

Is Separate Always Unequal? A Philosophical Examination of Ideas of Equality in Key Cases
Regarding Racial and Linguistic Minorities in Education

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One in five students in U.S. schools speaks a language other than English at home (U.S. Department of Education, 2010). Contemporary advocates for this large and growing group, known as language minority students, depict the movement for language minority students' rights as an outgrowth of the broader civil rights movement, which focused initially on securing rights for racial minorities. As with racial minorities, representatives of linguistic minorities have turned to the courts to remedy the discrimination they have suffered in educational settings. Yet do the needs of racial and linguistic minorities align? Can the fight for equality for racial minorities be extended to encompass a fight for equality for linguistic minorities? Does the same conception of equality apply in both contexts? Do the same legal remedies apply? In other words, does equal protection under the law mean the same thing for racial and linguistic minorities?

How Do the Categories of Linguistic and Racial Minorities Overlap and Diverge?

The phrase "language minority students," while common in specialized settings, remains rare in general parlance. The term refers to students who speak a language other than English (i.e., a "minority" language) at home. Language minority students are a diverse group, encompassing individuals of multiple racial and ethnic backgrounds. Most newly arrived immigrants (though not those from English-speaking countries who speak English natively) are language minorities, but so are many native-born U.S. citizens who are growing up in a home with family members who speak another language. Students classified as "English learners"

(ELs) by U.S. schools are, by definition, language minority students since English learner status is determined, in part, by a Home Language Survey, in which parents must state whether they speak a language other than English at home. Former English learners who have become fluent in English are language minority students, as well, since they, at least at one point, spoke another language at home.

The categories of racial minorities and linguistic minorities overlap but are not identical. White immigrants from France who were monolingual French speakers would be considered part of a linguistic minority in the United States but not part of a racial minority. However, Black immigrants from Britain who spoke standard English as their native language would be considered part of a racial minority in the U.S. but not part of a linguistic minority.

Courts have held that linguistic minorities, like racial minorities, have suffered discrimination and been denied access to services in a variety of settings, including schools. This paper examines conceptions of equality evoked by the courts in three key legal cases regarding racial and linguistic minorities. Implications of the conceptions of equality invoked in these cases for contemporary work towards educational equity for racial and linguistic minorities are discussed.

Two Conceptions of Equality from Philosophy: Negative and Positive Equality

In his essay “The Idea of Equality,” Bernard Williams (2005) writes, “The notion of equality is invoked not only in connections where people are claimed in some sense all to be equal, but in connections where they are agreed to be unequal, and the question arises of the distribution of, or access to, certain goods to which their inequalities are relevant” (pp. 105-106). In this brief statement, Williams references two different conceptions of equality. The first, that all people are equal and therefore should be treated identically, is the conception of equality

invoked in the seminal racial desegregation case *Brown v. Board of Education* (1954). I refer to this idea as negative equality. Williams' second conception of equality, that all people are moral equals but that differential treatment is what equality demands, is the conception of equality invoked in a seminal case involving language minority students, *Lau v. Nichols* (1974). I refer to this idea as positive equality. *Castañeda v. Pickard* (1981), another seminal case involving language minority students, makes use of both conceptions of equality.

The terms "negative equality" and its counterpart, "positive equality" were inspired by Isaiah Berlin's descriptions of "negative liberty" and "positive liberty." For Berlin, negative liberty represents "freedom from," or "the area within which a man can act unobstructed by others" (1958, p. 194). Berlin's idea of positive liberty, on the other hand, represents "freedom to," or the ability "to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by reference to my own ideas and purposes" (ibid, p. 203). Negative liberty focuses on limiting coercion, while positive liberty focuses on increasing autonomy. Although the distinction between negative and positive equality is perhaps not quite analogous, the dichotomy usefully distinguishes between two ideas. Negative equality, as defined here, focuses on removing spurious barriers to identical treatment – in some sense, limiting coercion. Negative equality is "equality via similar treatment." Positive equality, on the other hand, focuses on customizing treatment dependent on groups' particular needs and requires affirmative state action rather than the removal of barriers. Positive equality is "equality via differential treatment."

American courts seem to have laid out conflicting principles, on the one hand arguing in *Brown* that separate is inherently unequal, and on the other, arguing in *Lau* that special, separate treatment of particular groups is sometimes needed to ensure equality. By carefully analyzing

the ideas of equality invoked in each of these three cases, I will explore three questions: Are the ideas of negative and positive equality inherently at odds? In what circumstances have courts applied each? And how might these ideas of equality be reconciled?

Separate Is Inherently Unequal: Equality as Construed in *Brown*

The Court's decision in *Brown* is well-known. After years of legal segregation in American schools, in 1954 the Court ruled that communities could no longer maintain separate schools for Black and White students. Chief Justice Earl Warren, writing for a unanimous court, famously stated, "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." Past decisions had held that school segregation was impermissible if the schools available to Black students and White students differed with respect to the qualifications of teachers, the availability of textbooks and other curricular materials, or the quality of the school buildings themselves (e.g., *Sweatt v. Painter*, 1950). The *Brown* decision went further, holding that even if these factors were equal at schools for Black students and White students, segregation was still impermissible because, "To separate [the children of the minority group] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

The Court's reasoning here connects to aspects of the first conception of equality described by Williams, that all people *are* equal. As Williams points out, people clearly are not exactly equal; they differ in skin color, eye color, height, musical ability, and thousands of other dimensions. But the fact that people share a common humanity – and in particular that they share the capacity to feel pain and affection - is not trivial. This fact is usefully asserted, as it

was in *Brown*, when current practices do not honor these common human characteristics. As Williams (2005) writes:

Those who neglect the moral claims of certain people that arise from their human capacity to feel pain, and so forth are *overlooking* or *disregarding* those capacities. ...

Very often, indeed, they have just persuaded themselves that the people in question have those capacities to a lesser degree. Here it is certainly to the point to assert that apparent platitude that these human beings are also human (p. 100, emphasis in the original).

By asserting Black students' capacity to feel pain, to suffer from a detrimental "feeling of inferiority ... in a way unlikely ever to be undone," the Court gave the dismantling of segregated schooling the weight of a moral imperative. Either abolish segregated schooling or knowingly cause Black students irrevocable pain, the Court declared.

This notion of equality invoked the in *Brown* decision is what I will call negative equality, focused on removing morally untenable discriminatory practices – and thereby increasing liberty. Since people share a common humanity, they must have equal protection of the laws; the Fourteenth Amendment to our Constitution enshrines this principle. So if laws permitting segregated schooling cause irrevocable harm to Black children, as the Court argued in *Brown*, then segregation violates the Equal Protection Clause and must end.

Williams (2005) provides a means for understanding the Court's logic when he writes, "For every difference in the way people are treated, a reason should be given: ... the reasons should be relevant, and ... they should be socially operative" (p. 107). By "socially operative," Williams means that if there is a relevant reason why individuals should be treated differently, then society should operate in such a way that individuals who require different treatment should actually be able to receive it. To use his example, if we think that medical care should be

available to individuals who are ill, but in a particular society, receiving medical care is also dependent on having wealth, then illness is not a socially operative basis upon which that society allocates medical care. Extending Williams's definition of "socially operative" a bit farther, we might apply Rawls's (1999) idea of the original position and argue that the reasons for individuals' differential treatment should be reasons that we, from behind a veil of ignorance, would choose to have operate in such a way as to lead to differential treatment within society. It is this expanded notion of "socially operative" that I draw upon here. In *Brown*, the Court argued that not only was skin color not a relevant reason for school assignments, but that the use of skin color in school assignments caused harm to Black children since "the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." In other words, segregated schooling contributes to inequality and infringes on liberty, depriving Black students "of some of the benefits they would receive in a racially integrated system."

When Special Treatment Is Required: Equality as Construed in *Lau*

Racial desegregation cases slowly gathered steam in the late 1960s and early 1970s, with courts holding that school districts from Charlotte, North Carolina to Denver, Colorado must undo systems of racial segregation (e.g., *Swann v. Charlotte-Mecklenberg*, 1971, *Keyes et al. v. School District No. 1*, 1973), removing barriers to integrated schooling. Meanwhile, in San Francisco, a new type of civil rights case began brewing. In 1970, frustrated by the lack of educational services for Chinese-American language minority students, Chinese-American community leaders and civil rights lawyers brought a class-action suit on behalf of Kenny Kimmon Lau, a Chinese-American English learner enrolled in a San Francisco elementary school, and other similarly situated students. The suit alleged that by not providing educational services to meet students' language needs, the district violated students' rights under the Equal

Protection Clause of the 14th Amendment and under Title VI of the Civil Rights Act of 1964 (*Lau v. Nichols*, 1964). At the time the case was brought, “2,856 Chinese-speaking students in San Francisco needed special instruction in English. [However] 1,790 received no help of special instruction at all, not even the 40 minutes of ESL a day” required by the district (ARC Associates, 1994, p. 14). According to Ling-Chi Wang, a Chinese-American community leader, this lawsuit was an “avenue of last resort” meant to address the “tremendous frustration, discouragement, resentment, truancy, delinquency, and dropping out” on the part of Chinese-American students, “none of which was commonly talked about in those days because Chinese-American children were considered to be model minority students” (ARC Associates, 1994, p. 14). This suit was brought amidst tension between communities of color in San Francisco over desegregation (discussed in greater detail below).

The District Court and the Ninth Circuit both ruled against the plaintiffs in *Lau*, arguing that Chinese-speaking students had no right to special treatment, and were only entitled to “the same facilities, textbooks and curriculum” as other students (*Lau v. Nichols*, 1973). The Ninth Circuit applied Williams’ first idea of equality here, the same idea of equality articulated in *Brown*: Given individuals’ status as moral equals, the Equal Protection Clause (and in *Lau*, the Civil Rights Act, as well) demands identical treatment of individuals. In the Court’s eyes, since the San Francisco Unified School District provided all students with access to “the same facilities, textbooks, and curriculum” and had no laws setting some schools off limits to particular groups of students, the district had not violated the Equal Protection Clause or the Civil Rights Act. Under this interpretation, the district’s failure to establish special educational programs to meet the particular needs of Chinese-speaking students did not constitute a civil rights violation.

The Ninth Circuit granted that non-English-speaking students might not have the same opportunity to benefit from instruction as English-speaking students. However, using a legal framework from desegregation cases decided up to that point, the court held, “The discrimination suffered by these children is not the result of laws passed by the state of California, presently or historically, but is the result of deficiencies created by the children themselves in failing to know and learn the English language” (*Lau v. Nichols*, 1973). In other words, this discrimination was *de facto*, not *de jure*, and therefore not subject to court-ordered remedies. Furthermore, the district was treating students equally, according to the Ninth Circuit; if differences in language proficiency existed among students, that was the children’s fault, the court held.

Despite the court’s ruling against his client, Ed Steinman, the lawyer arguing on behalf of Kenny Kimmon Lau, felt elated when the Ninth Circuit’s decision was handed down. “My God how could you be happier!” he exclaimed. “You schmucks! You idiots! Blame the kids” (Brilliant, 2010, p. 248). Steinman’s feeling proved justified. The Supreme Court did not look favorably on the Circuit Court’s argument when it heard the case one year later. “Basic English skills are at the very core of what these public schools teach,” the Court argued (*Lau v. Nichols*, 1974). “Imposition of a requirement that, before a child can effectively participate in the educational program he must already have acquired those basic skills is to make a mockery of education.” The Supreme Court unanimously reversed the Ninth Circuit’s decision, holding:

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 (*Lau v. Nichols*, 1974).

In a direct rebuke to the Ninth Circuit, the opinion also stated, “There 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.”

The idea of equality articulated in this decision stands in stark contrast to that articulated in the Ninth Circuit’s ruling in *Lau* or the Supreme Court’s ruling in *Brown*. Here, the Supreme Court states that the differential treatment of individuals is not only permissible, it is required when failure to treat individuals differently would deny them access to “the educational program offered by a school district.” The Supreme Court declined to stipulate the particular “affirmative steps” San Francisco Unified School District should take to “open its instructional program” to language minority students. Writing for the Court, Justice Douglas explained:

Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation.

Although the district was free to choose which “affirmative steps” it wished to take, inaction – in other words, treating English learners as identical to fluent English speakers – was not an option.

Brown, invoking the concept I have termed negative equality, mandated the removal of laws and practices prohibiting racially integrated schooling.¹ *Lau*, on the other hand, invoked what I will refer to as positive equality, requiring the creation of specialized programs designed for the particular needs of a particular group, in this case language minority students. Why did the Court invoke these two different ideas of equality in the two cases? In *Brown*, the Court held that race was not a factor relevant to students’ educational trajectories and that the current use of

race caused irrevocable harm to Black students. Therefore, districts must not “separate [children of the minority group] from others of similar age and qualifications solely because of their race” (*Brown v. Board of Education*, 1954). However, in *Lau*, the Court ruled that language proficiency was a factor relevant to students’ educational trajectories. Therefore, in order to provide access to their instructional programs, districts must treat students with different language proficiencies differently, supporting non-English-speaking students in learning English. In other words, considering these two cases together, the courts’ rulings can be interpreted to suggest that race is not a factor relevant to students’ educational trajectories but language proficiency is. Thus, treating students differently on the basis on language proficiency is not in itself pernicious; in fact, under the Court’s interpretation of Title VI of the Civil Rights Act in *Lau*, it is required.

Title VI of the Civil Rights Act bans “discrimination on the ground of race, color, or national origin,” in “any program or activity receiving Federal financial assistance” (42 U.S.C. § 2000d, 1964). Since the San Francisco Unified School District received federal funds, it was subject to this Act. Furthermore, the Department of Health, Education, and Welfare issued regulations pursuant to this Act stipulating that “[s]chool systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system” (33 Fed. Reg. 4956, 1968). It further clarified these regulations in 1970, requiring that schools districts receiving federal funds “rectify [students’] language deficiency in order to open” instruction to these students (35 Fed. Reg. 11595). It was on the basis of these regulations and Title VI of the Civil Rights Act – not the Equal Protection Clause - that the Court found for the plaintiffs in *Lau*. While Title VI does not forbid discrimination on the basis of language, it does forbid discrimination on the basis of

national origin. As in other cases (e.g., *Mendez v. Westminster*, 1946), the Court used national origin as a proxy for language. If Title VI forbids discrimination on the basis of Chinese ancestry, then it should also forbid discrimination on the basis of Chinese language use, the reasoning goes. Some scholars have argued that using national origin as a proxy for language is spurious since language proficiency varies within national origin groups (e.g., Skrentny, 1998, as cited in Davies, 1998). Nonetheless, that was the basis for the Court's holdings in *Lau*.

The Two Ideas of Equality at Odds: Desegregation vs. Bilingual Education in San Francisco

While the *Brown* and *Lau* decisions each had theoretical coherence, in practice, they sometimes led to clashes between advocates of desegregation, often from the African-American community, and advocates of bilingual education, often from the Latino and Chinese-American communities. Desegregation required the dispersal of students from particular racial groups across a school system to enable all students to reap the benefits of integration. On the other hand, bilingual education, which was one program designed to assist language minority students, required the concentration of students of particular language backgrounds within particular schools so that students could receive tailored, language-specific instruction. The tension between these two strategies and their proponents peaked in San Francisco in the 1970s. Like many cities around the country, San Francisco faced legal challenges to its school assignment plans, and in 1971, a court-mandated desegregation plan went into effect (*Johnson v. San Francisco Unified School District*, 1971). Given the prevailing residential segregation, this plan was designed to decrease the racial isolation within city schools by busing some students to schools outside their immediate neighborhoods. However, on the first day of school in September 1971, as buses appeared across the city to transport students to their new schools, in

Chinatown, only 40 of the 750 students assigned to board buses to schools in other neighborhoods did so (*San Francisco Chronicle*, 1971 as cited in Brilliant, 2010). Citywide, more than 40% of elementary schoolchildren did not attend the first day of school (ibid).

This absenteeism was a direct protest of the district's desegregation plan. The plan, while heralded by the NAACP, who had fought hard for its creation, remained deeply unpopular in many circles, including among numerous Chinese-American and Latino community leaders (Brilliant, 2010). These community leaders had voiced objections to the desegregation plan from the beginning, on the grounds that desegregation would undermine specialized language programs necessary for language minority students. Leaders of the Chinese-American community argued, for example, that scattering Chinese-American students across the city's schools would deprive Chinese-American students of the opportunity to learn and know the Chinese language, art, and culture (Brilliant, 2010). While *Brown* was intended to prohibit involuntary segregation, attempts to comply with its mandates appeared to be disrupting what some might consider voluntary segregation among Chinese-Americans in San Francisco.

By October, the school boycott had dissipated throughout most of San Francisco, but numerous parents in Chinatown withdrew their children from district schools and created their own parallel school system rather than have their children bused outside the neighborhood. Borrowing terminology from the African-American civil rights movement in the South, Chinese-American community leaders dubbed these new autonomous schools "freedom schools." This network of "freedom schools" served 1000 neighborhood students (with 1000 more on a waiting list) and taught the same curriculum as the public schools but insulated students from busing (Kirp, 1976; Lum, 1978).

The opposition of some communities of color to busing quickly gained national attention and was used by politicians to curry favor with these communities. For example, while campaigning for reelection as Governor of California, Ronald Reagan explained his opposition to busing by asserting that it would harm educational programs for language minority students:

The fact is some of our most innovative and forward-looking programs for minority students in our public schools would be imperiled if bussing becomes mandatory. For example, what would happen to the vital teaching program for youngsters of Mexican descent in Los Angeles schools which is now underway? More than 600 bilingual specialists have been assigned to neighborhood schools in Spanish-speaking areas of the city to assist in resolving these youngsters' language problems. ... It is no wonder that so many parents of Mexican descent are opposed to bussing (Press Release #101, 1970, cited in Brilliant, 2002).

San Francisco was left to reconcile these two issues, struggling with court orders to desegregate and to meet the needs language minority students. As a result of *Lau*, district leaders and community advocates worked with the Center for Applied Linguistics to develop a master plan for language minority students in the district. The resulting plan required bilingual/bicultural education for language minority students and specifically called for the maintenance of Chinese-American and Latino students' Chinese and Spanish language skills even after the students acquired English (ARC Associates, 1994). Yet, like the district's efforts to desegregate, this goal remained difficult to achieve. A shortage of qualified bilingual teachers and appropriate bilingual instructional materials were just two of the problems preventing the vision of San Francisco's *Lau* Consent Decree from being realized (ARC Associates, 1994). Meanwhile, segregation in city schools increased during the early 1970s while *Lau* was being

litigated. In 1971, when San Francisco's court-ordered desegregation plan went into effect, 38% of elementary school students in the city attended racially imbalanced schools. By 1974, after the desegregation plan had been in effect for three years, 43% of elementary school students attended racially imbalanced schools (Brilliant, 2002). Segregation persisted to such an extent that the NAACP filed another desegregation lawsuit against the district in 1978. This second desegregation lawsuit resulted in another consent decree, which coexisted with the *Lau* consent decree into the 21st century (Biegel, 2005; Chinese for Affirmative Action, 2007). In an attempt to balance the seemingly conflicting requirements of these consent decrees, the district sometimes engaged in educationally questionable practices. For example, until 1995, when African-American leaders insisted that the practice end, the district sometimes placed African-American and White students in bilingual classes if the classes were not fully enrolled (Check, 2002).

The Two Ideas of Equality Coexisting: *Castañeda*

Based on San Francisco's experience in trying to simultaneously implement desegregation and bilingual education, the two practices seem irreconcilable. How can school districts treat all racial groups identically while treating linguistic minorities differently? How can all racial groups be dispersed evenly across a city while some linguistic minorities are concentrated for specialized services? However, in the 1981 case *Castañeda v. Pickard*, a group of Mexican-American parents demanded both desegregated schools and high-quality bilingual programs for their children. The plaintiffs wanted their children to be treated as the moral equals of the White children in the district, with identical opportunities to attend any district school and to participate in the highest academic tracks at these schools. At the same time, the parents wanted their children to have the opportunity to participate in specialized programs designed to

meet their particular language needs. A closer examination of the facts of the case will illustrate the ways in which the plaintiffs invoked both negative equality (à la *Brown*) and positive equality (à la *Lau*) in their arguments.

While discrimination against Latinos received less national attention than discrimination against African-Americans, it had a long history, particularly in California and the Southwest. In the landmark education case *Mendez v. Westminster* (1946), a group of Mexican-American parents successfully challenged the segregative practices of school districts in Orange County.² A series of cases challenged the segregation of Mexican-Americans in other spheres, including Mexican-Americans' access to public swimming pools (*Lopez v. Seccombe*, 1944) and the ability of Mexican-Americans to serve on juries (*Hernandez v. Texas*, 1954). In *Keyes* (1973), the Supreme Court held that Latinos should be considered a minority group for the purposes of school desegregation plans, "reframi[ng] the White-Black paradigm through which desegregation had been viewed since *Brown* into a White-non-White model" (Scott, 2008, p. 130). Citing a report by the Civil Rights Commission, the Supreme Court in *Keyes* explicitly compared the discrimination experienced by "Hispano" students to that experienced by "Negro" students:

Focusing on students in the States of Arizona, California, Colorado, New Mexico, and Texas, the Commission concluded that Hispanos suffer from the same educational inequities as Negroes and American Indians. In fact, the District Court itself recognized that "[o]ne of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination.

Within this context of successful legal challenges to discrimination, in 1978, lawyers for the Mexican American Legal Defense and Education Fund (MALDEF) brought a class-action

suit on behalf of Mexican-American children and their parents in the Raymondville, Texas Independent School District. The plaintiffs made three claims. First, invoking the idea of negative equality as used in *Brown*, plaintiffs charged that the district used “an ability grouping system for classroom assignments which was based on racially and ethnically discriminatory criteria and resulted in impermissible classroom segregation.” Second, again invoking the idea of negative equality, the plaintiffs alleged that the district discriminated against Mexican-American teachers in hiring and placement decisions. Third, this time invoking the idea of positive equality as used in *Lau*, plaintiffs claimed that the district failed to provide students with “adequate bilingual education to overcome the linguistic barriers that impede the plaintiffs’ equal participation in the educational program of the district.” Thus, *Castañeda* was simultaneously a desegregation, employment discrimination, and bilingual education case.

Throughout the late 1960s and the 1970s, as bilingual education gained momentum and its apparent conflict with desegregation became more apparent, MALDEF explicitly took the position that it wanted both for Mexican Americans. MALDEF’s 1973 Annual Report stated, “For the Chicano, equal educational opportunity means both desegregation and bilingual-bicultural education. ... When MALDEF asks a court for school desegregation, it also requests an order to implement bilingual-bicultural educational programs” (MALDEF: A Progress Report, 1973, as cited in Brilliant, 2002, p. 333). *Castañeda* reflected this strategy.

The plaintiffs’ first claim was an appeal to negative equality, to eliminate district practices that denied Mexican-Americans their status as moral equals deserving of treatment identical to that of Anglos. Plaintiffs argued that if the district grouped students by ability, Mexican-American students should not be denied access to the high-ability groups based

spurious factors unrelated to their intellectual capacity. Plaintiffs argued, to paraphrase *Brown*, that separate educational tracks for students of different national origins are inherently unequal.

The facts surrounding ability grouping in the Raymondville District were disturbing. Although only 17% of the students in grades K-3 at the central elementary school in 1977-78 were Anglo, 41% of the students in the highest-ability track were Anglo. Similar patterns existed in grades 4-8. The Fifth Circuit explained that such results did not necessarily indicate a violation of Mexican-American students' rights. However, if the district:

has a past history of discrimination and has not yet maintained a unitary school system for a sufficient period of time that the effects of this history may reasonably be deemed to have been fully erased, the district's current practices of ability grouping are barred because of their markedly segregative effect.

However, the Fifth Circuit was disturbed by other facts surrounding Raymondville's ability grouping practices. In practice, since the district administered the tests to determine ability groups in English, students lacking English fluency ended up in the "low" ability group. The Court agreed that the district was not prohibited from grouping students on the basis of language proficiency (in fact, *Lau* could be interpreted as encouraging specialized services to students of particular language proficiency levels). However, as the Fifth Circuit argued in *Castañeda*, confusing language proficiency with overall intellectual ability is pernicious. Using language that echoes *Brown*, the Court stated:

If the district court finds that the RISD's ability grouping practices operate to confuse measures of two different characteristics, i.e., language and intelligence, with the result that predominantly Spanish speaking children are inaccurately labeled as "low ability," the court should consider the extent to which such an irrational procedure may in and of

itself be evidence of a discriminatory intent to stigmatize these children as inferior on the basis of their ethnic background.

As the Court forcefully argued in *Brown*, the Equal Protection Clause forbids stigmatizing children as inferior on the basis of their racial or ethnic background.

Again, the Court's reasoning here can be illuminated by Williams' (2005) claim that for every instance in which individuals are treated differently, a rational and socially operative reason should be given. As in *Lau*, the Court contends that language proficiency is a rational and socially operative reason for treating students differently. However, as in *Brown*, the Court contends that race or national origin is not a rational or socially operative reason for differential treatment of students.

In this first claim, we see that Mexican-American parents in Raymondville did not want their children to experience discrimination on the basis of their national origin or to have educational opportunities foreclosed to them. On the contrary, the parents wanted their children to be treated as moral equals and to participate in integrated educational environments at the classroom level. Yet in the parents' third claim, we see that they simultaneously wanted separate, high-quality educational programs targeted to their children's particular language needs.

Raymondville operated a bilingual program for Spanish-speaking students at the primary grades, placing students who spoke predominantly Spanish in the ability group labeled "low" and providing them with bilingual instruction. However, as witnesses explained, many bilingual teachers in Raymondville did not have adequate Spanish language skills and were unprepared to foster students' bilingual development.

The Fifth Circuit expressed doubts about the adequacy of Raymondville's bilingual program and laid out precedent-setting three-prong test for determining the legality of educational programs for language minority students. First, the Court stated, the program should be based on "an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy." Second, the program should be well-implemented, "with practices, resources, and personnel necessary to transform the theory into reality." Finally, the program must "produce results indicating that the language barriers confronting students are actually being overcome."

Applying this three-prong test to RISD's bilingual program, the Court found that the program failed the second prong of the test. Approximately half of the district's bilingual teachers were Anglos with very limited prior exposure to Spanish. To become certified by the district as a bilingual teacher, individuals simply had to possess a current teaching certificate, plus complete a 100-hour course on the Spanish language and on bilingual teaching methods. Among other goals, this course aimed to provide teachers with a 700-word vocabulary in Spanish. At the conclusion of the course, to prove their Spanish language competency, teachers had to read a text in Spanish, answer oral questions in Spanish, and write a single paragraph in Spanish; they were permitted to use a bilingual dictionary while completing the writing portion of the test. No portion of the test was formally graded, and many of those who became certified as bilingual teachers had "a very limited command of Spanish." As a district administrator explained "Some of the teachers had difficulty in communicating in Spanish in the classroom ... [and] taught almost exclusively in English" (*Castañeda v. Pickard*, 1981). Based on this evidence, the Fifth Circuit stated:

Deficiencies in the in-service training of teachers for bilingual classrooms seriously undermine the promise of the district's bilingual education program. Until deficiencies in this aspect of the program's implementation are remedied, we do not think RISD can be deemed to be taking "appropriate action" to overcome the language disabilities of its students.

In its decision, the Fifth Circuit invoked negative equality, forbidding differential treatment on the basis of irrational, non-socially operative factors. The *Castañeda* opinion required the lower court, on remand, to determine whether Raymondville had a history of discriminating against Mexican-American students, shunting them into particular schools or particular programs based solely on their national origin. The lower court was then to weigh this history as a factor when evaluating plaintiffs' "claims that the ability grouping and employment practices of RISD are tainted by unlawful discrimination." Raymondville, in other words, could not use race, ethnicity, or national origin as a basis for differential treatment of students since these factors, on their own, provided no rational or socially operative reason for the differential treatment. On the other hand, the Fifth Circuit invoked positive equality in its *Castañeda* opinion, as well, requiring differential treatment when rational, socially operative reasons motivated the treatment. The court stated, "An effective language remediation program is essential to the education of many students in Raymondville," and required the district to "alleviate [the] deficiencies" in its current bilingual program."

In some respects, the Court's decision in *Castañeda* connects to conceptual distinctions that judges and scholars have sometimes made between invidious discrimination – discrimination intended to harm — and benign discrimination – discrimination intended to help. The Fifth Circuit seems to be prohibiting invidious discrimination, such as excluding linguistic

minority students from high-ability classes, while encouraging benign discrimination, such as the creation of “an effective language remediation program” for the district’s linguistic minority students. However, as the Supreme Court has held, a policy that is alleged to discriminate on the basis of race (or national origin, among other criteria) merits heightened scrutiny regardless of whether it appears invidious or benign (*City of Richmond v. J.A. Croson Co.*, 1989). (I will discuss this heightened scrutiny in more detail below.) The *Castañeda* decision is notable precisely because the court went much further than simply banning invidious discrimination and encouraging benign discrimination. The three-prong test outlined in the decision is crucial. Rather than leaving courts to guess about the intentions behind programs designed to serve linguistic minority students, *Castañeda* lays out criteria courts can use to determine whether such programs are adequate.

A Potential Compromise: Applying the Least Restrictive Environment Concept to Language Minority Cases

The Fifth Circuit recognized the tension between desegregation and specialized instructional programs designed to meet the specific language needs of Spanish-speaking students. Yet, like MALDEF and the Raymondville plaintiffs, the Court saw possibilities for the two practices to coexist. First, in accordance with *Brown* specifically and the concept of negative equality generally, the Court acknowledged the importance of desegregation. The *Castañeda* opinion follows the same line of reasoning as cases since *Brown* in ordering the removal of barriers to equal treatment of similarly situated students.

Second, the Court acknowledged the importance of treating differently situated students differently, in accordance with *Lau* specifically and the concept of positive equality generally. While grouping students with similar language proficiencies for specialized language instruction

“would predictably result in some segregation,” the Court stated, “the benefits which would accrue to Spanish speaking students by remedying the language barriers which impede their ability to realize their academic potential in an English language educational institution may outweigh the adverse effects of such segregation.”

Third and most importantly, the Fifth Circuit outlined a potential compromise to minimize the conflict between the two ends it sees as desirable, desegregation and bilingual education:

We assume that the segregation resulting from a language remediation program would be minimized to the greatest extent possible and that the programs would have as a goal the integration of the Spanish-speaking student into the English language classroom as soon as possible and thus that these programs would not result in segregation that would permeate all areas of the curriculum or all grade levels.

As can be inferred from the *Castañeda* opinion, this potential compromise echoes language from disability legislation. The *Castañeda* opinion quotes the Developmentally Disabled Assistance and Bill of Rights Act of 1975, which states, “The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's liberty.” While the Supreme Court ruled that this particular Act did not grant individuals with disabilities a substantive right to placement in the least restrictive environment (LRE) possible (*Pennhurst State School v. Halderman*, 1981), subsequent legislation made the least restrictive environment standard a governing principle shaping the education of students with disabilities (Douvanis & Hulsey, 2002).

Although the Fifth Circuit does not explicitly state that the LRE standard should apply to language minority students, the compromise between desegregation and bilingual education that the Court outlines echoes LRE principles. Under this compromise, negative equality, in which all students are treated identically, honoring their common humanity, stands as the underlying first principle. Integrated schooling is the mechanism for enacting this principle. However, rational and socially operative differences between individuals, in this case differences in language proficiency, demand differential treatment, in this case a “language remediation program.” But, as the Court describes, this differential treatment should be the exception, an interruption to integrated schooling that must be justified and limited “to the greatest extent possible.”

The argument that negative equality is primary, that individuals should be treated identically unless we can justify their differential treatment on rational and socially operative grounds, echoes, to some extent, the Supreme Court’s doctrine of strict scrutiny. This doctrine holds that certain justifications for differential treatment, including race and national origin, are inherently suspect since they have long been used spuriously to justify discrimination on irrational, non-socially operative grounds.³ Therefore, the Supreme Court analyzes cases in which race, national origin, or other suspect classes are the basis for differential treatment by making two determinations. First, the Court determines whether the differential treatment for suspect classes meets a compelling government interest. Second, the Court determines whether the differential treatment is narrowly tailored, aligning closely with the state’s stated goal and affecting the smallest number of people necessary to achieve this goal. In both the least restrictive environment standard and the strict scrutiny tests, we see an effort to limit differential treatment, to have individuals’ common humanity as the primary goal, with differential treatment

sometimes permissible to a limited extent, when this differential treatment serves as a means of recognizing fellow members of society as moral and civic equals.

The famous line from *Brown*, “In the field of public education the doctrine of ‘separate but equal’ has no place,” seems to forbid separate educational services for particular groups of students. However, as *Lau* and *Castañeda* illustrate, separate educational services for particular groups of students are, in some cases, not only permissible but required. As Williams articulates:

A system of allocation will fall short of equality of opportunity if the allocation of the good in question in fact works out unequally or disproportionately between different sections of society, if the unsuccessful sections are under a disadvantage which could be removed by further reform or social action (p. 111).

Thus, districts have an obligation to create targeted programs for English learners. As the Court held in *Lau*, “There 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.”

However, as *Castañeda* plaintiffs argued, districts have sometimes used language differences as an excuse for shunting students into stigmatized, inferior educational settings with unqualified teachers and less rigorous curricula. The *Castañeda* plaintiffs did want specialized educational programs for their children, in some cases, but only if these programs were of high-quality. In short, the *Castañeda* plaintiffs first wanted their children to attend schools in a district that recognized their common humanity and did not instill feelings of inferiority based on their national origin or language abilities. Like the plaintiffs in *Brown*, the plaintiffs in *Castañeda* did not want their children forced into stigmatized, segregated settings.

Therefore, our examination of ideas of equality in cases involving racial and linguistic minorities suggests two principles. First, the concept of negative equality is paramount. Enrolling individuals in specialized programs to meet their particular educational needs only represents a move towards greater equality if these specialized programs operate in a context which does not stigmatize these individuals' differences or treat these individuals as inferior. Otherwise, separate educational programs will perpetuate stigmatization and inequality. Second, as disability legislation suggests, any specialized programs to meet particular groups' educational needs should be as limited in scope and duration as possible. Otherwise, such programs will become dead-end tracks that never realize their goal of facilitating equality of opportunity.

As the *Castañeda* decision points out, the tension between desegregation and effective programs for language minority students exists, but it need not be paralyzing. As suggested earlier, disability law provides useful guidance here. It is important to explicitly state that the application of concepts from disability law is in no way meant to suggest that English learners' lack of English fluency represents any kind of physical or cognitive disability. However, language minority students and students with disabilities both have unique educational needs that traditionally have not been well-met by our educational system. Therefore, concepts from disability law can, in some limited contexts, usefully be applied to thinking about language minority students.

When determining the appropriate educational placement for a student with disabilities, the district and the student's family must consider a continuum of placement options. These options might include placement in a self-contained classroom comprised entirely of other students with disabilities, placement in a mainstream classroom with several hours of individualized instruction from a specially trained teacher several hours per week, and placement

in a mainstream classroom with the assistance of an instructional aide. By considering a range of placement options, the district and the students' family can balance the benefits of receiving specially tailored instruction with the benefits of participating in a fully integrated setting with opportunities to learn and socialize with students without disabilities. Then, the district and the student's family can determine the least restrictive environment for the students' education. Just as advocates for students with disabilities have been able to craft compromises that balance specialized services with integration, advocates for linguistic minorities can do the same.

Some in the disability community disagree strongly with the idea that integration represents their overarching goal. "Some of my clients don't want the least restrictive environment," one lawyer who litigates on the behalf of individuals with disabilities explained (Prof. Bill Koski, personal communication, Nov. 24, 2008). Some within the linguistic minority community agree. For example, members of the Deaf community, who straddle the disability and linguistic minority communities, are known for asserting their rights to create Deaf institutions. How should educational institutions respond when continued separation is demanded by a particular cultural or linguistic group? While an in-depth examination of this question lies outside the scope of this paper, it seems important to consider why the particular cultural or linguistic group is demanding continued separation. Perhaps such demands are particularly likely to arise when individuals feel most intensely that their common humanity is not being (or will not be) recognized. When what some might term "voluntary segregation" appears to be at work, as in the case of the Deaf community's desire to form a Deaf university, we must closely analyze "the relative institutional strength, and the changing and often narrow range of options available to ... non-dominant groups" (Nightingale, 2012, p. 12). Negative equality still seems to function as paramount for individuals with disabilities and members of language minority groups; they

want their common humanity to be recognized – and legally protected. While specialized services may sometimes be required, perhaps as a means of recognizing individuals' common humanity, we must think creatively about how to provide these specialized services in ways that expand rather than limit individuals' future opportunities.

Dual-Language Programs: Operationalizing the Least-Restrictive Environment and Challenging the Monolingual Norm

Although case law related to language minority students does not explicitly apply the least restrictive environment standard when evaluating the appropriateness of educational program for such students, these programs themselves are, in some cases, constructed in ways that align with the least restrictive environment standard. One particularly promising approach is dual-language programs (also called dual-immersion or two-way immersion programs). In these programs, native English speakers and linguistic minority students are educated together in the same classrooms using both English and the primary language of the linguistic minority students, with the goal that all students will become fluent in both languages. When applying the least restrictive environment standard, the appeal of these programs becomes obvious. Linguistic minority students attend the same classrooms as their native English-speaking peers from their very first day of school. All students are seen as learners of languages, educated together.

Dual-language programs hold appeal for another important reason, as well. Some critics of attempts to equalize opportunities within education via compensatory programs, such as temporary English as a Second Language pull-out programs, charge that these programs are inadequate because they do not capitalize on or develop the unique abilities of marginalized students. In the case of linguistic minority students, such compensatory programs leave the status quo, in this case the monolingual English norm, unchallenged, while ignoring the valuable

bilingual skills that linguistic minority students bring to school. As Howe (1993) summarizes, individuals from non-dominant groups:

... don't seek an education that provides compensation so that they may enjoy an equal opportunity to assume pre-defined roles within the status quo; rather, they seek a renegotiation of what educational opportunities have worth in a way that acknowledges and incorporates their group experiences, interests, and identities (p. 334).

Researchers have argued that one possible contributor to the positive outcomes frequently observed in dual-language classrooms is precisely that the bilingual abilities of linguistic minority students are valued. It is linguistic minority students who become the experts for the part of the school day when instruction takes place in their primary language. Rather than having a “language deficiency” that needs to be rectified, as *Lau* frames the issue, linguistic minority students who are in the process of learning English, are recognized in dual-language programs as possessing knowledge and abilities of great value (e.g., Genesee & Gándara, 1999).

Dual-language programs are not a panacea. They require skilled teachers and appropriate curriculum materials. They are challenging to implement when linguistic minority students speak many different primary languages. Researchers have documented that English often functions as a higher-status language in these programs (Freeman, 1998; Palmer, 2008), and the intercultural connections that may develop among students from different cultural backgrounds may fade when the programs end (Freeman, 1998). Nonetheless, they represent an innovative approach to operationalizing the least restrictive environment standard while also supporting bilingualism.

Threats to Both Separate and Equal: Where Do We Go From Here?

A Retreat from Aspects of *Lau* and *Brown*

Although we may have crafted a means of reconciling negative equality and positive equality, courts themselves have arguably retreated from their holdings in both types of cases. As the courts have stated and numerous commentators have described, subsequent decisions have invalidated much of *Lau* (e.g., Gándara, Moran, and Garcia, 2004; Moran, 2004). First, courts have ruled that challenges under the Equal Protection Clause and Title VI of the Civil Rights Act must show discriminatory intent, not just disparate impact (*Washington v. Davis*, 1976; *Regents of the University of California v. Bakke*, 1978). Second, courts have eliminated private rights of action under the Title VI except in cases of discriminatory intent (*Alexander v. Sandoval*, 2001). As Gándara et al. (2004) comment:

Only the central finding of fact in *Lau* remains uncontested; that is, an English-only curriculum can be exclusionary whether or not school officials act with an intent to harm non-English-speaking students. Of course, as with *Brown*'s finding that separate educational facilities were inherently unequal, this fact unfortunately does not guarantee that the law can be effectively implemented if the courts do not press enforcement (p. 34).

Many commentators also argue that the Court has retreated from its holding in *Brown*. In *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), by a vote of 5-4, the Court struck down both Seattle and Louisville's student assignment plans, which used race as a factor, holding that the plans were not narrowly tailored enough to meet strict scrutiny. In a stinging dissent, Justice Breyer wrote:

[The majority's decision] distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it

threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality."

In his own brief, stinging dissent, Justice Stevens added, "It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision."

Outside the courts, we see an emphasis on liberty, rather than equality, in the rhetoric surrounding education. Both 2012 presidential candidates frequently extolled the virtues of charter schools but rarely if ever mentioned desegregation efforts or specialized programs for language minority students. Meanwhile, linguistic isolation and racial isolation both remain in America's schools and America's cities, creating hurdles for integration efforts for both linguistic and racial minorities (e.g., Gifford & Valdés, 2006; Frankenberg, Lee, & Orfield, 2003). In the year 2000, 70% of the nation's English learners were enrolled in 10% of its schools (Consentino de Cohen, 2005).

Securing Resources for Racial and Linguistic Minorities through Adequacy Cases

Given this context, what options remain open for crafting an educational system which honors students' common humanity by providing all students with high-quality educational programs to which all have access, as well as specialized programs designed to meet the needs of particular groups? The most promising legal option seems to be bringing adequacy cases, which challenge the resources provided to students under state constitutional provisions that often guarantee individuals' right to an "adequate education." The *Williams* case in California represents one example of an adequacy case. Its settlement requires additional funding for low-performing schools, plus annual monitoring to ensure that students have adequate textbooks and safe facilities, among other provisions ("*Williams* settlement highlights," 2005). As of May 2013,

courts in forty-five states had heard adequacy cases. In those cases, courts ruled that states' funding systems did require changes, sometimes sweeping changes, in approximately two-thirds of those cases (National Education Access Network, 2013).

The needs of racial and linguistic minority students have sometimes played important roles in adequacy cases. A recent court ruling in Texas found, in part, that “the current public school finance system is constitutionally unsuitable ... for low income and English Language Learner students” (*Tex. Taxpayer & Student Fairness Coal. v. Williams*, 2013). School districts typically receive state funding on a per-student basis, with additional funding for English learners because of their unique needs. In Texas, the current level of this per-student weight for ELs stands at an additional 10% of the basic amount that districts receive for every student (Tex. Ed Code §42.153), a percentage that advocates argued is inadequate and arbitrary. Typically, cost studies play a central role in adequacy cases, as parties attempt to determine the funding levels necessary to meet the states' constitutional obligations, including their obligations to linguistic and racial minorities. However, no uniform methodology for cost studies exists (Rebell, 2008). The additional per-student weight for ELs in Texas is targeted towards “program and student evaluation, instructional materials and equipment, staff development, supplemental staff expenses, salary supplements for teachers, and other supplies required for quality instruction and smaller class size” for EL students (Tex. Ed Code §42.153). It is understandably difficult to determine the level of expenditures necessary in these areas to ensure the ELs receive an education that “enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation.” (Tex. Ed Code § 4.001(a)). This is the sixth lawsuit to challenge the school funding system in Texas since the 1980s (Smith, 2013). It remains to be seen if and to what extent funding levels for ELs in

Texas will change.

Numerous critics have argued that fighting for an “adequate education” represents a significant retreat from fighting for equal educational opportunity. Furthermore, adequacy cases can obscure the different needs of particular groups of students, including racial and linguistic minorities. Debates about the relative merits of an adequacy framework compared to an equality framework continue (e.g., Brighthouse & Swift, 2009; Howe, in press), but given the current legal landscape, the adequacy movement may be “the only game in town” (Rebell, 2008).

Horne v. Flores: More Separate than Equal

An ongoing legal battle in Arizona represents the most recent test of how courts reconcile conceptions of equality in the case of linguistic minority students. *Horne v. Flores* is perhaps most aptly characterized as an adequacy case, but particularly in its most recent incarnation, it has elements of a desegregation case, as well. The case’s complicated history dates back more than twenty years, when English learners and their parents in Nogales, Arizona sued the state for violating the Equal Educational Opportunities Act of 1974 (EEOA) by not providing ELs with adequate instruction. Passed in the wake of *Lau*, EEOA codifies the Court’s central finding from that case by requiring states to take “appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs” (20 U. S. C. §1703(f)). After eight years, the case finally went to trial, and the District Court ruled that the State had not met its obligations under the EEOA because the amount of funding the State allocated for EL students was arbitrary and not related to the actual amount of money necessary to educate EL students (*Flores v. Arizona*, 2000). Though the court’s ruling originally was limited to Nogales, the court ultimately extended the order to apply to the entire state. The court ordered Arizona officials to conduct a cost study to determine the amount of funding necessary for EL students

and then adjust the actual funding levels accordingly. The State did not fully comply with these orders, so in 2005, the court held the State in contempt and began imposing fines (*Flores v. Arizona*, 2005).

Meanwhile, Arizona legislators passed various bills related to EL education. Most importantly, in 2006 the Arizona legislature passed a bill designed to address problems with the State's EL education system identified by the court. Specifically, the bill increased EL incremental funding; however, it imposed a two-year per-student time limit on that funding. In addition, the bill created a task force to develop and plans for the implementation of "research based models of Structured English Immersion" (SEI) across the state. In 2000, Arizona voters had approved a proposition requiring that ELs be educated in English-only SEI classrooms as opposed to bilingual classrooms (with limited exceptions), but no uniform model of SEI had been implemented across the state. On the basis of these and other changes, the State petitioned for relief from the court's original judgment in the case, arguing that key circumstances of the State's EL education system had changed. Both the District Court and the Court of Appeals ultimately denied the State's petition, holding, in part, that the State still did not have a funding system for ELs that was based on the actual necessary costs (*Flores v. Arizona*, 2007, 2008). The State then appealed to the Supreme Court.

In 2009, the Supreme Court ruled 5-4 that the lower courts had improperly evaluated the State's motion for relief from the original judgment in the case by focusing too narrowly on whether state funding for ELs had changed. The justices remanded the case to the District Court for further evidentiary hearings to determine if changes in the broader context of the EL education system did in fact merit relief. While Justice Alito states, "There is no question that the goal of the EEOA—overcoming language barriers—is a vitally important one," his opinion is

striking for its focus on proper approaches to “institutional reform litigation” rather on discussions of equality (*Horne v. Flores*, 2009).

On remand, much of the case centered on determining whether state’s four-hour Structured English Immersion model violated the EEOA. While the model’s goal was for students to exit the SEI program within one year, in reality, students typically remained in the program for longer. The SEI program requires that English learners in Arizona spend hour hours a day focused exclusively on learning the English language, to the exclusion of instruction in math, science, social studies, and other subjects. Thus, the plaintiffs argued that “the participation of ELL students in the four hour model beyond their first year unnecessarily segregates those students and deprives them of equal access to the academic curriculum” (*Flores v. Arizona*, 2010). To support this position, the plaintiffs cited policy guidance from the Office of Civil Rights (1991) stating that programs for English learners should be implemented “in the least segregative manner consistent with achieving its stated goals.”

Using *Castañeda*’s three prongs to evaluate Arizona’s programs and practices for English learners, the District Court’s ruling in March 2013 found that the State was not in violation of the EEOC. Specifically, on the question of the legality of the four-hour SEI model, the court ruled that the state’s decision to group students by language proficiency did not constitute segregation. To support this finding, the court cited a variety of cases, including a decision by the 8th Circuit, which found, “A policy that treats students with limited English proficiency differently than other students in the district does not facially discriminate based on national origin” (*Mumid v. Abraham Lincoln High School*, 2010). In conclusion, Judge Raner Collins wrote:

Education in this state is under enormous pressure because of lack of funding at all levels. It appears that the state has made a choice in how it wants to spend funds on teaching

students the English language. It may turn out to be penny wise and pound foolish, as at the end of the day, speaking English, and not having other educational gains in science, math, etc. will still leave some children behind. However, this lawsuit is no longer the vehicle to pursue the myriad of educational issues in this state (*Flores v. Arizona*, 2013).

The plaintiffs appealed the case to the Ninth Circuit, where it currently remains.

All parties in the case repeatedly turned to *Castañeda* to support their arguments.

Initially, the case focused on the second prong of *Castañeda*, specifically whether the State had provided adequate resources, most importantly money, to implement appropriate services for English learners. While the most recent incarnation of the case still included much discussion related to *Castañeda*'s second prong, the focus shifted away from funding (per the Supreme Court's direction) and to whether Arizona's Structure English Immersion program for English learners had been implemented in such a way that, in the words of *Castañeda*, the program was "reasonably calculated to enable these students to attain parity of participation in the standard instructional program within a reasonable length of time after they enter the school system."

Throughout the case, all parties also turned to data to support their arguments about whether the State's programs and practices for ELs met *Castañeda*'s third prong, producing "results indicating that the language barriers confronting students are actually being overcome" (*Castañeda v. Pickard*, 1981). However, confusion about how to appropriately analyze data and limited data capacity at the state level seems to have constrained the role of outcome data in shaping the courts' decisions. In the most recent decision, the court stated that an official from the Arizona Department of Education (ADE) "was uncertain whether ADE's data system is capable of calculating the average length of time it takes for an ELL student to reclassify" and exit the SEI program (*Flores v. Arizona*, 2013).

In its decision upholding the SEI model, the District Court seems less concerned with positive equality (ensuring that spurious barriers to equal treatment are removed) than with negative equality (ensuring that groups receive customized treatment based on their particular needs). The plaintiffs attempted to argue that “many of the [English learner] students are stigmatized and regarded as being in ‘dumb’ classes and that the racial composition of those classes does not go unnoticed by other students” (*Flores v. Arizona*, 2010). But the court was dismissive of these claims, holding that the plaintiffs had “have failed to prove that Defendants’ implementation of the four hour model was driven by a deliberate intent to discriminate on the basis of race, color, or national origin” (*Flores v. Arizona*, 2013). The plaintiffs also attempted to argue that English learners in other programs, including a two-hour block of English language instruction and a dual-language bilingual program, developed English proficiency at similar or faster rates than students in the four-hour block. Thus, the four-hour block was not the least restrictive environment for students. Again, the court seemed dismissive of this argument. Given the wide discretion granted to education agencies in determining the program model to implement for linguistic minority students under the EEOC (and in *Lau* and *Castañeda*), the District Court seems to have decided that differential treatment for this group of students, even for a period of many years, is permissible, even when it means that students miss out on content-area instruction.

As the District Court judge suggested, other developments in the state may in fact prove more significant than developments in this case. In August 2012, after the Office of Civil Rights and Department of Justice investigated a complaint that English learner identification and reclassification procedures in Arizona led to too few students being identified as ELs and students being inappropriately reclassified as proficient in English, the state agreed to revamp EL

identification and reclassification procedures and provide intervention services to students affected by past errors (“Resolution agreement,” 2012). In addition, the Arizona Board of Education announced in May 2013 that it would begin a “systematic review” of the state’s EL program, including the four-hour Structured English Immersion Model (Radnovich, 2013).

The Need for Local Innovation in Programs for Linguistic Minorities

Rather than looking to the court to provide legal remedies to unequal educational opportunities – violations of both negative and positive equality – a useful strategy may be to focus on crafting creative solutions at the local and regional level, experimenting with ways to balance services for language minority students and desegregation. Local initiatives can explore what might constitute the least restrictive environment for linguistic minority students in a variety of contexts and what resources are necessary to make a variety of least restrictive environments serve as effective placements for students.

In analyzing program options, it is important to remember that it is not just a matter of ensuring that linguistic minority students spend the least amount of time in specialized programs possible. Rather, the principle of negative equality must be paramount. Linguistic minority students must not be stigmatized or treated as inferior. A range of program options may satisfy this overarching principle. As discussed earlier, dual-language programs represent one promising approach, as their rapid expansion across the country attests (Center for Applied Linguistics, 2011). Another innovative program implemented in several California high schools capitalizes on both technology and curriculum materials developed in students’ home countries to support linguistic minority students’ education. In this program, teachers use online math and science curriculum materials developed in Mexico to provide recent Spanish-speaking immigrants with access to college-preparatory STEM classes during part of their school day (Hopkins, Martinez-

Wenzl, Aldana, & Gándara, in press). A national survey of programs for recent adolescent immigrants highlighted the variation that existed among the ten case study programs they identified as particularly promising (Short & Boyson, 2012). Some operated as programs within a school, some as separate site programs that students attended for a short period of time, such as one year, and some as separate four-year high schools. Despite this variation, one important commonality across the programs was that all held high expectations for students and supported them in meeting these expectations. One school profiled is the International High School at Lafayette. Located in New York City, the school serves recent immigrants from more than 25 different countries. Approximately 15% of its students have had limited formal education. In addition to rigorous academic coursework in all subject areas, including English, all students at the school participate in an intensive internship. Students must apply for these internships with resumes and interviews, and the internship is linked to students' academic work. Students may also participate in the City University of New York's College Now program, in which they take courses for college credit while still in high school. Rather than serving as a dead end track, the school explicitly prepares linguistic minority students for college and career opportunities (Short & Boyson, 2012).

Conclusion

As Isaiah Berlin suggests in his essay "Pursuit of the Ideal" (1988), no final ordering of competing values – including competing visions of equality – is possible. "We must engage in what are called trade-offs – rules, values, principles must yield to each other in varying degrees in specific situations," Berlin writes (p. 15). But, as Berlin argues, it is this struggle to craft compromise, to innovate, and to experiment that is at the very core of the human experience. All students, including all racial and linguistic minorities, deserve our commitment to ensuring that a

“meaningful education” is open to them, despite the compromise, innovation, and experimentation that might be necessary to realize this goal.

References

- Alexander v. Sandoval, (99-1908) 532 U.S. 275 (2001).
- ARC Associates. (1994). *Revisiting the Lau decision: 20 years after*. Oakland, CA: ARC Associates. Oakland, CA: ARC Associates.
- Berlin, I. (1958). Two concepts of liberty, an inaugural lecture delivered before the University of Oxford on 31 October 1958. Oxford: Clarendon Press.
- Berlin, I. (1988). Pursuit of the fair ideal. In H. Hardy and R. Hausheer (Eds.), *The proper study of mankind: An anthology of essays* (pp. 1-16). London: Pimlico.
- Biegel, S. (2005). Reports of the Consent Decree monitoring team for the years 1997-2005: Final supplemental report.
- Brighthouse H. & Swift, A. (2009). Educational equality versus educational adequacy: A critique of Anderson and Satz. *Journal of Applied Philosophy*, 26(2): 117-128.
- Brilliant, M. (2002). *Color lines: Civil Rights struggles on America's "racial frontier," 1945-1975*. (Unpublished doctoral dissertation). Stanford University, Stanford, CA.
- Brilliant, M. (2010). *The color of America has changed: How racial diversity shaped civil rights reform in California, 1941-1978*. New York: Oxford University Press.
- Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
- Castañeda v. Pickard, 648 F.2d 989 (5th Cir. 1981).
- Center for Applied Linguistics. (2011). Growth of TWI programs, 1962-present. Retrieved from <http://www.cal.org/twi/directory/growthtable.htm>
- Check, J. W. (2002). *Politics, language, and culture*. Westport, CT: Praeger.

- Chinese for Affirmative Action. (2007). Lau plaintiffs request the Federal Court to maintain reporting requirements and provide greater oversight of school district's English learner programs. Retrieved from http://www.caasf.org/PDFs/Lau_Response_01_30_07.pdf
- City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
- Cosentino de Cohen, C., Deterding, H., & Clewell, B. C. (2005). *Who's left behind? Immigrant children in high and low LEP schools*. Washington, D.C.: The Urban Institute. Retrieved from http://www.urban.org/UploadedPDF/411231_whos_left_behind.pdf
- Davies, G. (2002). The great society after Johnson: The case of bilingual education. *The Journal of American History*, 88(4), 1405-1429.
- Douvanis, G. & Hulse, D. (2002). *The Least Restrictive Environment mandate: How has it been defined*. Arlington, VA: ERIC Clearinghouse on Disabilities and Gifted Education. (ERIC Document Reproduction Service No. ED469442). Retrieved from <http://www.eric.ed.gov/PDFS/ED469442.pdf>
- Flores v. Arizona, 172 F.Supp.2d 1225 (D.Ariz. 2000).
- Flores v. Arizona, 405 F. Supp. 2d 1112 (D. Ariz. 2005).
- Flores v. Arizona, 480 F. Supp. 2d 1157 (D. Ariz. 2007).
- Flores v. Arizona, 516 F.3d 1140 (9th Cir, 2008).
- Flores v. Arizona, No. 92-CV-596-TUC-RCC, Plaint. Resp. (D. Ariz. Sept. 7, 2010).
- Flores v. Arizona, No. 92-CV-596-TUC-RCC (D. Ariz. March 29, 2013).
- Frankenberg, E., Lee, C., & Orfield, G. (2003) *A multiracial society with segregated schools: Are we losing the dream?* Cambridge, MA: The Civil Rights Project.
- Freeman, R. D. (1998). *Bilingual education and social change*. Philadelphia: Multilingual Matters. Malden, MA: Blackwell.

Gándara, P. & Genesee, F. (1999). Bilingual education programs: A cross-national perspective.

Journal of Social Issues, 55(4): 665-685.

Gándara, P., Moran, R., & Garcia, E. (2004). Chapter 2: Legacy of Brown: Lau and language

policy in the United States. *Review of Research in Education*, 28(1), 27-46.

Gifford, B. & Valdés, G. (2006). The linguistic isolation of Hispanic students in California

public schools: The challenge of reintegration. *Yearbook for the National Society of the*

Study of Education, 105(2): 125-154.

Green v. County School Board of New Kent County, 391 U.S. 430 (1968).

Hernandez v. Texas, 347 U.S. 475 (1954).

Hopkins, M., Martinez-Wenzl, M., Aldana, U., & Gándara, P. (in press). Cultivating capital:

Latino newcomer young men in a U.S. urban high school. *Anthropology and Education*

Quarterly.

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

Howe, K. R. (1993). Equality of educational opportunity and the criterion of equal educational

worth. *Studies in Philosophy of Education*, 11: 329-337.

Howe, K. R. (in press). Adequacy versus equality. *Philosophy of Education 2013*. Normal, IL:

Philosophy of Education Society.

Johnson v. San Francisco Unified School District, 339 F. Supp. 1315, 1319 (1971).

Keyes v. Denver School District No. 1, 413 U.S. 189 (1973).

Kirp, D. (1976). Race, politics, and the courts: School desegregation in San Francisco. *Harvard*

Educational Review, 46(4): 572-611.

Lau v. Nichols, 483 F.2d 791 (9th Cir. 1973).

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

Lopez v. Seccombe, 71 F. Supp. 769 (1944).

Lum, P. A. (1978). The creation and demise of San Francisco Chinatown freedom schools: One response to desegregation. *Amerasia*, 5(1): 64.

Mendez v. Westminster School District of Orange County, 64 F. Supp. 544 (1946).

Moran, R. F. (2005). Undone by law: The uncertain legacy of *Lau v. Nichols*. *Berkeley La Raza Law Journal*, 16(1), 1-10.

Mumid v. Abraham Lincoln High School, 618 F.3d 789 (8th Cir. 2010).

National Education Access Network. (2013). "Adequacy" and "equity" school funding liability court decisions, May 2013. Retrieved from <http://schoolfunding.info/wp-content/uploads/2011/07/%E2%80%98Equity%E2%80%99-and-%E2%80%98Adequacy%E2%80%99-School-Funding-Decisions-by-Outcome2.pdf>

Nightingale, C. H. (2012). *Segregation: A global history of divided cities*. Chicago: University of Chicago Press.

Office of Civil Rights. (1991). Policy update on schools' obligations toward national origin minority students with limited English proficiency. Retrieved from <http://www2.ed.gov/about/offices/list/ocr/docs/lau1991.html>

Palmer, D. K. (2008). Building and destroying students' "academic identities": The power of discourse in a two-way immersion classroom. *International Journal of Qualitative Studies in Education (QSE)*, 21(6), 647-667.

Parents Involved in Community Schools v. Seattle School District No. 1, 128 S. Ct. 2738 (2007).

Pennhurst State School v. Halderman, 451 U.S. 1 (1981).

Radnovich, C. (2013, May 5). Ariz. Board of Education continues with English-immersion program fight. Retrieved from <http://ktar.com/22/1632172/Ariz-Board-of-Education-continues-with-Englishimmersion-program-fight>

- Rawls, J. (1999). *A theory of justice* (Rev. ed.). Cambridge: Harvard University Press.
- Rebell, M. A. (2008). Equal opportunity and the courts. *Phi Delta Kappan*, 89(6): 432-439.
- Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
- “Resolution agreement among the Arizona Department of Education, the U.S. Department of Education’s Office of Civil Rights (Denver), and the U.S. Department of Justice’s Civil Rights Division.” (2012, August 31). Retrieved from <http://www.azed.gov/public-relations/files/2012/08/executed-resolution-agreement-08-31-12.pdf>
- Scott, M. C. (2008). Resegregation, language, and educational opportunity: The influx of Latino students into North Carolina public schools. *Harvard Latino Law Review*, 11, 123-156.
- Short, D. J. & Boyson, B. A. (2012). Helping newcomer students succeed in secondary schools and beyond. Washington, DC: Center for Applied Linguistics. Retrieved from <http://www.cal.org/pdfs/newcomer/helping-newcomer-students-succeed-in-secondary-schools-and-beyond.pdf>
- Smith, T. (2013, February 4). Judge rules Texas’ school-funding method unconstitutional. *National Public Radio*. Retrieved from <http://www.npr.org/2013/02/04/171113168/judge-rules-texas-school-funding-method-unconstitutional>
- Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971).
- Sweatt v. Painter, 339 U.S. 629 (1950).
- Tex. Taxpayer & Student Fairness Coal. v. Williams, No. D-1-GN-11-003130 (Tex. 200th Jud. Dist. Ct., Travis Cnty. Feb. 4, 2013).
- U.S. Department of Education, National Center for Education Statistics (2010). *The condition of education 2010* (NCES 2010–028).
- Washington v. Davis, 426 U.S. 229, (1976).

Williams, B. (2005). The idea of equality. In G. Hawthorn (Ed.), *In the beginning was the deed: Realism and moralism in political argument* (pp. 97-114). Princeton, NJ: Princeton University Press.

“Williams settlement highlights.” (2005). Retrieved from

http://www.decentschools.org/settlement/Williams_Highlights_April_2005.pdf

Notes

¹ As Powell noted in his opinion in *Keyes et al. v. School District No. 1* (1973) a case regarding the segregation of Latino and African-American students in Denver public schools, under later interpretations, such as in *Swann v. Charlotte-Mecklenberg Board of Education* (1971), the Court held that *Brown* required district action to enable integrated schooling to occur, through busing programs, for example. Nonetheless, *Brown* was never used to argue that districts must establish specialized educational programs for students of different racial backgrounds.

² Segregation of Mexican-American students was not licensed by California law (though the segregation of Asian and Native American students was), and the Court found for the plaintiffs based on this fact. Therefore, *Mendez* did not overturn any state law or challenge the “separate but equal” standard of *Plessy v. Ferguson*. The segregation of Asian and Native American students was repealed by the state legislature two months after the *Mendez* decision (Brilliant, 2010).

³ The Court does not consider language a suspect class, and therefore, classifications based on language are not technically subject to strict scrutiny. However, as discussed above, courts have frequently used language as a proxy for race or national origin, which are subject to strict scrutiny. My point here is philosophical rather than legal, however. Courts agree with

Williams that differential treatment must be justified; unlike Williams, they hold that the justification necessary varies depending the basis for the differential treatment.