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## PROPOSITION 227: A BURNING ISSUE FOR CALIFORNIA'S BILINGUAL STUDENTS\*

### INTRODUCTION

The past decade has brought increased immigration, and, with it, an increased education of children who are not proficient in English. From the 1980s to the 1990s, immigration to the United States rose by thirty-three percent.<sup>1</sup> California has been a primary destination for many of these immigrants.<sup>2</sup> Although it is often praised as the "multihued model of an ever-changing America,"<sup>3</sup> California also illustrates the social division and volatile politics that can arise when many cultures come together in one society.<sup>4</sup> Currently, bilingual education is a burning issue on California's agenda. Tensions caused by cultural change, diverse demographics, and an increase in immigrants from the Third World fuel the unabated controversy on bilingual education.

Bilingual education is "a general instructional method that teaches students English while at the same time ensuring that they learn core academic subjects, like science, math, and social studies, through supplemental instruction in their primary language until they have mastered enough English to learn in English alone."<sup>5</sup> A bilingual program is a transitional approach which concentrates on mainstreaming Limited English Proficiency ("LEP") students.<sup>6</sup>

Proponents of bilingual education generally support bilingual programs as the most effective way to teach English to LEP students.<sup>7</sup> Some English-only advocates, however, contend that bilingual education defies the "melting pot" tradition because it "threatens to sap our sense of national identity and divide us

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\* Research assistance for this Note was provided by Maribel Medina, an Associate at Richards, Watson & Gershon of Los Angeles, California.

<sup>1</sup> See Gi Hyun An, *The Right To Bilingual Education: Providing Equal Educational Opportunity For Limited English Proficiency Children In A Pluralist, Multicultural Society*, 11 GEO. IMMIGR. L.J. 133, 134 (1996).

<sup>2</sup> See Martha Jimenez, *The Educational Rights of Language Minority Children*, in LANGUAGE LOYALTIES 243 (James Crawford et al. eds., 1992).

<sup>3</sup> Jonathan Peterson, *Clinton to Take On Race Divisions*, L.A. TIMES, June 14, 1997, at A9.

<sup>4</sup> See *id.*

<sup>5</sup> Mexican American Legal Defense and Educational Fund ("MALDEF"), *Questions & Answers on the Unz Initiative*, 1 (Sept. 19, 1997) [hereinafter Questions and Answers].

<sup>6</sup> See Sonja Diaz-Granados, *How Can We Take Away A Right That We Have Never Protected: Public Education And Immigrant Children*, 9 GEO. IMMIGR. L.J. 827, 831 (1995). See also Proposition 227, English Language for Immigrant Children, CAL EDUC. CODE § 306(a) (June 2, 1998) [hereinafter Proposition 227] (defining a Limited English Proficiency student as "a child who does not speak English or whose native language is not English and who is not currently able to perform ordinary classroom work in English").

<sup>7</sup> See Questions and Answers, *supra* note 5, at 6.

along ethnic lines.”<sup>8</sup> Moreover, English-only advocates fear that government acknowledgment of minority languages “‘sends the wrong message’ to immigrants, encouraging them to believe they can live in the U.S.A. without learning English or conforming to ‘American’ ways.”<sup>9</sup>

These concerns have spurred calls for English-only policies in schools and have made bilingual education a target of political attacks. One of the most serious current attacks on bilingual education in California is Proposition 227. This proposition, formerly known as the “English for the Children” initiative, and later the “Unz Initiative,” is backed by former GOP gubernatorial candidate Ron Unz.<sup>10</sup> It proposes to eliminate required bilingual education and all other English language development programs in public schools that use primary language to supplement academic instruction, leaving the decision to offer such programs to the local school districts.<sup>11</sup> One aim of Proposition 227 is to teach children English “as rapidly and effectively as possible.”<sup>12</sup>

The initiative imposes a “one-size-fits-all” approach that places students in the same classroom with other students of similar English fluency.<sup>13</sup> This one-year structured English immersion approach requires placing LEP students of various native languages, ages, and grade levels together in one classroom.<sup>14</sup> After the year, students will be one year behind their peers academically, and will be transferred to all-English classrooms regardless of whether they have mastered English.<sup>15</sup> This is referred to as a “sheltered English immersion” program.

The results of Proposition 227 “could prove disastrous for California’s 1.3 million students with limited English skills.”<sup>16</sup> This initiative has generated an explosive debate rivaling those surrounding Propositions 209 and 187.<sup>17</sup> Many

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<sup>8</sup> James Crawford, *Bilingual Education* (visited Oct. 4, 1997) <<http://ourworld.compuserve.com/homepages/JWCrawford/billing.htm>>.

<sup>9</sup> *Id.* See also Mark Z. Baraba, *GOP Bid to Mend Rift with Latinos Still Strained*, L.A. TIMES, Aug. 31, 1997, at B2 (quoting Ron Unz, who stated that his own grandparents “came to California in the 1920s and 1930s as poor European immigrants . . . [who] came to work and become successful . . . not to sit back and be a burden on those who were already here!”).

<sup>10</sup> See *Mend, Don’t End Bilingual Education*, S.F. CHRON., Sept. 21, 1997, at 8.

<sup>11</sup> See *id.*

<sup>12</sup> Proposition 227, *supra* note 6, § 300(f).

<sup>13</sup> See Mexican-American Legal Defense and Educational Fund (MALDEF), *Preliminary Section-By-Section Analysis of Unz Initiative*, 1, 4 (Sept. 19, 1997) [hereinafter *Preliminary Analysis*].

<sup>14</sup> See *id.* at 4.

<sup>15</sup> See *id.* at 6.

<sup>16</sup> James Crawford, *Anti-Bilingual Education Initiative in California* (visited Oct. 4, 1997) <<http://ourworld.compuserve.com/homepages/JWCrawford/Unz.htm>>.

<sup>17</sup> See Nanette Asimov, *Foes of Bilingual Education Encounter Hostile Crowd at UC Berkeley*, S.F. CHRON., Oct. 22, 1997, at A16. See also Joseph Perkins, *Coming Down On the Right Side of the Bilingual Education Issue*, SAN DIEGO UNION-TRIB., Oct. 17, 1997, at B7. Proposition 209, the ‘California Civil Rights Initiative,’ “prohibited discrimination or preferential treatment in state employment, education and contracting.” *Id.* Proposition

Latinos in California condemn the initiative, coming on the heels of Propositions 187 and 209, as an anti-immigrant backlash, and the third assault on California's growing minority population in as many elections.<sup>18</sup>

Part I of this Note analyzes the development of bilingual education policies on the federal and state levels, specifically in California. Part II explores the legal implications of Proposition 227. Part III analyzes the social policy issues of Proposition 227. Part IV presents an alternative approach to overcoming the language barrier. This Note ultimately concludes that Proposition 227 is an extreme measure that is based on popular fallacies about education and bilinguals and that it fails to provide to LEP students the equal educational opportunity guaranteed under federal law.

## I. DEVELOPMENTAL ANALYSIS OF BILINGUAL EDUCATION POLICIES

### A. *The Development of Federal Law on Bilingual Education*

#### 1. The Bilingual Education Act of 1968

The principle that "all children in the United States should have the right to an equal education" was once interpreted to mean that schools merely had to provide the same books, curriculum, and teachers to LEP students that they provided to English-speaking students.<sup>19</sup> Under the Civil Rights Act of 1964, school districts receiving federal funds were prohibited from discriminating on the basis of race, color, or national origin, but were not explicitly required to teach in any language other than English.<sup>20</sup> Therefore, if a school board provided identical instruction to all children, it would not be held to have discriminated, even if the LEP children failed to understand the language and fell behind academically.<sup>21</sup> As a result, LEP children were left to "sink or swim" in English-only classrooms.<sup>22</sup> This meaningless educational experience drove many LEP students to drop out of school.<sup>23</sup> Alarmed by the high drop-out rate of Latino children and concerned about the self-image and academic performance of these students, educators, judges, policymakers, legislators, and civil rights activists fought for

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187, the 'Save our State' initiative, "made undocumented immigrants ineligible for welfare and other social services, public health care (except in emergencies), and gratis education in California public schools." *Id.*

<sup>18</sup> See *Mend, Don't End Bilingual Education*, *supra* note 10 (quoting Theresa Bustillos of the Mexican American Legal Defense who stated "[f]or Latinos, we see this as three in a row").

<sup>19</sup> Jimenez, *supra* note 2 (stating that "[i]f children failed to understand the language of the classroom and fell behind their peers, that was unfortunate, but it was not illegal").

<sup>20</sup> See 42 U.S.C. § 2000(d) (1976).

<sup>21</sup> See Jimenez, *supra* note 2, at 243.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

federal intervention in schools.<sup>24</sup>

To remedy the injustice of this situation, several school districts with large immigrant populations experimented with bilingual programs in the early 1960s.<sup>25</sup> New federal programs like Title VII of the Elementary and Secondary Education Act of 1968, known as the Bilingual Education Act, provided funds for schools with large numbers of students from low-income families,<sup>26</sup> encouraging schools to establish Transitional Bilingual Programs.<sup>27</sup>

The Bilingual Education Act, however, did not grant LEP children a universal right to instruction in their native language.<sup>28</sup> The purpose of the Act was to "encourage," rather than "mandate," the implementation of bilingual programs through federal financial assistance.<sup>29</sup> The requirement for bilingual instruction applied only to school districts that received funding under the Bilingual Education Act.<sup>30</sup> Nevertheless, the Act promoted further research and experimentation and triggered a national commitment of political will and financial resources to serving the needs of LEP students.<sup>31</sup>

The Bilingual Education Act was scheduled to expire in 1983; but, after negotiations, the Act was revised and enacted as Title II of the Education Amendments of 1984.<sup>32</sup> However, rather than explicitly granting a legal right to bilingual education, the Act merely set aside funds for exploring "alternate methods of education."<sup>33</sup>

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<sup>24</sup> See Diaz-Granados, *supra* note 6, at 831. See also Harvard Law Review Association, 'Official English': Federal Limits On Efforts To Curtail Bilingual Services In The States, 100 HARV. L. REV. 1345, 1351 (1987).

<sup>25</sup> See Diaz-Granados, *supra* note 6, at 830-31. See also Jimenez, *supra* note 2, at 243 (stating that in "many cases bilingual programs were adopted voluntarily; in others they resulted from court orders, state laws, or pressure by federal civil rights authorities").

<sup>26</sup> See Alberto T. Fernandez & Sarah W.J. Pell, *The Right to Receive Bilingual Special Education*, 53 W. EDUC. L. REP. 1067, 1069 (1989) (noting that the Bilingual Education Act provided funds to schools with a significant number of students from families with an annual income under \$3,000, however, in 1974, the low income condition was eliminated and participation was opened to all LEP students).

<sup>27</sup> See An, *supra* note 1, at 142-43 (noting that "[w]hile the original version . . . [of the Act] emphasized teaching English-speaking abilities, . . . subsequent versions of the Act . . . encompass[ed] reading and writing English. The current version states that 'programs shall be designed to enable students to achieve full competence in English and to meet school grade-promotion and graduation requirements'").

<sup>28</sup> See Diaz-Granados, *supra* note 6, at 831.

<sup>29</sup> See Fernandez & Pell, *supra* note 26, at 1070.

<sup>30</sup> See *id.* at 1069.

<sup>31</sup> See Diaz-Granados, *supra* note 6, at 831.

<sup>32</sup> See *id.* at 831 n.23 (noting that the Amendments contained three new types of programs: "(1) Programs of Academic Excellence, for programs shown to be effective; (2) Developmental Bilingual Education Programs, to help school districts establish projects for English dominant and LEP students to master English and a second language while mastering subject matter skills . . . ; and (3) Family English Literacy Programs, to teach English to adult relatives of LEP students").

<sup>33</sup> *Id.* at 831.

## 2. Title VI of the Civil Rights Act of 1964

Title VI, section 601 of the Civil Rights Act provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>34</sup> In a 1970 memorandum, the Office of Civil Rights ("OCR") stated that the Title VI provision "barred discrimination against national origin-minority group children on the basis of language."<sup>35</sup> Moreover, Title VI, section 602 empowered the Department of Health, Education and Welfare ("HEW") to issue rules and regulations to carry out the law set out in section 601 of the Civil Rights Act.<sup>36</sup> While the language of the Civil Rights Act does not directly provide for a right to bilingual education, courts have found such a right within the meaning of the Act. In 1974, the Supreme Court interpreted Title VI in *Lau v. Nichols*.<sup>37</sup> In *Lau*, Chinese-speaking LEP students brought a class action suit against the San Francisco public schools for failing to provide them with an equal educational opportunity by offering classes only in English.<sup>38</sup> The Supreme Court ruled in favor of the plaintiffs, finding that "the school system, by denying the LEP children an effective education, discriminated against them in violation of Title VI."<sup>39</sup>

## 3. The Equal Educational Opportunities Act of 1974

In response to the *Lau* decision, Congress codified the Court's ruling in section 1703(f) of the Equal Educational Opportunity Act ("EEOA") of 1974.<sup>40</sup> The EEOA requires that a school district take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."<sup>41</sup> The EEOA, however, does not define appropriate action, nor does it provide criteria for courts to evaluate whether a school district has taken "ap-

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<sup>34</sup> 42 U.S.C. § 2000(d) (1976). See also An, *supra* note 1, at 143.

<sup>35</sup> Diaz-Granados, *supra* note 6, at 831.

<sup>36</sup> See *id.*

<sup>37</sup> 414 U.S. 563, 567 (1974).

<sup>38</sup> See *id.* at 564.

<sup>39</sup> An, *supra* note 1, at 143.

<sup>40</sup> See Stuart Biegel, *The Parameters of the Bilingual Education Debate in California Twenty Years After Lau v. Nichols*, 14 CHICANO-LATINO L. REV. 48, 51-52 (1994).

<sup>41</sup> 20 U.S.C. § 1703(f) (1974). See also An, *supra* note 1, at 145; Terri Lynn Newman, *Proposal: Bilingual Education Guidelines for the Courts and the Schools*, 33 EMORY L.J. 577, 593 (1984); Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 312, 331 (1987) (noting that "[r]ather than publish the *Lau* guidelines, . . . [the] Department of Education published a Notice of Proposed Rulemaking (NPRM) in 1980"). The NPRM was never finalized, so the *Lau* guidelines were withdrawn and "the controlling administrative regulation under Title VI is now OCR's 1970 memorandum." *Id.* The OCR promulgated guidelines for districts to use in complying with *Lau*. See *id.* These guidelines, however, went beyond *Lau* by specifying a preference for bilingual education and deeming ESL instruction inappropriate. See *id.*

propriate action."<sup>42</sup> The definition in the Act is broad enough to encompass Bilingual Education, ESL, and structured immersion programs,<sup>43</sup> but the lack of criteria rendered enforcement difficult.<sup>44</sup>

### B. *Developmental Analysis of Bilingual Education Policies in California*

In response to *Lau*, the California Legislature passed the Chacon-Mascone Bilingual Education-Bicultural Education Act of 1976.<sup>45</sup> This Act mandated bilingual education in California.<sup>46</sup> The Act recognized that the language barrier created an obstacle to the equal educational opportunity rights of LEP students, which could be "removed by instruction and training in the pupils' primary languages while such pupils are learning English."<sup>47</sup>

In 1987 the Chacon-Moscone Act expired, and Governor George Deukmejian vetoed the legislation that would have continued it.<sup>48</sup> He declared that local school districts should be free to "fashion their own programs."<sup>49</sup> Although the Chacon-Moscone Act is no longer operative, the Sunset Statutes of the California Code currently apply to provide continuing funds for specific programs that may cease to be mandatory under state law.<sup>50</sup> Thus, although California school districts are no longer required to comply with the Chacon-Moscone Act, school districts may still receive funding for bilingual education programs if they continue to provide services that comply with section 62002 of the California Education Code.<sup>51</sup>

Today, California school districts receive money for bilingual education programs as long as they continue to provide services consistent with the general purposes of the bilingual requirements of the Chacon-Moscone Act.<sup>52</sup> California's bilingual education programs received \$318 million in state funds last year.<sup>53</sup>

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<sup>42</sup> See Moran, *supra* note 41, at 331.

<sup>43</sup> See *id.*

<sup>44</sup> See Biegel *supra* note 40, at 53.

<sup>45</sup> See *id.* (citing CAL. EDUC. CODE §§ 52160-52178 (Deering 1987)).

<sup>46</sup> See *id.*

<sup>47</sup> *Id.* at 53-54.

<sup>48</sup> See Biegel, *supra* note 40, at 54. See also CAL. EDUC. CODE § 62000 (West 1997) (regarding the mandatory review prescribed by the legislature before the mandatory bilingual education program could be continued); CAL. EDUC. CODE § 62000 (West 1997) (defining "Sunset" and "sunset date" as the dates on which specific categorical programs cease to be operative, and the Sunset Statutes become operative).

<sup>49</sup> Biegel, *supra* note 40, at 55. See also *Governor Buries Bilingual Education Bill and 6 Other Education Proposals*, L.A. DAILY J., July 27, 1987, at 2.

<sup>50</sup> See Biegel, *supra* note 40, at 54.

<sup>51</sup> See *id.* at 55.

<sup>52</sup> See *id.*

<sup>53</sup> See Ed Mendel, *Unz Pursues Initiative to Ban Bilingual Education*, SAN DIEGO UNION-TRIB., June 3, 1997, at A3.

## II. LEGAL IMPLICATIONS OF PROPOSITION 227

The statewide implementation of Proposition 227 may have severe legal consequences that violate LEP students' civil rights. The proposal's sheltered English immersion program may violate federal law under *Lau*. In that case the Supreme Court stated that "[t]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."<sup>54</sup> The Court held that the schools were obligated to eliminate the language barriers when English-only instruction had the effect of excluding LEP children from "meaningful participation" in the educational program.<sup>55</sup> The Court found that the school system discriminated against LEP children in violation of Title VI by denying them an effective education.<sup>56</sup> Although the Court did not order a specific remedy, it identified bilingual education and English as a Second Language ("ESL") instruction as viable options.<sup>57</sup>

Proposition 227 would only teach English to LEP students for "a period normally not exceeding one year," during which the instruction would be almost exclusively in English.<sup>58</sup> This sheltered English immersion program does not provide LEP students with additional aid in their native language.<sup>59</sup> After one year, LEP students are placed in "English language mainstream classrooms" where they are taught academic subjects in English, but are no longer taught the English language in a manner geared specifically toward bilingual students.<sup>60</sup> Hence, LEP students at this stage are left to "sink or swim."<sup>61</sup> This program prevents LEP students from participating meaningfully and equitably in the school curriculum as required by *Lau*.<sup>62</sup>

The fundamental premise of *Lau* is that public education must be effective. In *Rios v. Read*,<sup>63</sup> a case consistent with *Lau*, the Eastern District of New York held that a bilingual program designed to teach ESL for the purpose of quickly "mainstreaming" LEP students failed to provide the same standard of education as that afforded to English-speaking students.<sup>64</sup> The court held that the school

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<sup>54</sup> *Lau*, 414 U.S. at 566.

<sup>55</sup> See *id.* at 567-68.

<sup>56</sup> See *id.*

<sup>57</sup> See *id.* at 565. See also Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321, 322 (1987) (defining ESL as a program in which "linguistic minority children spend most of the day in regular classes but receive additional instruction in English for part of the day").

<sup>58</sup> Proposition 227, *supra* note 6, § 306(d) (stating that "nearly all classroom instruction is in English, but with the curriculum and presentation designed for children who are learning the language").

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*

<sup>61</sup> See Jimenez, *supra* note 2, at 243.

<sup>62</sup> See *Lau*, 414 U.S. at 568-69.

<sup>63</sup> 480 F. Supp. 14 (E.D.N.Y. 1978).

<sup>64</sup> See *id.* at 23 (stating "[a] denial of educational opportunities to a child in the first



district violated Title VI of the Civil Rights Act, the EEOA, and the Bilingual Education Act.<sup>65</sup> In *Rios*, LEP students were offered instruction in Spanish either upon request or when school personnel recognized the need for such instruction.<sup>66</sup> However, most of the bilingual teachers lacked formal training in Spanish bilingual teaching,<sup>67</sup> and no validated test or measure was used to determine when LEP students achieved English proficiency, to ensure that they were mainstreamed.<sup>68</sup> The court held that the "statutory obligations upon the school district require it to take affirmative action for [LEP] students by establishing . . . a bilingual program and to keep [LEP] students in such a program until they have attained sufficient proficiency in English to be instructed along with English-speaking students of comparable intelligence."<sup>69</sup> Additionally, the court held that the school district must provide procedures for monitoring progress of LEP students and allow them to exit the program only after tests indicate an appropriate level of proficiency.<sup>70</sup> Thus, until this proficiency level is met, the LEP students must remain in the bilingual program.

*Rios* demonstrates that a "good faith effort to teach [LEP] children basic English language skills is not always enough to satisfy the Supreme Court's requirements as set forth in *Lau*."<sup>71</sup> Rather, "[t]he effectiveness of the program is dependent upon the diligence with which the program is implemented as well as the actual success of the program in teaching English to [LEP] students."<sup>72</sup>

Like the program in *Rios*, Proposition 227 does not provide teachers with formal training in teaching bilingual students, and establishes no method to measure LEP students' proficiency in English after the one year of English-only instruction.<sup>73</sup> During that year, LEP students are denied educational opportunities provided to non-LEP students.<sup>74</sup> Furthermore, after one year the LEP students are mainstreamed regardless of their English proficiency.<sup>75</sup> Proposition 227 may be a good faith effort to teach English, but it denies educational opportunities to LEP students. It also violates Title VI of the Civil Rights Act and the EEOA by excluding LEP students from equal participation and educational opportunities.

Moreover, Proposition 227's one year cutoff period to learn English may violate LEP students' rights guaranteed under *Lau*. After one year, the LEP students

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years of schooling is not justified by demonstrating that the educational program employed will teach the child English sooner than programs comprised of more extensive Spanish instruction").

<sup>65</sup> See *id.* at 14.

<sup>66</sup> See *id.* at 18.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.* at 19.

<sup>69</sup> *Id.* at 23.

<sup>70</sup> See *id.*

<sup>71</sup> Newman, *supra* note 41, at 607-08.

<sup>72</sup> *Id.*

<sup>73</sup> See Proposition 227, *supra* note 6, § 305.

<sup>74</sup> See Preliminary Analysis, *supra* note 13, at 3.

<sup>75</sup> See Proposition 227, *supra* note 6, § 305.

are placed in English mainstream classrooms even if they have not learned English.<sup>76</sup> At this stage Proposition 227 would no longer provide assistance and students' right to equal participation in the curriculum would be impeded.<sup>77</sup> This would violate *Lau's* requirement that schools rectify the language barriers when English-only instruction has excluded LEP children from meaningful participation in the educational program.<sup>78</sup>

Although California courts are bound by *Lau*, they are not similarly bound by *Rios*. There are no Ninth Circuit cases establishing a legal framework for assessing whether a particular language remedial program constitutes appropriate action. Although the Ninth Circuit held in *Guadalupe v. Tempe Elementary School District No. 3*<sup>79</sup> that appropriate action need not include bilingual-bicultural education, that court did not articulate what does constitute appropriate action.<sup>80</sup>

However, the Fifth Circuit set forth a standard for applying the EEOA's appropriate action requirement in *Castaneda v. Pickard*.<sup>81</sup> That case involved a challenge by a group of Mexican-American children and their parents to a Texas school district's practices that allegedly deprived them of equal educational opportunities.<sup>82</sup> The case established the analytical framework used by many courts to determine whether school districts meet the EEOA's requirement that schools take "appropriate action" to overcome language barriers.<sup>83</sup>

*Castaneda* held that in evaluating a school system's remedial language program, a court should apply a three-prong analysis. First, the court must determine whether a "school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy."<sup>84</sup> Second, the court must evaluate whether the "programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school."<sup>85</sup> Third, the court must determine whether the school's program "produce[s] results indicating that the language barriers confronting students are actually being overcome . . . ."<sup>86</sup> If all three prongs are fulfilled, then the appropriate action requirement of EEOA section 1703(f) has been met.<sup>87</sup> Today, most bilingual education litigation is decided under the EEOA "appropriate action"

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<sup>76</sup> See *id.*

<sup>77</sup> See *id.*

<sup>78</sup> See *Lau*, 414 U.S. at 568.

<sup>79</sup> 587 F.2d 1022, 1030 (9th Cir. 1978).

<sup>80</sup> See *id.* at 1030.

<sup>81</sup> 648 F.2d 989, 1009-10.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.* See also Diaz-Granados, *supra* note 6, at 833 (reiterating *Castaneda's* three-tiered mode of analysis).

<sup>84</sup> *Castaneda*, 648 F.2d at 1009.

<sup>85</sup> *Id.* at 1010.

<sup>86</sup> *Id.*

<sup>87</sup> See *id.* at 1010 (stating that the court uses the three-tiered method as a "framework to guide [its] analysis").

requirement and the *Castaneda* three-part analysis.<sup>88</sup>

Although California courts are not bound by the *Castaneda* three-prong approach, the District Court for the Northern District of California adopted the *Castaneda* criteria in reviewing the appropriate action issue in *Teresa v. Berkeley Unified School District*.<sup>89</sup> Similarly, the Seventh Circuit applied the *Castaneda* standard in *Gomez v. Illinois State Board of Education*.<sup>90</sup> The *Teresa* and *Gomez* courts agreed that the *Castaneda* guidelines provide a helpful analytic structure for the review of bilingual education programs.<sup>91</sup> The use of the *Castaneda* standard in the Ninth Circuit and the Seventh Circuit may indicate that other courts will adopt it in future cases.

#### A. *Proposition 227 is not Based on Sound Educational Theory*

The EEOA does not require the implementation of a particular educational theory.<sup>92</sup> It seems that Congress intended to give educational authorities the latitude to create and structure programs to meet the EEOA obligations by using the term "appropriate action," rather than specifically mandating "bilingual education."<sup>93</sup> To satisfy the first prong of the *Castaneda* test, the school system must pursue "a program informed by an educational theory recognized as sound by some experts in the educational field or at least deemed a legitimate experimental strategy."<sup>94</sup>

Proposition 227 adopts and mandates an unproven approach called sheltered English immersion.<sup>95</sup> Although it has been deemed a legitimate experimental strategy by experts and researchers in education, it is a novel and untested model.<sup>96</sup> Structured immersion uses English to teach subject matter, although the

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<sup>88</sup> See Diaz-Granados, *supra* note 6, at 833.

<sup>89</sup> 724 F. Supp. 698, 713 (N.D. Cal. 1989). A class of LEP students sued Berkeley Unified School District ("BUSD"), claiming that the school district's language remedial program of English as a Second Language ("ESL") and bilingual education violated the Equal Educational Opportunity Act ("EEOA") and Title VI of the Civil Rights Act. See *id.* The U.S. District Court for the Northern District of California held that no such violation occurred. See *id.* The court noted that several other courts have adopted the *Castaneda* approach to review cases similar to the present one. See *id.* See also *Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1041 (7th Cir. 1987) (holding that the school system violated the EEOA by failing to provide appropriate educational services for LEP students); *Keyes v. School District No. 1 Denver, Colorado*, 576 F. Supp. 1503, 1510 (D. Colo. 1983) (holding that evidence of deficiencies in school system's transitional bilingual program violated the EEOA).

<sup>90</sup> See *Gomez*, 811 F.2d at 1041.

<sup>91</sup> See *Teresa*, 724 F. Supp. at 713 (citing *Gomez*, 811 F.2d at 1041).

<sup>92</sup> See Biegel, *supra* note 40, at 52.

<sup>93</sup> *Castaneda*, 648 F.2d 989 at 1009. See also *Teresa*, 724 F. Supp. 698 at 713.

<sup>94</sup> *Castaneda*, 648 F.2d at 1009.

<sup>95</sup> See Proposition 227, *supra* note 6, § 305.

<sup>96</sup> See Preliminary Analysis, *supra* note 13, at 3 (stating that "research shows that limited English proficient students who are placed in immersion classrooms are in fact reclassified as English proficient at a lower rate than students who receive some primary

teacher speaks both the native language and English.<sup>97</sup> Hence, the program is structured to have a teacher in the classroom who understands and can communicate with anyone in the classroom.<sup>98</sup> LEP students are permitted to use their native language until they feel comfortable with English.<sup>99</sup> However, students are encouraged to use English as soon as possible.<sup>100</sup> This program may provide as little as thirty to sixty minutes of native-language instruction each day.<sup>101</sup> Normally, sheltered English immersion is used as a step in English language development in which intermediate level English learners are brought up to the speed of a mainstream English classroom before transitioning from bilingual to mainstream classes.<sup>102</sup> It is not a technique designed to serve as the only source of English language development.<sup>103</sup>

Proposition 227 mandates a sheltered English immersion program different from any other used by education researchers and the California Department of Education to date.<sup>104</sup> Proposition 227 employs an unsound educational theory that has never been recognized by researchers in the educational field. It combines various questionable practices that are untested in practice. First, it proposes a program in which teachers are not required to speak the native language of the students.<sup>105</sup> Thus, unlike under recognized structured immersion programs, teachers may not be able to understand and communicate with the LEP students.<sup>106</sup> Moreover, even if the teachers do speak the native language of the LEP students, Proposition 227 prohibits communicating with the child in that language, subjecting teachers who do so to personal liability.<sup>107</sup> Second, Proposition 227 proposes a one-year sheltered English immersion program as its sole approach to teaching English before students are placed in fully English-taught classrooms with native English speakers.<sup>108</sup> Available research does not support such a cutoff for English language development. In fact, reputable research illustrates that at least four years of sheltered instruction may be necessary for students to become sufficiently fluent to participate fully in an English-taught

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language instruction”).

<sup>97</sup> See Moran, *supra* note 41, at 322.

<sup>98</sup> See Preliminary Analysis, *supra* note 13, at 5.

<sup>99</sup> See Newman, *supra* note 41, at 610.

<sup>100</sup> See *id.*

<sup>101</sup> See Moran, *supra* note 41, at 322.

<sup>102</sup> See Preliminary Analysis, *supra* note 13, at 3. See also Questions and Answers, *supra* note 5, at 2; Joseph Torres, *New Bilingual Education Study Challenges Past Research, But Lacks Press Appeal*, (Oct. 19, 1997) <<http://www.latinolink.com/opinion/opinion97/1019hi1e.htm>> (stating that “an English-immersion program . . . is more likely to be effective with students at the intermediate stage”).

<sup>103</sup> See Preliminary Analysis, *supra* note 13, at 3.

<sup>104</sup> See *id.* at 3.

<sup>105</sup> See *id.* at 5.

<sup>106</sup> See *id.*

<sup>107</sup> See *id.*

<sup>108</sup> See Proposition 227, *supra* note 6, § 305.

curriculum.<sup>109</sup>

Another factor that makes Proposition 227's sheltered English immersion program unsound is the proposal to place non-English speaking children of all ages and grades together.<sup>110</sup> This is not conducive to learning and is counter to educational practices.<sup>111</sup> Children progress through age-based developmental stages regardless of the language they speak.<sup>112</sup> This is the reason for the formation of grade specific classrooms.<sup>113</sup> Hence, "[t]here is no pedagogically sound justification for placing children of vastly differing ages and maturity levels in one classroom."<sup>114</sup> LEP students in these classrooms suffer as a result of such placement. Mixing children of different ages and grades precludes effective instruction in subjects other than English, since these students will be at very different levels of proficiency in other areas, such as math and science. This places LEP students at an academic disadvantage.

For the reasons stated above, Proposition 227's sheltered English immersion proposal does not satisfy the first prong of *Castaneda* because the immersion program is neither a sound educational theory, as recognized by researchers in the educational field, nor a "legitimate experimental strategy."<sup>115</sup>

## B. Implementation of the Educational Program

### 1. Ineffective Teachers

The second prong of the *Castaneda* test inquires whether "the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school."<sup>116</sup> Remedial English programs are not likely to have any significant effect without properly qualified teachers.<sup>117</sup> Under this prong, any school district that chooses to fulfill its obligations required by EEOA section 1703(f) by means of an English remedial program "has undertaken a responsibility to provide teachers who are able to teach competently in such a program."<sup>118</sup> A school district is expected to make a good faith effort to employ qualified teachers, relative to the resources

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<sup>109</sup> See Office of Bilingual Education and Minority Language Affairs, *General Questions on Bilingual Education*, (visited Feb. 18, 1998) <[http://www.ed.gov/offices/OBEMLA/q\\_al.html](http://www.ed.gov/offices/OBEMLA/q_al.html)> (citing a study currently being conducted at George Mason University that has found that students "typically reach and surpass native English speakers' performance across all subject areas after 4-7 years in a quality bilingual program").

<sup>110</sup> See Proposition 227, *supra* note 6, § 305.

<sup>111</sup> See Preliminary Analysis, *supra* note 13, at 5.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

<sup>114</sup> *Id.*

<sup>115</sup> See *Castaneda*, 648 F.2d at 1009.

<sup>116</sup> *Id.* at 1010.

<sup>117</sup> See *id.* at 1013.

<sup>118</sup> *Id.* at 1012.

available in the community.<sup>119</sup>

Proposition 227 may not fulfill the second prong because it lacks a requirement for teacher training that will provide competent teachers for the proposed English remedial program.<sup>120</sup> It does not require schools to make good faith efforts to hire teachers competent to teach the proposed sheltered English immersion program. There are few explicit requirements in the initiative as to the qualifications teachers must possess. The proposal does require that teachers possess "a good knowledge of the English language," but does not further explain this requirement.<sup>121</sup> The teachers must also be qualified to teach English to LEP students of different grades and age levels combined in one classroom.<sup>122</sup> The initiative's failure to specify standards for teachers runs contrary to current California law, which requires that the state Department of Education conduct appropriate training for bilingual education teachers and set minimum standards for teacher qualifications.<sup>123</sup>

Although Proposition 227 proposes teaching English to parents and other members of the community who pledge to tutor limited LEP students, these tutors are not teachers.<sup>124</sup> The use of tutors as aides may be an appropriate interim measure, but they cannot take the place of qualified teachers for English remedial programs.<sup>125</sup> In *Teresa*, the school district hired tutors for its bilingual education programs who were college graduates or students with at least two years of college, some with native language ability, and provided them with relevant training.<sup>126</sup> By contrast, Proposition 227 does not explicitly provide for training of the tutors to prepare them to teach the mixture of students of various ages and grade levels in the sheltered English immersion program.<sup>127</sup> Moreover, the initiative fails to establish a standard to measure the level of English fluency attained by the tutors, ensuring that they are qualified to teach.<sup>128</sup>

Proposition 227 is also inadequate under *Castaneda's* second prong because its sheltered English immersion program gives teachers disincentives to execute the proposed program. The initiative penalizes teachers by holding them personally liable, giving parents and children legal standing to sue teachers for failure to enforce its provisions.<sup>129</sup> This could discourage individuals from pursuing careers as bilingual educators. Teachers - particularly bilingual teachers — might hesi-

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<sup>119</sup> See *id.* at 1009. See also *Teresa*, 724 F. Supp. at 714.

<sup>120</sup> See Preliminary Analysis, *supra* note 13, at 5.

<sup>121</sup> Proposition 227, *supra* note 6, § 306(b).

<sup>122</sup> See *id.* § 305 (stating that "schools shall be permitted to place in the same classroom English learners of different ages . . .").

<sup>123</sup> See CAL. EDUC. CODE §§ 52182, 52183 (West 1997).

<sup>124</sup> See *id.* § 315.

<sup>125</sup> See *Castaneda*, 648 F.2d at 1013 (stressing that "qualified teachers are a critical component of the success of a language remediation program").

<sup>126</sup> See *Teresa*, 724 F. Supp. at 714.

<sup>127</sup> See Proposition 227, *supra* note 6, § 315.

<sup>128</sup> See *id.*

<sup>129</sup> See *id.*

tate to instruct non-English speaking children because communicating with them in their native language could be found to violate the English-only requirement, potentially leading to personal liability. LEP students would be unable to communicate with teachers, possibly leading to feelings of isolation.<sup>130</sup> Thus, this disincentive discriminates against LEP students and excludes them from equal participation in the educational system.<sup>131</sup> Furthermore, the initiative may not be adequately implemented to overcome the language barrier, thus violating the EEOA.<sup>132</sup> The disincentive to bilingual teachers will decrease the number of teachers qualified to teach the proposed program. The fewer teachers available, the more difficult it will be to implement the program throughout the state.

Since Proposition 227 does not require teachers to be proficient in the foreign language, and does not ensure that teachers will be qualified to teach students of different grades and age levels in one classroom, it fails to guarantee that schools will make a bona fide effort to hire teachers competent to teach its sheltered English immersion program. Furthermore, Proposition 227 violates *Lau* because the lack of communication with teachers effectively impedes LEP students' learning process and their equal participation in the curriculum.<sup>133</sup> This may result in frustration among students, and possibly an increase in the dropout rate of LEP students.

## 2. Insufficient Time for Effective Implementation

Moreover, the second prong will be difficult to satisfy under Proposition 227 because there is not an adequate amount of time to effectively implement its educational theory. The California Constitution indicates that initiatives take effect the day after they are enacted.<sup>134</sup> Although the initiative provides for a sixty-day delay before completely eliminating bilingual education and other methods of English development, this is insufficient to prevent disruption of the educational progress of LEP students.<sup>135</sup> It does not provide adequate time to hire and train teachers so that they are competent to teach the sheltered English immersion program set forth in Proposition 227.

Thus, when bilingual education and other English remedial programs are eliminated, the LEP students' rights protected by Title VI of the Civil Rights Act, the EEOA, and *Lau* are violated. There may be an insufficient number of teachers qualified to teach Unz's proposed sheltered English immersion program when the initiative is implemented throughout California. This delay in implementation

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<sup>130</sup> See Preliminary Analysis, *supra* note 13, at 5.

<sup>131</sup> See, e.g., U.S.C. § 2000(d) (1976); An, *supra* note 1, at 143 (explaining the Supreme Court decision in *Lau*).

<sup>132</sup> See 20 U.S.C. § 1703(f) (1974). See also *Castaneda*, 648 F.2d at 1011 (arguing that if no remedial action is taken to overcome the difficulties that LEP students might encounter, the language barrier may impede their equal participation in regular instruction programs).

<sup>133</sup> See *Lau*, 414 U.S. at 566.

<sup>134</sup> See Preliminary Analysis, *supra* note 13, at 11.

<sup>135</sup> See Proposition 227, *supra* note 6, § 330.

places LEP students behind in learning English and substantive subject matters, and impedes their participation in the curriculum. This discriminates against LEP students, denying them an equal educational opportunity while Proposition 227 is in effect.

### 3. Lack of Remedial Academic Assistance

EEOA section 1703(f) not only imposes on the states an obligation to address the problem of language barriers, but also imposes an obligation to provide assistance in other areas of the academic curriculum.<sup>136</sup> LEP students' equal participation "may be impaired because of deficits incurred during participation in an agency's language remediation program."<sup>137</sup> If no remedial assistance is provided this may pose an impediment to students' equal participation in the curriculum.<sup>138</sup> The school district has the discretion to implement a remedial program to overcome academic deficits incurred during intensive language development.<sup>139</sup> The district can accomplish this by keeping LEP students at a lower grade level in other areas of the curriculum, by providing instruction in their native language, or by providing compensatory and supplemental education to remedy deficiencies developed during the intensive language development program.<sup>140</sup>

Proposition 227, however, does not mandate remedial action to help LEP students recoup any academic deficits that they may incur.<sup>141</sup> As written, it does not provide any compensatory or supplemental education after the one-year period to remedy deficiencies in other academic areas.<sup>142</sup> Those LEP students who fall behind their non-LEP peers are denied the opportunity to equally participate in the curriculum.<sup>143</sup> Proposition 227 fails to guarantee remedial assistance. Although there is no fundamental constitutional guarantee of remedial action under such circumstances, the program should require it to prevent LEP students from being disadvantaged.

### C. Difficulty in Evaluating the Success of the Program

The third prong of the *Castaneda* test involves the program's results. *Castaneda* states that a bilingual education program should "produce results indicating that the language barriers confronting students are actually overcome . . . ."<sup>144</sup> Since Proposition 227 has not yet been implemented, it is difficult to assess the effects of the program. However, the proposal does not provide for

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<sup>136</sup> See *Castaneda*, 648 F.2d at 1011.

<sup>137</sup> *Id.* at 1011.

<sup>138</sup> See *id.*

<sup>139</sup> See *id.*

<sup>140</sup> See *id.*

<sup>141</sup> See Proposition 227, *supra* note 6, § 305.

<sup>142</sup> See *id.*

<sup>143</sup> See *Castaneda*, 648 F.2d at 1011.

<sup>144</sup> *Id.* at 1010.



any method of measuring the program's effectiveness.<sup>145</sup> It calls for educating English learners through sheltered English immersion during a temporary one-year period and then transferring students into mainstream English-only classrooms, regardless of any particular student's progress or success.<sup>146</sup> Currently, "school districts with English learners must assess those students' academic progress annually."<sup>147</sup> The initiative, however, fails to provide an assessment mechanism for students' mastery of English through the immersion program.<sup>148</sup>

Proper testing and evaluation are essential in determining the progress of bilingual students and in evaluating the program itself.<sup>149</sup> A "good faith effort to teach [LEP students English] is not always enough to satisfy the Supreme Court's requirements set forth in *Lau*. Rather, a [program] must . . . achieve some minimal level of success in teaching English."<sup>150</sup> The effectiveness of a program depends on the actual success of the program in teaching English to LEP students.<sup>151</sup> Since no standard exists by which to measure the success of the Proposition 227 sheltered English immersion program, there is no way to know whether the program is effective, and thus no indication that appropriate action is being taken by the school district.

### III. SOCIAL POLICY ANALYSIS OF PROPOSITION 227

The debate over bilingual education has produced diverse public reactions. The reasons for support or opposition are so varied that one tends to lose sight of a pedagogical rationale in the heat of emotional, patriotic, and racial arguments. These fervent arguments overshadow the benefits and success of bilingual education. They reflect a pervasive misunderstanding of bilingual education and its rationale, methods, goals, and results. These misconceptions about bilingual education are prevalent in Proposition 227.

#### A. *Encouraging Bilingualism May Lead to Economic Benefits*

Proposition 227 proclaims that English is "the leading world language for science, technology, and international business, thereby being the language of economic opportunity."<sup>152</sup> The initiative declares that public schools have a constitutional duty, as well as a moral obligation, to provide all children with "the skills necessary to become productive members of society."<sup>153</sup> It is further declared that "literacy in the English language is among the most important" of these

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<sup>145</sup> See Proposition 227, *supra* note 6, § 305.

<sup>146</sup> See *id.*

<sup>147</sup> Preliminary Analysis, *supra* note 13, at 6 (citing 5 CAL. CODE REGS. § 4311).

<sup>148</sup> See *id.*

<sup>149</sup> See *Castaneda*, 648 F.2d at 1014. See also Newman, *supra* note 41, at 608.

<sup>150</sup> Newman, *supra* note 41, at 608 (discussing the *Castaneda* requirements).

<sup>151</sup> See *id.*

<sup>152</sup> Proposition 227, *supra* note 6, § 300(a).

<sup>153</sup> *Id.* § 300(c).

skills.<sup>154</sup> Furthermore, it states that literacy in English allows LEP students to “fully participate in the American Dream of economic and social advancement.”<sup>155</sup>

There is no doubt that literacy in English is an important skill that all children in California should acquire. Proposition 227, however, implies that English should be emphasized above other subjects such as math, science, history, and civics. Additionally, the initiative seems to espouse the view that fluency in English is easily acquired if LEP students are heavily exposed to it in the classroom.<sup>156</sup>

While proficiency in English clearly yields significant benefits, a child’s right to an education means more than simply learning the English language.<sup>157</sup> If language were the only important skill for children to acquire, our educational system would teach only that skill. The forces that unite Americans consist of more than just a common language: it is the American sense of shared destiny and opportunity that unites all Americans.<sup>158</sup>

Fortunately, our educational system does not limit instruction to English alone; rather, it teaches other skills such as math, science, history, and civics. These skills also provide access to economic opportunities and future success. LEP students who do not speak English should not be restricted from learning skills that enable them to contribute to society simply because these skills are taught only in English. “Bilingual education and the other English language development techniques eliminated by the initiative are designed to teach children English while ensuring that they are not deprived of the opportunity to learn other essential academic skills.”<sup>159</sup>

Furthermore, Proposition 227 fails to consider the benefits that bilinguals contribute to society. Bilinguals are an asset, rather than a detriment, to our national power. The “rapidly changing demographic and economic outlook of the United States” supports this view.<sup>160</sup> As stated by one author:

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* § 300(b).

<sup>156</sup> See *id.* § 305 (stating that “all children in California public schools shall be taught English by being taught in English”).

<sup>157</sup> See Vincent J. Schodolski, *Drive Is On To Eliminate Bilingual Education In California*, CHI. TRIB., Sept. 23, 1997, at 5 (quoting James Lyons, executive director of the National Association for Bilingual Education, who states that “English is an essential skill, but it is not the only skill”).

<sup>158</sup> See JUDITH HARLAN, *BILINGUALISM IN THE UNITED STATES* 54 (1991) (stating that it is “[t]he freedoms and opportunities that attract people from all over the world to the United States [that] unite . . . all [Americans]. The belief in individual rights, freedoms, and constitutional protections . . . [and] [o]ur independent spirited democracy and our free economy also unite us all as Americans”).

<sup>159</sup> Preliminary Analysis, *supra* note 13, at 1. The main goals of bilingual education are “the rapid development of English language proficiency” and “the simultaneous development of academic skills.” *Id.* at 2.

<sup>160</sup> An, *supra* note 1, at 155.

In moving towards a global economy, the public schools should be looking to maximize the potential of all students, and to "harness the diversity" of the immigrant student population. By utilizing the advantage that immigrants offer in terms of connecting the U.S. with the rest of the world, the possibility of a net fiscal drain is countered.<sup>161</sup>

The change in demographic and economic perspectives in the global market presents a window of opportunity to many bilingual people. The passage of the North American Free Trade Agreement demonstrates the United States' commitment to engaging in transactions with non-English speaking nations.<sup>162</sup> Bilingual people will have an advantage over monolingual people in this expanded market.<sup>163</sup> They will have greater success in communicating and interacting in the global market, thus improving their economic status.<sup>164</sup> This will help our nation remain competitive in the national market. Thus, bilingual education gives LEP children an additional advantage in the economic world market by maintaining their native language skills.<sup>165</sup> Hence, encouraging bilingualism is a long-term investment in human capital.

Proposition 227 fails to encourage bilingualism. It concludes that "English . . . [is] the leading world language for science, technology, and international business [and] . . . of economic opportunity."<sup>166</sup> Thus, it does not recognize that communication in these fields in languages other than English can make a bilingual person more effective and successful in his or her area of expertise than a monolingual counterpart.<sup>167</sup>

Proposition 227 also states that "[i]mmigrant parents are eager to have their children acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream of economic and social advancement . . . ."<sup>168</sup> This participation in the American dream, however, will not come to fruition unless their children are afforded an opportunity to advance in each of the essential subjects taught in school.

#### B. *Subjecting Teachers to Personal Liability is an Unwarranted Intrusion into the Classroom*

Proposition 227 encourages governmental intrusion into every classroom. Any teacher, administrator, school board member, or other elected official who "willfully and repeatedly" refuses to implement the terms of the statute may be held personally liable for attorney's fees and damages.<sup>169</sup> The statute would give par-

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<sup>161</sup> Diaz-Granados, *supra* note 6, at 852.

<sup>162</sup> See An, *supra* note 1, at 155.

<sup>163</sup> See *id.* at 156.

<sup>164</sup> See *id.*

<sup>165</sup> See *id.*

<sup>166</sup> Proposition 227, *supra* note 6, § 300(a).

<sup>167</sup> See An, *supra* note 1, at 156.

<sup>168</sup> Proposition 227, *supra* note 6, § 300(b).

<sup>169</sup> See *id.* § 320.

ents "legal standing to monitor classes and to sue a teacher personally if the teacher is not following an English-only curriculum."<sup>170</sup> This unlimited liability could spark fear among teachers and preclude effective instruction of the English language because qualified teachers may refuse to work with LEP students to avoid personal liability. This disincentive could decrease the number of bilingual teachers willing to teach LEP students, impeding their ability to participate in educational programs.

Currently, California requires that a public entity "pay judgments against employees for acts done during the course of their employment."<sup>171</sup> Moreover, the California Education Code requires that "the governing board of any school obtain liability insurance for members of the school board and employees against personal liability."<sup>172</sup> Proposition 227 penalizes teachers and school officials by subjecting them to personal liability, despite the obvious intent of the legislature to insulate these employees from such liability.<sup>173</sup> Because the initiative holds teachers, administrators, and school board members personally liable, it may discourage individuals from pursuing careers in education. The consequences of this initiative endanger the California educational system because this disincentive occurs at a time when the demand for teachers is great.<sup>174</sup>

### C. *Myths About the Failure Rate of Bilingual Education are Inaccurate*

Proponents of Proposition 227 claim that California schools are wasting money on "experimental" language programs that have failed, as demonstrated by "high drop-out rates and low English literacy levels."<sup>175</sup> Ron Unz, author of the "Unz Initiative," which was adopted in full by the California legislature as Proposition 227, states that "[a] quarter of all the children in California public schools are classified as . . . [LEP students, and] . . . only [five] or [six] percent learn English."<sup>176</sup> Therefore, according to Unz, the current system has an annual failure rate of ninety-five percent.<sup>177</sup>

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<sup>170</sup> Preliminary Analysis, *supra* note 13, at 10.

<sup>171</sup> CAL. GOV'T CODE § 825.

<sup>172</sup> See CAL. EDUC. CODE § 35208 (WEST 1997).

<sup>173</sup> See Preliminary Analysis, *supra* note 13, at 10.

<sup>174</sup> See *id.* (stating that according to the Department of Education, there is an estimated demand for 40,000 new teachers).

<sup>175</sup> Proposition 227, *supra* note 6, § 300(d).

<sup>176</sup> Interview by Margaret Warner with Ron Unz and James Lyons, executive director of the National Association of Bilingual Education, in Newshour, *Double Talk?* (Sept. 21, 1997) <[http://www.pbs.org/newshour/bb/education/july-dec97//bilingual\\_9-21.html](http://www.pbs.org/newshour/bb/education/july-dec97//bilingual_9-21.html)> (quoting James Lyons as saying that "bilingual education provides children with continuous development in an intelligible way while they're in the process of acquiring a language").

<sup>177</sup> See Amy Pyle, *Education Campaign Targets Bilingual Education Former Gubernatorial Candidate Ron Unz and Teacher Gloria Matta Tuchman Unveil Petition Drive For 1998 Initiative*, L.A. TIMES, July 9, 1997, at B2. (noting that only five percent of school children not proficient in English are found to have gained proficiency in English each year).

Ron Unz, however, has misinterpreted the data. The "[five percent] transition rate is based on all bilingual education students, most of whom are only beginning a three- to seven-year transition to all-English classes."<sup>178</sup> Proposition 227 defines English learning as "acquir[ing] a good working knowledge of English."<sup>179</sup> Reputable research indicates that it takes three or more years to become sufficiently fluent in English to fully participate in an English-taught curriculum.<sup>180</sup> "In addition, research shows that Limited English Proficiency students who are placed in immersion classrooms are in fact reclassified as English proficient at a lower rate than students who receive some primary language instruction."<sup>181</sup> Furthermore, since California does not compile drop-out or English literacy statistics specifically for LEP students, allegations regarding the failure of bilingual education are without any statistical basis.<sup>182</sup>

*D. Bilingual Education is a More Effective Method of Teaching LEP Students than English-only Instruction*

In some school districts, bilingual education has not been as successful as expected.<sup>183</sup> This is true of many public school programs, however, as a result of "inadequate resources, untrained teachers, inadequate parent involvement, or poor management by the principal or district."<sup>184</sup> Where funding is used properly to educate LEP students with trained and qualified teachers, bilingual education is effective, successfully fulfilling its dual purpose of teaching both English and core subjects.<sup>185</sup>

Research demonstrates that bilingual education programs are more effective than English-only programs in teaching English because students perform better in a variety of subjects in a system of native language instruction.<sup>186</sup> A report by

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<sup>178</sup> *Id.* See also Warner, *supra* note 176 (quoting James Lyons, who states that "one third of children in California who are limited English proficient are receiving bilingual education. Two thirds are not . . .").

<sup>179</sup> Proposition 227, *supra* note 6, § 305.

<sup>180</sup> See J. David Ramirez, *Final Report: Longitudinal Study of Structured English Immersion Strategy, Early-Exit and Late-Exit Transitional Bilingual Education Programs for Language-Minority Children* (Feb. 1991). See also Warner, *supra* note 176.

<sup>181</sup> Preliminary Analysis, *supra* note 13, at 3.

<sup>182</sup> See *id.*

<sup>183</sup> See Questions & Answers, *supra* note 5, at 3. See also Office of Bilingual Education and Minority Language Affairs, *supra* note 109.

<sup>184</sup> Questions & Answers, *supra* note 5, at 3.

<sup>185</sup> See *id.*

<sup>186</sup> See An, *supra* note 1, at 151 (stating that there are "numerous studies demonstrating that the more the students' native language is incorporated into English instruction, the better their results on English language tests in reading and writing. In addition, other studies suggest that students in bilingual programs perform better in English language tests than their classmates in English-only classrooms"). See also Lisa Rodriguez, *Why Bilingual Education* (visited Oct. 4, 1997) <<http://www.laclase.com/why.html>> (stating that children need to attain literacy skills in their native language in order to better learn other languages, because "[s]tudents who are literate in their own native language have

the Association for Supervision and Curriculum Development cites numerous studies indicating that "the more the student's native language is incorporated into English instruction, the better their results on English language tests in reading and writing."<sup>187</sup> This research shows that primary language instruction does not impede acquisition of English.<sup>188</sup> In fact, students with a strong academic background in their first language are more likely to develop higher levels of English proficiency than those who do not have such an advantage.<sup>189</sup>

Numerous studies have indicated that it takes "at least five to seven years to become orally proficient in a second language and by the seventh year . . . reading and writing in the second language can approach that of a native English speaker."<sup>190</sup> One credible study has shown that achieving proficiency may take as long as ten years. This study measured students' progress in English-language development programs in the Santa Ana Unified School District over a three-year period.<sup>191</sup> This study differs from previous fluency studies in that it is not based on the performance of students who have successfully completed bilingual programs.<sup>192</sup> Instead, this study proposes that a "more accurate gauge would be how long it takes a student to move from one level of English fluency to another."<sup>193</sup> Regardless of which study is the most accurate, it seems unlikely that proficiency can be attained in less than five years. Therefore, Proposition 227's

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strong word recognition skills to bring to the reading of English").

<sup>187</sup> An, *supra* note 1, at 151 (emphasizing that "physiological evidence demonstrates that bilingual children possess superior linguistic skills . . . the development of cerebral lateralization for language use and in acquiring skills for linguistic abstraction occurs earlier than in monolingual children").

<sup>188</sup> *See id.*

<sup>189</sup> *See* Office of Bilingual Education and Minority Language Affairs, *supra* note 109, at 3.

<sup>190</sup> Warner, *supra* note 176, at 4. *See also* Office of Bilingual Education and Minority Language Affairs, *supra* note 109, at 3 (stating that the largest evaluation of bilingual education is currently underway by Drs. Virginia Collier and Wayne Thomas of George Mason University. The study explains that "[w]hen bilingual education students are tested in English, they typically reach and surpass native English speakers' performance across all subject areas after 4-7 years in a quality bilingual program. Because they have not fallen behind in cognitive and academic growth during the 4-7 years that it takes to build academic proficiency in English, bilingually schooled students typically sustain this level of academic achievement and outperform monolingually schooled students in the upper grades.").

<sup>191</sup> *See* Torres, *supra* note 102 (citing a study by the California Educational Research Cooperative at the University of California at Riverside, which "measured students' progress in English-language development programs in the Santa Ana Unified School District over a three-year period. Of the district's 53,000 students, more than 36,000 are limited-English proficient").

<sup>192</sup> *See id.* (stating that using the formula that other studies have used is "comparable to basing the average time in which a runner should complete the Boston Marathon on the times of the first hundred finishers").

<sup>193</sup> *Id.*

adherence to a strict one-year limit for sheltered English immersion makes it unlikely that most LEP students will achieve fluency.

E. *Proposition 227 Requires an Unduly Burdensome Waiver Procedure*

Proposition 227 permits parents to request a waiver of the English-only requirement.<sup>194</sup> The parent must apply in writing, annually, and in person at the school, and their child must meet one of three specified conditions.<sup>195</sup>

Proposition 227's waiver requirements are unduly burdensome to parents. The initiative requires parents to understand the complicated procedural requirements for a waiver, to be sufficiently literate to submit a written request, and to go personally to the school. This procedure is more burdensome to families who have children in different schools. Moreover, even if a parent satisfies the requirements, Proposition 227 gives school districts unlimited discretion to approve or deny waivers without providing standards for denial or providing an appeals procedure.<sup>196</sup> Additionally, the schools do not have to offer a bilingual education class if there are not at least twenty waivers granted in the same grade level.<sup>197</sup> Therefore, a school district could arbitrarily limit waivers to nineteen per grade and never be required to provide an alternative course. Under these circumstances, parents would have only one other option, to transfer their child to a school that does offer bilingual education. This may impose a burden on families with limited resources. Moreover, there is no guarantee that a school district will offer bilingual education or other language development programs as alternatives.

F. *Proposition 227 Will Cost More Than Current Programs*

Proposition 227 alleges that school districts are wasting money on the current English development programs.<sup>198</sup> Proposition 227, however, will not save any money. The initiative requires that the current supplemental funding for English learners be maintained, and adds another \$50 million per year for English tutor-

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<sup>194</sup> See Proposition 227, *supra* note 6, § 310.

<sup>195</sup> Proposition 227 requires that students meet the following criteria:

- (a) . . . the child already possesses good English language skills, as measured by standardized tests of English vocabulary comprehension, reading, and writing . . .
- (b) . . . the child is age 10 years or older, and it is the informed belief of the school principal and educational staff that an alternate course of educational study would be better suited to the child's rapid acquisition of basic English language skills; or
- (c) . . . the child has such special physical, emotional, psychological, or educational needs that an alternate course of educational study would be better suited to the child's overall educational development.

*Id.* § 311.

<sup>196</sup> See *id.* § 310.

<sup>197</sup> See *id.* However, if there are fewer than twenty waivers in one grade level, the school must allow the pupil to transfer to a public school that does offer a bilingual education class. See *id.*

<sup>198</sup> See *id.* § 300(d).

ing.<sup>199</sup> Therefore, this initiative will cost the states more than current programs.

In order for Proposition 227 to be effective, remedial programs will be necessary for students falling behind in core academic subjects. In addition, under Proposition 227, if twenty or more students in the same grade are granted a waiver, the school district is required to provide two instructional programs:<sup>200</sup> the sheltered English immersion program, and another English developmental program, such as bilingual education or ESL,<sup>201</sup> for students who successfully waive out of sheltered English immersion. The increased cost of funding two programs may discourage schools from granting waivers.

The \$50 million provided for tutoring under the initiative will not be nearly be enough to alleviate the problem. It is indisputable that English tutoring must be provided to parents and children, but \$50 million a year "amounts to \$1.20 each year for every Californian seeking to learn English."<sup>202</sup>

#### G. *Proposition 227 is Based on Unfounded Myths About Language Development*

Proposition 227 also states that young children can easily acquire full fluency in English if they are heavily exposed to it in the classroom at an early age.<sup>203</sup> Generally, "people who assert the superiority of child learners claim that children's brains are more flexible."<sup>204</sup> Current research, however, counters this biological argument and shows that the acquisition of a second language may reflect psychological and social factors favoring child learners.<sup>205</sup> Research shows that "adults are much more efficient and quicker language learners than children because they're working from a broader linguistic base, a greater conceptual base."<sup>206</sup> In fact, the reason that children are taught skills in all core subjects at a young age is that educators increasingly recognize the importance of an early foundation in all subjects.<sup>207</sup> LEP students cannot learn subjects taught in a language that they have not mastered. Thus, an LEP child's native language can assist in making English comprehensible by "providing contextual knowledge that

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<sup>199</sup> See *id.* § 315 (stating that \$50 million per year will be provided to teach English to parents and other members of the community who pledge to tutor LEP students).

<sup>200</sup> See *id.* § 310.

<sup>201</sup> See *id.*

<sup>202</sup> Preliminary Analysis, *supra* note 13, at 9.

<sup>203</sup> See Warner, *supra* note 176, at 6 (quoting Ron Unz, who states "[M]ost of the children . . . enter California . . . public schools when they're five or six or seven. And at that age children can learn another language so quickly and easily that the only reasonable thing to do is to put them in a program where they're taught English as rapidly as possible and then put into the mainstream classes with the other children so they can move forward academically").

<sup>204</sup> ERIC Clearinghouse on Languages and Linguistics, *Myths* at 1 (visited Oct. 4, 1997) <<http://www.smartnation.org/wwwdocs/myths/myths.htm>>.

<sup>205</sup> See *id.* at 2.

<sup>206</sup> Warner, *supra* note 176, at 7.

<sup>207</sup> See Preliminary Analysis, *supra* note 13, at 4.



aids in understanding.”<sup>208</sup> Consequently, a strong foundation in a native language can make it easier for LEP students to learn English. Therefore, bilingual education that maintains the students’ native language as they learn English is a more effective way for LEP children to learn English.

Furthermore, research has shown that the quality, rather than the quantity, of English exposure is the main factor in attaining proficiency.<sup>209</sup> Hence, the second-language input must be comprehensible in order to be effective. Research indicates that children in “bilingual classes with exposure to the home language and to English acquire English language skills equivalent to those acquired by children who have been in English-only programs.”<sup>210</sup>

Moreover, Proposition 227 indicates that through the sheltered English immersion program children will learn English as rapidly and effectively as possible.<sup>211</sup> Proposition 227 demonstrates the prevalent misconception that children acquire a second language once they can speak it. Proficiency in conversation does not indicate proficiency in the more complex academic language needed to engage in the classroom.<sup>212</sup> It is inappropriate to mainstream LEP children on the basis of oral language assessment. Language problems in reading and writing may not be apparent to teachers if oral abilities alone are used to assess English proficiency. Thus, social communication skills such as playground English should not be confused with the demanding academic English which children must master to succeed in school.

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<sup>208</sup> Fernandez & Pell, *supra* note 26, at 1070 (noting that some studies indicate that the more extensive the native language instruction, the better students perform because bilingual education instills a positive self-image and self-respect by “validating a child’s native language and culture”).

<sup>209</sup> See Jimenez, *supra* note 2.

<sup>210</sup> *Id.* (stating that increased exposure to English does not necessarily speed the acquisition of English). See also Associated Press, *Latino Leaders Rally For Bilingual Education As a Vessel That Has Ferried Countless Latinos From Isolation Into America’s Mainstream*, STAR-TRIB., Sept. 23 1997 at 4A (noting that a George Mason University study of 42,000 bilingual education students over ten years indicated that the students equalled or surpassed native English speakers after four years in a quality bilingual program.); ERIC Clearinghouse on Languages and Linguistics, *supra* note 204, at 4 (stating that although oral communication skills in a second language may be acquired within two or three years, it may take four to six years to acquire the level of proficiency needed for understanding the language in its academic uses).

<sup>211</sup> See Proposition 227, *supra* note 6, § 300(f).

<sup>212</sup> See ERIC Clearinghouse on Languages and Linguistics, *supra* note 204, at 4 (citing a study of 1,210 immigrant children in Canada who required much longer, approximately five to seven years, to master the cognitive language required for the regular English curriculum than to master oral communicative skills). See also James Crawford, *Bilingual Education* (visited Oct. 4, 1997) <<http://ourworld.compuserve.com/homepages/JW-Crawford/biling.htm>> (stating that while playground English tends to be acquired rapidly by most children, academic English is acquired over a period of five to seven years).

#### IV. AN ALTERNATIVE SOLUTION: THE ALPERT-FIRESTONE PROPOSAL AND TRANSITIONAL BILINGUAL EDUCATION

Proposition 227 is an unwarranted burden to place upon California's bilingual students. Instead, a middle ground should be reached that attempts to meet the concerns of bilingual education opponents, while also guaranteeing LEP students equal participation in the educational process. Senator Dede Alpert (D-Coronado) and Assemblyman Brooks Firestone (R-Santa Barbara) propose a bilingual education bill that could strike this balance.<sup>213</sup> This proposal gives local districts flexibility to decide what method will work best for their particular students.<sup>214</sup> This proposal would, for the first time, force school districts to measure the educational progress of LEP students.<sup>215</sup> "If after three years the students showed little progress in academics or English proficiency, the districts would be required to revamp their plan. If no progress was indicated after five years, the state would step in to oversee the program."<sup>216</sup> This proposal would give districts the latitude to experiment with programs, while also ensuring that English-deficient students move forward in substantive subjects in a timely manner.<sup>217</sup>

This bill takes into account the realities that have too often been ignored in the ideological battle over bilingual education. For instance, each California school district varies in its resources, materials, competency of bilingual instructors, and mix of students. It is best for each district to tailor a program to meet the needs of its LEP students. Although the Alpert-Firestone bill may seem to be a compromise, it is preferable to a complete lack of bilingual education. The Alpert-Firestone bill makes far more sense than the punitive measure proposed by Unz and those who deem bilingual education to be a waste of time or a plot to undermine the purity of the English language.<sup>218</sup>

However, if the school district has the resources, transitional bilingual education is a preferable approach. Transitional bilingual education does not sacrifice other substantive subjects at the expense of English instruction. In this program, LEP students are taught substantive subjects in their native languages while they learn English as a foreign language.<sup>219</sup> LEP students in this program are able to continue learning other substantive courses in the five to seven years it takes to master academic English.<sup>220</sup> "As the child's proficiency in English increases, he is gradually taught his substantive subjects in English until, eventually, he is placed in an English-only class. Once English has been mastered, however, native language skills are neither maintained nor perfected."<sup>221</sup>

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<sup>213</sup> See *Mend, Don't End Bilingual Education*, *supra* note 10, at 8.

<sup>214</sup> See *id.*

<sup>215</sup> See *id.*

<sup>216</sup> *Id.*

<sup>217</sup> See *id.*

<sup>218</sup> See *id.*

<sup>219</sup> See Newman, *supra* note 41, at 614.

<sup>220</sup> See *id.*

<sup>221</sup> *Id.* at 614-15.

Bilingual Education programs can produce fully bilingual students, capable of communicating both in English and in another language. Moreover, such programs may produce students with superior problem solving skills, able to "consider problems from two or more perspectives, . . . a valuable skill in today's job market," as our nation moves toward a global economy.<sup>222</sup>

There are two examples of federally funded bilingual education programs that have successfully accomplished the goals of bilingual education. In California, Calexico Unified School District used federal bilingual funds to initiate a district-wide program. Ninety-eight percent of the 6,700 students are Hispanic.<sup>223</sup> This program has enjoyed enormous success, as illustrated by the following:

Although 98 percent of its kindergarten students enter school knowing little or no English, by fourth grade almost all of them are in English language classrooms. The annual dropout rate is less than half the statewide average for Hispanic students. In fact, the district has a lower proportion of dropouts than any other predominately Hispanic district in the state. About four-fifths of its students go on to postsecondary education; one-fifth of its students go to four-year colleges.<sup>224</sup>

The Healdsburg Union School District provides another example of a successful transitional bilingual education program.<sup>225</sup> The following passage demonstrates the dramatic results achieved:

All of the students who entered the program were limited-English proficient and scored the 35th percentile or less in reading and language arts . . . . Evaluations show that by the end of fourth grade students in the program, on average, were at national norms for their grade level in reading, language, and math.<sup>226</sup>

Such research indicates that bilingual education is successful when it is well-funded and properly executed.<sup>227</sup> School districts that have the resources should adopt the elements that have led to this success in other schools. For instance,

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<sup>222</sup> Office of Bilingual Education and Minority Language Affairs, *supra* note 109, at 2.

<sup>223</sup> *See id.* at 4.

<sup>224</sup> *Id.*

<sup>225</sup> *See id.*

<sup>226</sup> *Id.* The authors also state that:

In New York, the PRISM program at the International High School used federal bilingual education program funds to begin a joint venture between the City University of New York, the New York City Board of Education, New York State Education Department, the Coalition Essential Schools and the New York Networks for School Renewal. Fifty-four percent of the school's LEP students graduate within 4 years, compared to 34% in the city's other schools. Three out of four students enroll in at least one college course while in high school with a pass rate of 85%, surpassing the rate for regular college students. The school's senior class graduation rates average over 94%, with annual dropout rates of 1.8%. Over 92% of their LEP graduates apply to and are accepted to college.

*Id.*

<sup>227</sup> *See id.*

adequately compensating educational personnel trained to serve LEP students; conducting parent outreach; upgrading curricula, instructional material, and assessments; conducting professional development activities; and acquiring educational technology to assist LEP students are all factors that contribute to a successful Bilingual Educational program.<sup>228</sup>

Some may find the cost of the Alpert-Firestone bill and the Bilingual Transitional Program objectionable. However, in the long run, fully bilingual students with an effective English education would enhance the United States' participation in the global economic market. Thus, providing quality education for LEP students is in the nation's best interest, because these students can link the United States to the rest of the world.<sup>229</sup>

#### CONCLUSION

Bilingual education is a practical educational program. It is an efficient tool for teaching English to children so they may achieve their full potential as students and professional adults. Research has revealed many misconceptions about how children learn second languages. It is essential that people are aware of these misconceptions and realize that quick and easy solutions are not appropriate for such complex problems. Proposition 227's sheltered English immersion program is an extreme and unwarranted measure that violates the rights of LEP students under Title VI of the Civil Rights Act, the EEOA, and *Lau*. An alternative to Proposition 227 is the Alpert-Firestone bill, under which each school district tailors its program to meet the needs of its LEP students. If the school district has the resources and is capable of implementing a bilingual education program, it should make an effort to do so. Where problems exist with bilingual education, the answer is to fix the individual program, not to eliminate all bilingual programs. California should concentrate its efforts on finding the best way to educate students with language deficiencies, rather than abandoning them. Bilingual education may be problematic in some school districts, but forbidding it outright is a dangerously easy solution.

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<sup>228</sup> See *id.*

<sup>229</sup> See Diaz-Granados, *supra* note 6, at 852.

