

Language Restrictionism Revisited: The Case Against Colorado's 2000 Anti-Bilingual Education Initiative

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INTRODUCTION

Statewide ballot initiatives, such as California's Proposition 227, Arizona's Proposition 203, and Massachusetts's Question 2, have become effective political tools for attacking bilingual education programs and changing the language policies governing the education of Spanish-speaking students. These propositions have reintroduced language restrictionism—prohibitions on the use of languages other than English—to the language policy landscape through direct-voter political processes that bypass the traditional language policymaking bodies of state legislatures and local school boards.

In November 2002, a proposed anti-bilingual initiative in Colorado was, for the first time, defeated at the polls.¹ However, this was not the first time such an initiative had appeared in Colorado. During the 2000 election cycle, an anti-bilingual education initiative was introduced that was challenged in the Colorado Supreme Court before it reached voters.² In reviewing this initiative, the court ruled that the initiative's ballot summaries were misleading and unclear, and that they contained prohibited catch phrases and slogans.³ Through this legal challenge, the proposed Colorado initiative became the first and only anti-bilingual education initiative to be blocked from appearing on a ballot.

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¹ Eric Hubler, *Amendment 31 Bilingual-Ed Ban Fails*, DENVER POST, Nov. 6, 2002, at E1.

² *In re* Title, Ballot Title & Submission Clause, & Summary for 1999–2000 # 258(A), 4 P.3d 1094 (Colo. 2000).

³ *Id.* at 1096–97.

Current statewide anti-bilingual education initiatives, like the 2000 Colorado case, are reminiscent of an earlier period of American history during which nativism gave rise to similar language restrictionistic policies. Nativism has a long history in America. Since the nineteenth century, nativism has appeared as language restrictionism—the official designation of a particular language, such as English, for use in a given domain, like education, and the prohibition of the use of other languages in that domain.⁴ Prohibitions of the use of languages other than English for educational purposes were established during the last large wave of immigration at the turn of the twentieth century.⁵ These restrictions on language were manifestations of nativist sentiment directed primarily against immigrants whose cultural and linguistic traits were considered threats to the nation.⁶ Such prohibitions use laws to force an assimilationist ideology, which devalues the languages and cultures of national minorities and reaffirms a narrow definition of national identity. Increasingly, anti-bilingual education initiatives are directed against the growing number of Spanish-speaking Latinos.⁷ This trend mirrors the historical pattern of language restrictionism which spread throughout America during periods of increased immigration.⁸ Hence, using voter initiatives to eliminate bilingual education simply puts a new face on an old tradition.

Even though anti-bilingual education initiatives do not use expressly anti-immigrant or racist terminology, their impact on education is classic nativist language restrictionism. Anti-bilingual education initiatives officially designate English as the only language to be used in the educational domain and essentially prohibit the use of all non-English languages during classroom instruction.⁹ This differs from the nativism of the past in that nativism used to be explicitly anti-immigrant.¹⁰ Today's nativism is much more subtle because it can have the same anti-immigrant effect without using anti-immigrant or blatantly racist language. Initiatives are now *de facto* anti-immigrant and racist, since they target Latino language minority students.

Currently, these initiatives disproportionately impact Latinos in the United States. Latinos will soon be the country's largest minority group.¹¹

⁴ Arnold Leibowitz, Language as a Means of Social Control: The United States Experience, Paper Presented at the Eighth World Congress of Sociology, University of Toronto, Ontario, Canada 4 (Aug. 1974). This document can be obtained through the Educational Resources Information Center (ERIC), funded by the U.S. Department of Education, and is catalogued as ED093168.

⁵ *Id.*

⁶ See Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 340–41 (1992).

⁷ See CAROL L. SCHMID, THE POLITICS OF LANGUAGE: CONFLICT, IDENTITY AND CULTURAL PLURALISM IN COMPARATIVE PERSPECTIVE 172–73 (2001).

⁸ See *id.* at 32.

⁹ See *id.* at 159.

¹⁰ See *id.* at 171.

¹¹ Press Release, United States Census Bureau, Hispanic Population Reaches All-Time

The Latino school-age population has grown sixty-one percent since 1990, and approximately forty-nine percent of school-age Latino students are immigrants.¹² Although similar in intent to state and federal official-English efforts that aim to grant official designation to the English language as the sole means of official communication, English immersion initiatives differ in that they do not target governmental agencies.¹³ Instead, they target the public education system, which has long been viewed as the central mechanism for the assimilation of immigrant students.¹⁴ Also, in contrast to most official-English initiatives, which are largely symbolic, the effects of English immersion initiatives are immediately felt in affected schools. When directed against Spanish-speaking communities, the elimination of the Spanish language in schools through English immersion continues a pattern of forced assimilation.¹⁵ Not only do the initiatives undermine bilingualism, cultural pluralism, and ethnic pride in Latino students, they also result in the loss of educational opportunities for linguistic minority populations by eliminating educational options.¹⁶

To provide a historical basis for our analysis of anti-bilingual education initiatives and the Colorado Supreme Court ruling of *In re Title, Ballot Title and Submission Clause, and Summary for 1999–2000 # 258(A)*,¹⁷ this Article proceeds with a brief overview of nativism and language restrictionism with special attention given to how they have been directed at Mexican-origin communities.

I. NATIVISM

While the words “nationalism,” “racism,” and “nativism” are often used interchangeably by the general public, many scholars have argued that stark differences exist between these concepts and their manifestation in society.¹⁸ Nativism is often defined as the practice of favoring na-

High of 38.8 Million, New Census Bureau Estimates Show (June 18, 2003), available at <http://www.census.gov/Press-Release/www/2003/cb03-100.html>.

¹² U.S. SENATE COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS ET AL., KEEPING THE PROMISE: HISPANIC EDUCATION AND AMERICA'S FUTURE 1 (2002).

¹³ See SCHMID, *supra* note 7, at 61, 159.

¹⁴ FRANK V. THOMPSON, SCHOOLING OF THE IMMIGRANT 1 (1920); see U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY, 1997 REPORT TO CONGRESS (1997).

¹⁵ Guadalupe San Miguel, Jr. & Richard R. Valencia, *From the Treaty of Guadalupe Hidalgo to Hopwood: The Educational Plight and Struggle of Mexican Americans in the Southwest*, 68 HARV. EDUC. REV. 353, 358 (1998).

¹⁶ See SCHMID, *supra* note 7, at 159.

¹⁷ *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 # 258(A)*, 4 P.3d 1094 (Colo. 2000).

¹⁸ See, e.g., George J. Sánchez, *Face the Nation: Race, Immigration, and the Rise of Nativism in Late-Twentieth-Century America*, in THE HANDBOOK OF INTERNATIONAL MIGRATION: THE AMERICAN EXPERIENCE 371, 373 (Charles Hirschman et al. eds., 1999); John Higham, *Instead of a Sequel, or, How I Lost My Subject*, in THE HANDBOOK OF IN-

tive-born citizens over immigrants or “intense opposition to an internal minority on the ground of its foreign . . . connections,”¹⁹ with modern nationalism serving as the energizing force of the intense opposition.²⁰ Nativism often manifests itself during times of national stress, as in times of war, economic recession, demographic shifts, or unwanted immigration.²¹ It stems from fear and “triggers restrictive laws aimed at persons whose ethnicity differs from that of the core culture.”²²

Nativism consists of more than personal grudges or individual anxieties. Rather, it is a body of interconnected ideas about American government and society, about the past and future of the United States, and about who counts as an American. Nativism has given rise to fraternal organizations and political parties that seek to ensure a certain ethnic make-up of the country and defend it against perceived threats from immigrants.²³ More than a descriptor of xenophobic attitudes, nativism is one of the most sustained social movements in the United States, spanning over 150 years.²⁴ Nativism has opposed and continues to oppose unregulated immigration, has favored the disenfranchisement of foreign-born citizens through uniform naturalization procedures, and opposes allegedly excessive “foreign” influences in American life.²⁵ “America for Americans” is its most memorable slogan.²⁶ What nativism has done, in part through nativistic organizations, is to portray “prejudices as patriotism and convert[] individual indignation and anxiety into coordinated action.”²⁷

Nativist movements seek to reinforce their narrow view of a national culture and purport to protect national unity or security against perceived threats from immigrants. Under classic nativism, different traits or activities of immigrants were considered “foreign,” or “un-American,” and a threat to the nation.²⁸ Specifically, these threats were easily identifiable traits such as language, membership in a religious denomination, racial-ethnic background, or political activity, as in the case of refugee radicals who were thought to be agents of class warfare.²⁹

INTERNATIONAL MIGRATION: THE AMERICAN EXPERIENCE 383, 384 (Charles Hirschman et al. eds., 1999).

¹⁹ JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925 4 (1955).

²⁰ *Id.*

²¹ *See id.*

²² Perea, *supra* note 6, at 340.

²³ DALE T. KNOBEL, AMERICA FOR THE AMERICANS: THE NATIVIST MOVEMENT IN THE UNITED STATES xviii (1996).

²⁴ *Id.* at xix, 1–2.

²⁵ *Id.* at xxvi–xxvii.

²⁶ *Id.* at xix.

²⁷ *Id.* at xxvii.

²⁸ HIGHAM, *supra* note 19, at 4.

²⁹ *See* Higham, *supra* note 18, at 384.

The term “nativism” is often associated with anti-immigrant sentiment occurring at the turn of the twentieth century, when there was mass immigration from Europe.³⁰ Examples of nativism from that era include anti-Irish and anti-Catholic campaigns.³¹ However, nativism has had and continues to have a strong presence in American society as illustrated by the successful passage of California’s anti-immigrant Proposition 187, but with an added twist. The nativism that immigrants and linguistic minorities face today includes a racial dimension not as pronounced as before. Today immigrants are generally from non-European areas, such as Latin America and Asia.³² While the nativism experienced by these recent immigrants is very similar to the nativism of the nineteenth century, their non-European background adds a new racial dimension.

Although directed primarily at white European immigrants, the nativism of the nineteenth century included an element of racism in that people often considered different ethnicities to be distinct races. For instance, some encyclopedias and other reference books explicitly stated that groups such as Swedes, Germans, Greeks, Finns, Italians, and Spaniards constituted different races.³³ Nativism against European immigrants, however, differs from that experienced more recently by non-European immigrants. Immigrants of color possess physical, cultural, and linguistic differences distinct from dominant American society. For example, “Anglo society views Latinos, with their Spanish language and surnames, their non-Anglo Saxon culture, and their different physical appearance, as foreign and different.”³⁴ These differences prevent full acceptance by the dominant society, regardless of how long these immigrants have been in the United States. As Juan Perea notes, “[A]n important part of the public image of the Latino is the Latino as alien: an immigrant, a recent arrival, a foreigner not really belonging to, or in, America.”³⁵ Although at times considered members of different racial groups, European immigrants did not face the same barriers of entry into American society because they were white. Ultimately, the European immigrant could assimilate.

³⁰ See Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 *LAW & HIST. REV.* 69, 74–75 (2003).

³¹ HIGHAM, *supra* note 19, at 29–30.

³² See Leo R. Chavez, *Immigration Reform and Nativism: The Nationalist Response to the Transnationalist Challenge*, in *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 61, 73 (Juan F. Perea ed., 1997).

³³ See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610–12 (1987).

³⁴ ROBERT BELTON & DIANNE AVERY, *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 1, 9 (6th ed. 1999).

³⁵ Juan F. Perea, *Los Olivados: On the Making of Invisible People*, 70 *N.Y.U. L. REV.* 965, 977 (1995).

II. NATIVISM VERSUS RACISM

In contrast to the concept of racism, nativism “divide[s] insiders, who belong[] to the nation, from outsiders, who [are] in it but not of it.”³⁶ Nativism is distinct from racism in that the latter is more concerned with distinctions between “civilization and barbarism than . . . with boundaries between nation-states.”³⁷ Racism helps to maintain a lower societal status for a group considered to be inferior.³⁸ Although nativism is often racialized, and thus racist, nativism espouses assimilation into the dominant culture, whereas racism entails exclusion from the dominant culture.³⁹ The division that nativism creates between insiders and outsiders forms part of an effort to demand conformity to, and to protect the social structure of, the dominant culture. Unfavorable reactions to personal and cultural traits are not necessarily nativist, but perhaps are still racist. Only when integrated with hostile and fearful nationalism do these reactions take a nativist tone. John Higham observes, “While drawing on much broader cultural antipathies and ethnocentric judgments, nativism translates them into a zeal to destroy the enemies of a distinctively American way of life.”⁴⁰ Nativism demands conformity, uniformity, and assimilation and fiercely opposes all who resist.

Although based on fear, much like racism, nativism touts assimilation through the elimination of undesirable cultural, linguistic, religious, or political traits. This concept of assimilation permeates both the classical nativism of the turn of the twentieth century as well as the neo-nativism of today.⁴¹ A perceived failure to assimilate, such as continuing to speak a non-English language, is considered evidence of disloyalty and un-American-ness.⁴² From the nativist perspective, “outsiders” assimilate through language fluency, cultural integration, and adoption of mainstream social values.⁴³ From the colonial era to the early twentieth century, immigrants tended to be of the same racial group.⁴⁴ Consequently, for these groups, assimilation was at least possible. For this reason, it is crucial to recognize that the changing geography of immigration patterns has affected the ability of immigrants to attain the levels of assimilation previously accomplished by European immigrants.⁴⁵ Although nativism

³⁶ Higham, *supra* note 18, at 384.

³⁷ *Id.*

³⁸ *See id.*

³⁹ *See id.*

⁴⁰ HIGHAM, *supra* note 19, at 4.

⁴¹ *See* Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 13, 34 (Juan F. Perea ed., 1997).

⁴² *See* HIGHAM, *supra* note 19, at 4–5.

⁴³ *See* Feagin, *supra* note 41, at 25–26.

⁴⁴ *Id.* at 24.

⁴⁵ *See* Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE

still pushes assimilation, the emergence of racialized nativism indicates that this is an assimilation for outsiders whose physical traits and characteristics most reflect the dominant culture, as the history of racial segregation in the United States demonstrates.⁴⁶

III. NATIVISM IN PRACTICE

American immigration law stands out as an example of nativism in practice. Citizenship defines who is, and is not, a member of society entitled to all the rights and privileges guaranteed by law. In order to become a citizen, one must be granted permanent residence and access to the territory of the United States. Throughout American history, immigration law has defined who is eligible to enter the United States, and once here, who can become a member of American society. As such, immigration law has had an incredible power to shape how the majority of Americans look and speak. Insiders and outsiders have been identified by numerous characteristics, including ethnic, religious, racial, and linguistic bases.

In a recent essay, John Higham revisited his theory on the construct of nativism and its past and present manifestations.⁴⁷ He argued that, during the mid to late 1800s, nativism meant that immigrants could eventually gain acceptance into American society through assimilation.⁴⁸ However, as anti-Catholic and anti-radical sentiment have decreased, nativism has become increasingly racialized, where the opportunity to assimilate is not extended equally to all. Higham observed that no variety of anti-European sentiment ever approached the violent extremes that characterized anti-Chinese sentiment in the 1870s and 1880s, which led to the Chinese Exclusion Act.⁴⁹ This Act illustrated the influence of nativism on immigration policy and the use of legislation to exclude undesirable immigrants.⁵⁰

Nativism also influenced the National Origins Act of 1924, which established a national origins quota for immigration.⁵¹ The quota system classified immigrants on the basis of their country of origin. This system sought to “limit immigration so that the demographic composition of immigrants matched the predominantly white, northern European composition of the extant American population.”⁵² The result was explicit discrimination against immigrants from Eastern and Southern Europe, Af-

ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 165, 166 (Juan F. Perea ed., 1997).

⁴⁶ *Id.* at 166.

⁴⁷ Higham, *supra* note 18, at 383.

⁴⁸ *Id.* at 384.

⁴⁹ HIGHAM, *supra* note 19, at 25; Act of May 6, 1882, ch. 126, 22 Stat. 58.

⁵⁰ HIGHAM, *supra* note 19, at 25.

⁵¹ National Origins Act of 1924, ch. 190, 43 Stat. 153.

⁵² BELTON & AVERY, *supra* note 34, at 574.

rica, the Middle East, and Asia.⁵³ Mexican immigrants were initially not subject to these quotas since their labor was needed in the agricultural fields.⁵⁴ However, opposition to Mexican immigration grew as the number of immigrants increased. Opponents of Mexican immigration characterized Mexicans as inferior to other groups that were restricted by the National Origins Act of 1924.⁵⁵ The national origins quota system was abolished by the Immigration and Nationality Act Amendments of 1965.⁵⁶ This did not mark the end of immigration discrimination against people of color. In response to large numbers of immigrants from Mexico and other Spanish-speaking countries, Congress included a ceiling on immigration from the western hemisphere in the 1965 statute, in lieu of a national origins quota.⁵⁷ In 1976, following the passage of further amendments, immigration regulations were made the same for both hemispheres.⁵⁸

IV. NATIVISM DIRECTED AGAINST MEXICANS

Stereotypes of Mexicans contributed to a view in which the terms “Mexican” and “peon” were fused.⁵⁹ Mexicans were viewed as culturally backward, unable to assimilate, and as a threat to the cultural and racial homogeneity of American society.⁶⁰ Further, Mexican immigrants were turned into scapegoats for the country’s economic depression.⁶¹ A dramatic example of how nativism and economic stress combined to harm Mexicans occurred during the Depression era of the 1930s, when “repatriations” of Mexicans and Mexican Americans took place.⁶² Between 1929 and 1937, an average of approximately 80,000 Mexicans and Americans of Mexican descent were repatriated to Mexico annually.⁶³ In 1931, this number skyrocketed to a reported 138,519.⁶⁴ Most individuals who went back to Mexico during this time period were not formally deported. Some left semi-voluntarily because they were frightened by raids at work sites and public areas, or because they were informed that if they left voluntarily they had a better chance to return legally.⁶⁵

⁵³ *Id.*

⁵⁴ See Sánchez, *supra* note 18, at 373.

⁵⁵ See DAVID G. GUTIÉRREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY 53 (1995).

⁵⁶ Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

⁵⁷ See *id.*

⁵⁸ See GUTIÉRREZ, *supra* note 55, at 200.

⁵⁹ *Id.* at 54–55.

⁶⁰ *Id.*

⁶¹ See *id.* at 55.

⁶² *Id.* at 72.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ ABRAHAM HOFFMAN, UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION: REPATRIATION PRESSURES, 1929–1939 43–48 (1974).

A second wave of repatriations took place in the 1950s through “Operation Wetback”: a policy that was shaped by a combination of politics and economics. In 1954 under this program, 84,278 apprehensions took place in California and 80,127 occurred in central and eastern Texas.⁶⁶ This wave of repatriation was influenced by economic recession, as well as by the lingering influence of McCarthyism.⁶⁷ During the repatriations of both the Depression Era and Operation Wetback in the 1950s, only one group was targeted—people of Mexican descent.⁶⁸ As a result, family and kinship ties were disrupted as long-term residents and U.S. citizens were sent to live in Mexico.⁶⁹

V. THE NEW NATIVISM

Anti-immigrant sentiments have reemerged over the past few decades. This new nativism includes the nationalistic anti-immigrant sentiment of the early twentieth century, but is also unique in that it targets immigrants of color who are non-European and thus both racially (or ethnically) and linguistically identifiable. Because of this identifiability, new nativism does not allow for the relatively easy assimilation of non-European immigrants.⁷⁰ Immigrants today face a multi-faceted oppression based on immigration status, social class, language, and the perception of racial difference.⁷¹ The combination of these factors exacerbates nativist responses.

Two distinct characteristics of new immigrants have contributed to a different immigrant experience from that of a century ago. First, new immigrants are typically people of color.⁷² Second, new immigrants are considered “transnationalist.”⁷³ Transnationalism is a term that refers to the cross-border migration of people, capital, goods, and services facilitated by modern developments in transportation, communication, and global economic expansion.⁷⁴ This has given rise to an immigrant identity based on strong and sustained cross-border ties.⁷⁵ Many of these new immigrants, who are primarily from Latin America and Asia, receive support through ongoing social and economic connections to their home country.⁷⁶ Due to better communication and transportation services, individu-

⁶⁶ JUAN R. GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 228 (1980).

⁶⁷ *Id.* at 231.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Johnson, *supra* note 45, at 167.

⁷¹ *See id.*

⁷² Chavez, *supra* note 32, at 73.

⁷³ *Id.* at 62.

⁷⁴ *See* Alejandro Portes et al., *The Study of Transnationalism: Pitfalls and Promise of an Emergent Research Field*, 22 ETHNIC & RACIAL STUDIES 217, 217–18 (1999).

⁷⁵ *Id.* at 228–29.

⁷⁶ *See id.*

als are no longer bound by borders. Immigrants are now able to more easily maintain multiple identities.⁷⁷ This dual nationalism or biculturalism contributes to a different type of immigrant experience and assimilation pattern, where the strength of community ties in the home country provides additional support to these new immigrants, thus decreasing the sense of isolation and helplessness that many of the immigrants of the past felt.

Nativism today does not manifest itself as explicit racism. Rather, nativism attacks recent non-European immigrants as horrendous strains on the economy because of access to social services, as threats to national unity because of linguistic and cultural differences, and as threats to national security because of the undocumented status of many immigrants.⁷⁸ Specifically, nativists fear that the nation—especially California and the Southwest—will be overwhelmed by undocumented Mexican immigrants.⁷⁹

An “us versus them” framework, typical of nativism, has been invoked in the debate over immigration legislation. Interestingly, patriotism and nationalism are not often used in support of anti-immigrant legislation. Instead, proponents at both the state and national levels use protection of national security and the economy to justify legislation.⁸⁰ This argument combines anti-foreign sentiments with elements of linguistic differences, physical identifiability, affirmative action, and restrictions on access to social benefits. For example, California’s Proposition 187—aimed most clearly at Mexican immigrants—intended to eliminate undocumented immigrants’ access to social services and public education.⁸¹ This legislative action prompted many other proposals, including requiring notification to the Immigration and Naturalization Service when a hospital requested reimbursement for treatment of undocumented immigrants; cutting off public education to undocumented immigrants; denying federal assistance related to health programs, Social Security, disability payments, housing assistance, and childhood immunizations to millions of legal immigrants; and restricting benefits given to naturalized citizens.⁸²

Racialized nativism raises questions about the impact of the assimilation promoted today. Immigrants of color will always be of a different color, although they may be culturally and linguistically assimilated.⁸³ Kevin Johnson argues that race creates an artificial barrier for new immi-

⁷⁷ *See id.*

⁷⁸ Feagin, *supra* note 41, at 31–32.

⁷⁹ *See id.* at 31.

⁸⁰ Chavez, *supra* note 32, at 67.

⁸¹ *See id.* at 62.

⁸² Berta Esperanza Hernández-Truyol, *Reconciling Rights in Collision: An International Human Rights Strategy*, in *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 254, 265 (Juan F. Perea ed., 1997).

⁸³ *See Johnson, supra* note 45, at 166–67.

grants and impedes the process of assimilation into the American mainstream, largely due to the refusal of the dominant society to accept racial minorities in general.⁸⁴ Historically, nativist sentiments against a particular group decreased as the process of assimilation took root and the immigrants became “Americanized.”⁸⁵ With the added element of color, full integration may never be possible.⁸⁶ Immigrants of color will have a difficult time gaining acceptance into society because of racial stratification.⁸⁷ Even if naturalized, these immigrants still possess the “wrong” skin color and customs, so therefore will remain marginalized just like many American-born citizens of color.⁸⁸ Regardless of their citizenship status, minorities are often treated as non-American. As a result, hostility towards new immigrants is more significant today than in earlier periods because their racial identifiability allows them to fit into the existing racial stratification of America.⁸⁹ Therefore, as immigrants are more likely to be people of color, the assimilation process becomes more complex.

Charles Jaret compared nativist attitudes and actions during two periods of mass immigration: 1880–1924 and 1970–1998.⁹⁰ He concluded that nativism became more widespread in the 1990s than it had been for several decades.⁹¹ Moreover, while new nativism resembled old nativism, the new form included unique ideas that gave it support beyond its traditional conservative form.⁹² For instance, some environmental groups concerned with the effects of overpopulation promoted increased immigration restrictions.⁹³ Across these two time periods, the public’s negative attitudes towards immigration remained constant. These attitudes were based on the fear that immigration would decrease economic opportunities while increasing threats to political order and national character.⁹⁴

Jaret also observed that nativists focused on the effect that new immigrants could have on the racial and cultural balance of the country.⁹⁵ Threats from terrorists have rekindled the concern that immigrants are in this country as agents of hostile nations.⁹⁶

⁸⁴ *Id.*

⁸⁵ *Id.* at 166.

⁸⁶ *See id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Sánchez, *supra* note 18, at 373.

⁹⁰ Charles Jaret, *Troubled by Newcomers: Anti-Immigrant Attitudes and Action During Two Eras of Mass Immigration to the United States*, 18 J. AM. ETHNIC HIST. 1, 1 (1999).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 32.

⁹⁴ *Id.* at 12, 34.

⁹⁵ *Id.*

⁹⁶ *Id.* at 22.

VI. LATINOS AS FOREIGNERS

The anti-Mexican immigrant rhetoric of today does not take into account the Mexican presence in the Southwest that predates English-speaking European immigration. The ethnic, linguistic, and religious affiliation (mostly Catholic) of the Mexican-origin population in the Southwest has historically differentiated them from the Anglo population.⁹⁷ Nativism directed against Mexicans has created a “Latino-as-foreigner” phenomenon in which both long-term residents and recent immigrants are perceived as foreigners.⁹⁸ There is neither a direct counterpart in the experience of European immigrants who faced nativism in the nineteenth and twentieth centuries, nor in the nativism directed against Asians in California during the late nineteenth century, because Asians could not claim a presence that predated that of nativists.⁹⁹

The “Latino-as-foreigner” attitude manifests itself through verbal insults such as “This is America, so speak English” or “Go back to where you came from,” which have been directed even at political elites like Congressman Luis Gutierrez, who was born and raised in the United States.¹⁰⁰ It also manifests itself as claims that Latinos fail to assimilate, despite evidence to the contrary. Kevin Johnson labels immigration policy and related issues as “a convenient lens through which to learn how dominant society generally views Latinos” and cites the anti-Mexican message of the Proposition 187 campaign as an example.¹⁰¹ Anti-Mexican sentiment specifically targets an ethnic group that is most visibly identifiable and disenfranchised.¹⁰² Johnson has also observed that “the United States has been schizophrenic in its views about undocumented Mexican labor.”¹⁰³ For instance, Mexicans have been described as being hard-working and taking jobs that others would never perform.¹⁰⁴ However, during times of economic strife, they turn into “convenient scapegoats.”¹⁰⁵ Likewise, the dominant image of the “bad foreigner” is often an undocumented Mexican, or some other person of color.¹⁰⁶

⁹⁷ Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 121 (1997).

⁹⁸ *See id.* at 128–29.

⁹⁹ *See* Johnson, *supra* note 45, at 167–71.

¹⁰⁰ Johnson, *supra* note 97, at 118; *see also* Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 4 (1998).

¹⁰¹ Johnson, *supra* note 97, at 122.

¹⁰² *See id.* at 124.

¹⁰³ Johnson, *supra* note 45, at 171.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 172.

VII. NATIVISM HIDDEN

Nativism denotes a negative attitude and ethnocentric hostility toward internal foreigners, or those perceived as such.¹⁰⁷ However, the term “hostility” is multifaceted and can manifest itself in various forms including immigration policies, social welfare reforms, language restrictions, and—most commonly today—racial and ethnocentric animus towards immigrants.¹⁰⁸ Accordingly, nativism can be manifested subtly or blatantly. Nativism in its boldest form materializes as hate crimes or anti-immigrant attitudes and discourse.¹⁰⁹ When manifested subtly, nativism takes the form of restrictive social policies, such as limitations on who has a right to social benefits.¹¹⁰ Although not actively engaged in anti-immigrant discourse, restrictive language policies target one of the most easily identifiable facts of minority immigrant communities: their language. At the end of the twentieth century, nativistic sentiment appeared as antipathy towards non-English languages and as a fear that linguistic diversity would undermine national unity.¹¹¹ Today, immigrants are still perceived as being resistant to learning English despite evidence to the contrary.¹¹²

VIII. LANGUAGE RESTRICTIONISM AND EQUAL OPPORTUNITY
IN EDUCATION

Language restrictionism places prohibitions on the use of languages other than the dominant language. It results from the official designation by an official body of the dominant language for governmental or educational purposes.¹¹³ Language restrictionism also enforces monolingualism through official policies that repress the multilingualism of a society within a given domain of public activity.¹¹⁴ Official designation may be considered the most significant act that a government can take with respect to language planning because it holds great consequences for minority language communities in terms of their role in society and their

¹⁰⁷ Linda S. Bosniak, “Nativism” *the Concept: Some Reflections, in* IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 279, 281–83 (Juan F. Perea ed., 1997).

¹⁰⁸ *Id.* at 282.

¹⁰⁹ See Johnson, *supra* note 97, at 122–23.

¹¹⁰ Chavez, *supra* note 32, at 73.

¹¹¹ Sánchez, *supra* note 18, at 377.

¹¹² See generally ALEJANDRO PORTES & RUBÉN G. RUMBAUT, LEGACIES: THE STORY OF THE IMMIGRANT SECOND GENERATION (2001).

¹¹³ Leibowitz, *supra* note 4, at 4, 6.

¹¹⁴ ARNOLD LEIBOWITZ, EDUCATIONAL POLICY AND POLITICAL ACCEPTANCE: THE IMPOSITION OF ENGLISH AS THE LANGUAGE OF INSTRUCTION IN AMERICAN SCHOOLS 4 (1971). This document can be obtained through the Educational Resources Information Center (ERIC), funded by the U.S. Department of Education, and is catalogued as ED047321.

access to social arenas, such as education and voting.¹¹⁵ Also, the status of speakers of minority languages is greatly affected across time as a result of the societal devaluing of their native language.¹¹⁶ Resistance by language minorities, both historically and currently, to official designation of the dominant language indicates an awareness on their part of the devaluing consequences of official designation.

Restrictions placed on language use are often accompanied by other measures.¹¹⁷ For example, during the 1910s in Nebraska during a period of strong prohibitions against the German language, “aliens” were prevented from holding public office or teaching in any public, private, or parochial school.¹¹⁸ In the current era, language restrictionist policies—such as state official-English and anti-bilingual initiatives—have developed alongside other anti-immigrant policies like California’s Proposition 187. Although Proposition 187 was found to be unconstitutional, other legislation that restricted benefits to immigrants was not.¹¹⁹ For instance, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 targeted immigrants by eliminating some of the social benefits that legal immigrants could receive, such as food stamps.¹²⁰ Language restrictionism has not only been a component of nativistic reactions to immigrant languages, but has also affected other language communities—including Native Americans and Mexican Americans—that predate the arrival of Western European immigrants.¹²¹

From 1789 to 1880, prior to the large wave of immigration from Western Europe, there was no explicit designation of English as the official language for state government or education.¹²² There also existed greater tolerance for the use of non-English school texts and languages other than English for instruction in bilingual schools.¹²³ For example, Pennsylvania passed a law in 1837 permitting German schools to be funded on an equal basis with English schools, and Midwestern states were willing to subsidize German instruction in public schools.¹²⁴

¹¹⁵ Leibowitz, *supra* note 4, at 3–4.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 49.

¹¹⁸ WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917–1927 95 (1994).

¹¹⁹ *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 786–87 (C.D. Cal. 1995).

¹²⁰ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.); Christine Marie Sierra et al., *Latino Immigration and Citizenship*, 33 PS: POL. SCI. & POL. 535, 536 (2000).

¹²¹ LEIBOWITZ, *supra* note 114, at 4.

¹²² Leibowitz, *supra* note 4, at 5.

¹²³ *Id.* at 9.

¹²⁴ See 2 ALBERT B. FAUST, THE GERMAN ELEMENT IN THE UNITED STATES: WITH SPECIAL REFERENCE TO ITS POLITICAL, MORAL, SOCIAL, AND EDUCATIONAL INFLUENCE 201–49 (1909).

After the Civil War, nativism—inspired by groups such as the American Protective Association—ended the era of tolerance toward instruction in languages other than English.¹²⁵ This reaction was not based on educational need, but rather on the political, religious, and economic threat perceived by nativists stemming from the large wave of immigration that occurred during the 1880s.¹²⁶ As teaching languages other than English came under severe attack by nativists, immigrant communities shifted from public to parochial schools in order to maintain mother-tongue education.¹²⁷ In response, language restrictionist legislation was written to limit instruction in foreign languages in parochial, private, and public schools.¹²⁸ New state constitutions containing prohibitions against sectarian education were developed in 1875 in Nebraska; in Colorado in 1876; and in Idaho, Washington, and Wyoming in 1889.¹²⁹ The following excerpt from an 1890 editorial from *The Chicago Tribune* illustrates the perceived threat:

In Illinois and Wisconsin a contest between the supporters and enemies of the American free schools, between the right of Americans to make their own laws and the claim of an Italian priest living in Rome that he has the power to nullify them can have but one termination—the defeat of such arrogance and presumption.¹³⁰

The Illinois and Wisconsin laws were repealed in 1893 in response to organized resistance by German Lutherans, Polish and German Catholics, and Scandinavian Lutherans.¹³¹

In Colorado, bilingual education was available in German and English or Spanish and English.¹³² According to a Colorado school law passed in 1867, school districts with at least twenty-five German children were directed to establish a bilingual school.¹³³ In 1870, one of the four Denver public schools was entirely German.¹³⁴ By 1877, German went from being a language of instruction to a mere subject.¹³⁵ A school law enacted that year mandated that English should be the language of instruction in public schools.¹³⁶ However, with a request from a minimum of twenty

¹²⁵ Leibowitz, *supra* note 4, at 10.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 11.

¹²⁹ *Id.*

¹³⁰ *Id.* at 12.

¹³¹ *Id.* at 13.

¹³² HEINZ KLOSS, *THE AMERICAN BILINGUAL TRADITION 179–80* (1977).

¹³³ *Id.* at 180.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

parents, German or Spanish could be taught as a subject.¹³⁷ Support for bilingual schools disappeared by 1919 when a state school law excluded non-English languages from public schools and allowed their use only as subjects in private schools.¹³⁸

Language restrictionist actions continued throughout and beyond World War I. From 1913 to 1923, many states passed statutes requiring English to be the language of instruction in both public and private schools.¹³⁹ By 1923, thirty-four states had passed language restrictionist laws requiring English instruction in the schools.¹⁴⁰ For example, the Siman Act of 1919 enacted in Nebraska required all subjects taught in public, private, and parochial schools to be in English.¹⁴¹ Non-English languages could only be taught as foreign languages after the eighth grade.¹⁴² A coalition of German, Polish, Bohemian, and Danish communities challenged the Siman Act in court, but the Nebraska Supreme Court affirmed the lower court's denial of an injunction in December 1919.¹⁴³

In a related Nebraska case, Robert Meyer was arrested and fined in 1920 for offering German instruction during recess.¹⁴⁴ The defendant alleged that the Siman Act was unconstitutional under the Fourteenth Amendment since it restricted his vocation as a foreign language teacher and constituted an invasion of personal liberty.¹⁴⁵ The teacher further asserted that the law violated Nebraska's constitutional guarantee of religious liberty.¹⁴⁶ Meyer lost his appeal to the Nebraska Supreme Court, which held that teaching ancestral languages to children was "unfavorable to national safety and self-interest."¹⁴⁷ Meyer appealed to the United States Supreme Court, which considered his case along with four others dealing with similar language restrictionist issues.¹⁴⁸ The Court's decision in *Meyer v. Nebraska* overturned the state supreme court's decision, reasoning that during peacetime, no threat to national security could justify

¹³⁷ *Id.*

¹³⁸ *Id.*; COLO. REV. STAT. § 123-21-3 (1919).

¹³⁹ Leibowitz, *supra* note 4, at 14.

¹⁴⁰ *Id.*

¹⁴¹ Siman Act of 1919, 1919 Neb. Laws 249.

¹⁴² *See* Ross, *supra* note 118, at 94.

¹⁴³ *Neb. Dist. of Evangelical Lutheran Synod of Mo., Ohio, and Other States v. McKelvie*, 175 N.W. 531 (Neb. 1919).

¹⁴⁴ *Meyer v. State*, 187 N.W. 100, 101 (Neb. 1922), *rev'd*, 262 U.S. 390 (1923).

¹⁴⁵ *Meyer v. State*, 187 N.W. at 101-02; Ross, *supra* note 118, at 105.

¹⁴⁶ *Meyer v. State*, 187 N.W. at 101 ("The defendant argue[d] that in teaching the German language in this book he was giving religious instruction according to the faith of the Zion Evangelical Lutheran Congregation."); Ross, *supra* note 118, at 105.

¹⁴⁷ Terrence G. Wiley, *The Imposition of World War I Era English-Only Policies and the Fate of German in North America*, in LANGUAGE AND POLITICS IN THE UNITED STATES AND CANADA: MYTHS AND REALITIES 211, 233 (Thomas Ricento & Barbara Burnaby eds., 1998); *Meyer v. State*, 187 N.W. at 103.

¹⁴⁸ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

restricting the teaching of languages in this manner.¹⁴⁹ Despite the ruling against language restrictionist legislation in *Meyer v. Nebraska*, anti-German sentiment lingered. High school German language courses were drastically reduced nationwide, and student enrollment in German classes dropped from twenty-five percent to eight percent during the interwar period.¹⁵⁰

The language restrictionism directed against German communities is an example often cited because of the landmark *Meyer v. Nebraska* Supreme Court ruling, the historical language policy information regarding German communities available from the colonial era to World War II, the organized political resistance to language restrictionism by German communities, and the documented consequences of anti-German policies. However, prohibitions against mother-tongue instruction and language restrictionist policies also characterized education for non-European groups such as Native Americans, Mexican Americans, and Japanese Americans.¹⁵¹

The nativistic legacy in the education of Mexican-origin communities dates to 1848, when the Southwestern states were annexed by the United States following the Mexican American War.¹⁵² The educational experience of these communities has been characterized as a process of subtraction involving the removal of Mexican culture and the Spanish language from the governance, administration, and curricula of public schools.¹⁵³ The removal of Spanish from public education occurred in two phases. In the first phase, during the 1850s, Spanish was only limited in its use of instruction. During the second phase, from 1870 to 1890, Spanish was entirely prohibited in public schools. In addition, public schools removed classes pertaining to Mexican history.¹⁵⁴

IX. THE BILINGUAL EDUCATION ACT OF 1968

Since the late 1800s, one response to multilingualism in the United States has been to designate English as the only official language of instruction in schools. One recent and important exception was the Bilingual Education Act of 1968 (BEA), which provided federal funding for instructional materials, teacher training, and program development in an attempt to address the academic underachievement of Spanish-speaking students.¹⁵⁵ The BEA concerned itself primarily with providing equitable access to education for language minority students, and not with main-

¹⁴⁹ *Id.* at 400–03.

¹⁵⁰ Wiley, *supra* note 147, at 229.

¹⁵¹ LEIBOWITZ, *supra* note 114, at 4.

¹⁵² See San Miguel, Jr. & Valencia, *supra* note 15, at 353.

¹⁵³ *Id.* at 358.

¹⁵⁴ *Id.* at 362.

¹⁵⁵ Bilingual Education Act of 1968, Pub. L. No. 90-247, 81 Stat. 783 (codified as amended at 20 U.S.C. §§ 7401–7491 (2000)).

taining students' native languages.¹⁵⁶ Native languages were not seen as resources upon which to build, but as barriers to overcome. This marked a significant shift in the treatment of non-English languages within the educational system.

The BEA's approach to societal multilingualism can be attributed in part to the reexamination of educational policies for minority communities—a project growing out of the civil rights movement and the federal “poverty programs” of the 1960s.¹⁵⁷ The BEA recognized a limited role for native language instruction in the education of linguistic minority students, although there has been some disagreement across presidential administrations. Native languages have generally been seen as a temporary bridge for the acquisition of the English language. Although the BEA represented a policy shift from previous language restrictionist laws, relatively few Spanish-speaking students ever participated in bilingual education programs. Less than seven percent of the schools in the Southwest offered bilingual education programs at the beginning of the 1970s,¹⁵⁸ and less than twenty-five percent of limited-English students in California (seventy-three percent of whom were Latino) were in bilingual education programs as of 1987.¹⁵⁹

The BEA has not been free of nativistic influence. For example, increasing concern about rising immigration from 1980 to 1990 led to revisions of the BEA.¹⁶⁰ While the BEA had previously mandated only bilingual programs, the 1984 reauthorization of the BEA shifted toward utilizing English as a Second Language (ESL) programs, which do not include native language instruction.¹⁶¹ Additionally, the 1992 appropriation for ESL programs increased from six percent to twenty-three percent of the BEA budget.¹⁶²

The BEA ended as a result of President George W. Bush's No Child Left Behind Act of 2001, which replaced the BEA with the English Language Acquisition, Language Enhancement, and Academic Achievement Act (ELAA).¹⁶³ Also, the Office of Bilingual Education and Minority Language Affairs became the Office of English Language Acquisition, Lan-

¹⁵⁶ Ann-Marie Wiese & Eugene E. García, *The Bilingual Education Act: Language Minority Students and Equal Educational Opportunity*, 22 BILINGUAL RES. J. 1, 4-5 (1998).

¹⁵⁷ *Id.* at 5.

¹⁵⁸ San Miguel, Jr. & Valencia, *supra* note 15, at 383.

¹⁵⁹ James Crawford, *The Campaign Against Proposition 227: A Post Mortem*, 21 BILINGUAL RES. J. 1, 5 (1997).

¹⁶⁰ Thomas Ricento, *National Language Policy in the United States*, in LANGUAGE AND POLITICS IN THE UNITED STATES AND CANADA: MYTHS AND REALITIES 85, 97 (Thomas Ricento & Barbara Burnaby eds., 1998).

¹⁶¹ Wiese & García, *supra* note 156, at 7.

¹⁶² Ricento, *supra* note 160, at 97.

¹⁶³ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002); English Language Acquisition, Language Enhancement, and Academic Achievement Act, Pub. L. No. 107-110, tit. III, pt. A, 115 Stat. 1690 (2002).

guage Enhancement, and Academic Achievement for Limited English Proficient Students.¹⁶⁴ The transformation brought about by the new legislation reflected a language policy shift from promoting English and, to the extent possible, native language skill development, to stressing only English skills.¹⁶⁵ Under the ELAA, federal subsidies are no longer administered through competitive grants, but instead are distributed directly to the states through formula grants based on enrollment of limited English proficient students.¹⁶⁶ Funding was expected under the ELAA, but its impact has been diluted because the funds are distributed across more states, programs, and students.

The BEA recognized a role for languages other than English in instruction. In contrast, the general voting public has continued the historic pattern of designating English as the official language of instruction in public schools by approving anti-bilingual education initiatives in California in 1998 (Proposition 227), Arizona in 2000 (Proposition 203), and Massachusetts in 2002 (Question 2).¹⁶⁷ All three of these initiatives were passed with a minimum of sixty percent voter support.¹⁶⁸ At the same time, the historic pattern of resistance to language restrictionist policies by language minority communities has also continued, as approximately sixty percent of Latinos voted against these initiatives.¹⁶⁹

Under these initiatives, students for whom English is a second language are supposed to receive one year of English immersion instruction.¹⁷⁰ Under an English immersion approach, the student receives all instruction solely in English.¹⁷¹ If parents want their children to receive bilingual instruction and the students' native language would aid in the transition to English, the parents must complete a cumbersome waiver process with no guarantee that their request will be granted.¹⁷² Proposition 203 states, "Teachers and local school districts may reject waiver requests without explanation or legal consequence . . ." ¹⁷³ The waiver procedures of these initiatives have resulted in a number of ongoing constitutional challenges concerning parents' due process rights.¹⁷⁴

¹⁶⁴ James Crawford, *Obituary: The Bilingual Ed. Act, 1968–2002*, 16 *RETHINKING SCH.* 5, 6 (2002).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Recent Legislation, *Education—English Immersion—Colorado Voters Reject an English Immersion Ballot Initiative*, 116 *HARV. L. REV.* 2709, 2709 (2003).

¹⁶⁸ Charu A. Chandrasekhar, *The Bay State Buries Bilingualism: Advocacy Lessons from Bilingual Education's Recent Defeat in Massachusetts*, 24 *CHICANO-LATINO L. REV.* 43, 43 (2003); SCHMID, *supra* note 7, at 159; Mary Ann Zehr, *Arizona Curtails Bilingual Education*, *EDUC. USA*, Nov. 15, 2000, at 7.

¹⁶⁹ SCHMID, *supra* note 7, at 159.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Chandrasekhar, *supra* note 168, at 48–49.

¹⁷³ *ARIZ. REV. STAT. ANN.* § 15-753 (West 2003).

¹⁷⁴ *See, e.g.,* Hipolito R. Corella, *Parents Sue Over English-Only*, *ARIZ. DAILY STAR*, Dec. 7, 2001, at B1.

English immersion initiatives are merely one part of a larger English-only movement that has grown out of a long history of domestic language restrictionism. Anti-bilingual education and state official-English initiatives are the contemporary version of the language restrictionist laws of the past. Unlike previous language restrictionism, the current version utilizes a direct democracy, voter initiated process to achieve its ends.¹⁷⁵ In contrast to the BEA, the popular support shown for anti-bilingual education initiatives by some sectors of the voting public mirrors a historical pattern of language restrictionism, where there is no role for non-English native languages in education.

Based on a historical review of language restrictionism, legal historian Arnold Leibowitz concluded that it was primarily a political act to mandate that English be the sole medium of instruction in education.¹⁷⁶ The development of language restrictionist educational policies has largely been due to nativistic reactions to immigrants.¹⁷⁷ Social and political acceptance of ethnic groups, coupled with popular attitudes influenced by nativism, have been important factors in the development of linguistically restrictionist policies.¹⁷⁸ As Arnold Leibowitz explained:

Further analysis of the record indicates that official acceptance or rejection of bilingualism in American schools is dependent on whether the group involved is considered politically and socially acceptable. The decision to impose English as the exclusive language of instruction in the schools has reflected the popular attitudes toward the particular ethnic group and the degree of hostility evidenced toward that group's natural development. If the group is in some way (usually because of race, color or religion) viewed as irreconcilably alien to the prevailing concept of American culture, the United States imposed harsh restrictions on its language practices; if not so viewed, study in the native tongue has gone largely unquestioned or even encouraged.¹⁷⁹

Professor Juan Perea draws similar conclusions, noting that strong popular support for language restrictionism not only indicates an affirmation of English as a symbol of national identity, but also devalues Latino culture and the Spanish language.¹⁸⁰ The devaluation of Spanish—an important and highly visible symbol in its own right—continues the nega-

¹⁷⁵ Perea, *supra* note 6, at 362.

¹⁷⁶ Leibowitz, *supra* note 4, at 3.

¹⁷⁷ *Id.* at 48–49.

¹⁷⁸ *Id.*

¹⁷⁹ LEIBOWITZ, *supra* note 114, at 4.

¹⁸⁰ Perea, *supra* note 6, at 362, 366.

tive mode of incorporation and nativism that the Mexican-origin community has experienced for over a century.¹⁸¹

The overview of nativism presented herein provides a context for understanding language restrictionism as an expression of nativism. The nativists of the past sought national unity through both racial and linguistic uniformity.¹⁸² The use of languages other than English, especially in nation-building endeavors such as schooling, was viewed as a threat to national identity and raised questions regarding immigrants' loyalty to the nation.¹⁸³ Immigration legislation that supported efforts to enforce racial uniformity ended with the elimination of the Johnson-Reid Immigration Act of 1926, but pressure for linguistic uniformity has continued into the present day through the language restrictionism efforts of official-English and anti-bilingual education initiatives.¹⁸⁴

Like California, Arizona, and Massachusetts, Colorado has been targeted by anti-bilingual, pro-English immersion political campaigns.¹⁸⁵ However, unlike the political efforts in the other three states, the first attempt in Colorado to tap into popular nativistic sentiment and advance an English immersion agenda was successfully challenged before the initiative ever hit the ballot box.¹⁸⁶ The following is an in-depth examination of the first English immersion campaign in Colorado. This chronological overview highlights the positions taken by supporters and opponents of the initiative. An analysis of the consequent Colorado Supreme Court decision illustrates the legal challenges that anti-bilingual education initiatives may encounter.

X. A CHRONOLOGY OF COLORADO'S INITIATIVE # 258(A)

In April 2000, the Washington-based organization One Nation Indivisible made known their plan to introduce the English Language Instruction in Public Schools Initiative in Colorado.¹⁸⁷ The initiative, similar to California's Proposition 227 and Arizona's Proposition 203, would have replaced bilingual education programs in Colorado public schools with one-year English immersion programs.¹⁸⁸ United States Representative Tom Tancredo and Linda Chavez of One Nation Indivisible collabo-

¹⁸¹ See *id.* at 362.

¹⁸² See *id.* at 276–78.

¹⁸³ *Id.* at 329–30.

¹⁸⁴ See *id.* at 343.

¹⁸⁵ Chandrasekhar, *supra* note 168, at 43, 52.

¹⁸⁶ Editorial, *Immersion Plan on Hold*, DENVER POST, July 12, 2000, at B8; *In re* Title, Ballot Title & Submission Clause, & Summary for 1999–2000 # 258(A), 4 P.3d 1094 (Colo. 2000).

¹⁸⁷ Carlos Illescas, *Opponents Speak Up Over English-Immersion*, DENVER POST, Apr. 14, 2000, at B1.

¹⁸⁸ Mary Ann Zehr, *Campaigns to Curtail Bilingual Ed. Advance in Colorado*, ARIZONA, 19 EDUC. WK. 1, 1 (2000).

rated to develop the November 2000 Colorado ballot initiative.¹⁸⁹ Representative Tancredo's commitment to the ballot initiative underscored his belief that bilingual education costs taxpayers too much money.¹⁹⁰ Further, both Representative Tancredo and Chavez stated that they believed that their initiative was in the best interests of affected children.¹⁹¹

Current bilingual programs in Colorado generally consist of three years of education in both English and Spanish before transitioning to English-only classes.¹⁹² Dual language programs, which are becoming more common in the state, do not place a cap on native language instruction, but rather they achieve an equal balance between Spanish and English instruction.¹⁹³ In contrast, under the English immersion model, students only receive one intensive year of English instruction before entering mainstream classes.¹⁹⁴

Denver Public Schools, which together form the largest urban school district in the state, are under a federal court order to provide bilingual education.¹⁹⁵ As a federal court order should supersede state action, any effort to undermine the court order for bilingual education is suspect.¹⁹⁶ The goal behind Denver Public Schools' current bilingual education program is to teach students English as quickly as possible.¹⁹⁷ This program employs instruction in Spanish as a bridge to English and expects students to exit the bilingual program within three years.¹⁹⁸ Student progress is monitored and extra help is available if needed.¹⁹⁹ Those students who are not conversant in English start by developing reading and other skills in their own language before learning to master English.²⁰⁰

Although Representative Tancredo and Linda Chavez built a waiver into the initiative so that parents could opt their children out of the immersion program and into bilingual education, no school would have been legally required to offer bilingual education programs in response to parental waivers.²⁰¹ Thus, such an initiative effectively eliminates bilin-

¹⁸⁹ Carlos Illescas, *Bilingual Foes Gird for Ballot*, DENVER POST, Apr. 13, 2000, at A1. Tom Tancredo is a Republican Congressman from Colorado. *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Illescas, *supra* note 187.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Illescas, *supra* note 189.

¹⁹⁶ *Id.*; see Scott Roberts, Comment, *The Evolving Concept of Preemption Removal: An Expansion of Federal Jurisdiction*, 20 ST. MARY'S L.J. 189, 202 (1988) ("Once Congress preempts a field of law and provides a remedy, the federal cause of action supersedes any state law cause of action.").

¹⁹⁷ Valerie Richardson, *Colorado Teacher Leads Push for English Immersion Plan*, WASH. TIMES, June 19, 2000, at A6.

¹⁹⁸ Editorial, *Unnecessary Meddling*, DENVER POST, May 7, 2000, at G4.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See Brian Weber, *Bilingual Issue Removed From Nov. 7 Ballot: Education Measure Misleading to Parents State High Court Says*, ROCKY MOUNTAIN NEWS, July 11, 2000, at

gual education in public schools. Accordingly, officials for Denver Public Schools immediately opposed the initiative on the basis that it limited parental choice in their students' education.²⁰²

Not surprisingly, opinions expressed about the issue were not limited to educators and initiative drafters.²⁰³ Points of contention between general supporters and opponents of the initiative began to appear in the press shortly after the public announcement that One Nation Indivisible had launched a \$500,000 campaign to eliminate bilingual education.²⁰⁴ On May 7, 2000, a demonstration was held to oppose the proposed ballot initiative.²⁰⁵ United States Representative Diana DeGette argued that English immersion is a "one size fits all" approach to education and that such an approach is never successful in teaching.²⁰⁶ Gully Stanford of the Colorado Board of Education joined Representative DeGette in criticizing the initiative by stating that "any reduction in diversity strategies will only discourage students from staying in school."²⁰⁷ Representative Tancredo stood in sharp contrast to initiative opponents. He expressed the view that bilingual education only serves to restrain children, keeping them "segmented and impoverished."²⁰⁸ Tancredo felt that by not learning English rapidly, students forego educational opportunities.²⁰⁹ Additionally, program sponsors averred that bilingual education "bottles up some children in a program they no longer need, wastes money and encourages dropouts."²¹⁰

June 2000 signaled the beginning of significant English-only campaigning in Colorado. Linda Chavez claimed that Hispanic children were being harmed by society's refusal to encourage their assimilation into the dominant culture.²¹¹ Chavez further asserted that bilingual education treats non-English-speaking children as intellectually inferior and keeps them "linguistically segregated for up to seven years."²¹² During press confer-

A5.

²⁰² Jorge Amaya, *English Immersion is a Misnomer*, DENVER POST, June 21, 2000, at B11.

²⁰³ See, e.g., Hector Gutierrez, *Harsh Words for Proposal Emphasizing English Only: Degette Calls Ballot Initiative "Destructive,"* ROCKY MOUNTAIN NEWS, June 25, 2000, at A15.

²⁰⁴ Brian Weber, *Group Launches Campaign Against Bilingual Education: Organization Wants Voters to Decide on "English Immersion" Plan Like California's*, ROCKY MOUNTAIN NEWS, June 2, 2000, at A5.

²⁰⁵ John C. Ensslin, *Bilingual Education Measure Slammed: Protesters Urge Cinco De Mayo Revelers to Oppose Ballot Item*, ROCKY MOUNTAIN NEWS, May 8, 2000, at A4.

²⁰⁶ *Id.*

²⁰⁷ Monte Whaley, *Bilingual Classes Backed at Rally*, DENVER POST, May 8, 2000, at B1.

²⁰⁸ Ensslin, *supra* note 205.

²⁰⁹ Charles Roos, Editorial, *Bilingual Initiative Likely to Fracture Coloradans*, ROCKY MOUNTAIN NEWS, Apr. 24, 2000, at A42.

²¹⁰ *Id.*

²¹¹ See Brian Weber, *Bilingual Education Under Attack*, PATRIOT LEDGER, June 3, 2000, at 6.

²¹² Weber, *supra* note 204.

ences sponsored by One Nation Indivisible, supporters of the proposed initiative proclaimed that the bill was necessary “to give our kids a fair chance to achieve the American dream.”²¹³

Initiative opponents fought the campaign, alleging that it was an attack on local control of education as proscribed by the state constitution.²¹⁴ The initiative campaign platform lacked any concrete facts about whether Colorado’s bilingual education programs have been successful.²¹⁵ Linda Chavez claimed that this deficiency was due to the fact that her organization had been denied access to Denver schools to judge the success of the programs.²¹⁶ Furthermore, Chavez stated that Colorado schools do not provide bilingual instruction in Chinese, Vietnamese, Russian, and Khmer, and as a result these children rapidly learn English.²¹⁷

Relying on the premise that “English fluency is the key to economic success” in the United States, Linda Chavez promoted English immersion in Colorado as the best way to attain English fluency.²¹⁸ Under the initiative Spanish-speaking students would receive one year of intensive instruction before being placed into mainstream English classes.²¹⁹ Many believed that this program was anti-immigrant in that it promoted assimilation and devalued immigrants’ culture and language.²²⁰

Throughout June 2000, the initiative continued appearing in columns and articles reporting local events, such as press conferences, public debates, and rallies hosted by elected officials opposed to the initiative.²²¹ Much of this media coverage documented the downsides of English immersion. Denver Post contributor and Executive Director of the Northern Colorado Hispanic Chamber of Commerce, Jorge Amaya, noted that the presentation of English immersion as a new approach was misleading since it had been common throughout the Southwest before the civil rights era helped usher in the current form of bilingual education.²²² Amaya also observed that Spanish-speaking parents were not the ones requesting the change from bilingual education to immersion, and that the initiative ignored the bilingual and biliterate realities of students’ lives outside of school.²²³

On July 11, 2000, it was announced that the initiative would not appear on the November ballot because the wording was deemed unclear

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Weber, *supra* note 211.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Carlos Illescas, *Petitioners Target Bilingual Ed: Initiative Seeks “English Immersion,”* DENVER POST, June 2, 2000, at B8.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² Amaya, *supra* note 202.

²²³ *Id.*

and misleading by the Colorado Supreme Court.²²⁴ The court's decision was unanimous, holding that the title and description intended for the election ballot were not only misleading but also employed an improper use of slogans.²²⁵ In Colorado, ballot titles and initiative language cannot use catch phrases or slogans.²²⁶ Furthermore, ballot language cannot use phrases which either fail to contribute to or decrease voter understanding of the initiative.²²⁷ The purpose behind such ballot requirements is to make sure that citizens can intelligently and rationally vote on issues.²²⁸

Use of sloganeering in this case could prompt voters to interpret the initiative as offering a choice between bilingual education and immersion programs, when in fact there was no such choice.²²⁹ The initiative, if passed, would mandate English immersion.²³⁰ The Colorado Supreme Court ruled that the summaries of the initiatives prepared by the State Title Board failed to mention that schools would not be required to offer bilingual programs in response to parental requests for waiver from the English immersion program.²³¹ This omission was misleading and confusing for voters and was ultimately deemed material by the court.²³² The court also held that a particular phrase in the ballot language, specifically "as rapidly and effectively as possible," improperly generated voter support for the initiative without contributing anything to voter understanding.²³³

If a court finds ballot language to be inappropriate, all petition signatures gathered up to that point are considered invalid, and the initiative organizers must again gather the requisite number of signatures.²³⁴ One Nation Indivisible complained that the ruling was made too late for the organization to alter the ballot title and summaries and regather the necessary signatures before the August 7, 2000, deadline.²³⁵ One Nation In-

²²⁴ *In re* Title, Ballot Title & Submission Clause, & Summary for 1999–2000 # 258(A), 4 P.3d 1094, 1096–97 (Colo. 2000); Fred Brown, *Bilingual Ed Issue Won't Be on Ballot: State High Court Rules Wording "Misleading,"* DENVER POST, July 11, 2000, at A1.

²²⁵ 4 P.3d at 1096–97.

²²⁶ *Id.* at 1100.

²²⁷ *Id.* at 1099.

²²⁸ *Id.*

²²⁹ *Id.* at 1099–1100. As the court explained:

The Title Board's failure here to articulate in the titles that school districts and schools cannot be required to offer bilingual programs promotes confusion. Voters could assume that parents of non-English speaking students will have a meaningful choice between an English immersion program and a bilingual program, and, thus, favor the proposal as assuring both programs.

Id.

²³⁰ Brown, *supra* note 224.

²³¹ 4 P.3d at 1099–1100.

²³² *Id.*

²³³ *Id.*

²³⁴ COLO. REV. STAT. ANN. § 1-40-111 (West 2000); *In re* Proposed Initiated Const. Amend. Concerning Limited Gaming in the City of Antonito, 873 P.2d 733 (Colo. 1994).

²³⁵ Brown, *supra* note 224.

divisible vowed to reintroduce the initiative in 2002, after the mandated waiting period of one year.²³⁶ Linda Chavez and Representative Tancredo stated that the Colorado Supreme Court's ruling was a political decision, not one of sound legal reasoning.²³⁷ The court had two weeks to decide whether it wanted the Secretary of State to hold a special hearing for a new title.²³⁸ However, even if the court had ordered a hearing, the signature collection deadline allowed insufficient time for the initiative's sponsors to complete the ballot proposal process.²³⁹

Ballot initiatives have become a successful and preferred means of changing language policy in the area of bilingual education.²⁴⁰ The following analysis of the Colorado Supreme Court ruling identifies the specific legal challenges to the initiative, as well as the court's reasoning. This analysis identifies the legal constraints that restrict the wording of ballot titles and the ways in which an initiative may address an issue. The prohibition on the use of political speech in the ballot title serves as a reminder that the educational question regarding the future of bilingual education is being addressed within the political arena and through political campaigns.

Ballot initiatives may be legally challenged in two ways, either before the initiative is placed before voters or after it is approved by voters.²⁴¹ Challenges to initiatives subsequent to voter approval are typically made on the substance of the initiative itself.²⁴² In other words, the challenge is an attack on the constitutionality of the passed initiative, similar to what occurred in California after the adoption of Proposition 187. However, challenging an initiative before it appears on a ballot is essentially an allegation that the initiative fails to meet the technical requirements demanded of all ballot initiatives.²⁴³ The Colorado case is unique in that it exemplifies how citizens have used courts to attack English immersion initiatives before they appear on the ballot.

²³⁶ Weber, *supra* note 201.

²³⁷ Brown, *supra* note 224.

²³⁸ Weber, *supra* note 201.

²³⁹ *Id.*

²⁴⁰ See Frank Monaghan, *Entering the List: Campaigning for Bilingual Education on the Net*, 17 LANGUAGE & EDUC., 281, 282 (2003).

²⁴¹ See *City of Glendale v. Buchanan*, 578 P.2d 221, 225 (Colo. 1978).

²⁴² See, e.g., *League of Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

²⁴³ *Say v. Baker*, 322 P.2d 317, 319 (Colo. 1958) (“[N]either the secretary of state nor any reviewing court should be concerned with the merit or lack of merit of a proposed constitutional amendment”); *In re Title, Ballot Title & Submission Clause, & Summary for 1997–1998 # 105*, 961 P.2d 1092, 1096–97 (Colo. 1998) (concluding that the scope of review is limited to ensuring that ballot components fairly reflect the proposed initiative so that voters will not be misled); *In re Ballot Title, Ballot Title & Submission Clause, & Summary 1999–2000 245(b), 245(c), 245(d) and 245(e)*, 1 P.3d 720 (Colo. 2000).

XI. HOW DID THE PROPOSED INITIATIVE GET TO THE COLORADO SUPREME COURT?

In Colorado, a few requirements must be satisfied before initiatives can be placed on a ballot.²⁴⁴ First, the initiatives must receive a certain number of signatures from eligible voters, the exact number of which is a percentage of the voters who voted in the last election.²⁴⁵ Second, titles and summaries placed on the ballot for voter review must be developed by the Title Board and be based on material provided by ballot supporters.²⁴⁶ The titles and summaries need to meet state requirements, such as addressing only one subject and being fairly descriptive of the initiative to be placed before voters.²⁴⁷

Once the Title Board accepts the titles and summaries, the initiatives will appear on the ballot unless opponents file a brief with the Colorado State Supreme Court challenging the determination of the Title Board.²⁴⁸ Since the court will not act *sua sponte* in this matter, it will not examine whether an initiative meets the technical requirements to appear on a ballot unless a party makes a formal challenge.²⁴⁹ If the court decides that any of the proposal language should be changed, then the signatures gathered up to that point are considered invalid.²⁵⁰

At a hearing on April 19, 2000, the Title Board set the titles and summaries for Colorado Initiative # 258(A).²⁵¹ On May 3, 2000, Colorado registered voters Jorge Garcia and Susan Marie Pacheco filed a petition challenging the Title Board's decision to place the proposed initiative on the November ballot.²⁵² The petitioners made three objections to allowing the initiative to go before voters.²⁵³ Each objection by itself, if accepted by the Colorado Supreme Court, would have prevented the initiative from appearing on the November ballot.²⁵⁴

²⁴⁴ See COLO. CONST. art. V, § 1; COLO. REV. STAT. ANN. §§ 1-40, 1-41 (West 1994); see also COLO. GEN. ASSEMBLY, STEPS FOR PLACING AN INITIATED PROPOSAL ON THE STATEWIDE BALLOT (2003), available at http://www.state.co.us/gov_dir/leg_dir/lcsstaff/balpage.htm.

²⁴⁵ COLO. REV. STAT. ANN. § 1-40-109 (West 2000).

²⁴⁶ COLO. REV. STAT. ANN. § 1-40-106.5 (West 2000).

²⁴⁷ *Id.*

²⁴⁸ See *In re* Title, Ballot Title & Submission Clause, & Summary for a Petition on Campaign and Political Finance, 877 P.2d 311, 316 (Colo. 1994); COLO. REV. STAT. ANN. § 1-40-105 (West 2003).

²⁴⁹ See 877 P.2d at 316.

²⁵⁰ COLO. REV. STAT. ANN. §§ 1-40-109 to 1-40-117; see also COLO. GEN. ASSEMBLY, *supra* note 244.

²⁵¹ *In re* Title, Ballot Title & Submission Clause, & Summary for 1999–2000 # 258(A), 4 P.3d 1094, 1097 (Colo. 2000).

²⁵² *Id.* at 1096, 1103; COLO. REV. STAT. ANN. § 1-40-106.5(1)(e)(I) (West 1994).

²⁵³ 4 P.3d at 1096 n.2.

²⁵⁴ *Id.* at 1098–1100; COLO. REV. STAT. ANN. §§ 1-40-106, 1-40-106.5(1)(e)(I).

Petitioners' first objection was that the initiative contained four distinct subjects.²⁵⁵ The Colorado Constitution and state statutes require that all ballot initiatives possess only one subject.²⁵⁶ Under this requirement, all of the initiative's provisions must be tied to its central focus.²⁵⁷ If the court, upon challenge, deems that the proposed initiative possesses more than one separate and distinct subject, the initiative cannot be allowed on the ballot in that form.²⁵⁸ While the subjects cannot be dependent upon or connected with each other, implementation provisions that are directly tied to the initiative's central focus are not considered separate subjects.²⁵⁹ Petitioners asserted that Initiative # 258(A) encompassed four separate subjects, specifically: (1) a mandate that all instruction in public schools be in English; (2) a requirement that structured English immersion programs be developed and instituted in Colorado's public schools for children who primarily speak another language and the elimination of bilingual education in public schools; (3) removal of local school boards' constitutionally vested power to require schools within their districts to offer bilingual education programs; and (4) the establishment of a new constitutionally sanctioned civil cause of action against schools and school districts for enforcement of Initiative # 258(A)'s provisions.²⁶⁰

Petitioners' second objection was that the title, ballot title and submission clause, and summary did not fairly express the true intent and meaning of Initiative # 258(A).²⁶¹ Specifically, they alleged that the titles and summary did not accurately state the proposal and would mislead voters.²⁶²

Petitioners' third objection was that the title, ballot title and submission clause, and summary contained unfair and prejudicial catch phrases and slogans.²⁶³ The claim was that initiative drafters characterized English immersion as being the "most rapid and effective" way to teach English to non-English-speaking children.²⁶⁴ Petitioners believed that such an assertion should not be presented to voters because it is an entirely untested claim.²⁶⁵ The court ruled on these objections on July 10, 2000.²⁶⁶

²⁵⁵ 4 P.3d at 1098.

²⁵⁶ COLO. CONST. art. V, § 1 cl. 5; COLO. REV. STAT. ANN. §§ 1-40-106.5.

²⁵⁷ COLO. REV. STAT. ANN. §§ 1-40-106.5; 4 P.3d at 1098; *In re* Proposed Ballot Initiative on Parental Rights, 913 P.2d 1127, 1130 (Colo. 1996) ("In order to violate the single-subject requirement, the text of the measure must 'relate[] to more than one subject and [have] at least two distinct and separate purposes which are not dependent upon or connected with each other.'" (alteration in original)).

²⁵⁸ COLO. REV. STAT. ANN. § 1-40-106.5(1)(a) (2000 West).

²⁵⁹ *See* 4 P.3d at 1097; *In re* Title, Ballot Title & Submission Clause, & Summary 1997-1998 No. 74, 962 P.2d 927, 929 (Colo. 1998).

²⁶⁰ 4 P.3d at 1096 n.2.

²⁶¹ *Id.*

²⁶² *Id.* at 1099.

²⁶³ *Id.* at 1097-98, 1100.

²⁶⁴ *Id.* at 1095, 1100.

²⁶⁵ *Id.* at 1100.

²⁶⁶ *Id.* at 1094.

XII. THE COURT DECIDES

Petitioners' first objection alleged that four separate and distinct subjects appeared in the ballot titles and summaries.²⁶⁷ The single subject requirement for initiatives is designed to protect voters from surprise and fraud and to prevent unrelated subjects from being grouped together.²⁶⁸ The requirement that an initiative be limited to a single subject is intended to ensure that each proposal is passed on its own merits²⁶⁹ and that "incongruous subjects" are not joined in the same measure.²⁷⁰ The single subject requirement precludes the combination of multiple subjects into a single initiative in the hope of attracting support from various factions, which may have different or even conflicting interests.²⁷¹

In order to constitute more than one subject, the text of the measure itself must have at least two distinct and separate purposes which are not dependent upon or connected to each other.²⁷² Thus, the initiative is a single subject under law only if it tends to effect or carry out one general object or purpose.²⁷³ The majority held that, as proposed, Initiative # 258(A) did not violate the single subject requirement of the state constitution.²⁷⁴ According to the court, all of the initiative's provisions were tied to its central focus, namely mandating instruction of public school students using the English language.²⁷⁵

Petitioners' second objection focused on the issue of whether the title, ballot title and submission clause, and summary accurately stated the proposal in a way that did not mislead voters. Titles must be unambiguous and must fairly reflect the initiative so that voters are not misled by virtue of the particular words employed.²⁷⁶ A court should reject the initiative if the language used is misleading, inaccurate, unfairly prejudicial, or fails to accurately reflect the central features of the proposed measure.²⁷⁷ The court must ask itself whether the initiative uses terminology

²⁶⁷ *Id.* at 1096–97.

²⁶⁸ *In re* Title, Ballot Title & Submission Clause, & Summary with Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colorado Adding Subsection (10) to Section 20 of Article X (Amend Tabor 25), 900 P.2d 121, 125 (Colo. 1995).

²⁶⁹ COLO. REV. STAT. ANN. § 1-40-106.5(1)(e)(I) (West 1994).

²⁷⁰ *Id.*; see also *In re* Title, Ballot Title & Submission Clause, & Summary Adopted Apr. 5, 1995, by Title Bd. Pertaining to a Proposed Initiative "Pub. Rights in Waters II," 898 P.2d 1076, 1078–79 (Colo. 1995).

²⁷¹ 900 P.2d at 125.

²⁷² *In re* Title, Ballot Title & Submission Clause, & Summary for 1999–2000 # 258(A), 4 P.3d at 1098; *In re* Proposed Ballot Initiative on Parental Rights, 913 P.2d 1127, 1130 (Colo. 1996).

²⁷³ 898 P.2d at 1079.

²⁷⁴ 4 P.3d at 1099.

²⁷⁵ *Id.* at 1098–99.

²⁷⁶ 4 P.3d at 1099.

²⁷⁷ *Id.*

that may conjure inappropriate images.²⁷⁸ It must also consider whether voters could misconstrue the titles in terms of what the initiatives would prohibit or allow.²⁷⁹ All titles must be sufficiently clear and brief so that voters can understand the principal features of what is being proposed.²⁸⁰ While titles do not need to include every detail of the proposed initiative, they cannot mislead voters or promote voter confusion.²⁸¹ Titles and summaries containing “a material and significant omission, misstatement, or misrepresentation” cannot be allowed to stand.²⁸²

In reviewing the language of Initiative # 258(A), the Colorado Supreme Court held that the titles and summary set by the Colorado State Title Board were defective.²⁸³ The court ruled that the titles were unclear and misleading as to its principle feature regarding the proposed constitutional amendment.²⁸⁴ There was a material omission which could mislead voters by not specifying that passing the initiative would, in effect, constitute a prohibition on bilingual education.²⁸⁵ The omission that no school or school district shall be required to offer a bilingual program was a material omission, which would result in misleading voters into believing that parents could opt out of immersion programs in favor of bilingual programs.²⁸⁶ Thus, Initiative # 258(A) seemed to give parents a choice as to their children’s education. Yet unless districts voluntarily decided to initiate bilingual programs alongside English immersion programs at their own expense, parents of non-English-speaking children would have no meaningful choice. In reality, English immersion would be the only option.

Petitioners’ third objection alleged that the title, ballot title and submission clause, and summary were unfair and prejudicial because they incorporated the use of catch phrases and slogans.²⁸⁷ In particular, they characterized English immersion as being the most effective and rapid method for teaching English to non-English-speaking children.²⁸⁸ Slogans and catch phrases are harmful to the initiative process because they distract voters from considering the proposal on its merits. Instead voters are faced with sorting out what is actually being proposed from biased, superfluous blurbs in favor of or against the initiative.

²⁷⁸ *Id.*

²⁷⁹ *See id.*

²⁸⁰ *Id.* at 1098.

²⁸¹ *See id.*; *In re* Title, Ballot Title & Submission Clause, & Summary for 1999–2000 No. 29, 972 P.2d 257, 260, 266 (Colo. 1999).

²⁸² *See In re* Title, Ballot Title & Submission Clause, & Summary for 1997–1998 # 62, 961 P.2d 1077, 1082 (Colo. 1998).

²⁸³ 4 P.3d at 1096–97.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 1099–1100.

²⁸⁶ *Id.* at 1100.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

In searching for such phrases, the court must look for terms that provoke political emotion and impede voter understanding, instead of simply describing the proposal.²⁸⁹ Titles, ballot titles and submission clauses, and summaries must inform voters of the ramifications of their support or opposition to the initiative.²⁹⁰ While not every possible outcome of, or problem with, the initiative need be included by the Title Board, those that reflect the intent of the initiative should be presented.²⁹¹ Additionally, the terminology used must be neutral and unambiguous. Campaign phraseology may prejudice voters without allowing them the opportunity to fully understand and vote on the true intent and meaning of the initiative, thereby creating potentially inappropriate interpretations of the initiative.²⁹² Insufficient, unfair, or inflammatory language constitutes catch phrases or slogans.²⁹³

In its decision, the Colorado Supreme Court defined a catch phrase as “words which could form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment.”²⁹⁴ Slogans were defined as “catch phrases tailored for political campaigns—brief striking phrases for use in advertising or promotion.”²⁹⁵ The catch phrase identified by the court that operated as a slogan—“requiring all children . . . to be taught English as *rapidly and effectively as possible*”—conveyed the message that English immersion is in fact the best means of teaching English to children.²⁹⁶ This was an unsupported statement that served no purpose other than to promote voter support. Regardless of whether or not the slogan had a basis in fact, it was still the subject of great public debate.²⁹⁷ The language in this title hid the underlying policy question of whether immersion was the best way to teach English. The Title Board is not allowed to use non-operative language from the initiative in the titles when such language constitutes a catch phrase or slogan.

Thus, the Colorado Supreme Court agreed with petitioner’s third objection regarding the use of catch phrases and slogans.²⁹⁸ The majority

²⁸⁹ *Id.*

²⁹⁰ *In re* Title, Ballot Title & Submission Clause, & Summary with Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colorado Adding Subsection (10) to Section 20 of Article X (Amend Tabor 25), 900 P.2d 121, 125 (Colo. 1995).

²⁹¹ *In re* Title, Ballot Title & Submission Clause, & Summary Pertaining to the Casino Gaming Initiative Adopted on Apr. 21, 1982, 649 P.2d 303, 306, 308 (Colo. 1982).

²⁹² *See id.*

²⁹³ *In re* Title, Ballot Title & Submission Clause, & Summary for 1999–2000 # 258(A), 4 P.3d at 1100; *In re* Tit., Ballot Tit. & Submission Cl., & Summary Pertaining to Workers Comp. Initiative Adopted Jan. 6, 1993, 850 P.2d 144, 147 (Colo. 1993).

²⁹⁴ 4 P.3d at 1100 (quoting *In re* Title, Ballot Title & Submission Clause, & Summary for 1997–1998 # 105, 961 P.2d 1092, 1096–97 (Colo. 1998)).

²⁹⁵ 4 P.3d at 1100.

²⁹⁶ *Id.* (alteration in the original).

²⁹⁷ *Id.*

²⁹⁸ *Id.*

invalidated Initiative # 258(A) because the title, ballot title and submission clause, and summary were both misleading and unclear and contained a prohibited catch phrase that operated as a slogan, resulting in voter confusion.²⁹⁹ As such, Initiative # 258(A) was defective and not allowed to appear on the November 2000 ballot.

XIII. THE REALITY OF THE COURT'S 2000 RULING AND SUBSEQUENT ATTEMPTS

The Colorado Supreme Court did not rule on the substance of the initiative. The state court reviews ballot title initiatives not for constitutionality but for accuracy between the actual proposed legislation and the titles and summaries scheduled for presentation to voters.³⁰⁰ An initiative may be placed on a ballot if it receives a certain number of supporting signatures of voters.³⁰¹ In terms of substance, initiatives placed on ballots for voter approval can contain whatever the initiative creators want, so long as the description is not misleading or unclear for voters. Voters must know what they are voting for. Once an initiative is passed by voters, its constitutionality may be raised.³⁰² The substance of initiatives is for voters, not judges, to determine.

Although the court supported two of the plaintiffs' challenges, it rejected the most critical challenge to the initiative: the ballot measure violated the single subject requirement.³⁰³ If the court had agreed on this point, the authors of the initiative would have had to do considerable re-writing before they could resubmit the initiative. Instead, only two revisions to the ballot titles needed to be made by the State Title Board. The phrase "to be taught English as rapidly and effectively as possible" had to be deleted from the ballot titles and summary, although it did not need to be removed from the actual initiative.³⁰⁴ In addition, the declaration that school districts would not be required to offer bilingual education programs had to be inserted.³⁰⁵

XIV. ANOTHER ATTEMPT

The year 2001 witnessed another attempt by English immersion supporters to place anti-bilingual education initiatives before Colorado voters.³⁰⁶ However this time, Ron Unz, the California businessman who had

²⁹⁹ *Id.* at 1096–97.

³⁰⁰ *Id.* at 1097–98.

³⁰¹ COLO. REV. STAT. ANN. § 1-40-109 (West 2003).

³⁰² *See* *City of Glendale v. Buchanan*, 578 P.2d 221, 225 (Colo. 1978); *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

³⁰³ *See* 4 P.3d at 1098–99.

³⁰⁴ *Id.* at 1099–1100.

³⁰⁵ *Id.*

³⁰⁶ Louis Aguilar, *Ron Unz Willing to Pay for Bilingual-Ed Fight*, DENVER POST, June

been the main political force behind anti-bilingual education initiatives in California, Arizona, and Massachusetts, was involved.³⁰⁷ In December 2001, the Title Board set titles for two initiatives, both of which were immediately opposed on the grounds that they violated the single subject requirement and were misleading to voters.³⁰⁸ On April 8, 2002, the Colorado Supreme Court issued its decision.³⁰⁹ While the court did not find that the initiative titles incorporated more than one subject, it did agree with initiative objectors that the titles were misleading as to the procedure by which parents could waive out of English immersion and opt for bilingual education.³¹⁰ In contrast to the 2000 initiative, the 2002 titles included too much information on the process, thus overwhelming voters and obscuring the actual, inevitable outcome of the waiver process.³¹¹ The court stated that because the titles failed to inform voters that the waiver process actually eliminated bilingual education as a viable option for parents and school districts when all provisions were considered, the titles were misleading.³¹² Since the titles failed to clearly express the true intent and meaning of the initiatives, the court held that they must be amended before being presented to Colorado voters.³¹³ The reworded ballot title was approved on May 1, 2002, and sponsors began gathering the requisite 80,571 signatures.³¹⁴

Amendment 31—a state constitutional amendment that would have changed the way non-native children learn English—was defeated by Colorado voters on November 6, 2002 by a fifty-six percent “no” vote.³¹⁵ If passed, it would have required children learning English in Colorado public schools to spend no more than one year in intensive English courses before moving to mainstream classes.³¹⁶ Unz, the main proponent of the initiative, contributed over \$340,000 in support of the amendment.³¹⁷ The defeat of this proposal stood in sharp contrast to similar initiatives led by Unz that passed by more than sixty percent in California and Arizona.³¹⁸

22, 2001, at A14.

³⁰⁷ *Id.*

³⁰⁸ Nancy Mitchell, *Bilingual Initiative “Misleading”: Court Says Proponents Must Clarify Wording Before It Can Go Before Voters*, ROCKY MOUNTAIN NEWS, Apr. 9, 2002, at A7.

³⁰⁹ 4 P.3d at 1096–97.

³¹⁰ *Id.*

³¹¹ Mitchell, *supra* note 308.

³¹² 4 P.3d at 1099–1100.

³¹³ *Id.*

³¹⁴ Holly Yettick, *Ballot Question on Bilingual Education Tweaked*, ROCKY MOUNTAIN NEWS, May 2, 2002, at A14.

³¹⁵ Holly Yettick, *2 States, 1 Issue, Unexpectedly Different Outcomes: Bilingual Initiatives in Colo. and Mass. Affected By Funding*, ROCKY MOUNTAIN NEWS, Nov. 7, 2002, at A28.

³¹⁶ Nancy Mitchell & Holly Yettick, *Victory for Bilingual Ed.: English Immersion Plan Goes Down to Surprise Defeat*, ROCKY MOUNTAIN NEWS, Nov. 6, 2002, at A8.

³¹⁷ *Id.*

³¹⁸ *Id.*

Likewise, voters in Massachusetts replaced the state's bilingual education law that allowed non-native English speakers up to three years to learn English before being moved into mainstream classes, with an initiative similar to Colorado's proposed Amendment 31.³¹⁹ Massachusetts's Question 2 won sixty-eight percent of the vote in 2002 and will restrict non-native English speakers to a maximum of one year to learn English before they are moved into regular classes.³²⁰ One important factor that contributed to the differing outcomes of the Colorado and Massachusetts proposals was a \$3 million donation made by medical equipment heiress Pat Stryker in opposition to the initiative.³²¹ This donation, thought to be the largest individual contribution to a ballot initiative in Colorado history, helped launch an aggressive television blitz just prior to the election.³²²

CONCLUSION

Voter initiatives to eliminate bilingual education are the most recent form of language restrictionism. Language restrictionism has a long tradition that surfaced as early as the nineteenth century, and has repeatedly reappeared during periods of increased immigration.³²³ A fundamental component of language restrictionist movements, both past and present, has been a vision of a uniformly English monolingual country.³²⁴

Modern English immersion initiatives build upon the ideological link, developed across time, between loyalty to the nation and speaking English, with the concomitant devaluation of bilingualism and the use of other languages in the public sphere.³²⁵ The connection between the English language and national identity was strengthened during the large wave of immigration at the turn of the twentieth century during which thirty-four states passed English-only legislation and an English language requirement for citizenship was established.³²⁶ English became a symbolic marker of national identity. Cultural and linguistic conformity, illustrated through linguistic assimilation, was expected from immigrants as evidence of loyalty to the nation.³²⁷ Pressures toward linguistic assimilation have been and continue to be strong in this country because

³¹⁹ Nancy Mitchell & Holly Yettick, *Massachusetts Dumps Dual-Language Classes*, ROCKY MOUNTAIN NEWS, Nov. 6, 2002, at A28.

³²⁰ *Id.*

³²¹ Mitchell & Yettick, *supra* note 316.

³²² *Id.*

³²³ SCHMID, *supra* note 7, at 44–45.

³²⁴ SCHMID, *supra* note 7, at 168.

³²⁵ Perea, *supra* note 6, at 366–68.

³²⁶ *See* Leibowitz, *supra* note 4, at 5.

³²⁷ Perea, *supra* note 6, at 329.

there are few symbols aside from language upon which to base national identity, due to the varied backgrounds of the country's immigrants.³²⁸

The anti-bilingual education initiatives benefit from the national perception that large numbers of Spanish-speaking immigrants pose a threat to national security. In contrast to the nativism of the past, modern anti-bilingual education efforts generally do not use the same anti-immigrant rhetoric. Rather, they attempt to distance themselves from anti-immigrant positions by recruiting high-profile Latinos to serve as initiative sponsors. In addition, proponents of English immersion initiatives attack bilingual education programs, which they define as being Spanish-only. This is because non-English languages used for instruction in schools are visible and easy targets for English-only advocates. Further, opposition to the use of foreign languages in public schools can also be manipulated for political status and control.³²⁹

While not overtly anti-immigrant, anti-bilingual education initiatives produce the same results as historical examples of language restrictionism—namely, to designate English as the official language and restrict the use of other languages. These initiatives also produce a discriminatory effect, since only one category of students—linguistic minority students—lose an educational option that they had prior to the proposal's passage. The designation of only English for educational purposes devalues both the role of linguistic minorities in society and the potential contribution of their cultural-linguistic resources. Current language restrictionist positions disregard the fact that immigrants today are increasingly transnational and rely on cross-border ties for social and economic benefit. For many immigrant families, bilingualism is not only an important cultural resource, but also an economic necessity in a globalized economy.

The lack of recognition of languages other than English, in particular Spanish, contrasts with high school and college foreign language requirements which recognize that bilingualism is an educational asset. Anti-bilingual education initiatives use the force of law to restrict the educational options of immigrants, consistent with restrictions of the past. For the Mexican-origin community, this reproduces the historical nativistic pattern of subtracting the Spanish language and Mexican culture from the schooling of its children.³³⁰

³²⁸ PORTES & RUMBAUT, *supra* note 112, at 114.

³²⁹ Leibowitz, *supra* note 4, at 3.

³³⁰ See San Miguel, Jr. & Valencia, *supra* note 15, at 358.