The Journal of Law and Education

Volume 5 | Issue 2 Article 3

4-1976

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Linguistic and cultural diversity has always been one of the distinctive features of American life. It hasn't been, however, until the passage of the Bilingual Education Act[1] in 1967 that such diversity received national attention and encouragement in school programs, through the implementation of local bilingual education projects designed to provide alternative modes of educating linguistic and ethnic minorities. School districts, with federal funds (and occasionally court orders) in hand, provided a variety of educational structures, all conceived as meeting the need for bilingual education.

The term itself suggests much of what is valued in a pluralistic society—equality of languages and cultures, a democratic variety of opinions, and diversity within unity—and the program rationales usually tend to reflect these values.[2] There are, however, two difficulties. The first is concerned with the extent to which bilingual programs actually reflect the stated values in their program structure. This is primarily an educational issue, one which

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[1] Bilingual Education Act 20 U.S.C.A., §880b. [P.L. 90-247, Title VII, §701, as amended by Educ. Amends. of 1974, P.L. 93-380, Title I, §105.] In Fiscal Year 1973, $35,000,000 in Title VII funds were available. 209 projects in 24 languages serving 129,000 students were funded. $60,000,000 was appropriated in F.Y. '74. [*Federal Funds, DHEW Expenditures on Bilingual Education,* 10 AMERICAN EDUCATION (July, 1974)]. The F.Y. '75 appropriation was $85,000,000 [*Guide to O.E.-administered Programs,* 11 AMERICAN EDUCATION 32 (July, 1975)].

[2] Thus, Andersson & Boyer identify at least ten components for a rationale of bilingual schooling in the United States, including (1) America has not met the needs of non-English-speaking children, (2) the self-image and sense of dignity of other language speakers must be preserved, and (3) bilingual education will help to harmonize ethnic groups within a community and allow the development of a creative pluralistic society. T. ANDERSSON & M. BOYER, BILINGUAL SCHOOLING IN THE UNITED STATES, 49 (1970). Note, however, an editorial in the New York Times on the divisive language situation in Quebec:

> The very different Canadian situation tragically demonstrates the awesome power of bilingualism to perpetuate differences within a country, deepen antagonisms and make national politics an endless walk on an ethnic tightrope.

[Editorial, N.Y. Times, Oct. 28, 1975, at 32, col. 2.] It would seem, however, that the Canadian situation reflects not a situation of "bilingualism" but one of politically-competitive first languages—French and English.

can be related to the status of ethnic minorities in our society and to the types and functions of the school programs provided them.

A second difficulty has to do with the legal requirements placed on school districts to consider and provide for the linguistic and cultural needs of minority students. Liberal interpretations of recent court cases suggest that bilingual education might in fact be mandated by constitutional doctrine; however, at this point in time any constitutional compulsion of bilingual programs remains problematic, national and local legislation provide a more sympathetic response to minority needs.

It can be argued, then, that educators responsible for the establishment and maintenance of school programs responsive to ethnic minorities need to appraise both the educational and legal issues involved in bilingual education, from the perspective that such dual consideration will allow one to view bilingual programs not only in terms of minimum requirements regarding their inclusion in a school curriculum, but also in terms of the various effects different types of bilingual programs may have on the affected population. With this in mind, some of the educational aspects of bilingual education can be examined.

Educational Aspects of Bilingual Education

A Definition

Bilingualism (or multilingualism) implies competent functioning in two (or more) languages, and as such is readily observed throughout the world. In the United States, however, the concept of bilingualism is strongly tied to those groups somewhat euphemistically described as "educationally deprived," "culturally deprived," or "disadvantaged." [3] Because of this linkage, a definition of bilingual education refers to children who are *potentially* bilingual: monolingual youngsters whose first language is one other than that needed for social, occupational and political expression in this country—English.

The U.S. Office of Education has provided a useable definition:

> Bilingual education is instruction in two languages and the use of those *two languages* as mediums of instruction for any part of or all of the school curriculum. Study of the history and culture associated with a student's mother tongue is considered an integral part of *bilingual education.*[4]

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[3] These terms have received some wide usage as general euphemisms for poverty. Bailey [S. Bailey, *The Office of Education and the Education Act of 1965*, in THE POLITICS OF EDUCATION AT THE LOCAL, STATE AND FEDERAL LEVELS 357 (M. Kirst ed. 1970)] explains the origins of this when he states:

> . . . Lyndon Johnson decided to make federal aid to education and the elimination of poverty his two central domestic issues. Ultimately, he saw the first as a condition of the second. *Id.* at 362.

Under the Bilingual Education Act, an applicant school must enroll high concentrations of children from families whose income is below poverty levels or who receive benefits from the aid to families with dependent children program [39 Fed. Reg. 17966 (1974)].

[4] U.S. OFFICE OF EDUCATION, DRAFT GUIDELINES TO THE BILINGUAL EDUCATION PROGRAM, in ANDERSSON & BOYER, *supra* note 2, Appendix B.

It should be noted that this definition includes within the concept of "bilingual education" the notion of bicultural education, often considered as a separate component. The above definition could also be extended to include developmental stages of implementation, so that the mother-tongue might be used exclusively in the first phase of instruction, with a gradual phasing in of English until the curriculum reflects more or less equal usage of the two languages. Generally in a bilingual program the non-native language is considered initially a subject of instruction rather than a means, and the purpose of the program one of social, rather than academic value.

Bilingual Education: Some Social Factors

The justification for the establishment of bilingual education programs is, of course, related to the position of ethnic and racial minorities in our society, whose sometimes limited English ability has precluded successful social and academic experiences. There are at least three major categorizations of such groups[5]: national minorities—large blocs of ethnic groups whose isolation and deprivation constitute a "national problem"; localized minorities—those ethnic groups whose urban disposition and value structure has resulted in more or less successful assimilation into the Anglo-American ethic (or, at least, in the development of a cultural entente between themselves and the social majority); and indigenous minorities—those groups whose history and culture ties them to a particular area. Bilingual education can be conceived as an educational method of some applicability to each of these groups—a method conceived in response to these groups' social position.

Indigenous minorities. This category would include such diverse peoples as the Eskimos, Aleuts, native Hawaiians, American Samoans, and American Indians. The American Indian population, about 800,000, is probably the largest of these groups.[6] Because of their physical as well as cultural isolation, Anglo-American ethnocentrism towards these groups has been most marked, and the schooling provided them seems to reflect this fact. Heath,[7] for example, suggests that for American Indians, "[e]ducators persist in forcing a square peg into a round hole, despite all the lamentable signs that compulsory assimilation of Indian students is more alienation than education." [8]

The history of Indian education suggests as much. In 1879, General R. H. Pratt founded a school for Indians under the motto "Kill the Indian, and save

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[5] Black-Americans are neglected in this discussion because their special linguistic and cultural position in American society would seem to deserve a treatment separate from that suggested by "bilingual education." Linguistic similarities between black and standard English, and distinctions between sub- and bi-cultural groups argue for the separation. For a summary of the issues involved, *see* Tyll Van Geel, *Law, Politics, and the Right to be Taught English,* 83 SCHOOL REVIEW 245 (Feb., 1975).

[6] U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, PC(2)-1F, Table II, at XI. The exact figure is 792,730.

[7] G. HEATH, RED, BROWN & BLACK DEMANDS FOR BETTER EDUCATION (1972).

[8] *Id.* at 33.

the Man," [9] and the years since have seen the same theme resurface.[10] At least part of the issue lies not simply in the school's refusal to recognize cultural differences but in the lack of recognition given to language as the mediator between thought and action, so that an English-language curriculum, even one apparently sensitive to cultural differences, suggests a world-view in large part alien to the students it serves. In the process of being schooled in an English-language curriculum, the indigenous student must not only capture the semantic and structural qualities of the new language, but concurrently attempt to learn the content of reality as expressed therein.[11]

A compounding factor is that English as a language is not only a method of communication, but represents and expresses almost overwhelming social and economic power, a power that may be oppressive if it separates a person from his culture. As soon as English comes to be thought of as the *only* language appropriate for education, for trade, or for politics, then the native language has lost its status as a means of expression in these areas, and its ability to contribute is lessened as the formerly inclusive first language becomes confined to specific situations of use, perhaps only to within the family. Given communities may, of course, adapt very well to the intrusion of a second language; however, it would seem that the attempts to integrate languages and cultures through the use of bilingual programs represent a more satisfactory solution to the issue of educating indigenous peoples.

Localized Minorities. Localized or regionalized ethnic populations whose place of origin is other than the present area of residence are included within the second category, e.g., Italian, German, Polish, French and other language speakers distributed across the country in regional enclaves. Many of these groups came to the United States between the 1880s and 1920s and encountered heavy social and economic pressure to become assimilated into Protestant America. A respected educator of the period, E. P. Cubberley, found the southern and eastern Europeans who immigrated after about 1880 to be:

> Largely illiterate, docile, lacking in initiative, and almost wholly without the Anglo-Saxon conceptions of righteousness, liberty, law, order, public decency, and government. . . .[12]

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[9] As reported in R. F. BUTTS, THE EDUCATION OF THE WEST (1973), at 465.

[10] *See, e.g.,* BUTTS, *id.,* who traces social policy towards Indians from the Dawes Act (1887), which broke up tribal lands, to the Snyder Act (1924), which conferred citizenship on Indians, and the Wheeler-Howard Act (1934), which revived Indian culture, to the termination policies under the Eisenhower era, not formally renounced until 1970 and designed to assimilate the Indian nations by terminating federal protection and dismantling tribes.

[11] In this connection, Young notes that the absence of semantic categories in one language "greatly increases their difficulty in another," and forces the bilingual to acquire a new semantic system to express the same kind of basic meanings. Young, *The Development of Semantic Categories in Spanish-English and Navajo-English Bilingual Children,* in BILINGUALISM IN THE SOUTHWEST 95 (P. Turner ed. 1973), at 103. And, the less languages resemble each other, the greater the difficulty.

[12] E. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES 338 (1919).

Although Cubberley felt that the country suffered from a "serious case of racial indigestion," [13] he was confident of the schools' ability to eventually absorb and assimilate the divergent groups—through pressure if necessary.

The groups themselves were eager to become "Americans." Smith,[14] for example, finds that:

> The early parochial schools, moreover, stressed the learning of English quite as much as the preservation of Old World culture. The 70,000 pupils attending Polish Roman Catholic schools in Chicago, in 1901, studied religion and Polish language and history in their parents' native tongue, but the language of instruction in geography, American history, bookkeeping, and algebra was English.[15]

The Result of these educational efforts was seemingly what Fishman[16] terms "unstable bilingualism." [17] He finds that:

> American immigrants needed English both as a lingua franca because they came from so many different speech communities and as a passport to social and economic advancement. . . . [T]he home and immigrant life itself became domains of English—particularly under the onslaught of the American school and the Americanizing and amalgamating efforts of American churches.[18]

Both public and private schools provided the necessary entry into the social and economic structure of the period, and their success in assimilating many of these groups is reflected in the fact that bilingual programs for them now would seem anachronistic. Exceptions are, of course, apparent, as the recent court cases concerning Chinese-speaking students would seem to indicate. Generally, however, these regionalized groups became fairly well assimilated into American life, and began to assert some strong ethnic power in a variety of localities.

National Minorities. The last category attempts to include those whose large numbers and lack of assimilation have warranted national attention and concern, particularly in reference to the "Spanish-surnamed," [19] including Mexican-Americans (about 50% of Spanish-origin persons[20]), Puerto Ricans, and other Latin groups. The social status of these groups is reflected in the kind of schooling experiences they have had, and, for at least the Mexican-Americans of the Southwest, these have been singularly unfortunate.

A seminal survey undertaken by the U.S. Commission on Civil Rights

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[13] *Id.*

[14] Smith, *Immigrant Social Aspirations and American Education, 1880–1930,* in EDUCATION IN AMERICAN HISTORY 236 (M. Katz ed. 1973).

[15] *Id.* at 239.

[16] Fishman, *The Sociology of Language,* in LANGUAGE AND SOCIAL CONTEXT 45 (P. Giglioli ed. 1972).

[17] *Id.* at 52.

[18] *Id.*

[19] The U.S. Census reports that there are about 4.7 million people in five Southwestern states who are "Spanish-surnamed", and over 9 million of "Spanish origin" in the United States. U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, PC(2)-1C, at IX.

[20] The U.S. Census lists 4,532,435 people of "Mexican origin" of the total of 9,072,602 of Spanish origin. *Id.*

documented the effects of schooling practices on Mexican-Americans by looking at ethnic isolation, educational outcomes and educational practices.[21] Regarding isolation, the Commission found:

> [P]ublic school pupils of this ethnic group are severely isolated by school district and by schools within individual districts . . . for the most part, Mexican Americans are underrepresented on school and district professional staffs and on boards of education. . . .[22]

Additionally, the Commission noted:

> Without exception, minority students achieve at a lower rate than Anglos; their school holding power is lower; their reading achievement is poorer; their repetition of grades is more frequent; their overageness is more prevalent; and they participate in extracurricular activities to a lesser degree. . . .[23]

Finally, the Commission found that "schools use a variety of exclusionary practices which deny the Chicano student the use of his language, a pride in his heritage, and the support of his community." [24]

The insistence on the sole use of English as a means of communication, the limiting of cultural consciousness to "festival days," and the treating of the minority language as one foreign to the community contribute to the establishment of distinct social boundaries for language usage[25] and the attendant exclusion of a large part of the minority child's life from formal education. While Mexican-Americans, the largest of the groups, have been the subject of the Commission's study, there can be little doubt that the findings are applicable to other similarly situated groups.

Bilingual Programs: Some Models

Bilingual education programs are the formalized response to the educational needs of ethnic minorities who still maintain a viable ethnic identity. Both educators and linguists often see bilingual programs as the only alternative available to both allow the maintenance of a valued cultural heritage as well as an adaptation to a pluralistic society.[26] However, differing pedagogical structures and functions of these programs are instrumental in determining the extent to which the stated aims of bilingual education are realized.

Structures. Like, perhaps, most educational endeavors, bilingual pro-

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[21] U.S. COMM. ON CIVIL RIGHTS, MEXICAN AMERICAN EDUCATION STUDY (Report I, April, 1971; Report II, October, 1971; Report III, May, 1972).

[22] *Id.*, Rep. I, at 59.

[23] *Id.*, Rep. II, at 41.

[24] *Id.*, Rep. III, at 48.

[25] Fishman provides considerable information on language boundaries and "domains." Reporting on Edelman's 1968 work, he finds that for Puerto Rican children in a selected city, "education" was the language domain most often chosen for English, "family" most often for Spanish. *See,* Fishman, *Domains and the Relationship between Micro- and Macrosociolinguistics,* in DIRECTIONS IN SOCIOLINGUISTICS 435 (J. Gumperz & D. Hymes eds. 1972), at 449.

[26] *See, e.g.,* Andersson, *A New Focus on the Bilingual Child,* in EDUCATING THE MEXICAN AMERICAN 242 (H. Johnson & W. Hernandez-M eds. 1970).

grams could be placed on a continuum with regard to both the functions or goals of the program and the structure that the program may take. The structure of the classroom environment, in a language program, may tend toward the extremes of either completely integrated classes, where the minority and the majority groups are grouped together, or of completely separated classes, where the segregation of ethnic groups for purposes of instruction is the norm. In between the extremes would be found those programs that separate minority students for special instruction, such as English language classes, but then re-integrate them with other students in the school or class. Each of the three examples of program structures may qualify as a bilingual program if the language of the minority group affected is attended to within some kind of formal instructional effort, so that in an integrated environment, classroom instruction may be given alternatively in both languages while, in a segregated one, may be considered only as a teaching aid to help the ethnic child conquer English. A variety of program efforts seemed to have earned the title of bilingual education; the major criterion seems simply to be whether more than one language is recognized by the school.

Functions. Two distinct purposes seem to define the functions of language programs: a desire to assimilate the minority into the dominant culture, or a desire to establish and maintain a pluralistic culture. Assimilation is a function which generally seems to follow from the dominant culture's need to ameliorate social problems, such as those caused by friction between ethnic and non-ethnic groups or even those which arise when the social conscience is offended. Pluralism, while attentive to social problems, stresses more the basic values of a society committed to diversity. Thus, on the one hand, it would probably not be difficult to find language programs justified on the basis that their presence reduces minority drop-outs which in turn reduces crime; on the other hand, there are many programs which stress the need of a people for a specific identity, culture and language, and for a school system responsive to this need.

Program Models. From the combination of structures and functions, several program models representative of language education efforts can be identified. The possibilities are presented in Table 1.

Model A: Mixed Classes-Assimilation. This model represents a traditional approach to the educating of newcomers: they are integrated into regular classes with the idea of speeding their assimilation into the dominant culture. Ethnic differences are, for the large part, ignored. The model is a bilingual one only in the sense that the first language of the minority child is utilized to the extent necessary to allow an efficient transition to the English language and culture. It is not bilingual in the sense of a programmatic effort aimed at developing dual language skills.

Model B: Separate Classes-Assimilation. This type of model might be most readily seen in areas where public schools have had to absorb large numbers of immigrant children for whom special classes and programs were designed to assist the children in transiting to a new life style. In this case, the affected

TABLE 1

Structures, Functions and Some Characteristics of Common Language Programs

	Functions	
	Assimilative	Pluralistic
Structures		
Mixed (integrated)	MODEL A Group Differences Ignored	MODEL C Equality of Languages and Cultures
Separated (segregated)	MODEL B Ethnic Differences A Tool for Change (English classes stressed)	MODEL D Core Identity (Ethnic curriculum stressed)

students would usually be given accelerated English-as-a-second-language instruction and subject-matter instruction in their native language. As the child's English ability progressed, he or she would be phased into the regular school program.

Model C: Mixed Classes-Pluralistic. This model reflects the kind of program most often considered "bilingual education"; the minority students as well as the other students are considered one student population, and emphasis is given to the need for each group to learn the language of the other. The classroom may well present subject matter in alternate languages, geared to the language ability level of each group. In effect, a traditional school environment has been modified to allow for the linguistic and cultural needs of a sizeable minority, with the intention of attempting to maintain the distinctive cultural qualities possessed by the ethnic group.

Model D: Separate Classes-Pluralistic. As far as cultural intermingling, this is the most radical of the models, and might be found where there exists a strong desire to establish or maintain a given cultural identity. Some Indian schools may represent the kind of program discussed here. In this model, the ethnic or minority language is consistently the prime means of providing instruction; English is considered at best a useful supplement and a skill to be learned. Separate classes and even schools are provided whose purpose is to nurture the psychological identification of the student with his own culture while similarly teaching him to adapt to the surrounding one.

These tentative categorizations of language programs suggest the direction in which such programs may lean: between assimilation into a "national" ethic or into diverse ones and between separated or mixed instructional

situations. The type of program found in a school district will depend not only on the goals of the district but also on the age and grade level of the children involved. Kjolseth's[27] analysis of bilingual education also suggests the possibility that a bilingual program in a school may have the effect of retarding ethnic language use in the community insofar as the program teaches only the "scholarly" form of the ethnic language, ignoring or downgrading its local usage.

In considering bilingual education, Albert Shanker, the union leader and educator, claims that "[t]he American taxpayer, while recognizing the existence of cultural diversity, still wants the schools to be the basis of an American melting pot." [28] Even if true, this does little to determine whether the bilingual child has any kind of right to a bilingual education which is pluralistic in scope and which builds upon the cultural and linguistic diversity the child brings with him to school. The courts have begun answering this question, and have found themselves more or less caught between the values of unity and diversity.

Legal Aspects of Bilingual Education

Bilingual Education as a Constitutional Issue

The notion that the ethnic minority child has a particular civil right to an education sensitive to at least his linguistic background has found greatest debate within the bounds of the equal protection clause of the fourteenth amendment. Since the 1954 decision in *Brown v. Board of Education*,[29] equal protection moved to the front as the means for equalizing disparate opportunity in education,[30] and since the decision, as Kirp[31] notes, the courts "have increasingly scrutinized decisions once made solely by school administrators and boards of education." [32] Bilingual education partisans were thus encouraged by the possibility that ethnic diversity could receive official encouragement within the courts and under the Constitution. However, an analysis of the decisions in this area leaves a large area of doubt as to whether there is any constitutional validity to the argument that pluralism must be encouraged. To pursue an analysis requires a review of three related issues: the

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[27] Kjolseth presents a cogent analysis of bilingual programs from a sociolinguistic perspective, to which I am indebted. Kjolseth, *Bilingual Education Programs in the United States: For Assimilation or Pluralism?*, in BILINGUALISM IN THE SOUTHWEST 3 (P. Turner ed. 1973).

[28] Shanker, *Where We Stand*, N.Y. Times, Nov. 3, 1974, §E, at 11, col. 6 (purchased space). Shanker is President, United Federation of Teachers.

[29] 347 U.S. 483 (1954).

[30] Kurland reports:

> It is clear that prior to the Warren Court, the Equal Protection Clause was not a strong element in the Supreme Court's arsenal. The egalitarian movement was not yet a part of the American *Zeitgeist*. But equality was beginning to cast its shadow. Its entrance on the scene at center stage was heralded by *Brown v. Board of Education*.

P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 110 (1970).

[31] Kirp, *Student Classification, Public Policy, and the Courts*, 44 HARV. EDUC. REV. 7 (1974).

[32] *Id.* at 14.

nature of the rights involved, the disfavored class, and the nature of remediation.

The Nature of the Right. In using the Constitution as the basis for asserting a right to equal educational opportunity, a rather basic problem emerges: education itself can hardly be considered a "fundamental" right which falls under the protection of the Constitution. *Flemming v. Adams*[33] stated this when it declared:

> The United States Constitution does not secure to the appellant the right to an education; rather the Constitution secures the appellant's right to equal treatment where the state has undertaken to provide public education to the persons within its borders.[34]

The Supreme Court, in *San Antonio Independent School District v. Rodriguez,*[35] reaffirmed this conception when it found that "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." [36] Had education been considered a fundamental right explicitly protected, the basis for asserting a right to a specifically bilingual education could rely on the stringent concern expressed by the courts in cases where fundamental rights are threatened. Equal protection, however, has become the standard bearer for attempts to ensure second-culture opportunities within schools. Three major arguments can be made within the Equal Protection Doctrine which assert a child's right to learn in his own native language and culture. The arguments are based on the notions of absolute deprivation, segregation, and inherent inequality, and the responses to each of the arguments delimit the nature of the right to bilingual education.

While the *Rodriguez* court found education itself not a fundamental right, it was considering the issue of *relative* deprivation of educational services resulting from claimed financing inequities. Because of the presence of a state-administered minimum support program for all school districts, the notion of *absolute* deprivation was not at stake. In the case of non-English-speaking children, however, this latter conception is an important consideration: at least some "bilingual" students have no knowledge of English and their presence in a regular school program is simply of no benefit. In *Rodriguez,* Justice Powell stated that "[W]e have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice." [37] This does, of course, bypass the issue of whether an absolute denial of education to some children, such as the non-English-speakers, also absolutely abridges speech and voting rights and thus violates some fundamental liberties. Education has become one of the prime mediators between the family and society, and it can be suggested that a schooling system which does not account for linguistic differences

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[33] Flemming v. Adams, 377 F.2d 975 (10th Cir. 1967).

[34] *Id.* at 977-8.

[35] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[36] *Id.* at 35.

[37] *Id.* at 36.

among its student population may be denying all educational opportunity, since schooling is premised on a basic ability to understand the language of instruction. The deprivation of education, relative to its provision to English speakers, could well be considered a deprivation of very basic rights.

The issue, however, remains open. When Justice Powell prefaced a remark by stating "[w]hatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities," [38] the possibility for a continued exploration of this question remained. Kirp, also treating the *Rodriguez* case, comments that:

> In rejecting the claim that education is of fundamental constitutional significance, *Rodriguez* appears to foreclose all challenges to inequities in the provision of education—or, at least, inequities which are neither racial in nature nor represent complete denial of schooling.[39]

One apparent issue, when considering the argument of absolute deprivation, is whether the children involved constitute an identifiable class which can seek remediation. Assuming that a class such as this, based on language qualities rather than on other criteria, is acceptable, then the question must be raised whether there *has* been complete denial of schooling opportunities, in the face of the fact that schooling of a sort is offered and no prohibition against attendance could be said to exist. The added significance of complete denial is in the effect this may have on the practice of fundamental rights; yet the relationship between schooling and rights is unclear—the California Supreme Court has ruled that a Spanish-only literate cannot be denied the right to vote because of inability in English.[40] Because of the availability of sources for translation, the Spanish speaker is in a position to be aware of political issues, and thus capable of exercising the franchise in as competent a manner as any citizen, this court suggested. Reviewing several such cases in California,[41] one commentator has suggested that while "bilingual requirements are highly desirable, they do not appear to be a question for the courts but rather a matter of public policy for the legislature to act upon," [42] at least in the area of state services effecting unemployment insurance and welfare benefits.

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[38] *Id.* at 37. The full quote is:

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

[39] Kirp, *supra* note 31, at 14. Note also that on this basis a court has held that for wealth discrimination to receive the test of "compelling state interest," *absolute* discrimination must be present. *See,* Brown v. Board of Educ. of City of Chicago, 386 F.Supp. 110, 123 (N. D. Ill. 1974).

[40] Castro v. State of California, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970).

[41] Comment, *Breaking the Language Barrier: New Rights for California's Linguistic Minorities,* 5 PACIFIC L. J. 648 (1974).

[42] *Id.* at 657.

However, while the non-English-speaker may indeed not require ability in English to exercise the franchise or other rights, it must be noted that it is important to be literate in some language, and if the schools do not teach English literacy, neither do they teach literacy in other tongues to these children.

Grubb is one author who feels that the school's inattention to non-English-speaking children is an absolute denial of educational opportunities affecting fundamental rights.[43] Outlining a constitutional argument,[44] she finds that, on the adoption of a theory of equal protection which addresses results and consequences rather than the initial inputs, there is a complete denial of educational opportunity and that these same students may be considered not only as a class, but as a suspect class.[45] In any event, Grubb attempts to find a solution to the problems of linguistically different children which is mandated by the Constitution. While an argument based on complete denial is intriguing, it has yet to be adequately tested and will probably require further empirical study; yet it remains as the most viable alternative for granting constitutional protection to non-English-speakers as a generalized class.

The cases that have occurred in the area of bilingual education have addressed themselves to two other major issues: prior segregation and inherent inequality. The argument for bilingual education based on the notion of prior segregation suggests that a bilingual curriculum could only be constitutionally mandated if previous state discrimination had been found and that bilingual education is not otherwise a child of equal protection. Here, the courts have looked at the equality of the "inputs," or what the state initially provides its students. *Lau v. Nichols*[46] is the major case representing this stand. The federal circuit court there found that:

> [A]ppellants have alleged no such past de jure segregation. More importantly, there is no showing that appellants' lingual deficiencies are at all related to any such past discrimination. This court, therefore, rejects the argument that appellees have an affirmative duty to provide language instruction to compensate for appellants' handicaps because they are carry-overs from state-imposed segregation.[47]

In the case, Chinese students petitioned for compensatory language classes to allow them equality of opportunity within the school system, claiming their deficiency in English denied them such. The court, however, suggested that the students' failure was of their own making, not state-related, and

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[43] Grubb, *Breaking the Language Barrier: The Right to Bilingual Education,* 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 53 (1974).

[44] Grubb outlines two possible arguments: one is based on equal protection and finds on the basis of the empirical evidence that absolute educational denial occurs; the other is based on due process and asserts that the teaching of only English to non-English-speakers is an infringement on their liberty to acquire useful knowledge and on their freedom from restraint, this latter because of compulsory attendance laws. *Id.* at 72–92.

[45] See text *infra,* at 164.

[46] Lau v. Nichols, 483 F.2d 791 (9th Cir. 1973); *rev'd,* 414 U.S. 563 (1974). Note, however, the Supreme Court's reversal of *Lau* did not address the constitutional issues.

[47] 483 F.2d at 797.

thus of little consequence when school resources were limited. This case suggests, then, that the relative equality of that which a student brings to school in terms of language background, and perhaps ability, is not a state (nor school district) concern if any such original inequality was not state-related. The court went on to say:

> As long as there is no discrimination by race or national origin, as has neither been alleged nor shown by appellants with respect to this issue, the States should be free to set their educational policies, including special programs to meet special needs, with limited judicial intervention to decide among competing demands upon their resources at their commands, subject only to the requirement that their classifications be rationally related to the purposes for which they are created.[48]

In adopting the rational-basis test, the court here has rejected the notion that these students fall into a suspect classification by virtue of their language abilities since such a classification would require the state to show some "compelling" reason for their purposes. And, not finding discrimination, the court has decided that bilingual programs are matters better left to the judgements of school officials and their constituency, rather than to the courts.

If requests for language instruction in languages other than English require the showing of prior discrimination, it is fruitful to explore what appears to constitute state-related discrimination. In specific reference to Mexican-American students, the court in *Cisneros v. Corpus Christi Independent School District*[49] attempted to answer this by stating:

> [U]nlike cases involving the traditional black-white dual systems, the question is whether the segregation of mexican-american children who are not the victims of statutorily mandated segregation is constitutionally impermissible. We hold that it is....[50]

The court then went on to add what it considered the bounds of state action:

> We think it clear today beyond peradventure that the contour of unlawful segregation extends beyond statutorily mandated segregation *to include the actions and policies of school authorities*. (Emphasis added.)[51]

Similarly, in *United States v. Texas*,[52] the court found Mexican-American students "part of a so-called *de jure* school system based upon separation of students of different ethnic origins" [53] and ordered not only the removal of racial barriers but also the establishment of a comprehensive remediation program which included bilingual instruction.

What these opinions suggest is, of course, the courts' involvement in the

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[48] *Id.* at 799.

[49] Cisneros v. Corpus Christi Indep. Sch. Dis., 467 F.2d 142 (5th Cir. 1972).

[50] *Id.* at 144.

[51] *Id.* at 147.

[52] United States v. Texas, 342 F.Supp. 24 (E.D. Tex. 1971); *affd*, 466 F.2d 519 (5th Cir. 1972); *cert. denied*, 404 U.S. 1016 (1972).

[53] 342 F.Supp. at 24.

rather hazy area of determining the intentions of school systems as reflected in their actions, a method later followed by the Supreme Court in *Keyes v. School District No. 1, Denver*[54] where, in a different context, the Court found a definite *intent* to segregate on the part of school officials.[55] This extension of the limits of discriminatory action allows, for the ethnic youngster, a greater latitude in determining the applicability of equal protection, with the resultant implementation of a bilingual curriculum designed to remove the effects of discrimination. It should be noted, however, that the lower court's *Lau* decision suggests that a further step must be taken: not only must prior discrimination–including intent to discriminate–be established, but there must also be some connection between the discrimination and the claimed deficiency suffered or interest abridged. In *Guey Heung Lee v. Johnson,*[56] Justice Douglas, sitting as a Circuit Judge, found that:

> Historically, California statutorily provided for the establishment of separate schools for children of Chinese ancestry. That was the classic case of *de jure* segregation involved in *Brown v. Board of Education*. Schools once segregated by state action must be desegregated by state action, at least until the force of the earlier segregation has been dissipated. (Footnotes omitted.)[57]

While *Johnson* suggests the presence of past discrimination, the *Lau* court specifically countered by stating that, even if so, no relationship had been established between state discrimination and the students' present linguistic deficiencies.[58] In *United States v. Texas,* where de jure segregation was established, the relationship between the discrimination and student deficiency was apparently strong enough to warrant special programs and curricula.[59]

There is another possibility for stating that minority children must be provided an education sensitive to their linguistic and cultural needs. This is the conception that school programs which do not allow for these needs are *inherently* unequal and in violation of equal protection standards. The case which comes closest to adopting this approach is *Serna v. Portales,*[60] where the court found that, despite the seemingly similar program provided Anglo and Mexican-American students, the generally dismal I.Q. records of the latter group indicated that they were unable to take advantage of the opportunities provided by the school and thus that:

> [T]he conclusion becomes inevitable that these Spanish-surnamed children do not in fact have equal educational opportunity and that a violation of their constitutional rights to equal protection exists.[61]

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[54] Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1973).

[55] *Id.* 208-12.

[56] Guey Heung Lee v. Johnson, 404 U.S. 1215 (Douglas, Circuit Justice, 1971).

[57] *Id.* at 1215-16.

[58] *See* text, *supra* at 161.

[59] The decision required the establishment of bilingual-bicultural programs, community involvement, English as a Second Language classes, and a generally comprehensive revision of school curricula.

[60] Serna v. Portales, 351 F.Supp. 1279 (D. N.Mex. 1972); *aff'd,* 499 F.2d 1147 (10th Cir. 1974).

[61] 499 F.2d at 1282.

Discrimination was never at issue in this case; the very equality of the school program was the source of complaint and led to the finding that equal protection was violated because of an inadequate curriculum which led to unequal performance between the two groups. Unlike *Lau,* and there is a distinct parallel between the two cases,[62] the court here chose to examine educational outputs or performance and then conclude that the state has an obligation in its school systems to remedy student deficiencies which may not have been state-caused. The logic of the decision has apparently linked together state discrimination and student deficiencies, such as linguistic ones, as evidenced by this passage:

> The promulgation and institution of a program by the Portales school district which ignores the needs of such [minority] students does constitute state action.[63]

Serna, then, seems to assert that curricular denial is in fact state discrimination, leading to the conclusion that programs which do not account for linguistic and cultural differences are inherently unequal, a conclusion which recalls the *Brown* opinion that separate facilities are inherently unequal.[64]

The *Serna* decision has been upheld,[65] but not on constitutional grounds, leaving unanswered several relevant points. While the court found the "equality" of the programs provided to be unsatisfactory, it didn't suggest at what point school districts may consider their curriculum appropriate, other than to continually seek judicial review. Also ignored was the application of the de jure-de facto distinctions still honored in other courtrooms; more accurately, the court seemed to stretch the de jure concept to cover practically all circumstances. Some observers, however, have been sympathetic. Rosenfelt,[66] for example, finds that:

> In *Serna,* the Court held that the school district's failure to provide adequate bilingual and bicultural programs was unconstitutional. In *United States v. Texas,* the cultural isolation and racial segregation of minority students was found to be discriminatory. What appears to be emerging from these cases is the frank recognition that a public school district which ignores the learning styles, languages, and cultural backgrounds of minority students discriminates against them just as surely as would a requirement that minority students attend separate schools.[67]

At issue, however, seems not to be whether a school district ignores linguistic and cultural backgrounds; rather, it would appear to be whether this ignoring constitutes state action. *Serna,* of course, decided that it did; *Lau,* however, and, by implication, *United States v. Texas,* required the prior

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[62] The Court of Appeals for *Serna* stated that "*Lau* is a case which appellants admit is almost identical to the present one." 499 F.2d at 1152 (1974). And, as with the *Lau* appeal, the court here found no need to address constitutional issues.

[63] Serna v. Portales, *supra,* note 60, at 1283.

[64] The *Serna* court seemingly echoes *Brown's* conclusions when it suggests that the state's provision of "equal" programs ignores minority needs and is thus discriminatory, as "equal" facilities were once found discriminatory.

[65] 499 F.2d 1147 (10th Cir. 1974).

[66] Rosenfelt, *Indian Schools and Community Control,* 25 STAN. L. REV. 492 (1973).

[67] *Id.* at 526.

establishment of discriminatory state actions whose effects are felt in the school program.

These bilingual cases appear to offer little evidence that bilingual education can be considered a subject of equal protection in and of itself. The *Serna* court did seem to approach the stand that any other kind of education for ethnic minorities is *prima facie* discriminatory and in constitutional violation; in the end, however, even *Serna* was required to justify its position on the basis of state action found discriminatory, suggesting bilingual education to be remediation only for racial-alienage segregation rather than a specific right. If state action is found to be as limited as the *Lau* court indicated, then there would seem to be little constitutional protection offered the non-English-speaker. However, the *Hobson v. Hansen*[68] guideline should be remembered when considering any of these cases, and their results interpreted in light of what seems to be a given court's understanding of it:

> Orthodox equal protection doctrine can be encapsulated in a single rule: government action which without justification imposes unequal burdens or awards unequal benefits is unconstitutional.[69]

Of course, these cases differ on just what government action is, and on what makes an unequal burden. And the application of this rule depends also on the prior identification of a class upon which the inequality falls.

The Disfavored Class. In appealing the *Serna* decision, it was suggested that the appellees had no standing as an identifiable class;[70] a ground for reversal which underscores the need for establishing that a particular group is affected by the claimed discrimination. A class based on language distinctions, such as "non-English-speakers," may be too broad to warrant special attention from the courts; however, a class based on "national origin" would be distinctively considered. This distinction, of race rather than language, allows the use of the precedents established in the black-white cases, but also suggests the need to link language inadequacies to racial discrimination.

Any group whose common characteristic is a racial or ethnic one is considered to have standing: in *Guey Heung Lee v. Johnson,* Justice Douglas asserted that "[t]he theme of our desegregation cases extends to all racial minorities treated invidiously. . . ." [71] Whether, however, such groups receive the benefit of strict scrutiny depends on their meeting the criteria found in *Rodriguez.* There, a state action would be considered "suspect" if the class affected were "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection. . . ." [72] On meeting one of these criteria, the burden of proof shifts and a compelling reason for the

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[68] Hobson v. Hansen, 269 F.Supp. 401 (D.D.C. 1967).

[69] *Id.* at 497.

[70] 499 F.2d at 1152 (10th Cir. 1974).

[71] 404 U.S. at 1216–17 (1971). *See also,* Hernandez v. Texas, 347 U.S. 475 (1954).

[72] 411 U.S. at 28 (1973). A lower court has categorized the suspect class notion in areas based on "race, alienage, nationality, and probably, sex." Belkner v. Preston, 332 A.2d 168 at 170 (N.H. 1975).

discrimination must be shown. The groups previously labelled "national" and "indigenous" would seemingly meet these criteria more easily than that group considered "local."

The Scope of Remediation. Assuming that a school system has been found to be negligent in its treatment of language minorities, it is necessary to examine the scope of remediation. In this area, the courts have exercised broad prerogatives in the fashioning of decrees against school districts, including their determination of kinds of programs, of grades affected, of curriculum content, of numbers of teachers required and the backgrounds needed, and of time periods for specific subjects. Bilingual and bicultural education has figured prominently in the area of remediation.

United States v. Texas,[73] for example, held that for purposes of true integration (as opposed to "mere desegregation" [74]) the school district must provide special educational consideration to the discriminated-against group to assist them in adjusting to "those parts of their new school environment which present a cultural and linguistic shock." [75] This special consideration took the form of a comprehensive bilingual-bicultural program for the district. The *Serna* court similarly fashioned a broad program.[76]

Notable in these cases is the fact that non-minority students may also be required to participate equally in bilingual programs. In *United States v. Texas,* the court stated: "To avoid this result [of providing minority students with 'badges and indicia of slavery' by giving them special consideration], the Anglo-American students too must be called upon to adjust to their Mexican-American classmates, and to learn to understand and appreciate their different linguistic and cultural attributes." [77] A desegregation case, *Clark v. Board of Education*[78] has affirmed this policy by saying "the burden on all students, black and white, should be as equitable as possible." [79] Generally, then, as a remedial measure bilingual education may be thought of as a necessary, but not always sufficient, undertaking: it attempts to rectify linguistic and cultural discrimination but is no solution for the removal of official segregation.[80]

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[73] 342 F.Supp. 24.

[74] *Id.* at 28.

[75] *Id.*

[76] The *Serna* court not only required the implementation of a broad bilingual-bicultural school program, but the recruitment of minority teachers and the exploration of other funding sources.

[77] 342 F.Supp. at 28.

[78] Clark v. Board of Educ., 449 F.2d 493 (8th Cir. 1971).

[79] *Id.* at 494.

[80] A recent case which has found bilingual programs to be a necessary part of a remediation effort is, *Hart v. Community Sch. Bd. of Brooklyn,* 383 F.Supp. 699; *appeal dismissed,* 497 F.2d 1027 (1974). And, *see also, Morales v. Shannon,* 516 F.2d 411, 415 (5th Cir. 1975), in which the court stated that:

> It strikes us that this entire question [of bilingual-bicultural education] goes to a matter reserved to educators. However, on the off chance that defendants are engaging in discriminatory practices in the program as it currently exists, we pretermit decision here and remand. . . .

This court also notes that "It is now unlawful educational practice to fail to take appropriate

Summary. The three possibilities which seem to exist for exerting a right to bilingual education must be interpreted in light of the cases which discuss this area. An argument from absolute deprivation of educational services remains possible, but has not really been addressed in cases of precedent; as it stands, it is somewhat problematic because of the need to assert complete denial, to base a class on language features, and to establish a relationship between education and the fundamental rights. It may well be argued, however, that a person, of whatever origin, *must* be literate in some language in order to exercise his rights, and that the one-language school does a fundamental disservice to other-language speakers. When state discrimination has been found, though, whether interpreted as an inherently unequal curriculum or as statutorily mandated or simply intended, then bilingual education becomes a vital part of the remediation process. The finding of state discrimination depends to a large extent on whether one chooses to look at what is initially provided by the school system and determining its equality, or at the results that are attained from the educational system by the linguistic minority.

In relation to those models of bilingual programs discussed earlier, it appears that most court-ordered efforts would tend to be more assimilative than pluralistic in their intent, to, in effect, develop a "unitary" system. Judge Hill's vigorous minority dissent in *Lau* noted this: "Plaintiffs seek only to learn English. . . . They do not seek instruction in the Chinese language or to be taught anything in Chinese except how to speak English." [81]

But as important as the constitutional questions are, they have become overshadowed by the effect of the Civil Rights Act of 1964, a law whose interpretation has been as pleasing to bilingual proponents as English-only requirements were offensive.

Bilingual Education as a Legislated Right

If the Federal Constitution appears somewhat unclear about the need for linguistic and cultural diversity, the Civil Rights Act of 1964[82] provides a strong alternative for proponents of pluralism. Section 601 of the Act states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[83]

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action to overcome language barriers [under §204(f) of The Equal Educational Opportunity Act of 1974 [20 U.S.C.A. 1703(f)].

[81] 483 F.2d at 802.

[82] 42 U.S.C. §2000. A more recent law buttressing the effects of the Civil Rights Act is The Equal Educational Opportunity Act of 1974 which states in part:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program.

[20 U.S.C.A. §1703(f), P.L. 93-380, Title II, §204.]

[83] 42 U.S.C. §2000d. [Civil Rights Act of 1964, Title VI, §601.]

Because of the dependence of virtually all local governmental units—including school districts—on federal funds, this passage has established what amounts to a national standard of conduct. In an interpretation of the Act, the Department of Health, Education and Welfare has issued regulations to school districts with more than five percent national origin or minority group children which state in part:

> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.[84]

Rosenfelt,[85] in reviewing Title VI of the Act, finds that:

> A strong argument can be made that public schools not only may, but must, provide a bilingual, bicultural curriculum for non-English-speaking children in order to afford them an equal educational opportunity.[86]

While the bicultural part is largely untested, in view of the HEW regulations, Rosenfelt's comment appears quite accurate: the Office of Civil Rights has pursued a vigorous program to assure compliance with Title VI.[87] The decisions made in the appeals of the *Lau* and *Serna* cases have also served to strengthen linguistic minorities' demands for bilingual programs.

The Supreme Court reversed the *Lau* decision on the grounds of the Civil Rights Act of 1964.[88] In so doing, the majority found, first, that bilingual education was allowed by the California Education Code (the *Lau* trial occured in California) to " 'the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language' " [89] and then that:

> Imposition of a requirement that, before a child can effectively participate in the educational program, he must have already acquired those basic [English] skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful. . . . It seems obvious that the Chinese-speaking minority receives less benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by the [HEW] Regulations.[90]

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[84] 35 Fed.Reg. 11,595 (1970).

[85] Rosenfelt, *supra* note 66.

[86] *Id.* at 524.

[87] Wherein, for example, plans outlining compliance with Title VI regulations must be submitted by districts with substantial numbers of minority children. *See,* e.g., *Memorandum* from Director, Office of Civil Rights and Commissioner, U.S. Office of Education, to Chief State School Officers, August 11, 1975.

[88] 414 U.S. 563 (1974).

[89] *Id.* at 565.

[90] *Id.* at 566.

The decision additionally found that "[d]iscrimination is barred which has that *effect* even though no purposeful design is present" [91] and quoted from the HEW Regulations: "[A] recipient 'may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination.' " [92] This does, of course, allow the bypassing of intentions and purpose to let courts review the actual operation of school districts to determine the factual validity of claimed discrimination, a term now applicable to the absence of language compensation programs for minorities.

The Court minced no words in reversing the original decision. Shannon[93] finds this a "real expansion of the 'de facto' concept [which has discredited] even further the constitutional validity of the de facto segregation issue." [94] But while the Court has explicitly stated that the education provided non-English-speakers in an English-only school is "in no way meaningful," it remains to be seen whether the decision would in fact have constitutional applicability. Its findings, however, do seem to strengthen a claim based on absolute deprivation.

Two concurring opinions in the *Lau* decision might be noted. In one, Justice Stewart questioned whether the HEW regulations were in fact accurate interpretations of the law, and then found them to be so.[95] Justice Blackmun, in the other, suggested that, for him, "numbers are at the heart of this case," [96] indicating a reluctance to see bilingual programs mandated for other than a significant number of students, apparently (under the HEW guidelines) at least five percent of the student population in a district.

The *Serna* appeal[97] is also of significance in considering the application of the Civil Rights Act of 1964 to bilingual programs. There, the trial court's decision was affirmed, using the Supreme Court's verdict in *Lau* as a distinguishing precedent.[98] The appeals court found that, given state requirements for compulsory education and the use of English in schools, the "Portales school curriculum, which has the effect of discrimination even though probably no purposeful design is present, . . . violates the requisites of Title VI and the . . . HEW regulations." [99] The court further stated that:

> Under Title VI of the Civil Rights Act of 1964 appellees have a right to bilingual education [and] the trial court . . . can properly fashion a bilingual-bicultural program which will assure that Spanish-surnamed children receive a meaningful education.[100]

This decision, and the preceding *Lau* one, addresses the issue of bilingual

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[91] *Id.* at 568.

[92] *Id.*

[93] Shannon, *Your Stake, Mr. (or Ms.) Administrator, in Three 1974 Supreme Court Decisions*, LV PHI DELTA KAPPAN 460 (1974).

[94] *Id.*

[95] 414 U.S. at 571 (1974) (concurring opinion).

[96] *Id.* at 572 (concurring opinion).

[97] 499 F.2d 1147.

[98] *Id.* at 1152-3.

[99] *Id.* at 1154.

[100] *Id.*

education in a most comprehensive way, to the benefit of those ethnic minorities who feel that a regular school curriculum is unsatisfactory. Under these decisions, when significant minority children are present in the school district, there is no alternative but to provide some kind of bilingual curriculum; not necessarily one which is completely pluralistic in function, but at least one which makes some special provisions for the entrance of the minority children into the regular school program. Including a strong bicultural component in a school's bilingual program may well make the effort less assimilative in nature. While the *Serna* appeal referenced such a component, there is no indication that this dictum has any wide application unless such a component could be shown to be necessary to the bilingual instruction provided. Thus, the Act and the court decisions supportive of it have established a network of requirements relating to the non-English-speaking child with which school districts must comply; additionally, some states have designed statutes which complement the provisions of the Act and assist language minorities in finding quality education.

Selected Statutes. Historically, state statutes have been designed to promulgate English usage rather than to allow a multi-lingual environment.[101] Kobrick,[102] in proposing a model act for states desiring bilingual legislation, has offered the following summary on state statutes prior to the initiation of the federal bilingual program:

> Some 21 states, including California, New York, Pennsylvania and Texas, had laws which prevented local initiation of bilingual programs by requiring all instruction in public schools to be in English.
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> . . .
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> Since 1968, three states have repealed requirements that English be the exclusive medium of instruction in the public schools, [Texas, Indiana, Oregon]; two states have repealed criminal penalties for teaching in a language other than English [Texas, South Dakota]; five states have modified the prohibition to allow an exception for programs serving non-English-speaking children [California, New York, Colorado, Maine, Washington]; and a total of eleven states have, in various forms, passed laws permitting or encouraging local school districts to provide bilingual education [Arizona, California, Colorado, Illinois, Maine, Michigan, New Mexico, New York, Oregon, Pennsylvania, Texas].[103]

Massachusetts is mentioned by Kobrick as a state where local districts must provide bilingual education to non-English-speaking students; other states have, however, recently passed or begun to pass such legislation. Alaska, Colorado, New Jersey and Texas can be added as states which have passed

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[101] The U.S. Commission on Civil Rights provides, in its MEXICAN AMERICAN EDUCATION STUDY, Report III, *supra* note 21, a succinct history of legislation specifically pertaining to the Mexican-American population of the Southwest, showing the extent of English-only statutes. Kobrick, *infra* note 102, also gives a comprehensive review.

[102] Kobrick, *A Model Act Providing for Transitional Bilingual Education Programs in Public Schools*, 9 HARV. J. LEGIS. 265 (1972).

[103] *Id.* at 268–9.

recent legislation mandating bilingual education programs for linguistic minorities. The legislation in four states is particularly impressive.

The Massachusetts statute[104] provides that children of limited English ability and not enrolled in private schools "shall be enrolled and participate in the program of transitional bilingual education" [105] and should remain in the program until able to perform successfully in English-only classes or until three years have lapsed. The statute additionally provides for the reimbursement to local districts for those program costs which exceed the district's average per pupil costs, and allows parents the "absolute right" to withdraw their child from the program at any time. Significantly, the law provides for instruction not only in dual languages but also in two cultures and histories.

An Alaskan statute[106] similarly provides bilingual opportunities for the state's children. This statute reads that:

> A state-operated school which is attended by at least 15 pupils whose primary language is other than English shall have at least one teacher who is fluent in the native language of the area where the school is located. Written and other educational materials, when language is a factor, shall be presented in the language native to the area.[107]

This statute, with its requirement that educational materials be in the native language, is particularly helpful to the development of pluralistic programs.

Texas is another state that has moved to the forefront of bilingual efforts. The Texas Education Code[108] states in part:

> Beginning with the 1974–1975 scholastic year, each school district which has an enrollment of 20 or more children of limited English-speaking ability in any language classification in the same grade level during the preceding scholastic year, and which does not have a program of bilingual instruction . . ., shall institute a program of bilingual instruction for the children in each language classification commencing in the first grade, and shall increase the program by one grade each year until bilingual instruction is offered in each grade up to the sixth.[109]

As in Massachusetts, the program established is one of transitional education, where English remains the basic language of instruction. It is, however, a comprehensive piece of legislation which requires instruction in the history and culture of the native language speakers as well as of the United States, participation by the bilingual children in regular school classes in primarily nonverbal subjects, and participation by these children in extracurricular activities.

Colorado, later than other states in passing a bilingual education act, has provided what many hope is model legislation. Although the program is only from kindergarten through the third grade, the act requires that school

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[104] MASS. ANN. LAWS, ch. 71A, §§1–9 (Cum.Supp. 1972).
[105] *Id.* at §2.
[106] ALASKA STATS., §14.08.160 (Cum.Supp. 1972).
[107] *Id.* at §14.08.160(a).
[108] V.T.C.A., EDUCATION CODE, §21.451–460 (Cum.Supp. 1973).
[109] *Id.* at §21.453(b).

districts with 50 or more students in these grades (or ten percent of the total) who are linguistically different provide a plan for bilingual-bicultural education which then must be implemented on the receipt of funding. The programs developed are open to non-minority students and require the participation of parents and the community. In addition, a school district with more than a hundred students in the bilingual component is required to appoint a district director for bilingual education. The act also makes provisions for the training of bilingual teachers and their aides.[110]

The statutes found in these states can thus be considered as examples of the degree to which state legislatures can enact regulations responsive to some of the values inherent in our liberal conceptions of society. While such legislation does not suggest that schools prepare generations as ethnic as their forbears, it does encounter the very real needs of students whose language and heritage lies other than in Anglo-America.

Conclusion

Bilingual education is a concept which might be interpreted as either a pedagogical method designed to establish more effectively a unified society by preparing children through special programs to learn the ways and language of the dominant social order, or as a means of insuring the existence of diverse groups within society each capable of contributing to a pluralistic polity. Bilingual programs, as actualized in any of a series of models, can reflect either of these social goals, as they apply to specific ethnic or racial minorities. It becomes, then, important to review the legal issues pertaining to bilingual programs to attempt to clarify the constraints which might be placed on either of the goals or functions of assimilation or pluralism. Constitutionally, bilingual education has more often been seen as a remedy for racial segregation than as a right of its own sake. One can argue that school programs insensitive to the needs of minority children are by their nature discriminatory and require programmatic remediation. School districts are thus made responsible for those student conditions attaining prior to their entrance into school, a position which is constitutionally arguable. *Serna,* of course, held that it is the duty of the school to rectify these conditions; *Lau,* however, suggested this to be a policy matter unless the state had in some way caused the deficiencies. *Lau* was reversed, and the language used in the reversal was particularly supportive of minorities; yet given the limitations supplied by *Rodriguez,* it is not quite accurate to claim that the *Lau* reversal is constitutionally binding.

But for practical purposes, these questions are largely moot; the Civil Rights Act of 1964 and its court-supported interpretations by HEW, along with important state legislation, has opened to many students the opportunity of learning in their native tongue and about their native heritage, while preparing them for participation in regular school programs. For educators, however, the pedagogical issues remain; supportive laws are present for designing bilingual programs but it remains to be seen whether the educators will embrace assimilative or pluralistic efforts.

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[110] Col. Rev. Stats., §§22-24-101-119 (1975).