

THE UNZ INITIATIVES AND THE ABOLITION OF BILINGUAL EDUCATION

Abstract: In 1998, Silicon Valley millionaire Ron Unz spearheaded the passage of California's Proposition 227, designed to ban bilingual education as an instructional method. Two years later, Arizona approved similar legislation, and Unz has recently brought his campaign to Massachusetts and Colorado. This Note analyzes Proposition 227 and its "offspring" in Arizona and argues this legislation is violative of federal statutes, politically unsound, culturally biased, and pedagogically inaccurate. In particular, the Note contends that bilingual education involving instruction in a student's native language with the goal of either transition to English proficiency or complete bilingual fluency is an effective educational method and efforts to eliminate it are a rash, false "cure-all" to a variety of problems facing schoolchildren. Finally, the Note argues that effective challenges to legislative initiatives that seek to eliminate bilingual education must address the legal, political, cultural, and pedagogical implications of this elimination and consider the impact of this legislation within a context that considers its full impact on students, teachers, and society.

INTRODUCTION

On November 7, 2000, voters in Arizona approved legislation intended to ban bilingual education as an instructional method.¹ The Arizona legislation was the brainchild of Silicon Valley millionaire Ron Unz, who in 1998 led the passage of Proposition 227 in California, which similarly had the purpose of ending bilingual education.² Since the passage of the initiative in Arizona, Unz has brought his campaign to end bilingual education to Massachusetts and Colorado.³ Unz has already gathered enough signatures for an initiative nearly identical to the one in Arizona to appear on the ballot in Massachusetts in November 2002.⁴

¹ See Anne Ryman, *Paradise Valley OKs Bilingual Teachers*, ARIZ. REPUBLIC, Jan. 5, 2001, available at <http://www.onenation.org/0101/010501a.htm> (last visited Mar. 28, 2002).

² See June Kronholz, *Unease Fueled Vote Against Bilingual Education*, WALL ST. J., June 4, 1998, at A2.

³ See Charlie Brennan, *Language Battle Heads to Colorado*, DALLAS MORNING NEWS, Sept. 1, 2001; Scott Greenberger, *Bilingual Ed Law Gets a New Foe*, BOSTON GLOBE, July 31, 2001, at B1.

⁴ *Town's Bilingual Classes Hailed*, BOSTON GLOBE, Oct. 28, 2001, at W4.

Bilingual education involves instruction in a student's native language with the ultimate goal of either transition to English proficiency or complete bilingual fluency.⁵ Unz's initiatives have transformed the issue of bilingual instruction from a pedagogical debate into a prominent legal and political issue. Bilingual education needs to be recognized as an effective educational method, and the attempts to eliminate it need to be exposed as unlawful, politically and pedagogically unsound, and culturally biased.

In an attempt to ascertain the legal viability of bilingual education, this Note begins its analysis, in Part I, with the question of education as a constitutional right.⁶ Part II examines the political history of education, the traditional state control over education, and the federal government's involvement in education through legislation and judicial determinations.⁷ Part III focuses directly on the issue of bilingual education—from its historical roots to its treatment by the courts and Congress.⁸ Part IV examines Proposition 227 in California by outlining the legislation itself, the manner in which it was passed, the current challenges it faces, the effects it has had, and its "offspring" in Arizona—Proposition 203.⁹ Finally, Part V offers potential challenges and alternatives to the drastic step of eliminating bilingual education.¹⁰

I. RIGHT TO EDUCATION?

Recognizing education's significance, the Supreme Court of the United States has characterized schooling as essential to preserving the underlying fabric of our country.¹¹ Congress has codified education as "fundamental to the development of individual citizens and the progress of the Nation."¹² Yet, despite this proclaimed significance, no explicit right to education exists within the U.S. Con-

⁵ See Rachel Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1249-50 (1988).

⁶ See *infra* notes 11-21.

⁷ See *infra* notes 22-33.

⁸ See *infra* notes 34-94.

⁹ See *infra* notes 95-153.

¹⁰ See *infra* notes 154-241.

¹¹ See *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (holding that although education is not a right granted by the Constitution, it deserves elevated scrutiny); see also *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("American people have always regarded education and acquisition of knowledge as matters of supreme importance.").

¹² 20 U.S.C. § 3401(1) (1979).

stitution.¹³ Therefore, courts and legislatures continually struggle to determine the educational opportunities to which students are entitled and the means by which these opportunities are delivered.¹⁴

The Supreme Court attempted to clarify the significance and limits of educational opportunity in *San Antonio Independent School District v. Rodriguez*.¹⁵ In *Rodriguez*, the Court acknowledged the significance of education but found that nowhere did the Constitution explicitly or implicitly establish education as a constitutional right.¹⁶ *Rodriguez* was the result of a class action suit brought on behalf of poor and minority students in Texas by the parents of Mexican-American school children.¹⁷ The plaintiffs challenged the constitutionality of the state's system of partially financing public education through property taxes under the Equal Protection Clause of the Fourteenth Amendment.¹⁸ The trial court found that disparities in per-pupil expenditures, the result of the variation of amount of taxable properties within each district, constituted discrimination on the basis of wealth and thus violated the Equal Protection Clause.¹⁹ The Supreme Court ultimately reversed the trial court, finding that because education was not a constitutional right, a form of minimal scrutiny applied to Texas' manner of school funding, and thus, the legislation was presumptively valid.²⁰ While the Court repeatedly underscored the value of education, it recognized its inability to "create a constitutional right" and rejected the argument that education is a fundamental right because of its links to the First Amendment and the right to vote.²¹

Since education has never been recognized as a constitutional right, great deference is given to a state legislature's determinations of educational policy. This judicial deference stands as a great obstacle to a challenge to legislation that eliminates bilingual education.

¹³ See *Plyler*, 457 U.S. at 223.

¹⁴ See, e.g., *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690-91 (Mont. 1989) (holding school funding system unconstitutional under state constitution); *Charlet v. Legislature of State*, 713 So. 2d 1199, 1207 (La. Ct. App. 1998) (holding school funding was appropriately allocated by state).

¹⁵ See 411 U.S. 1, 1 (1973).

¹⁶ See *id.* at 35.

¹⁷ See *id.* at 4-5.

¹⁸ See *id.* at 5-6.

¹⁹ See *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 285-86 (W.D. Tex. 1971).

²⁰ See *Rodriguez*, 411 U.S. at 62.

²¹ See *id.* at 33.

II. POLITICAL HISTORY OF EDUCATION: A FEDERALIST STRUGGLE

An important aspect of the viability of bilingual education is its place within the context of education's political history. A basic tenet of the Constitution is the creation of a federalist system—dual sovereignty and dual responsibilities for the federal government and the states.²² Within this federalist system, it is a well-established provision that education is traditionally a concern of the states.²³ In fact, this deference to states in the field of education has been codified by Congress.²⁴ Congress not only grants the power to the states, but it also explicitly limits federal power in this area—preventing, for example, the Department of Education from exercising any control over curricula-related decisions.²⁵

Despite this inclination to defer to the states, the federal government has taken several affirmative steps to regulate education.²⁶ Congress has passed numerous acts relating to education, from the Bilingual Education Act of 1968 to the Equal Educational Opportuni-

²² See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.").

²³ See *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974).

²⁴ See 20 U.S.C. § 3401(4) (1979) ("The Congress finds that . . . in our Federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the States.").

²⁵ See *id.* § 3403:

(a) Rights of local governments and educational institutions. It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments . . . and to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education that is reserved to the States and the local school systems and other instrumentalities of the States.

(b) Curriculum, administration, and personnel; library resources. No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system . . . or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.

Id.

²⁶ See *South Dakota v. Dole*, 483 U.S. 203, 206–08 (1987) (noting Congress is allowed to attach extensive conditions to the receipt of federal funds for education, though it must do so unambiguously). See generally *Moran*, *supra* note 5.

ties Act of 1974.²⁷ Congress has thus shown a willingness to intrude into the historical boundaries of federalism to regulate instruction and schooling.

The Supreme Court has also dealt extensively with education. In 1923, in *Meyer v. Nebraska*, the Court invalidated a law that prohibited the teaching of languages other than English.²⁸ The Court, finding that education was extremely important and should be assiduously supported, held that the statute was arbitrary and unreasonable.²⁹ In 1925, in *Pierce v. Society of Sisters*, the Court refused to allow enforcement of an Oregon statute which would have required all students between the ages of eight and sixteen to attend public school.³⁰ The Court reasoned that such legislation interfered with parents' liberty to raise and educate their children.³¹ The Court also has used education as a forum for advancing its ideas on social justice and asserting its views on individual liberties.³² The significance of the history of federal involvement in education is indicative of the potential role federal law and government could play in determination of access to bilingual education.³³

III. BILINGUAL EDUCATION: HISTORICAL AND POLITICAL ROOTS

A. Uncertainty in Bilingual Education

Bilingual education is not a product of recent theory; it holds a firm position in the educational roots of this country.³⁴ With the arrival of a large number of European immigrants to the United States in

²⁷ See generally Moran, *supra* note 5.

²⁸ See 262 U.S. 390, 403 (1923). The court was reviewing a conviction for violating this statute. See *id.* at 396-97.

²⁹ See *id.* at 401, 403.

³⁰ See 268 U.S. 510, 534-35 (1925).

³¹ See *id.*

³² See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978) (holding the University's special admissions program was unlawful and preventing the University from considering applicants' race); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that African-American students were deprived of equal protection of law).

³³ See *infra* notes 155-87.

³⁴ See Peter Schrag, *Language Barrier*, NEW REPUBLIC, Mar. 9, 1998, at 16. In the early nineteenth century, Michigan had the following law: "every township within this territory containing [fifty] families or householders shall be provided with a good schoolmaster or schoolmasters, of good morals, to teach children to read and write, to instruct them in the English or French languages as well as in arithmetic, orthography, and decent behavior." Amy Zabetakis, Note, *Proposition 227: Death for Bilingual Education*, 13 GEO. IMMIGR. L.J. 105, 106 (1998).

the 1800s, schools implemented programs that used immigrants' native language either as the sole language of instruction or as a complement to English instruction.³⁵ German, French, and Dutch communities established schools focused on instruction in their respective native language.³⁶ Bilingual education was an accepted form of instruction among immigrant communities until the early twentieth century, when the scope of bilingual education was greatly limited.³⁷ Some scholars characterize the reduction in the use of bilingual education as an inevitable result of the rise of industrialism and the need for a common, economically unifying language.³⁸ Others claim that the xenophobia created by World War I had a strong impact on limiting foreign or dual language instruction.³⁹

Though never completely absent from the educational landscape, bilingual education did not regain a prominent position in educational and political discourse until the late 1960s and early 1970s, coinciding with the Civil Rights Movement.⁴⁰ The Bilingual Education Act of 1968 (the Act) was representative of this "rebirth" of bilingual education.⁴¹ The Act was the first piece of federal legislation created exclusively for the support of Limited English Proficient (LEP) students.⁴² Though it did not mandate bilingual education, it pledged federal support for instruction of LEP students and sought to convince school districts to adopt bilingual education programs.⁴³ As recently as 1995, the Bilingual Education Act provided \$215 million

³⁵ See Joseph Santosuosso, Note, *When in California . . . In Defense of the Abolishment of Bilingual Education*, 33 NEW ENG. L. REV. 837, 837(1999) (citing CHRISTIAN J. FALTIS & SARAH J. HUDELSON, *BILINGUAL EDUCATION IN ELEMENTARY AND SECONDARY SCHOOL COMMUNITIES* 3 (1998)).

³⁶ See Schrag, *supra* note 34, at 16.

³⁷ See *id.*

³⁸ See Santosuosso, *supra* note 35, at 837.

³⁹ See Schrag, *supra* note 34, at 16 ("[Instruction in languages other than English] ended with the jingoism of World War I, when some states passed laws banning German speech, and mobs raided schools and burned German textbooks.").

⁴⁰ See Rachel Moran, *Bilingual Education, Immigration and the Culture of Disinvestment*, 2 J. GENDER RACE & JUST. 163, 164 (1999).

⁴¹ See 20 U.S.C. § 7401 (2000). Not only did the Act seek to improve the academic skills of LEP students, it also recognized that using a student's native language for instruction promotes his or her self-esteem and develops the language resources of the country. See *id.* § 7402(14)(A)-(C).

⁴² See Moran, *supra* note 5, at 1259-60.

⁴³ See *Castaneda v. Pickard*, 648 F.2d 989, 1008-09 (5th Cir. 1981).

for research and professional development in the area of bilingual education.⁴⁴

Title VI, the Civil Rights Act of 1964, also affected the status of bilingual education and LEP students.⁴⁵ The Department of Health, Education, and Welfare (HEW), in order to enforce Title VI, established guidelines which "prohibit[ed] recipients of federal funds from using race, color, or national origin as a basis for providing disparate services and benefits or restricting access to such opportunities."⁴⁶ Both Title VI and HEW put pressure on schools and school systems to deal affirmatively with LEP students.⁴⁷

States also introduced legislation permitting and supporting bilingual education. In 1971, Massachusetts became the first state to institute extensive bilingual education.⁴⁸ The Massachusetts legislation provided for "the establishment of transitional bilingual education programs in the public schools" and "supplemental financial assistance to help local school districts to meet the extra costs of such programs."⁴⁹

A pivotal transition point in the political and judicial history of bilingual education was the 1974 case *Nichols v. Lau*.⁵⁰ In *Lau*, the Supreme Court held that the promulgation of unequal educational opportunities among bilingual students by the San Francisco Unified School District, a recipient of federal aid, violated section 601 of the Civil Rights Act.⁵¹ The Civil Rights Act forbade discrimination based on race, color, or national origin in any program that received federal financial assistance.⁵² The Court also found that the District's policies defied the implementation requirements of HEW.⁵³

⁴⁴ See Kirsten Gullixson, Note, *California Proposition 227: An Examination of the Legal, Educational and Practical Issues Surrounding the New Law*, 17 LAW & INEQ. 505, 518 (1999).

⁴⁵ See 42 U.S.C. § 2000a (2001).

⁴⁶ Thomas Felton, Comment, *Sink or Swim? The State of Bilingual Education in the Wake of California Proposition 227*, 48 CATH. U. L. REV. 843, 855 (1999) (citing 29 Fed. Reg. 16,298, 16,299 (1964)).

⁴⁷ See *id.*

⁴⁸ See John Rhee, Note, *Theories of Citizenship and Their Role in the Bilingual Education Debate*, 33 COLUM. J.L. & SOC. PROBS. 33, 34 (1999).

⁴⁹ See MASS. GEN. LAWS ANN. Ch. 71A.

⁵⁰ See 414 U.S. 563, 563 (1974) (holding a violation of Title VI of the Civil Rights Act had occurred where schools had failed to address the needs of non-English speaking students).

⁵¹ See *id.* at 565-69.

⁵² See *id.* at 566.

⁵³ See *id.* at 568-69.

In *Lau*, non-English speaking students of Chinese descent claimed that the District's practice of providing the same content and manner of instruction for all students, whether or not they spoke English, did not constitute equal educational opportunities.⁵⁴ The Court ruled that San Francisco's failure to develop an appropriate program for Chinese-speaking students prevented the students from participating and achieving in school because of the limitations placed on them by the language barrier.⁵⁵ The Court concluded that the school's practices constituted discrimination and were therefore prohibited under the Civil Rights Act and under HEW, as the school district was the recipient of federal funds.⁵⁶ Because the petitioners in *Lau* did not call for a specific remedy, the Court did not grant one.⁵⁷

After *Lau*, HEW established the "Lau Guidelines" to give specific guidance to school districts which were not in compliance with Title VI due to shortcomings in their instruction of LEP students.⁵⁸ Congress responded to the *Lau* case with the creation of the Equal Educational Opportunities Act of 1974 (EEOA).⁵⁹ EEOA "prohibited states from denying equal educational opportunities to students based on race, color, sex, or national origin."⁶⁰ The legislation also listed certain prohibited policies including the "failure to take appropriate action to overcome language barriers that impede[d] equal participation by its students in its instructional programs."⁶¹ When Congress adopted EEOA, they also enacted the Bilingual Education Act of 1974, which provided federal funding to school districts that used bilingual education programs.⁶²

Even with some clarification provided by *Lau* and EEOA, courts continued to struggle with a clear determination as to the obligation of school districts with regard to LEP students. In 1974, in *Serna v. Portales Municipal Schools*, the United States Court of Appeals for the Tenth Circuit affirmed the trial court's order to implement a bilingual program after the court found the district's English as a Second Lan-

⁵⁴ See *id.* at 564-66.

⁵⁵ See *Lau*, 414 U.S. at 568.

⁵⁶ See *id.* at 568-69.

⁵⁷ See *id.* at 564.

⁵⁸ See *Castaneda v. Pickard*, 648 F.2d 989, 1007 (5th Cir. 1981).

⁵⁹ See James Crawford, *Summing Up the Lau Decision: Justice is Never Simple* (Nov. 1996), at <http://ourworld.compuserve.com/homepages/JWCRAWFORD/summing.htm>.

⁶⁰ See 20 U.S.C. § 1703 (2001).

⁶¹ See *id.* § 1703(f).

⁶² See *Castaneda*, 648 F.2d at 1008-09.

guage Program inadequate.⁶³ In *Serna*, plaintiffs accused the school district of discriminating against Spanish-surnamed students in a variety of ways, including failing to provide bilingual education.⁶⁴ The Tenth Circuit affirmed the trial court's decision to remedy this discrimination, found to be a violation of Title VI, through creation of a bilingual-bicultural program.⁶⁵ Yet, the following year, in *Keyes v. School District No. 1*, the Tenth Circuit refused to provide the remedy it employed in *Serna*, distinguishing *Serna* as a statutory issue and not a constitutional one as in *Keyes*.⁶⁶ *Keyes* involved an attempt by students to assure fulfillment of desegregation in Denver public schools.⁶⁷ The technical legal distinction that the Tenth Circuit offered seemed indicative of a retreat from the strong judicial activism that it had demonstrated in *Serna*. The United States Court of Appeals for the Ninth Circuit likewise faced cases similar to those that had been presented in the Tenth Circuit, and generally found that the federal Constitution neither necessitates nor prevents the implementation of bilingual education.⁶⁸

In several other jurisdictions, parents and schoolchildren have brought suit to try to establish appropriate bilingual education programs.⁶⁹ The courts' responses to these challenges have varied, from requiring district action to granting deference to local school boards. As courts have wavered, the struggle between a desire to assure appropriate educational opportunities without overreaching in judicial advocacy has endured. So while *Lau* and EEOA redefined the foundation of legal thought with regard to LEP students and their education, the nature and character of that effect is still being determined.

⁶³ See *Serna v. Portales Mun. Sch.*, 499 F.2d 1147, 1153-54 (10th Cir. 1974).

⁶⁴ See *id.* at 1148-49.

⁶⁵ See *id.* at 1154.

⁶⁶ See 521 F.2d 465, 483 (10th Cir. 1975).

⁶⁷ See *id.* at 469.

⁶⁸ See, e.g., *Guadalupe Org. Inc. v. Tempe Elementary Sch. Dist.*, 587 F.2d 1022, 1027 (9th Cir. 1978) (rejecting students' class action claim to compel school district to provide bilingual-bicultural education for all non-English speaking Mexican-American and Yaqui-Indian students).

⁶⁹ See *United States v. Texas*, 680 F.2d 356, 374 (5th Cir. 1982) (granting deference to school districts in determination of education programs); *Rios v. Read*, 480 F. Supp. 14, 23 (E.D.N.Y. 1978) (finding district's bilingual education program inadequate under Title VI and EEOA and ordering district to file a plan for a new program).

B. *Resolution?*: *Castaneda* and *Plyler*

In the early 1980s, two cases were decided that brought some clarity to how bilingual education cases would be analyzed.⁷⁰ In 1981, the United States Court of Appeals for the Fifth Circuit heard *Castaneda v. Pickard* and in 1982 the Supreme Court decided *Plyler v. Doe*.⁷¹ While still not conclusive in their determinations, much of the analysis and reasoning used in these cases established a workable framework for legal debate and analysis of bilingual education.⁷²

In *Castaneda*, the Fifth Circuit held that the Raymondville (Texas) Independent School District's (RISD) approach to bilingual education did not violate Title VI of the Civil Rights Act and was an "appropriate action" for educating LEP students as required under the EEOA.⁷³ The plaintiffs in the case, Mexican-American children and their parents claimed that the bilingual education and LEP programs instituted by the RISD were ineffective and that RISD's unwillingness to remedy these programs violated Title VI and the EEOA.⁷⁴ The plaintiffs also maintained that the RISD plans failed to satisfy the "Lau Guidelines," as established by the HEW.⁷⁵ The plaintiffs further claimed that the RISD objective to teach LEP students to read and write in both English and Spanish was inappropriate because it overstressed the mastery of English language skills at the expense of the child's general academic development.⁷⁶ The plaintiffs thus criticized not only the goals of the RISD programs, but also the manner in which the program was implemented—from the inappropriateness of assessment tools to the lack of adequate training of the teachers.⁷⁷

Despite the various claims by the plaintiffs, the Fifth Circuit affirmed the district court's holding.⁷⁸ The Fifth Circuit found that the RISD program did not violate Title VI and rejected the students' claims.⁷⁹ While the court reaffirmed what it termed the "essential

⁷⁰ See *infra* notes 71–94.

⁷¹ See *Plyler v. Doe*, 457 U.S. 202, 202 (1982); *Castaneda*, 648 F.2d 989.

⁷² See e.g., *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1239 (D. Ariz. 2000) (applying *Castaneda* test of appropriate action and finding that defendants' LEP program violates EEOA); *Teresa v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 717 (N.D. Cal. 1989) (holding that District's ESL program did not violate the EEOA or Title VI).

⁷³ See *Castaneda*, 648 F.2d at 1014–15.

⁷⁴ See *id.* at 1006.

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *Castenda*, 648 F.2d at 1006–07.

⁷⁹ See *id.* at 1014–15.

holding" in *Lau* ("that schools are not free to ignore the need of limited English speaking children for language assistance to enable them to participate in the instructional program of the district"), the court stated that no legislation or right mandated school districts to provide bilingual education.⁸⁰

In reaching its decision, the Fifth Circuit set out a three-part test to determine if schools were indeed taking "appropriate action," as required by the EEOA, to improve the situation of LEP students.⁸¹ The test examined the school's program by asking the following questions: 1) whether the educational theory on which the program was based was sound; 2) whether the theory endorsed was implemented effectively; and 3) whether the program achieved results in overcoming language barriers confronting LEP students.⁸² This test has become the broadly accepted standard of analysis for whether a district's LEP program is an "appropriate action."⁸³

The Supreme Court further developed the legal analysis of education in *Plyler v. Doe*.⁸⁴ In *Plyler* the Supreme Court held that although education is not a constitutional right, its importance merits a form of elevated scrutiny.⁸⁵ The Court stated that education is not just another benefit, and to deny a child an education is to deny the child the chance to achieve in violation of the Equal Protection Clause of the Fourteenth Amendment.⁸⁶

The plaintiffs in *Plyler* filed a claim on behalf of undocumented school children to challenge Texas state legislation that permitted local school districts to forbid children not legally admitted into the United States from enrolling in classes.⁸⁷ The Court found that the legislation violated the Equal Protection Clause because education is not only an essential element of the country's political and cultural structure, but also because the denial of education to a specific group of school children runs counter to a basic element of the Equal Pro-

⁸⁰ See *id.* at 1008-09.

⁸¹ See *id.* at 1009-10.

⁸² *Id.*

⁸³ See e.g., *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030, 1041 (7th Cir. 1987) (holding schools violated the EEOA by failing to provide appropriate programs for LEP students); *Flores*, 172 F. Supp. 2d at 1239 (finding through application of the *Castaneda* test that the State violated the EEOA because it did not take appropriate action to remedy language barriers); *Teresa*, 724 F. Supp. at 713.

⁸⁴ See 457 U.S. 202, 202 (1982).

⁸⁵ See *id.* at 221.

⁸⁶ See *id.*

⁸⁷ See *id.* at 206.

tection Clause.⁸⁸ The Court characterized this important element of the Equal Protection Clause as "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."⁸⁹ The Court emphasized that education prepares students to be independent actors in society and that illiteracy would hinder them throughout their lives.⁹⁰ The Court also restated language from its 1954 decision in *Brown v. Board of Education*, calling education arguably the most significant of governmental duties and extolling education's virtues as an essential element in a child's social, cultural, and political development.⁹¹ The Court concluded by stating that legislation that prevents children from receiving an education must be shown by the proponent of such legislation to advance some substantial state interest.⁹² Here, the legislation failed to advance such a substantial state interest and was therefore invalid.⁹³

While *Castaneda* and *Plyler* further clarified that school systems needed to take some action to assist LEP students, the extent or limit of a school's obligation was still not well defined. The courts had ascertained the social, political, and cultural value of education, and hinted at a need to look at LEP students with special care, but failed to establish a bright line rule to define the obligations of schools and legislatures or the rights of students. The field of bilingual education was open for influence and direction; such influence arrived most dramatically in California.⁹⁴

⁸⁸ See *id.* at 221-22.

⁸⁹ *Plyler*, 457 U.S. at 222.

⁹⁰ See *id.* at 222.

⁹¹ See *id.* at 222-23 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)):

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms.

Id.

⁹² See *id.* at 230.

⁹³ See *id.*

⁹⁴ See Kronholz, *supra* note 2, at A2.

IV. PROPOSITION 227: RON UNZ AND BILINGUAL EDUCATION IN CALIFORNIA

A. *Developments and Elements of Proposition 227*

In 1998, Ron Unz, a former gubernatorial candidate and successful software developer, spearheaded the passage of Proposition 227, a California initiative, which sought the elimination of bilingual education in the state.⁹⁵ Supported by sixty-one percent of the voters, the "English for the Children" initiative ended a tradition of thirty years of bilingual education in California.⁹⁶ The Proposition replaced bilingual education programs with a system in which LEP children spend one year in a "sheltered English" classroom and thereafter join native English speakers in the mainstream, English-only classrooms.⁹⁷ While the bilingual system used a student's native language to facilitate transition to English proficiency, the "immersion" program operates on the theory that the student best learns English through instruction conducted entirely in English.⁹⁸ The immersion program is often characterized as a *sink or swim* approach wherein the non-English speaker, in an attempt to learn English, succeeds or fails because of the urgency of the challenge.⁹⁹

In addition to the immersion program, Proposition 227 also directed schools to place English learners of different ages and of different native languages in the same classroom when their level of English proficiency is similar.¹⁰⁰ Further, a much-disputed provision of the

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See CAL. EDUC. CODE § 305 (2001).

⁹⁸ See Moran, *supra* note 40, at 171-72.

⁹⁹ See Felton, *supra* note 46, at 863.

¹⁰⁰ See CAL. EDUC. CODE § 305.

Subject to the exceptions provided in Article 3 (commencing with Section 310), all children in California public schools shall be taught English by being taught in English. In particular, this shall require that all children be placed in English language classrooms. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year. Local schools shall be permitted to place in the same classroom English learners of *different ages* but whose degree of English proficiency is similar. Local schools shall be encouraged to mix together in the same classroom English learners from *different native-language groups* but with the same degree of English fluency. Once English learners have acquired a good working knowledge of English, they shall be transferred to English language mainstream classrooms.

Proposition gives parents the right to sue teachers who do not engage in English-only instruction.¹⁰¹ The statute specifically states that:

Any school board member or other elected official or public school teacher or administrator who willfully and repeatedly refuses to implement the terms of this statute by providing such an English language educational option at an available public school to a California school child may be held personally liable for fees and actual damages by the child's parents¹⁰²

Section 325 of the Proposition also revealed that the drafters foresaw potential challenges to the legislation. This section states that if any part of the Proposition was "found to be in conflict with federal law or the United States or the California State Constitution, the statute shall be implemented to the maximum extent that federal law, and the United States and the California State Constitution permit."¹⁰³

Finally, waivers from inclusion in the immersion program can be granted in special circumstances where parents grant permission and students fall within certain categories.¹⁰⁴ For example, parents may apply for a waiver if the child already possesses adequate English language skills, if the child is older than ten years old, or if the child has special educational needs.¹⁰⁵ While some school districts have attempted to obtain a waiver from the immersion program, courts have left the right to request a waiver to the parents.¹⁰⁶

Proposition 227 not only purported to promote an educational theory, it also incorporated certain social assumptions. For example, Proposition 227 asserted that English is the language of economic opportunity, immigrant parents want their children to participate in the "American Dream," and the public schools in California do a "poor job of educating immigrant children."¹⁰⁷ Such statements are

¹⁰¹ See *id.* § 320.

¹⁰² *Id.*

¹⁰³ See *id.* § 325.

¹⁰⁴ See *id.* §§ 310-311.

¹⁰⁵ See *id.* § 311 (a)-(c).

¹⁰⁶ See *infra* notes 133-137.

¹⁰⁷ See CAL. EDUC. CODE § 300 (1998).

The People of California find and declare as follows:

(a) Whereas, The English language is the national public language of the United States of America and of the State of California, is spoken by the vast majority of California residents, and is also the leading world language for

indicative of the values the proponents of the Proposition espoused and attached to the legislation.

B. Challenges to Proposition 227

Within hours of Proposition 227's passage, students filed for an injunction of its enforcement on statutory and constitutional grounds.¹⁰⁸ In *Valeria G. v. Wilson*, the federal district court for the Northern District of California denied a petition to enjoin the implementation of the Proposition.¹⁰⁹ LEP students filed a facial attack on the Proposition claiming that it violated the EEOA, Title VI of the Civil Rights Act, the Equal Protection Clause and the Supremacy Clause of the Constitution, a variety of international charters, and the First Amendment.¹¹⁰

Using the *Castaneda v. Pickard* test, the court assessed whether the Proposition represented an "appropriate action" in overcoming the obstacles created for language minority students as required by the EEOA.¹¹¹ The court found that the Proposition satisfied the first prong of the test in that it was based on sound educational theory.¹¹² The court stated that its role was not to determine what was the "bet-

science, technology, and international business, thereby being the language of economic opportunity; and

(b) Whereas, Immigrant parents are eager to have their children acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream of economic and social advancement; and

(c) Whereas, The government and the public schools of California have a moral obligation and a constitutional duty to provide all of California's children, regardless of their ethnicity or national origins, with the skills necessary to become productive members of our society, and of these skills, literacy in the English language is among the most important; and

(d) Whereas, The public schools of California currently do a poor job of educating immigrant children, wasting financial resources on costly experimental language programs whose failure over the past two decades is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children; and

(e) Whereas, Young immigrant children can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language in the classroom at an early age.

(f) Therefore, It is resolved that: all children in California public schools shall be taught English as rapidly and effectively as possible.

Id.

¹⁰⁸ See *infra* notes 109–130.

¹⁰⁹ See 12 F. Supp. 2d 1007, 1012 (N.D. Cal. 1998).

¹¹⁰ See generally *id.*

¹¹¹ See *id.* at 1017–18.

¹¹² See *id.* at 1019.

ter" education model, only whether the strategy employed was one accepted by scholars in the field.¹¹³

The second prong of the *Castaneda* test required that the programs actually employed by schools be "reasonably calculated to implement effectively the educational theory."¹¹⁴ The court in *Valeria G.* noted that the Proposition had not yet been implemented, and it was therefore difficult to assess with certainty whether such a relationship between theory and practice existed.¹¹⁵ The court, however, doubted that no programs could be adopted which would reasonably be calculated to implement the educational theory of Proposition 227.¹¹⁶

Finally, the court examined the third prong of the test that required the demonstration of results that show language barriers are being surmounted.¹¹⁷ The court found that at that early stage of the process there was no data to establish whether the Proposition would not work.¹¹⁸ The court concluded that there was no evidence to show that the Proposition facially violated the EEOA's requirement that the educational program be an "appropriate action" to overcome inequalities among language minority students.¹¹⁹ The district court acknowledged, nevertheless, that it performed its assessment even though there were "not yet any results to evaluate."¹²⁰

The court in *Valeria G.* also ruled that Proposition 227 did not violate Title VI despite the claims that the Proposition resulted in disparate harm to LEP students because of their nationality and native language.¹²¹ The court held that whether the plaintiffs were held to a standard of having to prove either that the legislation was motivated by discrimination or that the Proposition had the effect of discrimination, they were highly unlikely to satisfy the burden because the Proposition had just been implemented.¹²² The court similarly rejected the claim that the provisions of the Proposition, which made it exceedingly difficult to repeal the law, violated the plaintiffs' equal protection rights by limiting their ability to express their political

¹¹³ See *id.* at 1018-19.

¹¹⁴ See *Castaneda*, 648 F.2d at 1010.

¹¹⁵ See *Valeria G.*, 12 F. Supp. 2d at 1020.

¹¹⁶ See *id.* at 1020-21.

¹¹⁷ See *id.* at 1021.

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See *Valeria G.*, 12 F. Supp. 2d at 1021.

¹²¹ See *id.* at 1023.

¹²² See *id.*

opinions.¹²³ The court found that the Proposition did not burden the plaintiffs' rights because it only denied access to bilingual education, which is not a constitutional right, and hence there was no basis for an Equal Protection claim.¹²⁴

Further, the court rejected plaintiffs' Supremacy Clause claim, in which they argued that the new California law violated Article VI, clause II of the Constitution by interfering with federal law (the EEOA) and by ignoring Congress's express support of bilingual instruction as evidenced by the Bilingual Education Act of 1974.¹²⁵ The court stated that the EEOA did not require states to implement bilingual education programs and concluded that states were free to implement or deny such programs as they deemed suitable.¹²⁶

The *Valeria G.* court also declined to consider arguments from amici briefs that claimed that the Proposition was motivated by discrimination based on race or national origin and therefore violated the United Nations Charter, the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Covenant on Civil and Political Rights.¹²⁷ The court found these arguments outside the scope of the action as there was no violation of these doctrines and, furthermore, both sides possessed the same objective—to most effectively educate LEP students.¹²⁸ Finally, the court rejected an argument from an amicus brief that teachers possess an unconditional First Amendment right to choose the material they teach in the classroom.¹²⁹ The court stated that the First Amendment does not possess such a broad scope, explaining that instructional techniques are determined by state and local school districts and can be limited without violation of the First Amendment.¹³⁰

Valeria G.'s extensive examination of challenges to Proposition 227 is an essential starting point in considering the legal viability of similar anti-bilingual education legislation. While the court acknowledged there were areas where information was not yet available, the court's approach provides much insight into the analysis other courts could potentially use.¹³¹ As data becomes increasingly available, the

¹²³ See *id.* at 1023–24.

¹²⁴ See *id.* at 1024.

¹²⁵ See *Valeria G.*, 12 F. Supp. 2d at 1021–22.

¹²⁶ See *id.*

¹²⁷ See *id.* at 1027.

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See *Valeria G.*, 12 F. Supp. 2d at 1027.

¹³¹ See *infra* notes 155–165.

standards and structure offered by *Valeria G.* will become even more valuable in creating challenges to anti-bilingual education legislation.¹³²

C. Judicial Deference

As in *Valeria G.*, where the constitutionality and legality of the Proposition was upheld, other early indications from the judiciary in California indicate that Proposition 227 will be examined with great deference. In *McLaughlin v. State Board of Education*, the California State Appeals Court reaffirmed that the Proposition only allowed parents, as opposed to districts, to file for a waiver from inclusion in the English immersion program for their children.¹³³ In *McLaughlin*, school districts applied for a writ of mandamus under California Education Code section 33050, which allowed school districts to apply for waivers from educational legislation.¹³⁴ The districts argued that under section 33050 they could apply for a waiver from the sections of the California Education Code created by Proposition 227.¹³⁵ The court held that although there was no specific language in the Proposition that exempted the legislation from section 33050, the legislative history of Proposition 227 clearly intended both to transfer the decision-making power from the school boards and school officials to the parents and to guarantee English instruction to all students except in cases of parental waivers.¹³⁶ Therefore, the court held that the failure to amend section 33050 after the passage of Proposition 227 was a "drafters' oversight" and thus waivers could be granted only to parents and not to districts.¹³⁷ This decision appeared to be consistent with an inclination to give deference to the supposed will of the people, manifested by the initiative's passage.

In August 2001, the United States Court of Appeals for the Ninth Circuit further confirmed this deference to Proposition 227 in *California Teachers Ass'n v. State Board of Education*.¹³⁸ The Ninth Circuit rejected claims by numerous plaintiffs, including several teacher organizations, that the parental enforcement provision of the Proposition was unconstitutionally vague and violated other due pro-

¹³² See *infra* notes 155–165.

¹³³ See 75 Cal. App. 4th 196, 196 (1999).

¹³⁴ See *id.* at 209–10.

¹³⁵ See *id.*

¹³⁶ See *id.* at 218–19.

¹³⁷ See *id.* at 223.

¹³⁸ See 271 F.3d 1141, 1141 (9th Cir. 2001).

cess rights.¹³⁹ The Ninth Circuit affirmed the district court's summary judgment on all claims in favor of the State Board of Education.¹⁴⁰

Plaintiffs argued that section 320, the provision which allowed parents to sue teachers and administrators to enforce the Proposition, was unconstitutionally vague in failing to clearly state when teachers were required to speak in English and in failing to clearly define how much non-English speech would make them liable.¹⁴¹ The court found the plain language and intent of the Proposition clarified the disputed language and hence the scope of the Proposition was not limitless.¹⁴²

The court also found that teachers' instructional speech is protected by the First Amendment to that extent that the provisions of the Proposition must be "reasonably related to legitimate pedagogical concerns."¹⁴³ This First Amendment protection, therefore, allowed the teachers to challenge the statute on its face, and it also mandated a heightened vagueness scrutiny.¹⁴⁴ Even given the First Amendment protection, however, the claims of vagueness failed as the court found that not only had less clear language survived facial vagueness challenges, but, in addition, the state's educational interests outweighed the teachers' First Amendment interests.¹⁴⁵ Despite the dissent's claim that the parental enforcement provision of the Proposition now permitted "legalistic ambush," the provision and the Proposition survived.¹⁴⁶

D. *Unz in Arizona*

In 2001, the proposition that changed the face of bilingual education in California appeared in a similar form on the ballot in Arizona.¹⁴⁷ In November 2001, voters passed the initiative with sixty-three

¹³⁹ See *id.* at 1148.

¹⁴⁰ See *id.* at 1155.

¹⁴¹ See *id.* at 1146.

¹⁴² See *id.* at 1148.

¹⁴³ See *Cal. Teacher's Ass'n*, 271 F.3d at 1148-49 (citing *Hazlewood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260 (1988)).

¹⁴⁴ See *id.* at 1149-50.

¹⁴⁵ See *id.* at 1154.

¹⁴⁶ See *id.* at 1159 (Tashima, J., dissenting).

¹⁴⁷ See Scott Greenberger, *Spotlight is Turned on Bilingual Education*, BOSTON GLOBE, Dec. 31, 2000, at B5.

percent of the vote.¹⁴⁸ Once again the movement was led by Ron Unz, although this time it was known as Proposition 203.¹⁴⁹

Proposition 203 had as its purpose the elimination of bilingual education as a means to learn English.¹⁵⁰ The Proposition would not only affect Spanish speakers, but also Native Americans studying tribal languages and deaf students learning through American Sign Language.¹⁵¹ Proposition 203 was similar to Proposition 227 in that they both provided for an intensive English immersion program prior to transition to an English-only classroom.¹⁵² However, the Arizona proposition presented stricter rules in many aspects—from allowing denial of waivers from inclusion in the program without explanation or legal consequence to banning reading and writing materials in languages other than English.¹⁵³ While specific provisions of the Ari-

¹⁴⁸ See generally James Crawford, *Bilingual Education: Strike Two*, 15 RETHINKING SCHOOLS ONLINE 2 (Winter 2000/2001), at <http://ourworld.compuserve.com/homepages/JWCRAWFORD/RS-az.htm>.

¹⁴⁹ See James Crawford, *Proposition 203: Anti-Bilingual Education in Arizona*, (Mar. 12, 2001) at <http://ourworld.compuserve.com/homepages/JWCRAWFORD/az-unz.htm> (stating that, according to the Arizona Secretary of State, Unz supplied \$186,886 of the \$229,786 (81%) of the money to put Proposition 203 on the ballot and advertise for its passage). For a general criticism of Unz's self-serving role in the referendum process, see Lisa Ellern, Note, *Proposition 227: The Difficulty of Insuring Language Learners' Rights*, 33 COLUM. J.L. & SOC. PROBS. 1, 15-18 (1999).

¹⁵⁰ See Greenberger, *supra* note 147, at B5.

¹⁵¹ See Crawford, *supra* note 148 (explaining "that's because large percentages of such children are currently assessed as 'limited English proficient'"). Since the passage of Proposition 203, the Attorney General of Arizona has released an opinion stating that Proposition 203 did not apply to schools which were run by tribes or the federal government, or to public schools which instructed Native American students and which were protected by rights of tribal sovereignty or federal law. See Janet Napolitano, *Re: Application of Proposition 203 to Schools Serving the Navajo Nation*, 101-006, (Feb. 15, 2001) at <http://ourworld.compuserve.com/homepages/JWCRAWFORD/101-006.htm>.

¹⁵² See Crawford, *supra* note 148.

¹⁵³ See *id.* According to Crawford, Proposition 203:

- Prohibits any "teaching of reading, writing, or subject matter" and the use of "books and instructional materials" in a language other than English.
- Restricts "waivers" of the English-only rule, for children under age 10, to those with "physical or psychological handicaps"—i.e., special education students; only for older children would schools be given flexibility to exercise their 'informed belief' about what's best for the student.
- Allows parental waiver requests to be denied "without explanation or legal consequence."
- Requires English learners to be reassigned to mainstream classrooms once they have acquired "a good working knowledge of English" (a standard that remains undefined).

zona initiative may have been different, it clearly had the same primary goal of abolishing bilingual education.

V. ANALYSIS: THE FUTURE OF BILINGUAL EDUCATION

The elimination of bilingual education is a rash, false "cure-all" to a variety of problems facing schoolchildren. Propositions like those in California and Arizona are violative of federal statutes, politically unsound, culturally biased, and pedagogically inaccurate. The initiatives that Ron Unz hopes to bring to Colorado and Massachusetts are similarly flawed.¹⁵⁴ To effectively challenge legislation that seeks to eliminate bilingual education, the strongest argument will be one that encompasses each of these faults.

A. Legal Arguments

Valeria G. remains the most direct challenge to Proposition 227, and therefore the most significant precedent for challenges to Propositions 227, 203, or similar future legislation. The *Castaneda v. Pickard* test as used in *Valeria G.* likely holds the answers to challenges to the legality of the Propositions. Specifically, whether the Propositions survive will likely depend upon determination of whether the legislation is "appropriate action" as mandated by the EEOA.¹⁵⁵

-
- Repeals all Arizona statutes governing the education of English language learners, including standards of student assessment, teacher training, program accountability, parental choice, and other civil rights guarantees.
 - Mandates English language achievement tests for all Arizona students, regardless of their English proficiency.
 - Invites lawsuits to enforce the initiative by any "parent or legal guardian of any Arizona school child."
 - Holds educational administrators and school board members who violate the law liable for personal financial damages, which could not be paid by an insurance policy or other third party.
 - May never be repealed by the Arizona legislature; while amendments to "further the purposes" of the law will require a three-fourths "super Majority" vote in both houses, substantive changes will require passage of another statewide ballot measure.

Id.

¹⁵⁴ See Brennan, *supra* note 3. For the full text of the proposed initiatives see *An Initiative Petition for a Law: Act Relative to the Teaching of English in Public Schools*, Text of Proposed Massachusetts Initiative, at <http://onenation.org/matext.htm>; English Language Education for Children in Public Schools, Text of Proposed Colorado Initiative, at <http://onenation.org/cotext.htm> (last visited Mar. 28, 2002).

¹⁵⁵ See *Castaneda v. Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981).

The *Castaneda* court stated that a district's LEP program would be assessed as an "appropriate action" by asking: 1) whether the educational theory on which the program was based was sound; 2) whether the theory endorsed was implemented effectively; and 3) whether the program achieved results that confirm that language barriers are being overcome.¹⁵⁶ Within this test, the key area that opponents of Proposition 203 should focus on is the third prong that discusses the results of the program. The first and second prongs of the test are harder to challenge, as courts are unlikely to make a determination of what constitutes the better educational policy or practice.¹⁵⁷ However, the language in the decision is fairly vague as to what "results" encompasses, requiring, in general, that there are results indicating only that the language barriers are actually being overcome.¹⁵⁸ In deciding *Valeria G.*, the court was forced to assume certain facts with regard to the results of the program since the Proposition had only been approved by the voters and not yet enacted.¹⁵⁹ Because of this flexibility, the "results" language in the third prong seemingly could be an area where a creative argument could be inserted.

Initial indications and scores from California are now available and offer a chance for stronger arguments with regard to "results."¹⁶⁰ In considering challenges to the anti-bilingual education legislation, parents and students could construct a definition of what the term "results" should mean—incorporating both this new information and a broader understanding of the "results" of the Proposition. For example, the Supreme Court has repeatedly noted that education is a social and cultural force, not just the achievement of high test scores.¹⁶¹ "Results" should encompass not only academic test scores but should also demonstrate how this legislation affects the cultural and political development of the students and the effectiveness of the teachers in assessing whether language barriers are being overcome. "Results" should incorporate the psychological harms produced when students are being denied the opportunity to speak their native tongue.¹⁶² They should include the social drawbacks of creating disin-

¹⁵⁶ *Id.*

¹⁵⁷ *See id.* at 1009.

¹⁵⁸ *See id.* at 1010.

¹⁵⁹ *See Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1021 (N.D. Cal. 1998).

¹⁶⁰ *See infra* notes 161–187.

¹⁶¹ *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹⁶² *See* 20 U.S.C. § 7402 (14) (2001) (stating that instruction in student's native language increases self-esteem). *See generally* Rhee, *supra* note 48.

interested citizens and culturally shunned persons—the consequence of belittling a citizen's native language.¹⁶³ "Results" should also be measured in terms of the number of teachers leaving the profession and the low morale engendered by the new legislation.¹⁶⁴ Finally, "results" should encompass the psychological impact of students implicitly being told that they are inferior when they are not permitted to speak their native language.¹⁶⁵ Whether language barriers are being overcome is not a simple analysis that can be determined by a narrow assessment; various components need to be analyzed.

Despite the necessity of a broad examination of the concept of "results," courts will inevitably need to consider test scores as part of the "results." Recently, academic statistics of how Proposition 227 has effected LEP students over the first two years of its implementation have become available.¹⁶⁶ For example, since the Proposition's passage, there has been a 2.5% increase in reclassification of students from LEP status to fluent English speakers.¹⁶⁷ In addition, LEP students in the second grade saw a 9% increase, from the 19th to the 28th percentile, in the average score in reading since the passage of the Proposition.¹⁶⁸ Similarly, in mathematics, there was a 14% increase, from the 27th percentile to the 41st.¹⁶⁹

Supporters of the Proposition also submit comparative studies in which test scores seem to indicate that the change in policy is working.¹⁷⁰ For example, in the Oceanside School District, a largely bilingual community in southern California, the new English immersion program was strictly adhered to and only 150 students—3% of the total LEP student population—sought waivers, and only twelve waivers were granted.¹⁷¹ In the second grade, Oceanside students increased

¹⁶³ See Rachel Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321, 362 (1987) (noting that "for each side, language has become a proxy for their culture, customs, and values.").

¹⁶⁴ See Jill Kerper Mora, *Proposition 227 Lawsuits Against Teachers Challenged—And for Good Reason!*, at <http://coe.sdsu.edu/people/jmora/CTA227Lawsuit.htm> (Aug. 30, 2001) (stating that "morale among bilingual teachers is very low and that many feel personally and professionally threatened by [Proposition 227]").

¹⁶⁵ See 20 U.S.C. § 7402(14).

¹⁶⁶ See, e.g., Jacques Steinberg, *Increase in Test Scores Counters Dire Forecasts for Bilingual Ban*, N.Y. TIMES, Aug. 20, 2000, at A1.

¹⁶⁷ See Jill Mora, *Proposition 227's Second Anniversary: Triumph or Travesty?*, at <http://coe.sdsu.edu/people/jmora/Prop227/227YearTwo.htm> (Jan. 19, 2001). Reclassification refers to a student being designated as English-proficient as opposed to LEP. *Id.*

¹⁶⁸ See Steinberg, *supra* note 166, at A1.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

their test scores 19% from the 13th to the 32nd percentile.¹⁷² Oceanside's neighboring district of Vista did not adhere to the Proposition as strictly and granted waivers to nearly half of the LEP students.¹⁷³ At virtually every grade level, the increases in the Oceanside School District were twice those in the Vista School District, which possesses a similar economic and ethnic makeup as Oceanside.¹⁷⁴

The reported numbers, however, do not tell the whole story. For example, despite the claims of Proposition supporters, redesignation of LEP students had been on the rise for nearly a decade since before implementation of the legislation.¹⁷⁵ Also, classroom size has been reduced in the second grade, from thirty students per class to twenty students per class over the last several years.¹⁷⁶ This reduction in class size enables more direct teacher instruction and likely contributed to the increased test scores.¹⁷⁷ In addition, a return in California to a more traditional, phonics-based method of teaching reading has replaced the "whole language" approach that was a more modern technique which emphasized context clues over phonetic pronunciation.¹⁷⁸ The return to this traditional instructional method may also have been very influential in increasing test scores, as the whole language approach has been repeatedly criticized as an ineffective teaching strategy.¹⁷⁹

In addition, a renewed and overwhelming emphasis on test scores has teachers and districts "teaching to the test."¹⁸⁰ Subsequently, test scores may be more indicative of test preparedness as opposed to greater mastery of academic skills.¹⁸¹ Recently, districts have also implemented summer school and after-school programs to work with underachieving students.¹⁸² Furthermore, since the passage of Proposition 227, teachers have participated in an array of professional

¹⁷² See *id.*

¹⁷³ See Steinberg, *supra* note 166, at A1.

¹⁷⁴ See *id.*

¹⁷⁵ See Mora, *supra* note 167. The redesignation rate rose from 4.2% in 1990-91 to 10.3% in 1999-2000. *Id.* Between 1994-95 and 1995-96 the redesignation rate also grew by 2.5%; this was two years before support for the Proposition had even been initiated. *Id.*

¹⁷⁶ See Steinberg, *supra* note 166, at A1.

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See Tanya Schevitz, *Antioch Schools Face Choice of Methods to Teach Reading Traditional Phonics vs. Whole Language*, S.F. CHRON., Nov. 14, 1997, at A26.

¹⁸⁰ See Steinberg, *supra* note 166, at A1.

¹⁸¹ See *id.*

¹⁸² Jill Mora, *What do the SAT-9 Scores for Language Minority Students Really Mean?*, at <http://coe.sdsu.edu/people/jimora/SAT9analysis.htm> (Jan. 20, 2001).

development sessions relating to improvement in reading skills instruction.¹⁸³ Any one of these factors, or the combination thereof, could have influenced the test scores as much as, if not more than, the change in bilingual education policy.¹⁸⁴ While Unz and his supporters are anxious to graph the results and highlight the increase in test scores, careful consideration of these claims is necessary. It is both presumptuous and premature to assert that the increase in scores is solely a result of the new legislation.

Not only are there reasons to believe that the recent test scores are not due to the new English immersion program, but now studies exist which point to the successes of the old bilingual system in Arizona.¹⁸⁵ For example, some data indicates that LEP students in bilingual programs in Arizona outperformed LEP students in English-only programs at every level and in every subject matter of standardized testing.¹⁸⁶ The presence of such data is a key difference from California where the bilingual program was generally acknowledged to be failing and routinely criticized by scholars.¹⁸⁷ Opponents of Proposition 203 can call for a return to a system that was deemed effective even by the standards of assessment used by proponents of the Proposition.

For a successful legal challenge to succeed, challengers to anti-bilingual education must expect to apply *Castaneda's* test of "appropriate action." Within this test, proponents of bilingual education need to incorporate a broad definition of results, challenge the supposed positive results offered by supporters of the legislation and present data which shows the effectiveness of bilingual education. Therein, a strong argument that English immersion is not "appropriate action" can be made.

B. Political Concerns

The passage of Propositions 227 and 203, as funded by small groups of individuals, has potentially negative effects not only for LEP students but also for the political health of the country. Ron Unz sup-

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See Stephen Krashen et. al., *Bilingual Education in Arizona: What the Research Says*, at <http://ourworld.compuserve.com/homepages/JWCRAWFORD/Krashen8.htm> (Feb. 17, 2001).

¹⁸⁶ See *id.*

¹⁸⁷ See Santosuosso, *supra* note 35, at 879.

plied nearly 81 percent of the funding for the initiative in Arizona.¹⁸⁸ This monopolistic financial influence offered to advance his personal and political preference undermines the nation's confidence in the voting process and the political system.¹⁸⁹ In 1996, a study found that Americans deemed the "power of special interest groups in politics" behind only "international terrorists" as major threats to the country's future.¹⁹⁰ Ron Unz's central role in financing these initiatives seems to unfairly dominate the free exchange of ideas wherein the students most often affected by the elimination of bilingual education often do not have the means to compete in the costly marketplace of ideas.¹⁹¹ In addition, Unz's involvement in the initiative has been alleged to be highly politically motivated.¹⁹² The former gubernatorial and senatorial candidate has gained significant recognition by tackling this issue, yet it seems this advantageous political maneuvering has come at the cost of LEP children. Exposure to Unz's personal and political motives could be a strong force in undermining voter confidence in Unz and his anti-bilingual education movement.

C. Culturally Unsound

The issue of the right to bilingual education is a heated and passionate one. Racial and ethnic undertones, the concept of "us" versus "them," and the future of thousands of children and their academic success all surrounded the passage of these propositions. Inherent in these propositions are certain cultural biases. For example, Pete Wilson, California's Governor at the time Proposition 227's was passed, did not name one Latino to the State Board of Education, the organization responsible for establishing educational policy in the state.¹⁹³

¹⁸⁸ See Crawford, *supra* note 149 (citing disclosure statements filed with the Arizona Secretary of State).

¹⁸⁹ See John Bonifaz, *Challenging Buckley v. Valeo: A Legal Strategy*, 33 AKRON L. REV. 39, 47 n.34 (1999) (citing public opinion survey conducted by the Princeton Survey Research Associates on behalf of the Pew Research Center for the television series, *The State of the Union*). For a discussion in the rise of the influence of initiatives, see Peter Schrag, *The Fourth Branch of Government? You Bet*, 41 SANTA CLARA L. REV. 937, 937 (2001).

¹⁹⁰ See Bonifaz, *supra* note 189, at 47.

¹⁹¹ See Ellern, *supra* note 149, at 5 n.27 ("77 percent of English-language learners were eligible for free or reduced-price lunches, compared with 38 percent overall in the same schools").

¹⁹² See Francisco Ramos, *Prop. 227 a Success in California? Don't Believe it, Arizona, TUCSON CITIZEN*, (July 25, 2000), available at <http://ourworld.compuserve.com/homepages/JWCRAWFORD/TC4.htm> (last visited Mar. 28, 2002).

¹⁹³ See Deborah Escobedo, *Propositions 187 and 227: Latino Immigrant Rights to Education*, 26 SUM. HUM. RTS. 13, 14 (1999).

The absence of a representative of the ethnic group most affected by the legislation points to a cultural insensitivity in its creation. Furthermore, a poll from the *Los Angeles Times* indicated that 73% of those polled would vote in favor of the Proposition, basing their vote on the belief that "if you live in America you need to speak English."¹⁹⁴ Often lost in the debate over bilingual education is the fact that an objective of bilingual education is that the student achieves English fluency. In addition, one scholar has accused the media of attempting to create the image that a majority of Hispanic voters supported the initiative.¹⁹⁵ In fact, fewer than 40 percent of Hispanics in California voted for the Proposition.¹⁹⁶ Voters who described themselves as "white, conservative, and male" supported the proposition most emphatically.¹⁹⁷

Those who initiated and supported the Proposition allegedly based their endorsement on improving an ineffective education system, as evidenced by low test scores and high dropout rates.¹⁹⁸ A fundraising letter by Unz, however, points to a more subliminal motivation.¹⁹⁹ He wrote that his grandparents "who came to California in the 1920s and 1930s as poor European immigrants . . . came to WORK and become successful . . . not to sit back and be a burden on those who were already here!"²⁰⁰ The letter is indicative of Unz's preconceived notion of a "proper" immigrant; and clearly, according to Unz, that "proper immigrant" must be ready to master English immediately.

In a challenge to the anti-bilingual education legislation, the cultural biases at the base of the legislation need to be exposed. Many people who voted for the initiative undoubtedly would reconsider their votes if presented with a clearer picture as to the legislation's driving motivation and intent.

¹⁹⁴ See Nirej Sekhon, Note, *A Birthright Rearticulated: The Politics of Bilingual Education*, 74 N.Y.U. L. REV. 1407, 1415 (1999).

¹⁹⁵ See *id.*

¹⁹⁶ See Greenberger, *supra* note 147, at B1.

¹⁹⁷ See Sekhon, *supra* note 194, at 1415.

¹⁹⁸ See Luis Rodriguez, Note, *Discretion and Destruction: The Debate Over Language in California's Schools*, 4 TEX. F. ON C.L. & C.R. 189, 191-93 (1999).

¹⁹⁹ See *id.* at 192.

²⁰⁰ See *id.*

D. Pedagogical Problems

The California legislature stated that its purpose in passing the statute was to teach English to all children in California public schools "as rapidly and effectively as possible."²⁰¹ Extensive statistics are available that show that the old bilingual education system was ineffective.²⁰² For example, in 1997, under the bilingual education system less than 7% of LEP students in California learned enough English to be transitioned into English-only classes.²⁰³ Moreover, Latino students, representing the majority of recipients of bilingual education over the last twenty years, performed at the lowest level in assessments and dropped out at the highest rate of all students.²⁰⁴

There is extensive evidence, however, that an immersion program is not the most rapid or effective way to instruct LEP students in English.²⁰⁵ Some studies show that it takes students at least five years to acquire sufficient English skills to succeed in an English-based classroom.²⁰⁶ The National Research Council recently compared bilingual education and English immersion programs.²⁰⁷ The Council concluded that bilingual education yielded higher results than English immersion.²⁰⁸

The threat of lawsuits against teachers and administrators for failing to follow the mandate of the Proposition is also a problematic aspect of the immersion program as an educational strategy.²⁰⁹ As the dissent in *California Teachers Ass'n v. Board of Education* stated, "if teachers must fear retaliation for every utterance, they will fear teaching."²¹⁰

Opponents of Unz's initiative in Massachusetts have already begun to piece together their case in favor of bilingual education.²¹¹ These opponents are highlighting the success of an existing bilingual

²⁰¹ See CAL. EDUC. CODE § 300(f) (2001).

²⁰² See Catherine Johnson, Note, *The California Backlash Against Bilingual Education: Valeria G. v. Wilson and Proposition 227*, 34 U.S.F. L. REV. 169, 193-94 (1999).

²⁰³ See *id.* at 193.

²⁰⁴ See *id.* at 193-94.

²⁰⁵ See Sekhon, *supra* note 194, at 1424.

²⁰⁶ See *id.* at 1424-25.

²⁰⁷ See Jeff McSwan, *Arizona Should Decide School Issue*, ARIZ. REPUBLIC, June 12, 2000, at B7.

²⁰⁸ See *id.*

²⁰⁹ See e.g., CAL. EDUC. CODE § 320 (2001).

²¹⁰ Cal. Teachers Ass'n v. Bd. of Educ., 271 F.3d 1141, 1159-60 (9th Cir. 2001) (Tashima, J., dissenting).

²¹¹ See *Town's Bilingual Classes Hailed*, *supra* note 4, at W4.

education program in Massachusetts.²¹² This program has produced students who scored above state average on standardized tests and who spent just over two years in the bilingual education programs.²¹³

In Arizona, to limit teachers ability to instruct in students' native language is to return to an educational strategy which was initiated in 1919 and dismantled in 1967.²¹⁴ During this time, Hispanics in the immersion program graduated at very low rates from high school and had poor academic records.²¹⁵ Some changes to the current bilingual education system are surely needed, but the abolition of bilingual education is too drastic a measure. According to the former chief compliance officer for Proposition 227 in California, the immersion program has been "a policy disaster for children" and "it promotes an untenable image in the minds of the public that English can be learned, or any language can be learned, within a year."²¹⁶

E. Options and Alternatives

Given the lack of success of legal challenges against the Proposition, other options must be considered in order to preserve the use of bilingual education in classrooms. One possible alternative is exemplified by an agreement reached by the Roosevelt School District in Phoenix, Arizona with the United States Department of Education's Office for Civil Rights (OCR).²¹⁷ Before passage of Proposition 203 in Arizona, a complaint was filed with OCR alleging that the Roosevelt District discriminated against Hispanic students based on their national origin.²¹⁸ The complaint specifically charged the district with failing to provide an effective language program to meet the needs of LEP students.²¹⁹

In order to resolve the complaint, the Roosevelt School District entered into an agreement with the OCR wherein it agreed to make

²¹² See *id.*

²¹³ See *id.*

²¹⁴ See Mexican American Legal Defense and Educational Fund, *Section-by-Section Analysis of Arizona's Unz Initiative*, at <http://ourworld.compuserve.com/homepages/JWCRAWFORD/MALDEF2.htm> (June, 1999).

²¹⁵ See *id.*

²¹⁶ See Brennan, *supra* note 3.

²¹⁷ See *infra* notes 218-230.

²¹⁸ Letter from M. Arnold Chavez, Supervisory Team Leader, Office for Civil Rights, Dept. of Education, to Dr. Russell Jackson, Superintendent, Roosevelt School District (Aug. 15, 2000).

²¹⁹ See *id.*

significant changes to its LEP program.²²⁰ Under the agreement, each student, whose primary home language is not English, will be tested to determine his or her level of English proficiency.²²¹ After the test is administered, school staff will recommend the appropriate instructional strategy for the child.²²² The three instructional options are: maintenance bilingual, in which the student receives all instruction in her native language combined with 45 minutes each day of English as a Second Language (ESL) instruction; Bridge English Language Development, in which instruction is given primarily in English with support in the student's native language with 45 minutes each day of ESL; and mainstream English, in which all instruction is in English.²²³ The determination as to which section a student will be placed in is based on her score on the test that was adopted as part of the plan.²²⁴ The lowest scoring students go to the bilingual maintenance program, the middle group goes to the bridge program, and the highest scoring group goes to the mainstream English class.²²⁵ Regardless of the score obtained by a student, however, parents maintain the option of electing the instructional style they deem most appropriate for their child.²²⁶

Proposition 203's passage and the Roosevelt district's lack of adequate internal structures to accommodate the three different instructional programs have complicated whether the plan will be implemented over the next several years.²²⁷ The viability of this agreement, however, seems to have endured even the passage of Proposition 203. As the agreement was reached with a federal agency dealing with the civil rights of students, it seemingly will be honored by the state even given the state's new position on bilingual education. The superintendent of the Roosevelt School District, Russell Jackson, expressed his confidence in the agreement when he stated that the federal law upon which the agreement was based would supersede Proposition

²²⁰ See ROOSEVELT SCHOOL DISTRICT, EQUAL EDUCATIONAL OPPORTUNITIES FOR ALL STUDENTS, OCR DRAFT PLAN (2000).

²²¹ See *id.* at 6.

²²² See *id.* at 14.

²²³ See *id.* at 16.

²²⁴ See *id.* at 12.

²²⁵ See OCR DRAFT PLAN, *supra* note 220, at 12.

²²⁶ See *id.* at 14.

²²⁷ See *id.*

203.²²⁸ OCR provided this confidence when it sent a letter to Arizona schools stating that Proposition 203 "does not repeal or reverse federal law."²²⁹ Accordingly, Jackson indicated that he would continue to hire more bilingual teachers despite the passage of the proposition.²³⁰

In addition to specific district agreements, still other options exist besides a complete abolition of bilingual education. For example, in their campaign against Ron Unz and Proposition 227, former President Bill Clinton and former Education Secretary Richard Riley openly criticized the Proposition.²³¹ They offered support for alternative measures, such as a three-year limit on bilingual education, which they found to be more in accord with pedagogical research and federal law.²³²

More recently, Jane Swift, acting governor of Massachusetts, in anticipation of the state's referendum on the ban of bilingual education, announced a plan for legislation that would increase school districts' and parents' ability to determine how and when bilingual education would be used in the education of their students.²³³ The legislation would not eliminate bilingual education but rather would institute a more flexible system in which individual districts would determine the methods by which the students learn English.²³⁴ This legislation would thereby eliminate the current "one-size-fits-all approach" to bilingual education and allow for individual communities to determine the most appropriate strategies for their children.²³⁵

The solution employed by the Roosevelt School District (if it is upheld) and those proposed by Clinton's Department of Education and Acting Governor Swift are indicative of creative solutions that supersede the drastic measure of eliminating bilingual education. They also allow students to transition at their own pace (as opposed to the one year "sink or swim" immersion strategy) and they grant parents greater decision-making power in the education of their children.

²²⁸ See Lorry Baker & Kelly Pearce, *Schools Seek Solutions to Bilingual Law*, ARIZ. REPUBLIC, available at <http://www.azcentral.com/community/comstories/0302wvbilingual020Z1.html> (March 2, 2001).

²²⁹ See Ryman, *supra* note 1.

²³⁰ See Baker & Pearce, *supra* note 228.

²³¹ See *Clinton Takes Stand Against Proposition 227*, S.F. CHRON., Apr. 28, 1998, at A18.

²³² See *id.*

²³³ See *Text of Address Details "Challenges, Opportunities,"* BOSTON GLOBE, Jan. 16, 2002, at A10.

²³⁴ See *id.*

²³⁵ See *id.*

Ron Unz has a vision of reform in this country. He wants to eliminate what he labels "Spanish-almost-only instruction."²³⁶ He has started to send his message nationwide and has gathered supporters in Massachusetts and Colorado.²³⁷ With the number of Hispanics increasing to nearly 35.3 million, the issue of bilingual education is an increasingly significant one.²³⁸

Challenges to Arizona's Proposition 203 are already developing.²³⁹ The challenges will likely argue that the Proposition violates the civil rights of the students by mandating segregation for purposes of the English immersion program, by restricting their access to programs offered to other students and by limiting teachers' ability to provide individualized instruction.²⁴⁰ Opponents also argue that Proposition 203 creates disparate levels of education in violation of various state and federal laws.²⁴¹ The question remains, however, whether proponents of bilingual education can be successful in Arizona, and perhaps in Massachusetts and Colorado, where they failed in California.

CONCLUSION

Without clear guidelines regarding the right to education, schooling is, and has been, an issue at the forefront of judicial and legislative negotiating and battling.²⁴² Issues relating to education, from school desegregation to teacher accountability, have historically resulted in extensive political, social, and legal debate. Currently, bilingual education stands as a focal point of such debate.

Legally, politically, culturally and pedagogically, it is necessary to maintain bilingual education as an instructional option. Yet, for an attack upon the anti-bilingual education legislation as passed in Arizona to be successful, it seems necessary to modify and reinvigorate the arguments raised in California. Courts, in determining whether the Proposition represents effective legislation, must be forced to ex-

²³⁶ See Ron Unz, *Bilingual Education Lives On*, N.Y. TIMES, Mar. 2, 2001, at A23.

²³⁷ See Brennan, *supra* note 3.

²³⁸ See Cindy Rodriguez, *Latinos Surge in Census Count*, BOSTON GLOBE, Mar. 8, 2001, at 1A.

²³⁹ See Crawford, *supra* note 148.

²⁴⁰ See *id.*

²⁴¹ See *id.*; see also Kevin Johnson & George Martinez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1275-76 (2000) (arguing that Proposition 227 discriminates against individuals of Mexican descent in violation of the Equal Protection Clause).

²⁴² See David Broder, *Joining Hands for School Reform*, WASH. POST, Jan. 28, 2001, at B07.

amine the effectiveness of the legislation not only in a vacuum of legal theory and concepts but rather within a context that encompasses its full impact on students, teachers, and society.

In considering challenges to Proposition 227, courts in California have shown great deference to the legislation. Nevertheless, the question must be raised whether an initiative misinterpreted by large portions of the voting population, financed almost exclusively by a single individual, and not in the best interest of students deserves such deference. Yet, since courts have shown such deference, perhaps the solution is not in the courtroom, but rather with an emphasis on keeping voters better informed, balancing the influence of Ron Unz and creating compromises that incorporate the voices of students, teachers and parents.

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