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Education-policy-by-ballot-initiative. Considerations related to democracy and justice

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Kontakt / Contact:

peDOCS
DIPF | Leibniz-Institut für Bildungsforschung und Bildungsinformation
Informationszentrum (IZ) Bildung
E-Mail: pedocs@dipf.de
Internet: www.pedocs.de

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Bildungspolitik zwischen Expertenwissen und Öffentlichkeit

■ *Allgemeiner Teil*

Die Einrichtung von Gemeinschaftsschulen in Schleswig-Holstein – der Kontext des Systemwandels in lokaler Entscheidung

Formen innerschulischer Steuerung mittels zentraler Lernstandserhebung

Unbekannt, unverstanden, unterschätzt – Gregor Girards facettenreiche Schulpädagogik

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Impressum U 3

Michele S. Moses

Education-Policy-by-Ballot-Initiative: Considerations Related to Democracy and Justice¹

Abstract: What is the relationship between direct democratic ballot initiatives, democratic deliberation, and justice? When voters collectively make policy decisions, what responsibilities do experts have to contribute to informing public deliberation about the relevant issues? This article investigates how the direct democratic ballot initiative process, increasingly and controversially used in the United States to allow citizens to make education policy decisions, may serve to enhance or constrain democracy and justice. Through the lens of deliberative democratic theory, this article aims at providing greater understanding of the education-policy-by-ballot-initiative phenomenon and bringing to light the possibilities of tyranny of the majority when policies having to do with civil rights are left up to popular vote. It concludes with an argument for researchers to use their expertise in the service of public information and deliberation.

1. Democratic Process and Education Policy

This article examines the relationship between direct democratic ballot initiatives, democratic deliberation, and justice. A second, related aspect is what responsibilities experts have in informing the public in making policy decisions. In tackling these issues, I investigate how direct democratic ballot initiatives, increasingly – and controversially – used in the U.S. to allow citizens to make education policy decisions, enhance or constrain democracy and justice. In so doing, this article aims at providing greater understanding of the education-policy-by-ballot-initiative phenomenon and bringing to light the possibilities of a tyranny of the majority.

Education policies placed on state ballots often impact minority populations directly (Moses, 2010; Sabato, Ernst & Larson, 2001). Yet they are decided by a democratic process based on majority rule. Whereas in the past these policies were determined by “experts” – policymakers and political representatives – citizens now hold the power and responsibility. In 2010 alone, 160 state-level initiatives were on the ballot in the U.S. They concerned issues such as affirmative action, climate change, health care, and taxes (Prah, 2010). This shift from experts to citizens means that in order to promote fair decisions, voters should have access to meaningful information. In light of the increasing role of the public, which some argue is good for democracy (Gerber, 1999;

1 I would like to thank Amy Farley, Chad Nash, and Lauren Saenz for research assistance and feedback. An initial version of this paper was presented at the 2009 Philosophy of Education Society annual meeting.

Smith & Tolbert, 2004), there is a need for researchers (i.e., experts) to contribute information.

In what follows, I first explain my mode of inquiry and how I use deliberative democratic theory as my theoretical lens. Afterwards, I delve into the policy context, explaining how direct democracy functions in the U.S. and detailing the use of ballot initiatives in education policy. I move then to a discussion of direct democracy. Here, I pay special attention to the threat of majority tyranny. Finally, I advance an argument for researchers to use their expertise in the service of public information.

2. Theoretical Framework and Method

Using the analytical tools of political philosophy, I examine the ways that direct democratic ballots affect democratic processes. I evaluate the most common arguments for and against such initiatives, using justice as the central evaluative concept. This method follows Gutmann (1999) by exploring “implications of democratic principles for educational [and political] practice” and refining “the principles in light of their practical implications” (p. 17).

According to democratic ideals, public policy should not degrade citizens’ capacity for democratic participation. It also should not hinder citizens’ ability to pursue their conception of a good and just life. The democratic ideal I have in mind is inextricably linked with deliberative democracy, which according to Gutmann (1999) has as a guiding principle:

reciprocity among free and equal individuals: citizens and their accountable representatives owe one another justifications for the laws that collectively bind them... To the extent that democracy is not deliberative, it treats people as objects of legislation, as passive subjects to be ruled, rather than as citizens who take part in governance. (Gutmann, 1999, p. xii)

Gutmann’s (1987) idea of deliberative democracy is premised from the notion that democratic political life necessarily includes moral conflicts. Ballot initiatives introduce challenges to democracy, as, like in the case of affirmative action, non-expert citizens are asked to decide on education policies that directly affect their fellow citizens. Since moral conflicts are seen as a challenge facing democracy, Gutmann and Thompson (1996, 2004) attempted to place moral discussion in political life at the center in order to cope with fundamental conflicts in values and ideology. Their conception is characterized by three conditions that regulate the deliberative *process* of politics: 1) reciprocity, by which reason-giving and justification for mutually binding policies are seen as a mutual endeavor; 2) publicity, which stipulates that policy makers, researchers, officials, and members of the public should have to justify their decisions in public; and 3) accountability, which requires those who make policy decisions to answer to those who are bound by those policies. In addition to these conditions, Gutmann and Thomp-

son outlined three components that govern the *content* of policy deliberations: 1) basic liberty, which controls what government and society can demand of people and what people can demand of one another; 2) basic opportunity, which concerns the distribution of goods necessary for pursuing a good life (e.g., basic income); and 3) fair opportunity, which has to do with the distribution of goods to people based on their qualifications.

A deliberative perspective encourages greater public participation in and understanding of policy debates by demanding that citizens abide by the principles of reciprocity, publicity, and accountability. I hold the assumption that an understanding of the content of moral disagreements is especially important in education policy.

3. Direct Ballot Initiatives and Democracy

In the U.S., 24 states currently permit state ballot initiatives. Starting in the early 1900s, these initiatives were seen as powerful tools to challenge the undue influence of money in political processes. The use of initiatives began to increase dramatically during the late 1970s. For example, in California between 1954 and 1974 there were 29 state ballot initiatives. From 1976 to 1996 there were 106 (HoSang, 2010). Spending on initiative campaigns has also grown significantly (Smith & Tolbert, 2004). State ballots often involve amendments to state constitutions, which are very difficult to undo.

There are three types of direct democracy: initiative, referendum, and recall. Depending on state rules, citizens need to gather a certain number of signatures in order to put an issue to popular vote. Herein I am concerned primarily with initiatives, also called ballot measures. Initiatives involve placing a statutory measure or constitutional amendment on the ballot (Smith & Tolbert, 2004). Such measures have covered myriad issues. Related to education, they have, e.g., proposed to ban affirmative action in public higher education, mandate a teacher pay-for-performance system, and eliminate bilingual education (Ash, 2008).

Some supporters of direct democracy claim that initiative processes overwhelmingly support what the majority of citizens want (rather than special interest groups). Matsusaka (2004) characterized the debate over ballot initiatives as a struggle between those concerned about the power of money in initiative processes and those arguing that initiatives serve to foster democracy. Based on my analyses, I disagree. Although I understand how initiatives could be a good idea, this is overridden by the concern that in education, egalitarian policies on the whole, and those seen as benefiting underrepresented minorities in particular, are not faring well through initiative processes (as evidenced by the elimination of policies aimed at increasing educational equity).

Because eliminating race-conscious education policies often negatively affects equality and diversity (Contreras, 2005; Moses, Yun & Marin, 2009; Saenz, 2008), I examine whether the simple majoritarian rule exemplified by ballot initiatives can be considered just. This is part of a larger dispute between aggregative democratic theorists (including proceduralists) and deliberative democratic theorists (including epistemic and substantive theorists) (Goodin, 2003; Gutmann & Thompson, 2004; Young, 2000). Aggregative

conceptions of democracy consider citizens' preferences to be given, i.e., preferences are taken at face value and justifications are viewed as irrelevant to fair democratic processes. By contrast, deliberative conceptions consider citizens' reasons (i.e., justifications) for their sociopolitical preferences to be central to the democratic process (Gutmann & Thompson, 2004; Young, 2000). Regarding the important question, "how to make legitimate decisions for the society as a whole in the face of fundamental disagreement", (Gutmann & Thompson, 2004, p. 14) aggregative theories typically turn to majoritarian methods of governance (i.e., let voters or elected representatives decide). Gutmann and Thompson argue that the aggregative conception is flawed because it "fundamentally accepts and may even reinforce existing distributions of power in society" (p. 16). Yet, a difficulty with deliberative conceptions is that there is no clear way to resolve disagreements and make public policy decisions, so the default is to rely on a procedure like voting, which is not necessarily a deliberative process. In addition, within deliberative democratic theory, there is disagreement over deliberation's instrumental value (i.e., "as a means of arriving at good policies") and its expressive value (i.e., "as a manifestation of mutual respect among citizens") (p. 21). Deliberative theorists maintain that both fair procedures and substantive principles need to be part of the democratic process. I take this as a guiding assumption in this article.

4. Education Policy Ballot Initiatives

Related directly to race-conscious education policies, five states, California, Washington, Michigan, Nebraska, and Arizona, have voted to outlaw the use of affirmative action in higher education admissions. Three states, California, Arizona, and Massachusetts, have voted to replace bilingual education with English immersion programs. Colorado and Oregon had similar, ultimately unsuccessful, anti-civil rights initiatives in 2008.

My primary concern has to do with civil rights and equality of educational opportunity. I consider affirmative action (or positive discrimination) as a specific example of the education-policy-by-ballot-initiative phenomenon. The 1990s brought a significant backlash against affirmative action, culminating in the passage of two ballots banning affirmative action in California and Washington.² Opponents of affirmative action then sought legal support, and no new anti-affirmative action ballots were proposed for five years. In 2003, the Supreme Court decision in *Grutter v. Bollinger* supported the constitutionality of race and ethnicity as factors in university admissions, which preserved affirmative action nationally. Immediately, opponents turned their attention from the legal to the political arena through state ballot initiatives. In fact, on the day the *Gratz* and *Grutter* decisions were announced, Ward Connerly, a major sponsor of such initiatives through his organization, the American Civil Rights Institute, announced the cam-

² Proponents call these "civil rights initiatives", but I prefer to refer to them by their initiative number.

paign for what would become Proposal 2 in Michigan. In 2006, 2008, and 2010, Michigan, Nebraska, and Arizona voters, respectively, decided that affirmative action in public higher education admissions, employment, and contracting should be eliminated. The new laws have negative consequences for equality of educational opportunity and university diversity. For example, the freshman enrollment of students of color at the University of Michigan immediately declined by two percent (Schultz, 2008). Most recently, as in Arizona and Utah, ballot initiative sponsors have begun to use state legislature-initiated ballots rather than citizen-initiated ones, which require a certain number of citizen signatures. This calls into question ballot initiatives as direct democratic tools.³

5. Arguments for and against Direct Democratic Ballot Initiatives

The key arguments for direct democratic ballot initiatives are that they: 1) provide citizens access to the democratic process; 2) function as check on legislators and policymakers; and 3) stimulate voter education and participation. The first two arguments come out of a proceduralist conception of democracy. There are, in turn, three primary arguments against ballot initiatives: 1) moneyed interests play a disproportionate role, serving to corrupt campaigns; 2) most citizens are not informed enough for making certain decisions; and 3) the majoritarian intuition inherent in direct democracy too often tramples minority concerns (Broder, 2000; Matsusaka, 2004; Sabato et al., 2001). These arguments come out of a deliberative conception of democracy. In the following, I examine the arguments separately.

A strong argument in favor of direct democratic ballots is that they provide citizens *access* to the lawmaking process (Guetzloe, 2001). This can sometimes be positive. Consider Oregon's 1990 seat belt law, which required:

all Oregonians to buckle up... The bill was simple, people could use their own everyday experiences to make an informed decision, the money expended to qualify and pass the measure was modest,... and the policy change did not produce a host of unintended consequences. (Ellis, 2002, p. 2)

Similarly, in education policy, some citizen-initiated measures make good sense, in particular when related to local school bond issues. Proponents of direct democracy like Bowler and Donovan (2000) would go further. They maintained: "it is difficult for us... to come up with many examples of approved initiatives that participating voters did not really want" (p. xi). The problem here is that voters may not have everyone's best interests at heart.

Perhaps the most compelling argument for citizen-initiated ballots is that they provide the public with the opportunity *to keep legislators in check*. There is however, a

³ For the purposes of this paper, I consider direct democratic ballot initiatives, rather than legislator-sponsored initiatives.

common misunderstanding about how citizens can indeed check legislative power. Earlier I mentioned that there are three common ballot measures: initiative, referendum, and recall. This is where referendum and recall come into play. The popular referendum serves well the purpose of checking on the legislature – through it, citizens can gather signatures to call for a vote on state legislation (Ellis, 2002; Gerber, 1996). The recall works in much the same way to call for a vote on a sitting elected official. With these avenues in place, there is no need for the ballot initiative to serve as an additional check.

The body of research on ballot initiatives serving to check legislators does not reach clear conclusions. Whereas Gerber (1996) found that direct democratic initiatives serve to make legislators more responsive to the public, Lascher, Hagen and Rochlin (1996) found just the opposite: “[I]n none of these policy areas, however, does the presence of the initiative process significantly enhance the connection between public opinion and policy outcomes” (p. 769). Indeed, ballot summaries are notoriously misleading (Sabato et al., 2001), and the media rarely provide the public with substantive information (Moses & Saenz, 2008).

Concerning the first argument against ballot initiatives, several studies have concluded that the effect of initiative campaigns on the democratic process can be dangerous, as they are easily *corrupted by the influence of money and power* (Broder, 2000; Stratmann, 2005). Supporters of ballot initiatives like Gerber (1999) argued that the money and power of interest groups or individual sponsors have less impact than some believe: “Wealthy economic interest groups are severely constrained by the institutional and behavioral hurdles inherent in the direct legislation process. They cannot and do not use their financial resources to ‘buy’ legislation that is detrimental to broader citizen interests” (p. 20). Yet, there are numerous cases of initiative campaigns spearheaded by very wealthy individuals or groups. For instance, this was evident when a perennial ballot initiative figure, Bill Sizemore, a former candidate for governor in Oregon, registered a proposed ballot initiative to put a two-year cap on the amount of time English-language learners (ELLs) can receive bilingual instruction. Sizemore opposes bilingual education, endorsing instead an English immersion approach. Both educators and immigrant rights groups disagree with the immersion approach, arguing that it limits educational opportunities and that ELLs should be provided with native language instruction and English as a Second Language classes for as long as necessary before being mainstreamed into all-English classrooms. This is a classic example of a wealthy and powerful individual putting a pet issue up for popular vote.

Similarly, initiatives can be very deceptive, because voters may think they are voting for one thing when in fact voting for something quite different. In 2000, for instance, when Arizona voted on an anti-bilingual education initiative, the title was “English for the Children.” This title implied that supporters of bilingual education were not already concerned about teaching non-native speakers of English. In addition, all of the anti-affirmative action ballot initiatives were entitled “Civil Rights Initiatives”, when they actually aimed to abolish a traditional civil rights policy. In Colorado, the chief spokesperson for the proposed anti-affirmative action initiative, Jessica Peck Corry, claimed that it

would not eliminate affirmative action. Instead, it would just require that all affirmative action and equal opportunity programs include white people and men (Corry, 2008).

Ellis (2002) pointed out that the way initiatives are worded and framed makes a huge difference in whether people support them. For example, people react more negatively to “preferential treatment” than to “affirmative action” (p. 77). The wording of all of the anti-affirmative action proposals passed in many states omitted the phrase “affirmative action.”⁴ When a Houston, Texas city ballot initiative proposed to end “affirmative action” in public employment and contracting, the measure was defeated. In Colorado, research on the factors that affected the vote on Amendment 46 found that even though the initiative failed by a slim margin, if the ballot language had been clear, it likely would have failed by a much larger margin (Moses et al., 2010).

Regarding the *information* of citizens, Holt (2006) pointed out, “most citizens have no economic incentive to learn enough about what politicians do to vote intelligently. Nearly half of American voters acquiesce in their infantilization by not voting at all” (p. 18). I would not go as far as Holt, but I do think that it is problematic to leave important questions of educational justice in the hands of voters who may not be meaningfully informed. Magleby (1989) pointed out that initiative campaigns have a strong impact on swaying voters who are less informed. He concluded that powerful policy players use initiative campaigns to control information. Downplaying this concern, proponents of direct democracy point out that there is no guarantee that experts or legislators would make a better, more equitable education policy. But a crucial idea behind representative democracy is that legislators are accountable to the people. By contrast, voters are not accountable to anyone.

Even the most informed voters rely on the media for much of their information (The Project for Excellence in Journalism, 2004; Roberts & Klibanoff, 2006). My own research on print media coverage of anti-affirmative action initiatives found that coverage most often does not provide meaningful information (Moses & Saenz, 2008). This is one reason that Ellis (2002) maintained, “when a policy has complex and far-reaching consequences for government and society, the initiative process is a particularly poor lawmaking instrument” (p. 3). I should point out that I am not trying to make the argument that citizens cannot be trusted with democratic responsibilities, but that direct democracy is not the best way to exercise responsibilities regarding issues of education policy.

There were important reasons that the framers of the U.S. Constitution advocated for representative rather than direct democracy. For example, they believed that there would be problems with *majorities trumping minorities* regarding controversial issues (Epstein, 1984; Sabato et al., 2001). This concern is substantiated by many ballot initiatives, especially those aimed at constraining the educational opportunities of people of color.

4 The most typical wording: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting” (Ballotpedia, 2008).

According to Matsusaka (2004), the primary point of disagreement about initiatives is the question of whose interests are most often served. Indeed, a breakdown of the vote on Michigan's Proposal 2, for example, shows that minority concerns were neglected. This point – what Guinier (1994) called the “tyranny of the majority” (p. 20) – is perhaps the most crucial reason to be skeptical about the education-policy-by-ballot-initiative phenomenon. According to Guinier, “In a racially divided society, majority rule may be perceived as majority tyranny” (p. 3). With ballot initiatives on education policies related to equality of educational opportunity, the problem of the tyranny of the majority is all too prevalent.

Following such insights, I conclude that ballot initiatives related to issues of civil rights for minority populations serve to degrade the democratic ideal, and consequently, social justice. Education policy is often concerned with the most profound issues of opportunity and justice. Although citizens are capable of fair thinking, the problems sketched above are substantive. In any education policy ballot, the one common crucial element is public dialogue and deliberation:

[P]ublic dialogue is critical to represent all perspectives; no one viewpoint should be permitted to monopolize, distort, caricature, or shape public debate. The tyranny of The Majority is just as much a problem of silencing minority viewpoints as it is of excluding minority representatives or preferences. (Guinier, 1994, pp. 19-20)

6. Civil Rights, Race-Conscious Policy, and the Tyranny of the Majority

To be sure, some initiatives may be useful tools of direct democracy. For this reason, I would not advocate eliminating all ballot initiatives wholesale. But significant reform is needed in order for ballot initiatives not to erode justice, violating tenets of both aggregative and deliberative democracy (Goodin, 2003). Although ballot initiative supporters argue that detrimental effects on minorities are drastically overstated (Hajnal, Gerber & Louch, 2002), research has shown otherwise. Examining ballots related to civil rights proposed from 1959 to 1993, Gamble (1997) found that of the 74 such initiatives, 78% constituted a defeat for minority interests, while only a third of all other initiatives were approved. When it comes to education policy, ballot initiative reform is crucial, given how threats to civil rights and equality of educational opportunity adversely affect the public good.

Supporters of reform have advocated wholesale changes, such as requiring all ballot initiatives to succeed only by supermajority (Ellis, 2002). They have also advocated more moderate reforms: increased voter information; greater transparency of campaign finance, so voters could assess the motives of an initiative's funders; public subsidies available to ballot campaigns to mitigate the role of money; detailed voter guides with pro and con information, and independent analyses of the initiative's likely consequences (Sabato et al., 2001).

While I agree with these suggestions, I want to add one broader point stemming from democratic theory: reform of the ballot initiative process should focus on eliminating – or at least mitigating – significant flaws. One way to do this in a democratic manner is to follow Gutmann’s (1999) limits on political authority. The principle of nonrepression in particular limits the state’s ability to use education “to restrict rational deliberation of competing conceptions of the good life” (p. 44). Ballot initiatives proposing to end civil rights policies like affirmative action too often violate the principle of nonrepression by serving to restrict the self-determination and social contexts of choice of students of color (Moses, 2002). Since the 1996 passage of Proposition 209, California has experienced sharp declines in the number of students of color applying and admitted to state universities and a significant drop in the number of minority students at prestigious state law schools (Contreras, 2005; Espenshade & Chung, 2005; Kidder, 2005). Well over a decade later, the numbers of students of color in the University of California system have rebounded somewhat, but have not kept pace with increasing shares of students of color in the state, and have decreased at the two most selective campuses (Moses et al., 2009; Saenz, 2010).

The constraints for underrepresented students of color reveal majority tyranny in action. According to Gutmann (1999):

[i]f democracies are to govern themselves, they must remain free to make mistakes in educating their children, as long as those mistakes do not discriminate against some children or prevent others from governing themselves freely in the future. The promise of the principles of nonrepression and nondiscrimination is just this: to support a strong democracy without sanctioning majority tyranny or sacrificing self-government in the future. (Gutmann, 1999, pp. 97-98)

The negative consequences of anti-affirmative action ballots violate Gutmann’s key principle of nonrepression. Consequently, direct democratic education policy-making may serve to neglect minority rights, resulting in the *legally sanctioned* denial of equality of educational opportunity to students of color.

7. Applying Deliberative Democratic Theory

One way to improve voter knowledge on political issues, in addition to traditional media outlets, is through a more grassroots approach – community dialogues. Dialogues can take many different forms, including citizen juries, deliberative polling, consensus conferences, and intergroup dialogues (Gastil & Levine, 2005). Some bring together a group of randomly chosen citizens to deliberate on a particular issue or focus on bringing together college students from different identity groups to discuss issues related to difference and social justice (Zuñiga, Nagda, Chesler & Cytron-Walker, 2007). Deliberative dialogues of all sorts may allow participants to engage collectively in these important issues (Jacobs, Cook & Delli Carpini, 2009).

Such expert-facilitated dialogues provide one example of how researchers can use their expertise to inform voters in the service of democratic deliberation. The policy research community – those individuals and institutions most knowledgeable about the issues at hand – ought to share actively research- and theory-based information that is too often missing from public discussions.

8. Conclusion: Moving Toward Education Policy Based on Research and Deliberation

As explained above, deliberative democratic theory is a kind of political theory designed to respond to the values pluralism in contemporary democratic societies. It places special emphasis on inclusive and fair participation in political decision-making (Benhabib, 1996; Cohen, 1997; Gutmann & Thompson, 1996). Part of good deliberation is gaining a nuanced understanding of the nature of disagreements, the moral ideals involved, and the political commitments invoked. Gutmann and Thompson's framework is characterized by discussions in which people publicly provide reasons for their views in a broadly accessible way.

In the case of education, researchers have the responsibility of providing credible information that helps advance public deliberation (Wachbroit, 1998). This is all the more so as the public's role has been expanding through direct democratic initiatives. Public deliberation can function to clarify contested values, increase public understanding, foster people's willingness to reconsider their views, and increase communication between opposing sides. People need to hear both data-related and values-related information about disputed policies. As McDonnell (2004) observed, "even when potential targets disagree with a policy's goals and underlying values, if they at least share an understanding of it, debate and opposition can proceed in a thoughtful manner" (p. 198). This is especially important for policies that appeal to values that can be divisive and misunderstood.

Making decisions about education policies about which there is moral disagreement is not easy. The policy's design, goals, outcomes, and moral implications must be negotiated. While researchers can expand the way their expertise is communicated and used, the larger question that arises from education-policy-by-ballot-initiatives (Moses, 2010) concerns how it affects the democratic public good. Defining politics in terms of voting is not enough – we have to think in terms of democratic participation more broadly, so that, as Guinier (2008) explained, "citizens and their representatives work together to change the metric of success from winning elections to building the kind of collective intelligence and collective power that provides more robust sources of democratic accountability and legitimacy" (p. 4). Without such efforts, ballot initiatives on civil rights-related education policies will too often trample the interests of students of color, which is detrimental for both democracy and justice.

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Anschrift der Autorin

Michele S. Moses, Associate Professor, Associate Dean for Graduate Studies, School of Education, 249 UCB, Boulder, Colorado 80309, United States of America
E-Mail: michele.moses@colorado.edu