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CAUGHT IN A TIME WARP:

THE EDUCATION RIGHTS OF ENGLISH LANGUAGE LEARNERS

ROSEMARY SALOMONE

INTRODUCTION

Although the United States has long experience in educating children from immigrant families, the role the home language should play in the education of those who are not proficient in English remains politically charged and unresolved. For the past four decades, since the first infusion of federal funds that support programs for what are now called “English Language Learners,”¹ this question has engaged educators, policy makers, and researchers in a heated debate centering on bilingual education versus English-Only instruction. The first approach generally uses the child’s home language either as a transitional bridge to learning English or, less commonly, to develop dual language proficiency over the long term. The now favored English-Only model, “structured English immersion,” integrates students who may be of diverse home language backgrounds in a classroom using materials and methods geared toward English language development. This latter approach is vigorously supported by English-Only groups and is largely mandated by state voter initiatives in Arizona, California, and Massachusetts.²

Today, as throughout the nation’s history, such disagreements over language policy serve as a proxy for widespread concerns over immigration, including the fact that close to 13 percent of the U.S. population is now foreign-born, a figure that is up from 11 percent in

¹ See Amendments to the Elementary and Secondary Education Act of 1965, Pub. L. No. 90-247, §§ 701—708 81 Stat. 783 (1968).

² See CAL. EDUC. CODE §§ 300-340 (1999); ARIZ. REV. STAT. ANN. §§15-751—755 (2000); MASS. GEN. LAWS ANN. ch. 71A, §§ 1—8 (2002).

2000.³ Fears of an immigrant “onslaught” eroding the primacy of English and threatening national identity have effectively immobilized discourse on the education of English Language Learners. Many of the popular arguments, however, that are now advanced against bilingual education are overworked and outdated. Caught in a pedagogical and sociological time warp, these arguments often unfold as if the immigrant population were monolithic, parental preferences were insignificant, family ties were irrelevant, language development allowed no nuances or instructional alternatives, languages were separable from culture and individual identity, and schools still educated children for a life bounded by national borders. The facts belie these commonly held misconceptions.

I. THE NEW IMMIGRANTS

To best understand the underlying issues, one has to first examine the magnitude and changing demography of immigration and its impact on schooling. Over the past forty years, the percentage of school-age children from immigrant families has tripled, now reaching 12 million or 22 percent. Over half of their families come from Mexico, other Latin American countries, or the Caribbean. Another quarter come from Asia, and about 4 percent from Africa. As of 2007, 21 percent of children between the ages of 5 and 17 spoke a language other than English at home. Many of them were not proficient in English, but contrary to popular belief, only about one-quarter of them were foreign-born.⁴ An appreciable number of their families live transnational lives, maintaining contacts with their home country aided by the Internet, telephones, and inexpensive air travel, all beyond the imagination of immigrants of the past. Some maintain dual citizenship with the encouragement of sending countries whose economies benefit from remittances sent back home.⁵ Some of the children shuttle back and forth for summer and holiday vacations or for stays of longer

³ PEW HISPANIC CENTER, STATISTICAL PORTRAIT OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES, 2008 (2010), <http://pewhispanic.org/factsheets/factsheet.php?FactsheetID=59>.

⁴ NATIONAL KIDS COUNT PROGRAM, CHILDREN THAT SPEAK A LANGUAGE OTHER THAN ENGLISH AT HOME (PERCENT)—2007 (2009), available at <http://datacenter.kidscount.org/data/acrossstates/Rankings.aspx?loct=2&by=a&order=a&ind=81&dtm=397&tf=18>.

⁵ Peggy Levitt & Rafael de la Dehesa, *Transnational Migration and the Redefinition of the State: Variations and Explanations*, 26 ETHNIC AND RACIAL STUD. 587, 594–95 (2003); DILIP RATHA ET AL., REMITTANCE TRENDS 2007 2—3 (2007), <http://siteresources.worldbank.org/EXTDECPROSPECTS/Resources/476882-1157133580628/BriefingNote3.pdf>.

duration. Often they are the human link joining an extended family of relations dispersed between the old world and the new.⁶

Over 5 million of these students, about 10 percent of public school enrollment, fall into the category of English Language Learners, and their numbers are increasing at close to seven times the rate of the total school population. Of greatest concern is that close to 80 percent of these students speak Spanish.⁷ In fact, never before have public schools nationwide witnessed such a high concentration of speakers of one foreign language. Nor has any other language exhibited such resilience through several generations after immigration. Although it is true that 98 percent of U.S.-born Latinos ages 16 to 25 say they speak English “very well,” 79 percent of the second-generation and 38 percent of the third-generation report that they also are proficient in spoken Spanish. And although a vast majority (92 percent) expressly recognize that teaching English to children of immigrant families is an important goal, an almost equally large number (88 percent) believe it is important for public schools to help students maintain their native language.⁸

This inclination toward native language retention, along with a robust Spanish media including TV, radio, and newspapers, and various governmental accommodations like bilingual voting ballots, have provoked warnings from English-Only groups that we are moving toward becoming a bilingual nation, with all the potential problems of a Canada or a Belgium. Those fears of English losing its dominance are indeed overstated, especially in view of the rapid spread of English as a lingua franca across the globe.

That being said, on a more restrained note, the education of English Language Learners and particularly the Spanish question still pose a paradox for both education policy and the law. On the one hand, preserving

⁶ ROSEMARY C. SALOMONE, *TRUE AMERICAN: LANGUAGE, IDENTITY, AND THE EDUCATION OF IMMIGRANT CHILDREN* 64—65 (2010).

⁷ National Clearinghouse for English Language Acquisition & Language Instruction Educational Programs Frequently Asked Questions, <http://www.ncela.gwu.edu/faqs/> (last visited May 21, 2010); ANNEKA L. KINDLER, NATIONAL CLEARINGHOUSE FOR ENGLISH LANGUAGE ACQUISITION & LANGUAGE INSTRUCTION EDUCATIONAL PROGRAMS SURVEY OF THE STATES’ LIMITED ENGLISH PROFICIENT STUDENTS AND AVAILABLE EDUCATIONAL PROGRAMS AND SERVICES 2000-2001 SUMMARY REPORT 3, 6 (2002), http://www.ncela.gwu.edu/files/rcd/BE021853/Survey_of_the_States.pdf;

RANDY CAPPS ET AL., *THE NEW DEMOGRAPHY OF AMERICA’S SCHOOLS: IMMIGRATION AND THE NO CHILD LEFT BEHIND ACT 5* (2005), http://www.urban.org/UploadedPDF/311230_new_demography.pdf.

⁸ PEW HISPANIC CENTER, NATIONAL SURVEY OF LATINOS: EDUCATION 11 (2004), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Public_Opinion/Public_opinion_and_polls/pew_hispanic_education_012304.pdf

the home language and culture of newcomers seemingly runs counter to the traditional socializing mission of public schooling. On the other hand, forcing children to abandon their first language and culture seems morally unjust, developmentally unwise, politically and economically shortsighted, and legally questionable from the standpoint of equal opportunity. That paradox, while vexing, is not completely irreconcilable.

II. THE RESEARCH EVIDENCE

Despite compelling evidence pointing to the advantages of bilingualism and dual language instruction, programs for English Language Learners remain tangled in a web of ambiguous, and at times conflicting congressional, administrative, and court decisions that have evolved over the years, shaped more by politics and ideology than by reason. These pronouncements typically speak in the language of “deficiency,” a problem to be fixed. They talk of the mother language as a “barrier” to learning English.

Programs for English Language Learners primarily have gained support as a form of compensatory education, similar to remedial programs for disadvantaged students. As such, they fail to recognize the potential individual and national benefits to be gained in developing the linguistic resources these children bring to a world that is growing smaller by the nanosecond. They implicitly assume that a choice must be made between one language and the other, further reinforcing an American monolingual myth that betrays the multilingual abilities of most western populations.

Advocates of English-Only instruction argue that “time on task” is what really counts. The more time students spend speaking and learning English, the more quickly they are able to move into mainstream classes and achieve academically.⁹ That argument undeniably carries intuitive appeal. Advocates of bilingual instruction, nonetheless, offer persuasive evidence to the contrary. They maintain that teaching students partly in their home language bolsters their literacy skills, which can then be applied to English, while ensuring that they can keep up in other subjects. A number of research reviews or meta-analyses published in recent years reveal that bilingual development is a win-win situation. As compared to immersing children in English, teaching them to read in their home language leads to

⁹ See ROSALIE PEDALINO PORTER, FORKED TONGUE: THE POLITICS OF BILINGUAL EDUCATION 119 (1990); Christine H. Rossell & Keith Baker, *The Educational Effectiveness of Bilingual Education*, 30 RES. TEACHING ENG. 7, 42-43 (1996).

more advanced English reading skills.¹⁰ Studies further indicate that bilingualism does not interfere with academic achievement in either language.¹¹ It may, in fact, produce greater cognitive flexibility.¹²

But schooling is not simply a question of instructional methods. It also must be meaningful on a psychological or emotional level for it to be effective in helping students develop a positive sense of self, which is critical to academic achievement in the long run. Sociologists tell us that through language the child learns the cultural beliefs and practices of parents and community, in essence what they value. Ethnographic findings reveal that abandoning the home language, with all its familial and familiar associations, represents a significant break in those fundamental bonds, setting the child on a wandering course emotionally and culturally.¹³ Children need what is called the “social capital” embodied in relationships with their parents and other family members.¹⁴

III. VIEWS FROM THE COURT

These competing perspectives, represented in the dual language and English-Only camps, came to the fore in two Supreme Court decisions separated by a span of 35 years. In *Lau v. Nichols*,¹⁵ decided in 1974, the Court guaranteed the right to a “meaningful” education under Title VI of the Civil Rights Act of 1964,¹⁶ and its implementing regulations.¹⁷ More

¹⁰ See Robert E. Slavin & Alan Cheung, *A Synthesis of Research on Language of Reading Instruction for English Language Learners*, 75 REV. EDUC. RES. 247, 274 (2005); Kellie Rolstad, Kate Mahoney & Gene V. Glass, *The Big Picture: A Meta-Analysis of Program Effectiveness Research on English Language Learners*, 19 EDUC. POL’Y 572, 590 (2005); FRED GENESEE, KATHRYN LINDHOLM-LEARY, WILLIAM M. SAUNDERS & DONNA CHRISTIAN, EDUCATING ENGLISH LANGUAGE LEARNERS: A SYNTHESIS OF RESEARCH EVIDENCE 181–83 (2006); David J. Francis, Nonie Lesaux & Diane August, *Language of Instruction, in DEVELOPING LITERACY IN SECOND-LANGUAGE LEARNERS: REPORT OF THE NATIONAL LITERACY PANEL ON LANGUAGE-MINORITY CHILDREN AND YOUTH* 365–413 (Diane August & Timothy Shanahan eds., Lawrence Erlbaum Associates 2006).

¹¹ See WAYNE P. THOMAS & VIRGINIA P. COLLIER, CENTER FOR RESEARCH ON EDUCATION, DIVERSITY & EXCELLENCE, A NATIONAL STUDY OF SCHOOL EFFECTIVENESS FOR LANGUAGE MINORITY STUDENTS’ LONG-TERM ACADEMIC ACHIEVEMENT 3–6 (2002), <http://escholarship.org/uc/item/65j213pt>.

¹² See Ellen Bialystock, *Consequences of Bilingualism for Cognitive Development*, in HANDBOOK OF BILINGUALISM: PSYCHOLINGUISTIC APPROACHES, 417, 428 (Judith F. Kroll & Annette M.B. deGroot eds., 2005).

¹³ See CAROLA SUÁREZ-OROZCO & MARCELO M. SUÁREZ-OROZCO, CHILDREN OF IMMIGRATION 74 (2001).

¹⁴ See JAMES SAMUEL COLEMAN & THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES 223 (1987); ROBERT D. PUTMAN, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 19 (2000).

¹⁵ *Lau v. Nichols*, 414 U.S. 563 (1974).

¹⁶ 42 U.S.C. § 2000d (2010).

¹⁷ 20 U.S.C. §§ 1701–1704 (2010).

recently in *Horne v. Flores*,¹⁸ decided in 2009, the Court reined in on the right to an “appropriate” education under the 1974 Equal Educational Opportunities Act (EEOA),¹⁹ a law arguably adopted to codify the Court’s ruling in *Lau*.

Until this past year, *Lau v. Nichols* was the sole Supreme Court decision addressing the educational rights of linguistic minority students. In the early 1970s when the facts arose, the prevailing concept of equality still flowed out of racial discrimination. The discourse focused directly on the problems of segregated schools where both separation as well as different and unequal resources violated equality norms. *Lau* presented the Court with a different view, one that challenged the very notion of sameness. San Francisco school officials were in fact providing Chinese-speaking students with the same educational programs that they were providing to the larger school population. Yet for the plaintiffs, therein lay the problem. The two groups were not the same and so the treatment, they argued, had to be different.²⁰

In language that is widely quoted, the Court made clear that, “[t]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are *effectively foreclosed* from any *meaningful* education.”²¹ On the inputs side, equal meant “different,” whereas on the outputs side, it had to be “effective;” it had to produce results. But the Court did not mandate bilingual education or any other specific method of instruction despite what advocates wanted to believe.

In the years since the *Lau* decision, a changed membership on the Court has resulted in decisions that have pulled back progressively on the scope of the Title VI statute and the Department of Education’s Title VI regulations. In doing so, the Court has removed much of *Lau*’s legal underpinnings. In a series of decisions, the Court has limited the Title VI statute to claims of intentional discrimination.²² Claimants must present proof that school officials adopted a certain instructional program with the

¹⁸ *Horne v. Flores*, 129 S. Ct. 2579 (2009).

¹⁹ See 20 U.S.C. §§ 1701—1704 (2010); *Horne*, 129 S. Ct. at 2589.

²⁰ For a discussion of the litigation, see Rachel F. Moran, *The Story of Lau v. Nichols: Breaking the Silence in Chinatown*, in EDUCATION LAW STORIES 111—57 (Michael A. Olivas & Ronna Greff Schneider eds., 2007), and SALOMONE, *supra* note 6, at 119-35.

²¹ *Lau*, 414 U.S. at 566 (emphasis added).

²² See, e.g., *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582 (1983) (holding that a plaintiff can only recover injunctive, noncompensatory relief for a defendant’s unintentional violation of Title VI).

intent to discriminate against students based on their national origin and not merely despite that effect. The Court further has denied parents a private right to take their case to court when making a mere “effects” claim under the Title VI regulations. If all the parents can prove is that the school’s policy has had a discriminatory effect on their children, they would have to file a complaint with the Office for Civil Rights and hope that federal officials decide to pursue the claim or refer it to the Justice Department for further action.²³

With *Lau* incrementally dismantled, litigators increasingly have relied on the EEOA and its potential for challenging the level of funding, and consequently the resources that are provided for English Language Learners, without raising the contentious question of instructional methods. That rationale was the driving force behind a series of decisions dating from 2000 in *Flores v. Arizona*, a case initially brought against the Nogales school district and subsequently extended statewide. In June 2009, in a 5-4 opinion that turned heavily on federalism concerns, Justice Samuel Alito writing for the majority took the lower courts to task for unduly relying on funding as the sole measure of compliance with the law. He further questioned the related suggestion that the Act demands “equal results” between English Language Learners and other students.²⁴ The “ultimate focus” of the Act, the Court noted, is on the “quality of educational programming and services to students, not the amount of money spent” on them.²⁵ The Court emphasized that the EEOA allows state and local education authorities “a substantial amount of latitude” in deciding the contours of an “appropriate” education and remanded the case to the lower courts.²⁶

What is especially surprising is the majority’s apparent willingness to stake a position, not only in the charged debate over funding and the arguable connection with student achievement, but in the equally rancorous controversy over instructional methods. The Court made a sweeping assertion upholding “documented, academic support for the view that SEI [structured English immersion] is significantly more effective than bilingual education.”²⁷ That startling statement, despite repeated findings to the contrary, provoked a lengthy dissent, read partially from the bench,

²³ See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

²⁴ See *Horne*, 129 S. Ct. at 2588—89.

²⁵ *Id.* at 2587.

²⁶ *Id.* at 2589 (quoting *Castaneda v. Picard*, 648 F.2d 989, 1009 (5th Cir. 1981).

²⁷ *Id.* at 2601.

from Justice Stephen Breyer. Justice Breyer indirectly charged the majority with having selectively relied on evidence to reach a foregone conclusion. For him, the English immersion program in the Nogales school district was still “a work in progress.”²⁸

Educators, policy makers, and advocates are watching carefully to see how the case unfolds on remand. At the least, it is now clear that proof of inadequate funding alone is not enough to succeed under the EEOA. Yet it also is clear, and no one in the case has denied, that English Language Learners do in fact require additional funding for textbooks and instructional materials, teacher training, special assessments, tutoring and other individualized instruction.

IV. A MODEST PROPOSAL

With the prognosis for the EEOA looking less than favorable toward dual language instruction for English Language Learners, and the force of Title VI rights severely weakened, the time is ripe for exploring an alternative set of legal standards that conceptually holds fast to both a “meaningful” and “appropriate” education, while responding to the facts as they now exist. Two decades ago, Martin Gerry, who had served as Director of the Office for Civil Rights in the Ford Administration, suggested in hindsight that rights for linguistic minority students might better fit the individualized procedural model developed under federal law protecting the rights of students with disabilities.²⁹ Looking in that direction, we might consider a federal statute combined with Department of Education regulations that require school officials to make individualized decisions, with mandated parental input, before assigning a student to a particular instructional program. Each decision would be based on clearly articulated linguistic and academic goals and annual assessments, similar to the Individualized Education Plan (IEP) for students with disabilities.³⁰

Such a procedurally based law would guarantee the right to an education program that permits the child to proceed from grade to grade, as in the case of students with disabilities. The program would include instruction through the home language where deemed appropriate and desirable in

²⁸ *Id.* at 2623 (Breyer, J., dissenting).

²⁹ See Thomas Toch, *The Emerging Politics of Language*, *Educ. Wk.*, Feb. 8, 1984, at 14 (Statement of Martin Gerry, former director, Office for Civil Rights, U.S. Department of Health, Education, and Welfare).

³⁰ See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, §§ 601—614, 118 Stat. 2647 (2004) (codified as amended at 20 U.S.C. §§ 1400—1414).

consultation with the child's parent. Meanwhile, the law would grant parents the right to challenge the child's placement through an administrative process within the school district up to the school board level and to challenge the procedures followed, but not the substance of the program itself, in federal court.

This model would recognize the wide diversity among English Language Learners, including their age when they enter into U.S. schools, their fluency and literacy in the home language, the years and quality of schooling in their native country, and their cognitive abilities. For some students, especially those entering U.S. schools in the early grades, a dual language immersion program might be appropriate. Now favored among bilingual advocates, this approach combines equal numbers of English dominant students and English Language Learners in a classroom with at least equal amounts of instruction in English and the other language. For newcomers entering a U.S. high school with limited education, an intense English language program might be more effective in preparing them for college or the workforce upon graduation.

In any case, such a flexible model would remove the education of English Language Learners from the "one size fits all" thinking of structured English immersion. It would build on what educators and researchers have learned over the past four decades about various instructional approaches, while avoiding the long-term ethnic segregation that characterized many of the early bilingual programs. It also would provide schools with a profile of individualized information to determine what types of testing accommodations, if any, might be appropriate for a given student based on language and other academic and personal factors. That point is especially significant given widespread use of standardized tests to assess student achievement and school accountability, especially as mandated under the federal No Child Left Behind Act.³¹

Most importantly, this model is evenhanded. It rejects the deficit/remedial/subtractive rationale and the current presumption, whether in law or fact, against dual language instruction. Its transparent, clearly defined and inclusive procedures should lessen the incidence of perfunctory school decisions based purely on financial expediency or political ideology. At the same time, it allows a constrained measure of administrative flexibility with a narrowly defined role for the federal courts, while

³¹ See English Language Acquisition, Language Enhancement, and Academic Achievement Act, Pub. L. No. 107-110, §§ 3101—3112 (2002).

permitting parents a voice in their child's education. This approach is indeed reasonable. And although it would undeniably place administrative burdens on school officials, it would be far less costly to implement and enforce than current federal law protecting the rights of students with disabilities.

Yet as experience has proved, even modest legislative proposals can run up against political gridlock and bureaucratic resistance for any number of reasons. The country's checkered history on language policy, the continued disagreement among educators over various education approaches, widespread anti-immigrant sentiments, and fears of over-legalizing education decisions all weigh against the proposal's chance of success.

Moreover, unlike students with disabilities, whose interests cut across racial, social, and economic lines and provoke no ideological opposition, English Language Learners are largely remote from the American mainstream. Their parents typically lack the political awareness, financial resources, and basic language skills to make their voices heard. Some of them reside in the United States without proper documentation and therefore consciously remain outside the view of the law. Unable to engage in self-help, they rely on others to advance their interests while protecting their anonymity. And so the likelihood of Congress adopting such a statute is, realistically speaking, highly speculative. Most fundamentally, it defies reason to believe that Congress could reach consensus on the underlying philosophy and the ultimate goals for educating English Language Learners absent a broader constituency for language education and a dramatic change in national attitudes toward linguistic and cultural differences.

In an interesting twist of developments, the language constituency is qualifiedly in sight as research evidence stacks up on the side of bilingualism and especially as the federal government and educated Americans recognize the demand for multilingual skills in the global economy. Many parents are now rushing to enroll their children, increasingly at the pre-school level, in dual language immersion programs, Chinese programs being among the fastest growing.³² Nonetheless, there remains the far more difficult task to convince policymakers and the general public that bilingualism is good not just for children of the native-born, but also for children of immigrants, and that we should embrace linguistic and cultural diversity as part of an evolving national identity in

³² Sam Dillon, *Foreign Languages Fade in Class – Except Chinese*, N.Y. TIMES, Jan. 21, 2010, at A18.

sync with the times.

CONCLUSION

The national “right” to home language instruction for English Language Learners, even as a procedural matter, simply seems to be an enduring hope from the past now carried forward to the indefinite future. That burning truth leaves advocates to nibble at the edges of existing federal law and push for incremental policy changes at the state and local levels, at least for the time being. Meanwhile, caught in a time warp, English-Only supporters continue to refute or completely ignore the empirical facts on bilingualism and the changed realities of immigrant lives as lived.

