 2011 to 2012, over four million American students participated in programs for ELLs).

state,²¹² passed Proposition 227 in 1998.²¹³ Proposition 227²¹⁴ decied the bilingual-education system in place. Declaring that “[t]he public schools of California . . . [had] wast[ed] financial resources” by employing a bilingual-education policy that led to “high drop-out rates and low English literacy levels of many immigrant children,” the state resolved that “all children in California public schools shall be taught English as rapidly and effectively as possible.”²¹⁵ This “rapid and effective” method involved one year of English immersion, with students who speak non-English languages placed in a separate classroom to learn English.²¹⁶ After that year, Proposition 227 provided, ELLs would enter “mainstream classrooms.”²¹⁷

This proposition represented a sea change in the education of ELLs in California. Although bilingual education had been the norm for the previous thirty years,²¹⁸ Proposition 227 effectively ended this system to make way for structured English immersion.²¹⁹ The California Department of Education ordered only a retroactive, five-year study to review this novel state experiment in education.²²⁰ For five years, then, California exposed all of its ELLs to an underinformed shift in education policy²²¹ in an effort to achieve better educational outcomes while promoting English-language use in the state.²²² The results were underwhelming. The study merely showed inconclusive changes in results for ELL progress, and suggested that “[a] new framework [was] needed, one that [would]

212. T.B. PARRISH ET AL., AM. INSTS. FOR RESEARCH, HOW ARE ENGLISH LEARNERS FARING UNDER PROPOSITION 227, at 3 (2006), available at http://www.air.org/sites/default/files/downloads/report/How_are_ELLs_faring_under_227_0.pdf.

213. CAL. SEC’Y OF ST., *Statement of Vote: Primary Election June 2, 1998*, at 86 (1988), available at http://primary98.sos.ca.gov/Final/P98_SOV.pdf.

214. CAL. SEC’Y OF ST., English Language in Public Schools Initiative Statute, <http://primary98.sos.ca.gov/VoterGuide/Propositions/227text.htm> (last visited Nov. 29, 2014) (codified at CAL. EDUC. CODE §§ 300–340 (West 2002)).

215. CAL. EDUC. CODE § 300(f).

216. *Id.* § 305.

217. *Id.*

218. T.B. PARRISH ET AL., *supra* note 212, at 4.

219. CAL. EDUC. CODE § 330.

220. T.B. PARRISH ET AL., *supra* note 212, at 3.

221. In fact, an important federal study of bilingual education from that period suggested that California’s previous system of education would be *more* effective than the state’s new method of education. See JIM CUMMINS, THE ONTARIO INST. FOR STUDIES IN EDUC., BILINGUAL EDUCATION AND ENGLISH IMMERSION: THE RAMIREZ REPORT IN THEORETICAL PERSPECTIVE 97–99 (1992).

222. CAL. EDUC. CODE § 300(a)–(d) (West 2002).

shift[] away from the bilingual-immersion debate to focus on the larger array of factors that appear to make a difference for English learner (EL) achievement.”²²³ Had the study indicated a decrease in the language apprehension of ELLs, the fallout would have been immense. Roughly 1.6 million ELLs would have suffered at the hands of state-level experimentation.²²⁴

California’s failure to adequately accommodate ELLs did not end there, however. In addition to its hasty implementation of English immersion upon its students, a state court in August 2014 found that there existed credible evidence that “districts are denying required instructional services” to ELLs altogether.²²⁵ The court based its decision on evidence that over twenty thousand Californian language learners went without *any* kind of accommodation for their learning needs.²²⁶

Moreover, this broad-reaching experimentation is not unique to California. Arizona²²⁷ and Massachusetts,²²⁸ like California, abandoned bilingual education entirely in favor of an English-only policy in 2000 and 2002, respectively. Arizona later continued its statewide experiment in 2006, the results of which are still being litigated as of 2014.²²⁹ Massachusetts, as of 2014, had yet to even conduct a state-level survey of the impact of its legislation, and its relative success as compared to the previous model.²³⁰ Whether or not ulterior motives prompted these state-level reforms, the laws completely rearranged the accommodation given to students who do not speak English. Given the importance of education, the vulnerability of ELLs, and the states’ poor track record in experimenting with ELLs, federal policy must be bolstered to allow prospective evaluation of state policy, in order to ensure that experimentation is conducted in a responsible manner.

Experimentation undoubtedly has its place in continuing to improve education initiatives. But it is a basic principle of proper

223. T.B. PARRISH ET AL., *supra* note 212, at 3.

224. *Id.*

225. D.J. v. California, No. BS142775, at *39 (Cal. Super. Ct. Aug. 21, 2014).

226. *Id.* at 12–13.

227. ARIZ. REV. STAT. ANN. §§ 15-751–752 (2014).

228. MASS. ANN. LAWS ch. 71A, §§ 1–4 (LexisNexis 2013 & Supp. 2014).

229. See *supra* notes 175–94 and accompanying text.

230. Qian Guo & Daniel Koretz, *Estimating the Impact of the Massachusetts English Immersion Law on Limited English Proficient Students’ Reading Achievement*, EDUC. POLICY 121, 124–25, Jan. 2013.

experimentation that new initiatives are not unleashed on a population as a whole before they have been tested on a smaller subset, or test group. There exists a trend in the literature, moreover, to require stricter controls on state experimentation that impacts an important right, due to the fear of violating that right through imprudent shifts in policy.²³¹ Education, given its important place in American society, should be one such area in which experimentation is highly scrutinized. By abandoning bilingual education in favor of the new model of English immersion, California arguably turned its students' worlds upside down with little forethought and only a backward glance. California then failed to provide *any* accommodation for a great number of its students. Congress should intervene either through the creation of agency evaluations or the use of explicit standards, to specify how state districts should adequately protect ELLs.

C. *The English-Only Movement: Animus in Experimentation?*

Ineffectual experimentation absent animus is sufficiently capable of limiting the educational opportunities of vulnerable students. A poorly planned or executed educational experiment designed by policymakers with even the best intentions of aiding ELLs may still leave students handicapped in their pursuit of education. Turning these students over to the whims of state governments that may take issue with their very presence in the country is even more troubling. In other words, the English-only movement may have as one of its goals more than a celebration of the “national language” of the United States, and the hope that a common tongue will “pull[] people together stronger.”²³²

There are specific indications that the impetus behind the English-only movement is more sinister than first appearances may indicate. One example can be gleaned from the actions of John Tanton, a cofounder of U.S. English, the English-only movement's most powerful lobbying group. In 1988, Tanton famously issued a

231. See, e.g., Alpheus Thomas Mason, *Brandeis: A Personal History of an American Ideal*, 50 HARV. L. REV. 370, 373 (1936) (discussing Justice Brandeis's view that legislative experimentation should not touch upon fundamental human and personal rights); see also Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1795 (2005) (“[E]xperimentation in the context of election administration must be undertaken with the utmost care, given the fundamental character of the right to vote.”).

232. U.S. English Video, *Why the U.S. Needs Official English—in 30 Seconds*, YOUTUBE (Oct. 27, 2011), <http://www.youtube.com/watch?v=daMhZBH1Um8>.

memorandum asking his peers pointedly, “In this society, will the present majority peaceably hand over its political power to a group that is simply more fertile? . . . Can *homo contraceptivus* compete with *homo progeneriva* [sic] if borders aren’t controlled?”²³³ Tanton’s tirade continued, declaring that “those with their pants up are going to be caught by those [Hispanics] with their pants down.”²³⁴ Tanton finally posited the ultimate question: he asked his followers directly, “as whites see their power and control over their lives declining, will they simply go quietly into the night? Or will there be an explosion?”²³⁵ Tanton formally disassociated himself from the organization following the publication of these statements.²³⁶

Senator Hayakawa, one of the most recognized voices of the modern English-only movement in the United States, likewise made questionable statements in his campaign for English-language primacy. In one speech, he stated that “[n]o Filipinos [and] no Koreans object to making English the official language[.] . . . [T]he Vietnamese . . . are so damn happy to be here. They’re learning English as fast as they can and winning spelling bees all across the country. But the Hispanics have maintained there is a problem . . . [because of them] we’re going to teach the kids in Spanish and we’ll call that bilingual education.”²³⁷

The leaders of the English-only movement were not the only individuals with such misgivings toward the growing Hispanic population. Incredibly, over 40 percent of supporters of the English-only movement polled in 1988 stated that their motivation for advancing an official-English position was because of “Hispanics[,] who shouldn’t be here.”²³⁸ An attitude, prevalent in the movement, that Hispanics are a problem and that an official English-only policy is the cure, has led civil-rights activist Raul Yzaguirre to declare that

233. JAMES CRAWFORD, LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 172 (1992).

234. Flavia C. Peréa & Cynthia García Coll, *The Social and Cultural Contexts of Bilingualism*, in AN INTRODUCTION TO BILINGUALISM, PRINCIPLES AND PROCESSES 220 (Jeanette Altarriba & Roberto R. Heredia eds., 2008).

235. *Id.*

236. *See id.*

237. JAMES CRAWFORD, HOLD YOUR TONGUE: BILINGUALISM AND THE POLITICS OF “ENGLISH ONLY” 149–50 (1992).

238. Jennifer Bonilla Moreno, Note, *Only English? How Bilingual Education Can Mitigate the Damage of English-Only*, 20 DUKE J. GENDER L. & POL’Y 197, 200 (2012) (citation omitted).

an effort to make the United States an English-only country is essentially to declare that the country is for non-immigrants only.²³⁹

Nor have these attitudes dissipated since the birth of the movement. In 2004, former Colorado Governor Dick Lamm addressed an immigration conference with a satirical “plan to destroy America.” He argued that the United States’s downfall would come from “encourag[ing] immigrants to maintain their culture . . . [and from ascribing] the Black and Hispanic dropout rates” to “prejudice and discrimination by the majority” alone.²⁴⁰ Particularly, Lamm opposed the idea that immigrants should “keep their own language and culture,” and posited that the United States’s celebration of “diversity rather than unity” would debase its hegemonic Anglo-American culture.²⁴¹ Congressional attempts to declare English the national language, though rejected, evince similar attitudes. As recently as 2010, a member of the U.S. House of Representatives likened multilingualism to a curse from God, and a punishment for human pride.²⁴²

Other possible motivations for the English-only movement may be gleaned from looking at state action. Oklahoma’s push toward strengthening the place of the English language perhaps best demonstrates another proposed motivation for the English-only movement, and the danger of allowing state experimentation in this field. Specifically, the Oklahoma legislature drafted the Oklahoma Taxpayer and Citizen Protection Act of 2007²⁴³ to discourage the presence of “illegal immigra[nts] . . . [that are] causing economic hardship and lawlessness” in the state.²⁴⁴ Thus, Oklahoma’s official-English constitutional provision²⁴⁵ must be evaluated within the greater context of Oklahoma’s recent legislation. Doing so, one notices that not only did the state take a stand against the growing presence of undocumented aliens, but the English-only amendment

239. LOURDES DIAZ SOTO, LANGUAGE, CULTURE, AND POWER: BILINGUAL FAMILIES AND THE STRUGGLE FOR QUALITY EDUCATION 6 (1997).

240. GEORGE AUTRY JR., MALICE CLOAKED IN LIBERTY: THE KILLING OF AMERICA 309–10 (2008).

241. *Id.*

242. 156 CONG. REC. H6863-05 (daily ed. Sept. 22, 2010) (statement of Rep. King).

243. H.B. 1804, 51st Leg., 1st Sess. §§ 2–3 (Okla. 2007).

244. *Id.*

245. OK. CONST. art. 30, § 1. This provision cuts out an exception for “require[ments] by federal law.” *Id.* Notably, however, it also states that “[n]o person shall have a cause of action . . . for [a] failure to provide any official government action in any language other than English.” *Id.*

strongly suggests that the language of a large subset of these individuals likewise had no place within the polity.²⁴⁶ States like Oklahoma, simultaneously interested in cutting costs through promoting the English language, discouraging the presence of undocumented aliens, and encouraging the assimilation of legal immigrants,²⁴⁷ may very well favor cheap, rapid promotion of English despite indications that such a system may not best serve ELLs.

D. The Federal Government as the Appropriate Guarantor of Adequate Accommodation

Some may find increasing federal control over education policy to be troubling, primarily because schooling has traditionally been the bailiwick of the states.²⁴⁸ Inconclusive data regarding federal grants' effect on the quality of education have similarly led critics to decry existing federal incursions into education.²⁴⁹ In particular, the Department of Education's sole role of supervising grants to education, while it "has no teachers and runs no schools," raises questions of bureaucratic efficiency.²⁵⁰ Despite these criticisms, federal intervention has increased piecemeal since the 1960s, with the NCLBA signaling immense growth in federal involvement in education through conditional grants to the states.²⁵¹

Likewise, the propriety of federal intervention is confirmed by the fact that Congress is "less responsive" than the state governments. Because Congress represents a larger polity composed of more diverse individuals with more diverse ideas, the federal government is less likely to become beholden to the whims of special-interest groups.²⁵² The existence of the initiative and popular referendum systems of lawmaking²⁵³ in a number of states exacerbates the

246. Donathan Brown, *Legislating in the Name of National Unity: An Oklahoma Story*, 13 INT'L J. DISCRIMINATION & L. 4, 12 (2013).

247. *Id.* at 11.

248. *See supra* notes 68–71 and accompanying text.

249. NEAL MCCLUSKEY, CATO INST., *DOWNIZING THE FEDERAL GOVERNMENT: K-12 EDUCATION SUBSIDIES* 3 (2009), <http://www.downsizinggovernment.org/education/k-12-education-subsidies>.

250. *Id.* at 4.

251. Neil King Jr., *Obama Plan Calls for Education-Funding Increase*, WALL ST. J., Feb. 2, 2010, <http://online.wsj.com/news/articles/SB10001424052748704107204575039090128849972>.

252. Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 527–29 (1995) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

253. In many states,

“closeness” between the people and the lawmaking process, through the means of direct democracy for questions of legislation.²⁵⁴ This closeness, still, remains prone to bias and control by special interests, allowing the most vulnerable groups to fall prey to the whim of the more powerful factions of society.²⁵⁵

That federal intervention has assisted students long denied adequate protection by state authorities illustrates the proposition that the federal government plays a role in protecting vulnerable groups from state caprice. Although equality of outcome in educational results has not been achieved, equality of access to similar educational facilities has been bolstered by legislation and executive orders handed down from the federal government that undercut state action and supplant state inaction.²⁵⁶ The NCLBA, despite its problems, did indeed “[bring] unprecedented attention to Limited English Proficient (LEP) students as a distinct subgroup.”²⁵⁷

Congressional inaction on English-only policies further attests to the federal government’s superiority as a guarantor of minority rights. Time and again, various members of Congress have proposed legislation to make English the official language of the federal government.²⁵⁸ One such example is the “English Language Unity Act of 2013.”²⁵⁹ After being introduced in the House of Representatives on March 6, 2013, this particular piece of legislation appears to have

[v]oters may act [directly] as legislators In an initiative a specified number of voters petition to propose statutes or constitutional amendments to be adopted or rejected by the voters at the polls. In a popular referendum a specified number of voters can petition to refer a legislative action to the voters at the polls.

DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 1 (1984).

254. See PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPINIONS AND COMPARISONS* 1–2 (1998) (noting that some “question the wisdom of the initiative. In their view, societal problems have become much too complicated for the black and white kind of solutions they believe possible through use of the initiative process”).

255. MAGLEBY, *supra* note 253, at 120–21.

256. See, e.g., Neal Devins & James B. Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1245 (1984) (“Federal financial assistance to elementary and secondary schools was critical to achieving the first substantial breaches in the southern system of segregated schools.”).

257. Nw. Reg’l Educ. Lab., *The Next Step: Assessment and the English Language Learner*, ¡COLORÍN COLORADO!, <http://www.colorincolorado.org/article/14733> (last visited Nov. 29, 2014).

258. For an updated compilation of proposed legislation aimed at creating an official-English policy at the national level, see *Federal Legislation, U.S. ENGLISH*, <http://www.us-english.org/view/310> (last visited Nov. 29, 2014).

259. H.R. 997, 113th Cong. (1st Sess. 2013).

died in committee.²⁶⁰ Whereas English-only laws have gained approbation across the states, federal attempts failed to move out of even the most cursory steps toward serious consideration.

Congress's immense amount of deference toward the states keeps with traditional notions of federalism but ignores the modern reality of federal involvement in education. The NCLBA *statutorily* declared a policy of deference to the states determining their own standards for ELL education. However, given the increasing amount of funding from federal sources in state public schools, increased federal control appears more appropriate. In 2011–2012, roughly 88 percent of all funds spent on public elementary- and secondary-education came from the state, local and private sources.²⁶¹ Close to 11 percent of funds came from the Department of Education and other federal agencies.²⁶² Although this latter number may seem minuscule at first blush, this figure represents a dramatic increase in federal funding as compared to previous years. In 1990, the federal government doled out only between 5 and 6 percent of the money spent in public schools.²⁶³ In the mid-2000s, the federal government provided 8 percent of all funds.²⁶⁴ Though state acceptance of federal funds does *not* create a contract between the respective sovereigns,²⁶⁵ the logic of “consideration for consideration” is applicable here. As federal funding increases, one should expect federal control over state education policies to increase as well.

Education has not only become increasingly subsidized by the federal government, but has also become increasingly standardized at the national level. Most recently, the federal government has set aside additional funds to encourage state adoption of an education program called the Common Core State Standards Initiative (Common Core).²⁶⁶ This national curriculum aims to better prepare students for the rigors of applying to and attending college, and specifically targets

260. H.R. 997—*English Language Unity Act of 2013*, CONGRESS.GOV, <http://beta.congress.gov/bill/113th-congress/house-bill/997/all-actions> (last visited Nov. 29, 2014).

261. *Federal Role in Education*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/overview/fed/role.html> (last visited Nov. 29, 2014).

262. *Id.*

263. *10 Facts About K-12 Education Funding, Archived Information*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/overview/fed/10facts/index.html> (last visited Nov. 29, 2014).

264. *Id.*

265. *Sossamon v. Texas*, 131 S. Ct. 1651, 1661 (2011).

266. Celia R. Baker, *The Conservative Battle over Common Core Standards*, DESERET NEWS, Jan. 2, 2014, <http://www.deseretnews.com/article/865593349/The-conservative-battle-over-Common-Core.html>.

English and Mathematics for standardization.²⁶⁷ Common Core originated from the National Governors Association and the Council of Chief State School Officers, and proponents of this nationalized plan stress that the “federal government was not involved in the development of the standards.”²⁶⁸ Still, participating states are eligible to receive a piece of the nearly three-and-a-half billion dollars the federal government has allotted for the program.²⁶⁹ North Carolina, for instance, received four hundred million dollars after agreeing to adopt these nationalized educational standards.²⁷⁰ Forty-four other states have adopted this curriculum, as have the District of Columbia and four territories.²⁷¹ Although Common Core has received its fair share of criticism,²⁷² the trend as of 2014 is toward a nationalization of education standards that moves away from statewide experimentation—at the very least, in Mathematics and English.

The federal government today is more involved in education than at any time before. Moreover, there has been a federally sponsored movement away from state-by-state control over educational topics. These factors suggest that the federal government is the appropriate arbiter of disputes between ELLs and the school districts. One important question remains, however—how can the federal government best undertake such a responsibility?

VI. PROPOSALS FOR THE FUTURE

The federal government should intervene on behalf of ELLs by creating a meaningful opportunity for them to vindicate their rights in the classroom. Although the EEOA was an important landmark in

267. See *Introduction to the Common Core State Standards*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/assets/ccssi-introduction.pdf> (last visited Nov. 29, 2014) (explaining that the standards address the topics of “English language arts and mathematics” so that “high school graduates . . . [can] succeed in college and careers”).

268. *Frequently Asked Questions*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/resources/frequently-asked-questions> (last visited Nov. 29, 2014).

269. Preston Spencer, *Battle Over Common Core Curriculum Continues*, STATESVILLE REC. & LANDMARK (Dec. 22, 2013, 2:07 PM), http://www.statesville.com/news/education/article_d4a54e86-68e0-11e3-8f8d-0019bb30f31a.html.

270. *Id.*

271. *Standards in Your State*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/in-the-states> (last visited Nov. 29, 2014).

272. See, e.g., Sam Dillon, *Bipartisan Group Backs Common School Curriculum*, N.Y. TIMES LATE ED., Mar. 7, 2011, at A12 (“A number of prominent Republicans . . . [who] believe in local control, are suspicious of the standards movement and seem likely to oppose the common-curriculum proposal.”).

recognizing and proscribing the unequal treatment ELLs face in attaining education, the definition of “appropriate action” contained therein has proven to be overly vague. The enforcement mechanism, too, is far too lax. This Note suggests two options for future legislation. The federal government could specify precisely what form of accommodation the states must provide, creating a national policy for ELLs in step with the nationalization of English and mathematics instruction under the Common Core standards. Or, alternatively, the federal government could severely cabin the states’ power to undertake new experiments in education and diligently observe those experiments. This second purpose could be achieved by creating an efficient forum for *prospective* evaluation of changes in state policy.

A. *Direct Federal Control Over English-Language-Learner Accommodation*

Experimentation has its place in the development of sound education strategies, and it is possible that a more effective method of educating ELLs may exist than bilingual education. But allowing the states—some of which have passed laws intended to hurt ELLs—to freely experiment with millions of lives is not the appropriate way to refine education policy. The federal government could *itself* conduct and supervise research to determine how best to implement the EEOA’s “appropriate action” standard, and do so in a manner that reduces the number of students impacted by such studies. The results of this limited experimentation would then inform a national standard that the states could adopt as the appropriate method for educating ELL populations. Only after federal observation and formulation of educational policy, therefore, should the states adopt new methods of education, ensuring that all ELLs would receive the same accommodations to increase their chances of learning English and succeeding in the outside world.

Previous scholarship has suggested that the Department of Education should “promulgate regulations” to better define the accommodation ELLs shall receive.²⁷³ The Department of Education could likewise assume responsibility for the research and evaluation of various educational programs for ELLs. With this responsibility, instead of merely doling out money to the state public schools, as critics claim,²⁷⁴ the Department of Education could protect the rights

273. Asturias, *supra* note 189, at 640–41.

274. McCLUSKEY, *supra* note 249, at 4–5.

of individual ELLs against state action designed to impair those rights. In the same way that the federal government has supported a nationalized curriculum in the areas of English and mathematics,²⁷⁵ the Department of Education's research could then inform the implementation of the federally imposed requirement of "appropriate action" under the EEOA. In the interim, Congress should condition funds for ELLs so as to allow the states little latitude from experimenting in this area altogether. Although bilingual education may not work perfectly, it has been shown to be somewhat successful.²⁷⁶ This more promising method of ensuring adequate accommodation of ELLs should not be discarded until an alternative strategy is tried, tested, and proven in a responsible manner by the federal government.

B. Substantial Federal Supervision of State Experimentation

If Congress still desires some level of state experimentation and freedom in the area of English-language learning, the federal government should exercise some oversight before a state implements changes to its curriculum. In other words, the federal government should restore and strengthen the first and second prongs of the *Castaneda* test, but place it within an agency framework, so as to require a prospective expert-backed evaluation of state experimentation before its commencement.

The federal government has previously created a streamlined administrative-adjudication structure in the area of federal labor law. For, although there is no question that regulating the industries within a state is the domain of that state,²⁷⁷ state governments have proven ineffective at protecting the interests of organized labor. To prevent strikes, boycotts, and other forms of economic warfare, state courts have frequently issued injunctions against the unions that initially requested relief from the state governments.²⁷⁸ Although

275. See *supra* notes 266–72.

276. See Li, *supra* note 98, at 570 ("ELL students can attain English proficiency through both English immersion and bilingual programs, but bilingual programs have proven most effective.").

277. See Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 81 (1937) (McReynolds, J., dissenting) ("The making and fabrication of steel by the Jones & Laughlin Steel Corporation is production regulable by the state of Pennsylvania.").

278. See William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1219–20 (1989) (discussing pro-labor anti-injunction and anticonspiracy laws passed by states in the late 1890s and early 1900s).

fruitful in some instances, these efforts were generally unsuccessful because the specter of organized labor “disturbed lawmakers.”²⁷⁹ Pro-union lobbyists, however, gained serious traction in petitioning Congress for labor reform in 1928.²⁸⁰

Congress did intervene when it passed the National Labor Relations Act of 1935 (NLRA).²⁸¹ The NLRA barred the courts from using injunctions in nonviolent labor disputes and declared that the “policy of the United States [was] to . . . encourag[e] the practice and procedure of collective bargaining.”²⁸² It likewise created a process of adjudication for allegations of unfair labor tactics that impinge upon employees’ ability to bargain collectively.²⁸³ Under the NLRA, after an employee or employer files an unfair-labor charge, the General Counsel of the National Labor Relations Board, appointed by the president and charged with the prosecution of unfair labor practices, investigates the claim to ensure that it is meritorious.²⁸⁴ An administrative-law judge then hears both sides’ arguments and renders a decision.²⁸⁵ This decision is filed with the National Labor Relations Board,²⁸⁶ whose decision is further reviewable in a federal court of appeals.²⁸⁷

The federal government similarly regulated interactions between private employers when it created the United States Equal Employment Opportunity Commission (EEOC) in 1965. To ensure enforcement of the guarantees enshrined in the Civil Rights Act of 1964, Congress created the EEOC and empowered a general counsel to “conduct . . . litigation” to that effect.²⁸⁸ The EEOC, after investigating the validity of a claim of workplace discrimination, may bring suit in federal court on behalf of a victim to vindicate his or her

279. *Id.*

280. *Id.* at 1227–28.

281. National Labor Relations Act (NLRA), Pub L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

282. 29 U.S.C. § 151 (2012).

283. *Id.* § 160.

284. Jonathan B. Rosenblum, *A New Look at the General Counsel’s Unreviewable Discretion Not to Issue a Complaint Under the NLRA*, 86 YALE L.J. 1349, 1353 (1977).

285. David C. Fairchild, *Successorship Doctrine: A Hybrid Approach Threatens to Extend the Doctrine When the Union Strikes Out*, 28 ST. LOUIS U. L.J. 263, 278 n.106 (1984) (“An Administrative Law Judge . . . presides over a hearing concerning violations of the [NLRA].”).

286. 29 U.S.C. § 160(c) (2012).

287. *Id.* § 160(f).

288. 42 U.S.C. § 2000e-4(b)(1) (2012).

rights.²⁸⁹ The EEOC also visits workplaces to “prevent discrimination before it occurs through outreach, educational and technical assistance programs.”²⁹⁰

The Supreme Court recently declared the unconstitutionality of a somewhat similar proposal in *Shelby County v. Holder*.²⁹¹ Since 1965, federal law had required a form of “pre-approval” of certain states’ plans of Congressional-district drawing before they went into effect.²⁹² Congress had enacted and reauthorized this regime as a means of “addressing entrenched racial discrimination in voting.”²⁹³ Employing the Fifteenth Amendment’s authorization to Congress to enforce its strictures by use of “appropriate legislation,” federal legislators imposed these requirements on offending states without their consent. The Court ultimately struck down the law on various grounds, one of which was its betrayal of the traditional understanding that the Tenth Amendment allowed the states “to determine the conditions under which the right of suffrage may be exercised.”²⁹⁴ The Court likewise found inappropriate the Voting Rights Act’s application to some states and not others.²⁹⁵ The unique burdens placed upon those states identified under the law violated the “‘fundamental principle of *equal* sovereignty’ among the [s]tates.”²⁹⁶

This proposal likewise suggests that the states should obtain preclearance before enacting laws. However, whereas the Voting Rights Act imposed requirements upon the states through the Fifteenth Amendment and absent their consent, this Note suggests that the federal government attach its preclearance standards as a condition of federal funding. The impact of *Shelby County* on conditional-funding schemes has not been developed, though the Court’s holding certainly implicates issues outside of Congress’s spending power. Moreover, this proposal does not suggest the “targeting” of only those states with poor records of ELL accommodation, such as California. The equal-sovereignty doctrine,

289. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *The Charge Handling Process*, <http://www.eeoc.gov/employees/process.cfm> (last visited Nov. 29, 2014).

290. *About the EEOC: Overview*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc> (last visited Nov. 29, 2014).

291. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

292. *Id.* at 2618.

293. *Id.*

294. *Id.* at 2623–24.

295. *Id.* at 2623.

296. *Id.* (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

then, would likewise not be implicated even if it were to apply to congressional-funding schemes.²⁹⁷

Absent an indication to the contrary, it appears that there is no particular reason why the federal government *must* follow the historical allocation of federal–state power in the field of education; it possesses the funds states desperately need for their schools, and it can condition such monies virtually free of limitation.²⁹⁸ Still, if the federal government chooses to avoid *directly* ordering the states to follow necessary regulations, then the Department of Education could also become an informal adjudicator that reviews states’ proposed education plans and education-plan experiments before they take effect. Such a review mechanism would prevent the states from drastically shifting their entire ELL policies in a six-month period, as California did in the 1990s.

CONCLUSION

Though state governments have carried the responsibility of providing public education since the early days of this country, they have proven unable to protect the interests of the very people to whom they have shown disfavor. Although Congress passed the EEOA with the intention of increasing ELL access to education, that law has seemingly become a dead letter—imposing federal control over ELL education without providing any meaningful method of limiting state action until after English-language students fail. In today’s climate of increasing English-only sentiment in many states, and with mounting empirical evidence of state mismanagement in educational experimentation, the federal government can and should step in to protect ELLs. Direct intervention would align with current trends of state–federal interaction in education, in keeping with

297. See *id.* (noting that “the fundamental principle of equal sovereignty” only attaches when “assessing . . . disparate treatment of the States” (emphasis added)).

298. *South Dakota v. Dole*, 483 U.S. 203 (1987), did note that “financial inducement[s] by Congress might be so coercive as to pass” into unconstitutional territory. *Id.* at 211. For the first time ever, the Court in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), found a federal funding arrangement coercive. *Id.* at 1604–05. Although this decision raises the specter that Congress’s conditioning of school funds might violate the Spending Clause, this possibility is unlikely. See Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 648–51 (2013) (noting that “federal education dollars occupy a different space in the political landscape than do federal Medicaid dollars”). Federal funding accounts for far too small a percentage of states’ overall budget, and education’s place within federal–state relations is likewise too unique, for this to be a serious concern. *Id.* at 622–23.

recent trends in the nationalization of education standards and the increasing use of federal funds to subsidize public education.

With the passage of the NCLBA, the evisceration of the inputs prong of the *Castaneda* test, and the Supreme Court's allowing of Arizona's and other states' experimentation in education, it appears that the federal judiciary's interpretations of federal education standards no longer adequately protect ELL rights. Students must now wait to fail before federal courts will enjoin any state experiments impacting scores of the United States's most vulnerable students. Congress should step in, at a minimum by itself defining "appropriate action" so as to confine the scope of state experimentation. As a second possibility, the federal government should research ways to innovate and improve ELL education. The Department of Education could use such research to inform a national ELL-education policy.

Plyler v. Doe emphasized the plight of only the undocumented-immigrant population. Its spirit, however, resonates with the struggle for adequate educational standards for the ELLs, some of whom make up a part of the undocumented population at issue in that case. The "specter of a permanent caste"²⁹⁹ of students who have been mistreated by states' educational experiments should stir the federal government into action. Although the United States has failed this subgroup in the past, relieving the states of the burden of determining exactly *how* they would educate ELLs would go a long way toward ensuring that every child in the United States, regardless of initial language ability, retains the opportunity for future success.

299. See *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982).