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Regulatory Rights:
Civil Rights Agencies Translating
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By
Ming Hsu Chen

A dissertation submitted in partial satisfaction of the
requirements for the degree of
Doctor of Philosophy
in
Jurisprudence and Social Policy
in the
Graduate Division of the
University of California, Berkeley

Committee in charge:
Professor Taeku Lee, Co-Chair
Professor Sarah Song, Co-Chair
Professor Robert Kagan
Professor Irene Bloemraad

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ABSTRACT

Regulatory Rights:
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Ming Hsu Chen

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Professor Taeku Lee, Co-Chair

Professor Sarah Song, Co-Chair

In a 1968 survey of the enforcement of federal civil rights laws, the US Commission on Civil Rights declared that “Civil rights laws now apply in almost every area in which the federal government has responsibilities. It is not so much new laws that are required today as a strengthened capacity to make existing laws work.” My dissertation shows that regulatory agencies are critical sites of policy-making, and even rights-making, for immigrants and non-English speakers and that they are instrumental to making civil rights laws work.

The dissertation asks how rights expand in the new civil rights era and why they expand to varying extents in different policy arenas. More specifically, it asks what politics and strategies are used to expand on existing civil rights statutes in order to create new civil rights. It uses the development of language rights as a lens into understanding processes of statutory interpretation and regulatory implementation directed at the political incorporation of immigrants. It compares the robustness of language rights produced by this politics of regulation by tracing the interpretation of “national origin” and “language minority” protections in education, employment, and voting.

The dissertation adopts a historical institutionalist perspective on legal change and path dependence and compares three case studies of policy innovation pertaining to language rights. First, the US Department of Education’s interpretation of Title VI largely succeeded in its attempt to establish a right for national origin minority students with limited English proficiency to receive meaningful access to education regardless of language ability. Second, the US Equal Employment Opportunity Commission was less successful in its efforts to find similar language rights for limited English proficient workers under Title VII. Third, in contrast to a regulatory approach, Congress amended the Voting Rights Act of 1965 to include express protections for “language minorities.”

My explanation for why rights expanded in all three policy arenas, albeit to different degrees in each of the institutional contexts, is that regulatory constructions of the civil rights requirements contributed to a transformation of norms and expectations surrounding language access. Bureaucratic entrepreneurs within civil rights enforcement agencies used informal policy guidance to construct regulatory rights. Deference from courts and other institutions to these regulatory assertions imparted legal effect to these regulatory constructions and contributed to variations in the strength of regulatory rights.

The introductory chapter establishes the “puzzle” of expansive language rights motivating the dissertation. It asks about the processes that lead to the emergence of robust rights and why the policy pathways lead to varying results in different policy arenas. It argues for an institutional explanation combining a politics of regulation with the constraining influences of legal context.

Chapter 2 establishes the historical and conceptual background for understanding the demand for language rights. After describing the demographic changes associated with the Hart-Cellar Act of 1965, the chapter presents statistics showing the increased linguistic diversity and linguistic ability introduced by migration. It particularly emphasizes the language gaps in Spanish Speaking and Chinese Speaking communities and narrates the efforts of community activists from both language minority groups to overcome language barriers.

The federal response to language barriers swept across multiple public policy arenas. The story of how they did so constitutes the core of the dissertation. Chapters 3 and 4 present parallel processes of policy innovation in all three civil rights regulatory agencies. Setting out a two-step theoretical account of the growth of regulatory rights, these chapters trace the emergence of language rights in education, employment, and voting respectively through agencies and into courts. Chapter 3 describes bureaucratic entrepreneurship leading to the assertion of regulatory rights, based on informal policy guidance. Chapter 4 describes the reception of courts and the regulated institutions to the putative regulatory rights and the consequent “hardening” of otherwise non-binding law into a meaningful standard for language access.

Chapter 5 examines the implications of the dissertation for contemporary research and policy. It begins by examining the persistence of the regulatory rights strategy since 1979. To establish external validity and to bring the studies up to date, it uses empirical data from a 2010 Government Accounting Office study to compare language policy implementation in the main case studies thirty years after the period of primary study. It then describes three legal developments that complicate regulatory policy implementation – decentralization, devolution, and deregulation – to provide a context for understanding the challenging context in which policy implementation will proceed. The conclusion mines the lessons of history to identify lost alternatives that shed insight into the continuing regulation of language in the United States.

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In the course of writing this dissertation, I incurred a great deal of intellectual debt to individuals and institutions. To all of my advisors, official and unofficial, I thank you. Your ideas, and reformulations of my ideas, have made an impression on my dissertation and on the way that I think about the academic world. Taeku Lee and Sarah Song, my co-chairs, steadfastly guided me through the project, and so much more, on the journey from academic infancy to junior scholar. Their commitment to this project began before they even joined the JSP Department and continues even as I prepare to leave it. Irene Bloemraad, never truly an “outside member” of this committee, contributed many thoughtful perspectives on the substance of immigrant incorporation and the process of research. Bob Kagan bookended this project: I took his Legal Institutions course during my first-year of graduate school and we will now retire together from the University of California, Berkeley. Many others unofficially advised me over the years, generously discussing drafts and encouraging me onward, including Tony Chen, Lauren Edelman, Chris Edley, Charles Epp, Sean Farhang, Malcolm Feeley, Paul Frymer, Michael McCann, and Rogers Smith. John Skrentny and Shep Melnick gave their blessings to this project early and often; they also shared their own research and opened the doors of many of their colleagues for me. Steve Teles took me on as a “stray” advisee during my final year in DC. I hope that I have made a meaningful contribution that builds upon their foundational work on the politics of rights, transformative bureaucracy, and changing meanings of equality.

Part of the challenge of being an interdisciplinary scholar is lacking a well-defined field, annual survey journal, or other external guide to navigating the academic landscape. One is constantly constructing her own map of the people and ideas that most helpfully advance her own project.

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For all of the shortcomings in this dissertation, I take comfort in the sentiment of a former dissertator who has gone on to turn his student project into award-winning scholarship. When I lamented that the dissertation is not the magnum opus I intended when I first began, he told me that if I do a good job on the dissertation, I'll get to keep working on it for many years. My solace and exhortation to remain true to the lofty aspirations that spawned the project extends from this sage counsel.

CHAPTER 1: RECONSTRUCTING CIVIL RIGHTS FOR NATIONAL ORIGIN MINORITIES IN EDUCATION, EMPLOYMENT, AND VOTING, 1965-1979

The wake of the Civil Rights Era was marked by a juxtaposition of changing equality norms and shifting demographics. Passage of landmark Civil Rights Act of 1964 collided with the path breaking Immigration Act of 1965 just one year later. The “collision”¹ of these two landmark pieces of legislation represents a transformative historical moment in our political landscape, the implications of which are still being wrought. In addition to enormous social and cultural upheaval, the fifteen years from 1965-1979 were accompanied by significant changes in the legal and political landscape. Many of these changes were facilitated by the growth of the national government and the emergence of the modern administrative state. The use of legal mobilization and institutionalized forms of activism to secure the promises of equality represented a break from the civil rights activism of the 1950s and 1960s. Reinterpretation of federal antidiscrimination laws to benefit language minorities grew directly from the heart of the egalitarian enterprise: the continuing efforts to keep pace with rising expectations for equal opportunity in a diverse and increasingly complex society. Viewed this way, language rights were one of many civil rights extensions. Yet language rights were not monolithic: across public policies arenas, they emerged along different pathways, took different forms, and varied in legal strength.

This dissertation examines the emergence of language rights as a lens for viewing the legal transformation of civil rights laws and the changing meaning of equality. Broadly, it attempts to explain how federal civil rights laws stretched to meet the needs of an increasingly diverse multicultural society. More specifically, it investigates regulatory politics and the creative use of the policy implementation phase of lawmaking to extend equal opportunity to national origin minorities in the form of language access. The growth of language rights occurred in the period immediately following the civil rights era, 1965-1979, and continued until the political and legal environment changed in the 1980s. Despite a shared focus on language needs, the federal response in the form of regulatory rights traversed many public policies and grew to varying extents across policy arenas. The story behind the emergence of language rights is narrated through the description of three case studies for the purpose of explaining processes of statutory interpretation, regulatory implementation, and rights-making. These narratives serve as fodder for a structured comparison of the policy implementation pathways leading to language access in education, employment, and voting.

¹ HUGH DAVIS GRAHAM, COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA (2003).

Section 1 Civil Rights and National Origin Discrimination

The legal basis for language access was the Civil Rights Act of 1964, which contained provisions to protect against discrimination for “national origin minorities” in both the public and private sector. Titles VI and VII of the Civil Rights Act left national origin discrimination undefined and the legislative history of Congress’ intent in its promulgation was slim. It fell to three regulatory agencies – the US Department of Education, Office for Civil Rights (OCR), US Equal Opportunity Commission (EEOC), and US Department of Justice, Civil Rights Division, Voting Section (DOJ) – to breathe content into these protections through their construction of the statutory term “national origin.” Each agency took to their charges quite differently: the OCR laid the foundation for bilingual education in public schools under Title VI, the US EEOC established guidelines for assessing English-only policies in workplaces under Title VII, and the DOJ mandated bilingual ballots and oral assistance at the polls under the Voting Rights Act of 1975 (VRA).

These varied responses raise several questions. First, how and why did regulatory agencies read into the national origin prohibitions a right to meaningful language access? Their expansive interpretation of national origin discrimination provisions during the policy implementation process is puzzling because new policies are typically constructed in Congress or the courts. Rarely do interest groups and activists target obscure Federal Register notices or mobilize agencies’ routine informal policy guidance as strategies for social change. Second, why did statutory and regulatory requirements for language access become strongest in voting, middling in public education, and weakest in the workplace? The regulatory agencies expanded on baseline antidiscrimination statutes in all three cases. Yet their legal effect differed significantly depending on their reception in courts and other legal institutions.

Rather than relying on binaries to classify rights as positive or negative, this study contends that the strength of language rights varies over multiple dimensions. Aggregated, that variation spans a graduated spectrum from soft to hard law. It is dynamic insofar as soft laws can crystallize into hard law. The concept of legal strength attempts to capture ex ante requirements and also some of the elements that transform “law on the books” into “law in action.” It is not, however, a gap study that is primarily concerned with the effectiveness of the language policies or their impact within schools, workplaces, and voting precincts. Those are important subjects for another study. A key dimension of legal strength is the source and the obligation for the regulatory right, expressed in terms of what an individual may demand of the government, what the government may compel an institution to provide, or what an individual may demand of an institution with

government support. Another dimension is the precision of the provision, which relates to the amount of interpretative authority delegated to administrative agencies. The enforceability of the provision² encompasses the generosity of the remedy and the vigor of enforcement.³

The processes leading to the policy outcomes, language rights, in each of the three arenas under study will be detailed in Chapters 3 and 4. A preview of those policy outcomes appears here.

Education

In schools, OCR officials initially sought bilingual education⁴ on Constitutional grounds; they eventually garnered judicial and Congressional rulings on statutory and regulatory grounds mandating that schools take affirmative steps to accommodate language minorities, with bilingual education as a desirable yet discretionary remedy. The Title VI national origin discrimination clause says that “no person shall be subjected to discrimination on the basis of race, color, or *national origin* under any program or activity that receives federal financial assistance.”⁵ The interpretive guidelines issued by the Office for Civil Rights within the US Department of Education mandate that public schools be accessible to all students, without regard to the student’s national origin status or language ability. Courts upholding the OCR interpretation require the school district to take “affirmative steps” to rectify language deficiencies in order to open up its instructional program to these students, wherever “inability to speak and understand the English language excludes English language learners from effective participation in the educational program offered by the school district.”⁶ Public schools who violate this prohibition risk losing their federal funding or otherwise becoming liable for discrimination under civil rights statutes. Once a violation is established, however, the specific remedy depends in part on the school district’s exercise of discretion. The school may choose bilingual education, English as a Second Language (ESL), immersion or any sound curricular

² Enforceability is related to durability, which is another important aspect of legal strength. While acknowledged here and in Chapter 5 Section 2, durability is not one of the dimensions systematically studied in this dissertation. The test of durability is the lasting power of the regulatory right against changes in political opportunity and social environment. Going beyond the fifteen year parameter for the main case studies would enable study of this ability to withstand changes in the broader environment and direct legal challenges.

³ The dimensions of legal strength are elaborated in Chapter 4.

⁴ Although the programs sought by language activists are commonly referred to as bilingual education, there are many styles of instruction that fall under the bilingual education umbrella and little agreement on the most effective ones. In addition, while lay usage refers to the curricular approach that teaches educational subjects in a language other than English, legal usage shifts after 1970, when Kinney Lau sought bilingual education in keeping with his Constitutional and statutory rights, to 1974, when Nixon administration OCR officials let stand the basic right of language access but stripped the specific remedy.

⁵ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C. (1964).

⁶ OCR May 1970 policy guidance on discrimination against national origin minority students. National Archives and Record Administration Pacific Region (San Bruno, CA) [hereinafter NARA Pacific.]

approach consistent with *Castaneda v. Pickard* and the *Lau Remedies*. As described in Figure 1.1, education-related language accommodations are characterized as “strong.”

Employment

Under Title VII, in contrast, the US Equal Employment Opportunity Commission failed to secure similar language rights for workers under Title VII despite nearly identical statutory language and a similarly expansive regulatory interpretation of national origin discrimination. Title VII declares that “all personnel actions affecting employees or applicants for employment ... shall be made free from any discrimination based on race, color, religion, sex, or *national origin*.”⁷ The EEOC’s 1970 policy guidance interprets the meaning of national origin broadly to mean the denial of employment due to “an individual’s, or his ancestor’s, place of origin; or because the individual has the cultural, linguistic or physical traits of a national group.”⁸ During the 1970s and 1980s, EEOC complaints relied upon the guidance to prohibit the use of English language tests in hiring for jobs where language skills are not job-related, to restrict the imposition of English-only policies that disadvantage non-English speaking workers, and to bar disciplinary procedures for speaking a native language in the workplace. However, the unwillingness of courts to defer to the EEOC guidance rendered the challenges only partially successful. According to settled case law interpreting Title VII, employees lacked a “substantive privilege” to language accommodation in the workplace and employers could reasonably discriminate on the basis of national origin in several circumstances: if there is a “legitimate nondiscriminatory reason” for distinguishing on this basis; if national origin is “a bona fide occupational qualification” (BFOQ) in employment reasonably necessary to the normal operation of that particular business or enterprise⁹; and if imposed for valid health or safety reasons. The EEOC Guidance is merely informal policy rather than a formal rule, regulation, or enforceable right with precedential value. Remedies for proving a violation of

⁷ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.)

⁸ 29 CFR 1606.1 (1970) (policy guidance on Title VII national origin discrimination). National origin is generally broader than race, as it encompasses discrimination within a particular race as well as discrimination based on a person’s place of birth. Since *Espinoza v. Farrah*, 414 U.S. 86 (1973), however, it does not include discrimination based on citizenship.

⁹ While BFOQs exist for sex and religion as well, there is not BFOQ for race. BFOQs function as an affirmative defense once discrimination has been admitted, such as when a facially discriminatory policy is present. To claim a BFOQ, an employer must prove that the aspects of the job for which national origin is claimed to be necessary go to the essence of the employer’s business. He must also show that substantially all members of the excluded group cannot perform the job or that it is impractical to deal with the excluded group on an individual basis. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

Title VII include the elimination of the offending policy. As described in the chart below, employment-related language protections are described as “weak.”

Voting

Voting rights laws contain the most ambitious protections for language minorities, requiring affirmative language accommodations for statutorily specified groups. The protections emanate from three sources: the Fifteenth Amendment, the enfranchisement of African-Americans under the predecessor statute of 1965, and the effort to incorporate Spanish-speaking members of Puerto Rican territories who were entitled to mainland political participation yet subject to linguistic isolation on the Spanish-speaking island. Of these, the most direct precedent for language accommodations was the 1965 Voting Rights Act, which was reconstructed by Congress during the ten-year reauthorization of the VRA, and the codification of *Lau v. Nichols* in the Equal Educational Opportunity Act of 1974. On advice from the US Department of Justice, the Congressional representatives engaged in passage of the 1975 VRA made permanent bans on English-language literacy tests. Sections 4 and 203 of the 1975 VRA guaranteed special accommodations for enumerated language minority groups in the form of bilingual ballots and translated election materials prior to and during elections. The VRA delegates enforcement to the US Department of Justice and the DC Circuit Court of Appeals, although in actuality most cases are processed administratively by the DOJ. Coverage under the VRA is limited to enumerated groups and designated districts with histories of discrimination and high levels of language minorities. As described in the chart below, language accommodations in voting are the “strongest.” Under the Voting Rights Act, an alignment of regulatory, legislative, and judicial support for language rights produced the more robust rights.

Figure 1.1. Comparison of Language Rights and Language Accommodations Across Policy Arenas.

	<i>Civil Rights Act 1964, Title VI Education</i>	<i>Civil Rights Act 1964, Title VII Employment</i>	<i>Voting Rights Act 1975</i>
<i>Example of Language Accommodation</i>	Bilingual Education	English-Only Policies	Bilingual Ballots
<i>Source and Authority of Language Right</i>	Statutory Right Regulatory Right	Statutory Right Regulatory Policy	Constitutional Right Statutory Right Regulatory Right
<i>Obligation</i>	“Affirmative duty”	Non-discrimination, but “no substantive privileges”	Section 4, Section 203; “Effective Participation”

		BFOQ/Business necessity excuse	Not covered district, opt-out district
<i>Delegated Interpretive Authority and Administration</i>	US Department of Education, OCR; K-12 public schools	US Equal Employment Opportunity Commission; private workplaces	US Department of Justice; DC Circuit Court of Appeals
<i>Enforcement and Available Remedy</i>	Transitional language program, translation of parental notices	Removal of language restriction	Section 4, Section 203; “Effective Participation”
OVERALL STRENGTH	STRONG	WEAK	STRONGEST

Section 2 Institutional Explanations for Legal Change and Policy Innovation

Language Rights Development as Legal Change

Administrative agencies of the 1960s and 1970s civil rights era expanded on and enlarged the New Deal. A sampling of the agencies created from 1964-1977 includes the EEOC (1964), the Environmental Protection Agency (1970), and the Occupational Safety and Health Administration (1973). The new agencies were prolific and ambitious: the Environmental Protection Agency enacted more than 21 regulatory measures in its first decade and civil rights agencies authored at least ten.¹⁰ As Cass Sunstein recounts, the agencies combined many of the traditionally separated powers of legislation, adjudication, and execution and sought to transform the terrain for future policy-making.¹¹ The growth of the administrative state transformed administrative law.

This dissertation examines how civil rights agencies incorporated the rights of national origin minorities into civil rights statutes by tracing the emergence of language rights. The puzzle of

¹⁰ Some of the regulatory measures that ensued include the Equal Pay Act of 1963, the Voting Right Act of 1965, the Age Discrimination in Employment Act (1967), the Rehabilitation Act (1973), the Age Discrimination Act (1975), and the Developmentally Disabled Assistance and Bill of Rights Act (1975). Cass Sunstein characterizes these civil rights statutes as constituting “the Second Reconstruction.” CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 28 (1993).

¹¹ *Id.* at 23-25.

language policy is how the law shaped, and got shaped by, the policy cycle. Traditional conceptions of policy-making as a linear process posit that Congress passes statutes, agencies implement them, and courts review the fidelity of agencies to Congress' intended legal meanings. In these policy narratives, agencies construct their own legal meanings while implementing civil rights statutes, in the absence of clear legislation and sometimes in anticipation of it.

Surprisingly little has been written on legal development at the intersection of immigration and civil rights laws, much less language rights.¹² This study contributes original empirical research about language rights and brings together interdisciplinary perspectives. The account most closely resembles that of political sociologist John Skrentny, who wrote about the expansion of civil rights to nonblack minorities in the *Minority Rights Revolution*.¹³ The *Minority Rights Revolution* is notable for its comparative research design in an effort to illuminate the conditions under which rights revolutions spread -- successfully for nonblack racial minorities, women, and the disabled, but less successfully for gays and white ethnics. This dissertation delves deeper into the emergence of language rights and builds comparisons among public policy areas, rather than across protected groups. The in-depth study of language rights brings to bear original research on an understudied phenomenon of second-generation discrimination – federally mandated obligations to provide language accommodations – when most second-generation studies focus on the rise of affirmative action in higher education and employment or sexual harassment.¹⁴

¹² Legal scholars have written more about language rights with the purpose of describing their origins or examining their normative implications. Their projects do not explain the politics or process of language rights from an institutionalist perspective. See e.g. Christina Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. CR-CLL REV. 133 (2001); Christina Rodriguez, *Language Diversity in the Workplace*, 100 NW. UL REV. 1689 (2006); Christina Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687 (2006); Moran, *supra* note 67; JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT (2009); Juan F Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REFORM 265 (1989); SANDRA DEL VALLE, LANGUAGE RIGHTS AND THE LAW IN THE UNITED STATES: FINDING OUR VOICES (2003).

¹³ JOHN DAVID SKRENTNY, THE MINORITY RIGHTS REVOLUTION (2002).

¹⁴ Skrentny himself draws upon the historical research of others have written about the rise of affirmative action in an earlier publication. JOHN D. SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA (1996); Graham, *Collision Course*, *supra* note 1; HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972 (1990); ANTHONY S. CHEN, THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972 (2009).

Regulatory Rights-Making as Innovation During Policy Implementation

In the classic literature on policy innovation by John Kingdon, Frank Baumgartner and Bryan Jones, and Hugh Hechlo, “policy entrepreneurs”¹⁵ capitalize on shifts in political “opportunity structures”¹⁶ in order to reframe the legislative agenda and advance their solutions to social problems. This literature on innovation represents an advance on earlier works on implementation due to its focus on change rather than path dependency. New studies maintain the emphasis on change and shift the sites of their study. The new studies characterize bureaucratic agencies as agents for change. The traditional notion of regulatory governance as a “transmission belt image,”¹⁷ with Congress passing laws and agencies issuing implementing rules under the supervision of Congressional committees¹⁸ and courts,¹⁹ gave way to studies of bureaucracies emphasizing innovation and creativity. Agencies are not merely institutions trained on rote administration of technical details; they are more than sources of incremental change subject to significant political²⁰ and organizational²¹ constraints. These recent contributors issue an important corrective to the scholarly attention to issue emergence and agenda-setting, without attention to later stages of policy development. They pinpoint the link between policy innovation and policy implementation.²²

¹⁵The term policy entrepreneur is used in FRANK BAUMGARTNER & BRYAN JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (2009). It was also used in Hugh Hechlo, *Issue Networks and the Executive Establishment*, *THE NEW AMERICAN POLITICAL SYSTEM* 87–124 (1978).

¹⁶Varieties of opportunity structures are discussed across disciplines, including sociologist Doug McAdam and political scientist John Kingdon. DOUGLAS MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970* (1999); JOHN KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984).

¹⁷Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARVARD LAW REVIEW* 1667-1813 (1975).

¹⁸Matthew McCubbins, Roger Noll & Barry Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *VA. L. REV.* 431 (1989); Matthew McCubbins, Rogers Noll & Barry Weingast, *Administrative Procedures as Instruments of Political Control*, 3 *JL ECON. & ORG.* 243 (1987); Terry M. Moe, *Power and Political Institutions*, 3 *PERSPECTIVES ON POLITICS* 215-233 (2005).

¹⁹STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* (2008).

²⁰McCubbins, Noll, and Weingast, *supra* note 17; McCubbins, Noll, and Weingast, *supra* note 17; Moe, *supra* note 17.

²¹Lauren Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, *AMERICAN JOURNAL OF SOCIOLOGY* 1531–1576 (1992); Lauren Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers’ Dilemma*, 13 *LAW & POL’Y* 73 (1991); Lauren Edelman, Howard Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 *LAW & SOC’Y REV.* 497 (1993); Jodi Short, *Creating Peer Sexual Harassment: Mobilizing Schools to Throw the Book at Themselves*, 28 *LAW & POLICY* 31–59 (2006).

²²ERIC M. PATASHNIK, *REFORMS AT RISK: WHAT HAPPENS AFTER MAJOR POLICY CHANGES ARE ENACTED* (2008).

Studies like those of Daniel Carpenter on New Deal bureaucracies and the Food and Drug Administration,²³ Shep Melnick on the welfare state and civil rights state,²⁴ Anthony Chen and John Skrentny on affirmative action,²⁵ and Steve Teles on the conservative legal mobilization²⁶ and political investment in the Reagan administration²⁷ show that ambitious regulators sometimes pursue agendas of their own. My study is situated in this new generation of scholarship. Its unique contribution is to focus on the distinctively *legal* character of policy innovation that, with few exceptions,²⁸ is often overlooked in the policy innovation literature. In the elusive attempt to draw distinctions between fleeting policy and enduring rights, Congress can make policy for the masses and also decide the futures of individuals; courts can set policy, not just resolve individual disputes. Congress and courts rely on the very agencies they seek to control in order to foment creative new legal theories and to protect new groups. In the end, even without resorting to formal rule-making, agencies are able to engage in regulatory rights-making.

For the sake of simplicity, the policymaking process can be broken into three steps: (1) Congress enacts statutes, (2) agencies interpret and administer statutes, and (3) courts review the agency's interpretations. This dissertation delves into the second and third steps of the policy cycle to understand the emergence of language rights. The dissertation assumes that rights creation is not completed at statutory enactment; rather statutory enactment is the inception of a longer process of rights-making that critically involves regulatory agencies. *Regulatory rights*, as I will label them, get constructed in a form of "subordinate lawmaking"²⁹ during stages 2 and 3. In the parlance of the Administrative Procedure Act (APA) and administrative law, the agencies under study use informal policy guidance to craft government obligations to provide language access. These statements of regulatory policy and interpretive rules are not by themselves legally binding; the weight of their legal authority rests on the agency's delegated authority from Congress to interpret statutes. Regulatory rights are neither formal rules nor hard law; they are

²³DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928* (2001); DANIEL CARPENTER, *REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA* (2010).

²⁴R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* (1994); Shep Melnick, *THE GREAT DEBATE OVER THE CIVIL RIGHTS STATE* (2010).

²⁵Skrentny, *Ironies*, *supra* note 14; Chen, *supra* note 14.

²⁶STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2010).

²⁷Steven Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 *STUDIES IN AMERICAN POLITICAL DEVELOPMENT* 61–83 (2009).

²⁸The exceptional works that focus on legal characteristics of policy innovation are further discussed in Chapter 3 Section 1. *See e.g.* Melnick, *supra* note 24; Skrentny, *MRR*, *supra* note 13; Skrentny, *Ironies*, *supra* note 14; MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION* (1988).

²⁹Shapiro, *supra* note 27.

technically soft laws. The putative law-like character of those regulatory constructions gain legal authority when they harden into black letter law, or legal doctrine, when favorably reviewed in courts and other legal institutions. Ultimately, the success of regulatory rights depends on their diffusion into the schools, workplaces, or polls they regulate and the impact of those rights practices³⁰ on-the-ground. These final steps extend beyond this project, although studies of organizational compliance and policy impact populate socio-legal studies and complement this focus on policy implementation.

In each of my case studies, bureaucrats enlarged civil rights protections for immigrants and language minorities by strengthening the implementation and enforcement of civil rights statutes through the use of informal policy. Two-steps crystallize the process: (1) first, administrative agencies engaged in bureaucratic entrepreneurship while implementing the national origin provisions of civil rights statutes by using informal policy guidance to require language accommodations (chapter 3); and (2) second, agency constructions gained legal strength as regulatory rights to the degree tolerated by courts and regulated organizations (chapter 4). Entrepreneurial bureaucrats, with prodding from legal activists, fashioned creative solutions to the need for language access which evolved into regulatory rights. They channeled their ideas into the process of policy implementation with varying results, depending on the judicial reception to their assertion of regulatory rights, the tolerance of regulated entities, and attributions of legitimacy from other institutions.

Alternative Explanations for the Development of Language Rights

Two competing explanations for legal change predominate: formalist explanations and legal process explanations. Formalist explanations rest on strong textual commitments to equality ground the development of language rights in the legal precedents that precede them. Legal formalism presumes that administrative agencies are compelled by a sense of legal obligation, tradition, and judicial accountability. In this view, *Brown v. Board of Education*, the Civil Rights Act, and *Lau v. Nichols* form a chain of unbroken logic toward the creation of bilingual education with each link determined by an earlier decision. This viewpoint, and its variants,³¹ assumes that agencies demonstrate fidelity to legal texts. The Equal Protection Clause of the Constitution and civil rights statutes were singularly responsible for the expansion of rights to language minorities.

³⁰ Barnes and Burke term these “rights practices.” Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 LAW SOC REV 493-524 (2006).

³¹ Originalists look to legislative history to ascertain the intentional of the original drafters, as a tool for understanding the meaning of the legal text. For more background on these forms of statutory interpretation, see ANTONIN SCALIA & AMY GUTMANN, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998).

While textual commitments to equality in the US can be strong, as compared with other civil service countries, both legal realists and empirical legal scholars demonstrate that laws are not independent of politics and that the rights they create are not self-executing. This is not to say that legal doctrine does not matter, of course. Formalists provide a partial account for the growth of language rights. Attitudinalism, a strand of legal process scholarship trained on judicial politics, suggests that judges' ideology and partisan preferences predict case outcomes. Their widely adhered-to view is tempered by recognition that legal precedent constrains the preferences of decision makers. They take for granted that "law on the books" will translate to "law in action" independent of a social and political context. Formalists overlook the fluidity and dynamism of legal development. They do not deeply study the *mechanisms* lying beneath the surface of legal decisions. They also do not offer a theory that can explain variation in the growth of language rights across policy arenas, despite similar legal text or doctrinal sources.

Legal process scholars, in contrast, offer a political analysis that studies interactions among institutions and the interaction of those institutions with their broader environment. Across disciplines, scholars of political and legal process focus on the pressure individuals and organizations generate apply to the policy-making process and efforts to capitalize on shifts in the opportunity structure. Pressure applied at the right moment increases the salience of social problems and places them on the issue agenda. Social movement theorists working in the political process tradition, for example, attribute civil rights victories to the sustained pressure of grassroots and community groups that collectively structure their social environment.³² Interest group scholars working in the resource mobilization tradition focus on the influence of social and financial capital in politics in building up institutional capacity for further advocacy; they theorize that pressure groups and civil society organizations generate an "institutional support structure"³³ that can sustain movements for change. The bureaucracy literature, in which I would situate my study, studies bureaucratic opportunity structures that give rise to legal change in the legal process tradition.³⁴

³² McAdam, *supra* note 14.

³³ CHARLES EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998).

³⁴ The literature on bureaucracy and legal mobilization is small, but growing. In addition to my own work, see e.g. Shannon Gleeson, "Membership, Opportunity, and Claims Making: Undocumented Immigrants Negotiating Bureaucracies." Unpublished paper presented at the Law and Society Association (2009).

Section 3 Research Design

Comparative Case Studies of Policy Development

In the context of theory-building, comparative historical scholars often point out that institutional contexts matter.³⁵ For example, immigration scholar and political sociologist Irene Bloemraad writes, “The story of citizenship is not just about the immigrants we receive, but also fundamentally about the reception we give them.”³⁶ Context is as important for cross-national studies or historical-institutionalist/American political development studies as for the structured comparison of three policy narratives in this study. Unlike much comparative-historical work, policy studies in American political development typically use single-case studies to draw comparisons over time rather than across policies.³⁷ These single-case studies contribute rich detail and valuable insights to our understanding of the origins and evolution of specific policies. But they also have a drawback. While it is possible to draw important conclusions from findings emanating from a single case study, it is difficult to say with certainty whether those findings suggest general tendencies or particularities of the single case. Investigating multiple instances of a single phenomena enhances the possibility for understanding the broader dynamics underlying policy change.³⁸ These process tracing case histories set up a “testing ground” for a theory, not just the “raw material for a compelling narrative.”³⁹ George and Bennett define process-tracing as the identification of “processes through which agents with causal capacities operate... in specific contexts or conditions to transfer energy, information, or other matter to other entities.”⁴⁰ My archival research and in-depth interviews attempt to trace the process leading from the passage of the Civil Rights Act, through critical moments in policy implementation and innovation, to the promulgation of policy supporting language rights. While they were selected to support sustained analysis across the case studies, this type of qualitative research does not lend itself to hypothesis-testing in the strict sense. Rather, it is directed at theory-generation around the issue of legal change. Detailed within case analysis reveals policy dynamics and transformations of legal meaning that escape the attention of those engaged in studies that compare policy outputs at discrete times (T1 and T2).

³⁵ See, e.g., Alejandro Portes and Ruben Rumbaut for an example of the sociological literature on “contexts of reception.” ALEJANDRO PORTES & RUBEN RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* (1996).

³⁶ IRENE BLOEMRAAD, *BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA* (2006).

³⁷ See broader discussion of trends in this area of scholarship in Paul Frymer. Paul Frymer, *Law and American Political Development*, 33 *LAW & SOCIAL INQUIRY* 779-803 (2008).

³⁸ ALEXANDER GEORGE & ANDREW BENNETT, *CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES* 75 (2005).

³⁹ See Jacob Hacker’s explanation of process tracing in *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* 65 (2002).

⁴⁰ George and Bennett, *supra* note 37, at 137.

The three case studies of civil rights expansion were selected because they involve different pathways of policymaking and because they lead to varying policy outcomes. The education and employment case studies present parallel pathways heavily reliant on bureaucratic entrepreneurship, yet leading to different outcomes. The voting case study presents a different pathway – through the legislature – that leads to rights expansion, underscoring that regulatory policy is not the inevitable vehicle of civil rights expansion. The three case studies in this dissertation are presented cross-sectionally within two chapters rather than policy-by-policy across three dedicated case study chapters. While within-case changes are very important to this study, the juxtaposition of key episodes in the narratives highlight comparisons and contrasts in the policy dynamics that undergirded the development of language rights.

Sources of Evidence: Interviews and Archives

For each case study, I examined public and private documents illustrating the social, historical, and political context of the 1964 Civil Rights Act and 1965 Hart Cellar Act. Among them, I looked into the interpretation of these statutes through regulatory guidance in 1970 and 1980 and key challenges to these constructions in 1968, 1970, 1974, and 1980. Government records from federal repositories provided my primary source material on Congress' intended meanings for the national origin provisions of Titles VI and VII of the Civil Rights Act of 1964. I found evidence about the shifting executive branch priorities that shaped civil rights enforcement in the papers of the presidents, cabinet secretaries, and other policy elites in the Presidential Libraries of Johnson,⁴¹ Nixon,⁴² Ford,⁴³ Carter,⁴⁴ and Reagan. My legal analysis of federal court responses to these regulatory interpretations focused on the Civil Rights Act of 1964, Titles VI and VII; national origin discrimination guidance in 1970 and 1980 (for the EEOC) and 1970, 1974, and

⁴¹ The Johnson Library (Austin, TX) contained extensive files on the EEOC and some material on OCR. Leon Panetta, director of the OCR for Johnson, left behind significant files, including research from Martin Gerry, his special assistant and the original author of the May 1970 memo.

⁴² The records from the Nixon Library were split between Yorba Linda, CA and Washington, DC because of the Watergate litigation and are those archives are voluminous. The combined records of the National Archives and Record Administration facility in College Park, MD [hereinafter NARA II], the US Department of Education (formerly Health, Education, Welfare's) Office for Civil Rights, and the EEOC headquarters library were needed to construct the history of language rights, which almost never presented itself as a research subject heading. Significant gaps in the record of *Lau v. Nichols* and *Garcia v. Gloor* necessitated additional inquiries to Federal Records Centers, NARA Regional Archives, and agency FOIA and acquisition officers.

⁴³ The Ford Library (Ann Arbor, MI) held presidential papers as well as files for Director of OCR and Assistant Attorney General for Civil Rights Stanley Pottinger. The Ford collection of Pottinger's papers held many of the missing documents from the Nixon era. Information about the Carter and Reagan administrations is from research available on microfiche and published accounts.

⁴⁴ Civil rights scholars Hugh Davis Graham, Gareth Davies, John Skrentny, Sean Farhang, and Shep Melnick provide particularly extensive descriptions of primary and secondary sources in their notes. Graham, *Civil Rights Era*, *supra* note 14; Gareth Davies, *The Great Society after Johnson: The Case of Bilingual Education*, 88 *JOURNAL OF AMERICAN HISTORY* 1405–1429 (2002); Skrentny, *Ironies*, *supra* note 14; SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES* (2010); Melnick, *Great Debate*, *supra* note 24.

1980 (for the OCR); and court cases reviewing those actions. Where official records contained insufficient information, I investigated private archives of the persons and organizations, law review articles and op-eds, legal briefs and policy papers, personal correspondence, and foundation reports.⁴⁵

In order to probe individual motivations and agency, and to fill in gaps in the paper trail, I conducted in-depth interviews with activists and regulatory officials.⁴⁶

The idiosyncratic nature of agency, executive, and organizational record keeping made it difficult to define the population of relevant documents from which to draw a random or even a theoretically-informed sampling frame. Judicial and legislative records are easier to catalogue with the advent of electronic databases and search tools. To filter through the piles of archival materials, I developed a list of key actors, events, laws, regulations, organizations, and agencies with subject headings and search terms to focus on while researching each case study. For education, I focused on these search terms: civil rights, national origin, discrimination, language, LEP, bilingual education, multicultural, Latino, Spanish, Hispanic, Mexican, Chinese, Asian American, ethnicity, race, immigration, *Lau v. Nichols*, OCR, Leon Panetta, Martin Gerry, Stan Pottinger, Equal Protection, Title VI, and May 1970 Memo. For employment, I added as search terms: Title VII, EEO, English-Only, Official English, disparate impact, *McDonnell-Douglas*, pretext, business necessity, BFOQ, accent, Title VII, and EEOC Commissioners from 1965-79. For voting, I searched the Voting Rights Acts of 1965 and 1975, literacy test, citizen, Section 203, language minorities, Puerto Ricans, bilingual ballots, and meaningful access.

⁴⁵ These richest materials were found in the Mexican American Legal Defense and Educational Fund Archives at Stanford University's Green Library [hereinafter MALDEF Archives], Chinese for Affirmative Action (CAA), Japanese American Citizens League (JACL), Asian Law Caucus, NAACP Legal Defense Fund, and the San Francisco Legal Aid-Employment Law Center.

⁴⁶ Key interviews for education are listed in the References section, *infra*, at 93. They include: Ed Steinman, Ling-chi Wang, Henry Derr, Christine Chen (Chinese for Affirmative Action), Chris Ho (Employment Law Center-Legal Aid Society), the former Executive Directors of Asian Law Caucus (Angelo Ancheta and Paul Igasaki), a San Francisco Unified School District bilingual education administrator, and a classmate of Kinney Lau. I also interviewed OCR attorneys involved in ongoing Lau monitoring, Paul Grossman and Susan Spelletich and consulted oral history and interview transcripts of Leon Panetta and Martin Gerry generously shared by John Skrentny. For employment discrimination, I relied on interviews with EEOC attorneys in the Office for General Counsel, the Office for Legal Counsel, the Executive Secretariat. I also interviewed Ernie Haffner, who revised the 1980 Title VII National Origin Guidelines (in conjunction with Karen Danart and Raj Gupta) and wrote the compliance manual; the EEOC attorneys who litigated *Garcia v. Gloor*; Regional Director Bill Tamayo, who specializes in the EEOC national origin docket; and EEOC Commissioners and their staff who were involved in bilingual and Hispanic workforce matters, such as Paul Igasaki, Stewart Ishimaru, Cari Dominguez. Additional information came from retrospective reports such as the 40th Anniversary Report of the US EEOC and updates to the Guidelines in the Task Force on National Origin Discrimination in 2001. Available online www.eeoc.gov.

Section 4 Roadmap for Dissertation

This introductory chapter established the “puzzle” of expansive language rights motivating the dissertation. It examines the implementation of civil rights statutes that led to the emergence of language rights and asks why the policy pathways led to varying results in different policy arenas. It argues for an institutional explanation combining the politics of entrepreneurial bureaucrats with the constraining influences of law and legal context.

Chapter 2 establishes the historical and conceptual background for understanding the demand for language rights. After describing the demographic changes associated with the Hart-Cellar Act of 1965, the chapter presents statistics showing the increased linguistic diversity and linguistic ability introduced by migration. It particularly emphasizes the language gaps in Spanish Speaking and Chinese Speaking communities. It concludes by narrating the efforts of community activists from both language minority groups to enlist the federal government to overcome language barriers. These efforts brought language access into the field of civil rights and demanded a response.

The federal response to language barriers swept across multiple public policy arenas. The story of how they did so constitutes the main body of the dissertation. Chapters 3 and 4 present parallel processes of policy innovation in three civil rights regulatory agencies and two stages of the policy-making cycle.

Chapter 3 sets out common processes of policy implementation in civil rights enforcement agencies that led to the creation of language rights for national origin minorities. Combining legal mobilization and policy innovation literatures, it identifies bureaucratic entrepreneurship and policy implementation as the key mechanisms driving legal change. It discusses the coordinated advocacy of public interest lawyers and the US Department of Education, Office for Civil Rights, backed by courts and Congress, which led to bilingual education in public schools. It contrasts this with the failure of the US Equal Employment Opportunity Commission to garner judicial support for comparable rights in private workplaces and the success of the DOJ in precipitating the language provisions of the Voting Rights Act of 1975.

Chapter 4 locates variation in the strength of language rights by describing the response of courts and other institutions to agency assertions that their policy guidance amount to regulatory rights. The concept of legal strength self-consciously goes beyond the formalist explanation for judicial deference to administrative policies taught in law schools. It instead introduces a more capacious definition of law and legalization. The chapter lays out the distinction between

accounts of judicial deference that emphasize legal doctrine or hard law and socio-legal theories that emphasizes more informal processes for shaping norms and sustaining change.

Chapter 5 examines the implications of the dissertation for contemporary research and policy. It begins by examining the *persistence* of the regulatory rights strategy since 1979. To establish external validity and to explore the scope and parameters of the findings on legal change, it uses empirical data from a 2010 Government Accounting Office study to compare language policy implementation in the US Department of Education, the US Department of Justice, and the US Equal Employment Opportunity Commission during the period of study and thirty years later. It then describes three legal developments that complicate regulatory policy implementation – decentralization, devolution, and deregulation – to provide a context for understanding the challenging context in which policy implementation will proceed. The conclusion mines the lessons of history to identify lost alternatives that shed insight into the continuing regulation of language in the United States.

CHAPTER 2 CONTEXTS FOR POLICY-MAKING: FROM CIVIL RIGHTS TO LANGUAGE RIGHTS

Chapter 2 establishes the historical and legal background of the particular legal changes under study. It begins by explaining the explosion of new immigrants as an unanticipated consequence of the Hart Cellar Act that eliminated national origin quotas from the Immigration and Naturalization Act of 1965. It then discusses the rising linguistic diversity and uneven language ability among immigrants and their progeny. Then it turns to the minority rights revolution, focusing in this chapter on the activist demands for language rights that confronted federal civil rights agencies. Taken as a whole, this background chapter provides context for understanding the mounting demand for language rights that precipitated a federal policy response.

Section 1 Shifting Demographics Diversify Immigration and Language Ability

The convergence of immigration reform with civil rights represented a critical juncture in American political development.⁴⁷ The civil rights agenda that supported the expansion of rights to language minorities were part and parcel of a growing national government and a realignment of party politics. Following the assassination of President John F. Kennedy, Democrats won huge victories in the 1964 elections and secured significant control over Congress after spending many years out of power. These Democratic strongholds remained well into the 1970s, papering over the moderating efforts of a Nixon Administration that was more concerned with courting Latino votes than pursuing their policy agenda. The liberal wing of the Democratic Party in Congress and the Democratic White House pushed an ambitious social agenda with civil rights as its centerpiece. A liberal majority in the Supreme Court bolstered these policy priorities. Led by moderates-turned-liberal such as Chief Justice Earl Warren and Justice William Brennan, political reforms in civil rights and other areas of equality were sustained in courts. These strong shifts in the political and legal culture during the civil rights era spilled over into parallel protest movements challenging poverty, the Vietnam War, corporate excess, and the environment; it also extended to ethnic minorities.⁴⁸ This social climate was conducive to regulatory agencies that vigorously and creatively implemented their statutory mandates.

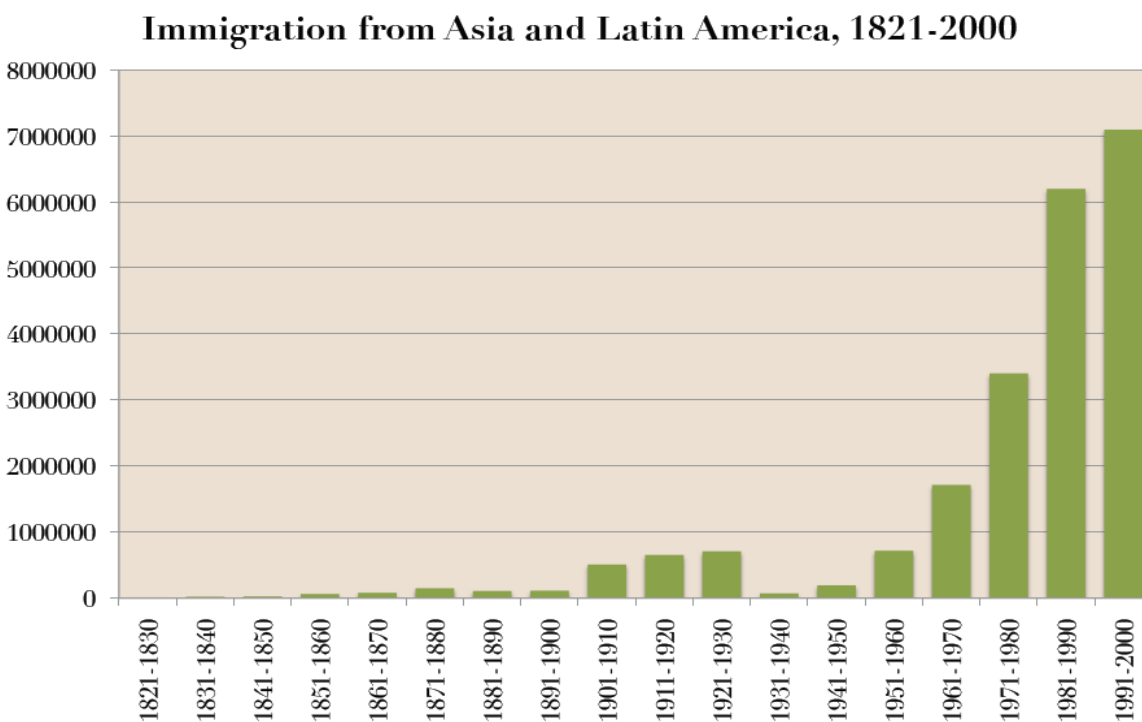
Against the backdrop of the expanding civil rights state, passage of the Hart-Cellar Act as part of the Immigration Act of 1965 lifted decades-long national origin quotas that limited non-European immigration. Ironically, President Johnson said upon passage of the Hart-Cellar Act,

⁴⁷ Baumgartner and Jones, *supra* note 14; PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* (2004). A critical juncture represents an important decision point in the development of policy because two or more possible paths diverge thereafter.

⁴⁸ Two general histories of these events include Graham, *supra* note 13; MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

“This bill we sign today is not a revolutionary bill. It does not affect the lives of millions. It will not restructure the shape of our daily lives.”⁴⁹ Robert Kennedy estimated “for the Asia-Pacific Triangle ... 5,000 immigrants would come the first year, but we do not expect that there would be any great influx after that.” Both statements proved wrong. The scope and scale of demographic change was unprecedented and unanticipated. The overall number of migrants from non-European countries increased under family based and employment based admission categories. By the late 1960s “third world” immigration crested; Asian and Latin American migration especially increased.⁵⁰ The ripple effects of the Immigration Act and the Civil Rights Acts created an opening for continuing reform.

Figure 2.1. Rising Levels of Asian and Latin American Immigration after 1965.



⁴⁹Cited in Graham, *Collision Course*, *supra* note 1. See also Hugh Davies Graham, *Since 1964: The Paradox of American Civil Rights Regulation*, in *TAKING STOCK: AMERICAN GOVERNMENT IN THE TWENTIETH CENTURY* 187-218 (1999); Robert Lieberman, *Ideas, Institutions, and Political Order: Explaining Political Change*, 96 *AMERICAN POLITICAL SCIENCE REVIEW* 697-712 (2003).

⁵⁰ Immigration historian Mae Ngai reports that Western Hemisphere numbers were restricted and actually cut down on slots available for Mexican migration. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004). According to David Reimers, “Western Hemisphere immigration was considerably less than it might have been without the numerical limit, but it was much above what the restrictionists wanted in 1965. Despite the fall from 1968 to 1969, immigration rose after that date. In the 1970s about two million persons entered from the Americas. In 1978 immigration reached a decade high of 262,542.” Numbers also increased significantly through unauthorized migration. DAVID REIMERS, *STILL THE GOLDEN DOOR: THE THIRD WORLD COMES TO AMERICA* 124 (1992).

Liberalization of immigration policy in 1965 amplified language inequality. While language barriers pre-existed the Civil Rights Act of 1964, high levels of Asian and Latino immigration and ongoing immigrant “replenishment” increased the percentage of non-native English speakers.⁵¹ The need to bridge language barriers escalated from 1965-1979 and has grown every year since. Demographic trends show a growing need for language access that continues today. Census 2000 data report that nearly 47 million people living in the US (18% of the population) spoke a language other than English at home, and 21 million did not speak English well.⁵² In historical perspective, this is proportionately greater than at the end of the 19th century: 8% in 2000 compared to 3.6% in 1890. The limited English proficient (LEP) population has long been concentrated in California, Texas, and New York and in major metro areas. They hail from a variety of countries, with the highest numbers from Spanish-speaking and Asian language backgrounds.

Figure 2.2. Percentage of Immigrants that Speak English “Very Well”, by country and migration year.

Country of Birth	Immigrant population in US (1990), 5 years and older	Immigrated 1980-1990	Immigrated Pre-1980	Total
Colombia	268,980	28%	44%	35.7%
Japan	237,171	26%	44%	33.2%
Korea	520,003	25%	44%	33.2%
Vietnam	521,207	24%	45%	31.6%
Mexico	4,032,703	19%	34%	26.5%
El Salvador	445,144	23%	34%	25.5%
China	506,653	20%	31%	25.1%

Source: US Bureau of the Census. The Foreign-Born Population of the United States. CP-3-1. 1993.⁵³

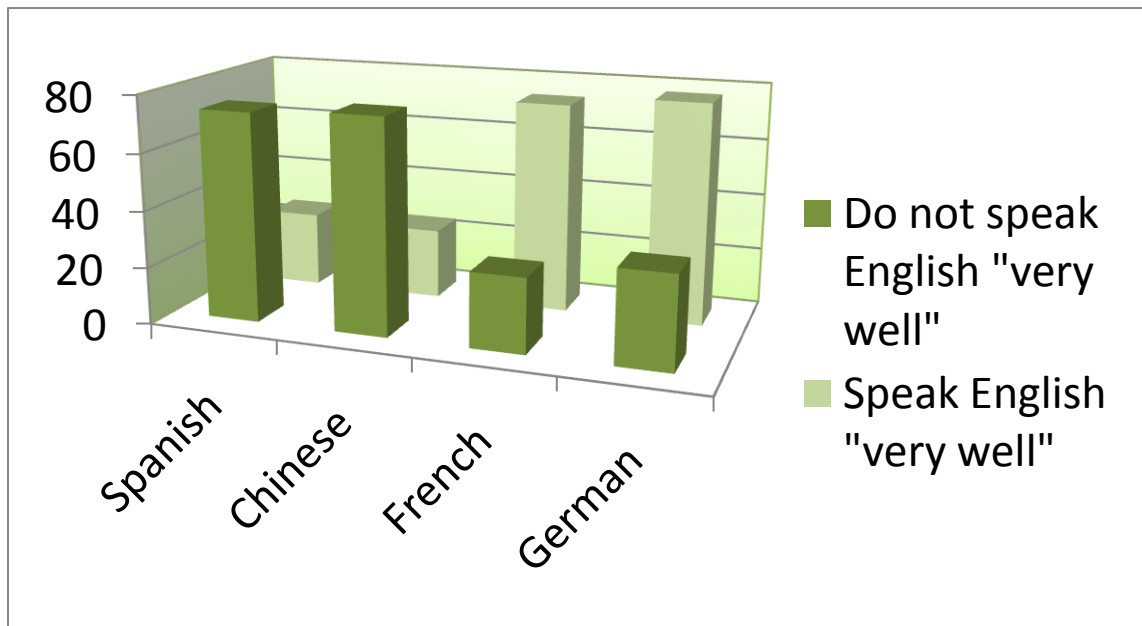
⁵¹ TOMÁS ROBERTO JIMÉNEZ, *REPLENISHED ETHNICITY: MEXICAN AMERICANS, IMMIGRATION, AND IDENTITY* (2010). Jimenez attributes the resilience of Mexican ethnic identity to persistent in-migration to the U.S.

⁵² For detailed figures, see the census bureau website and links from lep.gov. Data about recent changes is summarized in advocacy reports like the Asian Americans Advancing Justice/MALDEF publication *Equal Justice, Unequal Access* (2005) that include state-by-state analysis of changes in the LEP population between 1990 and 2000 (more than 200% change in Georgia, North Carolina, and Nevada; more than 100% in Arkansas, Utah, Colorado, Minnesota, Tennessee, and West Virginia).

⁵³ Adapted from APRIL LINTON, *LANGUAGE POLITICS AND POLICY IN THE UNITED STATES: IMPLICATIONS FOR THE IMMIGRATION DEBATE* (2006).

Not only did the diversity of languages increase, the range of language ability increased. According to Census Bureau data in 1970, 70% of foreign-born immigrants to the US hailed from European countries. Their language fluency increased with duration of residency, with 82% of first-generation immigrants reporting something other than English as their mother tongue, 59% of second-generation immigrants, and 7% of third-generation immigrants. A notable exception to this trend of increasing language fluency is the pattern of English acquisition and the maintenance of minority languages among Spanish speakers and Chinese speakers.⁵⁴ Nearly 70% of Spanish-speakers rate themselves as not speaking English “very well” and an even higher percentage of Chinese-speakers report difficulty with English. These figures are the inverse of French- and German-speakers, 70% of whom report speaking English “very well.”⁵⁵ By 2000, Chinese and Spanish were the two most common mother tongues, with French and German coming in a distant third and fourth. (Tagalog and Vietnamese, two more Asian languages, come in fifth and sixth). As Figure 2.3 shows, the language ability of these two largest groups is nearly inverse that reported from the European immigrants: a majority of Chinese and Spanish-speaking persons considered themselves unable to speak English well.

Figure 2.3. Language Spoken at Home and Ability to Speak English for Four Largest Language Minorities.



Source: Bureau of the Census, Population Division, Ethnic and Hispanic Statistics Branch. 1990.

⁵⁴ US Department of Commerce, 1970 Census Population: Supplementary Report on Country of Origin, Mother Tongue, and Citizenship for the US. April 1973.

⁵⁵ US Bureau of the Census, Population Division, Ethnic and Hispanic Studies Branch. Census 2000 Summary Report, available at <http://www.census.gov/main/www/cen2000.html> (last viewed 3/1/2011).

These alarming rates for these groups are the reason that this study focuses on Asian and Latino language minorities. Hispanics, commonly grouped together as “Spanish-speaking people” during this era, shared a common language. The largest Spanish-speaking ethnic subgroups hailed from Columbia, Mexico, Cuba, and Puerto Rico; only a minority of each ethnic group reports speaking English “very well.”⁵⁶ The Asian immigrant population was more linguistically heterogeneous than the Spanish-speaking population, with large numbers of Chinese and Japanese speakers arriving in the late-1800s; and Korean-speakers, Vietnamese/Cambodian refugees, and a continuing flow of Chinese-speakers arriving after 1970.⁵⁷ Each of these Asian subgroups spoke a different language and some groups were further divided by regional dialects. Among them, Chinese-speakers report the lowest levels of English proficiency, but all groups report a minority of fluent English speakers.

Although merely a snapshot of language ability, these descriptive statistics illustrate the scope of the problem of language barriers and the mounting demand among Asian and Latino language minorities. The consequences of these language barriers were exclusion from mainstream institutions such as schools, denial of access to basic goods such as health care, and diminished chances for academic, economic, and political success.⁵⁸ The next section establishes the evolution of these sad realities into perceived shared problems to justify a policy response.

Section 2 Immigrants Rights and Civil Rights Create Demand for Language Rights

The effects of civil rights and immigration colliding have been profound. The on-the-ground realities of demographic change generated material problems of inequality and fed feelings of isolation of racial hierarchy that so recently were the target of the black civil rights movement. Although it took time, minorities inspired by those precursor movements shared their own grievances. Mounting dissatisfaction, and rising hope, led to a minority rights revolution that included language rights as one of its battle fronts.

⁵⁶ Chart adapted from Linton, *supra* note 52.

⁵⁷ *Id.* See also ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE (2006); Ngai, *supra* note 48.

⁵⁸ For an overview of the effects of language gaps, consult the resources of ethnic minority groups such as the Asian American Justice Center & MALDEF, Language Rights: An Integration Agenda for Immigrant Communities (November 2007), Adult Literacy Education in Immigrant Communities: Identifying Policy and Program Priorities for Helping Newcomers Learn English (2007), <http://www.advancingequality.org/LanguageAccessPublications/>, http://www.maldef.org/employment/public_policy/language_access/index.html.

Spill-Over Effects from Desegregation

Latino activists organized in the 1950s and 1960s around their exclusion from the civil rights agenda and contended the experience of African-Americans eclipsed comparable poverty and discrimination against Mexicans.⁵⁹ An ironic example of this elision is that, in some parts of the Southwest, attempts to desegregate racially-identifiable black and white schools *exacerbated* rather than ameliorated inequality. Hispanics, who were initially classified by the government as an ethnic group but racially white, were grouped together with black school children for the purposes of declaring a school no longer “racially identifiable,” which was the legal marker for integration.⁶⁰

Latinos claimed that they suffered distinct harms from African Americans such as language discrimination and problems with language access, but their ambiguous classification as racial minorities made their problems difficult to address under the existing civil rights paradigm that presumed a black/white dichotomy in race relations. Further complicating matters, complaints over these and other educational inequities divided along generational lines. Young Mexican-Americans (Chicanos) focused on grassroots protest. Their radical politics dovetailed with earlier, 1950s grassroots organizing that employed confrontational strategies such as boycotts. These advocacy strategy changed as Mexican Americans observed the successes of the black civil rights movement. Gradually, Hispanic community groups came to rely on national advocacy groups that channeled their energies into more conventional interest group strategies. The formation of the Mexican American Political Association in 1959 and the Political Association of Spanish-Speaking Organizations in 1961⁶¹ pushed for the appointment of Hispanic officials to prominent federal government positions.⁶² Eventually, Latino advocacy

⁵⁹ The historical record showing that legislators focused mostly on blacks is voluminous. There are exceptions, like the US Commission on Civil Rights surveys on Mexican Americans in 1968 that led to an influential series of reports in the early 1970s. But most instances of racial classification until then evince a black-white binary into which every other color on the spectrum was squeezed. *See e.g.* Neil Gotanda, *Other Non-Whites“ in American Legal History: A Review of” Justice at War*, 85 COLUMBIA LAW REVIEW 1186–1192 (1985); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STANFORD LAW REVIEW 1–68 (1991); IAN HANEY-LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 THE YALE LAW JOURNAL 817-848 (2000).

⁶⁰ Some of the best sources of Latino history, include DAVID GUTIÉRREZ, *WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY* (1995); RICHARD DELGADO, JUAN PEREA & JEAN STEFANCIC, *LATINOS AND THE LAW* (2008); JUAN PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2007); CLARA E. RODRÍGUEZ, *CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY IN THE UNITED STATES* (2000); VICTORIA HATTAM, *IN THE SHADOW OF RACE: JEWS, LATINOS, AND IMMIGRANT POLITICS IN THE UNITED STATES* (2007); LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* (2007); Ngai, *supra* note 48.

⁶¹ Gutiérrez, *supra* note 59 at 168-169.

⁶² Political historian Craig Kaplowicz provides a slightly different interpretation based on his extensive review of the LULAC archives in Austin, TX and presidential libraries of Johnson and Nixon. This view was that the bilingual education emphasis was propagated by existing government officials more than Mexican American activists in the late-1960s and early-1970s, at which point it became the centerpiece of national policies concerning Hispanics or the

organizations banded together around the notion of systemic change requiring a coordinated, national response. Mexican American Legal Defense and Education Fund (MALDEF) was created by its more moderate predecessor League of United Latin American Citizens (LULAC) for the express purpose of creating an NAACP LDF for brown people. After giving MALDEF a few years to establish its organizational identity, its funder the Ford Foundation intervened to expedite its transformation into a national organization. Ford insisted that MALDEF move from San Antonio, Texas to a city on the national scene and installed Vilma Martinez, formerly on the staff of the NAACP LDF, as head of the organization in 1968. In time, MALDEF provided a respectable alternative voice to the more militant Chicano youth movement and Brown Power movement.⁶³ MALDEF built an impact litigation strategy based on the legal precedents established in *Brown*.⁶⁴ Their strategies were eventually mirrored by Puerto Rican and Asian American activists, who formed the Puerto Rican Legal Defense and Education Fund (PRLDEF) and the Asian American Legal Defense and Education Fund (AALDEF) within the same New York City storefront.

Asian immigrants and Asian Americans comprised a smaller disadvantaged minority group than Latinos, yet they shared many of the same problems. Older Asian immigrants lived in linguistically isolated households, suffered rampant job discrimination, and lacked access to most government services due to their limited English abilities. Segregated schools in San Francisco's Chinatown provided no assistance to nearly 1800 non-English speaking students and less than an hour of daily instruction in supplemental English instruction for others.⁶⁵ In short, the contemporary perceptions of Asian Americans as a highly-successful and highly-integrated minority group mask the very real struggles of this language minority group.⁶⁶

Spanish-speaking, as they were known to the federal government. CRAIG KAPLOWITZ, *LULAC, MEXICAN AMERICANS, AND NATIONAL POLICY* 143 (2005). This account most closely matches my own research and the account by John Skrentny in *Minority Rights Revolution*. Skrentny, MRR, *supra* note 13.

⁶³ The generational conflict is represented in the famous debate between Jose Angel Gutierrez, a Chicano militant activist, and Henry Gonzalez, a Congressman from San Antonio who believed in change from within the system, in 1969. In essence, the militants accused the mainstream reformers as showing “gringo tendencies” and labeled them *vendidos* (sellouts) who abandoned their culture in order to assimilate. Gutiérrez, *supra* note 59, at 186. *See also* IAN HANEY-LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2004).

⁶⁴ *See* Gutierrez, *supra* note 59, for more on the generational divides. *See also* MALDEF Reports and PRLDF Reports within the Stanford University Green Library Special Collections.

⁶⁵ *See generally* ethnic studies scholarship and literature on Asian Americans including Angelo Ancheta, *supra* note 56; YEN LE ESPIRITU, *ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES* (1993); Chris K Iijima, *Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm, The*, 29 COLUM. HUM. RTS. L. REV. 47 (1997); JUANITA TAMAYO LOTT, *ASIAN AMERICANS: FROM RACIAL CATEGORY TO MULTIPLE IDENTITIES* (1998).

⁶⁶ At the time *Lau* was filed in 1973, many non-English speaking students were also being placed in special education classes designed for those with learning disabilities. Some blamed the school district for these problematic practices. Others, including the federal district court that took on *Lau* in the first round of litigation, blamed the students: “The discrimination suffered by these children is not the result of laws passed by the state of California, presently or historically, but is the result of deficiencies created by the children themselves in failing to

The juxtaposition of first- and second-generation language needs in Chinatowns galvanized community activism. Chinatown activists inspired by the tactics of the civil rights movement and Vietnam War Protests began to organize around the language barriers that denied them access to public schools and public benefits. It was not easy. Locally-based and older-generation organizations such as Chinese for Affirmative Action and especially the Japanese American Citizens League initially exercised caution in opposing the federal government, which was understandable given their need to persuade the American public of their loyalty during World War II and the Japanese Internment. Also, the internal diversity of the Asian American ethnic community stymied some of their organizing efforts. Public perceptions of bilingual education as a Latino issue further detracted from the early efforts of Asian immigrants and Asian Americans to advance the cause.⁶⁷ These obstacles now seem ironic in retrospect, given that the landmark case for bilingual education would involve Chinese-speaking plaintiffs and be named “Lau, not Lopez.”⁶⁸

Section 3 Toward Language Rights: Federal Responses to Overcoming Language Barriers

Shifting Meanings of Race and Ethnicity

Several scholars have written about the distinction of race and ethnicity, although the nature of that distinction is far from settled. Legend has it that the inclusion of “national origin” in the 1964 civil rights legislation originally meant to benefit European immigrants whose numbers had fallen since the 1920s.⁶⁹ Some of those white immigrants and their descendents endeavored to be included during the Congressional debates over civil rights legislation and were no doubt helped by their champion Senator Edward Kennedy. The federal government began classifying racial minorities to measure the effectiveness of race equality programs after the 1964 Civil Rights Act.⁷⁰ Many of these deliberations took place behind closed doors, but key moments reported by historians include the development of the EEO-1 form in 1965 that would be used

know and learn the English language.” 483 F.2d 791 (9th Cir. 1973). As the case worked its way through the courts, eventually winning support for the principle that language barriers impeded access to a meaningful education from the Supreme Court, the substantive focus of Asian American activism shifted.

⁶⁷ K. T. CHUN, D. NAKANISHI & T. Y. NISHIDA, *THE ASIAN AMERICAN EDUCATIONAL EXPERIENCE: A SOURCE BOOK FOR TEACHERS AND STUDENTS* (1995).

⁶⁸ Rachel Moran, in her detailed account of the history of *Lau v. Nichols*, refers to this anomaly as the choice to make the case “Lau, not Lopez.” Rachel F. Moran, *The Story of Lau v. Nichols: Breaking the Silence in Chinatown*, in *EDUCATION LAW STORIES* 111-157 (2007).

⁶⁹ Gabriel Jack Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 *NORTH CAROLINA LAW REVIEW* 273 (1996).

⁷⁰ MATTHEW FRYE JACOBSON, *ROOTS TOO: WHITE ETHNIC REVIVAL IN POST-CIVIL RIGHTS AMERICA* (2006); DAVID A. HOLLINGER, *POSTETHNIC AMERICA: BEYOND MULTICULTURALISM* (1995).

for the purposes of affirmative action and the Office of Management and Budget codification of this classification scheme within the Statistical Policy Directive No. 15 in 1977.⁷¹ Directive 15 grouped people by color into a racial “pentagon”⁷²: black, white, yellow, red, brown. The non-white groups were generally considered official minorities, but the arrangement of these groups around a color line was intricate and complex. For example, Asians initially resisted the very idea of being racially classified because pan-ethnic clustering overlooked important differences among Asian subgroups (i.e. Chinese, Korean, Vietnamese, Filipino) and home-country prejudices. Latinos resisted for a different reason.⁷³ They were uncertain whether a black-white binary would place them on the black side as a disadvantaged minority or the white side as part of the mainstream majority. Categorization as “Spanish-speaking” or “Spanish-surnamed” individuals sidestepped the racial classification issue; so too did the use of Hispanic as a filter for ethnicity separate from race on census forms. Eventually, ambivalence gave way to advantage and Latinos became an official minority alongside Asian-Americans and African-Americans.

National Origin Discrimination and Language

The meaning of “national origin” apparently preceded the civil rights movement. It appears in early immigration legislation dating before 1900, and in that context it refers to “nationality.”⁷⁴ It subsequently traveled into the civil rights lexicon of state statutes.⁷⁵ Apparently, floor discussion is not recorded from when it moved from state to the federal legislation because the meaning had already been established. By the time Congress considered the Civil Rights Act of 1964, which forbids discrimination based on race, sex, religion and national origin, the term was part of the civil rights boilerplate.

During the civil rights era, national origin became the doctrinal hook for “ethnicity,” which is sometimes conflated or combined with “race” but bears distinct legal meaning.^{76, 77} Case law

⁷¹ *Id.*

⁷² The term “racial pentagon” comes from Hollinger. *Id.*

⁷³ The transformation of Hispanics into official minorities is also discussed in Graham, *Collision Course*, *supra* note 1; Skrentny, *Ironies*, *supra* note 14.

⁷⁴ Ngai, *supra* note 48.

⁷⁵ A search for early appearances of the term shows that it appears in state equal employment legislation during the Roosevelt Administration in the 1930s.

⁷⁶ Victoria Hattam, *In the Shadow of Race*, notes that the genealogy of the term is obscured by the more vibrant discussion of race in United States politics. Hattam, *supra* note 59. Stephen Steinberg’s review of *In the Shadow of Race* tours the “conception muddle” of ethnicity/race and the emergence of ethnicity as a distinct concept “unhinged from race.” He notes that the Dillingham Commission’s extensive study of racial diversity in 1911 spoke of the Negro race and the Chinese race, but also of the Irish, Italian and Hebrew races – therefore, “race” initially encompassed “nationality.” Hattam undertakes to narrate the bifurcation of race from ethnicity into “two distinct languages of difference.” More information is contained in her intellectual history, but she lists as key contributors

and administrative charges in civil rights enforcement agencies suggest that “ethnicity” typically cleaves groups based on religion, language, and nativity. Some civil rights statutes imply that the term refers to the subset of individuals who are members of both racial minority groups *and* national origin minority groups and omits white ethnics and national origin minorities of European descent. Others imply that the national origin demarcation operates independently of race. In the Civil Rights Act of 1964, the lack of definition means that the precise groupings are subject to interpretation. In contrast, the Voting Rights Act of 1975 defines the beneficiaries of its “national origin” voting protections as “language minorities.” It then enumerates and limits its coverage to speakers of Asian, Spanish, Native American, and Native Alaskan languages.

The enumeration of specific language minorities is convenient, but like race or ethnicity it merely freezes into place a dynamic process of social construction. The internal documents of the MALDEF on the boundaries of the “Spanish-speaking” evince an effort to forge commonalities across subgroups from many different nationalities, while also keeping out whites. According to memos exchanges between MALDEF and race experts, Latinos maintained that their protected group was neither white, nor black: they were nonblack minorities and were unified by Spanish-surnames and Spanish-languages.⁷⁸ Asians might make a similar claim to cultural distinctiveness, making language an awkward banner to unify or consolidate racial/ethnic diversity into a cohesive grouping given the vast linguistic diversity of Chinese, Japanese, Korean, Vietnamese, and Filipino subethnic groups.⁷⁹

The nomenclature of “language minority” or “limited-English proficient” also belies the mixed legal status of Asian and Latino communities. Many language minorities and language advocates were not immigrants at all. They were descended from immigrants or later-generations residing in ethnic enclaves. Many of these second- and third-generation US born language minorities felt a kinship with first-generation immigrants and aimed to leverage the promises of the civil rights movement for their ethnic communities. Given the multi-generational nature of these populations, to speak of the group distinctiveness in terms of nationality or nativity rather than the shared trait of language ability would be confusing and

early 20th century Zionists who participated in the Americanization movement (e.g. Horace Kallen) and the cultural pluralists (e.g. Nathan Glazer).

⁷⁷ For critical reflections on the complicated relationship between race and ethnicity, *See generally* Juan F Perea, *Black/White Binary Paradigm of Race: The Normal Science of American Racial Thought*, *The*, 10 LA RAZA L.J. 127 (1998); Juan Perea, *Five Axioms in Search of Equality*, 2 HARV. LATINO L. REV. 231 (1997).

⁷⁸ A related debate over the definition of Spanish-speaking arises in response to a draft of the 1980 EEOC Guidelines. Internal memos describe an effort to exclude Spanish-Europeans from the definition of Spanish-speaking, Hispanic, or Spanish-surnamed. This effort appears to have been dropped. MALDEF Archives.

⁷⁹ Some of this uncertainty is played out in the VRA Section 203 difficulties over counting the language minority group “Asian.” For more on the creation of a pan-ethnic Asian American identity, see Espiritu, *supra* note 64.

inaccurate. These re-energized groups merely raised the profile of language barriers during a highly-politicized time receptive to minorities' rights claims.⁸⁰

Affirmative Action for Language Minorities

Language minority groups appealed to the federal government for language rights in their campaign to overcome language barriers, in line with the legalistic culture of the civil rights era.⁸¹ Their approach paralleled legal developments in other areas of equality jurisprudence. Civil rights laws responsive to African Americans had focused primarily on the eradication of discrimination on the basis of race and initially required proof of invidious intent. This approach did not always take into account employers' and educators' non-intentional and seemingly-neutral practices that nevertheless led to discriminatory effects for other ethnic groups. As traditional civil rights legislation enacted in the 1960s was implemented during the 1970s, advocates emphasized the need for substantive equality over formal equality.

The demand for more tangible forms of equality that began in education law is mostly clearly expressed in the shift toward “equal results” as a marker of “equal opportunity” in employment law. Bureaucrats at the Office of Federal Contract Compliance considered numerical counts as evidence that their programs were working, initially in the form of quotas and eventually in the form of goals and timetables that roughly approximated the proportions of minorities in the general population. *Griggs v. Duke Powers*, racial integration and busing cases, and other forms of affirmative action formalized this logic by permitting a formula for proving discrimination under Title VII.⁸² The doctrine of disparate impact holds that employment practices may be considered discriminatory if they have a disproportionate “adverse impact” on members of a minority group. Even if the practice appears to be facially neutral, discrimination may be proved by showing that an employment practice produces disproportionate and adverse effects when applied to members of a protected class, as compared with non-protected classes, even without direct evidence of discriminatory intent.⁸³

⁸⁰ John Skrentny makes a similar point about increased salience in an exchange with social historian Victoria Hattam. See J. D Skrentny, *Policy Making Is Decision Making: A Response to Hattam*, 18 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 70–80 (2004); Victoria Hattam, *The 1964 Civil Rights Act: Narrating the Past, Authorizing the Future*, 18 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 60-69 (2004).

⁸¹ ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2nd ed. 2003); LAWRENCE MEIR FRIEDMAN & RUSSELL SAGE FOUNDATION, *TOTAL JUSTICE* (1994).

⁸² Skrentny, *Ironies*, *supra* note 14; Graham, *Civil Rights Era*, *supra* note 14; Graham, *Collision Course*, *supra* note 1; Chen, *supra* note 24.

⁸³ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1977).

The growing acceptance of effects-based definitions of equal opportunity bled into minorities' demands for language rights.⁸⁴ Chinatown activist Ling-Chi Wang recalls that in the late-1960s few laypeople had heard of bilingual-bicultural education as a solution to their problems of segregation.⁸⁵ He learned of this option in reading about Cuban activism in Florida schools and imported the strategy into San Francisco's Chinatown mobilizing.⁸⁶ Over the course of many years of struggle, the lofty ambitions of the Chinatown community organizers gradually gave way to more legalized claims. Wang recounted the turbulent political struggle that preceded the filing of the *Lau* lawsuit in federal court. Although Wang supported the litigation effort and eventually testified in Congressional Hearings about the success of *Lau v. Nichols*, he considered the lawsuit a "last resort."

The crux of the legal argument was that educational opportunity for LEP students required the government to affirmatively act on their behalf. In making their case, the lawyers for the *Lau* plaintiffs invoked *Sweatt v. Painter*⁸⁷ and other desegregation cases that followed *Brown II* for the proposition that a student disadvantaged with respect to his classmates triggers for the school an affirmative duty to provide special assistance to overcome his disabilities.⁸⁸ Affirmative duties were rare in this area of constitutional and antidiscrimination law. At the time, courts promised a more limited legal obligation in the form of a right to nondiscrimination or formal equality. (Given that *Griggs* had not yet been decided in Title VII employment discrimination law, disparate impact was still a novel way of proving discrimination under Title VI.⁸⁹) The San Francisco Unified School District, the defendants in the *Lau* lawsuit, conceded the adverse effects of linguistic isolation. However, they questioned the claim that they had an "affirmative duty" to provide supplemental instruction to LEP students absent evidence of intentional discrimination against the Chinese. The school districts' brief alleged: "herein lies the key to this lawsuit: plaintiffs argue that they want an equal education, but in fact what they are seeking is

⁸⁴ Media coverage from Regulation Magazine cited in Chapter 3 and 4 link affirmative action, bilingual education, and English-only Workplace policies. Affirmative action critic Abigail Thernstrom sees additional connections with the language provisions of the Voting Rights Act. See generally ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987).

⁸⁵ Phillip Lum, *Creation and Demise of San Francisco Chinatown Freedom Schools: One Response to Desegregation*, 5 AMERASIA JOURNAL 57 (1978) describes de jure segregation in Chinatown schools and the rise of voluntarily segregated "freedom schools" to resist desegregation efforts.

⁸⁶ Interview with Ling-Chi Wang, Chinatown community organizer and Emeritus Professor of Ethnic Studies, in Berkeley, California (January 31, 2010).

⁸⁷ 339 U.S. 629 (1950).

⁸⁸ Center for Law and Education amicus brief for plaintiffs from *Lau v. Nichols*, Case No. 26155. (9th Cir 1973) at 794. NARA Pacific. RG 276.

⁸⁹ Interestingly, language rights might be construed as a stepping stone toward disparate impact/effects-style logic, which is typically understood to have developed in a Title VII/employment context following *Griggs v. Duke Power*, 401 U.S. 424 (1971). More research needs to be done to verify this point, but it is potentially an interesting one... all the more so because of the continuity of the law with the Americans with Disabilities Act that would be the next logical step.

more than equal education.” *Lau v. Nichols* put language discrimination and language access on the civil rights agenda sidelong with the push for affirmative action as a legal remedy.⁹⁰

Implementation of Federal Civil Rights Statutes

The problem of language gaps arose from the collision of immigration and civil rights laws. The solution of language rights came to life during their implementation within agencies. The details of the federal response to advocates’ claims that the government had an affirmative duty to overcome language barriers are developed in Chapters 3 and 4. The general strategy was to attack language barriers through existing civil rights laws rather than to pass new language laws wholesale. The argument consisted of these four steps, with variations in each policy area:

- Channeling language needs into civil rights laws rather than developing an express language or multiculturalism policy
- Shifting characterization of language minorities and LEP persons from racial minorities to national origin minorities
- Singling-out Asian and Latino language minority groups, rather than including white or ethnically-based national origin minorities
- Defining discrimination on the basis of national origin broadly in informal policy guidance and seeking ambitious remedies for language rights violations from courts

⁹⁰ Subsequent language rights decisions took a variety of forms that paralleled the general development of equality jurisprudence and the Civil Rights Act. Under Title VII, for example, the theories migrate over time from “intentional discrimination,” to “disparate impact,” to “harassment” and to “hostile work environment.”

CHAPTER 3 BUREAUCRATIC ENTREPRENEURSHIP AND THE CONSTRUCTION OF NATIONAL ORIGIN DISCRIMINATION

This dissertation examines the mid-century transformation of civil rights laws as an instance of legal change. The next two chapters describe the policy pathways that led to the emergence of language rights. My overall account for rights expansion posits that change took place in two-steps following statutory enactment. The first part contends that bureaucratic entrepreneurs read into the “national origin discrimination” provisions of federal civil rights statutes a right to language access. While rights are typically constructed in Congress or the courts, this dissertation argues that the rising prominence of regulatory agencies in the wake of civil rights reforms brought with it shifts in the bureaucratic opportunity structure that created an opening for language rights; expansive agency interpretations of civil rights statutes were the engine of legal change. The second part seeks to explain why statutory and regulatory requirements for language access became stronger in public education and voting than in the workplace. It contends that policy interpretations were dependent on courts for their validation and enforcement. Federal courts’ willingness to defer to agency constructions of language rights were responsible for variations in the strength of language rights across public policy arenas. Even where courts did not rule directly, though, the law mattered in indirect ways. Step 1 is described in Chapter 3; step 2 is described in Chapter 4.

To illustrate the processes animating the construction of language rights, I present in this chapter two case studies in which policy entrepreneurs expanded upon the textually ambiguous “national origin” provision of the Civil Rights Act of 1964 to require language access for predominantly Chinese-speaking and Spanish-speaking language minorities. In the first case study, the US Department of Education, Office for Civil Rights (OCR) gave an expansive interpretation to Title VI in its 1970 policy guidance⁹¹ that subsequently garnered support from the Supreme Court and Congress. Consequently, the agency set in motion a transformation of Title VI to include an affirmative duty for schools to provide language access to limited English proficient (LEP) students. In the second case study, the US Equal Employment Opportunity Commission (EEOC) similarly adopted a broad interpretation of the Civil Rights Act in its 1970 and 1980 Guidance on National Origin Discrimination. However, the reluctance of judges to defer to the EEOC constructions rendered them vulnerable against competing interpretations and challenges in appellate courts. An alternative pathway is presented in the story of the Voting Rights Act. This final case study reminds us that the norm for legal change is the path of statutory amendment, not regulatory rights-making. The addition of language protections through amendments to the Voting Rights Act did not rely on bureaucratic interpretation or elaboration.

⁹¹ Reflecting its multiple authors during difference phases of its production, the Title VI national origin policy guidance is alternately called the May 1970 memo, the Gerry memo, the Pottinger memo, or the OCR memo.

Yet bureaucrats in the Department of Justice (DOJ) were no less entrepreneurial and, indeed, took an anticipatory role by drafting many of the legislative amendments providing for language rights. In the context of the broader argument, these three case studies illustrate themes and variations of bureaucratic entrepreneurship as an explanation for the creation of language rights.

Section 1 Regulatory Implementation of “National Origin Discrimination”

Very few social scientists have written about the legal aspects of policy implementation. Among the exceptional few who have, Malcolm Feeley and Ed Rubin demonstrate that courts advanced social policy by developing their administrative capacities for prison reform, and Shep Melnick demonstrates that judicial interpretation was the key to implementation of welfare reform in states. In subsequent work, Melnick describes the rise of a “Civil Rights State” that powered mid-century advances in racial equality and joined courts and agencies in a symbiotic effort to enforce civil rights statutes.⁹² Courts, agencies, and legal activists aspired to make legal rights real in the administrative state. Charles Epp characterizes a similar organizational interplay in after civil rights were enacted as a decades-long struggle over the “practical” meaning of those rights.⁹³ Epp describes 1970s reforms — targeted at police misconduct, sexual harassment, affirmative action, and playground safety — as congealing into a common policy framework called *legalized accountability*. The essence was a law-styled attempt to bring bureaucratic practice into line with emerging legal norms. The motivation of reformers represented an “aspiration to make rights ‘real’ in the administrative state.”⁹⁴ The process of doing so involved a “politics of rights” in which public and private organizations battle over the practical meaning of the civil rights revolution.⁹⁵

⁹² Melnick, Great Debate, *supra* note 24.

⁹³ CHARLES EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE (2009).

⁹⁴ *Id.*

⁹⁵ The account of institutional activists within the bureaucracies departs in key respects from leading theories of law and bureaucratic change. Policy-centered theorists, among them Robert’s Kagan’s adversarial legalism thesis, observe that activist litigation places intense pressure on agencies, forcing them to adopt policies that are contrary to their professional administrators’ better judgments. Kagan, *supra* note 80. Lauren Edelman’s legal endogeneity thesis argues that from the vantage point of organization theory that bureaucratic managers, responding to ambiguous liability messages, craft administrative policies that are little more than empty symbolism. Edelman, Erlanger, and Lande, *supra* note 20; Edelman, *supra* note 20. Missing is how activists shaped professional administrators’ interpretations of and response to liability. Contrary to organization-centered theories, Epp’s research shows that legalized accountability’s roots grew as much from activist ideas and pressure as from managerial ones. Epp, Making Rights Real, *supra* note 92. In contrast to policy-centered theories, he shows that practicing professionals came to see those formerly radical reform initiatives as a valuable contribution to professionalism itself. *Id.* Malcolm Feeley and Edward Rubin, in *Judicial Policy Making and the Modern State*, have shown how judges and administrators collaborated to reform prisoners, often over the initial opposition of these agencies. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS (2000).

My account of rights expansion within regulatory agencies builds on their theoretical frameworks. Like Melnick and Epp, I stress the entrepreneurialism of institutional activists such as civil servants who – sometimes willingly, sometimes reluctantly – drew upon legal strategies once civil rights statutes were adopted. Like Feeley and Rubin, I contend that these institutional idealists were policy experts with extensive practical experience as professionals and lawyers; they proposed administrative reforms that celebrated fidelity to law as the key to fulfilling the purpose of civil rights statutes. My top-down account of bureaucratic entrepreneurship departs from bottom-up explanations attributing change to liberal legal activists from the NAACP Legal Defense Fund or social movements; it also differs from Gerald Rosenberg’s more traditional public policy model depicting Congress as the savior of civil rights.⁹⁶ While my research confirms that social movements and legal activists instigated official inquiries and contributed vital information, expertise, and networks to sustain official efforts, I submit that regulatory agencies were the most central and the most direct cause for the creation of language rights in their current form.

Many aspects of this account will seem surprising and unorthodox. Locating civil rights advances in policy elites, especially government elites, runs counter to well-established research on the civil rights era that prioritizes the role of nonstate actors like social movement organizations, interest groups, and public interest law firms. While the case studies do not deny the possible influence of social movements in setting the agenda, framing the claims, or otherwise prodding the government toward progressive ends, these case studies focus on the *translation* of social movement goals into established channels of policy-making and, more specifically, on the *construction of new civil rights* outside of courts and Congress.

Section 2 Regulatory Constructions of Language Rights in Schools, Work, and Voting

The process-tracing account of the development of language rights presumes that the policy-making process is a long arc with at least three phases (1) enactment of legislation, (2) interpretation as regulatory policy, and (3) construction of rights. The case studies in this section focus on the second moment and make the surprising claim that policy implementation is a creative process, not merely a technical one. The creation story of language rights shows that new possibilities for change arise even after path dependence has locked into black civil rights emphasizing formal equality and same treatment.

Case Study 1: OCR Policy Guidance Constructs Title VI to Require Bilingual Education

Racial inequities in schools constituted the front line in the struggle for equal opportunity. Racially segregated schools that were identifiably black or white posed the most glaring example

⁹⁶ See e.g. GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2008).

of state-supported inequality, but similar practices of racial segregation separated Mexican and Chinese children from mainstream public schools. Moreover, subtle forms of discrimination and sheer neglect left many limited English proficient school children *functionally* separate within schools that were not under court order or monitoring. As expanding notions of equal opportunity recognized that laws that were not overtly discriminatory could nevertheless have a disparate impact on protected minority groups, the administrative challenges of securing educational opportunity to non-black minorities became clear.

As relayed in Chapter 2, two of the groups presenting the greatest need for language accommodations in public schools were Chinese-speakers and Spanish-speakers. Of the two groups, the number of LEP Spanish-speakers in public schools is larger and the prevalence of bilingual education broader. However, Chinese students enrolled in the San Francisco Unified School District suffered language isolation that was arguably more severe than Spanish-speakers, even if not as widespread. Concentrated numbers of non-English speakers, both immigrants and native-born children of immigrants, attended segregated schools in Chinatown. Some were lumped together in English-speaking classrooms with other immigrants who spoke neither English nor Chinese, resulting in an incomprehensible tower of babble. Others were tracked into special education classes for the disabled: an environment inappropriate for language instruction. Most were completely excluded from mainstream English-language classrooms in light of these practices and the unavailability of Chinese-English bilingual teachers and curriculum, as compared with Spanish-English bilingual education available in other parts of the country.⁹⁷ While the Chinese and Spanish-speaking students were the two largest groups, language advocates revealed that similar problems existed for Japanese Americans, Filipinos, and Puerto Ricans in other pockets of the country. Frustration with the illusory promise of educational opportunity announced in *Brown* led to the 1968 filing of a lawsuit against the San Francisco Unified School District, *Lau v. Nichols*, in the Northern District of California.

On behalf of the Chinese-speaking students and in cooperation with community activists, Legal Aid attorney Ed Steinman challenged the San Francisco Unified School District's language policies, or the lack thereof, in Chinatown schools. His opening brief characterizes the school district's practices as benign neglect, not borne of intentional discrimination but nevertheless barring Chinese students from educational instruction. It alleged that the denial of education on the basis of language exclusion violated the 14th Amendment, California's Constitution, and a number of city codes and school district policies. The main innovation on past equality law was to claim that ensuring equal opportunity may require more than the same treatment for

⁹⁷ See DON NAKANISHI AND TINA NISHIDA, *ASIAN AMERICAN EDUCATIONAL EXPERIENCE* (1995) for a more comprehensive social history of the *Lau* litigation and Chinatown school conditions.

differently-situated students. Schools were held responsible for taking affirmative steps to accommodate these differences.⁹⁸

Shortly after Steinman’s lawsuit reached decision in federal district court, the US Department of Education, OCR issued its policy guidance (known as the May Memo) calling for an administrative response. According to Steinman, there was little coordination between the Legal Aid’s strategy and the OCR policy response. Steinman became aware of the OCR memo shortly before *Lau* was to be decided yet after oral arguments had closed.⁹⁹ In any case, either of their own accord or in response to community pressure, the US Department of Education, OCR amassed significant evidence regarding the “systematic lower achievement of minority groups and existence of large numbers of segregated ability-grouping and special education classes”¹⁰⁰ in the course of its case investigations. The agency endeavored to develop an administrative strategy to combat “common practices that have the effect of denying equality of educational opportunity to Spanish-surnamed pupils” in breach of Title VI.¹⁰¹ In consultation with MALDEF, bilingual educators, and education psychologists, OCR began to research policy solutions to these problems that would benefit from administrative support. On May 25, 1970, under the authorship of Leon Panetta and then Stanley Pottinger’s assistant, Martin Gerry, OCR released its Guidelines on National Origin Discrimination. The memo set forth highly specific procedures for schools to develop and assess their own bilingual education programs. The interpretive guidelines require a school to take “affirmative steps” to rectify language deficiencies of national origin minority students. The goal was to open up its instructional program to these students, wherever the “inability to speak and understand the English language

⁹⁸ A legal history of the *Lau v. Nichols* litigation is contained in Moran, *supra* note 67. My account focuses on the administrative response to the needs of LEP students rather than the judicial response that Moran focuses on or the grassroots response that Nakanishi focuses on.

⁹⁹ Although his recollection is vague 30 years later, Steinman recalls a phone call from someone at OCR alerting him that the memo, which had been in the works for more than a year, would soon be issued. This account matches with unofficial accounts from OCR’s regional attorneys in San Francisco and is not inconsistent with published accounts of the *Lau* litigation. Interview with Ed Steinman, former attorney for Kinney Lau, in San Francisco (November 25, 2008). According to Paul Grossman (now Chief Civil Rights Attorney in OCR’s San Francisco field office, then a staff attorney), the language rights theory came from San Francisco and travelled to national headquarters with Martin Gerry, Leon Panetta, and Stan Pottinger, who were all from the Bay Area. Interview with Paul Grossman, OCR Attorney, in San Francisco, California (August 4, 2008). It may have been mere coincidence that the San Francisco OCR office was located just blocks from Steinman’s Legal Aid office and got wind of the as-of-yet insignificant lawsuit. In any case, Steinman claims that he took responsibility for drafting the district court order and delayed filing it until the OCR memo became public so that he could cite it as persuasive authority. Interview with Paul Grossman, Chief Civil Rights Attorney, OCR, in San Francisco, CA (August 4, 2008); Interview with Ed Steinman, Professor at Santa Clara Law and former attorney representing Kinney Lau, in San Francisco, CA (October 2008).

¹⁰⁰ 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.

¹⁰¹ Stanley Pottinger. “Memorandum to School Districts With More Than Five Percent National Origin-Minority Group Children.” Department of Health, Education, and Welfare – Office for Civil Rights. May 25, 1970. NARA Pacific. RG 276.

excludes English language learners from effective participation in the educational program offered by the school district.”¹⁰² As interpreted by OCR, the affirmative protections encompassed a right to access public education through the integration of LEP students into mainstream classrooms, the development of transitional language courses, and bilingual-bicultural curriculums that maintain and even promote minority languages.

The Title VI national origin anti-discrimination clause giving rise to the May 1970 memo prohibits discrimination “on the basis of race, color, or *national origin* under any program or activity that receives federal financial assistance.”¹⁰³ This interpretation was written into informal policy guidance – officially “interpretive” under the Administrative Procedure Act – that came to be used as the standard for measuring compliance with Title VI. The basis for interpretive policy is contained in two implementation provisions. Section 601 requires that entities receiving public funds comply with Title VI. In light of the enormous increase in federal aid to public schools, the attendant possibility of terminating funding served as a strong incentive to compel compliance. Section 602 authorizes federal agencies to issue substantive rules explaining how Title VI requirements apply to the particular programs they fund. It ultimately provides an administrative alternative to litigation and an end run around the “painfully slow and costly process” of remedying desegregation in courts.¹⁰⁴ Hugh Davis Graham calls Title VI “the greater sleeper provision” of the Civil Rights Act of 1964.¹⁰⁵ Although little attention was paid to it during an otherwise lengthy debate that focused on Title VII, it would become by far the most powerful weapon of them all.

Eventually, the litigation-based and regulatory-based challenges to ESL tracking came to a head in the Ninth Circuit in 1973, when OCR intervened on the side of the Chinatown students in the *Lau* appeal, arguing that the agency had an interest in ensuring that the San Francisco Unified School District follow its Title VI guidance. The Ninth Circuit court order summarily affirmed the Northern District Court decision siding with the San Francisco Unified School District rather

¹⁰² The *Lau* memo endeavored to combat “common practices that have the effect of denying equality of educational opportunity” to Spanish-surnamed pupils” in breach of Title VI. There were three main provisions: (1) “Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students”; (2) children were not to be placed in remedial programs on the basis of language skills, and any ability grouping connected with language deficiency “must be designed to meet... language skill needs as soon as possible and must not operate as an educational dead-end or permanent track”; (3) parents were to be kept informed of school activities through notification “in a language other than English.” OCR May 1970 policy guidance on discrimination against national origin minority students. Federal Register Doc. 70-9236; Filed, July 17, 1970; Office of the Secretary, US Department of Health, Education, and Welfare, “OCR NEWS”, May 25, 1972. NARA Pacific. RG 276.

¹⁰³ Civil Rights Act of 1964, Title VI. 42 U.S.C. § 2000d, et seq (1964).

¹⁰⁴ Congressional record for the Equal Educational Opportunity Act of 1974, 20 USC § 1701 et seq. (1976).

¹⁰⁵ Graham, Civil Rights Era, *supra* note 14.

than the *Lau* plaintiffs: “Every student brings to the starting line of his educational career 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. That some of these may be impediments which can be overcome does not amount to a denial by the Board of educational opportunities within the meaning of the Fourteenth Amendment.”¹⁰⁶ The Ninth Circuit declined to rehear the case *en banc*, before a full panel of appellate judges, instead sending the case to the Supreme Court.¹⁰⁷

Before the Supreme Court, Ed Steinman and Stan Pottinger (representing the OCR in his new position within the Department of Justice, alongside Solicitor General Robert Bork) split their oral argument into two parts: Steinman argued that San Francisco Unified School District practices violated the Equal Protection Clause of the 14th Amendment, and Pottinger argued that they violated Title VI as it was interpreted by the OCR. The dominant issue during oral argument concerned the agency interpretation of Title VI, not the Equal Protection Clause. The OCR pleaded, and the Court accepted, that the “determination of the constitutional issue in this case need not control the disposition of the statutory question” because Title VI is “neither dependent upon nor necessarily coincident with the Equal Protection Clause of the Fourteenth Amendment.”¹⁰⁸ The OCR defended its regulatory authority in several ways, even though *Skidmore* is never explicitly cited.¹⁰⁹ First, the OCR builds the case for agency deference by citing prior instances in which its rulemaking authority had been upheld.¹¹⁰ Second, it alluded to the origins of the May 25 memo in compliance reviews¹¹¹ as evidence of the agency’s expertise in the matter. Third, it justified its threat of cutting off funding to public schools under Section

¹⁰⁶ 483 F.2d at 797-98. Ed Steinman supported this interpretation, saying that everybody knew the case would be going up on appeal given the important legal issues presented (regardless of the plaintiffs’ likelihood of securing victory in a lower court). Interview with Ed Steinman, former attorney for Kinney Lau, in San Francisco (November 25, 2008.)

¹⁰⁷ Judge Shirley Hufstедler, who would later become President Carter’s Secretary of Education, filed a spirited dissent to the Ninth Circuit court order to rehearing *en banc* likening language barriers to state erected walls of brick and mortar in *Brown*. In a memorable quotation, she says that the Equal Protection Clause is “not so feeble as to wash away invidious discrimination because the able-bodied and the paraplegic are given the same command to walk.” June 1973 Ninth Circuit Order Rejecting Request for *En Banc* Consideration, Hufstедler dissent. *Lau v. Nichols*. Case no. 26155. Ninth Circuit Court of Appeals (1973), NARA Pacific. RG 276. Judge Hufstедler would later become the Secretary of Education under President Carter, overseeing the administration of the *Lau* remedies.

¹⁰⁸ Petitioner’s Brief, *Lau v. Nichols*, Case No. 26155, (9th Cir 1973), 414 US 563 (1974).

¹⁰⁹ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), is the leading case on judicial deference to informal agency rulemaking, in the absence of a clear statute. The level of deference afforded an agency’s interpretation of its enabling statute turns on the thoroughness evidenced in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and “all those factors which give it power to persuade, if lacking power to control.” See e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (quoting *Skidmore v. Swift*.)

¹¹⁰ Citing *US v. Jefferson County Board of Education*, 372 F.2d 836, a parallel lawsuit defending OCR’s desegregation strategy, and *Traficante v. Metro Life*, 409 US 205.

¹¹¹ Jorge Rangel & Carlos Alcalá, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 2 (1972) (linking migration study to Mexicans’ study, linking both to OCR compliance reviews, and linking compliance reviews to May 25 memo).

602. In defense of its authority for the guidelines, the OCR pointed to Title VI itself and the Fifth Circuit’s announcement that it would give “great weight” to OCR’s guidelines” in *US v. Jefferson County* (5th Cir 1966).^{112, 113} Their interpretations were backed by the National Education Association, which stated in an amicus brief that the OCR “regulations have the force of law.”¹¹⁴

The Supreme Court majority concluded in a unanimous opinion, “Where inability to speak and understand the English language excludes national origin minority group children from... school[s], the district must take *affirmative steps*... to open its instructional program to these students” (emphasis added). While it did not explicitly comment on the rulemaking authority of the OCR, the concurrence spelled out the reasoning. The concurring opinion squarely rests these bilingual education on regulatory grounds, posing as “the critical question” whether the regulations and guidelines promulgated by OCR go beyond the authority of § 601 or § 602. It asserts that departmental regulations and “consistent administrative construction” of remedial legislation are “entitled to great weight.”¹¹⁵ The implication is creating significant regulatory power, with uncertain outcomes. In either case, the effect of the Supreme Court decision was to endorse the OCR’s substantive interpretation of Title VI and Congress’ subsequent codification of *Lau* in the Educational Equality and Opportunity Act of 1974 reinforced the Supreme Court’s findings and, by extension, OCR’s. OCR aggressively enforced their guidelines, with ten districts lined up for compliance reviews in 1970 alone and many more later added.

The *Lau* decision wound up being a victory for regulatory authority, even more than a victory for language minorities or bilingual education. Chapter 4 will elaborate on the role of courts amplifying agency actions, but this case study has demonstrated the leadership of the OCR.

¹¹² Although the Supreme Court oral argument preceded the landmark administrative law case outlining the procedures for agency deference, *Chevron U.S.A. v. National Resources Defense Council*, 467 US 837 (1984), and thus would not be bound by them, they roughly follow the two-step analysis of agency authority and agency expertise.

¹¹³ 372 F.2d 836 (1966).

¹¹⁴ Other amicus briefs were filed on behalf of plaintiffs by the National Education Association, the San Francisco Lawyer’s Committee for Urban Affairs, the Center for Law and Education, the Puerto Rican Legal Defense and Education Fund, the Mexican American Legal Defense and Education Fund, the American Jewish Committee, the Childhood and Government Project, and the Chinese Consolidated Benevolent Association. NARA Pacific. RG 276.

¹¹⁵ Petitioner’s brief, *Lau v. Nichols*, Case No. 26155. (9th Cir 1973), 414 US 563 (1974).

Case Study 2: EEOC Guidance Fails to Construct Title VII Prohibition on English-Only Policies

In employment discrimination law, the US Equal Employment Opportunity Commission failed to secure similar language rights for workers under the Civil Rights Act of 1964 despite the agency's similarly entrepreneurial efforts to interpret prohibitions on national origin discrimination as provision of language protection. LEP workers entered the workforce on uneven ground. Among those possessing legal status and basic job qualifications, many prospective employees lacked language abilities that would make them competitive in the context of a skills test or an interview administered in English. If hired, their language limitations might impede career progress or lead to harassment by coworkers and supervisors. Employers sometimes formalized their expectations for an English-speaking work force by enacting policies mandating the use of English at work; some of these policies prohibited the use of other languages, even during off-hours or with coworkers. Language disadvantage was compounded by the singling-out of accents and language as a proxy for race, ethnicity, or legal status.¹¹⁶ These inequalities stymied economic advancement and reinforced existing inequalities.

Title VII became the vehicle for rectifying the disadvantage of LEP workers. Title VII governed equal opportunity in private employment, and it was the centerpiece of the landmark Civil Rights Act of 1964. It regulated the hiring, firing, and workplace practices of private employers and created an independent commission to ensure that those employers did not run afoul of antidiscrimination laws. Against a backdrop of social unrest, Congress debated the substance and structure of the EEOC during the last year of the Kennedy administration and into the Johnson Administration.¹¹⁷ Many political compromises were involved in the passage of the Civil Rights Act. Overcoming years of bickering and bargaining required overlooking weaknesses in Title VII implementation and enforcement powers. Congress limited the EEOC's

¹¹⁶ Accent litigation and English fluency cases represent the cutting edge of national origin-based language discrimination cases. Many of these cases have been filed by Chris Ho on behalf of the Employment Law Center-Legal Aid Society's National Origin Project in San Francisco. Interview with Chris Ho, ELC-LAS attorney, in San Francisco (multiple occasions in 2008-2010).

¹¹⁷ The EEOC was an independent, bipartisan five-person commission created for the specific purpose of consolidating and enforcing antidiscrimination provisions in the workplace that had previously been dispersed among the Department of Justice, the Department of Labor, and Federal Contracts. Hugh Davis Graham's magisterial history book, *The Civil Rights Era*, is perhaps the most authoritative text on the EEOC. Graham, *Civil Rights Era*, *supra*, note 13. More recent histories have been written about various aspects of the EEOC's work. *See generally* Farhang, *supra* note 44; Lieberman, *supra* note 49; Skrentny, *Ironies*, *supra* note 24; Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965-1971*, 110 AMERICAN JOURNAL OF SOCIOLOGY 709-760 (2004). The EEOC's website (www.eeoc.gov), Annual Reports, Administrative History (1969), and Anniversary Publications provide much of the early history recounted in this section.

influence, in part, by restricting its authority to issue substantive rules akin to Section 602 of Title VI.¹¹⁸ According to Section 713, Title VII rulemaking needed to be procedural (a.k.a. interpretive), merely interpreting statutory requirements rather than empowering the agency to fashion regulatory requirements calculated to fulfill statutory aims. This limitation proved consequential given the many places where Title VII lacked clear definitions. Canons of interpretation specify that when statutory text is ambiguous, agencies should turn to legislative history. The Congressional record shows little discussion of the national origin provision, though, so the EEOC entered a relatively open field. Representative Roosevelt attempted to provide a definition by saying, “May I just make clear that national origin means national. It means the country from which you or your forebears come. You may come from Poland, Czechoslovakia, England, France, or any other country.”¹¹⁹ Courts subsequently interpreting the legislative history were inconclusive about legislative intent. In the only Supreme Court case to ever interpret national origin, *Espinoza v. Farah Manufacturing*,¹²⁰ the Court constrains itself to a cramped definition of national origin and opines that the record on the meaning of national origin is “quite meager in this respect.”¹²¹

Under Chairman William Brown, the EEOC released its first specific Guidance on National Origin Discrimination in 1970. The 1970 policy guidance on national origin announced the Commission’s awareness of “widespread practices of discrimination on the basis of national origin” and its intention “to apply the full force of law to eliminate such discrimination.”¹²² It defines Title VII’s national origin discrimination to mean the denial of employment due to “an individual’s, or his ancestor’s, place of origin; or because the individual has cultural, *linguistic* or physical traits of a national group”¹²³ and provides as an example of discrimination on the basis of linguistic traits “the use of tests in the English language where the individual tested came from circumstances where English was not that person’s first language or mother tongue, and where English language skill is not a requirement of the work to be performed.”¹²⁴ The Federal Reporter in which the guidance appears does not contain prefatory remarks or summaries of public hearings that precipitated the release of the 1970 Guidelines. Consequently, there is little direct evidence about why the Commission chose to include linguistic traits in the original

¹¹⁸ Anecdotally, the liberal architect of key civil rights and immigration reforms, Emmanuel Celler, is credited with removing the substantive rule-making powers. Most likely, he proposed removal as a compromise to secure passage of the core provisions of the Civil Rights Act of 1964.

¹¹⁹ 110 Cong. Rec. 2549 (1964).

¹²⁰ 414 US 424 (1971).

¹²¹ The Court additionally specified that national origin was not equivalent to citizenship, requiring that prior EEOC guidance that was murky on this point be changed. Justice Brennan’s concurrence in *St Francis College v. Al-Khazraji*, 481 US 614 (1987), in contrast, says that the line between ancestry and national origin discrimination is not a bright one, and that the two often coincide.

¹²² EEOC, 1970 Guidelines on Discrimination on the Basis of National Origin, 35 Fed. Register 421 (Jan. 13, 1979).

¹²³ *Id.*

¹²⁴ *Id.*

national origin discrimination definition or to focus on English-only tests as a primary example. Contextual research reveals that the EEOC had previously released guidelines on three other issues, in an effort to establish clear standards for the resolution of its growing number of charges, and that the guidelines on testing and selection criteria brought attention to the relevance of language ability to hiring.¹²⁵ Support for guidelines addressing language may have come from a Spanish-speaking program that operated within the EEOC during the 1970s.¹²⁶

Other than linking language to national origin, the Commission took a safe route navigating the uncharted waters of proving national origin discrimination by importing established theories of liability from race and sex cases into its jurisprudence: discriminatory intent, disparate treatment, and adverse impact. Exceptions were made when an employer's preference for a particular national origin is a *bona fide occupational qualification* that is "reasonably necessary to the operation of that business or enterprise." The business necessity part of the exception was construed narrowly: the BFOQ needed to contribute to the "safety and efficiency" of the business.¹²⁷

The EEOC consistently took the stance that English-only policies constituted *prima facie* discrimination, but it often met resistance in courts.¹²⁸ For example, in one of the earliest published cases to challenge English-Only Workplace Policies based on their disparate impact, a Texas district court left the policy in place. In *Saucedo v. Brothers Well Service*,¹²⁹ the employer Brothers Well dismissed Saucedo, a Mexican-American employee, for asking his co-worker where to place a heavy metal pipe in Spanish. Brothers Well claimed that the deviation from English jeopardized the safety and teamwork of its employees. The court recognized that a rule that Spanish cannot be spoken on the job "obviously" has a disparate impact upon Mexican American employees "because most Anglo-Americans obviously have no desire and no ability to

¹²⁵ EEOC Administrative History (1969). Held at LBJ Library; EEOC Headquarters Library, FOIA Reading Room.

¹²⁶ The Spanish-speaking program is described in the Tenth Annual Report for the EEOC titled "A Decade of Equal Employment Opportunity: 1965-1975." EEOC Headquarters Library. The program engaged in community outreach, internal trainings for the EEOC, and produced several international documents and compliance manuals.

¹²⁷ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C. (1964).

¹²⁸ English-only rules in the workplace represent, in many ways, the private sector's rendition of laws such as the failed proposal by Senator Hayakawa to amend the US Constitution to declare English as the official language or the successful proposal by California to ban bilingual education. Whereas the official English movement is largely symbolic, however, English-only workplace rules have very practical implications. Communication skills often go to the heart of job qualifications usually left to the discretion of private employers. So unlike policy arenas concerning threshold rights to education or political participation (which apply to all citizens), workplace equality applies only to workers deemed sufficiently skilled and qualified for a job. Without a background entitlement to work – in any job – workers unfairly disqualified from jobs on the basis of their language skills are at risk for unemployment and associated poverty. Mark Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849 (1995).

¹²⁹ *Saucedo v. Brothers Well Service*, 464 F. Supp. 919, 922 (S.D.Tex 1979)

speak foreign languages on or off the job.”¹³⁰ While the policy was inappropriately applied to during Saucedo’s break, the policy as justified because it related to the safety of the business enterprise.

Similarly, a 1980 challenge suffered from the lack of an official EEOC policy on English-only policies. In *Garcia v. Gloor*,¹³¹ a bilingual employee was discharged from a lumber supply store for speaking Spanish in violation of a company policy prohibiting the use of Spanish, unless with a Spanish-speaking customer. The plaintiff, Hector García, claimed that his language was a defining characteristic of his national origin so that being denied the right to speak in his preferred language qualified as discrimination on the basis of national origin. Amicus briefs from the EEOC, whose staff included Vilma Martínez, the former President of MALDEF, and leading Latino civil rights organizations sought a broad ruling to protect bilingual workers from language discrimination. The Fifth Circuit ruled against García on the question of who had authority to interpret the national origin protection when “neither the statute nor common understanding equates national origin with the language that one chooses to speak.” While the court acknowledged that in some circumstances “language may be used as a covert basis for national origin discrimination,” it held that the English-only rule was not applied to García by the Gloor Company for this purpose. The plain language of the statute did not establish the meaning of “national origin discrimination,” so the EEOC’s interpretation was not necessarily incorrect, but the Court questioned the EEOC’s authority to set forth its own interpretation of the statutory term. Its skepticism was based on the failure of the 1970 Guidance on National Origin Discrimination to speak squarely to English-only policies, despite the Guidelines’ enumerated examples on English language tests, and the EEOC’s absence of substantive rulemaking powers.

The EEOC promptly and unanimously responded to *Gloor* by revising its 1970 guidelines to explicitly address English-only policies in the fall of 1980.¹³² The Commission, chaired by Eleanor Holmes Norton, released its proposed Guidelines during Hispanic Heritage Week. The Guidelines accomplished two things. First, the Guidelines reaffirmed the Commission’s 1970 definition of national origin discrimination as denial of equal employment opportunity because of an individual’s linguistic characteristics.¹³³ Second, the Guidelines made English-only rules

¹³⁰ *Id.*

¹³¹ 618 F. 2d 264 (5th Cir. 1980)

¹³² Minutes of the open session meetings regarding the National Origin Discrimination Guideline Revisions and internal memoranda from the Executive Secretariat from August to December 1980 reveals that the bulk of the discussion concerned the scope of the business necessity exception to EEOC prohibitions of English-only rules and the construal of English-only rules as harassment. Tapes of the closed sessions were not retained by the Executive Secretariat, but the unanimous votes in open session suggest that the Commissioners were unified in support. (Information obtained through author’s FOIA requests in 2009 and 2010.)

¹³³ 29 CFR section 1606.

prima facie evidence of discrimination, lowering the burden on employees to prove discrimination. The strong push to introduce the Revised Guidelines during Hispanic Heritage Week suggests that the Commission meant to rehabilitate the reputation of the agency after being undercut by *Gloor*. Commissioner Norton offered a balanced justification for their release declaring, “This is another instance where guidelines, by spelling out existing requirements of law, not only protect complainants but help employers prevent violations and assist courts in reaching fair decisions.”¹³⁴ The EEOC sought public reaction to its proposed guidelines through press releases and 60-days of publication in the Federal Reporter.¹³⁵ According to the prefatory remarks that precede the published Guidelines (and my own count), more than 250 public comments were received, with a strong representation of small business owners and private citizens worrying about maintaining cohesion in a multi-lingual workplace and about the inefficiency of conducting business in multiple languages. Commissioner Carmen Rodriguez directly solicited MALDEF in order to balance the perspectives. MALDEF principally endorsed the Guidelines calling them “positive, if modest steps” toward articulating standards for national origin, which otherwise experienced weak enforcement as an “orphan” among protected classes.”¹³⁶ MALDEF especially lauded the “close scrutiny” of total bans, the narrow construction of BFOQs, and the explicit recognition that an “individual’s primary language is often an essential national origin characteristic.”¹³⁷ However, it pressed the Commission to go farther in opposing *Garcia v. Gloor*, urging the EEOC “to reply on its own administrative expertise” and “to expressly repudiate *Gloor* and its reasoning.” They reminded the EEOC that it was not legally bound to follow the Fifth Circuit’s position. Despite broad support for the MALDEF interpretation among advocacy groups and the US Commission on Civil Rights, the EEOC played it safe: it asserted no “actual conflict” in its substantive ruling because *Gloor* did not address absolute prohibitions of primary language. The EEOC instead focused on the locus of interpretive authority, stressing its longstanding and continuous stance on language derived from handling numerous charges that were likely to rise in number given the growth of the LEP population.¹³⁸ In direct response, *Regulation* magazine criticized the EEOC’s “questionable administrative interpretation(s)” of Title VII as a “gradual and elusive” process of extending

¹³⁴ Press release of the EEOC. Held in the 1980 Public Hearings volumes and folders on media clippings at the EEOC Headquarters Library.

¹³⁵ Federal Reporter on the Final Guidelines. 45 Fed Reporter 85632 (12/29/90).

¹³⁶ Letter from President-General Counsel of MALDEF Vilma Martinez (Nov 14, 1980). MALDEF Archives.

¹³⁷ MALDEF also sought to substitute, for the EEOC’s use of the term “primary” language, the term “native language,” in order to reflect the multilingualism of the Spanish-speaking population and the preference of many bilingual employees to use Spanish. They also sought to define “national origin” to exclude white ethnics, including European Spaniards from outside the Western Hemisphere. They were unsuccessful in these attempts. MALDEF Archives.

¹³⁸ This continues to be the thrust of the EEOC interpretation in its 1984 Compliance Manual (since reissued several times) and in policy statements from the Office of Legal Counsel following the *Maldonado v. City of Altus* decision. 433 F.3d 1294 (10th Cir. 2006). See e.g. Statement of EEOC Legal Counsel Reed Russell on English-only Policies to the US Commission on Civil Rights (Dec 12, 2008). Provided by EEOC OLC attorney Ernie Haffner to author. (September 2010).

national origin protection to language problems: “Yesterday’s tentative suggestions become today’s hardened dogmas, the shift in emphasis never being squarely presented for public debate and no one at a high level of political accountability ever taking clear responsibility for the new approach.”¹³⁹

Judicial deference to EEOC Guidelines is a continuing dispute in matters of both policy and law. As will be elaborated in the discussion of judicial responses (Chapter 4), circuit courts subsequently split on the EEOC’s substantive interpretations after *García* and the 1980 revised guidance on national origin discrimination.¹⁴⁰ The legacy of the EEOC language policy is mired in its weak implementation powers, decentralized enforcement mechanisms, and legal constraints. Their policy statements consequently stop short of being transformed into regulatory rights. However, it was the reluctance of judges to defer to the EEOC constructions that rendered them vulnerable, not a lack of agency capacity or effort.

Case Study 3: Construction of Language Rights in Voting via Legislative Amendment

The final case study investigates a different set of circumstances to explore what might have been. The voting rights case study illustrates an instance where a civil rights agency drew upon existing legislation to *anticipate* revisions during subsequent legislative amendment. The case presents an alternative pathway to language rights that neither required nor involved the exercise of *reactive* regulatory discretion. I present this alternative pathway last for temporal reasons and conceptual reasons. As a matter of timing, federal requirements for bilingual ballots grew out of the 1975 Voting Rights Act (VRA) and, thus, were conjured by the DOJ/Congress relatively later than both the OCR conjured its 1970 Guidance and the EEOC conjured its 1970 Guidance. Conceptually, the language provisions of the 1975 VRA emanated from two policy feedback loops in which bureaucrats played an entrepreneurial role. Most directly, they grew from the administrative response to the 1965 predecessor voting legislation. Less directly, they were precipitated by the DOJ Assistant Secretary Stanley Pottinger’s support for bilingual education based on his experiences with *Lau v. Nichols* and the EEOA. The role of the DOJ in prompting the Congress to extend the Voting Rights Act to language minorities introduces a twist on policy

¹³⁹ In the same Winter 1980 issue of Regulation magazine that criticized the OCR, the staff criticized the EEOC for both its affirmative action and language rights policies. Comparing the OCR regulations supplying an affirmative duty to accommodate language minorities to hiring quotas, it took offense at what it perceived as “a questionable administrative interpretation.” Bilingual Education: The New Accent in Civil Rights Regulation, REGULATION 5-8 (1980).

¹⁴⁰ See e.g. *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988) (ruling for plaintiff on disparate impact theory) and *Garcia v. Spun-Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (ruling against plaintiff on same theory). Cf. *Jarado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (1987), in which a federal court ruled against a Spanish-speaking disk-jockey at a Californian radio station because the station’s policy of only broadcasting in English did not constitute disparate treatment and recent charges claiming that English-only policies contribute to a hostile work environment.

development. Rights do not always – indeed, they do not typically – flow from agencies. However, even where rights emerged from legislative processes, bureaucratic entrepreneurship can be detected.

As is well known among civil rights scholars, the initial enactment of the 1965 Voting Rights Act originated from massive social protest. Frustrated with the barriers to voting that remained following passage of the Civil Rights Act of 1964, civil rights protesters opposing African-Americans' inability to register to vote marched from Selma to Montgomery, Alabama. Before they could even cross the bridge, police and state troopers disrupted the peaceful protest with tear gas, attack dogs, and brutal violence. Televised images of this shocking and unprovoked outburst, nicknamed "Bloody Sunday" for its horrors, impressed upon a nation the urgent need for more robust federal voting rights legislation. President Lyndon B. Johnson responded quickly and decisively. He ordered then-Attorney General Nicholas Katzenbach to prepare "the goddamnedest toughest voting rights bill possible."¹⁴¹ The VRA of 1965 became law five months later, with bipartisan support, and has since become one of the most successful instances of civil rights legislation in this century. The success of the 1965 VRA is largely attributed to its substitution of "swift administrative relief" in the place of slow, costly enforcement in courts.¹⁴² For example, unlike most remedial measures, Section 5 of the VRA requires officials in covered jurisdictions to submit proposed changes in the electoral process to the DOJ for preclearance, or an administrative determination that the proposed change is not discriminatory *prior* to implementing those changes.¹⁴³

Overall success notwithstanding, ten years after the much heralded enactment of the Voting Rights Act of 1965, the US Commission on Civil Rights (USCCR) submitted to Congress a mixed report.¹⁴⁴ The USCCR, an independent investigative body, was commissioned to evaluate the status of minority voting ten years after passage of the original voting rights act. It presented extensive evidence that the VRA "contributed substantially to the marked increase in all forms of

¹⁴¹ Quoted in Chandler Davidson, "The Voting Rights Act: A Brief History." In *CONTROVERSIES IN MINORITY VOTING*, ed. Bernard Grofman and Chandler Davidson 192 (1992).

¹⁴² Congressional testimony on the insufficient DOJ resource for continuing with a litigation-based enforcement strategy. 42 USC § 1973(e) (1976).

¹⁴³ While proposals can be precleared by the D.C. courts or the DOJ, they are almost always submitted to the DOJ.

¹⁴⁴ For more on the early history of the US Commission on Civil Rights, see Foster Rhea Dulles, *The Civil Rights Commission: 1957-1965* (1968); Robert Anderson, "At the Hearings: An American Microcosm," 23 *New South* 2 (Spring 1968); Theodore Hesburgh, "Integer Vitae: Independence of the United States Commission on Civil Rights," 46 *Notre Dame Lawyer* 3 (Spring 1971). The USCCR was created by Congress in the 1957 Civil Rights legislation, alongside the Civil Rights Division within the DOJ, as an independent fact-finding body charged with investigating and reporting on civil rights and making recommendations to the federal government on how to fix the problems it uncovered.

minority [black] political participation.”¹⁴⁵ Reports showed that at the time of adoption, less than one-third of blacks were registered as compared with two-thirds of whites. Rates rose almost immediately. Registration of blacks in Mississippi increased from 6.7% before 1965 to 63.2% registration in 1970.¹⁴⁶ However, the USCCR proclaimed that “detailed examination of recent events reveals that discrimination persists in the political process.” Specifically, the USCCR found that “the problems encountered by Spanish speaking persons and Native Americans in covered jurisdictions are not dissimilar from those encountered by Southern blacks, and the VRA protects their rights as well.” Indeed, while data was scarce, the USCCR stated that apparently registration of Spanish speaking voters, Puerto Ricans, and Native Americans lagged behind that of blacks and well behind that of whites.¹⁴⁷ These groups were also unsuccessful electing representatives of their choosing.

The USCCR report advised Congress to consider amendments protecting Mexicans and other language minorities. Congress added 13 days of hearings and 34 witnesses to its renewal hearings in order to investigate the need to cover language minorities. Witness after witness testified that Latino voters experienced similar discrimination as blacks did. Some of these witnesses were Puerto Ricans, who were effectively penalized at the polls for the government’s insistence that Spanish be used in Puerto Rican schools and government.¹⁴⁸ Section 4(e) aimed to strike literacy tests that excluded Puerto Rican voters on the mainland as well. The eradication of literacy tests and provision of language assistance built on the 1965 VRA’s prior efforts to address “the problems of (native-born) English-speaking illiterates - those citizens who can speak but can neither read nor write English.”¹⁴⁹

Efforts to enlarge the coverage of voting reforms beyond Puerto Rican and Southern jurisdictions under Section 5 led to a nationwide ban on literacy tests in 1970. Spanish-speakers in the Southwest also confronted barriers to voting. Texas’ exclusion of Mexican voters was even more longstanding than exclusion of blacks from white primaries and included both the indirect effects of de jure segregation and overtly discriminatory efforts to stifle growing Mexican American activism through disenfranchisement. Among other problematic practices, Mexican Americans

¹⁴⁵ US COMMISSION ON CIVIL RIGHTS, VOTING RIGHTS ACT: TEN YEARS AFTER (1975) [hereinafter TEN YEARS AFTER]. In the course of the study, the Commission interviewed over 200 persons knowledgeable about the political process, visited 54 jurisdictions in 10 states, and reviewed information from the Department of Justice, the Lawyers Committee for Civil Rights Under Law (created by President Kennedy), the Voter Education Project, and the Joint Center for Political Studies. They also reviewed state election codes and judicial decisions for the 10 states.

¹⁴⁶ Data cited in Thernstrom, *supra* note 83; US Commission on Civil Rights, *supra* note 147.

¹⁴⁷ US Commission on Civil Rights, *supra* note 147 at 65.

¹⁴⁸ Congress had previously recognized the particular problem of Puerto Rican voters, who were educated in Spanish and were governed in Spanish but eligible to vote in mainland elections using English. Their experience with Puerto Ricans sharpened their focus on bilingual assistance for language minorities more generally.

¹⁴⁹ *Id.*

encountered barriers to participation like burdensome registration requirements, poll taxes and literacy tests, purging without adequate notification, voter intimidation, and violence. As the USCCR report put it, minorities experience the electoral process as an “obstacle course.”¹⁵⁰ In addition, bills from Representatives Jordon, Badillo, and Roybal aimed to protect Spanish-speaking individuals such as Hispanic whites, who were not clearly included in the “race or color” category at the time.

Congress additionally cited statistics showing that Spanish-speakers’ registration and voting rates were much lower than for other groups, as examples of the present effects of past discrimination. For example, tables taken from House and Senate Reports show that Spanish-speakers registered and voted at lower percentages than white ethnics and blacks.¹⁵¹

Figure 3.1. Reported Voter Participation and Registration of Persons of Voting Age, by Ethnic Origin: 1972.

Ethnic origin	All persons	% Registered	% Voted
German	16,010	79.0	70.8
Italian	5,900	77.5	71.5
Irish	9,863	76.7	66.6
French	3,275	72.7	63.2
Polish	3,355	79.8	72.0
Russian	1,605	85.7	80.5
English (UK)	19,400	80.1	71.3
Spanish	5,616	44.4	37.5
Negro	12,467	67.5	54.1
Other	46,855	74.1	65.9

Note: Numbers in thousands.¹⁵²

¹⁵⁰ US Commission on Civil Rights, *supra* note 147 at 65.

¹⁵¹ Notice Asian American voting behavior is not disaggregated in this table. Based on contemporaneous reports, however, it likely would show low participation. While these reports did not make it into the Congressional record, Chinatown activists Ling-Chi Wang recalled a survey that he had conducted for Dianne Feinstein in order to determine the percentage of Chinese voters in San Francisco. Comparing lists of Chinese-surnamed people with registrars of eligible-voters, he came up with a percentage far below 50%. Wang reports that this was the only report of its kind. It was not widely known or circulated, in part, because the California Secretary of State buried it. Interview with Ling-Chi Wang, Chinatown activist and Emeritus Professor U.C. Berkeley, in Berkeley, CA (January 31, 2010).

¹⁵² Table adapted from US Bureau of Census, Current Population Reports, October 1973, Series p.20, no.253.

While protections for Spanish-speakers covered the largest non-black minority group, representatives of other constituencies felt that it was necessary to further extend the franchise. The Stanley Pottinger, on behalf of the DOJ, pointed out that the singling out of a particular group was a “substantial departure from past civil rights legislation which has generally forbidden discrimination on account of ‘race or color,’ ‘race, color, sex, national origin, and religion’ or the like.”¹⁵³ Moreover, such a singling out may not be either justified or constitutional. He wrote: “It seemed clear that the Constitutionality of [the language provisions] would be strengthened by a broadening of the protected class to include American Indians and by the use of a generic description rather than by specifically naming it.”¹⁵⁴ Taking the advice to heart, Congress expressly adapted the special protections for Spanish-speakers to other language minority groups in section 203. The California delegation drew directly on *Lau* and the example of the Chinese as rationale for section 203: “If we substitute the word “voting” for “classroom” in the Court’s opinion, we can appreciate the difficulties Asian Americans face when they seek to engage in the political process.”¹⁵⁵

The Justice Department also commented extensively on Section 203’s affirmative language assistance requirements in “political subdivisions where more than five percent of the voting age population were members of any single group whose mother tongue was other than English” and whose literacy rates exceeds the national average.^{156, 157} They sought language assistance in the form of bilingual registration materials and ballots, monitoring of election-day activity by federal

¹⁵³ Staff memo from the DOJ Civil Rights Division, Appellate Section concerning HR 5552 (April 6, 1975). Files of Assistant Attorney General for Civil Rights, DOJ Stanley Pottinger, NARA II, RG 60, Box 63. Note that the final language adopted in the VRA used a general description “language minorities” and specified Native Americans, Alaskans, and Asian Americans rather than the previously-used “national origin” minorities. I have not yet found evidence of the rationale for this change nor the criteria used to delimit these four groups, but presumably the evidence was based on participation rates (with an inference of discrimination). It is also possible that a judgment was made about the soundness of this definition for the use of the Fourteenth vs. Fifteenth Amendment as the legal basis for Congress’ authority to enact the VRA.

¹⁵⁴ *Id.*

¹⁵⁵ Congressional Report for the Voting Rights Act of 1975, 42 USC § 1973(e) (1976).

¹⁵⁶ James Tucker says that VRA legislative history shows that Congress considered nationwide coverage for language minorities, but went with covered jurisdictions to contain costs. James Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 NEW YORK UNIVERSITY JOURNAL OF LEGISLATION AND PUBLIC POLICY 195 (2006).

¹⁵⁷ Social scientists vary on the links between English-language literacy and political participation and the effects of language assistance on the same. Some of the leading scholars of Latino political participation include LOUIS DESIPIO, COUNTING ON THE LATINO VOTE: LATINOS AS A NEW ELECTORATE (1998); RODNEY E. HERO, LATINOS AND THE U.S. POLITICAL SYSTEM: TWO-TIERED PLURALISM (1992); Matt A. Barreto, *Latino Immigrants at the Polls: Foreign-born Voter Turnout in the 2002 Election*, 58 POLITICAL RESEARCH QUARTERLY 79 -86 (2005); S. Karthick Ramakrishnan & Thomas J. Espenshade, *Immigrant Incorporation and Political Participation in the United States I*, 35 INTERNATIONAL MIGRATION REVIEW 870-909 (2006).

officials, and oral assistance at the polls for voters in covered jurisdictions. Many of these measures were labeled considered affirmative action for voting by opponents.¹⁵⁸

Other than the language provisions, most of the Congressional deliberation was over practical matters like the operation and administration of language accommodations. Within the Justice Department, the Assistant Attorney General for Civil Rights Stanley Pottinger, a liberal Republican, assisted the White House and Congress in thinking through these practicalities. The historical record shows that Pottinger went as far as to draft many of the proposals. Pottinger drew heavily from the accumulated experience of the DOJ in regulating voting rights since 1957. After decades of exhausting case-by-case adjudication against the obstructionist tactics of southern election officials, Congress decided “to shift the advantage of time and inertia from the perpetrators of the evil to its victims” by promulgating an administrative procedure for redress of voting violations.¹⁵⁹

DOJ attorneys explained in an internal agency memorandum that the language provisions needed to be interpreted quickly and uniformly. They argued that “this interpretation, indeed, is better given, in the first instance, administratively than judicially.”¹⁶⁰ They rationalized that the bilingual law was written in general terms and suffered from certain infelicities of drafting. They also pointed out that its enforcement structure required that the DOJ and electoral districts implement the provisions *before* they were interpreted by reviewing courts. “The overriding concern of the law is practical effectiveness. How this is to be achieved is more readily determined by the Department than by the Courts.” Moreover, the DOJ was already committed to being the initial interpreter of the bilingual requirements and nobody was likely to want “to evict the Department from that unenviable role, and most are horrified by the idea of the Department abdicating this role.”¹⁶¹

The outsize influence of the DOJ on Congress introduces a twist on agency entrepreneurship. For all of its involvement, the DOJ channeled its suggestions for policy development through the conventional channel of legislative amendment. They would be implementing voting rights and presumably would have leeway to interpret statutory provisions in favor of language minorities. Even so, the DOJ did not leave the vital task of interpretation to regulatory discretion and informal policy-making. As architects and implementers of the language amendments, they instead chose to revise the 1965 statute through formal means. The National Origin Guidelines they developed were adopted in three months with few substantive changes. In the context of the

¹⁵⁸ See e.g. Thernstrom, *supra* note 83.

¹⁵⁹ Congressional Record for 1975 Voting Rights Act. 42 USC § 1973(e) (1976).

¹⁶⁰ Ford Library, Box 99, Folder: VRA Guidelines, Memo from Barry Weinberg to David Hunter, Deputy Chief of the DOJ Civil Rights Voting Section, 1/6/76.

¹⁶¹ *Id.*

broader argument, the voting case study elucidates an alternative to the advancement of language rights through regulatory guidance. If the education and employment case studies posit agency responses to textual ambiguity in their statutory directives, voting provides a counterfactual in the form of anticipatory agency intervention to produce clear textual provisions for language rights. The DOJ proved to be a critical component of the rights-making process by providing Congress with legislative guidance responsive to their *prior* experiences with bilingual education. This early intervention in the policy cycle *anticipated* the need for a foothold for language rights in subsequent legislation. The decision to formally amend the original civil rights statute precluded the need to subsequently re-interpret it through the exercise of informal regulatory policy. The policy narrative reinforces the importance of bureaucratic entrepreneurship, while also introducing the nuance of policy feedback into the rights-making process.

Summarizing the detailed case studies in this section, Figure 3.1 provides an overview of the pathway from prohibiting “national origin” discrimination to providing language rights. The figure illustrates that agencies dominated the development of language rights in schools, workplaces, and voting. No single political institution was the sole prod to legal change and the specific interplay of agencies with courts, Congress and other institutions varied. However, the common denominator in all of these case studies was bureaucratic entrepreneurship as a source for rights expansion and the shared policy outcome of language rights, albeit to different extents across the case studies.

Figure 3.2. Regulatory Constructions of National Origin Discrimination.

	Schools	Workplace	Voting
Bureaucratic Entrepreneurship	Yes	Yes	Yes
Civil Rights Agency	HEW/DOE (OCR)	EEOC	DOJ Civil Rights
Statutory Source	Title VI National Origin Discrimination	Title VII National Origin Discrimination	1965 VRA National Origin Discrimination

Policy Outcome (Language Right)	Provision of Bilingual Education	Constraints on English-Only Workplace Policies	No Literacy Tests, Bilingual Ballots, Oral Assistance, Poll Monitors
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Section 3 Bureaucratic Entrepreneurship

This chapter demonstrates that regulatory agencies were the engine of civil rights expansions on behalf of national origin minorities and LEP persons. Bureaucrats within the US Department of Education and the US EEOC took it upon themselves to innovate on their statutory obligations in the course of implementing policy – namely the undefined prohibitions on national origin discrimination. Those agencies premised language rights on informal regulatory guidance that called for the federal government to provide LEP persons with “meaningful access” to publicly-funded programs. While these policies did not automatically carry the force of law, they paved the way for public provision of bilingual education and bilingual ballots, as well as legal protections against English-only workplace policies.

If the phenomenon of “bureaucratic entrepreneurship” sounds like an oxymoron, it represents a policy pathway brimming with possibilities during an era of backlogged courts and a log-jammed Congress. The realization and maintenance of those possibilities, however, turns heavily on the response of these and other legal institutions to the assertion of regulatory rights. While all three case studies evince a common process that led to the creation of language rights, the strength and form of those language rights varied. Legal resistance explains variations in the strength of these regulatory interpretations and, ultimately, the success or failure of their reconstruction as regulatory rights. If the overall policy-making process entails three phases -- (1) enactment of legislation, (2) interpretation as regulatory policy, and (3) construction of rights -- the next chapter focuses on this third phase of policy implementation: the construction of rights.

The basic chronologies of these case studies are summarized in the table below to highlight the institutions involved.

Figure 3.3. Policy Expansions Leading to Language Rights.

<i>Expansion via</i>	Education	Employment	Voting
Congressional Amendment	No	No	Yes
Agency Regulations	Yes	Yes	Yes
Supportive Court Opinion	Yes	No	Yes
Regulated Organizations	Yes	No	Yes
Policy Pathway	Bureaucratic Entrepreneurship + Judicial Deference	Bureaucratic Entrepreneurship - Judicial Deference	Bureaucratic Entrepreneurship + Congressional Support + Courts

CHAPTER 4 VARIATIONS IN THE STRENGTH OF REGULATORY RIGHTS

So far this dissertation has contended that the seeds of language rights were rooted in federal civil rights statutes prohibiting discrimination on the basis of national origin. Regulatory agencies responsible for implementing this provision took an expansive view of what the statutes required: that schools, workplaces, and voting booths needed to provide language accommodations. The agencies based their claim that language minorities held language rights on their own Guidelines on National Origin Discrimination. Thus, they promoted a system of regulation premised on regulatory rights, rather than Constitutional or statutory ones. While the assertions of agency-asserted regulatory rights had many similarities, the acceptance of those assertions diverged as they filtered through courts and into the regulated entities. This chapter attempts to provide an empirical and theoretical account of legal strength.

The premise in Chapter 4 is that language rights emerged to differing degrees in each of three public policy areas. Chapter 4 attempts to explain the mechanisms leading to cross-case variations in the strength of language rights. If bureaucratic entrepreneurship were the only variable, the shared enthusiasm of the US Department of Education (OCR), US Equal Employment Opportunity Commission (EEOC), and US Department of Justice (DOJ) ought to have led to roughly equal policy outcomes. Since this outcome was not the case, other factors and mechanisms must have altered the course of policy development. This chapter begins where Chapter 3 left off: presuming bureaucratic entrepreneurship led to the construction of language rights (Puzzle 1), this chapter seeks to explain how and why subsequent institutional responses rendered language accommodations strongest in voting, weaker in education, and weakest in employment (Puzzle 2). The chapter posits that the intertwining of soft law and legal constraints impacted the transformation of informal regulatory policies into regulatory rights.

The straightforward part of this explanation, laid out in section 2 following a definition of terms, is that variation in judicial deference to agency policies determined the extent to which those policies can acquire law-like characteristics such as enforceability. Courts reviewing and enforcing the informal policy guidance from each of the civil rights agencies chose to uphold or undermine the agency's positions. Given the operation of legal precedent and *stare decisis* when dealing with hard law,¹⁶² these judicial rulings affect more than the immediate resolution of a

¹⁶² Generally, doctrinal law encompasses the traditional understanding of the American legal system: Congress passes a statute (formal law) and courts interpret the law. Other similar terms used as shorthand include black letter law, formal law, legal precedent, and law-on-the books. The concepts can be considered 'hard law' (enforceable statutes and cases with precedential value), as contrasted with 'soft law' (non-binding resolutions or policies). I use the terms hard/formal and informal/soft interchangeably. Strictly speaking, the hard/soft distinction comes from international law discourse, but it is preferable to the informal/formal law distinction because it avoids confusion with terms of art from the Administrative Procedure Act "informal policy guidance" and "informal rule-making."

challenge to regulatory rights making: they also influence future policy decisions and regulatory authority for future decision-making.

The more complicated part of the explanation revisits the basic assumptions behind agency deference. Legal formalists usually consider all law to be hard law in the sense of judicially enforceable court opinions or Congressional legislation. The issue of deference is resolved by the common law and statutes governing on agency-rulemaking, namely informal policy guidance receives *Skidmore* deference and notice and comment rules/regulations receiving *Chevron* deference. However, even under *Skidmore*, regulatory rights occupy a gray zone in-between law and policy. This chapter presumes a broader conception of law to navigate the gray zone, identifying both judicial and extrajudicial influences on the hardening of regulatory rights. Section 3 will go beyond the court-centered explanation of judicial deference to illustrate a more subtle process of legalization that imbues informal rules and policies with normative force and legal strength. The chapter concludes by discussing the intertwining of soft and hard law in the production of regulatory rights and their combined effect on the strength of regulatory rights.

Section 1 Strengthening and Weakening of Regulatory Rights

Dimensions of Legal Strength

There is no settled or singular measure for the strength of language rights. However, useful analogies may be drawn between regulatory policy and international law. Both systems issue proclamations with normative force and yet depend on the cooperation of other institutions for their enforcement. A distinguished group of public law scholars with regulatory and international expertise (Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne Marie Slaughter and Duncan Snidal) speak about legal strength through the lens of legalization.¹⁶³ Applying the frameworks used by these international law scholars, legalization would be the hardening of language policy into enforceable rights. This transformation is a particular form of legalization characterized by three dimensions – precision, delegation, and obligation -- that correspond with the underlying legal source and the remedies derived from enforcing one's rights.

Precision is a measure of determinacy that reflects the authority of the underlying legal source. Precise laws, such as statutes, are marked by unambiguous proscriptions, requirements, and authorizations and can be considered hard law. In the case studies that follow, language accommodations are expressed the most precisely in Sections 4 and 203 of the Voting Rights

¹⁶³ Kenneth O. Abbott et al., *The Concept of Legalization*, 54 INTERNATIONAL ORGANIZATION 401-419 (2000).

Act, which have Constitutional roots and statutory roots. Language rights in schools and workplaces are relatively softer since they emanate from ambiguous statutory protections on the basis of national origin that are only defined in regulatory policies promulgated in the exercise of delegated interpretive authority.¹⁶⁴

The enforceability of a law relates to its powers of persuasion and the ability of private individuals or public agencies to procure remedies for violations of that law. Regulatory agencies do not have independent Constitutional authority to make policy; their authority is delegated from Congress under Article I or the President under Article II. Courts, the primary enforcement vehicle, are bound to follow legal precedent when deciding disputes. They will also take into account Congress' delegation of authority to agencies when deciding how stringently to enforce agency-based regulatory rights.¹⁶⁵ The VRA delegates rule-making and enforcement authority to the US Department of Justice, with supplemental authority in the DC Circuit Courts to redress violations judicially rather than administratively.¹⁶⁶ The Civil Rights Act of 1964 is more complex: Congress delegates informal rule-making power to both the US Department of Education¹⁶⁷ and US Equal Employment Opportunity Commission (EEOC).¹⁶⁸ However, as previously explained, OCR retains both substantive and interpretive rule-making authority under Title VI, whereas the EEOC retains only interpretive power under Title VII. Given the slipperiness of the distinction between substantive and interpretive rulemaking within agencies, the differences in practice are slight.

¹⁶⁴ The Department of Education is more precise in their interpretation of what Title VI requires. Follow-up internal memoranda, informal policy guidance, and decision letters regarding Lau remedies and the Castaneda framework for evaluating the adequacy of bilingual education programs make these rules more precise. *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). Prohibitions on English-only Workplace Policies, weak as they may on other dimensions, are worded rather precisely under the EEOC interpretation of Title VII. The 1970 EEOC Guidance on National Origin Discrimination provided specifically for the protection of language characteristics. The 1980 Guidance even more precisely delineated the legal standards for evaluating the appropriateness of English-Only Workplace policies.

¹⁶⁵ For a thoughtful definition of the term delegation in international law, as opposed to administrative law, see Timothy Meyer, *Soft Law as Delegation*, 32 *FORDHAM INTERNATIONAL LAW JOURNAL* 888 (2009) (defining soft law as obligations that, while not themselves legally binding, are given some legal effect through separate legal instruments; more common definitions distinguish soft from hard law on the basis that only the latter is legally enforceable and carries a strong compliance obligation).

¹⁶⁶ Courts are rarely involved in redress for VRA claims. In addition, the polling practices of voting precincts are closely monitored so that little discretion is exercised in the implementation of these provisions.

¹⁶⁷ However, once a violation of Title VI is established, the corresponding remedy relies heavily on the discretion of school districts to choose a curricular strategy for integrating an LEP student into the mainstream classroom after *Castaneda*.

¹⁶⁸ Like Title VI enforcement, considerable trust is placed in the regulated entity to establish and monitor its own compliance efforts. Private employers are typically allowed to post English-only policies so long as they are not discriminatory in intent, language skills are tied to the basic functions of the job, or they are necessary for workplace health and safety. The specific language of the policies is left entirely to the discretion of the employer.

Obligation describes the particular language accommodation owed to a language minority whose rights have been violated, whether an obligation that the government directly owes an individual, one that government compels another institution to provide to that individual, or one that institutions directly owe to the individual. In voting law, language accommodations rank high on obligation. Literacy tests are prohibited across the board. While the coverage of Section 203 is limited to four language minority groups (those of Asian, Hispanic, Native American, and Native Alaskan descent),¹⁶⁹ the government provides LEP voters with translated election materials, bilingual ballots, and permission to seek oral assistance at the polls. In education law, Title VI creates an “affirmative duty” to provide LEP students with access to the classroom that is usually fulfilled by some form of bilingual education. Employment discrimination law imposes the least obligation on employers. The Title VII national origin clause and EEOC Guidance do not create any substantive privileges for LEP or bilingual workers, but they do constrain employers from unfairly instituting English-only policies in the workplace.

Figure 4.1. Dimensions of Language Accommodations in Schools, Work, and Voting.

	Title VI Education	Title VII Employment	Voting Rights Act 1975
Legal Authority for Language Right (precision)	Statutory Right <i>Regulatory Right</i>	Statutory Right <i>Regulatory Policy</i>	Constitutional Right Statutory Right
Enforceability of Language Right (delegation of interpretive authority)	Transitional language programs chosen by schools and enforced by civil rights agency	Removal of unlawful language restrictions in workplace, enforced by workers filing claims/lawsuits	Section 203 language accommodations enforced in DOJ and DC circuit courts
Example of Language Accommodation (obligation)	Bilingual Education ESL Classes	Restrictions on English-Only Policies	Bilingual Ballots Ban on Literacy Tests

Note: Figure adapted from Chapter 1.

These three dimensions can be aggregated to array soft and hard law along a graduated spectrum of strength. Informal policy guidance from agencies that comprise “regulatory rights” operate

¹⁶⁹ Congress found strong evidence that these four groups suffered from sufficiently high levels of illiteracy and political disadvantage. Only “covered” jurisdictions need comply with the bulk of the requirements.

formalist. In *The Hollow Hope*, for example, Gerald Rosenberg measures the direct effects of court-issued desegregation orders following *Brown vs. Board of Education*. Noting a time lag in school desegregation between 1954 and 1964, he questions the significance of courts in forcing change and instead attributes positive reforms to Congress' passage of the Civil Rights Act.¹⁷¹

Unlike courts deriving their powers from Article III of the Constitution, agencies and administrative review processes (e.g. administrative courts, mediation, arbitration, consent decrees) are not directly provided for in the Constitution. Consequently, their powers are constrained and policed by other branches of government. Congress delegates to agencies the powers to fashion legally-binding rules and regulations to fulfill the purposes of a statute. The amount of policy-making power delegated to agencies is written into the statute. Formal rule-making leading to regulations are enforceable, and they also bind current and future decisions as hard law; informal rulemaking, of either the substantive or interpretive variety, function as soft law with persuasive but not controlling authority.¹⁷² Whether they are enforceable depends on the response of judges to those extrajudicial legal interpretations. Courts apply pre-formulated standards when reviewing agency regulations, rules, and policies and deciding whether or not to defer to the agency's statutory interpretations.¹⁷³

Going back to the three phases of policy implementation from chapter 3, once a law is enacted (phase 1) and informal policy guidance is adopted to interpret it (phase 2), regulated entities decide whether to let them stand or whether to test them in court, letting the courts determine whether or not they will become hard law and to what degree (phase 3). Whether informal regulatory policies become regulatory *rights* is contingent on the tolerance of legal

¹⁷¹ Although it is a smaller part of his argument, Rosenberg concedes a second path marked by the “indirect effects” of courts, which can include extrajudicial influences that lend persuasion, legitimacy, and salience to issues. Rosenberg, *supra* note 96. Compare the causal accounts of Michael McCann and Marc Galanter and others have most significantly developed the indirect pathways of legal influence, e.g. theorizing “radiating effects,” catalyzing effects, and constitutive effects of law. See generally Mark Galanter, *The Radiating Effects of Courts*, *EMPIRICAL THEORIES OF COURTS* 117–42 (1983); Michael W. McCann, *Reform Litigation on Trial*, 17 *LAW & SOCIAL INQUIRY* 715-743 (1992); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1 ed. 1994).

¹⁷² Under the *Skidmore* and *Chevron* doctrines, the weight of informal rulemaking is governed by the clarity of the text, the legislative intent behind the Civil Rights Act of 1964, and the specific steps taken by the agency in the promulgation of its language policies. Greater deference would be granted to OCR had it exercised its substantive rulemaking powers under Section 602.

¹⁷³ Consistent with the Administrative Procedure Act (APA) and decades of common law, courts are expected to review agency decisions for their reasonableness rather than directly reviewing the underlying policy issue: a concept known as judicial deference. If the statute that an agency interprets is relatively clear, courts need not be as deferential, and the agency policy often stands. But if the statute requires substantive or procedural rulemaking, courts adhere to predetermined standards that consider whether, in light of the factual record assembled during administrative hearings, the agency's decision is “arbitrary and capricious.”

institutions,¹⁷⁴ primarily courts, for those regulatory interpretations and procedural rules governing judicial deference, statutory interpretation, and regulatory rulemaking.

Figure 4.3. Overview of three policy implementation pathways leading to language rights

	Schools	Workplace	Voting
Judicial Deference	Yes	No	Yes
Agency	HEW/DOE (OCR)	EEOC	DOJ Civil Rights
Reviewing Institutions	US Supreme Court (<i>Lau v. Nichols</i>)	Federal appellate court (<i>Garcia v. Gloor</i>)	US Supreme Court/Congress (1965 VRA)
Delegated Power/Standard of Review	Substantive Policy Interpretive Policy	Interpretive Policy	Substantive Policy Interpretive Policy

Figure 4.3 row 1 shows that, as a whole, bureaucrats with a pioneering spirit used informal policy guidance (soft law) to provide language protections. They differed in their ability to transform their language accommodations into enforceable rights and hard law. Row 2 shows that courts gave direct legal effect to agency policies by ratifying OCR’s interpretation of the Civil Rights Act and the DOJ’s interpretation of the Voting Rights Act. But formal law constrained the normative power of agency guidance under Title VII. The resulting agency authority to author language rights is described in row 3 (using terms of administrative law.)

Case Study 1: Reconstructed Language Rights and Bilingual Ballots

The first case study, on the legislative pathway to the 1975 VRA amendments supplies a ceiling on agency involvement in the creation of language rights. Basic canons of statutory construction and formal law explain the strong legal effect of language rights in voting law. Requirements for language accommodation under the Voting Rights Act of 1975 were the most legalized because

¹⁷⁴ The insight that “tolerance” matters to the mobilization of law bears similarities to socio-legal findings about mobilization by resistance rather than exclusively by petitioner challenges. For the more on the theoretical framing of this empirical observation about mobilization by resistance, look to the discussion of Marc Galanter, *Why the “Haves” Come Out Ahead: Reflections on the Limits of Legal Change*, 9 LAW AND SOCIETY REVIEW 95 (1974) in HERBERT M. KRITZER & SUSAN S. SILBEY, IN LITIGATION: DO THE “HAVES” STILL COME OUT AHEAD? (2003).

they took the form of statutory amendments and required little agency interpretation. Consequently, the VRA Sections 4 and 203 are strong on all three measures of legalization – precision/legal authority, enforceability, obligation – and register overall as “very strong” (as shown in figure 4.2). Moreover, given that language rights were created through *statutory* means, there is little agency discretion for courts to review, and there is no need to analyze the voting context through the lens of transformation of *regulatory* rights. Because the statute itself was directly enforceable in courts and agencies, judges respected the DOJ interpretations as matter of fact assertions of formal and binding rights.¹⁷⁵

As described in Chapter 3, however, process tracing shows that the ten-year reauthorization of the Voting Rights Act did more than reaffirm Congress’ original commitments; it extended them to language minorities at the prodding of the Department of Justice and the US Commission on Civil Rights. Catalyzed by agency entrepreneurship, the legislative amendments relied on cooperation from Congress and the Supreme Court to transform agency proposals into hard law. Responding to the US Commission on Civil Rights’ and DOJ’s recommendations to extend the VRA to nonblack minorities, Congress entered into territory beyond what existing laws required. The ban on literacy tests, for example, came mostly Congress’s interpretations of Supreme Court precedents. In between the 1965 and 1975 Voting Rights Acts, the Supreme Court elaborated on

¹⁷⁵ Courts have consistently aligned with Congress and agencies on language rights in voting. Indeed, judicial interpretations of voting requirements paved the way for the 1975 Voting Rights Act and played an important part in sustaining these sweeping changes. Ever since *Baker v. Carr*, 369 US 186 (1962), courts have been actively engaged in the eradication of voting discrimination. The judicial support for voting protections intertwined with Congressional support in a policy feedback loop. Congress enacted watershed voting rights legislation enacted in 1965 and 1975, as described in Chapter 3. The Supreme Court repeatedly defended Congress’ powers to enforce the Voting Rights Act as an extension of the Fourteenth and Fifteenth Amendments. For example, the Supreme Court upheld Congress’ broad enforcement powers in *Fortson v. Dorsey*, 379 U.S. 433 (1965) (VRA Section 2 vote dilution clause), and *South Carolina v. Katzenbach*, 384 U.S. 301 (1966) (VRA Section 5 preclearance provisions). Congress specifically retained power to prohibit state literacy tests in *Oregon v. Mitchell*, 400 U.S. 112 (1970), and *Katzenbach v. Morgan*, 394 U.S. 641 (1966). The Supreme Court additionally lent support to language-related voting provisions in Justice Douglas’s opinions in *Cadona v. Power*, 394 U.S. 672 (1966), a companion case to *Morgan*, and led lower courts to approve the provision of bilingual ballots and indeed require them in *Torres v. Sachs*, 538 F.2d 10 (1976). These judicial endorsements endured through the rapid expansion of the administrative state after the civil rights movement. As described previously, the DOJ under Assistant Attorney General for Civil Rights Stanley Pottinger played an exceptionally active – even anticipatory – role in the adoption of language protections. The response to these reforms is catalogued in a recently-released book by James Tucker, who participated in the defense for language rights. See Tucker, *supra* note 95 at 74-109 (Chapter 4 Language Assistance and Voter Assistance Since 1975). Tucker’s book was not available when I began my research on the VRA language accommodations. His insider access, however, makes his account more authoritative than any assembled. Tucker speaks about modern battle over bilingual ballots in Courts with reference to the *Boerne v. Flores*, 521 US 507 (1997) proportional and congruent test and battle in Congress. He follows up this discussion with a consideration of Congressional responses in the 1996 Bill Emerson English Language Empowerment Act of 1996 (House amendment to repeal Section 4(f) and Section 203, died in Senate) and the 1992, 1996, and 2006 Reauthorizations of the VRA. In 2006, there were English-only attacks in several forms, including efforts to remove 203 completely, to constrict the definition of LEP), and Inhofe and Salazar amendments to establish English as official language.

the link between literacy and voter eligibility in *Oregon v. Mitchell*, in which Justice Douglas cited “an insufficient link between literacy and responsible interested voting to justify” literacy tests.”¹⁷⁶ Congressional committees for the Judiciary, Hispanic representatives of New York and Puerto Rico, and other members of the Hispanic Caucus worked with the DOJ to develop a legal theory to support language amendments. Thus, the DOJ may have *anticipated* the policy cycle leading to language rights, but their lack of an official role in policy-making meant that the success of their efforts – and the elaboration as hard law -- was contingent on legal institutions.

Case Study 2: Reconstructed Rights vs. Remedies and Bilingual Education

In contrast to the voting rights case study, the emergence of language rights in schools and workplaces would not exist without agency interpretations of the Civil Rights Act of 1964. Much turns on the legal strength of OCR’s assertion of regulatory rights. Courts transformed Title VI from a judicial enforcement mechanism for protecting constitutional rights into a statutory vehicle for administrative rules after the *Lau v. Nichols* decision that established a federal framework for bilingual education.¹⁷⁷ The elevation of administrative enforcement mechanisms, such as informal policies and formal regulations, to the status of judicially enforceable rules, displaced longstanding reliance on Constitutional and statutory law for the protection of civil rights. The underlying source instead shifted from statutes to regulations, with the regulations relying on validation from courts and other legal institutions for enforceability.

Justice Stevens, in a case reviewing *Lau v. Nichols*, characterizes the interdependence of agency rulemaking and judicial enforcement after *Lau* as an “integrated remedial model.”¹⁷⁸ Essentially, under this model, courts deciding Title VI civil rights complaints have shifted from reviewing an agency’s interpretation of the *underlying statute* to reviewing an organization’s fidelity to the *regulation itself*. Modern administrative agencies define and gather evidence about “discrimination” in a variety of contexts. They monitor the compliance of thousands of public and private organizations and use administrative and judicial tools to redress noncompliance with their regulations. The scope of the regulatory enterprise makes federal courts highly dependent on administrative agencies, even though the agency’s statutory interpretations and regulatory policies are not legally binding in future claims.

An article in *Regulation* magazine expresses the affront skeptics felt regulatory rights posed to more traditional processes of law making:

¹⁷⁶ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

¹⁷⁷ Melnick, Great Debate, *supra* note 24 at 10.

¹⁷⁸ *Id.* at 10. Melnick contends that this model of civil rights enforcement extends to voting rights as well.

Providing special treatment for some of our disadvantaged fellow citizens... under the guise of constitutional or statutory proscriptions against “discrimination” has considerable cost. It cheapens the currency of statutory rights; it removes a large number of social judgments from the political process and entrusts them to the federal bureaucracy or the courts.¹⁷⁹

In a direct challenge to regulatory rights-making, in 1978 language rights opponents filed a lawsuit in federal court challenging the US Department of Education’s agency authority to install bilingual education through informal policy guidance and to fashion remedies through a memo on *Lau Remedies*.¹⁸⁰ Although the opinion was left unpublished, *Northwest Arctic School District v. Califano*¹⁸¹ compelled the OCR to embark on a feverish attempt to codify its policy guidance as formal regulations after operating informally for more than a decade. OCR attorneys recall the effort to comply with the Administrative Procedure Act (APA) notice and comment procedures before President Carter’s term expired. Paul Grossman reports that a number of his young colleagues moved to Washington, DC to work on the regulations and others travelled constantly to conduct the necessary public hearings. Many left behind children and sacrificed their marriages to get the job done.¹⁸² Upon the election of President Reagan and the appointment of Terrence Bell as Secretary of Education, those proposed regulations were abruptly withdrawn before being enacted. The failed attempt to codify the policies as regulations left them open to greater resistance and vulnerable to future challenges.

The vulnerability of these regulatory rights shows itself in the ongoing debate over the proper remedy for violations of the Title VI prohibition on national origin discrimination. On June 23, 1981, the Fifth Circuit Court in *Castaneda v. Pickard*¹⁸³ issued a decision that remains the seminal post-*Lau* decision concerning education of language minority students. The case established a three-part test to evaluate the adequacy of a district’s program for LEP students

¹⁷⁹ See also an education report in the National Journal explaining Congress’s delay of the issuance of formal regulations until December 15 or later (into the Reagan Administration). The report states, “The argument isn’t over the right of the children to learn. It isn’t even over the best way to teach them, although there are substantial disagreements on that score. The fight is about local control of education and the extent of federal authority to regulate what goes on in the classroom.” Rochelle L Stanfield, *Education Report: Are Federal Bilingual Rules A Foot in the Schoolhouse Door*, NATIONAL JOURNAL (1980). Institute of Governmental Studies, University of California, Berkeley.

¹⁸⁰ *Northwest Arctic School District v. Califano*, Docket Number A-77-216 (D. Alaska, September 29, 1978.) Cited in Moran *supra* note 67 and internal memoranda of OCR held in National Council of La Raza Archives, Stanford University Green Library, Stanford, CA [hereinafter NCLR Archives].

¹⁸¹ Docket no. A-77-216 (D. Alaska 1978).

¹⁸² Interview with Paul Grossman, Chief Civil Rights Attorney, OCR, in San Francisco (August 4, 2008).

¹⁸³ 648 F.2d 989 (5th Cir. 1981).

once a Title VI violation is established: (1) is the program based on an educational theory recognized as sound by some experts in the field or is considered by experts as a legitimate experimental strategy; (2) are the programs and practices, including resources and personnel, reasonably calculated to implement this theory effectively; and (3) does the school district evaluate its programs and make adjustments where needed to ensure language barriers are actually being overcome?¹⁸⁴ This standard was a compromise between the original position of the OCR and its challengers who favor vesting greater decision-making authority in school districts, rather than in federal agencies. Effectively, rather than determining that Title VI was directly violated, *Castaneda* presumes that the regulatory interpretation of Title VI was violated. The regulatory interpretation is contingent on judicial validation, in this case according to a standard that is highly deferential to schools. Civil rights advocates perceive the *Castaneda* standard to afford school districts so much discretion as to undermine the intent of the Title VI and EEOA.¹⁸⁵ OCR itself considers *Castaneda* to be consistent with the regulatory framework that it espoused – thereby, perceiving no conflict between the statute and the regulation – even though the language transition programs deemed appropriate remedies for Title VI violations are undeniably weaker than bilingual education *per se*.

Notwithstanding *Castaneda*, the foundational principles that Title VI national origin discrimination prohibitions require language accommodations endured.¹⁸⁶ Moreover, their form as regulatory rights – anchored in federal civil rights statutes, and safeguarded by federal agencies – also endures.¹⁸⁷ While the OCR did not “legalize” the right to bilingual education *per se*, the durable quality of the policies they derived from *Lau* and Title VI evinces the normative power of their regulatory pronouncements, even if they never became enforceable, hard law.

Case Study 3: Deconstruction of Language Protections in Workplaces

In the third case study, the constraints of hard law contribute to the difficulty the EEOC had extracting concessions from employers for LEP employees. Courts are generally reluctant to

¹⁸⁴ *Id.*

¹⁸⁵ If the principles of language access and national origin discrimination have remained intact, the remedy of bilingual education has not fared as well. Rose Cuisor Villazor, *Language Rights and Loss of Judicial Remedy: The Impact of Alexander v. Sandoval on Language Minorities*, in AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE (2005); ROSEMARY C. SALOMONE, TRUE AMERICAN: LANGUAGE, IDENTITY, AND THE EDUCATION OF IMMIGRANT CHILDREN (2010).

¹⁸⁶ The OCR memo, EEOA of 1974, and *Lau v. Nichols* remain good law.

¹⁸⁷ As explained in Chapter 5, President Clinton in 2000 issued Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, which reaffirmed and extended *Lau* principles of language access from schools to all agencies administering public funds under Title VI. A full list of such agencies appears in Chapter 5. Shortly after the Executive Order issued, the US Supreme Court in *Alexander v. Sandoval* held that the national origin guidance enacted under Title VI did not include an implied right of action to enforce it, even though litigants presumed one in preceding cases such as *Lau* and *Castaneda*.

defer to the EEOC. The employment laws that they enforce are traditionally deferential to the private sector; they afford a wide berth to employers to operate their business so long as they do not do so in an unlawful, discriminatory manner. Thus, civil rights laws function merely as a floor below which employers may not drop. The continuing permissibility of restrictive language laws in the workplace, even when the core job functions do not require English fluency, is part and parcel of the employment law framework. Additional limitations on regulation-based language rights in employment are imposed by employer's assertions that discrimination on the basis of national origin occurs for legitimate nondiscriminatory reasons, constitute a *bona fide* occupational qualification, or persist due to business necessity or health and safety rationales.

That EEOC guidance had to overcome several legal interpretive hurdles before it could be considered hard law. Before the EEOC attempted to formalize their position on English-only policies, courts were already challenging them. The Fifth Circuit in *Garcia v. Gloor*,¹⁸⁸ the case that prompted the EEOC to promulgate formal Guidance, began by pointing out the absence of uniform EEOC regulations or standards concerning the application of English-only rules, despite the presence of the 1970 Guidelines. Applying its own analysis, the Fifth Circuit ruled against *García*, saying that “neither the statute nor common understanding equates national origin with the language that one chooses to speak.”¹⁸⁹ The Court held that the English-only rule was not applied to *García* by the Gloor Company for the purpose of discriminating on the basis of national origin. The substantive ruling was a mixed bag: it held that language could be used as a proxy for national origin under some circumstances, but the Court declined to rule that English-only policies *presumptively* or automatically had an adverse impact on bilingual employees, as the EEOC would have held under its guidelines. Read as a case on regulatory authority, the ruling constrained the capacity and power of agencies to implement statutory requirements as they saw fit. Circuit courts split on English-only policies after *Gloor*. The Ninth Circuit directly contradicted the EEOC in *Garcia v. Spun-Steak* (1992).¹⁹⁰ In *Spun-Steak*, bilingual employees in a meat-packing company challenged an English-only policy enacted in response to complaints from English-speaking workers that they were harassed by their Spanish-speaking coworkers. The Ninth Circuit announced: “We reach a conclusion opposite to the EEOC’s long standing position... We do not reject the English-only rule Guidelines lightly... but we are not bound by the Guidelines.”¹⁹¹ Undoubtedly, the refusal of courts to delegate power to agencies in this case

¹⁸⁸ *Garcia v. Gloor*, 618 F. 2d 264 (5th Cir. 1980)

¹⁸⁹ *Id.*

¹⁹⁰ *Garcia v. Spun-Steak*, 998 F. 2d 1480 (9th Cir. 1993)

¹⁹¹ *Id.* at 1489.

constrained the capacity for regulatory rights-making and weakened the EEOC’s national origin guidance.¹⁹²

Section 3 Extra-Judicial Influences on the Hardening of Soft Law

Hard law and formal doctrine are useful starting points for understanding institutional responses to agency assertions of regulatory rights. However, while initially persuasive, the seemingly straightforward, court-based explanations take for granted that rights are self-executing. This broad proposition is repeatedly challenged by empirical findings in the legal mobilization literature. Moreover, administrative law governing deference to regulatory policy was still developing at mid-century and did not dictate the judicial reasoning in the outcomes of cases.¹⁹³ Consequently, understanding legal strength requires more than reciting doctrines of judicial deference and administrative law as encapsulated in the Administrative Procedure Act or *Skidmore*: it requires understanding the processes of norm creation that underlie the implementation of language policies and, more specifically, extrajudicial processes that contribute to hardening of informal policy. This section turns to extrajudicial influences on the durability of regulatory rights. The extrajudicial influences on the hardening of law do not entirely omit the influence of court authority – after all, several of these extra-judicial influences derive from the legal threat or radiating effects of judge-issued law – but the term extrajudicial suggests that additional factors are also at play. Other influences consist of both the indirect influences of legal institutions and the direct effects of non-legal regulated entities such as schools, workplaces, and voting precincts and non-state actors like interest groups.

The next three case studies illustrate several processes at work in the production and sustenance of non-binding, soft language rights. The section begins by narrating the developments in bilingual education that were forged in the shadow of the law, namely *Brown* and Title VI. These shadow effects can be compared with the direct legal threat posed by voting rights, which hardened into the amended voting rights statutes, and the radiating effects of *Lau v. Nichols* on bilingual ballots. The section then turns to the taken-for-granted norms and gaps in the law that hindered English-only workplace policies in the 1980s.

¹⁹² Employment discrimination scholars often label the EEOC as a “weak agency” at least in part because they view Title VII as a civil rights statute crippled by political compromise. *See e.g.* Pedriana and Stryker, *supra* note 117; Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM LAW REVIEW* 1937 (2006). While capacity is a compelling explanation for variation in the strength of regulatory rights, other areas of Title VII law show that the EEOC is sometimes capable of protecting civil rights. Some scholars have even shown that the perceived weaknesses in the EEOC enforcement structure turned out to be a strength in affirmation action law. *See generally* Pedriana and Stryker, *supra* note 117.

¹⁹³ While the APA was in force, *Chevron* had not been decided. Administrative law principles for reviewing informal policy guidance such as *Skidmore* were on the books but did not control the outcome of decisions.

Case Study 1: Regulatory Rights to Bilingual Education Forged in the Shadow of the Law

The controlling influence of hard 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 dynamic as “bargaining in the shadow of law”¹⁹⁴ and it arises in many contexts. In alternative dispute resolution and administrative case processing, for example, the coercive power of law comes not from its actual exercise, but from a credible threat. The invocation of the law, with the insinuation that litigation is possible, is enough to deter bad behavior. In this way, a negotiation might be directly governed by norms of fairness or indirectly governed by the shared understanding that courts remain available if the parties are unable to reach a resolution through their own efforts. Should LEP employees seeking language accommodations prove unable to reach an agreement with their employers with the assistance of the US EEOC, for example, they retain the right to sue the employer in federal or state court.

The function of deterrence is to preempt undesirable behavior by holding out the “stick” of liability or punishment.¹⁹⁵ 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.

Another form of legal threat relies less on deterrence and more on the agency’s broad interpretations of public policies, public opinion, and other extralegal considerations such as the agency’s reputation.¹⁹⁶ Under Section 602, the OCR elaborated a substantive interpretation of what Title VI requires 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

¹⁹⁴ The phrase “bargaining in the shadow of the law” was coined by Robert Mnookin and Lewis Kornhauser and has since been used widely in the sociolegal literature. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 THE YALE LAW JOURNAL 950-997 (1979).

¹⁹⁵ *Id.*

¹⁹⁶ Carpenter claims that bureaucratic entrepreneurs innovate on existing policies in the course of policy implementation because of the reputation and signals of legitimacy sent by their agencies. Carpenter, *supra* note 23. Charles Epp provides an example of this phenomenon in the context of police misconduct. Epp shows how legal rules forged a coalition among professional reformers, civil rights advocates, and trial lawyers. New rules on liability for misconduct changed policing practices by giving leverage to reformers within those bureaucracies and in the professional groups closely associated with them, not just by exerting external pressure on government bureaucracies. Local officials worry about “the threat of public embarrassment and reputational damage” associated with litigation, not about monetary cost. The effect of litigation is magnified: it is the litigation itself, not just the threat of losing, that drives police to go above and beyond legal requirements in an effort to show that they are good, caring professionals. Epp, *Making Rights Real*, *supra* note 92.

LEP students emerges from a variety of sources, among them the broad language of the Equal Protection Clause, which the Supreme Court side-stepped in *Lau v. Nichols* under the well-established principle of constitutional avoidance (declining to rule on Constitutional principles if decisions can be reached on the basis of other, less consequential statutes or court cases in order to encourage stability in the law) and Title VI. The precedential value of “administrative constitutionalism,” defined by administrative law scholar Sophia Lee as regulatory agencies’ creative interpretation and implementation of constitutional law,¹⁹⁷ is questionable. As previously explained, so is agencies’ substantive rule-making 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 projecting normative value onto the law or leveraging the symbolic authority of official government policy.

Soliciting non-legal (strictly speaking) sources of counsel exemplifies an important aspect of the norm creation process whereby extralegal inputs shape policy and the policy, in turn, structures the context of reception. Apart from using strictly legal sources, OCR Direct Leon Panetta’s assistant, Martin Gerry, researched bilingual education extensively in the preparation of the policy guidance. As revealed in oral histories and notes kept in the MALDEF archives, Gerry drew upon educational research on student learning and language acquisition, psychological research on stigma, and demographic data about the needs and characteristics of national origin minority groups.¹⁹⁸ After *Lau* was remanded to the district court for a remedy, OCR consulted broadly with educational experts but ultimately retained an approach that gave school districts discretion over the proper remedy for violating an LEP student’s right to access the classroom. Even though OCR tried to formalize the *Lau Remedies* as formal regulations, in part because they were prompted by a legal challenge,¹⁹⁹ they withdrew the proposed regulations and retreated to the softer policy guidance once President Reagan’s Secretary of Education announced his intention to eliminate bilingual education as a signal example of curtailing regulatory overreaching.

¹⁹⁷ Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VIRGINIA LAW REVIEW 799, 801 (2010).

¹⁹⁸ 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.

¹⁹⁹ Northwest Arctic School District v. Califano, Docket Number A-77-216 (D.Alaska, September 29, 1978.)

Case Study 2: Policy Feedback Loops: Direct and Radiating Effects of the Voting Rights Act

The legal requirement for bilingual ballots and language accommodations in voting, hard law taking the form of the statute, actually emerged from *two* policy feedback loops. First and most directly, the requirement emanated from the 1975 reauthorization of its 1965 predecessor. This policy feedback loop is relayed in the prior section in Section 2 on the use of hard law in the amended Voting Rights Act. Second, voting-related language rights were indirectly precipitated by federal support for bilingual education. The radiating effects²⁰⁰ of law across issue areas can be seen where civil rights norms governing educational opportunity for national origin minorities were imported into the realm of political participation. After the *Lau* decision, rising demands for language access in education were coupled with the expectation that state-sponsored schools strive to eradicate illiteracy for children of all backgrounds. The inability of national origin minority children to speak English by the time they were eligible to vote was deemed an apparent failure of the public school system. The failure of state-sponsored K-12 public schools to teach English justified remedial action in the form of language accommodations in voting, so as to ensure that the LEP school children were not further disadvantaged later in life. In this way, the institutionalization of language access in education – articulated in informal policy guidance, not in formal law – seeped into the justifications for robust language provisions such as VRA Sections 4(f) and 203. Congress declared it “patently unfair” to require a certain level of 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.”²⁰¹ The establishment of legal requirements for access in schools changed the meaning of school districts’ practices concerning LEP students: Whereas the failure to accommodate was previously permissible so long as it was not intended to discriminate, the failure to take affirmative steps to accommodate LEP students constituted a failure of the public schools to prepare future citizens to vote. This lapse had ramifications beyond legal liability: setting aside lawsuits and administrative charges to enforce Title VI, school districts’ omissions shaped legislative remedies for language deficiencies in voting law.

Bilingual education and bilingual voting were linked through both analogy and justification. By way of analogy, a California Congressman said in support of Section 203, “If we substitute the word voting for classroom... we can appreciate the difficulties Asian Americans face when they

²⁰⁰ The radiating effect of the court is borrowed from Marc Galanter, who explained that the power of the court is not solely in resolving cases. Those adjudications also serve to articulate a set of norms and procedures that give prospective litigants a sense of what may happen if they decided to bring a case to trial. See text accompanying Galanter, *Radiating Effects*, *supra* note 172.

²⁰¹ 121 Congressional Record H.4716 (June 2, 1975)

seek to engage in the political process.”²⁰² Congress additionally cited statistics showing that language minority groups’ registration and voting rates were much lower than for other groups, even if not as low as black voters prior to the 1965 Voting Rights Act. On the basis of this cumulative evidence that more “catching up” was necessary, the DOJ accepted that 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.²⁰³ Congress absorbed the logic of language access established in the education arena, an interim step toward hardening soft law.

Case Study 3: Constraints on Eliminating English-Only Workplace Policies

The absence of mechanisms associated with hard law and lack of legal constraints on workplace regulations dampen the possibility that soft law can shape business practices. A common complaint from critics of using human rights frameworks to advance immigrants’ rights is that the absence of hard law – international law on human rights is typically soft law – renders enforcement difficult. They go on to say that weak enforcement mechanisms render the rights themselves hollow. Similarly, critics of the EEOC cite the lack of precedential value assigned to the EEOC Guidance on National Origin Discrimination by the Fifth Circuit in *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. By cabining the 1980 EEOC Guidance, courts limited the potential for the agency exhortations to become regulatory rights: they were clearly nonbinding; the legitimacy of their reasoning, and the source of their authority was also called into question. Soft law processes were hindered by the inability to reference supportive hard law as part of their legitimating and justification.

Other than an absence of legally enforceable precedent, the existence of competing law can impose barriers to regulatory rights-making. The absence of supportive law and the existence of competing hard law are both damaging to workers, for example.²⁰⁴ Generally, economic rights in the United States are weak to non-existent as a matter of law and as a matter of both informal norms. There is no formal right to work and poverty is not treated as a suspect category meriting the highest protection of the Court, unless a fundamental interest or other basis for strict scrutiny

²⁰² *Id.* (Statement of Representative Edwards).

²⁰³ *Id.*

²⁰⁴ Many progressive scholars, lawyers, and jurists have argued for greater legal protections on the basis of socio-economic status. However, the case law supporting this position is tenuous at best. The flavor of this longstanding debate is captured in these two competing perspectives: Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Robert H. Bork, *Impossibility of Finding Welfare Rights in the Constitution*, *The*, 1979 WASH. U. L. Q. 695.

is also implicated.²⁰⁵ There is also little expectation of economic incorporation for LEP workers given enduring income inequalities among native English-speakers. Moreover, the competing values of private sector independence, employer discretion, and efficiency/profit as paramount goals limit the possibilities for language-related civil rights expansion within the realm of soft law. Consequently, the constitutive value of competing employment laws and the lack of norms supporting workers functions to weaken the aspirations of EEOC policy guidance on language in the workplace.

Yet the basic principles of nondiscrimination and equal opportunity embedded in Title VII remain an outer limit on English-only workplace policies. The EEOC Guidance on English-only policies are valuable in ways similar to the OCR Guidance during the period before *Lau* and after *Castaneda*, when its legal effect was contingent on the acceptance of other legal institutions. 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. And the Guidelines are 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. In the meanwhile, employers can voluntarily enact worker protections that are not required by courts but that are consistent with Title VII anti-discrimination principles.²⁰⁶ In these senses, nonbinding regulatory policies have intrinsic merit as soft law, even when they do not (and even if they never will) develop into hard law.

Section 4 Intertwining of Soft/Hard Law as Mechanisms Behind Legal Strengthening

This chapter contends that, with or without formal law and litigation, informal regulatory policy guidance contributed to a transformation in the norms and expectations surrounding language access. The focus of the empirical analysis has been 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 broken into separate discussions of judicial/extrajudicial processes for

²⁰⁵ See e.g. *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding means-tested welfare benefits that harm poor).

²⁰⁶ Lesley Wexler, writing in the international law context, observes that soft laws can influence the *voluntary* behaviors of regulated entities by offering guiding principles. Lesley Wexler, *Non-Legal Role of International Human Rights Law in Addressing Immigration*, *The*, 2007 U. CHI. LEGAL F. 359, 1.

analytical purposes, ultimately the process of hardening is one of the intertwining hard and soft law. Stepping back, courts and the judicial endorsement of regulatory policy certainly strengthened informal regulatory policies and helped to elevate them to the status of regulatory rights. In the case of the DOJ and its issuance of bilingual ballots through legislative amendment to the 1965 Voting Rights Act, for example, that transformation to hard law was immediate and direct. Even without such a direct judicial enforcement, though, soft law can facilitate legal strengthening. Anne Marie Slaughter says by analogy to international law: “Like domestic administrative agencies, international organizations are often authorized to elaborate agreed- [upon] norms, especially where it is infeasible to draft precise rules in advance and where special expertise is required.”²⁰⁷ This gap-filling function of soft law performs an indispensable task by forging policy pathways that would otherwise be premature or foreclosed by political or legal viability. The feedback between Section 203 voting rights and *Lau v. Nichols* illustrates the indirect effects of soft law in catalyzing the creation of hard law. In the case of the OCR memo on national origin discrimination and the case law on 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 EEOA of 1974; subsequently, *Castaneda* softened the practical legal effect of the OCR Guidance.

Part of the function of filling gaps in hard law is to provide agencies with a vehicle for promoting entrepreneurial statutory interpretations and, effectively, constructing regulatory rights. Sophia Lee enumerates several dynamics in administrative Constitutionalism that 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.²⁰⁸ Even if the duty to accommodate language minorities was not enforceable – as is the case with the EEOC Guidance on English-Only Workplace Policies, for instance -- neither were they mere textual exhortations. Their obligations were *administrable*, even if not readily justiceable.²⁰⁹

There are definite benefits to hard laws that take the traditional black letter form of judicial doctrine or statutory legislation, among them a durability that stems from the ability to stick

²⁰⁷ Abbott et al., *supra* note 163.

²⁰⁸ Lee, *supra* note 193 at 807-809, 857. Lee provides an important perspective on administrative rulemaking in 1960s employment discrimination law that in many respects mirrors my comparative account, but her emphasis on *constitutional* interpretation departs from my emphasis on primarily *statutory* interpretation.

²⁰⁹ *Id.* They were also developed within the broader legal and normative principles of equality articulated in the Constitution and antidiscrimination statutes and absorbed by society.

when the political environment changes.²¹⁰ Yet all three case studies show that soft laws – whether expressed as informal policy guidance, opinion letters, memoranda of understanding, or Dear Colleague letters – shape expectations and compel actual practices within regulated organizations like schools, workplaces, and voting booths. A fuller study of regulatory effectiveness would look to the penetration of informal policy into organizational practices, or what Barnes and Burke call “rights practices,”²¹¹ and the actual impact on specific variables of interest (e.g. educational achievement, hiring and promotions, voter registration and participation rates.) While it remains focused on agencies rather than organizational compliance, Chapter 5 Section 2 lays the foundation for addressing some of the intervening mechanisms: how do agencies’ interpretations of legal requirements diffuse into organizations like schools, workplaces, and voting precincts? What forces help or hinder effectiveness? The proliferation of the OCR Guidance on Title VI National Origin Discrimination under Executive Order 13166 examines these issues during a recent episode in the development of regulatory language rights.

²¹⁰ Other advantages are explained in William Eskridge and Kevin Schwartz’s Yale Law Review article, *Chevron and Agency Norm Entrepreneurship*. Eskridge and Schwartz explain that agencies administer “super statutes” that are important sources of fundamental rights. William N. Eskridge & Kevin S. Schwartz, *Chevron and Agency Norm-Entrepreneurship*, 115 THE YALE LAW JOURNAL 2623-2632, 2624 (2006). Some of the benefits of this approach include: enriching national discourse about fundamental values, expanding the constitutional reach of liberal values (e.g. beyond state actors to capture abusive exercises of power in the private sector), promoting notice and comment procedures that are more democratically accountable than judicial value elaboration, ensuring direct accountability to democratically-elected Congress and President. *Id.* at 2625-2626. The same can be said for informal policy, even if it is governed by *Skidmore* rather than *Chevron*.

²¹¹ The compliance of organizations with legal requirements is labeled “rights practices” by Jeb Barnes and Tom Burke in their study of schools implementing the Americans with Disabilities Act. *See* Barnes and Burke, *supra* note 30. A similar study of schools implementing Title VI OCR Guidance, workplaces implementing Title VII EEOC Guidance, or voting districts implementing Section 203 or the DOJ Guidance on the VRA could be conducted to explore the issue of effectiveness further.

CHAPTER 5 CONCLUSION

The leading Administrative Law treatise of the civil rights era, authored by Kenneth Culp Davis, declared that “Rule-Making Procedure is the One of the Greatest Inventions of Modern Government.”²¹² Reflecting upon the rapid growth and widespread proliferation of administrative law, Davis declared that the main tool for getting governmental jobs done is rulemaking, “authorized by legislative bodies and checked by courts.”²¹³ The US Commission on Civil Rights confirmed Davis’ sense that the most pressing need was no longer the creation of new anti-discrimination laws.²¹⁴ More urgent instead was “a strengthened capacity to make existing laws work,” in light of changing demographic realities.²¹⁵

In this dissertation I have examined the 1965-1979 period of civil rights policy implementation in order to understand the development of federal language policy under the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Across three policy areas, I have found that agencies’ usage of informal policy guidance on national origin discrimination gave rise to the federal government’s affirmative duty to provide meaningful access to limited English Proficient (LEP) persons. After describing the social context of the period, Chapter 3 identifies bureaucratic entrepreneurship during policy implementation as the key mechanism driving constructions of “national origin discrimination” as requiring language accommodations. It first discusses the coordinated advocacy of public interest lawyers and the US Department of Education, Office for Civil Rights, backed by courts and Congress, which led to bilingual education in public schools. It then contrasts this with the failure of the US Equal Employment Opportunity Commission to garner judicial support for comparable rights in private workplaces and the success of the DOJ in precipitating language provisions of the Voting Rights Act in Congress. Chapter 4 observes that the outputs of policy implementation, language rights, were not monolithic. It attributes variations in the strength of language rights to judicial and extrajudicial receptivity to agency assertions that their otherwise nonbinding policies created regulatory rights. This chapter delves deeper than traditional legal accounts ascribing legal strength to judicial deference. It proposes a broad definition of law and describes a nuanced process by which informal policies, a form of

²¹² KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 6.01-6.1 (Supplement to 1st edition [1958] ed. 1976). With the release of his 1958 treatise, Davis is credited to a significant extent with advancing the field of administrative law beyond the New Deal framework set forth by Felix Frankfurter. He responded to rapid changes in the legal environment with the release of regular supplements throughout the 1970s, with a scheduled supplement to the one-volume treatise in 1970, a special stand-alone supplement in 1976, and a five-volume second edition in 1978 that continues to be updated in response to key developments.

²¹³ Davis, Administrative Law, *supra* note 211.

²¹⁴ US Commission on Civil Rights, *supra* note 147.

²¹⁵ *Id.*

soft law, harden into legally enforceable, regulatory rights. This alternative explanation of legal strength draws on institutional responses from extralegal sources as well as courts.

Section 1 Implications for Research and Policy on Regulation and Language Rights

My study of the administration of civil rights policies for LEP persons carries important lessons for civil rights and immigration scholars concerned about equality and for public law scholars interested in the use of administrative law to promote positive social change. Foremost, in thinking about how to make civil rights laws effective for new and persisting forms of disadvantage, scholars need to include regulatory rights within the vision of policy-making. Based on three in-depth case studies on the implementation of “national origin discrimination” laws, the dissertation argues the need to shift our gaze from traditionally recognized legal institutions – Courts and Congress – to regulatory agencies as the guardians of civil rights and the engine of legal change. Beyond mere policy implementation, civil rights agencies greatly influence the extent to which those aspirations to equality are realized.

Regulatory rights have remained the favored strategy for securing the rights of LEP persons. The regulatory framework has persisted in the three decades since my primary period of study. Following a contraction of civil rights and increasing hostility toward language rights from 1980-1990, the federal government’s commitment to extending meaningful access to LEP persons through civil rights agencies revived in 2000. 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. President Bush and Obama maintained EO 13166, illustrating that the entrenchment of a regulation-based approach toward language access that cuts across political parties. Notwithstanding the entrenchment of this approach, recent trends make more challenging a strategy that relies too heavily on a regulatory scheme for protecting language rights. How should we understand the legacy of agency-centered language rights? Do they hold across time periods? Across policy arenas? This concluding chapter examines the contemporary landscape of relying on regulatory strategies during a time of increasing legal complexity and rising linguistic diversity. It begins by rehearsing the known vulnerabilities and vices of regulatory policy, which frame the more particular findings associated with regulatory rights to language access.

Vulnerabilities and Virtues of Regulatory Rights

Striking a balance between flexibility and consistency and safeguarding against abuses of discretion is endemic to the administrative enterprise. It is not merely symptomatic of language

rights. Shortly after issuing his lavish praise for rulemaking, Kenneth Culp Davis wrote of the perils of “discretionary justice.”²¹⁶ Other scholars write about the pathologies of bureaucracy,²¹⁷ ideological capture,²¹⁸ and bureaucratic drift.²¹⁹ Advancing a generalized assessment of bureaucracies, Davis suggests that discretion is necessary and that the best way to regulate it is to “confine, structure, or check.”²²⁰ Moreover, regulatory agencies can suffer from a lack of capacity, resources or political will. Absent Congressional support or judicial deference, for example, the EEOC confronted the limitations of being given a broad mandate without being furnished sufficient authority or capacity for executing it.

Embedded in this vulnerability is a virtue: relying on agencies to administer language policy enables civil rights law to keep pace with changing demographic circumstances and to foster expertise around bridging language gaps within very different policy contexts. In this way, regulatory agencies have been able to accomplish what legislation and judicial action could not. In the wake of *Lau v. Nichols* and *San Antonio v. Rodriguez*, for example, the US Department of Education’s policy guidance leveraged regulatory authority to overcome otherwise insurmountable barriers. However imperfectly agencies have since realized the vision of providing meaningful access, their use of national origin discrimination policy guidance forged a path in terrain where Congress had previously declined to act. Moreover, the DOJ officials who persuaded legislators to incorporate language accommodations in the 1975 Voting Rights Act drew upon expertise acquired from handling language elsewhere. Although their byproducts were not by themselves legally binding, they might have been strengthened with doctrinal support. Still, shielded from public exposure and political pressure, civil servants accomplished *more* than they could have through judicial or legislative channels.

Section 2 Persistence of Federal Regulatory Policy on Language Access

The focus of the next section is on the implementation of regulatory rights to language access. Executive Order 13166, issued in 2000, renews the federal government’s commitment to the regulatory framework developed from 1965-1979 and extends the template to *all* federal

²¹⁶ Kenneth Culp Davis, *Confining and Structuring Discretion--Discretionary Justice: Chapter 3*, 23 J. LEGAL EDUC. 56 (1970); KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

²¹⁷ JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989); JERRY MASHAW, *4 BUREAUCRATIC JUSTICE* (1984).

²¹⁸ *Id.*

²¹⁹ Political scientists distinguish between ideological cooptation and bureaucratic drift insofar as drift may entail timidity, apathy, shirking, careerism, capture. These critiques indicate a generalized distrust of bureaucracy as product of inherent structural limitations, as opposed to particularized ones distrusting a specific presidential administration. See Farhang, *supra* note 44.

²²⁰ Davis, *Administrative Law*, *supra* note 211; Davis, *Confining and Structuring Discretion*, *supra* note 215; Davis, *Discretionary Justice*, *supra* note 215.

agencies administering public funds pursuant to Title VI. It uses agency implementation of EO 13166 to illustrate the persistence of federal regulatory guidance on national origin discrimination. The section begins by examining the *persistence* of the regulatory rights strategy using empirical data on the performance of the three enforcement agencies that have been the focus of the dissertation: the US Department of Education, the US Department of Justice, and the US Equal Employment Opportunity Commission. It supplements those case studies with three shadow cases of agency implementation of EO 13166 to explore the scope and limitations of these broader patterns.

Reaffirmation of Regulatory Rights: Executive Order 13166

One way to report on the fidelity of federal agencies to the regulatory rights that emerged in the 1970s is to track their responses to a subsequent mandate to provide meaningful access to their programs. In order to reaffirm the federal government’s commitment to preventing national origin discrimination under Title VI of the Civil Rights Act, President Clinton ordered all agencies to make their services available to the public, without regard to language proficiency. Clinton’s Executive Order requires agencies that administer public services “to ensure that recipients of federal financial assistance provide meaningful access to LEP applicants and beneficiaries.”²²¹ Significantly, the order entrusts agencies to evaluate their own practices as well the practices of the schools, workplaces, and other regulated institutions. To provide a concrete illustration using a familiar example: under EO 13166, the Department of Education (federal agency) must comply with Title VI, the DOJ regulations, and its own policy guidance because it administers K-12 schooling (federal financial assistance) to school districts (recipient) and oversees the actions of public school teachers (sub-recipients.) The rationale for EO 13166 is that 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.”²²² To be clear, EO 13166 does not pronounce new rights and is not by itself legally enforceable. Instead, it reaffirms the Title VI obligation of federal agencies to accommodate language minorities. The Executive Order lays out a unified approach toward providing program access, albeit one that encourages decentralization of agency implementation.

Pursuant to Executive Order 12250 (EO 12250), the Department of Justice (DOJ) is charged with ensuring the consistent and effective implementation of Title VI and other civil rights laws

²²¹ 65 FR 50121 (August 16, 2000). Although it is not discussed in the official history of the EO 13166, community activists indicate that they played a significant role educating and pressuring the President to take action. Health care activists were especially involved. Interview with Karen Narasaki, Executive Director of the Asian American Justice Center, and Paul Igasaki, then-EEOC Commissioner, in Washington, DC (March 1, 2011).

²²² DOJ Guidance 2002 at 2684.

applicable to recipients of federal financial assistance. The DOJ Civil Rights Division's Coordination and Review Section (COR) provides assistance and oversight to federal agencies civil rights offices Exec. Order No. 12250, Leadership and Coordination of Nondiscrimination Laws. The DOJ, in a corollary set of implementation guidelines, sets forth flexible standards to assess agency compliance.²²³ Rather than proscribe a specific approach, the DOJ orders agencies to promulgate policy guidance for the benefit of their recipients and to post agency plans outlining steps for ensuring that LEP persons can access their services and programs. The DOJ presumes that agencies will take into account the distinctive features of their organization and the needs of their constituents in formulating customized plans.

An audit of EO 13166 compliance documents that, as of February 2010, 22 agencies have completed and posted online policy guidance for their beneficiaries to bear in mind when interacting with LEP persons (listed in Figure 5.1) and 58 agencies have submitted their own plans to ensure meaningful access to their services (listed in Figure 5.2).²²⁴ Because it applies a singular policy to a broad range of agencies, EO 13166 provides a useful vehicle for studying agency implementation of Title VI national origin policy guidance. It provides a snapshot of variations in the degree to which language access have diffused into agency practices. Moreover, at the request of Congress, the Government Accounting Office (GAO) audited the performance of agencies subject to EO 13166 in 2010. While they differ from the Chapter 1 and 4 metrics of legal strength, the GAO standards can be applied to a greater number of agencies and help to facilitate comparisons of the in-depth case studies of the 1970s with shadow cases of other agencies in modern times.

Figure 5.1. Agencies with Recipient Guidance Listed on LEP.gov.

Executive-Level Agencies	Independent Agencies
Department of Commerce	Corporation for National and Community Service
Department of Education	General Services Administration
Department of Energy	Institute of Museum and Library Sciences
Department of Health and Human Services	NASA

²²³ 45 Fed. Reg. 72,995 (Nov. 4, 1980).

²²⁴ The GAO Report explains that it is not possible to determine the total number of agencies required to complete recipient guidance and an LEP plan because the EO makes agencies responsible for determining the need for guidance and does not require them to report on the results of their determination. In addition, participating agencies must make recipient plan guidance public (including publication in the Federal Register for notice and comment), but they do not have to make their LEP plans public. Most of these plans and guidances are available on agency websites or linked to the site for an interagency working group www.lep.gov (last visited 3/20/2011). They were also supposed to send copies of their policies to a DOJ Coordination and Review Section by December 11, 2000 for review and approval. The full GAO Report is available online: GAO, Language Access: Report to Congressional Requesters (April 2010), http://www.lep.gov/whats_new/GAO_LEP4_10.pdf (last visited 3/20/2011).

Department of Housing and Urban Development	National Archives and Records Administration
Department of Interior	National Endowment for the Arts
Department of Justice	National Endowment for the Humanities
Department of Labor	National Science Foundation
Department of State	Nuclear Regulatory Commission
Department of Transportation	
Department of the Treasury	
Department of Veterans Affairs	
Environmental Protection Agency	

Source: www.LEP.gov as of December 2009.

Figure 5.2. Agencies that have made their LEP Plans Publicly Available on LEP.gov.

Executive-Level Agencies	Independent Agencies
Department of Education	Consumer Product Safety Commission
Department of Energy	Equal Opportunity Employment Commission
Department of Housing and Urban Development	Federal Deposit Insurance Company
Department of Justice	Federal Trade Commission
	NASA
	National Council on Disability
	National Credit Union Administration
	National Endowment for the Arts
	Nuclear Regulatory Commission
	Pension Benefit Guaranty Corporation
	Railroad Retirement Board
	Social Security Administration
	US Office of Special Counsel

Source: www.LEP.gov as of December 2009.

The next section applies the GAO criteria for implementation to three case studies that have been the focus of the dissertation for the sake of external validity and to examine the scope and parameters of the dissertation findings on legal change.²²⁵ The GAO cautions that concrete

²²⁵ The GAO method for ascertaining agency compliance was based on a review of policies posted on www.lep.gov, found through a web-crawl, surveys of agencies, and agency/working-group provided documentation. They subjected these policies to legal analysis and interviews with DOJ officials about the required and recommended elements and compared those programs with practices that they identified that enhance collaboration. GAO Report, *supra* note 223, at 2. To examine additional opportunities for collaboration, they interviewed officials from the National Virtual Translation Center (NVTC), created by statute and housed by the Federal Bureau of Investigation,

measures of implementation are difficult to define given the DOJ’s encouragement to agencies to apply the “meaningful access” standard in context-specific ways. Reflecting this flexibility, the GAO Report draws on four “elements” for improving LEP access under the DOJ standard of “reasonableness”: (1) agency commitment, defined as issuance and implementation of agency-wide LEP plan and guidance for funding recipients; (2) needs assessment, operationalized as collection of data on the size of LEP customer base and frequency of contact; (3) service delivery, defined as systematic and strategic provision of services; and (4) monitoring, measured by stakeholder feedback and objective measurements of program inputs and outcomes. Agencies are characterized as fully implementing, partially implementing, or not implementing each element. The GAO analysis offers an alternative to process tracing as a way to describe agency policy implementation (compare chapter 3). It does not speak to the judicial reception to these agency constructions of language rights (compare chapter 4) because it does not appear that EO 13166 has lead directly to litigation. However, the strategy of relying on the DOJ, itself a law enforcement agency, to coordinate policy implementation across other agencies underscores the continuing reliance on agency implementation of broader civil rights policies as a means for protecting language rights, rather than encouraging Congress or the Courts to craft a direct response to language needs. It also highlights the ongoing use of nonbinding soft law instruments such as informal agency guidance, rather than hard law in the form of legislation or judicial opinion to compel organizational compliance.

Implementation of Executive Order 13166 in Schools, Workplaces, Voting Booths

In this section, the criteria from the GAO study are applied to the three agencies under examination thirty years later after the main period of study and ten years after EO 13166 in 2010: the US Department of Education, the US EEOC, and the US Department of Justice, Civil Rights Division. While the analogy is not perfect, the implementation of EO 13166 provides some insight into the persistence of the regulatory rights framework developed in 1965-1979

1. US Department of Education, OCR

The lasting power of the US Department of Education’s Title VI LEP plan and guidance to schools can be directly tracked. The OCR online reading library consists of LEP plans and Guidelines for recipients dating from 1970 and *Lau v. Nichols* since those cases served as the basis for EO 13166. While it does not directly discuss EO 13166, the criteria set out by the GAO

which makes translation services available to 15 federal intelligence agencies on an as needed basis. To observe the agencies’ language access services and collaborative efforts and to obtain views of agency officials who interact directly with LEP persons, the GAO interviewed IRS, FEMA, and SBA officials in California, Georgia, Louisiana, North Dakota, Texas, Washington, and Washington, D.C. More details on methods are contained in Appendix I of the GAO Report. GAO Report, *supra* note 223, at 41.

audit is fully implemented along three dimensions associated with providing meaningful access to public education. Built into the LEP plans and procedures, the OCR conducts a rigorous needs assessment and advises that their recipients do the same. One of the distinctions of accommodating LEP students is that there is no numerical threshold for coverage; the presence of even one national origin minority student justifies curricular adjustment and translation of parental notifications. Provision of technical assistance to school districts was highest immediately after the *Lau Remedies* memorandum was issued, but it continues to be fully implemented. The agency partially implements monitoring because school districts receive great deference in their selection of appropriate curricula for LEP students after *Castaneda v. Pickard*.²²⁶

2. *US Department of Justice, Civil Rights Division, Voting Section*

The same criteria applying to Title VI/EO 13166 implementation can be applied to 2010 implementation of the Voting Rights Act. Both provisions are assigned to the US Department of Justice Civil Rights Division and are overseen by the same bureaucratic leadership, even if the two statutes are assigned to different subdivisions. The DOJ Civil Rights Division has made available extensive information about its LEP Plan for EO 13166, governing the education, employment, and other sections of the Civil Rights Division.²²⁷ By comparison to these standards, the voting section's commitment to enforcing the Voting Rights Act is extremely strong. The VRA has even more specific requirements than Title VI. The voting section has taken a leadership role in issuing and implementing guidance for funding recipients (polling precincts) and developing an LEP plan for its own activities (not to mention the model for other agencies' activities). Their needs assessment system is one of the most sophisticated available, with close collaboration with the Census Bureau and informal collaboration with community groups who conduct exit polls. Monitoring is also fully implemented given the assignment of federal officials to covered jurisdictions and the employment of a cadre of policy analysts dedicated to each jurisdiction. Service delivery is also strong given the numerous publications and conferences made available to police departments, prisons, and state court recipients and the large size of their enforcement staff.

3. *US Equal Employment Opportunity Commission*

The EEOC occupies an unusual space in outreach to LEP persons. While it provides services of great importance to its stakeholders, it does not actually administer federal funds to the private

²²⁶ As of April 2011, OCR is conducting an extensive *Lau* investigation in the Los Angeles Unified School District that could affect its rating. Interview with OCR Staff Attorney in Washington, DC (December 18, 2011).

²²⁷ An expansive discussion of principles that is meant to serve as a model for other Title VI agencies appears in the 2002 Policy Guidance and is posted on the US Department of Justice's website: <http://www.justice.gov/crt/about/cor/lep/DOJFinLEPFRJun182002.php>.

employers that it regulates. Consequently, private employers are not “recipients,” even if they are beneficiaries, and their obligation to provide meaningful access that flows through the agency to recipients is severed by the wall of the private sector. Admirably, the EEOC has voluntarily posted an LEP plan on its website, and it has developed guidance for national origin discrimination. Needs assessment and monitoring are partially implemented. Historically, the EEOC data-gathering operations have been strong. However, EEOC relies on self-reports of employers and census data, rather than conducting its own assessments, which lowers their performance rating to partially implemented. Service delivery in the form of trainings and conciliations, the EEOC’s main lever of influence over the private sector, is partially implemented.²²⁸

The results of the 2010 GAO study are consistent with my own in-depth case studies, suggesting either that there have not been dramatic changes in agency implementation practices over the last thirty years or that any intermittent fluctuations have evened out via course correction during that time period. The table below shows that all three agencies show some level of commitment to providing language access; that is, they are all positive cases of language rights development. According to the GAO standards, the relative degree of the agencies commitments vary. The strength of agency commitment, as manifested in their LEP plans and policy guidance, accords with the estimates used throughout the dissertation, with language rights proving strongest in voting, strong in education and weakest in employment. Based on this comparison across time, I conclude that the dissertation findings about legal change are not overly contingent on the exceptional features of the 1960s-1970s political/legal climate. Rather, the scope and parameters of the findings are still meaningful thirty years later even in light of intervening developments.

Figure 5.3. Implementation of Executive Order 13166 in the OCR, the EEOC, and the DOJ.

Element	Description	US Department of Education – OCR	US Equal Employment Opportunity Commission	US Department of Justice – Voting
Agency Commitment	Issuance and Implementation of agency-wide LEP plan and issuance of guidance to funding recipients, as well as integrating services into strategic planning, processes, and resource allocation.	Fully Implemented	Fully Implemented	Fully Implemented
Needs	Collection of data on size of	Fully	Fully	Fully

²²⁸ The EEOC’s LEP plan is available at: <http://www.eeoc.gov/eeoc/plan/lep.cfm> (last visited 3/22/2011).

Assessment	LEP customer base, frequency of contact, and level of service provision needed.	Implemented	Implemented	Implemented
Service Delivery	Systematic and strategic provision of services and outreach provided through internal resources, technology, and partner organizations.	Partially Implemented	Partially Implemented	Fully Implemented
Monitoring	Stakeholder feedback, ongoing measurement of resources used and program outputs and outcomes, and compliance with civil rights requirements	Fully Implemented	Partially Implemented	Fully Implemented

Most importantly, these post-2000 snapshots of the original case studies speak to the continuing relevance of regulatory rights as a mechanism of policy innovation and legal development. The brief glimpse into the performance of our three agencies thirty years henceforth shows that the virtues and vices of flexibility within the entrenched framework of regulatory rights are enduring and not historically contingent. In important respects, EO 13166 strengthened and broadened language access requirements in federal agencies. However, the flexible approach of Executive Order 13166 and its inability to directly compel compliance²²⁹ – much like the informal policy guidance they facilitate – limits its reach as hard law and enables some agencies to slip below the radar. Voluntary compliance is encouraged, even where it cannot be required, but it is unclear how often this happens in practice. Further research into the diffusion of policy guidance into the practices of schools, workplaces, hospitals and other regulated organizations would add to our understanding of regulatory impact and effectiveness, as described in Chapter 4, Section 4.

Another way that this study could be extended would be to more systematically track the ebbs and flows of the regulatory rights established from 1965-1979 against subsequent challenges in courts and administrative decision-making forums. The GAO studies in Chapter 5 Section 2 jump ahead to describe a restoration of the 1970s framework from 2000-2010, but taking account of intervening contractions in regulatory rights during the 1980s would enhance our understanding of legal strength throughout the life cycle of a policy. Putting together the two halves of expansion and contraction would ultimately generate valuable data about the *durability* of rights, a critical of feature of legal strength that could be directly studied by measuring the resilience of putative regulatory rights over time.

²²⁹ Two of the small number of political science books dedicated to executive orders are KENNETH R. MAYER, *WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER* (2002); ADAM WARBER, *EXECUTIVE ORDERS AND THE MODERN PRESIDENCY: LEGISLATING FROM THE OVAL OFFICE* (2006).

Section 3 Contemporary Challenges to Agency Implementation of Language Policies

Recent legal developments pose yet more challenges to policy implementation within agencies. Legal scholars and lawyers have been quick and prolific to respond to many of these challenges. While space constraints preclude a similarly extensive commentary in this concluding chapter, three that particularly complicate a federal regulatory agencies' use as the fulcrum for prohibiting language discrimination include are described in this section: devolution of federal authority over civil rights and immigration to state governments, delegation of public enforcement duties to private companies, and restricted private enforcement of Title VI regulations.

Devolution of Federal Authority to States

Beginning in the 1980s, a raft of English-only laws and Official English initiatives were enacted in 29 states.²³⁰ Although there have been federal and local analogues,²³¹ state language laws constitute part of a broader trend of states asserting autonomy from federal regulation in both immigration and civil rights-related affairs.²³² California, the state with the highest number of LEP persons, undercut federal support for language rights by enacting Proposition 227 in 1998. 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.”²³³ Setting politics aside, Proposition 227 introduces uncertainty into the legal protections for LEP persons and creates unresolved tensions for Title VI entities. A “Frequently

²³⁰ For a general discussion of the Official English movement, see Linton, *supra* note ____; JAMES CRAWFORD, AT WAR WITH DIVERSITY: US LANGUAGE POLICY IN AN AGE OF ANXIETY (2000); JAMES CRAWFORD, LANGUAGE LOYALTIES: SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY (1992).

²³¹ For example, in 1983, Dr. John Tanton and US Senator S. I. Hayakawa founded a political lobbying organization, U.S. English, which aimed to make English the official language of the United States. Senator Hayakawa previously and unsuccessfully introduced legislation to make English the Official Language in 1981. The US Senate subsequently voted on amendments to immigration bills that would recognize English as a “common and unifying language” in 2006 and 2007. Similar bills episodically surface each time comprehensive immigration bills are considered. Local language initiatives have been adopted in Dade County, Florida and parts of California.

²³² A list of English-only and Official English initiatives with the years adopted appears in National Asian Pacific American Legal Consortium, Politics of Language: Your Handbook to English-Only Laws and Policies 40 (August 2003), http://www.advancingequality.org/files/2003_language_handbook.pdf. With some updates, the list includes: Alabama (1990), Alaska (1998, 2007), Arizona (1988, 2006), Arkansas (1987), California (1986), Colorado (1988), Florida (1988), Georgia (1986, 1996), Idaho (2007), Illinois (1969), Indiana (1984), Iowa (2002), Kansas (2007), Kentucky (1984), Massachusetts (2002), Mississippi (1987), Missouri (1998), Montana (1995), Nebraska (1920), New Hampshire (1995), North Carolina (1987), North Dakota (1987), Oklahoma (2000), South Carolina (1987), South Dakota (1995), Tennessee (1984), Utah (2000), Virginia (1981, 1996), Wyoming (1996). Some of these initiatives have since been overturned. Arizona and Oklahoma again proposed legislation in 2010.

²³³ Proposition 227 gives parents the ability to use wavers to request alternative programs for their children.

Asked Questions” section of the US Department of Education, OCR agency website explains that Californian schools are not exempt from Title VI requirements, even though compliance with Proposition 227 may violate federal requirements.²³⁴ The DOJ framework provides a detailed legal analysis of Proposition 227 in its 2002 Guidance on EO 13166 Implementation. In essence, the DOJ reaffirms the importance of complying with Title VI and stresses that state or local English-only laws neither relieve recipients of their obligation to ensure meaningful access to their programs, nor provides a defense for discriminating against LEP persons in service delivery. The Guidelines state: “Entities in states and localities with ‘English-only laws’ do not have to accept federal funding. However, if they do, they still have to comply with Title VI, including its prohibition against national origin discrimination by recipients.”²³⁵

Deregulation and Delegation of Public Enforcement to Private Companies

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. EO 12291 states: “To the extent permitted by law, regulatory action should not be taken unless the potential benefits outweigh the potential costs.”²³⁶ EO 12498 goes further by establishing OMB oversight over all “significant regulatory activities” that are adopted under the Administrative Procedure Act as informal rulemaking to make sure that the proposed programs align with “administrative policy.”²³⁷ They are collectively viewed by legal scholars across the political spectrum as an attempt to wrest power away from regulatory agencies and place it back in the control of the president. One presidential advisor who had served in four administrations said: “If the presidency did not control the bureaucracy, the bureaucracy would control him.”²³⁸ Cass Sunstein, who would later head President Obama’s counterpart to the office as “regulatory czar,”²³⁹ co-authored with Peter Strauss a law review article that situates these executive orders in the enduring tension between

²³⁴ The OCR “Questions That May be Raised by Proposition 227” fact sheet explains that whether or not Proposition 207 contravenes Title VI has not been resolved in courts. See OCR Website, available at <http://www2.ed.gov/offices/OCR/archives/prop227q.html> (last visited 3/20/2010).

²³⁵ DOJ Guidance, *supra*, at 2672, 2683.

²³⁶ Executive Order 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. §601 at 431-34 (1982).

²³⁷ Executive Order 12,498, 50 Fed. Reg. 1,036 (1985).

²³⁸ Clark Clifford is quoted in E. Donald Elliott, *TQM-ing OMB: Or Why Regulatory Review under Executive Order 12,291 Works Poorly and What President Clinton Should Do about It*, 57 LAW & CONTEMP. PROBS. 167, 168 (1994). Elliott’s essay appears in a special issue dedicated to EO 12,291 titled *Regulating Regulation: The Political Economy of Administrative Procedures and Regulatory Instruments*.

²³⁹ Jonathan Weisman and Jess Bravin, *Obama’s Regulatory Czar Likely to Set a New Tone*, WALL STREET JOURNAL, Jan 8, 2009 at A4.

expertise and politics at stake in the modern administrative state.²⁴⁰ In practice, cost-benefit analysis can limit the scope of mission-drive regulations.

In addition, in a number of instances, Congress specifically sought to transfer public enforcement duties to the regulated entities for self-policing. The Immigration Reform and Control Act of 1986 (IRCA), 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 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. Their cross-cutting obligation to balance their business needs against their public enforcement duties often led to the exploitation of immigrant workers, who were unlikely to complain about unfair treatment and labor violations out of fear of exposing their own immigration violations. Similar conflicts of interests redounded in the delegation of Title VII sexual harassment enforcement to Human Resources Departments within private companies and could result in the national origin context.

Restrictions on Private Enforcement of Title VI

At the same time that private entities are being entrusted with monitoring their own practices, the right of private individuals to challenge those entities is being curtailed. *Alexander v. Sandoval* (2001) concerned the negative effects of LEP persons unable to obtain driver's licenses amidst DMV refusals to provide translated forms and exams. Martha Sandoval, a Spanish-speaking housekeeper in Alabama who knew how to drive but could not obtain a license, complained that her inability to legally drive hampered her from grocery shopping or going to the pharmacy, taking her children to the doctor and responding to other emergencies, 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; that policy 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

²⁴⁰ Peter L. Strauss & Cass R. Sunstein, *Role of the President and OMB in Informal Rulemaking*, *The*, 38 ADMIN. L. REV. 181 (1986). Strauss and Sunstein attribute the juxtaposition of expertise and politics to James Landis, one of the earliest administrative law scholars who wrote *The Administrative Process* in 1938. After explaining Reagan's two executive orders, the scholars describe and analyze the American Bar Association's official response in a report titled *Roads to Reform*.

against on the basis of national origin on the basis that challenged policies have a disparate impact.²⁴¹ Unless they can prove discriminatory intent, harmed individuals must bring their claims to regulatory agencies such as the US Department of Education, who then 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. Their critique is compounded with deep misgivings about the commitment and capacity of regulatory agencies to implementing their statutory missions. They point to debilitating backlogs and chronic underfunding of civil rights agencies as limits on capacity. They also point to ideological hostility of civil rights agencies toward their historical missions during conservative administrations as evidence for their fear that agencies goals will depart from the goals of individual challengers. The ironic result, the critics argue, is that the need for language access is growing just as legal developments impede federal agencies' capacity to provide it. The DOJ, however, sets out a different perspective on the effect of *Sandoval* on agency policy. In the preface to its EO 13166 Guidance, the DOJ says that *Sandoval* makes agency policy implementation even more important. In their view, *Sandoval* enhances the longstanding responsibility of Title VI agencies to provide meaningful access to their services.²⁴² Moreover, the success or failure of federal agencies in securing language rights is not preordained.²⁴³

Section 4 Alternatives to Providing Language Access Through Regulatory Rights

Strengthening Legal Frameworks for Language Rights

One way to strengthen the commitment to language access would be to elevate it from the regulatory realm to statutory or even Constitutional grounds – that is, to harden the law. While hard laws do not obviate the need for softer norms supportive of the underlying legal purposes, they create possibilities for bolder and more durable interventions. Defining the statutory term national origin discrimination to expressly include language rights would limit abuses of discretion in the current regulatory enterprise. More ambitiously, Congress and courts could enshrine the meaning of “equality” for LEP persons as requiring “meaningful access” to public institutions for the purpose of ensuring successful integration into mainstream society. They

²⁴¹ The 2002 DOJ Guidance affirms that, even after *Sandoval*, the failure to provide language assistance has significant discriminatory effects on the basis of national origin: “Effects place the treatment of LEP individuals comfortably within the ambit of agencies’ implementing regulations. Also, existing language barriers may reflect underlying intentional or invidious discrimination of the type prohibited by Title VI itself.” DOJ Guidance 2002 at 2684 (Appendix B.)

²⁴² See 67 Fed. Reg. at 19238-19239.

²⁴³ Villazor, *supra* note 185 at 142.

could affirmatively make rulings to this effect, or they could ratify regulatory interpretations of their overarching commandments.

Short of support from the courts and Congress, civil rights enforcement agencies can build on the regulatory framework that is currently in place. Under the existing regulatory regime, there are several elements necessary to strengthen the substance of civil rights protection for language minorities. If legalization entails elements of precision, delegation, and obligation (Chapter 4), the government can begin by making more *precise* the term “LEP persons,” which more clearly defines the protected group than the existing term “national origin minority.” It could also strengthen the *obligation* of government to ensure language access by clarifying that the government has an “affirmative duty” to accommodate language minorities, that the standard for compliance is “meaningful access,” and enlarge statutory coverage to a broader array of “public institutions” than those directly administering public funds under Title VI. The EO 13166 experience with Title VI implementation suggests that designating a coordinating agency helps to ensure that *delegation* does not need to a dereliction of duties.

Agencies should exercise their regulatory authority to the full extent of the law, and then push for broader authority and more resources from Congress. While they cannot do this unilaterally, they can utilize notice and comment procedures, formalize agency policies as regulations, and otherwise mobilize the mechanisms of policy-making and rule-making available to them under the APA.

Where public laws cannot reach, the government should encourage public-private alliances to integrate LEP persons into the workforce. The EEOC case study reveals the challenges of private sector regulation. While there are sound reasons for granting private employers a berth for operating their businesses, deference does not operate as a free pass to discriminate. Employers are never required to employ or otherwise accommodate workers who cannot perform the essential tasks of a job; the legal determination in English-only cases is whether English fluency is essential to the job *and* whether language accommodations compromise workplace safety or efficiency. Voluntary compliance with public norms of language access cannot be compelled, but the government can create incentives to guide private behavior. For example, the SBA awards grants to small businesses with the condition that employers comply with Title VI.

Regardless of the reforms selected, the federal government will need to include enforcement and implementation as part of its commitment to language access. Judicial endorsement or Congressional approval of regulatory policies would directly strengthen the precedential value of these policies. It would also indirectly support the legitimacy of the policies and engender

confidence in the implementing agencies. Extrajudicial measures can also improve organizational compliance. Politically independent administrative oversight and the use of Executive Orders in the form of the Department of Justice’s coordination of EO 13166, for example, constitute a possible model.

Lost Alternatives to Regulatory Rights

It is often said that differences between the United States’ regulatory rights framework for language access and Canada’s comprehensive multiculturalism programs can be partly explained by our adherence to an adversarial legal system and their stronger civil service. Political culture is not destiny. By a difference of degrees, history reveals a fork in the road to United States civil rights enforcement that made available a similar choice. The story behind the public-private struggle for Title VII enforcement authority holds many lessons for language advocates confronted with a clear and continuing reliance on regulatory rights.

When it was founded, the EEOC’s lack of enforcement powers earned it the nickname of “toothless tiger.”²⁴⁴ In the years leading to the adoption of Title VII and the creation of the EEOC to administer it (1963-64), the NAACP LDF, the Lawyers’ Committee on Civil Rights, and the Leadership Council on Civil Rights sought to augment the EEOC’s conciliation powers with cease-and-desist powers. Reaching back in memory, the civil rights advocates recalled the National Labor Relations Board and other agencies whose progressive advances relied on public enforcement. The public enforcement model provided civil rights advocates and progressive legislators with a template for early designs for the EEOC. The issue of enforcement power became a flash point during “the great debate” over Title VII of the Civil Rights Act. After a series of political compromises, Congress created the EEOC with limited administrative powers. Civil rights advocates compromised on a hybrid enforcement model with private litigation, augmented by fee-shifting provisions to induce “private attorneys generals” to compensate for deficiencies of public enforcement. To the surprise of both civil rights activists and legislators, the hybrid enforcement model proved very successful. Private enforcement, coupled with EEOC support, led to significant gains for women in the workforce and helped build a disparate impact theory of discrimination in *Griggs v. Duke Power*.²⁴⁵

Notwithstanding this unexpected success, the progressive mistrust of agencies endured. When President Reagan launched an open attempt to “defund the Left” by shrinking government and deregulating, the progressive mistrust of agencies seemed vindicated. Chastened by the success

²⁴⁴ See Pedriana and Stryker, *supra* note 117; Farhang, *supra* note 44; Lieberman, *supra* note 49.

²⁴⁵ 401 U.S. 424 (1971).

of the conservative strategy of the 1980s, by the 1990s, civil rights advocates refused to give up private litigation as a means of enforcement in exchange for pure administrative authority over Title VII enforcement.²⁴⁶ Even though it was once the centerpiece of their reform agenda, civil rights advocates shifted their energies to preserving private litigation rather than strengthening regulatory agencies.²⁴⁷ A minority of Republicans during the 1990 civil rights amendments actually favored giving the EEOC *more* power and money, rather than feeding the transfer of civil rights lawsuits to private litigation by further diminishing the agency.²⁴⁸ Ironically, civil rights advocates eschewed the effort to strengthen agencies because they expected so little of the agencies by then.

Progressives did not have to give up entirely on public enforcement once private enforcement took off. It was not an either/or proposition. For all of their wavering, progressives once believed that a public enforcement model, centered in civil rights enforcement agencies, could work. Their early campaign for the EEOC reflected their faith that the agency would accomplish what had previously eluded private individuals. The counterfactual question of how things might have been different is a difficult one, but history and politics suggest that the federal government *could* have built stronger civil rights agencies with more robust capacities to implement civil rights mandates.

This EEOC history with Title VII enforcement contains correctives to the current progressive strategy for countering conservative civil rights rollbacks on private litigation (pushed by courts)²⁴⁹ and agencies (pushed by Congress and hostile executives.)²⁵⁰ While the historically-rooted shift away from public enforcement toward private enforcement of Title VII explains the reluctance of civil rights advocates to rely too much on regulatory agencies. It does not justify

²⁴⁶ Farhang, *supra* note 144 at 129-130.

²⁴⁷ The private enforcement model was threatened by courts, not by a hostile executive administration. Indeed, Reagan republicans tried but did not succeed in curtailing private litigation. Jefferson Decker says they tried to limit fee awards to “drive a stake through the incentive structure”). Reagan could not control it: number of private job discrimination suits from 1975-80 is 5,400 and increased by 59% until private litigation represented 96% of total enforcement actions/EEOC took on 4%. Similar for civil rights overall: 56% rise from Carter to Reagan. *Id.*

²⁴⁸ Other shadow cases of legislative-executive conflict reinforcing shift toward private litigation: labor unions (Taft-Hartley Act of 1947 show mistrust of NLRB) and clean air (1970 and 1990 legislation promote citizen suits). “Wide range of policy areas, diversity of historical periods, and variation in partisan interbranch configurations” in which causal process operates. *Id.* at 217.

²⁴⁹ Many examples of this faith in courts as protectors of civil rights, borne of the glory days leading up to *Brown v. Board of Education*, appear in a volume of essays written by scholars and advocates seeking a restoration of courts. DENISE C. MORGAN, RACHEL D. GODSIL & JOY MOSES, *AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE* (2005).

²⁵⁰ Larry Kramer claims Congress should play a larger role in equality battles and that courts can no longer/should no longer be trusted. LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2006). Cf. Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, CALIFORNIA LAW REVIEW 1013–1025 (2004). But there is a third way: agencies.

their reluctance to improve or strengthen regulatory strategies going forward in all areas of civil rights. It is not a foregone conclusion that regulation will fail. The take-away point is not that the federal government and civil rights advocates should replicate exactly the strategy of the Progressive Era agencies or considered during the design of the Civil Rights era agencies. History helps the government and advocates understand the policies in place. This understanding is valuable in its own right. It reveals the lessons learned from earlier institutional trials that can guide and inform our decisions about the future of regulatory agencies as guardians for civil rights.

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