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Regulatory Rights: Civil Rights Agencies, Courts, and the Entrenchment of Language Rights

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The Rights Revolution Revisited

INSTITUTIONAL PERSPECTIVES ON THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS IN THE US

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Contents

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Regulatory Rights: Civil Rights Agencies, Courts, and the Entrenchment of Language Rights

Ming Hsu Chen

Shortly after passage of the Civil Rights Act of 1964, policymakers recognized the need to transform the aspirations of civil rights rhetoric into concrete solutions for new immigrants and non-English speakers whose presence dramatically increased following passage of the Hart-Cellar Act in 1965. The Hart-Cellar Act lifted national origin quotas on Asian and Latin American countries, ushering in an unprecedented amount of racial and ethnic diversity. Asian and Hispanic immigrants faced many of the same barriers as African Americans, whose pioneering efforts culminated in sweeping civil rights reforms in many areas of public life. The new immigrants additionally faced language barriers.[1] Many Asian and Hispanic immigrants lacked the language skills to fully participate in mainstream institutions where English predominated. Generations of neglect also meant that some Asians and Hispanics lacked English language competency despite years of residence in ethnic enclaves in cities. In both schools and workplaces, the achievements of the civil rights movement eluded language minorities.

To address these problems, policymakers enlisted the resources of the newly assembled "civil rights state"[2] that included the US Department of Health, Education, and Welfare's (HEW's) Office for Civil Rights (OCR) and the US Equal Employment Opportunity Commission (EEOC). These agencies were tasked with enforcing federal civil rights statutes. Policy entrepreneurs within these agencies – "white men in suits"[3] – puzzled over how to adapt existing civil rights statutes to

[1] Gabriel Jack Chin and Rose Cuison Villazor, *The Immigration and Nationality Act of 1965: Legislating a New America* (New York: Cambridge University Press, 2015).

[2] R. Shep Melnick, "Courts and Agencies in the American Civil Rights State," in *The Politics of Major Policy Change in Postwar America*, eds. Sidney Milkis and Jeffrey Jenkins (New York: Cambridge, (2014).

[3] This description highlights agency officials as central actors in the extension of civil rights to non-black minorities, rather than grassroots activists. John David Skrentny, *The Minority Rights Revolution* (Cambridge, MA: Harvard University Press, 2004).

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the needs of the new immigrants using the implementation tools at their disposal. Curiously, the bureaucratic effort to define civil rights protections as encompassing language rights emerged without a single mention of the word "language" in the civil rights statutes they were charged to enforce. Bureaucrats latched onto the undefined terms "national origin" and "discrimination" to anchor language rights in existing civil rights laws.[4] In informal guidances and policy statements, agency officials interpreted vague statutory texts prohibiting national origin discrimination to include protections for immigrants and limited English proficient (LEP) speakers. "Discrimination" was interpreted to require more than the right to formal equality – the recognition of language rights required affirmative steps to overcome barriers to substantive equality.

This chapter explains how civil rights laws evolved to incorporate the needs of LEP speakers after 1965 and shows how federal civil rights agencies served as the engine of civil rights expansions on behalf of language minorities in the years following the passage of the Civil Rights Act and Hart-Cellar Act.[5] OCR and EEOC used guidances to innovate on existing statutory protections for language minorities. Their interpretations of vaguely worded provisions, such as "national origin minorities," enabled them to articulate language rights where the statutory text did not clearly provide for them. The school and workplace case studies illuminate the time period after the Civil Rights Act as a moment agency guidance was used expansively and to great effect.

CIVIL RIGHTS AGENCIES GOVERNING BY GUIDANCE

Agencies took the lead by interpreting the Civil Rights Act to reach language minorities. Created by Title VI for the purpose of ensuring equal educational opportunity, OCR applied its interpretation of Title VI's undefined national origin discrimination prohibition to non-English-speaking school children. Beginning with its studies into desegregation in Southwest schools, where Latinos were as racially isolated as blacks in the south, OCR conducted a review of the conditions in the schools for Latino students. Because the educational needs of Latino

[4] Section 601 of Title VI reads "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2006). Section 703 of Title VII reads: "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (2006).

[5] Ming H. Chen, "Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights," *Harvard Civil Rights-Civil Liberties Law Review* 49 (2014): 291–342.

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students were recently on their radar, OCR consulted with experts on the education of LEP students and parents of LEP students about their goals before enacting a language policy. Their investigations uncovered many instances of educational neglect, with LEP students being left in mainstream classrooms without appropriate classroom materials or being placed into special classrooms for the learning disabled. OCR enacted guidance on national origin discrimination that included an affirmative duty for schools to provide equal educational opportunity to LEP students on the basis of these investigations. EEOC also used guidance to elaborate on Title VII's national origin discrimination provision and its application to language-based discrimination. Although Title VII does not define national origin, the Supreme Court provided some direction in an employment discrimination case that says national origin refers to "the country where a person was born or… the country from which his or her ancestors came."[6] In the EEOC guidance that incorporates this definition, national origin discrimination refers to "the denial of equal employment opportunity because of an individual's, or his ancestor's, place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group."[7] The guidance also says that "primary language of an individual" is an "essential national origin characteristic."[8] Language discrimination in the workplace can occur in several ways, including denying employment or promotion based on English language ability and usage or instituting workplace policies mandating English-only.[9]

In agencies, the use of policy documents to interpret the meanings of vague statutory terms is a core function, whether the interpretation takes the form of notice and comment rules or interpretive rules exempt from Administrative Procedure Act (APA) requirements. For many reasons, Congress is often unable to write statutes with sufficient specificity for the underlying policies to be implemented or a specific issue may not have been contemplated. The legislative process may have led to rushing, compromise, and either deliberate or implicit delegation of details to agencies. Language can be indeterminate. In the face of complex or unresolved policy judgments, Congress may prefer to delegate rulemaking authority to agencies. Given the vagaries of legislative drafting, agency interpretation and implementation proved critical to the development of language rights.

6 *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973).
7 29 C.F.R. § 1601.1 (1980).
8 Ibid.
9 Ibid.

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COURTS AND AGENCIES: JUDICIAL DEFERENCE TO GUIDANCE'S IMPACT OR EFFECT

Comparing language rights development in schools and workplaces, sites where federal civil rights agencies were equally vigorous, shows that the institutional context impacted how language rights developed. Courts played a key role, if not always a coherent one.

Court justifications for the divergent treatment of OCR and EEOC guidances are unclear. Administrative law governing judicial deference to regulatory policy was still developing, and courts did not clearly discuss standards of review stressed in modern administrative law in the language rights cases from that time. So doctrine does not explain why courts would have deferred more to OCR than the EEOC.

Even if the courts had discussed deference, they would have had a hard time justifying their result under the tests now used to determine the weight of guidance. Agency expertise and the persuasiveness of agency reasoning are paramount.[10] For decades, the Supreme Court directed lower courts to review agency work product with some deference on the theory that agencies possess superior expertise over the matters within their jurisdiction, if the particular agency work product reflected this specialized expertise.[11] For example, the Supreme Court deferred to the EEOC in *Meritor Savings Bank, FSB v. Vinson*, stating that "Guidelines … 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[12] Even in *Garcia v. Spun Steak*, which limits language rights, the Ninth Circuit explained that they did not lightly reject EEOC guidelines because guidelines constitute a body of experience.[13] There is evidence that the EEOC invested considerable thought and effort into developing their national origin jurisprudence and its applications to discrimination on the basis of language ability in the workplace. OCR, by contrast, moved more rapidly and less deliberatively toward their national origin interpretation. While they did consult with educational experts and minority groups who had studied the issue, OCR attorneys were young and unstudied in bilingual education. OCR attorneys describe themselves as more motivated by passion than experience. The educational experts felt their expertise mattered less than the impassioned advocacy of civil rights advocates in

[10] *Skidmore v. Swift*, 323 U.S. 134 (1944). Kristin Hickman and Matthew Krueger, "In Search of the Modern Skidmore Standard," *Columbia Law Review* 108 (2009): 1235.

[11] Ronald J. Krotoszynski Jr., "Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of *Skidmore*," *Administrative Law Review* 54 (2002): 736, 739.

[12] 477 U.S. 57 (1986).

[13] 998 F.2d 1480, 1489 (9th Cir. 1993).

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the heyday of identity politics. Even if educational expertise had mattered more, the research on the effectiveness of curricular strategies for LEP students is largely inconclusive. This is not to suggest that OCR policies were not good or to imply that their process of gathering information was defective, but rather that courts likely did not defer to OCR more than the EEOC because OCR was more experienced or expert in language accommodation. If expertise was the key criterion, arguably courts would have reached the opposite result.

The doctrines for reviewing agency interpretations in light of Congress' intent to delegate rulemaking authority do not fare much better. In *Chevron, U.S.A., Inc. v. Natural Resource Defense Council*,[14] the Supreme Court presumes that Congress intends to delegate interpretive authority in the face of statutory ambiguity: "[d]eference … is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[15] So far so good since "national origin" certainly does not settle Congress's intentions with regard to language. After ascertaining congressional intent, *Chevron* turns to the agency's intentions to exercise their delegated authority. The modern test of agency intent emphasizes the agency procedures used to promulgate guidance. Agencies conforming to APA procedures that emulate the legislative process usually merit greater deference than those drafting their guidance behind closed doors. The procedures actually used by OCR and EEOC once again disfavor the level of deference afforded by courts: the EEOC more closely followed notice and comment procedures than OCR and yet their guidance received less weight.

Another judicial test focuses on the guidance's effects. The legal effect test looks to the binding nature of guidance in future administrative or judicial forums. Under this test, neither OCR nor EEOC guidance merited much deference since both claimed to be nonbinding on future proceedings. The substantial impact test, which focuses more on practical effect, was used for many years. Substantial impact "entailed invalidating rules that, despite satisfaction of the legal effects test, had a substantial impact on regulated parties"[16] if they did not follow notice and comment procedures. Both OCR and EEOC guidance had a significant impact on their regulatory spheres, but it is hard to say that the EEOC had greater impact that would necessitate more procedure. After the 1974 *Lau* decision, OCR agencies developed nine *Lau* centers to assist schools with implementation of language accommodations and to field questions about OCR guidance. More than 300 investigations of schools for *Lau* violations were opened in the first year after the *Lau* decision. Investigated schools generally conceded their affirmative duty to provide language

[14] 467 U.S. 837 (1984).
[15] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).
[16] Thomas Fraser, "Interpretive Rules: Can the Amount of Deference Accorded Them Offer Insight into the Procedural Inquiry?" *Boston University Law Review* 90 (2010): 1312.

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accommodations, even if they disagreed about the specific curricular approach or remedies required to satisfy their duty. So the investigations led to negotiated agreements, settlements or consent decrees. More than 500 *Lau* plans were in place by 1980. In comparison, businesses fought English-only policies and frequently invoked business necessity when confronted with EEOC guidance, avoiding liability.[17]

The *practical* effects of agency guidance provide similar insight. Doctrine itself recognizes the informal influence of law through acknowledgment of guidance's practical effects, even if it does not explain why it should matter to courts. Though not described in these terms in administrative law decisions, the practical effect of guidance lends itself to sociolegal conceptions of the normative influence of law. Sociolegal conceptions recognize that both hard and soft law have normative power. Guidance can be thought of as soft law. In contrast to the binding character of hard law, soft law works through powers of persuasion. It is part of the body of law, insofar the law references and incorporates it in its ever-evolving interpretations. Agencies may use guidances to articulate their interpretations of what is statutorily required during enforcement actions. These positions may not have *independent* legal effect, but may nonetheless influence legal interpretations because they constitute the agency's interpretations of what the statute requires. While agencies can change their legal interpretations relatively easily – that is one reason they prefer guidance – they usually try to maintain a consistent legal stance in their guidances in order to improve their credibility with courts. Thus, the agency commits itself to the legal position articulated in its nonbinding guidance. Although the legal position may not receive the same level of deference as a binding rule, the position articulated in the guidance is sometimes treated *as if* it were legal precedent.[18] Both OCR and EEOC bound themselves to the legal positions taken in their guidances on discrimination based on national origin. OCR continues to cite the original 1968 memorandum calling for inclusion of language minorities in classrooms in its enforcement actions.[19] EEOC relies on its revised guidance and on the national origin sections of its compliance manual, which have remained largely unchanged with regard to the language dimensions of national origin discrimination.[20]

The variation in language rights in schools and workplaces is only partially explained by black letter law. An institutionalist perspective that examines the

[17] EEOC guidelines on English-only workplace rules, 29 C.F.R. 1606.7 state that English-only rules must be justified by "business necessity." Courts are divided on whether to apply these guidelines to English-only rules.

[18] Robert Anthony, "Interpretive Rules, Policy Statements, Manuals and the Like – Should Federal Agencies Use Them to Bind the Public," *Duke Law Journal* 41 (1992): 1311.

[19] See Policy Update on School's Obligation toward National Origin Minority Students with Limited-English Proficiency (1991), available at www2.ed.gov/about/offices/list/ocr/docs/lau1991.html.

[20] EEOC Compliance Manual – Section 13 National Origin Discrimination (2002), available at www.eeoc.gov/policy/docs/national-origin.html#N_48, archived http://perma.cc/H44-ZEVR.

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relationship between courts and agencies does more to explain the divergent outcomes across case studies.

Schools: Integrated Remedial Model

In schools, courts and agencies became interdependent in the implementation of agency guidance. In a seminal case for Title VI enforcement, *Alexander v. Sandoval*,[21] Justice Stevens described the relationship between courts and agencies in the Title VI context as an "integrated remedial scheme"[22] where courts defer to and enforce agencies' promulgated guidances and provide agencies' requested remedy. Stevens wrote to express his dismay with the majority's opinion, which severed the court–agency intertwining by making it more difficult to use courts to enforce agency regulations. The basis for the approach Stevens favored and found more faithful to the history and tradition of Title VI was in *Lau v. Nichols*. In *Lau*, the majority satisfied itself that the statutory grounds for protecting language minorities existed within Title VI such that the articulation of language rights constituted the details of policy implementation – matters within the agency's discretion.[23] Without classifying the OCR memo as binding or nonbinding and without citing a specific standard of review, the *Lau* majority respected the agency's decision to require schools to bridge language gaps. The *Lau* majority acknowledged the rulemaking authority of OCR under Section 602 of the Civil Rights Act.[24] The majority referenced the OCR Guidelines on National Origin that require school districts receiving federal funds to "'rectify the language deficiency in order to open the instruction to students who had 'linguistic deficiencies'" within its Section 601 discussion, suggesting reliance on the underlying statute.[25] The Section 602 rulemaking discussion included the Court's conclusion that "it seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority … which denies them a meaningful opportunity to participate in the educational program – all earmarks of the discrimination banned by the regulations."[26] The Court carved out a sphere for agency influence through guidance.

Justice Stewart's concurring opinion in *Lau* more squarely addressed the legal authority for the OCR guidance. It rested language rights on regulatory grounds, positing as "the critical question" whether the regulatory guidelines promulgated by OCR went beyond the authority of Section 601.[27] The Court upheld the validity of

[21] *Alexander v. Sandoval*, 532 U.S. 275, 304 (2001).
[22] Ibid., 304, 310 n.20 (Stevens, J., dissenting).
[23] *Lau v. Nichols*, 414 U.S. 563, 566 (1974).
[24] Ibid., 567.
[25] Ibid. (citation omitted).
[26] Ibid., 568. The Court's reference to "regulations" apparently refers to the OCR Guidance.
[27] Ibid., 571 (Stewart, J., concurring).

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a regulation promulgated under a general authorization provision such as Section 602 "'so long as it is reasonably related to the purposes of the enabling legislation.'"[28] Justice Stewart credited the OCR memorandum as a "'consistent administrative construction'" of remedial legislation and claimed that such guidance is "'entitled to great weight.'"[29]

After *Lau*, Title VI transformed from an administrative enforcement mechanism for protecting constitutional rights into a judicial mechanism for enforcing regulatory rights. Under the latter model, courts deciding Title VI civil rights complaints shifted from reviewing an agency's interpretation of the *underlying statute* to reviewing an organization's fidelity to the *regulation itself*. Justice Stevens, in his dissent in *Sandoval* thirty years after *Lau*, characterized the interdependence of agency rulemaking and judicial enforcement after *Lau* as an "integrated remedial model" on the basis of the text and structure of Title VI:

> Section 601 does not stand in isolation, but rather as part of an integrated remedial scheme. Section 602 exists for the sole purpose of forwarding the antidiscrimination ideals laid out in § 601. The majority's persistent belief that the two sections somehow forward different agendas finds no support in the statute.[30]

With the clarity of hindsight, Justice Stevens' dissent recognizes federal agencies' broad powers to issue "prophylactic rules" for the purpose of realizing the vision of Title VI.[31] Whereas Section 601 deals with unambiguous discrimination using a static approach toward enforcement, Section 602 addresses subtle forms of discrimination through a dynamic approach. Section 602 delegates to agencies the "complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems" to warrant federal intervention.[32] This approach creates a capacity for nuanced assessments about complex problems. The integration of court enforcement and agency rulemaking "reflects a reasonable – indeed inspired – model for attacking the often-intractable problem of racial and ethnic discrimination."[33] Administrative agencies today define and gather evidence about discrimination in a variety of contexts. They monitor the compliance of thousands of public and private organizations and redress noncompliance at costs in the millions. The scope of the regulatory effort makes federal courts highly dependent on agencies.

[28] Ibid. (citation omitted).
[29] Ibid. (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972); *Griggs v. Duke Power Co.*, 401 U. S. 424, 433–34 (1971)).
[30] *Alexander v. Sandoval*, 532 U.S. 275, 304 (2001) (Stevens, J., dissenting).
[31] Ibid., 305.
[32] Ibid. (citation omitted).
[33] Ibid., 306.

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Workplace: Court Constraints

In contrast, courts constrained the role of guidance in the workplace. When courts have addressed EEOC statutory interpretations on language-based national origin discrimination, their discussions of English-only policies are the most specific. The EEOC presumes that workplace rules requiring employees to speak English at all times (including breaks) and to all persons (including to coworkers) violate Title VII because they burden the terms and conditions of employment and foster a hostile work environment for LEP or bilingual employees.[34] More limited English-only policies, requiring workers to speak English only at certain times of the day, must be justified by business necessity such as public safety and service of English-speaking customers.[35] They must be described to employees in a notice outlining "the general circumstances when speaking only in English is required and of the consequences of violating the rule."[36] Failure to provide notice is considered evidence of discrimination on the basis of national origin.

The federal circuit courts' rationales for upholding English-only workplace policies circumvent the substantive reasoning and procedural steps behind the EEOC's explanation of national origin discrimination. They instead center on the agency's limited rulemaking and enforcement powers. In the critical decisions referencing the EEOC's English-only guidelines, the circuit courts questioned the EEOC's ability to engage in substantive rulemaking under Title VII. In *Garcia v. Spun Steak*, the Ninth Circuit held that it was not bound by the EEOC guideline providing that an employee meets the prima facie case in a disparate impact case merely by proving the existence of the English-only policy and that an employer must always provide a business justification for such a rule. The employer initiated an English-only worktime policy in response to complaints that bilingual workers were using Spanish to harass and insult non-Spanish-speaking workers; the employer's stated intention was to promote racial harmony and enhance worker safety. The court said it was not bound by EEOC guidelines because nothing in the plain text or the legislative history of Title VII supported the EEOC's presumption of discrimination.[37] While EEOC's lack of substantive rulemaking powers under Title VII is fair to mention, certain exercises of interpretive and procedural rulemaking by the EEOC are entitled to deference. As Professor Melissa Hart explained, "the Court's lack of deference to the EEOC is part of a broader picture: the Court has established a bifurcated structure of administrative deference that leaves much of the kind of

[34] 29 C.F.R. § 1606.7(a).
[35] 29 C.F.R. § 1606.7(b).
[36] 29 C.F.R. § 1606.7(c).
[37] *Garcia v. Spun Steak Company*, 998 F.2d 1480 (9th Cir. 1993).

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interpretation that the EEOC most often engages in with the 'power to persuade' but not the 'power to control'… Even within this framework the EEOC receives remarkably little respect from the Court."[38] While Professor Hart is not discussing national origin, her analysis of judicial deference to the EEOC seems applicable to the English-only opinions.

The EEOC's hybrid enforcement scheme also limits its enforcement authority. Rather than relying exclusively on agency enforcement, Title VII enables private litigants to obtain a right-to-sue letter that funnels compliance into the federal courts.[39] The transfer of enforcement authority from agencies to courts differs from the Title VI approach that pairs bureaucratized decision-making and judicial review. EEOC's reliance on private litigation as an enforcement strategy is vulnerable to the same dysfunctions as courts generally have in an adversarial legal system: fragmentation, unpredictability, incrementalism, and expense.[40] Coupled with the inconsistent application of the English-only guidance in courts – absent a unifying standard from the Supreme Court or Congress – nondeference limited the reach and depth of language rights even in jurisdictions sympathetic to LEP workers. In circuits with contrary legal precedent, English-only challenges were soundly defeated. Ultimately, the legacy of the EEOC's effort to govern by guidance is mixed. The EEOC tried to advance language rights on behalf of language minorities against significant odds, and it succeeded for a while via the 1970 guidance. Yet those initial efforts to govern through guidance were not enough to endure subsequent litigation challenges and changed political conditions.

History tells us that, as a matter of legal effect, the OCR articulated language rights for language minorities more successfully than the EEOC. However, both the OCR and EEOC guidances have real and practical effect through their compliance standards, investigations, and enforcement actions. Their regulatory guidances influence the practical realities for language minorities in schools and workplaces more than the law suggests.

SOCIOLEGAL INFLUENCES ON AND OF THE LAW

Understanding variations in the legal strength of guidance requires more than reciting doctrines of judicial deference and administrative law as encapsulated in the

[38] Melissa Hart, "Skepticism and Expertise: The Supreme Court and the EEOC," *Fordham Law Review* 74 (2006): 1937–1938 (quoting *Skidmore v. Swift*); see also John S. Moot, "Analysis of Judicial Deference to EEOC Interpretative Guidelines," *Administrative Law Journal* 1 (1987): 213.

[39] Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits* (Princeton, NJ: Princeton University Press, 2010), 228–31.

[40] Robert Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2003), 29–31.

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APA or the tests that distinguish binding and nonbinding agency interpretations. It requires an institutionalist understanding of the relationship between courts and agencies and the processes of norm creation that underlie the implementation of language policies. These processes go beyond traditional analysis of courts to encompass extrajudicial processes that contribute to hardening of informal policy and the durability of regulatory rights. Going beyond prior research on the emergence of language rights in civil rights agencies, the remainder of this chapter uses an institutionalist perspective to examine the extrajudicial influences that instantiate nonbinding agency interpretations.

The assumptions of modern administrative law only partially explain the divergence between the two case studies, even after accounting for the doctrines that acknowledge the informal and practical influence of guidances. Agencies additionally forged meaningful civil rights protections independent of the judiciary. Borrowing from sociolegal scholarship, the stories of language rights also evidence the use of extrajudicial influences that "harden" soft law (such as agency guidance) outside of official channels. This is what happened with Title VI's language-based protections in schools. The extrajudicial influences on the hardening of law do not entirely omit the influence of court authority. Several extrajudicial influences derive from the legal threat or radiating effects of judge-issued law. But additional factors are also at play, including the indirect influences of legal institutions and the direct effects of regulated entities and social movement or interest groups. For example, civil rights advocates drew analogies to *Brown v. Board of Education* and the impediment segregated schools created for black school children in their quest to extend Title VI to Spanish-speaking and Chinese-speaking school children.

But the shadow of law only extends so far, as illustrated by the case study of language rights in the workplace. Safeguards against English-only policies bumped up against the constraints of hard law and social norms of deference to private employers and consumers, which hindered the development and durability of language rights based on agency regulation.

Bilingual Education in the Shadow of the Law

The controlling influence of law casts a long shadow. The existence of a credible legal threat, even without actual litigation, is sometimes enough to induce compliance or encourage cooperation. Robert Mnookin and Lewis Kornhauser refer to this as "bargaining in the shadow of law"[41] and it arises in many contexts. In alternative

[41] The phrase "bargaining in the shadow of the law" was coined by Robert Mnookin and Lewis Kornhauser and is used widely in sociolegal literature. Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," *The Yale Law Journal* 88 (1979): 950–997.

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dispute resolution, for example, the coercive power of law comes not from its actual exercise, but from a credible threat. The mere insinuation that litigation is possible may be enough to deter or redress bad behavior. So a conflict might be resolved by reference to norms of fairness as well as the shared understanding that courts remain available if the parties are unable to reach a resolution. LEP employees unable to resolve language rights conflicts with their employers through the EEOC retain the right to sue the employer in federal or state court.

Deterrence aims to preempt undesirable behavior by holding out the "stick" of liability or punishment. A simple example of deterrence can be found in the fund termination provisions of Title VI of the Civil Rights Act. Section 601 permits the federal government to terminate funds to public schools if they do not comply with Title VI requirements. While there have been only a handful of cases that have actually reached litigation, let alone judgment, schools typically cooperate once a violation is found. Formal proceedings become unnecessary for the enforcement of this provision.[42]

Another form of legal threat relies on the agency's broad interpretations of public policies and social norms. Under Section 602, the OCR elaborated a substantive interpretation of what Title VI requires, which was made manifest in informal policy guidance, rather than the harder form of agency regulations. Their theory that schools have an affirmative duty to accommodate LEP students partly emerges from the Equal Protection Clause, which the Supreme Court side-stepped in *Lau v. Nichols* instead deciding the case on the basis of Title VI. The precedential value of such "administrative constitutionalism"[43] is questionable. So is agencies' substantive rulemaking, interpreting the meaning and requirements of Title VI without the public hearings required by the APA. These interpretations lingered in schools even after the precedential value of *Lau* came into question, suggesting claimants are leveraging the symbolic authority of official government policy rather than substantive law.

Invoking nonbinding law as authority demonstrates the norm creation process. Legal and extralegal inputs shape policy; the policy then structures the social context in which policy is further developed. Apart from using strictly legal sources, OCR attorney Martin Gerry researched bilingual education as a curricular strategy to remedy language gaps. As revealed in oral histories and notes from the MALDEF archives, Gerry's private consultations with educational experts on student learning, psychological research on stigma, and demographic data about the needs of

[42] Eloise Pasachoff, "Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off," *The Yale Law Journal* 124 (2014): 248–335.

[43] Sophia Z. Lee, *The Workplace Constitution from the New Deal to the New Right* (New York: Cambridge University Press, 2014); Sophia Lee, "Race, Sex, and Rulemaking," *Virginia Law Review* 96 (2010): 799.

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national origin minority groups influenced the conclusion that bilingual education ought to be the solution to the problem of language barriers.[44] While none of these sources were legally authoritative, they gained authority through the endorsement of the OCR. After *Lau* was remanded to the district court for a legal remedy, OCR made bilingual education the favored legal strategy for fulfilling Title VI obligations in the initial *Lau* remedies. This elevated status – from a curricular strategy to a legal strategy – held for several years until competing norms of deference to schools' curricular judgments took hold.

Legal and Social Constraints on Workplace Policies

The absence of hard law protecting language rights and deference to private businesses and customers dampen agencies' capacity to protect LEP workers. Critics of the EEOC cite the lack of precedential value assigned to the EEOC Guidance, which is soft law, by the Fifth Circuit in *Garcia v. Gloor* as a serious limitation on the strength of the 1980 guidance. Judicial deference to private employers, and a refusal to defer to the EEOC, stifled the legal effect of the EEOC's disapproval of English-only policies. Courts further limited the potential for the agency exhortations to become more by cabining the 1980 EEOC Guidance. Even as soft law, the guidance was hindered by the inability to reference supportive hard law as justification for its reasoning.

The existence of competing law also imposes barriers to regulatory rights-making. Division in the appellate courts on the applicability of EEOC national origin guidance to English-only policies generated some contrary legal precedent. As case law developed, some courts drew distinctions that were often unfavorable to LEP workers. For example, some courts drew distinctions between the language rights of bilingual and monolingual LEP workers, suggesting that bilingual workers could not assert challenges to English-only policies because their decision to speak something other than English was a choice. Some failed to see the relationship between language discrimination and race-based discrimination, instead viewing charges of language discrimination as a novel theory with a short track record rather than one with the vintage of established doctrines that barred not only discriminatory treatment but also harassment and hostile environment on the basis of a protected classification. Others resisted findings of discrimination when presented with facially neutrally policies, even if those policies had systemic and disparate impacts on LEP and minority language speakers. Generally, language rights foundered because

[44] Martin Gerry, Testimony before House Subcommittee on Education hearings on the codification of *Lau v. Nichols* and the Bilingual Education Act. March 12, 14, 19, 21, 27, and 28, 1974 (GPO 1974), 20. See also MALDEF Archives, *Lau* Files, Stanford University, Green Library: Special Collections.

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economic and cultural rights in the United States have always been weak in the presence of an individualistic rights-based framework. There is no formal right to work and poverty is not treated as a suspect category meriting the protection of the Court, so there is also little expectation of economic incorporation for LEP workers when English-speaking workers lack such expectations. Moreover, the strong social values of private sector independence, employer discretion, consumer preference, and efficiency limit the expansion of language-related civil rights within the realm of soft law. Consequently, the competing laws and the lack of social norms supporting workers weaken the aspirations of EEOC guidance on language in the workplace.

Yet principles of nondiscrimination and equal opportunity demarcate an outer limit on language-based discrimination, even as Title VII's prohibition against English-only workplace policies have been inconsistently applied. The EEOC national origin guidance's examples of discriminatory English-only policies are valuable in ways similar to the OCR Guidance during the period before *Lau* and after *Castaneda*. While not by itself controlling legal precedent, the EEOC Guidance conveys the authoritative opinion of the five Commissioners of the EEOC and carries the imprimatur of the state. It provides a legal basis for the EEOC to intervene in private litigation, as amicus curiae, or to directly challenge employers using cease-and-desist powers. The guidelines form the basis for EEOC compliance manuals, technical assistance, and dissemination of information about best practices that influence employer behaviors. Legal constraints notwithstanding, a regulatory framework for protecting LEP workers emerged under Title VII that incorporates the *McDonnell-Douglas* burden shifting framework, disparate impact, and harassment standards developed in other areas of employment law, even if its aspirations have been difficult to fulfill. Employers can voluntarily enact worker protections that are not required by courts but that are consistent with Title VII nondiscrimination principles. In these senses, nonbinding regulatory policies have intrinsic merit as soft law, even if they are not – and never will be – hard law that controls by the raw assertion of judicial power.

Intertwining Hard and Soft Law

These case studies show that informal regulatory policy guidance contributed to a transformation in the norms surrounding language rights. The case studies have focused on the mechanisms of legal change that can expand on existing rights and produce variations in legal strength. While the key components of this analysis have been disaggregated into separate discussions of judicial and extrajudicial processes, ultimately the process of hardening is one of intertwining hard and soft law. Courts and the judicial endorsement of regulatory policy strengthened informal regulatory policies and helped elevate them to the status of regulatory rights; judicial skepticism

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weakened those norms and impeded their entrenchment as regulatory rights. Even without direct judicial enforcement, soft law can facilitate legal strengthening. Soft law has a gap-filling function that performs an indispensable task by forging policy pathways that would otherwise be premature or foreclosed. For bilingual education, the transformation from soft law to hard law (and back) ran in both directions: the OCR guidance took four years to wend its way to the Supreme Court in *Lau v. Nichols*, and it was another year before Congress codified principles of language access in the Equal Educational Opportunity Act (EEOA) of 1981.[45]

Filling gaps in hard law provides agencies with a vehicle for promoting statutory interpretations and, sometimes, constructing regulatory rights. Theorists of administrative constitutionalism find parallels in my account of regulatory rights-making: extending or narrowing court doctrine or statutes in the absence of clear rules, directly interpreting the Constitution with unspecified legal authority, selectively ignoring unfavorable precedents or unflattering interpretations from other administrators, and eschewing judicial skepticism of their authority to advance policies without necessarily acquiescing in the substantive principles themselves.[46] Even if the duty to accommodate language minorities was not enforceable – as is the case with the EEOC Guidance on English-Only Workplace Policies – neither were they mere textual exhortations. Their obligations were *administrable*, even if not readily justiceable.

There are definite benefits to hard laws that take the traditional form of judicial doctrine or statutory legislation, including a durability that stems from the ability to stick when the political environment changes.[47] Yet both case studies show that soft laws shape expectations and compel actual practices within regulated organizations like schools and workplaces.

REGULATORY RIGHTS ROLLER COASTER

As with other areas of the minority rights revolution, language rights evolved with the times. Although they suffered some setbacks during years of conservative backlash and hostility, they also benefited from revitalized interest in later decades. Regulatory rights as a means of protecting language rights ultimately persisted in form if not also in substance.

[45] Since 1981 federal regulators have relied on a provision of the Equal Educational Opportunities Act of 1974 to provide legal support for their Guidelines (1703(f)).

[46] Lee, "Race, Sex, and Rulemaking," 807–809, 857; William Eskridge and John Ferejohn, *A Republic of Statutes* (New Haven, CT: Yale University Press, 2013).

[47] William N. Eskridge and Kevin S. Schwartz, "Chevron and Agency Norm-Entrepreneurship," *Yale Law Journal* 115 (2006): 2624–2626.

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Persistence of Regulatory Rights

Regulatory rights underwent what R. Shep Melnick has called a "regulatory rollercoaster" in the 1980–1990s. Contracting civil rights and increasing hostility toward language rights prompted some setbacks after the initial emergence of language rights and victories such as *Lau v. Nichols*. In response to a legal challenge to its 1975 *Lau* remedies memo, which held up a high standard for school districts to comply with the 1974 *Lau v. Nichols* decision, OCR tried to formalize the memoranda that contained *Lau* remedies as formal regulations under the Carter administration.[48] However, OCR withdrew the proposed regulations under President Reagan, preferring to hold on to what they could of the *Lau* remedies in the form of a policy memo and negotiated agreements with school districts. Their new approach retained *Lau*'s core commitment to providing LEP students access to education, but adopted a more deferential framework to school districts that permitted a wider array of curricular approaches to satisfy the core commitment, including English-immersion and English-first transitional programs disfavored by some bilingual-bicultural education advocates and multiculturalists.[49] The radiating effects of this social and regulatory environment alternately fortified and undermined the development of the law.

While the EEOC was more successful combatting workplace policies forbidding foreign accents or requiring English fluency than in its prohibitions of English-only policies, they never secured robust safeguards against English-only policies under their national origin discrimination guidance. As discussed, a key explanation for the EEOC's struggles was their inability to promulgate binding regulations and the consequent absence of hard law protecting language rights. The case law interpreting the EEOC guidance developed in directions unfavorable to LEP and especially bilingual workers in some places. This case law generally lagged behind that interpreting the OCR guidance in schools, with most cases being decided in the comparatively hostile political conditions of the 1980s and 1990s, resulting in conflicting (at best) and contrary (at worst) case law on language rights. Considerable deference to private businesses and consumer preferences also hampered the law of language rights. The constraints magnified the inhospitable legal environment toward language rights in the workplace. EEOC's

[48] *Northwest Arctic School District v. Califano*, Docket Number A-77–216 (D.Alaska, September 29, 1978.)

[49] The revised *Lau* remedies memo incorporated the three-prong framework laid out in *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), which permits schools to choose the curricular means of satisfying the OCR guidance – thereby absolving the requirement of bilingual education. *Id.* at 1012. *Horne v. Flores* granted even greater deference to school districts. 557 U.S 433 (2009).

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regulatory approach was vulnerable to general conditions and specific challenges relative to schools.

While some civil rights experts understandably lament language laws' inability to go farther, this chapter contends that regulatory rights became entrenched in at least two ways. First, the emergence of language rights established a norm of nondiscrimination on the basis of language. Second, it established a strategy of regulation as a means to securing this end.

Entrenchment of Nondiscrimination

Despite the subtle erosion of language rights in both schools and workplaces during the 1980 and 1990s, the framework of regulatory rights that took root in the 1960s and 1970s ultimately persisted, evidencing the entrenchment of regulatory rights. The federal government's commitment to extending meaningful access to LEP persons was revived under the Clinton, Bush, and Obama administrations. In 2000, President Clinton issued Executive Order 13166 (EO 13166), Improving Access to Services for Persons with Limited English Proficiency, which renews and extends the federal framework for providing LEP persons meaningful access to regulatory programs to virtually every agency that administers federal funds. The order requires agencies that administer public services "ensure that recipients of federal financial assistance provide meaningful access to LEP applicants and beneficiaries" because the "core holding" embedded in Title VI – that failure to address language access among national origin minorities could constitute discrimination – has "equal vitality with respect to any federally assisted program or activity providing services to the public."[50] The order entrusts agencies to evaluate their own practices as well the practices of schools, workplaces, and other regulated institutions. President Bush maintained EO 13166 and President Obama expanded it, illustrating the entrenchment of a regulation-based approach toward language access across political parties. As of February 2010, twenty-two agencies have completed and posted online policy guidance for their beneficiaries to bear in mind when interacting with LEP persons and fifty-eight agencies have submitted their own plans to ensure meaningful access to their services.[51] The notion of measuring educational progress for LEP students made its way into President Bush's educational initiatives emphasizing the use of standardized tests to evaluate schools' performance and hold them accountable for results. Even if workplace language policies are less robust than in schools, specific protections have been undertaken

[50] 65 F.R. 50121 (August 16, 2000).

[51] Language Access: Report to Congressional Requesters, US Government Accountability Office (April 2010), available at www.lep.gov/whats_new/GAO_LEP4_10.pdf.

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on behalf of immigrant workers facing discrimination on the basis of citizenship masquerading as national origin.[52]

As further evidence of their entrenchment, the legacy of language rights rippled beyond schools and workplaces. Civil rights norms governing educational opportunity for national origin minorities seeped into the justifications for voting rights. Section 203 of the Voting Rights Act of 1975, which amended the original legislation, requires bilingual ballots and translation of election materials for LEP voters in certain jurisdictions. The statute's legislative history shows that Congress declared it "patently unfair" to require literacy from the same minority voters to whom educational opportunities had been denied; after all, many of these language barriers resulted from "unequal educational opportunities having been afforded these citizens."[53] The establishment of legal requirements for language access in schools enhanced the government's obligations at the polls: whereas benign neglect of LEP-speaking students was previously permissible, the failure to bridge language barriers now constituted a failure of the public schools to prepare future citizens to vote. On the basis of accumulated evidence that more "catching up" was necessary, the Department of Justice (DOJ) accepted its responsibility "'to take action to ensure that minority citizens whose usual language is not English receive adequate election materials and necessary assistance in the usual language to "meaningfully participate."[54]

Language access also took hold in courts. Under the 2002 DOJ guidance that implements E.O. 13166, lengthy consideration is given to litigants and witnesses in federal courts. At a minimum the guidance requires that courts provide competent interpretation during all hearings, motions, and trials where the LEP individual is expected to be present. Court-appointed counsel must be proficient in the LEP individual's language or a competent interpreter is required for attorney–client consultation. Certification standards for interpreters is also provided. While not binding on state courts, Assistant Attorney General Thomas Perez issued a guidance letter to state courts highlighting best practices (some of which exceed federal requirements) and areas of concern. Other policy arenas in which the federal government provided guidance on language include corrections/prisons, police and sheriff's departments, state and local government.[55]

[52] Title VII prohibits discrimination on the basis of citizenship under the national origin clause only in limited circumstances, such as when a citizenship requirement functions as a pretext for national origin discrimination. *Espinoza v. Farah Mfg.*, 414 U.S. 86 (1973); 29 C.F.R. 1606.5(a).

[53] Ming H. Chen, "Regulatory Rights: Civil Rights Agencies Translating 'National Origin Discrimination' into Language Rights, 1965–1979" (Ph.D diss., University of California Berkeley, 2011).

[54] Ibid.

[55] Letters and memoranda on language-based discrimination are collected on the LEP webpage, created by an Interagency Task Force on National Origin and LEP Issues, available at www.lep.gov/guidance/guidance_DOJ_Guidance.html.

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The ripple of language rights across policy arenas is not undisturbed. Opponents of multiculturalism in the 1980s and 1990s expressed concern that too much accommodation to LEP students or workers would lead to a failure to assimilate and erosion of shared culture in the United States.[56] Faced with these critical points of view, demographic pressures and political tides vindicated the language accommodation precepts crystallized in civil rights agencies' interpretations of what the law owed LEP individuals.

Entrenchment of Regulatory Strategies

Regulatory rights became the favored strategy for securing many minority rights. This occurred through two steps. First, civil rights statutes rather than courts and the Constitution became the legal source of equal opportunity in schools and workplaces. The landmark case *Lau v. Nichols* is often compared with *Brown v. Board of Education* because of its substantive pursuit of educational access, but it differs crucially in its reliance on civil rights statutes as the source of rights. Statutes are prescriptive in nature and can create affirmative duties and allocate resources rather than promising "hollow hopes."[57] Second, the pursuit of equal opportunity became more concrete and results-driven. The shifted emphasis on prescriptions and rights-remedies – rather than sweeping statements of principle – suited the regulatory form. Agencies earn their cache in experience and expertise; they possess institutional capacity to "make rights real," as evidenced by the OCR and EEOC rules for implementation of the statutes they enforced.[58] The strategy of regulatory rights functioned to displace long-standing reliance on the Constitution to fulfill aspirations of equality.

While the broadest application of the regulatory rights strategy of obtaining equality has attracted critics, the use of agency action – anchored in federal civil rights statutes and safeguarded by courts – endures in moderated form. Modern administrative agencies define and gather evidence about discrimination in many contexts. They monitor the compliance of thousands of public and private organizations and redress noncompliance costing millions of dollars. The scope of the regulatory enterprise makes individuals and institutions dependent on administrative agencies, even though the agency's statutory interpretations and regulatory policies are not legally binding per se.

[56] Samuel Huntington, "The Hispanic Challenge," *Foreign Policy* (2004): 30–45

[57] Gerald Rosenberg, *Hollow Hope: Can Courts Bring About Social Change?* (Chicago, IL: University of Chicago Press, 1991, 2008).

[58] Charles Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (Chicago, IL: University of Chicago Press, 2009).

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In many ways, the regulatory state is a victim of its own success: those leery of the expansion of civil and regulatory rights seek to limit the administrative state that it hinges on to achieve their goals, with conservative politicians perennially calling for the repeal of the US Department of Education among other agencies. The weakening influence of private enforcement under Title VI is another vector in the erosion of public regulation. Scholars like Rachel Moran and Rose Cuison Villazor have made the case that *Sandoval* greatly weakened private enforcement within public agencies and thereby harmed the administrative apparatus for protecting language rights – it at least closed off one pathway that has proved powerful in other venues as recounted by Sean Farhang's study of Title VII enforcement.[59]

Alexander v. Sandoval concerned the negative effects of LEP persons unable to obtain driver's licenses amidst the department of motor vehicles' (DMV) refusals to provide translated forms and exams.[60] Martha Sandoval, a Spanish-speaking housekeeper who knew how to drive but could not obtain a license, complained that her inability to legally drive hampered her from grocery shopping, taking her children to school, and going to work. She won in the trial court and in the Eleventh Circuit, with both courts holding invalid the DMV's English-only policy, which was adopted after the Alabama State Legislature amended its Constitution to declare English the official language in 1990. The Supreme Court reviewed the implied private right of action claim without reaching the substantive issue. It held that there is no implied right of action for private individuals to prove that they have been discriminated against on the basis of national origin because the challenged policies have a disparate impact. Unless they can prove discriminatory intent, harmed individuals must bring their claims to regulatory agencies to investigate and attempt to resolve the matter on their behalf. Many critics have characterized *Sandoval* as an impediment to Title VI enforcement generally and a constraint on agency policies in the area of national origin discrimination specifically.

The claim that cases like *Sandoval* weakened the civil rights state is to be taken seriously. It is compounded with misgivings about the commitment and capacity of regulatory agencies to implement their statutory missions. Debilitating backlogs and chronic underfunding of civil rights agencies limits their capacity to serve as guardians of civil rights. So does pressure on agencies to channel their actions into burdensome procedures such as notice and comment rulemaking. *Sandoval* cannot

[59] Rachel Moran, "Undone By Law: The Uncertain Legacy of *Lau v. Nichols*," *Berkeley La Raza Law Journal* 16 (2005): 1; Rachel Moran, "The Story of *Lau v. Nichols*: Breaking the Silence in Chinatown," in *Education Law Stories*, eds. Michael A. Olivas et al. (St. Paul, MN: Foundation Press, 2008); Rose Cuison Villazor, "Language Rights and Loss of Judicial Remedy," in *Awakening from the Dream: Civil Rights Under Siege and the New Struggle for Equal Justice*, eds. Denise C. Morgan et al. (Durham, NC: Carolina Academic Press, 2005) 135.

[60] *Alexander v. Sandoval*, 532 U.S. 275 (2001).

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be blamed for all of these problems. Language rights in public places remain essentially entrenched, even if the specific forms of bilingual education and deference to schools and educational experts on curricular decisions have limited federal influence. Language access remains important in health care and other areas covered by E.O. 13166. Although their by-products were not by themselves legally binding, they might have been strengthened with doctrinal support. Shielded from public exposure and political pressure, civil servants accomplished *more* than they could have through judicial or legislative channels. However imperfectly agencies have since realized the vision of providing meaningful access, their use of national origin discrimination policy guidances forged a path in terrain where Congress had previously declined to act.

Ongoing Challenges to Regulatory Rights

Recent trends that weaken the civil rights state make a strategy that relies too heavily on a regulation as the vehicle for protecting language rights more challenging. Delegations of power away from federal government and toward the private sector are one trend; devolution of authority to states is another.

The curtailment of federal authority and public regulation is partly fueled by rising influence of the private sphere and consequent constraints on the public sphere. Private influences pose special challenges in the workplace. Accompanying the move toward a smaller federal government in the 1980s was a narrowing of the scope and ambition of regulatory policies. President Reagan issued Executive Orders 12291 and 12498, which created the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) and requires agencies to submit all proposed regulations to a cost–benefit analysis prior to their enactment.[61] Legal scholars across the political spectrum view executive oversight as an attempt to wrest power away from regulatory agencies. Cost–benefit analysis and outsize consideration of financial hardships to regulated entities can limit the scope of civil rights compliance. This is somewhat true for OCR and especially true for EEOC efforts under Title VII to ensure that employers accommodate LEP-speaking workers in the face of inefficiency or expense.

Additionally, Congress specifically sought to transfer public enforcement duties to workplaces in many areas of immigration law that affect language minorities. The Immigration Reform and Control Act (IRCA) of 1986, for example, made it illegal for employers to knowingly hire undocumented immigrants. Diverging from past immigration practices, IRCA imposed sanctions on the employers for knowingly hiring undocumented immigrants. Many employers found it easier to avoid hiring

[61] Executive Order 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. §601 at 431–34 (1982).

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national origin and racial minority employees than to risk running afoul of IRCA, and they used English language ability as a proxy for citizenship on the theory that LEP persons were more likely to be undocumented. A special unit was developed within the US Department of Justice, Civil Rights Division, to guard against IRCA-related unlawful employer discrimination on the basis of national origin. Employers nevertheless were entrusted with employee background checks that ran counter to their interest in keeping business costs down or avoiding judicial sanction.

The comparison of schools with the EEOC case study reveals the multifaceted challenges of private sector regulation in ways that go farther than this chapter can explore. There are sound reasons for granting private employers a berth for operating their businesses. Employers are never required to employ or otherwise accommodate workers who cannot perform the essential tasks of a job. English-only cases contain exceptions where English fluency is a business necessity, such as when the lack of English language ability compromises coworkers' ability to communicate about a dangerous task or interferes with the ability to serve English-speaking customers. Still deference to businesses does not operate as a free pass to discriminate. Time and time again, agency regulations stand for this principle – more consistently than courts, Congress, or other institutions that generate hard law.

A second trend limiting regulatory rights is the devolution of authority to states. Beginning in the 1980s, a raft of English-only laws and Official English initiatives were enacted in twenty-nine states. California, the state with the highest number of LEP persons, undercut federal support for language rights by enacting Proposition 227 in 1998.[62] Proposition 227 limits bilingual education in public schools to one year of English immersion and then requires LEP students be transferred to mainstream classrooms taught "overwhelmingly in English." Federal courts in *Valeria* reviewing Proposition 227 ruled that it violated neither the Equal Protection Clause nor the EEOA. Applying the *Castaneda* test, a federal judge found that English immersion programs are "based upon a sound educational theory" without regard to preferences for bilingual education.[63] Proposition 227 introduces uncertainty into the legal protections for LEP persons and creates unresolved tensions for Title VI entities.[64]

If the *Castaneda* decision permitted schools more leeway to satisfy their obligation to educate LEP students, case law became even more deferential to schools in

[62] Proposition 227 gives parents the ability to use waivers to request alternative programs for their children.

[63] *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. CA, 1998); *Valeria G. v. Davis*, 307 F. 3d 1036 (9th Cir. 2002).

[64] The OCR "Questions That May be Raised by Proposition 227" fact sheet explains that whether or not Proposition 227 contravenes Title VI has not been resolved in courts. See OCR Website, available at www2.ed.gov/offices/OCR/archives/prop227q.html.

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Horne v. Flores. At issue in *Horne* was whether Arizona's voter resolution requiring English immersion was sufficient to meet its obligations to educate LEP students. The majority opinion indicated that when applying the *Castaneda* framework, judges should ordinarily defer to the judgment of state and local officials because "the EEOA…limits court-ordered remedies to those that are *essential* to correct particular denials of equal educational opportunity."[65] Specific curricular preferences or educational outcomes do not matter: "the EEOA requires 'appropriate action' to remove language barriers, not the equalization for results between native and nonnative speakers on tests administered in English – a worthy goal, to be sure, but one that may be exceedingly difficult to achieve, especially for older ELL students."

Devolution of language protections to states and local schools does not necessitate a weakening of language rights, although in practice it has occasioned remedies less satisfying to LEP students and their advocates. Still, as federal guidance and case law affirm, these state and local decisions run alongside federal obligations. State and local policies do not supplant or displace *the* affirmative duty to educate LEP students established in Title VI and then rearticulated by all three branches in *Lau v. Nichols*, the *Lau* remedies memo, and the EEOA.

CONCLUSION

The regulatory rollercoaster revealed in this fifty-year history of language rights suggests that regulatory rights rest on shifting ground, even if they are sufficiently rooted to remain. The clear advantages of regulation – greater expertise and agility – will be ever more important in a modern world characterized by complexity and change. The effect of the disadvantages of regulation on the modern world are less clear – at once, regulation is feared for its capacity to overstep and dismissed for its vulnerability to being overruled by the other branches of government (or even by future administrations within the same branch). Whatever uncertainty attends the next fifty years, regulatory rights are apt to stay.

[65] *Horne v. Flores*, 557 U.S. 433, 450 (2009).

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THE RIGHTS REVOLUTION REVISITED

The rights revolution in the United States consisted of both sweeping changes in constitutional doctrines and landmark legislative reform, followed by decades of innovative implementation in every branch of the federal government – Congress, agencies, and the courts. In recent years, a growing number of political scientists have sought to integrate studies of the rights revolution into accounts of the contemporary American state. In *The Rights Revolution Revisited*, a distinguished group of political scientists and legal scholars explore the institutional dynamics, scope, and durability of the rights revolution. By offering an interbranch analysis of the development of civil rights laws and policies that features the role of private enforcement, this volume enriches our understanding of the rise of the "civil rights state" and its fate in the current era.

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