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INVITED COMMENTARY

Undone By Law: The Uncertain Legacy of *Lau v. Nichols*

By Rachel F. Moran

Although there has been widespread celebration of the fiftieth anniversary of *Brown v. Board of Education*, there has been relatively little recognition of the thirtieth anniversary of *Lau v. Nichols*. *Brown* rested on a finding that intentional segregation of public school students by race violates the equal protection clause of the Fourteenth Amendment. *Lau* pushes beyond a paradigm of intentional harm to attack exclusionary practices, whether or not motivated by a discriminatory purpose. The Supreme Court's decision in *Lau* was based not on a constitutional wrong but on a violation of Title VI of the Civil Rights Act, as interpreted by the Office for Civil Rights (OCR). The statute, along with OCR's interpretation, barred school practices that have the effect of excluding children from the educational process based on language, where language is a proxy for race.

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By finding a violation based on discriminatory effect, regardless of underlying intent, *Lau* greatly amplified the scope of civil rights protection. Today, that approach is under increasing attack, and the pressing question is how and if *Lau* will miraculously survive the undoing of its opinion. This article first provides a brief history of *Lau* and then examines how it has undergone a kind of ritual dismemberment in the courts. The article closes by exploring whether *Lau*'s undoing really matters in light of other federal protections. Although these protections continue to provide meaningful access to the courts for English language learners, none is a perfect substitute for the enforcement regime established under *Lau*.

The *Lau* Decision

The *Lau* case was filed on behalf of 2,856 Chinese-speaking students in the San Francisco school system who received instruction only in English. Although the school district offered special assistance to Spanish-speaking students, it did nothing to accommodate Chinese-speaking students. In demanding relief, the plaintiffs relied not only on the equal protection clause but also on Title VI as interpreted by OCR. The lower federal courts rejected both the constitutional and statutory claims. In refusing to intervene on the students' behalf, the Ninth Circuit concluded that children arrived at school with "different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system." In the Ninth Circuit's view, the school was not required to rectify all of these differences and disadvantages.

The United States Supreme Court reversed, relying heavily on OCR's views about the scope of Title VI's coverage. According to OCR, language could be a proxy for race, ethnicity, and national origin. Moreover, language policies that effectively excluded children from an educational program could amount to impermissible discrimination. In adopting OCR's interpretation, the Court did not reach the constitutional question, nor did it order any specific remedy. Instead, the Justices urged the school district to apply its expertise to devise appropriate accommodations for the Chinese-speaking students. Because there was no finding that the district's actions were motivated by animus, the Court remained optimistic that school officials would act in good faith to redress the problem.

There are several key elements of the Supreme Court's decision in *Lau*:

• First, the Court presumed that Congress has the power to prohibit behavior that does not amount to a constitutional violation. The Constitution prohibits intentional wrongs, but in the Court's view, it does not reach actions that merely have a racially disparate impact. Even so, the Justices accepted the view that under Section 5 of the Fourteenth Amendment, Congress can act in the penumbra of a core constitutional wrong by recognizing disparate impact claims.

• Second, the Court found that Congress exercised these penumbral powers when enacting Title VI of the Civil Rights Act; that is, the statute reached not just intentional discrimination but also acts with an adverse effect. This approach enabled the federal government to police possible

wrongdoing even when a discriminatory purpose was difficult to prove.

• Third, the Court deferred to OCR's interpretation as legitimate and authoritative. Because Congress had delegated enforcement responsibilities to OCR, the agency could issue an interpretive memorandum that said Title VI reached exclusionary language policies.

• Fourth, the Court assumed that private individuals like the Chinese-speaking students in San Francisco could sue to ensure that Title VI's mandates were met. These private rights of action supplemented federal enforcement actions and were seen as critically important given the limited resources of agencies like OCR.

• Fifth and finally, given this legal foundation rooted in congressional power and agency interpretation, the school district's exclusive reliance on English-language instruction could wrongfully exclude non-English-speaking children from access to the curriculum in violation of Title VI.

The Fate of the *Lau* Decision: Undone by Law

Since *Lau* was handed down in 1974, its legal underpinnings have been under siege in the federal courts. Little by little, the case is being undone by law, and its fate grows increasingly uncertain. As will become clear, the Supreme Court has expressed significant doubts about the scope of congressional power and the discretion accorded to civil rights enforcement agencies under Title VI. In addition, the Justices have eliminated private rights of action for disparate impact claims under the statute.

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The first judicial foray involved *Lau*'s assumption that Title VI addresses both intentional discrimination and disparate impact. In *Guardians Association v. Civil Service Commission*, the Court found that Title VI authorized compensatory relief only for purposeful wrongs, not actions with adverse effects. The Justices hastened to add that *Lau* technically remained good law because it was predicated not just on the statute but on OCR's interpretation. Though *Guardians Association* produced a fragmented and somewhat confusing set of opinions, the Court's doctrinal position was subsequently clarified in *Alexander v. Choate*. There, the Court indicated that although Title VI itself did not support a disparate impact claim, agency regulations could rely on this theory of liability.

Lau suffered another blow in 2001 when the Court decided *Alexander v. Sandoval.* There, the Justices held that there is no private right of action under Title VI disparate impact regulations. As a result, private plaintiffs can sue only for intentional discrimination, an action already available under the Fourteenth Amendment. In *Sandoval*, the Justices said that if federal agencies interpreted Title VI as reaching actions with adverse effects, it was up to those agencies to file legal actions based on this theory. In the Court's view, Congress had not used clear and unambiguous language to establish a private right to sue based on disparate impact regulations, nor did the rights-based nature of these entitlements automatically imply an individual remedy in the courts.

Some legal commentators believe that plaintiffs can still use 42 U.S.C. § 1983 to sue under Title VI disparate impact regulations. Section 1983 provides that a person who, under color of state law, is deprived of "any rights, privileges, or immunities secured by the Constitution and laws" can bring a private right of action in federal court. However, the Court has been increasingly parsimonious in allowing § 1983 actions when a private lawsuit can not be brought under the statute itself. Because Title VI no longer permits a person to sue based on a disparate impact regulation, the Court might very well conclude that there is no right to be free of such adverse effects under § 1983 either. As a result, if federal civil rights agencies are too overburdened to file an action, children will be left without recourse under Title VI unless they can establish discriminatory intent.

These decisions substantially weaken *Lau*'s underpinnings, and the Court has dropped hints that additional challenges remain. First, there have been suggestions, particularly in the *Sandoval* case, that agencies do not have the authority to promulgate disparate impact regulations because the language of Title VI does not support such an interpretation. Second, the Justices have indicated that Congress itself may lack the power to authorize an enforcement regime that goes beyond core constitutional violations to punish adverse racial effects. That is, Congress must limit itself to prohibiting intentional discrimination. So far, the Court has avoided a direct confrontation with Congress over the scope of its Section 5 power in enforcing Title VI.

Because Title VI is aimed at racial and ethnic discrimination, it tackles wrongs that are at the very heart of the Fourteenth Amendment's grant of congressional enforcement power. However, the Court has been willing to strike down provisions less central to the Amendment's original aim of dismantling the legacy of slavery. For instance, the Justices have rejected provisions of the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Violence Against Women Act, and the Religious Freedom Restoration Act, each time insisting that Congress overstepped its constitutional bounds.

The issue of Congress's authority to outlaw disparate impact discrimination may be engaged if Congress amends Title VI in response to the Court's recent decisions. Legislation is pending in the House and Senate, but it seems unlikely to pass in a Republican-controlled Congress.

In sum, then, *Lau*'s foundational elements are on increasingly shaky ground:

• First, the Court has questioned congressional power to define racial discrimination to include disparate impact as well as intentional wrongdoing.

• Second, the Court has held that in any event, the language of Title VI itself does not reach adverse effects but instead applies only to purposeful discrimination.

• Third, the Justices have hinted that federal agencies may lack the authority to interpret Title VI as a basis for filing disparate impact actions.

• Fourth, the Court has concluded that individuals can not bring a private right of action under Title VI to challenge policies and practices that have adverse racial effects but must instead allege racial animus.

After all these judicial incursions, only the central finding of fact in *Lau* remains uncontested; that is, an English-only curriculum can be exclusionary whether or not school officials act with an intent to harm non-English-speaking students.

Alternatives to Title VI: Does *Lau*'s Undoing Matter?

Lau is not the only source of federal legal protection for English lanuage learners. If alternative provisions offer ample protection, *Lau*'s undoing would not jeopardize students' rights. The Equal Educational Opportunities Act (EEOA), the First Amendment guarantee of free speech, and the English Language Acquisition, Language Enhancement, and Academic Achievement Act (hereinafter the English Language Acquisition Act) are the most promising possibilities for replacing *Lau*'s Title VI disparate impact regime. Yet, none of these affords a perfect substitute for the anti-discrimination protections in *Lau*.

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The best alternative source of protection is the EEOA. Enacted by Congress to codify the *Lau* decision, the statute explicitly adopts an effects rather than an intent test in defining wrongful discrimination. Moreover, the EEOA includes an express private right of action, enabling individuals to bring suit if federal agencies fail to enforce the law. These features of the EEOA clearly have been critical in keeping *Lau*'s legacy alive despite recent judicial incursions on Title VI.

Although no educational remedies are specified, the EEOA empowers students and their parents to rely on a disparate impact theory when challenging instructional practices in federal court. Yet, because the statute addresses only those actions that exclude children from access to instruction, it does not reach some educational policies that would be covered by Title VI. For instance, in *GI Forum v. Texas Education Agency*, limited-English-proficient students challenged high-stakes testing that disproportionately barred them from obtaining a high school diploma. Without reaching the merits of the students' disparate impact claim, the federal district court judge held that they had no cause of action under the EEOA because the testing process was an evaluative procedure, not part of the instructional program.

Just as arguments about the scope of congressional power can be made regarding Title VI, questions can be raised about the EEOA. Recently, a legal commentator has argued that the EEOA violates the Eleventh Amendment. The Eleventh Amendment gives states immunity from private lawsuits in federal court when states have not consented to be sued. Congress can abrogate this immunity pursuant to the legitimate exercise of constitutional powers under Section 5 of the Fourteenth Amendment. Congress must make its intent to abrogate state immunity clear and unequivocal, and the abrogation must be congruent with and proportional to demonstrable constitutional violations. Otherwise, the federal government can not authorize private lawsuits against states in federal court.

The EEOA does not expressly abrogate state immunity, thus giving rise to the first possible basis for an Eleventh Amendment challenge. Assuming that this objection can be overcome, the EEOA does invoke congressional powers granted pursuant to the Constitution as authority for enacting the statute. This general statement will likely suffice, although Section 5 is not specifically mentioned. However, the EEOA bans disparate impact and not just intentional misconduct, thereby exceeding the scope of an equal protection violation.

To justify imposing liability for unintentional violations, Congress must show that its abrogation of state immunity is congruent with and proportional to documented constitutional misconduct. However, in 1974, the Nixon administration promoted the EEOA as anti-busing legislation, a package of educational remedies that could be used to counter mandatory school desegregation. As a result, the legislative findings emphasize the failings of busing, rather than the wrongs done to non-English-speaking students. In fact, to the extent that bilingual education issues were addressed at all, the focus was on local districts and officials, not state decisionmakers. The Court therefore could find that disparate impact claims against state educational agencies and officials are neither congruent with nor proportional to demonstrated constitutional wrongs in the legislative record.

Should such an Eleventh Amendment challenge succeed, the EEOA would no longer be available to challenge state policies in federal court. Instead, litigators would be forced to bring suits district by district, a time-consuming and burdensome task. As a result, some actions would be entirely beyond the reach of private lawsuits under federal law. Consider, for instance, the adoption of statewide laws and

regulations that control the delivery of bilingual education services.

Today, if students are dissatisfied with these provisions, they can not bring an equal protection or a Title VI claim unless they allege intentional discrimination. If the Eleventh Amendment challenge to the EEOA holds up, plaintiffs would have to abandon a disparate impact theory under this statute as well as Title VI. So, the sole basis for a statewide challenge would be discriminatory intent. The EEOA would be available only if local districts produced adverse effects in the instructional program when implementing state provisions, and these lawsuits would have to be brought on a district-by-district basis.

A far less promising source of legal protection than the EEOA is the First Amendment, which protects students' and teachers' free speech rights. First Amendment arguments have enjoyed some limited success in litigation challenging official English laws as an undue burden on individual speech rights. However, in the public school setting, rights of expression are circumscribed to permit the learning process to take place. Although students do not relinquish their First Amendment protections at the schoolhouse gate, the Supreme Court has shown an increasing willingness to allow school officials to regulate student expression if the restrictions are reasonably related to pedagogical goals. In fact, the Court's deferential stance has permitted a great deal of censorship to take place in the name of preserving civility.

Under the circumstances, a federal court would be unlikely to find that mandating English-language instruction violates a student's right to speak a language other than English, especially if the goal is to promote English-acquisition. Even if the instruction has some exclusionary effects, these would have to be so severe that the policy is no longer reasonably related to pedagogical aims.

Teachers, as employees charged with educating pupils about particular subjects, also must curb their speech on school grounds to promote the learning process. After the passage of Proposition 227, which mandates intensive English instruction for all students with limited proficiency, teachers challenged a provision that subjected them to lawsuits if they delivered instruction that was not "overwhelmingly" or "nearly all" in English. The teachers contended that the threat of a lawsuit had a chilling effect on their First Amendment speech rights, particularly given the vagueness of terms like "overwhelmingly" and "nearly all" in English.

In *California Teachers Association v. State Board of Education*, the Ninth Circuit court of appeals noted that teachers enjoy limited rights of expression in the classroom. The court reviewed three competing First Amendment standards in this area: (1) Teachers have no free speech rights in the classroom; (2) Teachers have no protection unless they are speaking on a matter of public concern; and (3) Regulation of teachers' speech must be reasonably related to legitimate pedagogical concerns. Without deciding which standard was appropriate, the court of appeals concluded that plaintiffs had no viable cause of action under any of the tests, including the last and most generous one.

According to the Ninth Circuit, Proposition 227's terms were not so vague that they would significantly chill legitimate speech in the classroom. Moreover, the court held that the state's pedagogical interests outweighed teachers' free speech rights. As the decision explained: "Because any speech potentially chilled by Proposition 227 enjoys only minimal First Amendment protection, assuming it enjoys any protection at all, and because it is the state's pedagogical interests that are paramount in this context, any vagueness contained in Proposition 227 is even less likely to jeopardize First Amendment values."

Finally, the English Language Acquisition Act is an unpromising substitute for *Lau*'s enforcement regime as well. This Act is not an anti-discrimination statute but instead is a grant-in-aid program designed to support research, development, innovation, and service delivery in the area of bilingual education and intensive English instruction. The law does not confer enforceable rights on students, and it certainly does not trigger a private right of action. Instead, the Act establishes administrative performance and accountability requirements. With respect to civil rights, the Act merely states that it should not be interpreted in a manner inconsistent with other protections. Because the Act is spending legislation, Congress must put grant recipients on clear notice that acceptance of funds will leave them open to private lawsuits. Yet, there is no provision that would seem to satisfy this requirement.

"...Lau's undoing has real consequences for English language learners who increasingly find the federal courthouse doors closed."

In sum, then, neither the EEOA, the First Amendment, nor the English Language Acquisition Act offers a perfect substitute for *Lau*'s Title VI enforcement paradigm. The EEOA continues to provide substantial protection in gaining access to the curriculum, and litigants can look to state courts and state law to challenge other facets of language policy and practice. Yet, plaintiffs can no longer depend on Title VI's comprehensive, national anti-discrimination regime.

When language barriers stand in the way of access to non-instructional resources and activities, such as meeting high-stakes diploma requirements or receiving ancillary school services, *Lau*'s undoing has real consequences for English language learners who increasingly find the federal courthouse doors closed. While these students theoretically can turn to the political process for a remedy, in fact neither they nor

their parents are apt to have the kind of clout to demand responsive policymaking. In fact, more and more, these families are losing one of their greatest sources of leverage in dealing with state and local officials: the threat of litigation.

Conclusion

As *Lau* is undone by law, the question arises: What remains of its legacy? *Lau* named an identifiable wrong; that is, an English-only curriculum can effectively exclude public school students who do not yet speak the language. In addition, *Lau* recognized a legal right to be free of such wrongs. Despite recent incursions, the heart of *Lau*, in particular, its naming of linguistic exclusion, survives. Even so, *Lau*'s enforcement regime rests shakily on the vestiges of administrative authority under Title VI and the individual lawsuits that can be brought under the EEOA. *Lau*'s endorsement of language rights is gradually being eroded, as the Court questions congressional power and curtails private rights of action.

On its thirtieth anniversary, *Lau* is a mere shadow of itself, but its legacy reminds us that the struggle for equal educational opportunity is a perennial one.

*Author **Rachel F. Moran** is the Robert D. and Leslie-Kay Raven Professor of Law at UC Berkeley. She has written extensively on issues of educational equity, including desegregation, bilingual education, and high-stakes testing. She is also the author of* Interracial Intimacy: The Regulation of Race and Romance *(Chicago 2001) and co-author (with Mark G. Yudof, David L. Kirp, and Betsy Levin) of* Educational Policy and the Law *(4th ed. 2002).*

Further Reading:

Brown v. Board of Education, 347 U.S. 483 (1954) http://laws.findlaw.com/us/347/483.html

Gregory Landward, *Board of Trustees of the University of Alabama v. Garrett and the Equal Education Opportunity Act: Another Act Bites the Dust*, 2002 BYU Education and Law Journal 313 (2002)

Lau v. Nichols, 414 U.S. 563 (1974), *reversing*, 483 F.2d 791 (9th Cir. 1973) http://laws.findlaw.com/us/414/563.html

Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 California Law Review 1249 (1988)

Rachel F. Moran, *Sorting and Reforming: High-Stakes Testing in the Public Schools*, 34 Akron Law Review 107 (2000)

Ronald Schmidt, Sr., *Language Policy and Identity Politics in the United States*, Philadelphia: Temple University Press (2000).

(Trueba, continued from Page 6)

Enrique was a moral force as well as research leader. He saw the social marginalization and lack of respect that many immigrants and language minority persons endured as resulting from the desire to exploit their labor—a theme that found a home in his more recent works and research. Through all this Enrique, at the same time, took a rational and hopeful stance viewing education as a tool for cultural change in support of human development.

In his final days, Enrique had the wonderful opportunity to celebrate his career and contributions with many of the people who benefited so immensely from his mentoring and colleagueship. He was honored with a special Distinguished Career award presented to his daughter Laura on his behalf by the AERA Committee on Scholars of Color and by a special tribute ceremony at the annual AERA Latino reception in April of this year in San Diego. Enrique was shown on video discussing his career and giving advice to young scholars. The entire event was videotaped and viewed by Enrique afterwards.

In the Jesuit tradition in which he was trained, Enrique Trueba was a "man for others." We are grateful for the opportunity to have known him and benefited from his tenacious intellect and generous spirit.

—Richard P. Durán
Professor, Gevirtz Graduate School of Education
University of California, Santa Barbara

Call For Proposals

UC LMRI Research Grants

Deadline: October 1, 2004

UC LMRI encourages University of California researchers to undertake comprehensive and collaborative research that improves the schooling conditions and academic achievement of language minority youth by increasing our understanding of the challenges they face as well as the resources they represent for the state.

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Please visit the UC LMRI web site for further information.

In Memorium: Enrique (Henry) Trueba, 1931-2004

Henry Trueba, one of the founding faculty of the UC Linguistic Minority Project and its first Director, passed away on July 17, 2004 following a lengthy battle with cancer. Enrique, as he was known to his close colleagues, led a distinguished career spanning nearly 35 years during which time he fostered the development of many of our leading scholars contributing to the field of education for linguistic minority persons and communities.

In 1985 Enrique served as one of the chief organizers of the Lake Tahoe Conference of the Linguistic Minority Project. This event was the first UC-wide conference dedicated to developing a research agenda and disseminating research by UC faculty on topics tied to the education of linguistic minorities. This singular event led to the formal founding of the Project—renamed the "Linguistic Minority Research Project"—with ongoing support from the UC system and with a base at UC Santa Barbara where UC LMRI, the successor organization, remains to this day.

Among his many published works, Enrique is especially well known for his landmark article in 1981 published with Pam Wright, "On Ethnographic Studies and Multicultural Education" published in the *NABE Journal.* This article helped the bilingual education community understand how its interests and concerns were deeply tied to the emerging research paradigms of classroom ethnography and interactional sociolinguistics. Among many collaborations, he is especially remembered for his work with his close colleague, Concha Delgado Gaitan, that led to the publication of the volumes *School and Society: Learning Content Through Culture* (1988) and *Crossing Cultural Borders: Education for Immigrant Families* (1991).

Issues of "context" were central to all of Enrique's research and writing. He was a constructive critic of researchers who sought to explain the educational challenges of English language learners as mainly limited by their lack of English language proficiency and familiarity with schooling practices. In the tradition of sociocultural approaches, Enrique sought evidence of how to build improved educational opportunities for English learners and immigrants by drawing on their extant cultural, linguistic, and community knowledge and values. *(Continued on Page 5)*

Reports in This Issue

Complete copies of **LMRI-funded Final Grant Reports** can be found on the UC LMRI web site. Abstracts from these reports featured in this newsletter have been edited for space considerations.

Dissertation Grant Reports can be found on the UMI ProQuest Digital Dissertations Database at: http://wwwlib.umi.com/dissertations/fullcit/9993004.

How To Contact Us

Email: lmri@lmri.ucsb.edu
Phone: 805.893.2250
Fax: 805.893.8673
Web: http://www.lmri.ucsb.edu

University of California
Linguistic Minority Research Institute
4722 South Hall
Santa Barbara, CA 93106-3220

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