

# LEARNING THE LANGUAGE: AN EXAMINATION OF THE USE OF VOTER INITIATIVES TO MAKE LANGUAGE EDUCATION POLICY

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*In recent years, several states have used initiatives to enact statewide mandates requiring children to learn English by being taught only in English, without instruction in their native language. Using Massachusetts as a case study, this Note argues that this way of deciding the issue—a voter initiative that mandates a uniform method of instruction—is not an appropriate way to make language education policy. Language education is not the type of issue that should be decided via direct democracy because (1) direct democracy does not give adequate protection to minorities, (2) it exacerbates the tendency to make decisions about sensitive immigration issues on the basis of rhetoric, emotional reactions, and campaign politics, and (3) it gives uninformed drafters and voters the power to make complex policy decisions implementing particular educational methods about which they know very little. Further, mandating a uniform method of instruction is undesirable because the empirical literature on which methods of language education are most effective is so divided and confused that it is illogical to mandate the use of only one method. Local education administrators should instead be left free to experiment within the spectrum of language education programs. Also, by mandating a uniform method of instruction for all children in all communities, the initiative does not have the flexibility to recognize and accommodate the many legitimate interests at stake, including individual children and their families, minority groups, local communities, and the democratic interest of the general public. Finally, the Note examines a better way to decide this question, with a system that gives schools freedom to experiment and respond to the needs of particular communities, and that gives parents more input and choice.*

## INTRODUCTION

A radio talk show host in Massachusetts recently commented on the reaction of local residents to increased immigration: “[P]eople are saying, ‘What do you mean, I have to learn another language to order a doughnut? I don’t live in New York. That’s not how it’s supposed

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to work here.”<sup>1</sup> This quote reflects one reaction to changing immigration patterns in the United States, where dramatic numbers of immigrants are entering states and localities that have never before experienced significant immigration.<sup>2</sup> Against the backdrop of a nation polarized by the tensions surrounding the immigration debate, existing institutions struggle to meet the many challenges accompanying this demographic change.<sup>3</sup> The school systems, in particular, have been strained as they attempt to accommodate the tremendous increase in the number of children who do not speak fluent English,<sup>4</sup> whom I will refer to as English Language Learners (ELLs).<sup>5</sup> Several states have reacted by passing new laws, via initiative,<sup>6</sup> governing lan-

<sup>1</sup> Yvonne Abraham & Scott Helman, *Immigration Debate Intensifies Across State*, BOSTON GLOBE, July 3, 2006, at A1.

<sup>2</sup> See, e.g., MARK A. GREY, IOWA CTR. FOR IMMIGRANT LEADERSHIP AND INTEGRATION, UNIV. OF N. IOWA, NEW AMERICANS NEW IOWANS: WELCOMING IMMIGRANTS AND REFUGEE NEWCOMERS 5–6 (2006), available at [http://www.bcs.uni.edu/icili/PDFDocument/icili\\_booklet.pdf](http://www.bcs.uni.edu/icili/PDFDocument/icili_booklet.pdf) (noting 138% increase in immigrants in Iowa between 1990 and 2005); Abraham & Helman, *supra* note 1 (discussing this phenomenon in Massachusetts); Ford Fessenden, *New Chapters in Regional Growth*, N.Y. TIMES, Dec. 3, 2006, at 14NJ (describing “the surge of immigration in suburbs in the last five years” and its impact on schools); Dean Foust et al., *The Changing Heartland: An Influx of Newcomers Both Buys and Burdens Small Town America*, BUS. WEEK, Sept. 9, 2002, at 80, 80–81 (discussing increased immigration in North Carolina); Anand Vaishnav, *Vote Seen Testing View of Immigrants*, BOSTON GLOBE, Nov. 10, 2002, at B1 (discussing phenomenon in Massachusetts); William G. Holt, III, *Immigration Is Changing the Face of Suburban America*, YALE GLOBAL ONLINE, July 6, 2004, <http://yaleglobal.yale.edu/display.article?id=4191> (noting that recently “first-generation immigrants . . . are turning to cities that have not historically received large numbers of immigrants” and that “immigrants are forming residential communities outside of major cities”).

<sup>3</sup> See, e.g., Ford Fessenden, *The New Crossroads of the World*, N.Y. TIMES, Aug. 27, 2006, at 14CN (discussing challenges of increased suburban immigration, particularly for schools); Antonio Olivo & Oscar Avila, *Latinos Choosing Suburbs over Cities*, CHI. TRIB., Nov. 1, 2005, at C1 (describing “problems such as overcrowded housing, stretched school resources, insufficient health care and challenges in getting people to jobs”). For a discussion of the inflammatory nature of the immigration issue, see *infra* note 54.

<sup>4</sup> Between the 1993–94 school year and the 1999–2000 school year, the number of ELLs in the public schools increased by nearly one million. David Meyer et al., *English Language Learner Students in U.S. Public Schools: 1994 and 2000*, 6 EDUC. STATS. Q. 37, 38 (2004), available at [http://nces.ed.gov/programs/quarterly/vol\\_6/6\\_3/3\\_4.asp](http://nces.ed.gov/programs/quarterly/vol_6/6_3/3_4.asp). States in the Midwest, South, and West experienced particular increases. *Id.* at 38. The suburban communities experiencing greater immigration have also naturally experienced particular increases in the number of ELL students. See *supra* notes 2–3.

<sup>5</sup> The issue of how to refer to the affected children is a charged question with no easy answer. One term commonly used in the literature is “limited-English proficient” or LEP. This term, however, connotes a certain deficiency, and this Note uses the more neutral “English Language Learner” (ELL). Although the term is not ideal—it places all the emphasis on English, implicitly devaluing children’s skills in their native language—it conveys the active status of the student.

<sup>6</sup> The initiative is “[a]n electoral process by which a percentage of voters can propose legislation and compel a vote on it by the legislature or by the full electorate.” BLACK’S LAW DICTIONARY 799 (8th ed. 2004).

guage education policy. These laws require children to learn the English language through immersion in English, without instruction in their native language. Propositions seeking to ban bilingual education have appeared on ballots in California,<sup>7</sup> Arizona,<sup>8</sup> Massachusetts,<sup>9</sup> and Colorado,<sup>10</sup> and passed in all except Colorado.<sup>11</sup> These laws, backed by millionaire Ron Unz, are sometimes referred to as the “Unz initiatives.”<sup>12</sup>

The issue of language education implicates far more than the pedagogical question of how to instruct children with distinct needs. It requires resolving fundamental questions about how society views assimilation and the goals of an educational system; it is “inextricably linked to broader issues of language, cultural identity, and national unity.”<sup>13</sup> Furthermore, for innumerable immigrant families, language education policies have profound personal effects. Learning English is crucial for academic success and economic opportunities, and the experience of English language education affects a child’s identity, her retention of her native language, and her connection to family and a broader community.

Because the stakes are so high and the issues are so charged, the education of ELLs has become a controversial, highly politicized issue. There is fierce debate over the goals of this education: Should it be to have ELLs learn English as quickly as possible, keep up in other subjects, or maintain proficiency in a native language while

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<sup>7</sup> Cal. Sec’y of State, Proposition 227: English Language in Public Schools: Initiative Statute (1998), available at <http://primary98.sos.ca.gov/VoterGuide/Propositions/227text.htm>.

<sup>8</sup> Ariz. Sec’y of State, Proposition 203: English Language Education for Children in Public Schools (2000), available at <http://www.azsos.gov/election/2000/info/PubPamphlet/english/prop203.htm>.

<sup>9</sup> Mass. Sec’y of the Commonwealth, Information for Voters 2002—Full Text of Ballot Questions, Question 2: English Language Education in Public Schools, available at <http://www.sec.state.ma.us/ele/elebq02/bq02full.htm> [hereinafter Massachusetts Question 2].

<sup>10</sup> Colo. Sec’y of State, Elections Center, Certified Ballot Questions: Amendment 31—English Language Education, available at <http://www.elections.colorado.gov/DDDefault.aspx?tid=452>.

<sup>11</sup> Anand Vaishnav, *English Immersion Plan Wins Over Bilingual Ed*, BOSTON GLOBE, Nov. 6, 2002, at A1 (noting that initiatives had passed in Massachusetts, California, and Arizona); Holly Yettick, *2 States, 1 Issue, Unexpectedly Different Outcomes: Bilingual Initiatives in Colo. and Mass. Affected by Funding*, ROCKY MTN. NEWS (Denver), Nov. 7, 2002, at 28A (noting that initiatives passed in Massachusetts, California, and Arizona but not in Colorado).

<sup>12</sup> See, e.g., William Ryan, Note, *The Unz Initiatives and the Abolition of Bilingual Education*, 43 B.C. L. REV. 487, 487–88 (2002) (referring to these initiatives as “Unz initiatives”); see also *infra* note 37 and accompanying text (describing Unz’s background and support for English-only initiatives).

<sup>13</sup> John Rhee, *Theories of Citizenship and Their Role in the Bilingual Education Debate*, 33 COLUM. J.L. & SOC. PROBS. 33, 34 (1999).

learning English?<sup>14</sup> Debate is equally intense over how best to achieve any of these goals, as a variety of educational programs exists.<sup>15</sup> The answers to these questions profoundly affect the 3.8 million ELLs in U.S. public schools,<sup>16</sup> and an important question arises: Who should decide which goals are set and how to achieve them?

This Note will examine the language education question using Massachusetts, one of the states that passed an Unz initiative,<sup>17</sup> as a case study. It argues that Massachusetts's way of deciding the question—namely, an initiative that mandated a uniform method of instruction—is an inappropriate way to make language education policy.<sup>18</sup> Much literature discusses the legality and constitutionality of the Unz initiatives,<sup>19</sup> and many articles analyze the initiatives from a

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<sup>14</sup> Amy S. Zabetakis, Note, *Proposition 227: Death for Bilingual Education?*, 13 GEO. IMMIGR. L.J. 105, 122 (1998) (noting that “lack of clarity concerning the objectives of bilingual education makes it very difficult to analyze the success of current bilingual programs” and discussing possible objectives of mainstreaming or preserving native language and culture); see also ERIKA HOFF, LANGUAGE DEVELOPMENT 368 (2d ed. 2001) (discussing “lack of agreement on the goal of bilingual education”); Sara Miller Llana & Amanda Paulson, *Bilingualism Issue Rises Again: Immigration Legislation Puts Fresh Attention on Teaching Methods*, CHRISTIAN SCI. MONITOR, June 13, 2006, at 1 (noting that goal of English immersion is “to quickly immerse students in English so they’re ready to join regular classes after a year”); Edmund Tijerina, *Un Poquito De Todo*; In America, Success Can Speak Two Languages, CONEXIÓN (San Antonio), Apr. 12, 2007, at 7A (goal of bilingual education has been to help students learn English and maintain their native language); Greg Collins, *Bilingual Consequences*, MASS. DAILY COLLEGIAN, Apr. 5, 2007, <http://media.www.dailycollegian.com/media/storage/paper874/news/2007/04/05/EditorialOpinion/Bilingual.Consequences-2824028.shtml> (explaining that “the goal of bilingual education programs that teach students mathematics and reading in their native language, like Spanish, is to ensure they do not fall behind their classmates in these subjects”).

<sup>15</sup> See *infra* Part I for an overview of these programs.

<sup>16</sup> NAT'L CTR. FOR EDUC. STATISTICS, FAST FACTS, <http://nces.ed.gov/fastfacts/display.asp?id=96> (last visited Feb. 24, 2007).

<sup>17</sup> See *supra* notes 7–12 and accompanying text.

<sup>18</sup> The text of Massachusetts's law can be found at MASS. GEN. LAWS ch. 71A (2005).

<sup>19</sup> See, e.g., Elizabeth T. Bangs, *Who Should Decide What Is Best for California's LEP Students? Proposition 227, Structural Equal Protection, and Local Decision-Making Power*, 11 LA RAZA L.J. 113, 114–15 (2000) (arguing that California's “Proposition 227 . . . violate[s] the Fourteenth Amendment equal protection guarantee by removing control over curricular decisions from local government and adding extra burdens to the legislative process, solely on the basis of race and national origin”); Kirsten Gullixson, *California Proposition 227: An Examination of the Legal, Educational, and Practical Issues Surrounding the New Law*, 17 LAW & INEQ. 505, 507–08 (1999) (arguing that Proposition 227 is probably legal under current law, though still maintaining it should not be implemented for pedagogical and policy reasons); Eric Haas, *The Equal Educational Opportunity Act 30 Years Later: Time to Revisit “Appropriate Action” for Assisting English Language Learners*, 34 J.L. & EDUC. 361, 361 (2005) (arguing that English immersion programs violate Equal Education Opportunities Act's requirement that districts take “appropriate action to overcome language barriers that impede equal participation by its students”); Kevin R. Johnson & George A. Martinez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227, 1227–28 (2000) (arguing that Proposition 227 “violates the Equal Protection Clause of the

variety of interdisciplinary perspectives.<sup>20</sup> This Note aims to do something slightly different: to examine whether, as a matter of policy apart from doctrinal and constitutional considerations, the lawmaking process and the form of the resulting law associated with the Unz initiatives are an appropriate way to make language education policy. Rather than take a normative stand on which method of language education is best for ELL children, the Note focuses on *who should decide* which method should be implemented. After analyzing the initiatives, the Note concludes that they are an inappropriate mechanism for developing policy in this area.

These initiatives fail as a tool for making language education policy because of problems stemming from two main sources. First, this is not the type of issue that should be decided via direct democracy. The atmosphere of direct democracy involves “the potential for rhetoric-fueled emotion to displace reason.”<sup>21</sup> This tendency can be especially dangerous when combined with issues such as language education that primarily affect immigrants and therefore involve sensitive, emotionally charged reactions. The danger is related to the centuries-old fear that direct democracy, a simple process of majority rule, often fails to protect minorities<sup>22</sup>—a particular concern when it comes to language education, given the direct impact of language education on minorities and many individuals who, as noncitizens, lack the ability to vote.

Also, voters engaging in direct democracy initiatives are often uninformed on key aspects of the policies. While this is a problem

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Fourteenth Amendment because, by employing language as a proxy for national origin, it discriminates against certain persons of Mexican and Latin American, as well as Asian, ancestry”).

<sup>20</sup> See, e.g., René Galindo & Jami Vigil, *Language Restrictionism Revisited: The Case Against Colorado's 2000 Anti-Bilingual Education Initiative*, 7 HARV. LATINO L. REV. 27, 27–28 (2004) (arguing that these new laws “mirror[ ] the historical pattern of language restrictionism” that was “manifestation[ ] of nativist sentiment directed primarily against immigrants whose cultural and linguistic traits were considered threats to the nation”); Rhee, *supra* note 13, at 36 (discussing how various conceptions of citizenship, including civic republicanism, liberalism, and communitarism, influence views on bilingual education policy); Charu A. Chandrasekhar, Comment, *The Bay State Buries Bilingualism: Advocacy Lessons from Bilingual Education's Recent Defeat in Massachusetts*, 24 CHICANO-LATINO L. REV. 43, 44 (2003) (arguing that Massachusetts's initiative “constitutes a devastating attack on educational opportunities for immigrant and minority students in the Commonwealth” and gleaned advocacy strategies for fighting this type of initiative); Joseph A. Santosuosso, Note, *When in California . . . In Defense of the Abolishment of Bilingual Education*, 33 NEW ENG. L. REV. 837, 840 (1999) (arguing that “bilingual education does not work and must be abolished”).

<sup>21</sup> Steven W. Bender, *Direct Democracy and Distrust: The Relationship Between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145, 163 (1997).

<sup>22</sup> See *infra* Part II.A.

with any issue decided via direct democracy, it is particularly inappropriate to use the initiative to mandate a particular *method* of instruction for language education, a complex field with confusing and hotly contested empirical evidence and a variety of instructional methods of which most voters are probably unaware.

The second source of problems with the Unz initiative is that it took the form of a uniform state mandate, requiring all children in all communities to be taught via the same method. This mandate is poor policy. There is no solid empirical support showing that the required method is more effective than others at teaching English. In light of the heated disagreement regarding the interpretation of empirical evidence in this field, schools should have the flexibility to experiment within the spectrum of language education programs. Further, the mandate is problematic because it lacks the flexibility to recognize the needs of many groups with legitimate interests in the issue.

While these are two distinct elements of the Unz initiatives—the process of direct democracy, and the initiatives' form as uniform mandates—the problems that they create often overlap. For instance, the Unz initiatives are unable to recognize the interests at stake partly because of the majority-rules nature of direct democracy, but also because the initiatives provide no flexibility to local school communities.

Another overlap exists between problems stemming from the initiative process and problems stemming from the nature of the bilingual education issue. Some of the Unz initiatives' flaws—campaign politics, exclusion of minorities, and weak drafting—result from the processes of direct democracy itself. Others stem from particularities of bilingual education, such as the field's confused empirical evidence about the effectiveness of particular language programs. Furthermore, the concern about decisionmaking based on emotion and gut reaction rather than reasoned consideration can be explained both by the nature of the initiative process and because bilingual education, as an issue closely related to immigration, tends to provoke emotional reactions.

The Note begins in Part I by giving background on methods of teaching English and on the Massachusetts controversy. Part II discusses the characteristics of direct democracy that make it poorly suited to implementing language education policy: It does not give adequate protection to minorities; it leads to decisionmaking based on rhetoric, emotional reactions, and campaign politics; and it gives uninformed drafters and voters the power to make complex policy decisions. Part III analyzes why the form of the initiative—mandating a uniform method of instruction—is undesirable. First, the empirical

literature on language education is so divided and confused that local education administrators should be left free to experiment within the spectrum of language education policies. Second, by mandating a uniform method of instruction for all children in all communities, the initiative does not have the flexibility to recognize and accommodate the many legitimate interests at stake. Finally, Part IV considers an alternative that allows parents to be more involved in the decisionmaking process and gives communities the opportunity to develop programs appropriate for their particular members.

## I

### A BRIEF OVERVIEW OF THE BILINGUAL EDUCATION CONTROVERSY

In order to evaluate the process and form of the Unz initiatives, it is necessary to discuss the various methods of language instruction available to policymakers. Many programs have emerged for teaching ELLs, but the Massachusetts controversy primarily involved two methods: transitional bilingual education (TBE) and English immersion. In TBE, children learn both the English language and other academic subjects, and instruction in both areas is given in a combination of the children's native language and a level of English appropriate for their proficiency level.<sup>23</sup> The program is "transitional" in that the goal is for the child to learn enough English to be completely "mainstreamed,"<sup>24</sup> which means being placed in an ordinary English-speaking classroom without special language support.

English immersion, on the other hand, places children in an all-English environment from the very beginning of their schooling, even if they know no English. The programs mandated by the recent initiatives have generally been "structured" or "sheltered" English immersion, where instruction occurs solely in the English language, but the class is limited to ELL students, "with the curriculum and presentation designed for second-language learners."<sup>25</sup> These programs seek to mainstream children as quickly as possible, often within one year.<sup>26</sup>

Another form of bilingual education, maintenance bilingual education, aims for children to achieve proficiency in English while main-

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<sup>23</sup> EUGENE E. GARCÍA, *TEACHING AND LEARNING IN TWO LANGUAGES: BILINGUALISM AND SCHOOLING IN THE UNITED STATES* 9 (2005).

<sup>24</sup> *Id.*

<sup>25</sup> Kellie Rolstad et al., *Weighing the Evidence: A Meta-Analysis of Bilingual Education in Arizona*, 29 *BILINGUAL RES. J.* 43, 46 tbl.2 (2005) ("According to the literature, though not enforced in Arizona, the model requires that teachers know the home language of students."). There may also be teachers' aides who speak the children's native language.

<sup>26</sup> See *infra* note 39 and accompanying text.

taining proficiency in their native language.<sup>27</sup> An additional option is two-way bilingual education, in which half the children in each class are native English speakers, and half speak a different native language (usually Spanish). Classes are conducted half in English and half in Spanish, and the goal is for all of the children to become fluent in two languages.<sup>28</sup>

Most Massachusetts schools used TBE programs from 1971 until the initiative's passage in 2002.<sup>29</sup> Some referred to the TBE programs as a "landmark success," pointing to statistics showing that about eighty percent of students in the programs had learned enough English to be mainstreamed after three years.<sup>30</sup> But others called the system "a disaster."<sup>31</sup> They claimed that children remained in bilingual classes far too long, often longer than three years, and pointed to evidence that close to twenty-five percent of ELL students failed the state's standardized MCAS English test.<sup>32</sup> They argued that bilingual education, in which students were not generally on a college track, "ha[d] become a form of segregation that threatens to put immigrants at a life-long disadvantage."<sup>33</sup> The latter position appears to have been more common,<sup>34</sup> consistent with widespread dissatisfaction with

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<sup>27</sup> See JUDITH LESSOW-HURLEY, *THE FOUNDATIONS OF DUAL-LANGUAGE INSTRUCTION* 13–14 (2005) (describing this as goal of maintenance bilingual education).

<sup>28</sup> GARCÍA, *supra* note 23, at 9.

<sup>29</sup> MASS. ANN. LAWS ch. 71A, § 1 (West 1996) (amended 2002) ("[I]t is the purpose of this act to provide for the establishment of transitional bilingual education programs in the public schools . . .").

<sup>30</sup> Chandrasekhar, *supra* note 20, at 50; see also Anand Vaishnav, *Faces of Bilingual Education, What Are Bilingual Programs Like? Who Are the Students? How Do They Learn? A Primer on Bilingual Education in Massachusetts*, BOSTON GLOBE, Nov. 3, 2002, at A33 (noting that "opponents [of the Unz initiative] point out that the average stay in the state's bilingual programs is about 2 ½ years").

<sup>31</sup> Scott S. Greenberger, *Bilingual Ed Loses Favor with Some Educators*, BOSTON GLOBE, Aug. 5, 2001, at A1 (describing teachers and administrators, some of whom once supported bilingual education, as now viewing traditional bilingual education program as "a disaster").

<sup>32</sup> Michele Kurtz, *In Holyoke, Tentative Steps Toward Immersion*, BOSTON GLOBE, Nov. 3, 2002, at A36.

<sup>33</sup> *Good for Immigrants*, PROVIDENCE J.-BULL., Nov. 24, 2002, at 8.

<sup>34</sup> See, e.g., DON SOIFER, LEXINGTON INST., *FEDERAL BILINGUAL EDUCATION PROGRAMS IN MASSACHUSETTS: "BUT DO THEY HELP THE CHILDREN?"* (2001), <http://lexingtoninstitute.org/372.shtml> (finding that students in federally funded Massachusetts bilingual programs had poor academic achievement and very few students were being mainstreamed); Scott S. Greenberger, *Study Hits Bilingual Classes*, BOSTON GLOBE, Oct. 3, 2001, at B2 (discussing Soifer study and noting criticisms of its methodology); Michele Kurtz & Cindy Rodriguez, *Debate over Immersion Roils Latino Community*, BOSTON GLOBE, Nov. 2, 2002, at A1 ("The state's current bilingual education system isn't working like it should, and the high-stakes MCAS test scores show it."). Even some of those who opposed the initiatives conceded that there were problems with the programs in place. Ed Hayward, *Election 2002: Voters Go for Change in State Bilingual Ed*, BOSTON HERALD,

bilingual education programs throughout the country.<sup>35</sup> Minority groups have also expressed dissatisfaction with TBE programs, although the question of whether Latinos support bilingual education is as heated and contested a question as any in this debate.<sup>36</sup>

In 2002, Silicon Valley millionaire Ron Unz,<sup>37</sup> who had spearheaded propositions seeking to ban bilingual education in California, Arizona, and Colorado,<sup>38</sup> led an initiative campaign to end bilingual education in Massachusetts. The initiative asked voters to approve a plan in which ELL children would learn English by being taught solely in English, without any native language instruction. The children would be placed in a “sheltered English immersion” class when they first arrived at school, and that class would “not normally . . . exceed one school year,”<sup>39</sup> after which the child would be fully mainstreamed. Parents could request waivers to remove their children from English immersion classes in certain limited circumstances.<sup>40</sup> The initiative passed in November 2002 with sixty-eight

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Nov. 6, 2002, at 4 (describing those who agreed that current system needed to be changed, but also felt that initiative campaign was not solving problems).

<sup>35</sup> See, e.g., PETER SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 116 (2003) (“The prospects for LEP students are dismal.”).

<sup>36</sup> *Id.* at 118 (“Most Latinos evidently oppose bilingual education.”); Bangs, *supra* note 19, at 151 (“A study by the Spanish-language television station Univision found that 83 percent of Latinos polled either strongly or somewhat supported bilingual education.”); Gerald P. López, *Learning About Latinos*, 19 *CHICANO-LATINO L. REV.* 363, 379 (1998) (showing that media had reported results of Latino National Political Survey as evidence that “Latinos reject bilingual education,” but, in fact “survey data also reveal most Latinos speak Spanish, want their children to speak Spanish, and support bilingual education”); Zabetakis, *supra* note 14, at 122 (quoting Don Terry, *The Reply, It Turned Out, Was Bilingual: No*, *N.Y. TIMES*, June 5, 1998, at A12) (“Although these voters may continue to believe that English is ‘the key to unlocking the treasures of the United States,’ they also believe ‘prejudice, not pedagogy, was at the root of the campaign to eliminate bilingual education.’”); Kurtz & Rodriguez, *supra* note 34, at A1 (“[P]olls indicate that Latinos themselves are split on the issue of English immersion.”). See *infra* note 159 for a discussion of immigrant parents who prefer English immersion.

<sup>37</sup> Unz’s varied background includes training in theoretical physics, work as a software entrepreneur, and a failed campaign to become governor of California. Ron Unz, Chairman, English for the Children, <http://www.onenation.org/unz.html> (last visited July 9, 2007). Unz drafted the original language education initiative, California’s Proposition 227. *Id.*

<sup>38</sup> Scott S. Greenberger, *Bilingual Ed Law Gets a New Foe: California Man Joins Mass. Ballot Crusade*, *BOSTON GLOBE*, July 31, 2001, at B1 (stating that “[t]he Silicon Valley millionaire whose money helped demolish bilingual education in California and Arizona is bringing his crusade to Massachusetts” and referring to Unz’s having “recently initiated an effort in Colorado”).

<sup>39</sup> Massachusetts Question 2, *supra* note 9.

<sup>40</sup> See MASS. GEN. LAWS ANN. ch. 71A, § 5 (West 2003) (setting forth waiver requirements); see also *infra* note 165.

percent of the vote.<sup>41</sup>

The constitutionality of the Unz initiative in California was challenged as a violation of equal protection. The plaintiffs did not challenge the constitutionality of English immersion programs per se, but instead challenged the structure of the California initiative.<sup>42</sup> The federal district court rejected the claim.<sup>43</sup> But even if both the structure and the content of these initiatives can withstand legal challenges,<sup>44</sup> important policy reasons militate against using them to set language education policy.

## II

### PROBLEMS WITH USING DIRECT DEMOCRACY TO DEVELOP LANGUAGE EDUCATION POLICY

The initiative processes used to introduce changes in language education policy put the issue to the entire state electorate—a direct-democracy approach to education reform. This Part will discuss several general characteristics of direct democracy that make it an inappropriate mechanism for forming language education policy, and present concrete illustrations of these problems. First, the process of direct democracy does not give adequate protection to minorities. Second, the campaign process can be divisive and can lead to decision-making on the basis of emotions and sound bites, rather than reasoned understanding of the issues. As the Massachusetts example demonstrates, this can be a particular problem when the topic at hand is a sensitive immigration issue. Third, neither the drafters nor the voters in an initiative campaign are likely to have the expertise to set detailed education policy. While the campaigns framed the question as a simple one asking whether or not children should be learning English, nonexpert voters were in fact deciding a particular *method* of teaching children English, something that those with more experience and expertise may be more qualified to do.

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<sup>41</sup> Michele Kurtz, *Officials Weigh Changes to English Immersion*, BOSTON GLOBE, Nov. 7, 2002, at B9.

<sup>42</sup> Plaintiffs challenged the California initiative on the ground that it “places higher burdens upon them in seeking future changes” because the proposition could “be amended only upon approval of the electorate, or by a statute passed by a two-thirds vote by each house of the legislature and signed by the governor.” They also argued that the provision should be subject to strict scrutiny because “it is of particular concern to minorities.” *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1024 (N.D. Cal. 1998).

<sup>43</sup> *Id.* (noting that circuit precedent held that bilingual education was not constitutional right, and finding no “intentional discrimination against [a] minority”). The court also rejected claims that the California proposition violated the Equal Education Opportunities Act and Title VI of the Civil Rights Act. *Id.*

<sup>44</sup> See *supra* note 19 (citing sources discussing legality and constitutionality of initiatives).

The term “direct democracy” encompasses several forms of popular decisionmaking, including both initiatives, which are drafted by citizens,<sup>45</sup> and referenda, which are drafted by legislators and placed on ballots for voters’ approval.<sup>46</sup> Such mechanisms became popular during the Progressive Era, in an attempt to increase governance “by the people”<sup>47</sup> and to circumvent the self-interested behavior of elected representatives who might focus only on seeking reelection and pleasing special interests.<sup>48</sup> Direct democracy thus may be particularly appropriate for topics that seek to police government officials, such as campaign finance reform or political conflicts of interest.<sup>49</sup> It has also been defended because it has the potential to make citizens more civic-minded by involving them in the legislative process.<sup>50</sup> Yet, although direct democracy may sometimes be a positive force, it also has many flaws that make it an inappropriate way to design language education policy.

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<sup>45</sup> See *supra* note 6 (defining initiative). While initiatives may be voted on by the legislature or the people, this Note refers only to those decided by popular vote.

<sup>46</sup> BLACK’S LAW DICTIONARY 1307 (8th ed. 2004).

<sup>47</sup> David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 16 (1995); see also Dina E. Conlin, Note, *The Ballot Initiative in Massachusetts: The Fallacy of Direct Democracy*, 37 SUFFOLK U. L. REV. 1087, 1090 (2004) (“Proponents of the initiative envisioned a government in which the people took an active part in making laws and governing themselves. They foresaw that the initiative would ensure that the government served the interests of all citizens, rather than corporate and special interests.”). The Progressive Era was characterized by a “sweeping reform agenda [that] changed the nature of American politics by elevating the role of individual citizens and sharply reducing the role of political parties and elected officials.” Magleby, *supra*, at 17.

<sup>48</sup> See Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 630–31 (1995) (“The initiative, consistent with its Progressive era roots, often is regaled as a populist tool that may force change on a government captured by special interests.”); Maimon Schwarzschild, *Popular Initiatives and American Federalism, or, Putting Direct Democracy in Its Place*, 13 J. CONTEMP. LEGAL ISSUES 531, 532 (2004) (“Representatives . . . are liable to represent the people’s views imperfectly, and ‘agency costs’ can range from gross corruption and self-seeking by elected politicians, to a subtler susceptibility . . . to well-organized special interests . . .”).

<sup>49</sup> Some authors have pointed out that when direct democracy is used for these government reform purposes, it does not disadvantage minorities. See, e.g., Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185, 207 (2002) (“Citizens have used direct democracy less to oppress vulnerable minorities than to . . . reform government processes through campaign finance laws, restrictions on lobbying, and conflict of interest statutes . . .”).

<sup>50</sup> See Schwarzschild, *supra* note 48, at 532 (“Direct democracy is also associated with the hope or expectation that voters will be more active, informed, and responsible—as citizens and people—when important decisions are in their hands.”).

### A. *Direct Democracy Fails To Protect Minorities*

One of the more troubling problems with direct democracy is its tendency to exclude minorities from the political process. James Madison long ago articulated the fear that it would lead to the proverbial “tyranny of the majority,”<sup>51</sup> serving only the interests of those who can marshal the support of more than fifty percent of the electorate and subjecting minorities to laws that trample their rights.<sup>52</sup> When a proposal only moderately benefits the majority of the electorate but harms a minority a great deal, a legislature is unlikely to act. Rather, the proposal is more likely to be passed by referendum or initiative, where intensity of interest is not as easily taken into account.<sup>53</sup> This concern about majority rule is amplified with immigration issues, which may be uniquely susceptible to decisionmaking on the basis of emotions and fears,<sup>54</sup> and where those whose rights are most endangered generally cannot vote.

Several characteristics of voter initiatives contribute to the concern that minorities might be made worse off by laws made through direct democracy than by those made in the legislature. First, initiatives are typically drafted by a small group of citizens without the compromise and public debate that ordinarily characterize legislative

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<sup>51</sup> The term “tyranny of the majority” is attributed to Alexis de Tocqueville. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 258 (Phillips Bradley ed., Vintage Books 1990) (1835).

<sup>52</sup> THE FEDERALIST NO. 10, at 49 (James Madison) (Clinton Rossiter ed., 1961) (arguing that in “pure democracy . . . there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual”).

<sup>53</sup> Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1, 25 (1978) (“[I]n a particular referendum on a particular issue, a matter extremely harmful to minority interests but only moderately beneficial to non-minority interests may be passed; the ballot does not easily register intensity of interest as the legislative process does.”).

<sup>54</sup> News coverage has frequently noted the heated and emotional nature of bilingual education and how it acts as a proxy for the issue of immigration. See, e.g., Virginia Buckingham, Op-Ed., *Dems Coddle Aliens at Their Own Peril*, BOSTON HERALD, May 4, 2006, at 39 (“For a taste of how immigration hot buttons play with the general electorate here, one need only look back four years ago at the whopping 68 percent of the vote in favor of ending bilingual education.”); Kurtz & Rodriguez, *supra* note 34 (describing bilingual education as “hot-button issue” and noting that “[s]ome opponents believe the initiative is backed by people who fear an increasingly multicultural community”); Nick Puleo, *Election 2002; Bilingual Education Now History; Immigrants Must Learn English First*, PATRIOT LEDGER (Quincy, Mass.), Nov. 6, 2002, at 15 (describing “vocal and passionate cries from educators and immigrant communities” against initiative and quoting accusations by supporters of initiative that bilingual education “segregate[s] children . . . in foreign language ghettos”); Anand Vaishnav, *Bilingual Ed Advocates Marshal Forces; State House Rally Sparks War of Words*, BOSTON GLOBE, Oct. 1, 2002, at B2 (describing initiative as “emotionally charged ballot measure”); see also *infra* notes 67–75 and accompanying text (contending that direct democracy exacerbates tendency to decide on basis of emotions and prejudices).

decisionmaking. The lack of deliberation among a variety of groups enables extreme views to be placed on the ballot.<sup>55</sup> When a small group has complete control over drafting and there is no debate over the merits of the proposal—when there is thus no need to compromise with groups representing different interests—extreme measures are more readily proposed.<sup>56</sup>

Nevertheless, in the initiative process, there are still two checks on the enactment of extreme legislation: the number of signatures required to get a measure on the ballot and the requirement that the majority vote yes.<sup>57</sup> These two requirements, however, are often not much of a check at all, as “voters are not likely to read the proposal, either when they sign it or when it is on the ballot.”<sup>58</sup> Thus the danger exists that uninformed voters,<sup>59</sup> easily swayed by misleading and simplistic campaigns,<sup>60</sup> will ratify problematic proposals. As a result, it is easier to enact extreme laws through direct democracy than through the legislative process.<sup>61</sup>

Furthermore, the initiative process limits the capacity of opponents to alter a proposed law’s content. By way of comparison, in the legislature, even if a minority cannot prevail in blocking a proposal, it may be able to influence the content of the proposal through the deliberative process.<sup>62</sup> While minority legislators may not be able to enact the precise laws they desire, they at least work within a law-

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<sup>55</sup> Daniel M. Warner, *Direct Democracy: The Right of the People To Make Fools of Themselves; The Use and Abuse of Initiative and Referendum, a Local Government Perspective*, 19 SEATTLE U. L. REV. 47, 77 (1995) (“The initiative process is not deliberative, and it tends to produce extreme and divisive legislation.”).

<sup>56</sup> *Id.* at 77–78.

<sup>57</sup> See Schwarzschild, *supra* note 48, at 540 (“A legislature, reflecting a popular majority, may succeed in passing a ‘compromise’ but still intolerant law, whereas an initiative—which cannot be compromised once launched—might prove too much for the voters to swallow.”). The courts, by enforcing constitutional limits on state legislation, can provide a further check on extreme proposals. See Magleby, *supra* note 47, at 40 (“The only institutional checks on the excesses of direct legislation are the courts.”).

<sup>58</sup> Warner, *supra* note 55, at 77–78. Warner also explains that “[m]any proponents of initiatives not only have no particular incentive to curb legislative extremism, they often do not want reasonable legislation. These individuals have taken no oath to uphold the laws of the jurisdiction or the Constitution.” *Id.* at 79–80. He goes on to note that supporters of various initiatives have even been aware that there was the strong possibility that their initiative was not constitutional, but “wanted to send a message, [and] did not care [about constitutionality].” *Id.* at 80.

<sup>59</sup> See *infra* Part II.C.

<sup>60</sup> See *infra* notes 67–73 and accompanying text.

<sup>61</sup> See Warner, *supra* note 55, at 77–78 (“In the legislature, despite strong individual feelings, measures must receive a majority vote; thus, compromise is inherent in that process. But proponents of initiatives have no particular incentive to curb their legislation’s extremism . . .”).

<sup>62</sup> Magleby, *supra* note 47, at 44.

making process that features many rounds of deliberation and compromise. Through this process, they might have some influence on the content of the final legislation.<sup>63</sup>

Another problem with direct democracy is that the intensity of each vote is not measured in the voting booth. Whereas “legislators routinely calculate and communicate the intensity of each others’ opinions,” each vote in an initiative is given the same weight regardless of how intensely the voter holds that preference.<sup>64</sup> Because of this, when a proposal only moderately benefits the majority but harms a minority a great deal, it is more likely to be passed by referendum or initiative than by the legislature.<sup>65</sup> It has been noted that laws making English the official language of government have been passed by direct democracy in states where they likely would have failed in the legislature, suggesting that legislatures might have greater sensitivity to minority positions on language issues.<sup>66</sup>

### B. *The Divisive Nature of Initiative Campaigns*

The second major factor that makes direct democracy dangerous is the political campaign for the initiative. The nature of direct-democracy campaigns may heighten voters’ tendency to make decisions about immigration issues based on emotions and fears of changing ways of life rather than reasoned considerations regarding the best policy.<sup>67</sup> Initiative campaigns generally reach the voters through advertising, seeking to reach a large number of people quickly and cheaply. This frequently results in oversimplified sound bites appealing to prejudice and emotions.<sup>68</sup> The media-driven nature of these campaigns creates an environment that “appeal[s] to passions

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See *supra* note 53 and accompanying text.

<sup>66</sup> See Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities’ Democratic Citizenship*, 60 OHIO ST. L.J. 399, 435 (1999) (“[I]n several jurisdictions where cultural and bilingual minorities possess significant electoral strength . . . the English-only measures would or would likely fail in the state legislature. In this handful of states, direct democracy instead has been used to adopt the provision [regarding official English] into the state constitution.”).

<sup>67</sup> See Abraham & Helman, *supra* note 1 (noting that executive director of Massachusetts Refugee and Immigrant Advocacy Coalition “said some residents may fear immigrants because they are not accustomed to them, or feel economically threatened” and discussing “unease” that suburban residents feel as immigrants move into smaller, outlying cities and towns); *supra* note 54 (citing sources discussing inflammatory nature of immigration issues).

<sup>68</sup> Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733, 741 (1988) (“Advertisers generally seek to appeal favorably to voters’ passions in the most effective and least expensive way possible. They accomplish this goal by appealing to prejudice, oversimpli-

and prejudices, spotlight[s] tensions, and may foster even greater conflict and disagreement.”<sup>69</sup> While the legislative process includes many safeguards “designed to encourage careful deliberation and reasoned decisionmaking,”<sup>70</sup> direct democracy takes place in an “emotionally charged atmosphere” that may result in voters considering issues less carefully and less reasonably than they otherwise would.<sup>71</sup> Also, voters tend to know very little about the proposed measures,<sup>72</sup> making it much easier for these campaigns to manipulate them.<sup>73</sup>

These phenomena can cause destructive results. Derrick Bell has referred to the referendum as “democracy’s barrier to racial equality.”<sup>74</sup> On language-related questions in particular, voters may be “bombarded by negative images of immigrants ‘refusing’ to learn English, linguistic ‘ghettos’ posing threats to national unity, and ‘demands’ by immigrants for ‘expensive’ multilingual government . . . .”<sup>75</sup>

### 1. *The Examples of Massachusetts and Colorado*

Massachusetts and Colorado both experienced Unz initiative campaigns that illustrate how direct democracy campaigns manipulate emotion and exploit gut reactions in order to influence lawmaking.

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fyng the issues, and exploiting the voters’ legitimate concerns by promising simplistic solutions to complex problems.”).

<sup>69</sup> Magleby, *supra* note 47, at 44; *see also* Bell, *supra* note 53, at 19 (“Appeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns.”).

<sup>70</sup> Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 398 (2003).

<sup>71</sup> Bell, *supra* note 53, at 18 (“The emotionally charged atmosphere often surrounding referenda and initiatives can easily reduce the care with which the voters consider the matters submitted to them.”).

<sup>72</sup> *See infra* note 119 (noting concerns that voters may be ill-informed about issues put to them for their vote).

<sup>73</sup> *See* Fountaine, *supra* note 68, at 738 (“When the electorate is not adequately informed, the potential for voter manipulation by political advertisements and the opinions of community leaders is dramatically increased.”).

<sup>74</sup> Bell, *supra* note 53, at 1; *see also* Johnson, *supra* note 48, at 631 (“Voters . . . have enacted laws that have violated the Constitution by impinging on individual rights. Some initiatives, even though they survived constitutional challenges, have been thinly veiled attempts to exclude outsiders from the community because of their race or class.”). Bell’s concerns are also relevant with respect to immigration issues. *See id.* at 632, 645–72 (noting that “Bell’s concerns are reflected in Proposition 187,” which would deny many social services to undocumented immigrants in California, and discussing nativist and anti-immigrant elements of drafting and campaign process of immigration-related initiatives, particularly this proposition).

<sup>75</sup> Bender, *supra* note 21, at 164.

The issue arose in Massachusetts as immigration increased rapidly and began to affect many non-urban areas for the first time.<sup>76</sup> Predictably, residents began to believe that their way of life was being threatened and began pushing for lawmaking on immigration-related issues.<sup>77</sup> According to one researcher, the language education initiative is about more than just bilingual education.

What we're seeing is a reaction to the large number of immigrants that are now in Massachusetts . . . . We're seeing immigrants going directly into small cities and towns that don't have the means or ways of understanding how to manage this great demographic change.<sup>78</sup>

There is an ongoing debate over whether these initiatives stemmed from anti-immigrant (or racist) sentiment,<sup>79</sup> a debate that is difficult to analyze “because both sides of the debate claim ‘to champion the rights of immigrants to achieve the American Dream’ . . . .”<sup>80</sup> There were undoubtedly many factors driving the vote, including, for some, a sincere belief that English immersion is the most effective way to learn English and gives immigrants the greatest chance for economic success in America.<sup>81</sup> But the vote was also, at least in part, an

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<sup>76</sup> Vaishnav, *supra* note 2 (noting recent “influxes of immigrants,” including those to small towns and cities, and difficulties of current residents in dealing with this change).

<sup>77</sup> See, e.g., Marcelo M. Suárez-Orozco, *Everything You Ever Wanted To Know About Assimilation but Were Afraid To Ask*, in *THE NEW IMMIGRATION: AN INTERDISCIPLINARY READER* 67, 68 (Marcelo M. Suárez-Orozco et al. eds., 2005) (“[I]mmigration . . . generates anxieties and at times even fans the fires of xenophobia . . .”).

<sup>78</sup> Vaishnav, *supra* note 2 (quoting senior research associate at Mauricio Gaston Institute for Latino Community Development and Public Policy).

<sup>79</sup> For arguments that the initiatives are racist or anti-immigrant, see Linda A. Cistone-Albers, *Deconstructionist and Pragmatic Analyses Reveal the “Intent to Discriminate” in Proposition 227—A California Initiative*, 27 *W. ST. U. L. REV.* 215, 218 (2000), (arguing that California’s initiative had intent to discriminate); Galindo & Vigil, *supra* note 20, at 28 (arguing that English-only initiatives are “*de facto* anti-immigrant and racist, since they target Latino language minority students”); Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail To Protect Latinos*, 117 *HARV. L. REV.* 1420, 1438 (2004) (arguing that California’s Proposition 227 “is understandable principally as a form of majoritarian hostility toward Spanish-speaking immigrants”). For arguments that they are not racist or anti-immigrant, see *Valeria G. v. Wilson*, 12 *F. Supp. 2d* 1007, 1023–25 (holding that Proposition 227 did not intentionally discriminate against minorities); Schuck, *supra* note 35, at 121 (“[T]he public’s strong opposition to bilingual education apparently reflects not xenophobia but a negative appraisal both of its pedagogical merits and of its use as an instrument of government-promoted cultural maintenance—an appraisal plainly shared by Hispanic voters and parents . . . .”); Richard Thompson Ford, *Brown’s Ghost*, 117 *HARV. L. REV.* 1305, 1325 (2004) (arguing that some minority support for initiative in California “undermin[es] claims by bilingual education advocates that opposition to bilingual education was racist or xenophobic”).

<sup>80</sup> Zabetakis, *supra* note 14, at 105 (quoting Ann Bancroft, *California Takes a Step Toward English-Only Instruction*, ASSOCIATED PRESS, Mar. 13, 1998).

<sup>81</sup> Vaishnav, *supra* note 2 (noting that “many say they supported Question 2 because they felt a rapid switch to English was the best route, not because of hostility to immi-

expression of anxiety and unease related to the increased immigrant presence, rather than a reasoned consideration of the best educational policy—for both ELLs and native English speakers. Marcelo Suárez-Orozco explained that “for some sector of the population, this was an anxious vote . . . about new immigrants and how it’s changing these towns.”<sup>82</sup> The assimilative intent behind the initiative can be seen in a statement attributed to Ron Unz, that “[t]he way to keep the country united . . . is a renewed commitment to ‘ethnic assimilation,’ including the primacy of the English language.”<sup>83</sup>

While assimilation is not necessarily an invalid policy goal, the instinctive reaction of many voters—that immigrants should be assimilated as quickly as possible—led them to vote reflexively for English-only instruction. This meant that many voters did not carefully consider the merits of the proposal on its own terms;<sup>84</sup> they did not consider, for instance, whether English immersion was actually more effective at teaching English,<sup>85</sup> or what effect the policy would have on native English speakers.<sup>86</sup> Issues like bilingual education, prone to provoking automatic emotional responses rather than reasoned considerations about policy,<sup>87</sup> require a more deliberative and sophisticated lawmaking process than that offered by voter initiatives.

The capacity of direct democracy to exploit voters’ fears and emotions and to lead to decisionmaking on that basis is highlighted by comparing the Massachusetts experience to a campaign for a similar Unz initiative that took place in Colorado in the same year. The initiative banning bilingual education passed in Massachusetts, but the proposition was defeated in Colorado. Given Colorado’s conservative

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grants,” and quoting voter arguing that “people are at a disadvantage if they don’t speak English in this country”).

<sup>82</sup> *Id.*

<sup>83</sup> Eric Hbler, *For Foes, Bilingual Ed Represents Ineffective Schools, Ethnic Friction*, DENVER POST, Feb. 10, 2002, at A19. Unz denies being racist or anti-immigrant, however, citing his opposition to Proposition 187, which denied social services to undocumented immigrants. *Id.*

<sup>84</sup> After talking to Massachusetts voters, a reporter noted that many did not know the details of the educational program they were implementing, but saw the initiative as a question about assimilation. Vaishnav, *supra* note 11 (noting that voters “saw the initiative in terms of immigrants’ assimilation, not just bilingual education”). According to one woman, “We’re not a bilingual country, we’re an English-speaking country.” Ed Hayward, *Campaign 2002: Backers, Foes Weigh in on English Immersion*, BOSTON HERALD, Nov. 5, 2002, at 5.

<sup>85</sup> See *infra* notes 127–37 and accompanying text.

<sup>86</sup> See *infra* notes 151–52 and accompanying text.

<sup>87</sup> Vaishnav, *supra* note 2 (noting that some analysts believe that message sent by initiative “had less to do with the best educational programs and more with the responsibility of immigrants to learn the primary language of their new home as fast as possible. Pulling the lever for Question 2 was a *gut reaction* . . . .” (emphasis added)).

politics and Massachusetts's liberal reputation, this outcome was precisely the opposite of what would have been expected.<sup>88</sup> Commentators attributed the defeat of the Colorado initiative to a large donation to bilingual education supporters, which enabled the anti-initiative faction to fund advertising campaigns playing on immigration-related anxieties.<sup>89</sup> Much of the money funded a series of television ads predicting chaos in mainstream classrooms if ELL children were mainstreamed.

The commercials "saturated Colorado's airwaves in October" and featured "the camera pann[ing] in on dark-eyed children while scary music played."<sup>90</sup> Designed to ignite white parents' fears, these ads predicted that when ELL children were mainstreamed, teachers would have to spend far more energy on those children, leaving fewer resources for the native English speakers.<sup>91</sup> The two men who designed the ads freely admitted that "they were meant to unsettle Anglos."<sup>92</sup>

Many felt that this ad campaign was the primary reason for the initiative's defeat.<sup>93</sup> Other factors probably also played a role, including Colorado's "strong tradition of local control"<sup>94</sup> and its "libertarian streak" (with traditional support of vouchers and parent choice).<sup>95</sup> But it is likely that money and the subsequent ad campaign

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<sup>88</sup> Yettick, *supra* note 11.

<sup>89</sup> Galindo & Vigil, *supra* note 20, at 60 (concluding that this donation, which was "thought to be the largest individual contribution to a ballot initiative in Colorado history" was "important factor" in initiative's defeat); Yettick, *supra* note 11 (noting that donation opposing initiative was for three million dollars, whereas "[n]o other campaign in either [Colorado or Massachusetts] raised even \$1 million"). The donation was made by Pat Stryker, the mother of a child in a two-way program. Eric Hubler, *Bilingual Backers Get \$3 Million Gift; Donor's Funds Target Amendment 31*, DENVER POST, Sept. 29, 2002, at B01. For a description of two-way programs, see *supra* text accompanying note 28.

<sup>90</sup> Eric Hubler, *Amendment 31: Bilingual Ed Backers Found Ally in Parents*, DENVER POST, Nov. 7, 2002, at E05.

<sup>91</sup> *Id.* The ad campaign also claimed that implementing English immersion would be very expensive and would raise taxes. This contention was based on erroneous information, but its backers let the ad run for a day even after they admitted the error to the *Denver Post*. *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Valerie Richardson, *English-Only Initiative on the Ropes: Colorado Foes' Huge Spending Edge Seen Preserving Bilingual Education*, WASH. TIMES, Nov. 5, 2002, at A06 (claiming that money funding ad campaign was difference between Massachusetts and Colorado outcomes); see also Anand Vaishnav, *Dissecting Bilingual Education's Poll Defeat; Movement Lacked Money, Message*, BOSTON GLOBE, Nov. 10, 2002, at B9 (discussing money that "bought advertisements that didn't tout the virtues of bilingual education but rather predicted bedlam if thousands of ill-prepared immigrant children flooded mainstream classrooms").

<sup>94</sup> Yettick, *supra* note 11.

<sup>95</sup> Hubler, *supra* note 90. Also, writers who had been involved in the pro-bilingual campaign attributed much of the defeat to the actions of the campaign itself, including

had a significant effect. An early poll had indicated seventy-eight percent support for the measure,<sup>96</sup> but by election day, only forty-four percent of the electorate voted for it.<sup>97</sup> Furthermore, while opponents of the measure in both Massachusetts and Colorado presented similar arguments, only those in Colorado included the additional argument about “chaos” in mainstream classrooms.<sup>98</sup>

Colorado and Massachusetts were two states facing the same issue: how to cope with immigration and how to educate immigrant children. Because this was an immigration issue, it was susceptible to decisionmaking based on emotional reactions rather than reasoned consideration of the issue. The atmosphere of direct democracy, with its emotional, divisive campaigns,<sup>99</sup> exacerbated this tendency. While one reason for Massachusetts’s passage of the initiative was the voters’ emotional reaction to pull the lever for anything that sounded like assimilation, the ad campaign in Colorado was able to play on other immigration-related emotional reactions—fear that the education of native citizens’ children would be compromised by overwhelming waves of immigrants—to reach the opposite outcome.

### C. *Uninformed Drafters and Voters Lead to Poor Education Policies*

While direct democracy generally presents problems with developing law and policy on immigration issues, the initiative process is particularly ill-suited to drafting specific language education policies. When education policy is created by initiative there are no require-

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legal strategies, educating the public, building coalitions, and factors such as timing and Ron Unz’s relative lack of presence in the state. Kathy Escamilla et al., *Breaking the Code: Colorado’s Defeat of the Anti-Bilingual Education Initiative (Amendment 31)*, 27 BILINGUAL RES. J. 357 (2003). Escamilla and her co-authors mention the large donation, but state that “it was only one of the many factors contributing to the defeat,” *id.* at 374, and mention the ad campaign only tangentially without any discussion of its possible effects, *id.* at 373.

<sup>96</sup> Hubler, *supra* note 90.

<sup>97</sup> Yettick, *supra* note 11. But Escamilla and her co-authors note that support had decreased from eighty percent to sixty percent before Stryker’s donation was announced. Escamilla et al., *supra* note 95, at 374.

<sup>98</sup> Owen Eagan, *Baseball, Apple Pie & English: Lessons from a Losing Campaign Against an “English Only” Ballot Measure*, CAMPAIGNS & ELECTIONS, Oct.–Nov. 2003, at 24, 28.

<sup>99</sup> See Bell, *supra* note 53, at 19 (“Appeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns.”); Bender, *supra* note 21, at 164 (noting that initiative media campaigns “tend to oversimplify issues and appeal to voter prejudice and emotion”); Magleby, *supra* note 47, at 44 (“By their nature, referendum campaigns appeal to passions and prejudices, spotlight tensions, and may foster even greater conflict and disagreement.”); Warner, *supra* note 55, at 83 (“Campaigns are marred . . . by oversimplification and appeals to prejudice . . .”).

ments that the drafters of the policy be experts or consult experts.<sup>100</sup> This can result in “half-baked, simplistic legislation.”<sup>101</sup> Furthermore, the voters approving the policy are also lay people, often uninformed about the particular issue before them. The essence of the problem was captured by a school superintendent, who complained, “Where we wouldn’t put a referendum that prescribes a method for practicing medicine or for building buildings for engineers or to build a bridge, we do it for teaching methods.”<sup>102</sup> Certain issues should be decided by professionals with expertise.<sup>103</sup>

Initiative ballots are also an inappropriate way to create education policy because the issues are too complex to be decided with only a “yes” or “no” vote.<sup>104</sup> Often, the best solutions to a complex problem allow for “fact finding, analysis, amendment, and compromise,”<sup>105</sup> and give decisionmakers “the opportunity to establish and

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<sup>100</sup> It is possible that small groups of people like Ron Unz, passionate about an issue and with plenty of money, will be able to educate themselves and become reasonably informed about the issue. While Ron Unz may have acquired a reasonable amount of information about the issue, however, his formal training is in theoretical physics, not education, and he has experience as a software entrepreneur, not as a teacher. See *supra* note 37. Those who have studied many aspects of education for years and who have a broad foundation of the variety of factors that can affect policy, and those who have actually worked with the affected children and know how the theories play out in practice, are probably more qualified to make policy (or at least to advise policymakers) than someone like Unz, acting on his own. See *infra* notes 115–17 and 128–45 for examples of the complex issues of which professionals in the field are likely to have a better understanding than individuals like Unz. Nevertheless, despite his lack of formal training, Unz actually drafted the initial California proposition. See *supra* note 37.

<sup>101</sup> Warner, *supra* note 55, at 81 (“[T]he [drafters] here, who actually draft the laws, are not generally well informed. Thus, the same problem that produces divisive and extreme legislation also produces half-baked, simplistic legislation.”).

<sup>102</sup> Kathleen Conti, *English Immersion Mandate Sinks In; Vote Disappoints School Officials*, BOSTON GLOBE, Nov. 10, 2002, at 1. There have been referenda on medical issues. Oregon, for example, put the question of physician-assisted suicide to the electorate. See Linda Greenhouse, *Assisted Suicide Clears a Hurdle in Highest Court*, N.Y. TIMES, Oct. 15, 1997, at A1 (discussing history of Oregon’s Death With Dignity Act, initially approved by referendum). However, the decision of *whether* a general type of procedure with general results should be permitted is quite different from a decision about *how to formulate and implement* a specific treatment. A referendum would not specify the precise treatment method for a particular form of cancer, because voters recognize that they simply do not have the medical expertise to make that type of decision.

<sup>103</sup> An education researcher in Colorado similarly said that Amendment 31, if it passed, would be the first time that a state mandated a *particular classroom practice*. Eric Hubler, *State Schools See ‘31’ As Poor Fit: Amendment Called too Denver-Specific*, DENVER POST, Oct. 29, 2002, at A1 (discussing comments of Kathy Christie, researcher for Education Commission of the States).

<sup>104</sup> See Magleby, *supra* note 47, at 44 (explaining that voters “may in fact favor the concept behind the initiative but object to some specific parts of the proposition”).

<sup>105</sup> Fountaine, *supra* note 68, at 743 (arguing that direct democracy is poor system because it does not have these characteristics and “[t]his type of discussion among the voters is . . . necessary to ensure that the best possible solutions are reached”).

evaluate all potential solutions.”<sup>106</sup> The initiative instead reduced a complex situation to an artificial binary choice<sup>107</sup>—either leave the bilingual education system, with its problems, in place, or jettison it completely.<sup>108</sup>

These aspects of ballot drafting combine with the emotional and misleading nature of initiative campaigns to produce particularly weak education policy. In the case of Massachusetts, the initiative campaign made it seem as though voters were deciding whether children should be taught English at all, when in fact the voters were implementing a particular *method* of teaching English—a decision better suited for experts in the field.<sup>109</sup> Some voters likely relied on this simplistic ad campaign rather than carefully reading the long ballot question that specified the method of instruction to be used in the state’s schools.<sup>110</sup> The campaign was called “English for the Children” with the slogan “Teach Kids English,”<sup>111</sup> thereby “fram[ing] the debate and distill[ing] it into a sound bite that no one could dispute. Who doesn’t want to teach kids English?”<sup>112</sup> Both TBE and English immersion aim to teach children English,<sup>113</sup> yet the way the campaign framed the question implied that a vote to maintain bilingual education was a vote against teaching children English.<sup>114</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> See Rhee, *supra* note 13, at 78–79 (“Bipolar measures such as initiatives and referenda, whose effects extend beyond a community and throughout a state, leave little ground for reasonable compromise.”).

<sup>108</sup> The California initiative was criticized under a similar rationale, that the vote demonstrated public dissatisfaction with the current system, not support for the proposed English immersion program. Lisa Ellern, *Proposition 227: The Difficulty of Insuring English Language Learners’ Rights*, 33 COLUM. J.L. & SOC. PROBS. 1, 2 (1999).

<sup>109</sup> See Gullixson, *supra* note 19, at 528 (complaining that “inexperienced voters are given the authority to set the educational method for the state’s LEP [limited-English proficient] children and abandon all other methods”); see also *infra* notes 111–12 and accompanying text (providing specific examples of way in which debate was framed).

<sup>110</sup> See *infra* note 119 (explaining that voters in direct-democracy campaigns are generally uninformed and rely on media sound bites); see also *supra* notes 68–73 (discussing media-driven nature of direct-democracy campaigns).

<sup>111</sup> Eagan, *supra* note 98, at 24.

<sup>112</sup> *Id.* (“Politically, supporting this issue was like saying you supported baseball and apple pie . . .”).

<sup>113</sup> Even people on opposing sides of the debate agree that it is important for immigrant children to learn English. See Gullixson, *supra* note 19, at 536 (“Both sides [Hispanics and the White majority] agree that English education is important for the state’s LEP children, but they differ on what they believe is the best means to achieve that end.”); *supra* notes 23–28 and accompanying text (describing different forms of language education and noting that fluency in English is goal of each).

<sup>114</sup> This reflects a common problem with direct democracy: The way the question is framed has an undue influence on the result. See Magleby, *supra* note 47, at 38 (“How campaigns have defined issues before the voters is probably the most important explanation of voting behavior on ballot questions.”); Conlin, *supra* note 47, at 1104 (“Initiative

The question was not whether or not to teach children English, but what was the best method of doing so. This involved complex pedagogical issues of which the average voter was probably not aware. For example, the typical voter may be unaware of the difference between “everyday” English that is used in ordinary social situations, and “academic” English, which entails more abstract and cognitive language skills necessary to succeed in school and understand, for instance, a math or science lesson.<sup>115</sup> It may take a child much longer to master academic English than everyday English,<sup>116</sup> but when people see that ELL children can communicate conversationally after a year, they may assume that the children are adequately prepared for English-speaking classes.<sup>117</sup> Voters also were not in a position to examine the confusing, contradictory empirical evidence about which language education programs are most effective.<sup>118</sup>

This decision should be made by experts qualified to evaluate these issues, rather than by lay voters inundated by a campaign that oversimplified issues into sound bites, a problem extensively noted with direct democracy.<sup>119</sup> Ron Unz appeared on the news making simplistic and hyperbolic statements, such as: “The bottom line is bilingual education has never apparently worked anywhere in the United States on a large scale in 30 years. . . .”<sup>120</sup> In Colorado, a proponent of the initiative referred to bilingual education supporters

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campaigns attempt to boil down complex issues into slogans that capture the interest and support of the voting public. Such sloganeering does little to foster public debate and understanding of the laws an initiative proposes, but much to influence the outcome of a vote.”).

<sup>115</sup> See GARCÍA, *supra* note 23, at 53–61 (“English ‘academic’ proficiency requires a mastery of a more extensive range of features than ‘everyday’ English.”).

<sup>116</sup> William N. Myhill, *The State of Public Education and the Needs of English Language Learners in the Era of ‘No Child Left Behind,’* 8 J. GENDER, RACE & JUST. 393, 411 (2004); see also Llana & Paulson, *supra* note 14 (discussing language-education teacher’s assertion that “students often pick up the oral skills first, but the nuances of academic lessons and writing elude them for much longer”).

<sup>117</sup> See Myhill, *supra* note 116, at 412 (asserting that conflation of these two types of proficiency is basis of one-year English-immersion programs).

<sup>118</sup> See *infra* notes 131–37 and accompanying text (discussing empirical evidence).

<sup>119</sup> See, e.g., Ellern, *supra* note 108, at 17 (explaining that “[b]allot initiatives generally allow an ill-informed electorate to make law,” and noting that some voters rely on “sound bites and billboards, and never develop an understanding of the laws in question”); Fountaine, *supra* note 68, at 739 (“Voters in a direct democracy generally do not possess the requisite understanding to make optimal governing decisions for two reasons: the complexity of the ballot issues and the lack of informative communication.”); Warner, *supra* note 55, at 83 (“Most people simply sign the petition after hearing a catchy slogan such as, ‘Do you want to stop importing infectious waste into our county?’” (citations omitted)).

<sup>120</sup> *The Osgood File: Efforts to End Bilingual Education in Colorado and Massachusetts on the Ballot* (CBS News television broadcast Nov. 5, 2002).

as “vampires who suck the blood out of our neighborhoods,”<sup>121</sup> demonstrating the emotional and unhelpful nature of the campaign. Bilingual education supporters threw around their own hyperbole, branding the initiative anti-immigrant and “antichildren,”<sup>122</sup> and even saying of Unz that “[h]alf of the words in his name say Nazi on it, and that says a lot.”<sup>123</sup> Some media sources presented more nuanced views,<sup>124</sup> but the campaign contained considerable hyperbole and oversimplification,<sup>125</sup> and this could have been some voters’ primary source of information.<sup>126</sup> Misleading campaign ads, combined with poorly informed drafters and voters and a divisive political campaign, create poor conditions for developing strong language education policies.

### III

#### THE FORM OF THE INITIATIVE: A UNIFORM STATE MANDATE

The initiative took the form of a uniform state mandate that required all children in all communities to be taught via the same method. This form is inappropriate for making language education policy for two reasons. First, there is heated disagreement about which methods of language education are most effective, which makes requiring all schools to use a certain method of instruction illogical. The lack of empirical consensus suggests that experimentation in the field of bilingual education is valuable, yet the initiative, as a mandate

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<sup>121</sup> Hubler, *supra* note 89.

<sup>122</sup> See, e.g., Greenberger, *supra* note 38 (quoting initiative opponent as stating, “There’s no way you can construe what Ron Unz is doing as anything less than anti-immigrant and antichildren”).

<sup>123</sup> Vaishnav, *supra* note 54. The remark was made by the executive director of the Hispanic Chamber of Commerce in a rally against the initiative. Other supporters of bilingual education disavowed the remark, which the speaker later retracted. *Id.*

<sup>124</sup> There were newspaper articles, for instance, that tried to set forth many sides of the story, and the *Boston Globe* ran a “Faces of Bilingual Education” series, showing the individual experiences of immigrant children in a variety of programs. E.g., Megan Tench, *English Success Stories on Both Sides of Debate*, BOSTON GLOBE, Nov. 3, 2002, at A36; Anand Vaishnav, *From Brazil to Brockton: A 2-Year Path to English*, BOSTON GLOBE, Nov. 3, 2002, at A36.

<sup>125</sup> A Massachusetts school superintendent also felt that the issue had been decided largely by catchy sound bites with loaded words like “segregation,” rather than by genuine understanding of the issues. Expressing his frustration, the superintendent remarked, “Who in their right mind, seeing that ‘kids are segregated into native language classrooms’ and that ‘the bilingual education system has failed,’ who in their sensible mind would say no to that?” Conti, *supra* note 102.

<sup>126</sup> See *supra* note 119 (explaining that voters in direct democracy campaigns are generally uninformed and rely on media sound bites); see also *supra* notes 68–73 (discussing media-driven nature of direct democracy campaigns).

for one uniform method of instruction, stifled that experimentation. Second, a uniform mandate meant that the law lacked the flexibility to recognize the interests at stake within the community.

A. *Lack of Scholarly Consensus About Effective Language Education Programs*

A fundamental problem with the Massachusetts initiative was that it mandated an instructional method without a basis of empirical support.<sup>127</sup> The one point on which everyone agrees is that children must learn English, but there is no academic consensus as to the most effective way to teach English.<sup>128</sup> Many scholarly studies show that some form of native language instruction is more effective, while others find no difference between native language and English language instruction, and very few scholarly studies have found English-only instruction superior.<sup>129</sup> Meanwhile, anecdotal accounts of the

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<sup>127</sup> The California initiative has been criticized for similar reasons. Ellern, *supra* note 108, at 2 (“[T]he initiative forced the implementation of an untried and poorly planned program.”); Gullixson, *supra* note 19, at 528 (“Because the relative effectiveness of these methods is still a matter of debate in the educational field, California voters should not have abandoned all programs, especially the effective ones, in favor of a single method . . .”).

<sup>128</sup> JAY P. GREENE, TOMÁS RIVERA POLICY INST., A META-ANALYSIS OF THE EFFECTIVENESS OF BILINGUAL EDUCATION 7 (1998), available at <http://ourworld.compuserve.com/homepages/JWCRAWFORD/greene.htm> (“[T]he unfortunate reality is that the vast majority of evaluations of bilingual programs are so methodologically flawed in their design that their results offer more noise than signal.”); Robert E. Slavin & Alan Cheung, *A Synthesis of Research on Language of Reading Instruction for English Language Learners*, 75 REV. EDUC. RES. 247, 273 (2005) (“The most important conclusion from research comparing the relative effects of bilingual and immersion programs for English language learners is that there are far too few high-quality studies of this question.”). The *Valeria G.* court also noted the complete disagreement about the effectiveness of bilingual education, explaining that “each side has submitted extensive evidence and arguments, including research studies and sometimes vehement expert opinions, that their education system is the better one. There is a legitimate policy debate among respected educators and scholars on this issue.” *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1015 (N.D. Cal. 1998).

<sup>129</sup> See, e.g., Llana & Paulson, *supra* note 14 (reporting claims of Johns Hopkins University education Professor Robert Slavin as to lack of empirical support for English-only education). One study that supports English immersion is Christine Rossell & Keith Baker, *The Educational Effectiveness of Bilingual Education*, 30 RES. TEACHING ENG. 7 (1996). Jay P. Greene then did an analysis of the studies reviewed by Rossell and Baker, concluding that out of seventy-five studies only eleven were methodologically acceptable for meta-analysis. Jay P. Greene, *A Meta-Analysis of the Rossell and Baker Review of Bilingual Education Research*, 21 BILINGUAL RES. J. 103 (1997). After completing this meta-analysis, Greene concluded that “the use of at least some native language in instruction for LEP students is more likely to help the average student’s achievement . . . than the use of only English . . .” *Id.* at 114–15.

merits of different programs vary wildly.<sup>130</sup> It is difficult to draw conclusions from the scholarly research because many studies have been attacked on the grounds of methodological problems<sup>131</sup> or biased interpretation,<sup>132</sup> and there is no solid empirical evidence supporting any method. The political nature of the issue also hinders unbiased scholarly research.<sup>133</sup>

Furthermore, it is difficult to assess which method is best because so much affects student success beyond method of instruction, such as teacher experience, enthusiasm and expectations, and parental involvement.<sup>134</sup> Dissatisfaction with many bilingual education programs may be due to general problems with the quality of certain school systems rather than with the particular language education

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<sup>130</sup> See, e.g., Kenneth Noonan, *English Immersion: A Convert Speaks Out*, PRINCIPAL, Sept.–Oct. 2002, at 72 (describing school superintendent who campaigned against California's proposition, but later said that "now I know from experience that English immersion, administered with determination, commitment, and good training, is even better [than bilingual education]"); Vaishnav, *supra* note 124 (describing positive experience of immigrant junior high school student with bilingual education).

<sup>131</sup> See, e.g., COLIN BAKER, FOUNDATIONS OF BILINGUAL EDUCATION AND BILINGUALISM 250 (3d ed. 2001) (describing several important language instruction studies and their criticism); LEE GUNDERSON, ENGLISH-ONLY INSTRUCTION AND IMMIGRANT STUDENTS IN SECONDARY SCHOOLS: A CRITICAL EXAMINATION 18 (2007) (criticizing large-scale, widely cited study by Wayne P. Thomas and Virginia Collier because authors "did not identify or describe any of the demographics related to the school districts nor provide enough information to allow the reader to evaluate whether or not their results are valid, reliable or accurate").

<sup>132</sup> GUNDERSON, *supra* note 131, at 18 (saying of Thomas and Collier study that "its dissemination by the National Clearinghouse for Bilingual Education adds the possibility that it is more a political document than an independent research effort"); see also N.Y. CITY Bd. OF EDUC., CHANCELLOR'S REPORT ON THE EDUCATION OF ENGLISH LANGUAGE LEARNERS 7 (Dec. 19, 2000), available at [http://schools.nyc.gov/daa/reports/chan\\_ELL\\_ed\\_report.pdf](http://schools.nyc.gov/daa/reports/chan_ELL_ed_report.pdf) ("Much of the research can be characterized as 'advocacy research,' lacking in scientific rigor. Methodological weaknesses in the research include lack of conceptual clarity, failure to control for important interactive factors such as students' socioeconomic status, inconsistency of programmatic approach and quality, and small sample sizes.").

<sup>133</sup> Llana & Paulson, *supra* note 14 (quoting Professor Slavin of Johns Hopkins University as saying, "This is so political, on both sides, that the evidence only enters in when it's used as a cudgel by either side"). The studies have also been described as "highly politicized and fatally ill with bias." Zabetakis, *supra* note 14, at 122 (quoting Don Terry, *Bilingual Education Faces Major Test in California*, N.Y. TIMES, March 10, 1998, at A2).

<sup>134</sup> BAKER, *supra* note 131, at 262–63 (describing factors that affect quality of bilingual education programs); see also HOFF, *supra* note 14, at 389 ("Another part of the evaluation problem is the fact that the nature of the programs varies enormously, depending not only on the state and the school district, but also on particular classroom teacher and the population served. This variability means that any general conclusion is likely to be misleading."); COMM. ON DEVELOPING A RESEARCH AGENDA ON THE EDUC. OF LIMITED-ENGLISH-PROFICIENT AND BILINGUAL STUDENTS ET AL., EDUCATING LANGUAGE MINORITY CHILDREN 58 (Diane August & Kenji Hakuta eds., 1998) [hereinafter COMM. ON DEVELOPING A RESEARCH AGENDA] (criticizing study for "noncomparability of sites").

method. The success of any language education program depends largely on how it is implemented.<sup>135</sup> Because of this, the research has moved away from fixating on the language of instruction and toward focusing on the general characteristics that make programs successful—the *quality* rather than the language of instruction.<sup>136</sup> It would be futile to mandate a particular method of instruction and expect success when the problem is not the method of instruction but the poor quality of the school system.

Finally, comparing the effectiveness of English immersion and bilingual education is difficult because the demarcation of language education into only two methods—those that use the native language and those that use English only—is overly simplistic. The field consists of a very diverse spectrum of programs with varying amounts of use of each language, contact with native speakers, and other features.<sup>137</sup> Given the inconclusive empirical evidence and dissatisfaction with current systems, school districts should be free to experiment within this spectrum to find the program that works best for their constituencies.

Furthermore, experimentation sometimes leads to successful programs, as can be seen with two-way programs.<sup>138</sup> These programs pro-

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<sup>135</sup> Ellern, *supra* note 108, at 15 (describing research that “supports the conclusion that success for ELL students does not depend on the educational model chosen but rather on the particular local implementation”); *see also* Zabetakis, *supra* note 14, at 122 (“[I]t is very difficult to control for the fact that education in large urban centers, where immigrant populations often reside, is generally worse than education in suburban areas.”).

<sup>136</sup> *See, e.g.*, BAKER, *supra* note 131, at 263 (arguing that researchers should “look at the conditions under which different forms of bilingual education become more or less successful”); COMM. ON DEVELOPING A RESEARCH AGENDA, *supra* note 134, at 61 (“[W]e see little value in continuing to focus evaluations on the question of which type of program is best. . . . The focus needs to be on the proper contexts in which a program component is most effective and conversely, the contexts in which it may even be harmful.”); Kendra Hamilton, *Bilingual or Immersion? A New Group of Studies Is Providing Fresh Evidence that It's Not the Language of Instruction that Counts, but the Quality of Education*, DIVERSE ISSUES HIGHER EDUC., Apr. 20, 2006, at 23 (noting that there is no conclusive evidence supporting superiority of either bilingual education or English immersion, and that quality of instruction, rather than method matters); Llana & Paulson, *supra* note 14, at 1 (“[E]ducators are divided about whether immersion or bilingual programs work best, and many are starting to focus on the quality of instruction rather than the type of program.”).

<sup>137</sup> *See, e.g.*, Ester de Jong, *Integrated Bilingual Education: An Alternative Approach*, 30 BILINGUAL RES. J. 23, 25–26 (2006) (exploring ways of having ELL children interact with native English speakers in settings other than English-only and two-way programs); Jeff MacSwan & Lisa Pray, *Learning English Bilingually: Age of Onset of Exposure and Rate of Acquisition Among English Language Learners in a Bilingual Education Program*, 29 BILINGUAL RES. J. 653, 664 (2005) (describing school district with four-level bilingual program, each increasing in amount of English as opposed to native language being used); *see also* SCHUCK, *supra* note 35, at 109 (noting that “hybrid forms of instruction are common”).

<sup>138</sup> *See supra* note 28 and accompanying text for an explanation of two-way programs.

vide a different paradigm through which to view language education:<sup>139</sup> While transitional programs see “children’s non-English language [as] something to be dispensed with, and transitioned out of, as quickly as possible,” two-way programs “adopt the position that non-English languages are resources for English learners and an enrichment for English speakers.”<sup>140</sup> These programs maintain the child’s native language connection to family and community while simultaneously mainstreaming the child with native English speakers. Such programs are popular among parents, and waiting lists are common.<sup>141</sup> Also, though it is difficult, for the reasons mentioned above,<sup>142</sup> to derive anything conclusive from existing studies, many studies have found high rates of academic achievement with two-way programs. For instance, one longitudinal study of several hundred students in eleven Spanish/English two-way programs found that, at the end of fifth grade, both native English and native Spanish speakers were performing well in speaking, reading, and writing in English,<sup>143</sup> and there are many other two-way program success stories.<sup>144</sup> It should be noted, however, that while the performance of English-speaking children on English-language tests does not suffer, there is less success in having English-speaking children become fluent in Spanish.<sup>145</sup> Finally, two-way programs have even been successful with low-income children who are often not well served by the school system more generally. In Massachusetts, for instance, all the eighth-

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<sup>139</sup> See Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687, 765 (2006) (“[Two-way] programs represent deliberate attempts to restructure a public sphere to adapts [sic] to society’s changing cultural characteristics.”).

<sup>140</sup> Patricia Gándara, *Learning English in California: Guideposts for the Nation*, in LATINOS: REMAKING AMERICA 339, 341 (Marcelo M. Suárez-Orozco & Mariela M. Páez eds., 2002).

<sup>141</sup> See, e.g., Sheila M. Shannon & Madeline Milian, *Parents Choose Dual Language Programs in Colorado: A Survey*, 26 BILINGUAL RES. J. 681, 681 (2002) (surveying parents in Colorado and finding that they “were overwhelmingly supportive of the dual language programs their children used”); Angelica Medaglia, *Bilingual Program Survives, and Parents Rejoice*, BOSTON GLOBE, July 24, 2003, at 1 (describing success of two-way program in Chelsea, Massachusetts, where “there is always a waiting list”).

<sup>142</sup> See *supra* notes 128–37 and accompanying text.

<sup>143</sup> DONNA CHRISTIAN ET AL., CTR. FOR RES. ON EDUC., DIVERSITY & EXCELLENCE, PROJECT 1.2 TWO WAY IMMERSION: FINAL PROGRESS REPORT 1–2 (2004), available at <http://www.cal.org/twi/CREDEfinal.doc>.

<sup>144</sup> See, e.g., GARCÍA, *supra* note 23, at 49 (describing two-way program in Cambridge, Massachusetts where study found that “children from fourth through eighth grades consistently performed at least as well as and often significantly better than control populations on standardized tests in both English and Spanish”); Ester J. de Jong, *Effective Bilingual Education: From Theory to Academic Achievement in a Two-Way Bilingual Program*, 26 BILINGUAL RES. J. 1, 3, 13 (2002) (describing successful two-way program in Framingham, Massachusetts).

<sup>145</sup> GARCÍA, *supra* note 23, at 49.

graders in one primarily low-income two-way program achieved passing scores on state standardized tests.<sup>146</sup> Two-way programs may not be the answer to this complex issue, but they are an example of the valuable experimentation that is stifled by uniform mandates,<sup>147</sup> experimentation that is particularly useful with regard to issues that implicate many hard questions with no easy answers.

### B. *The Initiatives Did Not Recognize the Interests at Stake*

#### 1. *The Many Groups with Interests in Language Education*

Many groups have strong interests in English language education and have a stake in how these policies are formed. One group consists of the children who are learning English as a second language, along with their families. These children must have access to a program that effectively teaches them English, which is crucial for many opportunities in the United States. How this teaching is approached will shape the child's identity<sup>148</sup> and her relationship to different cultures.<sup>149</sup>

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<sup>146</sup> Mara Estela Brisk, Op-Ed., *As You Were Saying . . . Scores, Popularity Make Case for Dual-Language Immersion*, BOSTON HERALD, July 20, 2003, at 22 (noting that one hundred percent of Latino eighth-graders in Framingham two-way program, many of whom are low-income, passed English language arts MCAS, and that Latino students in Cambridge, Boston, and throughout country consistently experience similar success). *But see* Matthew Bruun, *Board Won't Back Down: Bilingual Program Cut*, TELEGRAM & GAZETTE (Worcester, Mass.), June 20, 2006, at B1 (describing school committee's recommendation to discontinue two-way program because "[t]est scores showed the pupils enrolled were not meeting objectives," though parents wanted to keep program).

<sup>147</sup> In Massachusetts, two-way programs were actually permitted to continue operating after the initiative passed because the legislature amended the law, over Governor Romney's veto, and created an exception for two-way programs. Rick Collins, *Democrats: Romney Wrong About Veto Overrides*, PATRIOT LEDGER (Quincy, Mass.), July 17, 2003, at 9; *see also* MASS. GEN. LAWS ANN. ch. 71A, § 4 (West Supp. 2007) ("2-way bilingual programs . . . shall be unaffected.").

This move to amend the initiative was very controversial, suggesting that such an exception would not always be possible. For discussion of the controversy surrounding the amendments, *see* Collins, *supra*; Editorial, *Language Class for Romney*, BOSTON GLOBE, July 16, 2003, at A18; Editorial, *Immersion at Risk; Arrogance to Blame*, BOSTON HERALD, July 16, 2003, at 22; Brisk, *supra* note 146. Also, even though two-way programs were saved in Massachusetts, other experimental and possibly successful programs may not be given a chance.

<sup>148</sup> *See* Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 140 (2001) ("A common refrain of sociolinguistics is that language and identity formation are intimately linked.").

<sup>149</sup> *See id.* at 209 ("[I]n the public schools, where inculcating self-esteem and forging civic identity represent important pedagogical concerns, the status implications of linguistic difference are at their most serious.").

Language education policies also affect the child's retention of her native language and relationship to her family and community.<sup>150</sup>

Another group with interests at stake are native English-speaking children and their parents. These parents may be concerned that their children, some of whom may have a variety of special needs, will not receive adequate attention from classroom teachers unprepared for and overwhelmed by the language needs of ELLs.<sup>151</sup> Also, many parents of native English speakers passionately want their children to be part of two-way programs.<sup>152</sup>

Minority groups also have an interest in the bilingual education debate because language is often integral to a group's cultural identity.<sup>153</sup> Education "represents the chief survival mechanism for a language, because in the educational context, a language's fate is sealed."<sup>154</sup>

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<sup>150</sup> For instance, it has been argued that if a school system devalues the child's native language, she may come to see the native language as "inferior," which has an impact on family relationships, as children "becom[e] Americans by learning how to be ashamed of [their] parents." CHARLES E. SILBERMAN, *CRISIS IN THE CLASSROOM: THE REMAKING OF AMERICAN EDUCATION* 58 (1970) (quoting LEONARD COVELLO, *THE HEART IS THE TEACHER* 44 (1958)). Language education policies also affect children's retention of their native language, which, in turn, can affect parents' ability to transmit cultural and social values to their children, as well as the basic communication necessary for an ordinary parent-child relationship. Lily Wong Fillmore explains:

When parents are unable to talk to their children, they cannot easily convey to them their values, beliefs, understandings, or wisdom about how to cope with their experiences. They cannot teach them about the meaning of work, or about personal responsibility, or what it means to be a moral or ethical person in a world with too many choices and too few guideposts to follow.

Lily Wong Fillmore, *When Learning a Second Language Means Losing the First*, in *THE NEW IMMIGRATION* 289, 304 (Marcelo M. Suárez-Orozco et al. eds., 2005).

<sup>151</sup> The laws aim for mainstreaming after only one year of special instruction, and this is often not enough time for a child to be ready for the mainstream classroom. *See supra* notes 116–17 and accompanying text. The teacher may thus be overwhelmed by children not ready for her classroom and may also not be trained to work with ELLs. *See, e.g.*, Russell W. Rumberger & Patricia Gándara, *Seeking Equity in the Education of California's English Learners*, 106 *TCHRS. C. REC.* 2032, 2039–40 (2004) (discussing lack of professional development, training, and guidance as teachers tried to implement new English-immersion mandate in California).

<sup>152</sup> This can be seen in the fight to exempt two-way programs from the general ban on native language instruction, *see supra* note 147, the massive donation by the mother of a child in a two-way program to bilingual education supporters fighting the initiative in Colorado, *see supra* note 89, and the waiting lists for many of these programs, *see supra* note 141 and accompanying text. *See supra* note 28 and accompanying text for an explanation of two-way programs.

<sup>153</sup> *See* Rodríguez, *supra* note 148, at 141 ("[Language] defines the essence of cultural identity . . ."); Josiane Deschamps Abel, Comment, *Language, Nationality, and the Law: What Lies Ahead for America?*, 34 *U. MIAMI INTER-AM. L. REV.* 343, 345 (2003) (describing "connection between language and cultural identity").

<sup>154</sup> Rodríguez, *supra* note 139, at 758.

Another group is the local community, with its distinct culture and values, which will want to express these values through its education policies. The cultures and makeup of communities throughout a state can vary widely, and what is appropriate for one community may not be appropriate for another. Consider New York: A policy that is appropriate for urban Manhattan is unlikely to work well in the many suburban and rural areas in other parts of the state. The interests of local communities also overlap with the interests of minorities, as different minority groups may be concentrated in different communities.

A final interest is the public democratic interest in preparing children for citizenship. This interest is highly relevant to the bilingual education debate because public schools play a major role in this preparation.<sup>155</sup> Massachusetts law explicitly recognizes this in the requirement that all public schools teach “American history and civics . . . for the purpose of promoting civic service . . . and of fitting the pupils . . . for the duties of citizenship.”<sup>156</sup> Because the state-run, taxpayer-financed school system plays such a major role in shaping the views of the citizenry, “the people” should have a voice in what occurs within this system, even if their children are not directly affected by a particular policy.

Questions regarding the educational system will always be important, but those involving immigrants touch on even more “fundamental societal issues.”<sup>157</sup> The way a state or community approaches teaching English to immigrant children is bound up with ideas about the nature of citizenship, assimilation, diversity, and minority cultures. These are fundamental issues that go to the heart of the nature of society, and in a democracy the resolution of these issues should have at least some input from the citizenry.

## 2. *The Initiative Fails to Recognize These Interests*

The Massachusetts initiative and the similar proposals in other states were not capable of accommodating these varied interests. The nature of direct democracy, where a simple majority wins, means that

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<sup>155</sup> See Ford, *supra* note 79, at 1308 (claiming that education teaches children “the values and ethics of citizenship in a liberal democracy”).

<sup>156</sup> MASS. GEN. LAWS ANN. ch. 71, § 2 (West 1996).

<sup>157</sup> Rhee, *supra* note 13, at 35–36. Rhee explains some of the questions implicated in making language education policy:

What types of civic values do we, as Americans, want our education system to foster? Are communities and ethnic groups entitled to decide that question for their own children—in a manner different from that of the rest of society? To what extent are group rights, such as language rights and the right to “preserve one’s culture” feasible?

*Id.*

smaller groups such as minorities and individual families can have little impact on the policy that is implemented. Also, these initiatives took the form of a law that mandated a particular method of instruction for all communities and all children, leaving no room for individual communities and families to choose programs that work better for them.

Because language education policies have a profound impact on ELL children and their families, there should be some parental choice in selecting these formative programs.<sup>158</sup> Some immigrant families, particularly among certain ethnic groups, do prefer English-immersion programs.<sup>159</sup> In fact, the impetus for the original Unz initiative in California came from the story of a group of Latino families who were denied a request to move their children from primarily Spanish-language instruction into an English-language setting, and who pulled their children out of school for two weeks in response.<sup>160</sup> But there is a difference between allowing parents to choose English immersion from an array of programs offered and mandating that all ELLs be placed in those programs. While virtually all immigrant parents want their children to learn English,<sup>161</sup> choice gives them more access to programs that may work better for their families, particularly when there is concern about the impact of the loss of native languages on family relationships.<sup>162</sup> Debates continue over whether maintenance of native languages should be the role of the public school system. Some argue that this should instead be the role of the home or

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<sup>158</sup> See *id.* at 81 (“While it is difficult to prove that parents consistently make better decisions than government or education officials, parents should have a voice in decisions on issues of language, culture, and identity.”).

<sup>159</sup> See SCHUCK, *supra* note 35, at 120 (“English immersion is strongly favored by many parents, especially Russians and others who are less eager to retain their ties to the mother country.”).

<sup>160</sup> Thomas F. Felton, Comment, *Sink or Swim? The State of Bilingual Education in the Wake of California Proposition 227*, 48 CATH. U. L. REV. 843, 864 (1999).

<sup>161</sup> See, e.g., Marcelo M. Suárez-Orozco, *Global Shifts: U.S. Immigration And The Cultural Impact Of Demographic Change, An Address*, 179, 184 (Federal Reserve Bank of Boston Conference Series 46), available at <http://www.bos.frb.org/economic/conf/conf46/conf46f.pdf> (“[W]e have yet to meet a parent who tells us that he does not want his daughter to learn English . . .”).

<sup>162</sup> For instance, some families may prefer a two-way program that allows children to maintain native language skills while learning English and interacting with mainstream English-speaking children. Another option is simply waiting until a child is old enough to have solidly mastered the native language; preschoolers, for instance, may be vulnerable to losing their native language if placed in intensive English environments. Fillmore, *supra* note 150, at 305 (“The problem is timing, not English. The children have to learn English, but they should not be required to do so until their native languages are stable enough to handle the inevitable encounter with English and all it means.”).

minority institutions,<sup>163</sup> and some parents may prefer that their children be in intensive English-only environments from the beginning,<sup>164</sup> but when the effects of a school program have profound impacts on children and families, there should be more parental choice.<sup>165</sup>

Complete parental choice is not a realistic possibility. Often, there will not be enough teachers or students who speak a particular language to implement all types of programs using native-language instruction, especially with regard to languages less common than Spanish. Also, by virtue of being part of the community and sending the child to public school, the parent must sacrifice some choice. The system would fall apart if each parent attempted to dictate the precise methods by which her children should be taught in each subject.<sup>166</sup> But some measure of choice is necessary, and the Massachusetts law and other similar proposals, by mandating one method of instruction, do not offer any choice for parents.<sup>167</sup>

The interests of minority groups were also not recognized by the initiative.<sup>168</sup> The Latino population of Massachusetts was the

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<sup>163</sup> See, e.g., SCHUCK, *supra* note 35, at 114 (“The cultural maintenance argument for bilingual education most unsettled those . . . who favored a vision of multiculturalism that respects and tolerates the cultures of origin . . . but that leaves the task of defining and transmitting those cultures to families and private institutions, not to government . . .”). Fillmore also explains that even when intensive English programs are started *after* children have completely mastered their native language, it is important that the parents continue to speak the native language to children at home. Fillmore, *supra* note 150, at 305–06.

<sup>164</sup> See Ford, *supra* note 79, at 1323–25 (describing “parental resistance to bilingual education”). Ford offers a possible explanation for this phenomenon:

Parental resistance to bilingual education suggests that many Latino parents . . . do not expect the public schools to promote ethnic pride or preserve ethnic cultural difference . . . . Rather they expect the public schools to [provide] the skills and socialization necessary for success in the mainstream of American society.

*Id.*

<sup>165</sup> The Massachusetts program does provide for parents to obtain waivers to exempt their children from the English immersion requirement, but these waivers do not give parents any genuine choice—it allows them to *request* a different program for their children, but the ultimate decision rests with school officials. MASS. GEN. LAWS. ANN. ch. 71A, § 5 (West Supp. 2007). The waiver requirements can be difficult to meet, particularly for younger children who do not already speak English, who must show “special and individual physical or psychological needs” above and beyond not speaking the English language. *Id.*

<sup>166</sup> See Rodríguez, *supra* note 139, at 764 (“[A]cknowledging that parents have an interest of constitutional dimension at stake is not inconsistent with the conclusion that decisions about the types of programs to adopt in a given district must involve decision makers other than parents.”).

<sup>167</sup> Johnson & Martinez, *supra* note 19, at 1253 (arguing that California’s law “flies in the face of [the] nation’s firm tradition of protecting fundamental family decisions, such as the type of education the children receive, from governmental interference”).

<sup>168</sup> This may seem inconsistent with the assertion that extremist groups are more readily able to pass measures via initiative than through the legislature. The argument here, how-

minority group most directly affected by the initiative, as children whose native language is Spanish make up slightly more than half of Massachusetts's ELL population.<sup>169</sup> Yet, exit polls indicated that 91.7% of Latinos voted *against* Question 2.<sup>170</sup> This figure does not even take into account the views of noncitizens unable to vote. Latinos as a group may have been very interested in the issue, as indicated by voter turnout for the 2002 election,<sup>171</sup> but they made up only 5.6% of voters,<sup>172</sup> and were therefore unable to have any real impact on the outcome.

Local communities were another group whose interests were not adequately addressed by the initiative process and the statewide mandate it implemented. In a state with many diverse communities, it is unlikely that a statewide mandate will serve each appropriately,<sup>173</sup> and a strong win on the statewide level masks the opposition of individual communities to the measure. For instance, the town of Amherst was so strongly opposed to the English-immersion mandate that it sought exemption from the new law in order to maintain its bilingual education programs.<sup>174</sup> This was also an issue in Colorado, where educators felt that the failure of bilingual education applied to Denver schools, but not to schools in other parts of the state.<sup>175</sup> The initiative process denies communities input into the development of policies, and the initiative's form as a statewide mandate denies them the freedom to respond to the culture of their constituencies.

Finally, the initiative process does not serve the democratic interest of the general public. Direct democracy, through its media

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ever, is quite different. Even if a particular small group is able to use the peculiarities of the initiative process to pass an extreme measure, the "majority rules" nature of initiatives means that other minority groups, and any group that cannot command fifty percent of the vote, do not have any say in the matter.

<sup>169</sup> MASS. DEP'T OF EDUC., ENGLISH LANGUAGE LEARNERS, <http://www.doe.mass.edu/ell/statistics/lep.html> (last visited June 9, 2007) (showing that nearly fifty-five percent of ELL students spoke Spanish as first language as of March 2005).

<sup>170</sup> Hayward, *supra* note 34; *see also* Ramon G. McLeod & Maria Alicia Gaura, *Prop. 227 Got Few Latino Votes; Early Polls Had Claimed More Minority Support*, S.F. CHRON., June 5, 1998, at A19 (noting that, in California, "Latinos voted heavily against the bans on bilingual education"); Yettick, *supra* note 11 ("Most Hispanic voters opposed the amendment in both states [Massachusetts and Colorado].").

<sup>171</sup> *See* Cindy Rodriguez, *Activists Encouraged by Turnout of Latinos*, BOSTON GLOBE, Nov. 9, 2002, at B1 (reporting that voter turnout rates in Worcester and Chelsea were double rate in 1998 and that Latino voter turnout increased forty-one percent in Boston).

<sup>172</sup> *Id.*

<sup>173</sup> Rhee, *supra* note 13, at 82 ("Uniform policies inevitably cause friction, with communities resenting the imposition of programs that fail to adequately recognize their cultures.").

<sup>174</sup> Anand Vaishnav, *Amherst Bilingual Education Backers Still Battling*, BOSTON GLOBE, Nov. 19, 2002, at B1.

<sup>175</sup> Hubler, *supra* note 103.

campaigns and misleading characterizations of the proposal, often results in people casting a vote contrary to their actual preferences on an issue.<sup>176</sup> Because the Unz initiatives do not adequately take into account the interests of individual children and their families, local communities, and the general public, an alternative process must be used to reform language education policy.

#### IV

#### WHERE DO WE GO FROM HERE?

Massachusetts's experience demonstrates why the Unz initiatives should not be used to address the complex challenges associated with developing language education policy. It is thus important to look for decisionmaking processes better equipped to decide this issue. It is beyond the scope of this Note to fully evaluate options or to set forth a detailed plan for how decisionmaking power should be allocated. However, it may be helpful to identify characteristics of a decision-making process that would address some of the problems identified here.

One idea for a more promising process comes from a plan adopted by the Massachusetts legislature in an attempt to reform the language education system just months before the initiative was put to the voters. This plan allowed school districts to offer programs from many points across the language education spectrum,<sup>177</sup> required offering more than one type of program where there were a sufficient number of students,<sup>178</sup> and allowed parents to choose from among the options offered by the district.<sup>179</sup> Where there were more than twenty ELLs in any one language group, districts were required to form a Parent Advisory Council that would "advis[e] the school district . . . [and] meet[ ] regularly with school officials to participate in the planning, development, implementation and evaluation of the district plan . . . ."<sup>180</sup> This type of decisionmaking process gives a great deal of

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<sup>176</sup> Magleby, *supra* note 47, at 38–39 ("Previous research has demonstrated that significant numbers vote in ways inconsistent with their preferences on the issue generally.").

<sup>177</sup> Eligible programs included transitional bilingual education, English immersion, two-way programs and English-as-a-second-language (ESL). Act of Aug. 6, 2002, ch. 218, § 16, 2002 Mass. Acts 785; *see also* National Conference of State Legislatures, Bilingual Education: Chart, <http://www.ncsl.org/programs/educ/bilingualedchart.htm> (last visited June 9, 2007) [hereinafter Bilingual Education Chart].

<sup>178</sup> Act of Aug. 6, 2002, ch. 218, § 16, 2002 Mass. Acts 785–86 (requiring districts to offer at least two ELL programs where there are "50 or more limited English proficient students in any one language group").

<sup>179</sup> *Id.* § 18, 2002 Mass. Acts 791–92. Parents may choose from among the ELL programs, or may have their children placed in a mainstream classroom. *Id.*

<sup>180</sup> *Id.*

freedom to the local school district, but the state legislature will probably always retain some role.<sup>181</sup> In the Massachusetts proposal, this role included writing provisions about teacher qualification and student assessment, and setting time limits for the number of years a student could spend in ELL programs.<sup>182</sup> The role for the state government may also be to research and provide information about best practices,<sup>183</sup> to ensure that districts provide a variety of options in language education, or to set certain standards that must be met, without impinging on the school's institutional expertise by prescribing the *method* of meeting those standards.<sup>184</sup>

A decisionmaking process of this type has the potential to remedy, at least partially, many of the problems identified with the Unz initiatives. First, the local school districts would be free to experiment,<sup>185</sup> something particularly important in light of the confused and contradictory empirical evidence on this topic. Next, the smaller, more flexible local unit would be better able to accommodate the multiple groups with an interest in language education policy.<sup>186</sup> The proposed Massachusetts plan would give parents choice among programs offered by a district, and a Parent Advisory Council also would give parents a voice in developing policy regarding which programs are

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<sup>181</sup> Also, when the legislature, rather than the general public, plays the role of the centralized decisionmaker, one avoids many of the problems associated with direct democracy and minorities. See *supra* notes 51–75 and accompanying text on why legislatures better protect minorities.

<sup>182</sup> Bilingual Education Chart, *supra* note 177. This particular plan may not present the ideal role for the legislature, since the time limits in ELL classes and certain assessment models may disfavor districts that adopt programs with an emphasis on native language maintenance.

<sup>183</sup> See SCHUCK, *supra* note 35, at 121 (arguing that this should be role of federal government). Gullixson also supports the idea of significant freedom for local districts with an advisory role for state government:

Rather than politicizing the issue and dictating one method of education for all of California's LEP students, the State Board of Education should have encouraged schools to improve the effectiveness of English education in all existing programs for LEP students and to learn from successful programs in similarly situated districts.

Gullixson, *supra* note 19, at 528.

<sup>184</sup> See *Town's Bilingual Classes Hailed*, BOSTON GLOBE, Oct. 28, 2001, at 4 (quoting superintendent as saying, "We should be free to use whatever methods we want to reach the standards set by the state"). This, however, also has problems, because even standards can disfavor districts that emphasize native language maintenance if the standards focus on very quick acquisition of English.

<sup>185</sup> See SCHUCK, *supra* note 35, at 121 ("Washington should leave school districts and individual schools free to experiment with different methods of teaching English to immigrant children.").

<sup>186</sup> Rhee, *supra* note 13, at 81 ("Local administration would recognize the importance of community and parental input . . .").

offered.<sup>187</sup> More flexible and participatory local processes also would give minority groups a greater voice, and because different minority groups may be concentrated in different areas, local school districts could accommodate the varying needs and desires of the groups in their communities. Local decisionmaking also generally allows each community to develop the solutions appropriate for it,<sup>188</sup> responding to the culture and values of a particular place. This process also would satisfy the public, democratic interest in defining shared values and the role of the school system—it just does so primarily at the smaller community level.

This Note proposes that decisions be made by a panel of local school administrators and parents (both of ELLs and of native English speakers). This panel would be able to consider a variety of potential solutions and to develop a program that works for its community, rather than face the artificial binary choice presented by a ballot question. The panel could study the language education issue closely, ideally with advice from experienced educators who are aware of the many complex issues affecting language education. Public hearings could help the panel become more aware of community preferences.<sup>189</sup> This more reasoned and sophisticated decisionmaking process is preferable to the voter initiative.

This type of decisionmaking process would have its shortcomings as well. Realistically, there will always be limited choices for students in areas with few immigrants or immigrants who speak less common native languages. There simply will not be enough teachers or students speaking a particular native language to implement all types of programs. Also, even when decisionmaking is delegated to the school district level, there will be districts that encompass a variety of communities,<sup>190</sup> and it would be difficult there to implement a policy that

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<sup>187</sup> In addition, it may be best to give parents more choice with some form of vouchers. See SCHUCK, *supra* note 35, at 121–23. Schuck proposes giving parents vouchers for use in any program, public or private, and explains a variety of reasons why he believes that using vouchers for the limited purpose of bilingual education would avoid many of the issues that make educational vouchers such a controversial topic. *Id.*

<sup>188</sup> Rhee, *supra* note 13, at 81 (finding that local decisionmaking “acknowledge[s] that there are no blanket solutions to the complex issues raised by bilingual education programs”).

<sup>189</sup> This would also help serve the interests of minority groups and the public democratic interest. The Massachusetts plan required public hearings on district plans where there were “20 or more limited English proficient students in any 1 language group.” Act of Aug. 6, 2002, ch. 218, § 17, 2002 Mass. Acts 786–89.

<sup>190</sup> Take, for instance, the New York City public schools, whose Board of Education must manage a vast array of schools in very different types of neighborhoods. See New York City Department of Education, Organization of the DOE, <http://schools.nyc.gov/Administration/Organization+of+the+DOE/default.htm> (last visited July 9, 2007) (noting

appropriately serves the needs of the entire region. Even within a smaller community, residents may vehemently disagree about the best course of action.

Furthermore, any given community may be less accommodating to immigrants than the state as a whole, whether it is a community with very few immigrants made vulnerable by their small number, or a community experiencing a sudden and dramatic influx of immigrants and the accompanying social and cultural changes. When these emotions are present in society, they can manifest themselves in decision-making both by the general electorate and school administrators. However, the environment of direct democracy has the potential to exacerbate and appeal to these tendencies, while a local, nuanced decisionmaking process that incorporates the input of affected parents may help to contain that reaction.

#### CONCLUSION

There is a tremendous amount at stake in the language education debate, and it is essential that the appropriate decisionmakers set language education policy. The recent trend of using direct democracy to impose uniform statewide mandates not only fails to develop strong policies, but it also exacerbates the emotional dimension that infuses immigration politics. A better system would give more freedom to local school districts to develop policies appropriate for their communities, while giving parents more input in the development of programs and more choice in the placement of their own children.

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that New York City school system includes “10 Regions across the city—each of which includes approximately 120 schools”).