Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights

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On the fiftieth anniversary of the Civil Rights Act of 1964, this Article asks how federal civil rights laws evolved to incorporate the needs of non-English speakers following landmark immigration reform (the 1965 Hart-Cellar Act) that led to unprecedented migration from Asia and Latin America. Based on a comparative study of the emergence of language rights in schools and workplaces from 1965 to 1980, the Article demonstrates that regulatory agencies used nonbinding guidances to interpret the undefined statutory term "national origin discrimination" during their implementation of the Civil Rights Act of 1964. Their efforts facilitated the creation of language rights, albeit to different extents in schools and workplaces. The Article highlights the use of guidances to protect language minorities as a distinctive breed of civil rights law. It uses a historic, yet understudied episode to illustrate an often used, sometimes contested practice: governing by guidance.

TABLE OF CONTENTS

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INTRODUCTION

The ink had barely dried on the Civil Rights Act of 1964[1] when government policymakers realized that their efforts marked a beginning, not an ending, in the pursuit of equality. A landmark immigration reform,[2] only one year after the Civil Rights Act, lifted national origin quotas and resulted in dramatically increased Asian and Hispanic[3] immigration. The changing size and composition of this newcomer demographic — many of whom were not proficient English speakers[4] — fueled advocates' claims that the government needed to update its approach toward inequality.[5] Securing the

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[1] Pub. L. No. 88-352, 78 Stat. 241 (1964).

[2] A succinct history of the 1965 Hart-Cellar Act, which revised the Immigration and Nationality Act by lifting national origin quotas, and its resulting increase in Asian and Latin American immigration appears in DAVID REIMERS, STILL THE GOLDEN DOOR: THE THIRD WORLD COMES TO AMERICA 66–67 (1992). *See also* Phil Wolgin, Beyond National Origins: The Development of Modern Immigration Policymaking, 1948–1968 (June 2011) (unpublished Ph.D. dissertation, University of California Berkeley) *available at* http://escholarship.org/uc/item/1vr7k843#page-1, *archived at* http://perma.cc/B37B-Qk7V.

[3] While "Latino" tends to be the modern term for the racial minority group originating primarily from Latin America, "Hispanic" more accurately specifies the ethnic group that is identified by language for official purposes. *See* CLARA RODRIGUEZ, CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY IN THE UNITED STATES 7–8 (2000). For that reason, the term "Hispanic" is favored in this Article over "Latino." Alternative terms that were used somewhat interchangeably in this time period include "Spanish-surnamed" and "Spanish-speaking" minorities. *Id.*

[4] Language policies addressed both non-English speakers and Limited English Proficient ("LEP") bilinguals, regardless of citizenship. While LEP is a technical term used by the government and is more accurate, this Article uses it interchangeably with non-English speakers for ease of use.

[5] Asian and Hispanic experiences of discrimination originate long before 1965, as do grassroots activists' efforts to improve their conditions. Policymakers' responsiveness to those grievances, however, escalated after the civil rights era. *See* John Skrentny, *Policy Making is Decision Making: A Response to Hattam*, 18 STUD. AM. POL. DEV. 70, 70 (2004) (describing "sudden growth of law, regulations, and court decisions that established nondiscrimination rights for groups that policymakers saw as disadvantaged"). *But see* Victoria Hattam, *The 1964 Civil Rights Act: Narrating the Past, Authorizing the Future*, 18 STUD. AM. POL. DEV. 60, 64 (2004) (criticizing Skrentny's "unsubstantiated claim of political quiescence on the part of nonblack minorities").

"equal opportunity" long promised and now required by statutory mandates was still a work in progress for African Americans, and now government officials would need a fresh approach for language minorities.

Policymakers recognized that transforming the aspirations of civil rights rhetoric into concrete solutions would require greater capacity. They enlisted the resources of a newly assembled "civil rights state"[6] that included the U.S. Department of Health, Education, and Welfare's ("HEW's") Office for Civil Rights ("OCR") and the U.S. Equal Employment Opportunity Commission ("EEOC"). These civil rights agencies were tasked with interpreting, implementing, and enforcing federal civil rights statutes. Policy entrepreneurs[7] within these agencies — "white men in suits"[8] — puzzled over how to adapt civil rights statutes to the needs of the new immigrants. Asians and Hispanics faced many of the same barriers as African Americans. They also faced language barriers. A high percentage of Asians and Hispanics lacked the language skills to fully participate in mainstream institutions where English predominated, even if it was not the official language.[9] Compared to Canada or other immigrant-receiving nations, the United States had little infrastructure and scant resources to help them integrate into English-speaking institutions.[10] In addition, generations of neglect

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[6] The term "civil rights state" refers to the regulatory apparatus that developed in the mid-1960s to enforce civil rights. R. Shep Melnick, *Courts and Agencies in the American Civil Rights State*, *in* THE POLITICS OF MAJOR POLICY CHANGE IN POST-WAR AMERICA 1 (Sidney Milkis & Jeffrey Jenkins eds.) (forthcoming 2014).

[7] The term "policy entrepreneurs" has a long vintage. Adam Sheingate defines them as "individuals whose creative acts have transformative effects on politics, policies, or institutions." Adam D. Sheingate, *Political Entrepreneurship, Institutional Change, and American Political Development*, 17 STUD. AM. POL. DEV. 185, 185 (2003). The bureaucratic extension of civil rights to nonblack minorities specifically is described as the minority rights revolution in JOHN DAVID SKRENTNY, THE MINORITY RIGHTS REVOLUTION (2002).

[8] John Skrentny uses this description to highlight agency officials as central actors in the extension of civil rights to nonblack minorities, as opposed to grassroots activists. *See* Skrentny, *supra* note 5, at 70. My policy narrative accords with Professor Skrentny's top-down history, but recognizing the leadership role of bureaucrats does not suggest inappropriately activist behavior. In a separate study of workplace agencies serving undocumented immigrants, I describe the professional and organizational mandates that motivated bureaucrats as an alternative to the more politicized description of bureaucrats as activists. *See* Ming H. Chen, *Where You Stand Depends on Where You Sit*, 33 BERKELEY J. EMP. & LAB. L. 227 (2012). The difference between the way I describe the bureaucratic entrepreneurs in the emergence of language rights and those responding to undocumented immigration post-*Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), is the political context of the time. The 1965–1980 time period that is the focus of this Article was infused with activism and that activism was part and parcel of the regulatory state that developed alongside the public interest law.

[9] English is sometimes considered the de facto official language of the United States, even though congressional bills and proclamations seeking to adopt it officially have failed at the national level. *See generally* SANDRA DEL VALLE, LANGUAGE RIGHTS AND THE LAW IN THE UNITED STATES: FINDING OUR VOICES 54 (2003).

[10] Cristina Rodriguez describes the multiculturalist commitment of Canada and other immigrant-receiving nations as involving robust accommodation of language rights. *See* Cristina M. Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 157 (2001) ("Multiculturalism can take the form of state support and protection of ethnic or religious prac-

meant that some Asians and Hispanics lacked English language competency despite years of residence in ethnic enclaves of cities.[11]

Curiously, the effort to define civil rights protections as encompassing a right to access government programs without regard to language ability emerged without a single mention of the word "language" in the civil rights statutes being administered. Instead, bureaucrats latched onto the undefined terms "national origin" and "discrimination" to anchor language rights in civil rights law.[12] The term "national origin" existed in immigration laws going back to the New Deal era,[13] but the term was resurrected in agency implementation of civil rights statutes. In a variety of guidances and policy statements, agency officials interpreted vague statutory texts prohibiting national origin discrimination to include protections for immigrants and non-English speakers. They also interpreted "discrimination" to require more than the right to formal equality — to agency officials, a robust recognition of language rights required affirmative action to overcome language barriers that impeded substantive equality. In both schools and workplaces, policy entrepreneurs within agencies argued that the achievements of the black civil rights movement eluded Asian and Hispanic language minorities. Language gaps and institutional neglect isolated these language minorities from the institutions critical to entering mainstream society.[14] The result of agency statutory interpretations was to clarify and concretize the rights of language minorities; the means to achieve the result were guidances.[15]

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tices."). Canada is officially bilingual and commits significant government resources to the maintenance of French and English in schools and public life as part of its commitment to multiculturalism. Other immigrant-receiving nations (in Europe, for example) offer integration programs that include language instruction and cultural education to their newcomers. The United States, in contrast, limits its language integration programs to refugees and K–12 schoolchildren, leaving other adult immigrants to seek out private resources. *See* CAROL SCHMID, THE POLITICS OF LANGUAGE: CONFLICT IDENTITY, AND CULTURAL PLURALISM IN COMPARATIVE PERSPECTIVE 101–22 (2001).

[11] While not a well-known fact, five of the seven plaintiffs in *Lau v. Nichols*, 414 U.S. 563 (1974), and the named plaintiff in *García v. Gloor*, 618 F.2d 264 (5th Cir. 1980), were native-born racial minorities as opposed to recently-arrived immigrants. This litigation established the parameters of bilingual education and English-only workplace policies. *See infra* section III.D; *see also Lau*, 414 U.S. at 564; *Gloor*, 618 F.2d at 265; Reply Brief of Petitioners at 7, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172358.

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

[13] *See generally* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004) (providing an authoritative account of immigration history in the 1940s).

[14] *See infra* Part III.

[15] The use of the "rights" nomenclature in the regulatory context is often fraught with modern debates over the scope and weight of protections announced in agency rules. In the parlance of administrative law, substantive rights are typically issued in regulations produced

The fiftieth anniversary of the Civil Rights Act of 1964 offers an important opportunity to reflect on an earlier moment when civil rights evolved to accommodate new waves of immigration. This Article seeks to explain how civil rights laws evolved to include immigrants and non-English speakers. More specifically, it seeks to explain, first, how policy entrepreneurs in agencies read an affirmative right to language access into civil rights statutes. Their use of guidances and policy documents to clarify and concretize statutory rights for national origin minorities is notable for several reasons. As compared with community activists urging social movements in the streets or public interest lawyers urging constitutional change through courts, they employed obscure Federal Register notices and policy guidances to achieve meaningful legal protection for a neglected group.

Second, this Article seeks to explain why the pathways to language rights varied in schools and workplaces and the implications of those differences for the strength of language rights. While both the OCR and EEOC interpreted the statutory term "national origin discrimination" broadly in their guidances, the governing authority for these interpretations differed dramatically. In schools, OCR officials initially sought to extend the promise of equal educational opportunity to non-English speaking students on constitutional grounds; their claims evolved to base affirmative duties to accommodate non-English speaking students on statutory and regulatory grounds. This ambitious interpretation of Title VI of the Civil Rights Act of 1964 as imposing affirmative duties on schools to provide bilingual education programs[16] was upheld in the seminal Supreme Court case *Lau v. Nichols*,[17] codified by Congress in the Equal Educational Opportunity Act of 1974,[18] and largely accepted in schools.[19] In contrast, the EEOC more mod-

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in accordance with notice and comment procedures specified by the Administrative Procedure Act ("APA"). A prominent test used to determine the validity, and thus the legally binding effect, of a putative agency rule adopted without notice and comment procedures is the impact on the substantive rights of the regulated entity. While the episode described in this Article may raise questions taken up in this modern debate, this Article is not centrally concerned with modern doctrine because such concerns are anachronistic. The term "language rights" is used in this Article to refer to civil rights protections claimed by national origin minorities who confront barriers to equal opportunity on the basis of their language ability. It encompasses both legal claims (subject to administrative or judicial enforcement) and more rhetorical claims with practical and political significance. *See infra* section I.B and text accompanying note 52.

[16] 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 there is little agreement on the most effective ones. In addition, while lay usage refers to the curricular approach, legal usage shifts after the *Lau v. Nichols* case, once OCR officials let stand the basic right of language access but stripped the specific remedy of bilingual education. This history is further detailed in section III.C.

[17] *See* Lau v. Nichols, 414 U.S. 564, 568 (1974) ("Any ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent track." (quoting Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 10, 1970))).

[18] 20 U.S.C. §§ 1701–1758 (1974).

estly interpreted the Title VII prohibition against national origin discrimination as rendering suspect workplace policies that require employees to speak English on the job. The EEOC interpretation met resistance in appellate courts and hostility in workplaces.[20]

My explanation for how agency guidances transformed into stronger language rights in education than in employment broadens modern administrative law's accounting of the value of regulation. It demonstrates the ways agencies can use practically effective, yet legally nonbinding actions to protect the civil rights of minorities. Part I explains the framework and perspective of historical institutionalism as a lens for understanding the phenomenon of agency-promulgated rights, contrasting it along the way with modern understandings of agency guidances. Part II provides the background necessary to understand the expansion of civil rights and the social science methodology used to construct comparative case studies to study it. Part III presents two case studies that illustrate the use of guidances to elaborate on statutory rights: the rise of language rights in schools and workplaces. Part IV abstracts elements of the case studies to set forth a theory of governing by guidance. The Article concludes with reflections on how a historic, yet understudied development can inform current understandings of civil rights law and administrative practice.

I. Incomplete Accounts of Civil Rights Law

The puzzle that motivates this Article is the emergence of language rights under the Civil Rights Act of 1964, absent statutory language specifically providing for them. The OCR and the EEOC advanced policy statements and guidances interpreting these statutes to include concrete legal protections for language minorities in the course of administering the national origin discrimination provisions in these statutes. OCR guidances led

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[19] Section 1703(f) of the Equal Educational Opportunity Act requires school districts to "take appropriate action to overcome language barriers . . . ." 20 U.S.C. § 1703(f) (2012). These actions vary from district to district, but they are predominantly analyzed under the framework of *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). "[T]he responsibility of the federal court is threefold. First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based . . . . The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school . . . . Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts to make the program work does not necessarily end the court's inquiry into the appropriateness of the system's actions." *Id.* at 1009–10.

[20] The EEOC national origin guidance is discussed with more detail in section III.D. *See* Office of Legal Counsel, Title VII/ADEA/EPA Div., EEOC Directives Transmittal No. 915.003, Subject: EEOC Compliance Manual 15-8 (2006) ("In forbidding 'national origin' discrimination, Title VII prohibits the denial of equal employment opportunity because of the place of origin of an individual or his or her ancestors, or because an individual has the physical, cultural, or linguistic characteristics of a national origin group.").

to the inception of bilingual education in public schools, an ambitious regulatory undertaking that remains (albeit in an altered state) in Title VI law. The EEOC provided for comparatively more limited prohibitions against English-only workplace policies in its national origin guidances. Again, the legal edifice remains intact years later, but it is more contested. The question is *how* these regulatory conceptions of language rights took hold, absent statutory language clearly providing for them.

Legal accounts of civil rights law tend to focus on individual rights and emphasize the role of courts in their creation. The predominant account of civil rights as a case study for understanding the capacity of courts to effectuate change, for example, features prominently the landmark Supreme Court decision *Brown v. Board of Education*.[21] Political scientists studying policy change place it within its historical and institutional context,[22] although they tend to focus on Congress and the President. Each of these accounts neglects regulatory agencies as institutional change actors and regulatory practice as a mechanism of change. To the extent that they do consider agencies, they paint agencies as weak institutions subject to significant political[23] or organizational[24] constraints.[25] However, the growth of the ad-

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[21] 349 U.S. 294 (1955). The vast literature discussing *Brown* is summarized in William Manz, Brown v. Board of Education*: A Selected Annotated Bibliography*, 96 LAW LIBR. J. 245 (2004) and commemorated in fiftieth anniversary symposium issues of law reviews. For a small sample of fiftieth anniversary legal scholarship, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); Derek Bell, *The Unintended Lessons in* Brown v. Board of Education, 49 N.Y. L. SCH. L. REV. 1053 (2004); David Garrow, *"Happy" Birthday,* Brown v. Board of Education*?* Brown*'s Fiftieth Anniversary and the New Critics of Supreme Court Muscularity*, 90 VA. L. REV. 693 (2004); Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92 (2004); William E. Nelson, Brown v. Board of Education *and the Jurisprudence of Legal Realism*, 48 ST. LOUIS U. L.J. 795 (2003); and Jack B. Weinstein, Brown v. Board of Education *After Fifty Years*, 26 CARDOZO L. REV. 289 (2004).

[22] American Political Development ("APD") is the subfield of political science most concerned with the history and development of institutions. For an influential account of APD scholarship, see KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT (2004). Orren and Skowronek write: "[B]ecause a polity in all its different parts is constructed historically, over time, the nature and prospects of any single part will be best understood within the long course of political formation." *Id.* at 1. Of the several strands of APD, historical institutionalism emphasizes "how institutions emerge from and are embedded in concrete temporal processes" and offers ways of understanding dynamics of institutional change and stability. Kathleen Thelen, *Historical Institutionalism in Comparative Politics*, 2 ANN. REV. POL. SCI. 369, 369 (1999); *see also* Theda Skocpol & Paul Pierson, *Historical Institutionalism in Contemporary Political Science*, *in* POLITICAL SCIENCE: STATE OF THE DISCIPLINE (Ira Katznelson & Helen V. Milner eds., 2002).

[23] *See, e.g.*, Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440 (1989) ("An alternative means of achieving the policy outcome . . . is to constrain an agency's policies through its structure and process by enfranchising the constituents of each political actor . . . that is a party to the agreement to enact policy."); Terry M. Moe, *Power and Political Institutions*, 3 PERSP. ON POL. 215, 221 (2005).

[24] *See, e.g.*, Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 6, 1531, 1533 (1992) ("The organizational changes . . . are responses to these specific mandates as well as to the general legal

ministrative state under the New Deal and civil rights eras fundamentally altered the ambition of regulatory policy. The first phase of regulation focused on economic regulation.[26] Subsequently, regulatory goals expanded in depth and breadth to include rulemaking and regulation on civil rights, the environment, and health and safety.[27]

Administrative law scholars examine agency power very carefully. Because of their emphasis on judicial review and doctrines of deference as the fulcrum of the relationship between courts and agencies, however, they underestimate the significance of regulatory claims that are not, strictly speaking, enforceable in court.[28] For example, the leading administrative law treatise consists of three volumes, runs over a thousand pages, and spends less than a single chapter discussing policy statements and guidances, discussing only their exemption from Administrative Procedure Act ("APA") rulemaking procedures for agency rules that carry the force of law.[29] The same balance between rules and exceptions is kept in most administrative law casebooks and administrative law courses.[30] The result of this uneven

environment."); Jodi L. Short, *Creating Peer Sexual Harassment: Mobilizing Schools to Throw the Book at Themselves*, 28 L. & POL'Y 31, 32 (2006) ("[T]he constellation of professionals and organizations connected with them shap[e] both policy and law.").

[25] Political scientists Shep Melnick and Paul Frymer and political sociologist John Skrentny are exceptional in this regard. Professor Melnick, for example, demonstrates in multiple books that judicial interpretation was the key to implementation of welfare reform in states and also civil rights policy. *See* R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994); Melnick, *supra* note 6, at 33 (describing remedial model that blended courts and agencies in enforcement of Title VI). Professor Melnick cites Paul Frymer and John Skrentny as stating that, since the 1960s, the judiciary has "played a far more active and affirmative role in building the powers of the state and expanding its power to regulate civil society and the economy." Melnick, *supra* note 6, at 7 (citing Paul Frymer, *Law and Political Development*, 33 LAW & SOC. INQUIRY 789 (2008); and John Skrentny, *Law and the American State*, 32 ANN. REV. SOC. 213 (2006)).

[26] *See generally* CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1993).

[27] *Id.*

[28] Attention to judicial deference has jumped since the Supreme Court's 2001 decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), distinguishing the levels of deference afforded legislative and nonlegislative rules. *See, e.g.*, David Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276 (2010). The core questions in the post-*Mead* era are also represented in the scholarship of the 1990s that seeks to describe and evaluate the muddled distinction between legislative and nonlegislative rules. *See, e.g.*, Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 668–69 (1996) (criticizing judicial deference to policy statements to the same extent as regulations as a "profoundly unsound and dangerously antilibertarian practice"); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 83 (1995) ("[I]t is now at least arguable that: (1) courts accord greater deference to policy statements and interpretive rules than to legislative rules and; (2) in important contexts, interpretive rules and policy statements bind judges and the public to the same extent as do legislative rules.").

[29] RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE (4th ed. 2002) (chapter six references guidance only indirectly as an exception to the APA rulemaking procedures).

[30] The same pattern is seen in other leading administrative law casebooks. *See, e.g.*, STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, ADRIAN VERMEULE & MICHAEL HERTZ, ADMINISTRATIVE LAW AND REGULATORY POLICY (7th ed. 2011); WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE (4th

coverage is an impression that agency guidances are an insignificant legal topic, despite their prevalence and import in the realm of administrative practice. In administrative practice, a nonbinding rule with the power to shape industry practices and inform the general public matters very much.

This Article sweeps more broadly than administrative law. It also demarcates more precisely than social science the mechanisms used by agency officials to innovate using existing civil rights statutes. The Article's intention is to draw attention to agency issuance of nonbinding guidances as a distinctive breed of civil rights law. While the prevalence and importance of guidance documents have grown only in recent years, the Article illuminates the civil rights era as a historical moment when the nascent practice of governing by guidance was used to great effect. In the case studies of both schools and the workplace, regulatory agencies implementing civil rights statutes articulated institutional obligations to provide language access in their guidances and policy statements. Without resorting to formal pathways for legal change, they effectuated meaningful protections for a neglected group that, over time, have retained practical and normative significance. The rights they announced were not born from thin air. Nor were they merely ripples of other rights expansions. Unlike other civil rights developments, for example, these agency actions did not expand existing theories of civil rights to new groups by amending a statute nor did they codify judicially created theories of legal liability to implement statutorily created rights.[31] Agencies instead embedded their pronouncements of language rights in statutes and then developed them through nonbinding rules in order to derive legal and moral authority. Bureaucrats used guidances to enact meaningful rights to language access that could be invoked against schools and workplaces during administrative enforcement, even if these rights lacked the full force of law accorded regulations in courts. Interestingly, bureaucrats accomplished this feat in a legal environment not yet overtaken by the preoccupations of modern administrative law: judicial review and doctrines of deference. Muddling their way through the policy thicket, agencies made legal rights "real" in the administrative state, to borrow language

ed. 2010); KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW (2010). *But cf.* LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN & KEVIN M. STACK, THE REGULATORY STATE (2d ed. 2013) (takes into account the broader political context); JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION (2d ed. 2013) (same).

[31] Affirmative action and sexual harassment are frequently cited as judicially created theories of legal liability. On the development of affirmative action, see generally ANTHONY S. CHEN, THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941–1972 (2009); HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972 (1990); and JOHN D. SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA (1996). On sexual harassment law, see generally CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) and Catherine MacKinnon, *Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813 (2002).

from Professor Charles Epp's aptly titled *Making Rights Real*.[32] The theory of policy innovation and regulatory rightsmaking advanced in this Article builds on this richer account of administrative law.

A. Agency Statutory Interpretation and Nonbinding Guidances

The process of policy innovation, or what this Article terms governing by guidance, can be viewed as a long arc with at least three phases: (1) enactment of legislation, (2) statutory interpretation in the development of regulatory policy, and (3) implementation and enforcement as agency-promulgated rights. Agencies are critically involved in both statutory interpretation and implementation.[33] Authority to interpret statutes may be delegated, or denied, to agencies either implicitly or expressly. Agencies that possess the authority to interpret statutes, while focused on text and guided by legislative history and established canons, engage in a creative process that goes beyond "rule articulation."[34] Interpreting existing civil rights laws as encompassing language rights required civil rights agencies to engage in several interpretive leaps. The doctrinal "hook" for these interpretive leaps came in the form of the Civil Rights Act of 1964. Like many laws enacted during the 1960s, Titles VI and VII of the Civil Rights Act contained broad language, lending themselves to textual ambiguities and even contradictions born of political compromise.[35] Famously, the civil rights statute does not even define "discrimination."[36] The nondiscrimination clauses then refer to

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[32] *See* CHARLES EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 2–4 (2009). Epp describes 1970s reforms in police misconduct, sexual harassment, affirmative action, and playground safety as taking on a law-styled attempt to bring bureaucratic practice in line with emerging legal norms.

[33] *See* Abbe Gluck, *Intrastatutory Federalism and Statutory Interpretation*, 121 YALE L.J. 534, 537 n.2 (2001) ("By many accounts, 'implementation' *is* the new interpretation, or at least a very substantial part of it.").

[34] SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES 165 (2010) (describing agency function as "rule articulation"). Others have also noted the interpretive aspects of statutory implementation. *See, e.g.*, William Eskridge & Kevin Schwartz, *Chevron and Norm Entrepreneurship*, 115 YALE L.J. 2623, 2624 (2006) (describing the exercise of agencies filling in the details of statutes as normative rather than value neutral); Abbe Gluck, *supra* note 33, at 537 (arguing that some "federal statutory interpretation . . . takes place not in the courts, but on the ground, by the state governors, state legislators, and state administrative officials whom Congress increasingly places on the front lines in the implementation — and so by necessity, the interpretation — of federal statutory law"); *see also* United States v. Mead Corp., 533 U.S. 218, 227 (2001) ("[A]gencies charged with applying a statute necessarily make all sorts of interpretive choices.").

[35] Title VII is cited for its complexity in WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 38 (2d ed. 2006) ("The most complex, and the most often litigated, portion of the Civil Rights Act has been Title VII.").

[36] Section 601 of Title VI reads "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2006). Section 703 of Title VII reads "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or

the protected category "national origin" without defining the term and without explaining how national origin differs from potentially overlapping categories like race, ethnicity, country of origin, and citizenship.[37] How the regulatory agencies were supposed to implement the prohibition against national origin discrimination was unclear based on the plain language of the statutory text. It would require interpretation, elaboration, and even innovation in the course of implementation. The tools available to agencies to accomplish these critical tasks during the civil rights era were not well defined, even if categories of rulemaking existed on the books. A comparison of the theoretical and practical agency tools ensues.

B. Administrative Law on the Books

In the parlance of modern administrative law, agencies engage in rulemaking as a way to interpret and implement statutes.[38] Two forms of agency rulemaking are provided for under the APA[39]: formal rulemaking and informal rulemaking. Formal rulemaking adopts trial-like procedures.[40] Informal rulemaking, also known as notice and comment rulemaking, emulates the legislative process by commanding public input and agency deliberation.[41] Rulemaking "is the product of an exercise of delegated legislative power to make law through rules."[42] For the purposes of this Article, I define guidances as all agency statements clarifying a legal position that are not required to undergo the formal rulemaking or notice and comment rulemaking procedures. Guidances encompass "interpretive rules" and "general statements of policy."[43] While the APA's list of excepted rule types is not further defined within the APA, the working definition that many judges consult says that interpretive rules "advise the public of the agency's construction of a statute" and that general statements of policy "advise the public prospectively of the manner in which the agency proposes to exercise

otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2.

[37] *Id.* §§ 2000d, 2000e-2.

[38] The APA's general definition of "rule" encompasses "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency." 5 U.S.C. § 551(4) (2012). Agencies may also, through adjudications, interpret their own statutes and regulations. Adjudications, however, fall outside the scope of this Article.

[39] 5 U.S.C. §§ 500–596.

[40] *Id.* §§ 556–557. Because formal procedures were not used in the creation of language rights, such procedures are not discussed in this Article.

[41] *Id.* § 553.

[42] Kenneth C. Davis, Administrative Law Treatise § 7:8, at 36 (2d ed. 1979).

[43] While the APA requires that "[g]eneral notice of proposed rulemaking shall be published in the Federal Register," general policy documents are collectively grouped under an exception that states: "Except when notice or hearing is required by statute, this subsection does not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A).

a discretionary power."[44] Although not specifically mentioned in the APA exceptions, guidances can also take the form of Dear Colleague letters, memoranda of understandings, compliance manuals, and even press releases setting out agency positions. Collectively, guidances constitute a major form of regulatory action in the modern state. They are the primary focus of this Article.

Agencies can generally choose from a variety of vehicles through which to promulgate rules and/or guidances — formal rules, informal rules, statements of policy, position statements, etc. Each vehicle carries a varied amount of legal significance. For example, if a validly promulgated rule is considered binding, the agency can cite to it as binding when challenged by a regulated entity. If it is not considered binding, the agency needs to establish the basis for its reasoning or borrow from the authority of underlying statutes and case law. However, even to this day, there is no bright line test to establish whether courts will consider an agency's promulgation binding, so it is challenging for an agency to determine accurately, from the outset, whether courts will allow an agency to cite a promulgation as binding when challenged.

C. Administrative Law in Action

This initial account of agency rules demonstrates considerable doctrinal complexity and confusion. But the doctrine is yet more complex. For example, courts have crafted a distinction between "legislative" and "nonlegislative" rules, which determines whether a rule must follow the APA's notice and comment rulemaking procedures or is exempt.[45] The doctrine provides a variety of tests to determine whether a rule is legislative or nonlegislative: the substantial impact test,[46] the legal effects test,[47] and others.[48] However, each of these tests can cut differently when applied to a particular instance. In theory, once a singular test is agreed upon, the distinction between legislative and nonlegislative rules would become clear. In practice, however,

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[44] TOM C. CLARK, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURES ACT pt. 3, § 4 (1947). For a more recent definition of interpretive rules, see *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993). This case found that a rule is "legislative," not "interpretive," if the answer to any of the following questions is yes: "(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule." *Id.* at 1112.

[45] *See, e.g.*, Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1046 (D.C. Cir. 1987); Am. Postal Workers Union v. U.S. Postal Serv., 707 F.2d 548, 558 (D.C. Cir. 1983).

[46] *See, e.g.*, U.S. Dep't of Labor v. Kast Metals Corp., 744 F.2d 1145, 1153 (5th Cir. 1984).

[47] *See, e.g.*, *Am. Mining Cong.*, 995 F.2d at 1112.

[48] *See* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN L. REV. 1321, 1324–25 (2001) (suggesting a procedural test for whether a rule is legislative or nonlegislative).

applying the tests is extremely difficult and even a single test can cut different ways. This is partially because, ex ante, agencies do not always clearly characterize their issuances as legislative or nonlegislative, and do not often make clear at the outset their intentions to bind the regulated entity or the public through their issuances. Additionally, during implementation and afterwards, courts can decide that an agency's issuance is an invalid legislative rule — a document issued without notice and comment procedures that intends to bind courts or the agency in future actions. Such issuances overstate the legal effect of the document.[49] These errors and omissions are exacerbated when an important reality is confronted: guidances can have practical effect, even if they lack legal effect as a formal matter. As Professor Robert Anthony explains, "A document that was not issued legislatively [via notice and comment rulemaking procedures], and which therefore cannot be binding legally, is nevertheless binding as a practical matter if the agency treats it as dispositive of the issue it addresses."[50] For example, a guidance may be treated as if it imposes mandatory standards in an enforcement action, or may effectively impose such standards through regular application of the standards set forth in the document.

Modern courts and commentators reflecting on these practical difficulties have declared the doctrine "tenuous," "baffling," and "enshrouded in considerable smog."[51] Given that the contours of administrative law were still taking form in 1970,[52] the precise mode of rulemaking undertaken to implement the Civil Rights Act was even murkier than would be the case today. Rather than adhering to well-settled case law,[53] agencies followed instinct and intuition. By and large, agencies encountered these practical realities without self-consciousness about the legal consequences that would follow. The agencies set out to solve the problems entrusted to them by statute through their regulatory toolkit. The choices they made — adminis-

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[49] *See* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007) ("Because it is procedurally easier to issue guidance documents, there also may be an incentive for regulators to issue guidance documents in lieu of regulations."). *But cf.* Conor Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 813 (2010).

[50] Robert A. Anthony, *Interpretive Rules, Policy Statements, Manuals and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312 n.1 (1992). Professor Anthony goes on to argue that such issuances that lack legally binding effect yet are practically binding should be invalid. *Id.* at 1312.

[51] These negative descriptors were used in *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987); *Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987); and *Chisholm v. FCC*, 538 F.2d 349, 393 (D.C. Cir. 1976).

[52] While *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), providing the main alternative to *Chevron* deference, had been on the books since 1944, it was not well integrated in the framework for judicial review of agency issuances until 2001. Thus, it is not surprising that it would not have been invoked in the language rights cases involving agency guidance during the 1970s–80s. *See also supra* note 15.

[53] Today, *Chevron* and *Mead* specify norms that take into account the form of regulatory action in determining whether the agency's intentions and procedures demonstrate sufficient deliberation to merit judicial deference. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984); United States v. Mead Corp., 533 U.S. 218, 228 (2001).

trative law in action — are elaborated in comparative case studies after a brief discussion of the methodology used to construct them in Part II.

II. Research Design and Methodology

Studying policymaking as an unfolding process recognizes the importance of contingency, timing, and sequencing in the development of law and legal institutions. My decision to study historical antecedents to contemporary language policy challenges the perceived inevitability of those policies. Studying policies that originate in regulatory agencies provides a fresh perspective on enduring questions about the civil rights era, which is more commonly viewed as the paradigmatic instance of rights-based legislative and judicial change. The study attempts to reconstruct the policy pathways leading from the passage of the 1964 Civil Rights Act and elimination of national origin quotas in immigration law one year later, through critical moments in the policy implementation process, to the promulgation of agency guidelines on language rights.[54]

A. Comparative Case Studies

These process-tracing histories set up a "testing ground" for a theory; they are not just the "raw material for compelling narrative."[55] Toward that end, I use a structured comparison of two case studies and counterfactuals to illuminate differences in the processes of policymaking that produced language rights in schools and workplaces. The use of strategically selected case studies provides perspective on the scope of the phenomenon described and insight into the conditions under which regulatory rulemaking might lead to stronger or weaker rights.[56]

By way of qualification, in both education and employment, I studied *federal* civil rights laws that were the main vehicles for change during the 1960s–70s. The choice to omit state laws that were assuredly influential[57] admittedly has its tradeoffs, but it is appropriate given the distinctively federal character of legal change during this era. Plus, a methodological advantage is that the study of federal policy promotes uniformity across the two case studies: schools and workplaces.

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[54] *See* Alexander George & Andrew Bennett, Case Studies and Theory Development in the Social Sciences 137 (2005). George and Bennett have defined a "causal mechanism" as the "processes through which agents with causal capacities operate . . . in specific contexts or conditions, to transfer energy, information, or matter to other entities." *Id.*

[55] Jacob Hacker, The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States 65 (2002).

[56] While the narratives were constructed to support sustained analysis across cases, this type of qualitative research does not lend itself to hypothesis testing in the strict sense.

[57] Two examples of excellent scholarship on state-level civil rights include Mark Brilliant, The Color of America Has Changed: How Racial Diversity Shaped Civil Rights Reform in California, 1941–1978 (2010); and Chen, *supra* note 31.

B. Case Selection

Schools and workplaces comprise two sites that are especially worthy of study given their prominence as equality-advancing institutions and their centrality to immigrant integration. Further, the OCR and the EEOC, which administer the Civil Rights Act's provisions on schools and workplaces respectively, shared many traits during the emergence of language rights that make them comparable, or "most similar" in methodological parlance. They each administered key provisions of the same Act, operated in similar political environments marked by openness to change, and employed similar legal strategies.

However, differences in the agencies' institutional designs and in the policy arenas in which they regulate provide important contrasts.[58] Most obviously, the OCR regulates public schools under Title VI, whereas the EEOC regulates private businesses under Title VII. In terms of institutional design, a cabinet-level secretary directly accountable to the President leads the U.S. Department of Education (the successor agency to HEW), while a bipartisan commission leads the EEOC. The OCR uses mostly administrative case processing whereas the EEOC relies heavily on private litigation for law enforcement. The EEOC lacks substantive rulemaking authority whereas the OCR has such authority. The last fact is the most relevant for purposes of this study and requires further elaboration in the subsections below.

1. OCR and Title VI Rulemaking.

By statute, the OCR implements Title VI of the Civil Rights Act in public schools. Hugh Davis Graham calls Title VI "the great sleeper provision" of the Civil Rights Act.[59] Although little attention was paid to it during legislative debate, which focused on Title VII, Title VI would become "by far the most powerful weapon of them all."[60] The reason is that Title VI actually consists of two implementation provisions, with the latter unlocking the potential for enhanced agency capacity in the OCR.

Section 601 goes to the statutory purpose of the Civil Rights Act. It states that "no person in the United States shall, on the basis of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving

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[58] Christopher Bonastia calls this the "institutional home." CHRISTOPHER BONASTIA, KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS 6–7 (2006).

[59] Hugh Davis Graham, *Since 1964: The Paradox of American Civil Rights Regulation*, *in* TAKING STOCK: AMERICAN GOVERNMENT IN THE TWENTIETH CENTURY 187, 194 (Morton Keller & R. Shep Melnick eds., 1999).

[60] GRAHAM, *supra* note 31, at 83.

Federal financial assistance."[61] It sets forth a carrot for entities receiving public funds — including most public schools — to comply with Title VI. In light of the enormous increase in federal aid to public schools, the attendant possibility of terminating funding serves as a strong incentive to compliance.

Section 602 authorizes federal agencies to issue rules explaining how Title VI requirements apply to the particular programs they fund.[62] These agency rules can be interpretive or substantive in nature. By relying on agency rules and procedures to effectuate the statutory purposes in section 601, section 602 ultimately provides an administrative alternative to litigation and an end run around the "painfully slow and costly process"[63] of remedying desegregation in courts. In accordance with the APA, the choice to exercise the rulemaking authority provided in section 602 is left to the OCR.

2. EEOC and Title VII Rulemaking.

The statutory authority for rulemaking under Title VII differs from the authority granted by Title VI in important respects. While the APA generally leaves agencies with a choice as to their form of rulemaking, in some instances Congress can restrict an agency's rulemaking authority. This was the case in Title VII with regard to the substantive rulemaking powers of the EEOC. The only explicit delegation of rulemaking authority directs the EEOC "from time to time to issue . . . suitable procedural regulations to carry out the provisions of this subchapter."[64] As Professor Melissa Hart explains:

> To some extent, the Court's lack of deference to the EEOC is part of a broader picture: The Court has established a bifurcated structure of administrative deference that leaves much of the kind of

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[61] Civil Rights Act of 1964, Pub. L. No. 88-352, Title VI, § 601, 78 Stat. 241, 252; *see also* 42 U.S.C. § 2000d-1 (2006).

[62] 42 U.S.C. § 2000d-1; Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000) ("Each agency providing Federal financial assistance shall draft title VI guidance . . . ."); Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980) ("The Attorney General shall coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions of . . . Title VI of the Civil Rights Act.").

[63] R. Shep Melnick, Thomas P. O'Neill Jr. Professor of Am. Politics, Bos. Coll., Paper Prepared for Delivery at the Western Political Science Association Annual Meeting: The Great Debate over the Civil Rights State 7 (Apr. 1, 2010), *available at* https://lapa.princeton.edu/uploads/2010-0405%20Melnick%20Seminar%20Paper.pdf, *archived at* http://perma.cc/8GW-SP5J.

[64] 42 U.S.C. § 2000e-12(a) (2006). Title VII does not require the EEOC to use notice and comment procedures when issuing its procedural regulations. *See* Edelman v. Lynchburg Coll., 535 U.S. 106, 114 n.7 (2002).

interpretation that the EEOC most often engages in with the power to persuade but not the power to control.[65]

The EEOC can, however, issue interpretive guidelines on substantive matters of law,[66] and its interpretations sometimes receive great deference.[67] For example, interpretive guidelines might have the power to persuade a court if they demonstrate sufficiently compelling logic. Professor Rebecca White observes that "since the mid-1970s, the agency has issued its interpretive guidelines only after extensive study, notice and comment, and sometimes public hearings."[68] These are the kinds of factors that typically persuade courts to defer to agencies. While reviewing courts have not taken up the opportunity to endorse the national origin guidelines specifically — due to the agency's lack of formal authority to issue substantive rules — the EEOC invoked its delegated authority to issue interpretive guidelines when promulgating its national origin guidelines.[69]

As discussed in Part I and elaborated in section III.D,[70] EEOC interpretive rules can have a meaningful practical effect even if their legal effect is somewhat limited.

C. Data: Archives and Interviews

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.[71] Within these documents, I looked into statutory interpretation and regulatory implementation, focusing especially on key challenges to these regulatory constructions of statute-based rights in 1968,

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[65] Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1937 (2006). However, Hart further states that the Court has been reluctant to specify what level of deference it owes to EEOC interpretations. *Id.* at 1938. When it does apply a settled deference standard, it more often than not finds the EEOC's interpretation unpersuasive. *Id.* at 1938, 1941–42.

[66] "The [EEOC] . . . does not have the authority to issue legislative rules that further define the prohibitions of the discrimination contained in Title VII of the Civil Rights Act. It can offer its construction of the statute (called interpretive guidelines), but those constructions do not have binding legal effect." Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1387–88 (2004); *see also* 42 U.S.C. § 2000e-12(a) (granting EEOC "authority from time to time to issue suitable procedural regulations to carry out the provisions of this subchapter").

[67] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971), for the proposition that EEOC guidelines "do constitute '[t]he administrative interpretation of the Act by the enforcing agency,' and consequently . . . are 'entitled to great deference'" (alteration in original)); *Griggs*, 401 U.S. at 433–34.

[68] Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 98 (1995).

[69] *See* 29 C.F.R. § 1606 (2013) (citing Title VII as its source of authority).

[70] *Infra* text accompanying notes 214–220 (discussing administrative enforcement and settlement proceedings favoring plaintiffs on the basis of EEOC guidance).

[71] Pub. L. No. 89–236, 79 Stat. 911.

1970, 1974, and 1980. Government records from federal repositories provided my primary source material on Congress's 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 Presidents Johnson,[72] Nixon,[73] Ford,[74] and Carter.[75]

My study of agencies was the most difficult part of this work: it required trips to the National Archives in Washington, D.C., and the individual archives of the agencies to uncover largely unedited, unstudied events. 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, 1974, and 1980 (for the OCR) and in 1970 and 1980 (for the EEOC); and court cases reviewing those actions. Where official records left gaps in the story of political development, 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. In order to probe individual motivations of agency officials, I conducted in-depth interviews with activists and regulatory officials who had been active during the period of rights expansion (many of whom have since retired from office).[76]

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[72] The Johnson Library (Austin, Texas) contained extensive files on the EEOC and some material on the OCR. Leon Panetta, director of the OCR for Johnson, left significant files, including research from Martin Gerry, his special assistant and the original author of the May 1970 memo on discrimination against national origin minority students discussed in Part III *infra*.

[73] The voluminous Nixon archives are split between Yorba Linda, California and Washington, D.C., because of the Watergate litigation. I searched presidential and cabinet records related to education, employment, Hispanics, Asians, civil rights, social protest, and known controversies concerning agency regulation (e.g., busing, affirmative action, sexual harassment). The combined records of the National Archives and Records Administration ("NARA") II (College Park, Maryland), the U.S. Department of Education (formerly the Department of Health, Education, and Welfare's OCR), and EEOC headquarters 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 *García v. Gloor* necessitated additional inquiries to Federal Records Centers, NARA Regional Archives, and agency Freedom of Information Act ("FOIA") and acquisition officers.

[74] The Ford Library (Ann Arbor, Michigan) 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 (on file with author). Information about the Carter and Reagan administrations is from research available on microfiche and published accounts (on file with author).

[75] Civil rights scholars Hugh Davis Graham, Gareth Davies, and John Skrentny provide extensive descriptions of sources from the Carter library. *See* GRAHAM, *supra* note 31; SKRENTNY, *supra* note 7; Gareth Davies, *The Great Society After Johnson: The Case of Bilingual Education*, 88 J. AM. HIST. 1405 (2002).

[76] For bilingual education, I interviewed: Ed Steinman, Attorney for Kinney Lau; Ling-Chi Wang, Cofounder of Chinese for Affirmative Action and Associate Professor Emeritus, U.C. Berkeley Ethnic Studies Department; Henry Der, Former Executive Director of Chinese for Affirmative Action; Chris Ho, Senior Staff Attorney, Legal Aid Society-Employment Law Center; Angelo Ancheta, former Executive Director of Asian Law Caucus and Executive Di-

III. Case Studies: Statutory Interpretation and Enforcement in Civil Rights Agencies Lead to Regulatory Rights in Schools and Workplaces

A. Background: The Civil Rights Act Meets Immigration Reform

The convergence of immigration reform with the Civil Rights Act of 1964 represented a critical juncture in American political development.[77] The civil rights agenda that supported the expansion of rights to language minorities was part and parcel of a growing national government and a realignment of party politics.[78] Following the assassination of President John F. Kennedy, Democrats secured control over Congress in 1964.[79] The Democratic stronghold in Congress remained well into the 1970s, balancing the moderating efforts of the Nixon Administration.[80] The Democrats partnered with the White House to push an ambitious social agenda with civil rights as its centerpiece.[81] A liberal majority in the Supreme Court bolstered these policy priorities.[82] Consequently, the social climate was conducive to regulatory agencies that vigorously and creatively implemented civil rights mandates.

Against the backdrop of the expanding civil rights state, the Hart-Cellar Act of 1965 lifted national origin quotas that limited non-European immigration.[83] Ironically, President Johnson said during the bill signing, "This is not a revolutionary bill. It does not affect the lives of millions. It will not restructure the shape of our daily lives . . . ."[84] Robert Kennedy estimated "for the Asia-Pacific Triangle . . . 5000 immigrants would come in the first year, but we do not expect that there would be any great influx after that."[85] Both statements proved wrong. The scope and scale of demographic change

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rector of the Alexander Community Center at Santa Clara Law School; Paul Igasaki, former Executive Director of Asian Law Caucus and former EEOC Commissioner; and Paul Grossman, Chief Civil Rights Attorney for the OCR. I also consulted oral histories and interview transcripts of Leon Panetta and Martin Gerry from John Skrentny. For employment discrimination, I interviewed EEOC attorneys in the Office of General Counsel, the Office of Legal Counsel, and the Executive Secretariat; and the staffs of Commissioners Paul Igasaki, Stewart Ishimaru, and Cari Dominguez and Regional Director Bill Tamayo (specializing in national origin, bilingualism, and Hispanic affairs).

[77] A critical juncture represents an important decision point in the development of policy because two or more possible paths diverge thereafter. *See* Paul Pierson, Politics in Time: History, Institutions, and Social Analysis 134–35 (2004).

[78] For a general history of the civil rights era that covers these events, see generally Graham, *supra* note 31.

[79] *Id.* at 163.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *See* Reimers, *supra* note 2, at 80.

[84] *Id.* at 84.

[85] *Id.* at 74.

was unprecedented. By the late 1960s, "third world" immigration crested; Asian and Latin American migration especially increased.[86]

Liberalization of immigration policy exacerbated language gaps. While language barriers preexisted the Civil Rights Act of 1964, high levels of migration increased the percentage of non-native English speakers.[87] The need to bridge language gaps escalated during this period. The U.S. Census Bureau reports that in a sample of 9.5 million people, the number of people in the United States whose native language was an Asian language or Spanish approximately doubled from 1960 to 1970 (from 306,624 to 556,445 for Asian languages and from 813,429 to 1,696,240 for Spanish).[88] Sixty-nine percent of non-native English speakers self-reported that they could not read a newspaper printed in English well in 1980.[89] Nearly 25% of Spanish speakers rated themselves as speaking English "not well" or "not at all" and nearly 30% of Chinese speakers reported similar difficulty with English.[90] These figures stand in contrast to the less than 10% of French and German speakers who struggled with English.[91] These language-proficiency levels are the reason that this study focuses on Asians and Hispanics.

Although merely a snapshot of language ability, these descriptive statistics illustrate the scope of the problem of language barriers in 1970. Due to these language barriers, many non-English speakers were effectively excluded from mainstream institutions such as schools and workplaces and

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[86] *Id.* at 61, 92, 123. However, according to Professor Reimers, "Western Hemisphere immigration was considerably less than it might have been without the numerical limit, but it nonetheless exceeded that ceiling and 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 or more than double the 120,000 figure." *Id.* at 124.

[87] Professor Jiménez attributes the resilience of Mexican ethnic identity, including the desire to speak Spanish, to persistent in-migration to the United States. TOMÁS ROBERTO JIMÉNEZ, REPLENISHED ETHNICITY: MEXICAN AMERICANS, IMMIGRATION, AND IDENTITY 88–92 (2010).

[88] *See* Campbell Gibson & Emily Lennon, *Historical Census Statistics on the Foreign Born: 1850–1990* tbl. 6 (U.S. Census Population Division, Working Paper No. 29, Feb. 1999); U.S. DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION: SUPPLEMENTARY REPORT ON COUNTRY OF ORIGIN, MOTHER TONGUE, AND CITIZENSHIP FOR THE UNITED STATES 1-599 tbl. 193 (1973).

[89] *See* PAUL SIEGEL ET AL., U.S. CENSUS BUREAU, LANGUAGE USE AND LINGUISTIC ISOLATION: HISTORICAL DATA AND METHODOLOGICAL ISSUES 7 tbl. 2 (2001). The Census did not ask about language proficiency until 1980, so this Article uses sample data from the 1970s and 1980s proficiency figures as the best available data. *See* Roberto Ramirez, *Analysis of Multiple Origin Reporting to the Hispanic Origin Question* 16 (U.S. Census Bureau, Working Paper No. 77) ("The question on language spoken in the home was first used in the 1980 Census."); Robert Kominski, How Good is How Well? An Examination of the Census English-Speaking Ability Question 1 (unpublished paper presented at the 1989 Annual Meeting of the American Statistical Association) (describing the evolution of census language questions and attributing the increased detail beginning in 1980 to the need to prove eligibility for government language-assistance programs established in the 1970s).

[90] BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION: DETAILED POPULATION CHARACTERISTICS 1-16 tbl. 256 (1984).

[91] *Id.*

faced diminished chances for academic, economic, and political success.[92] In essence, the on-the-ground realities of language barriers generated material problems of inequality and fed feelings of isolation. Mounting dissatisfaction, and rising hope over the potential of civil rights laws, led to a rights revolution that included language minorities.

B. Redressing Language Barriers in Bureaucracies

In a break from past civil rights struggles, non-English speaking Asians and Hispanics excluded from schools and workplaces took advantage of institutional channels to redress their concerns. In education, parents and students invoked *Brown v. Board of Education*[93] and Title VI in litigation campaigns to challenge unfair school practices. They also participated in government-sponsored task forces to oversee the implementation of regulatory guidance on national origin discrimination. In employment, the Mexican American Legal Defense and Education Fund ("MALDEF") lobbied Congress and the President for increased representation of Hispanics in high-level jobs in both the public and private sectors and made brief appearances during the public hearings attendant to the EEOC's notice of proposed rulemaking on national origin discrimination.[94] On the ground, frustrated parents, students, and workers complained to independent agencies responsible for monitoring civil rights enforcement or the regulatory agencies directly responsible for enforcement.[95] In response, agency officials launched proactive investigations, set demanding compliance standards, and ramped up enforcement — in essence, the administrative response transformed language barriers into a legally redressable problem without resorting to legisla-

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[92] For more on the effects of language gaps, consult the resources of ethnic minority groups such as the Asian American Justice Center and MALDEF. *See, e.g.*, ASIAN AM. JUSTICE CTR. & MALDEF, LANGUAGE RIGHTS: AN INTEGRATION AGENDA FOR IMMIGRANT COMMUNITIES 13–17 (2008), *available at* https://www.maldef.org/resources/publications/language_rights_briefing_book_June%202008.pdf, *archived at* http://perma.cc/NB25-X6M2 [hereinafter ASIAN AM. JUSTICE CTR. & MALDEF, LANGUAGE RIGHTS]; ASIAN AM. JUSTICE CTR. & MALDEF, ADULT LITERACY EDUCATION IN IMMIGRANT COMMUNITIES: IDENTIFYING POLICY PRIORITIES FOR HELPING NEWCOMERS LEARN ENGLISH 22–34 (2007), *available at* http://www.aecf.org/upload/publicationfiles/IM3622H5009.pdf, *archived at* http://perma.cc/Q26G-NMUX [hereinafter ASIAN AM. JUSTICE CTR. & MALDEF, ADULT LITERACY EDUCATION IN IMMIGRANT COMMUNITIES].

[93] 349 U.S. 294 (1955).

[94] *See generally* GARETH DAVIES, SEE GOVERNMENT GROW: EDUCATION POLITICS FROM JOHNSON TO REAGAN 332 n.19, 335 n.76 (2007); JULIE LEININGER PYCIOR, LBJ AND MEXICAN AMERICANS: THE PARADOX OF POWER 164–68 (1997); Memorandum from Hector Garcia and Carlos Vela in MALDEF Archives Box 156, RG 9 (Stanford Univ., Green Library, Dept. of Special Collections M0673).

[95] *See generally* DAVIES, *supra* note 94; Memorandum from Hector Garcia and Carlos Vela in MALDEF Archives Box 156, RG 9 (Stanford Univ., Green Library, Dept. of Special Collections M0673).

tive action or amendment of the Civil Rights Act.[96] The development of that administrative response is the heart of this Article.

The remainder of this section presents two case studies in which policy entrepreneurs expanded upon the text of a vaguely worded federal civil rights statute to require language access for predominantly Chinese-speaking and Spanish-speaking language minorities.[97] The two case studies will demonstrate that, in both schools and the workplace, agencies interpreted the Civil Rights Act as including language rights within the scope of national origin discrimination. However, differences with respect to judicial enforcement and congressional action have resulted in much more robust language rights in schools than in workplaces.

C. OCR Interpretation of Title VI National Origin Discrimination

Racial inequities in schools constituted the front line in the struggle for equal opportunity during the civil rights era. Segregated schools that were identifiably black or white posed the most glaring example of state-supported inequality. While less prominent in the national reform effort, similar practices of racial segregation separated Mexican and Chinese children from public schools. Moreover, subtle forms of discrimination and benign neglect left many schoolchildren with limited English proficiency *functionally* separate within schools that were not being monitored by courts. Expanding notions of equal opportunity recognized that laws and policies that were not overtly discriminatory could nevertheless result in disparate impacts on protected groups.[98] Those who lacked language competency received deficient education and would go on to be screened out from public services through literacy requirements, skills tests, and untranslated forms necessary to access public benefits.[99]

The pivotal stage in the struggle for language rights in schools emerged in San Francisco's Chinatown. Eventually, both the litigation and the agency guidance that arose from the plight of Chinese immigrants in San Francisco's schools would have a nationwide impact on language rights in education. In San Francisco's Chinatown, Chinese students enrolled in the San Francisco

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[96] In comparison, the Voting Rights Act of 1965, Pub. L. No. 89-110, was formally amended in 1970 to cover language minorities and provide for bilingual ballots. 42 U.S.C. § 1971 (2006). The Voting Rights Act comparison is developed in other work. *See, e.g.*, Ming H. Chen, Regulatory Rights: Courts and Agencies Constructing "National Origin" Discrimination as Language Rights in Schools and Workplaces, 1965–1980, at 17–29 (June 2011) (unpublished Ph.D dissertation, University of California, Berkeley) (on file with the Harvard Law School Library).

[97] The case studies draw significantly on material presented in my doctoral dissertation. *See* Chen, *supra* note 96, at 38–51.

[98] *See, e.g.*, Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 140, 143 (2014).

[99] *See generally* ASIAN AM. JUSTICE CTR. & MALDEF, LANGUAGE RIGHTS, *supra* note 92, at 13–16; ASIAN AM. JUSTICE CTR. & MALDEF, ADULT LITERACY EDUCATION IN IMMIGRANT COMMUNITIES, *supra* note 92, at 22–34.

Unified School District ("SFUSD") suffered language isolation. Concentrated numbers of non-English speakers attended segregated schools in Chinatown or were lumped together in English-speaking classrooms with other immigrants who spoke neither English nor Chinese.[100] Most were completely excluded from classroom instruction due to the unavailability of Chinese-English bilingual education.[101] There was enough dissatisfaction to generate the 1970 filing of a lawsuit, now known as *Lau v. Nichols*,[102] against the SFUSD and a parallel administrative response.

In response to linguistic isolation in Chinatown, Ed Steinman, a Legal Aid attorney, brought litigation to challenge the SFUSD's language policies, or the lack thereof, in the Northern District of California. His opening brief characterized SFUSD's practices as benign neglect, not born 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 Fourteenth Amendment, California's constitution, and a number of city codes and school district policies. The brief's main innovation on past equality law was the claim that ensuring equal opportunity required more than affording the same treatment for differently situated students. Steinman argued that schools were responsible for taking affirmative steps to accommodate these differences.[103]

On May 25, 1970, the same year that Steinman filed the *Lau* litigation in federal district court, the OCR released a policy guidance titled *Discrimination Against National Origin Minority Students* under the authorship of Martin Gerry and Stanley Pottinger.[104] The OCR policy guidance outlined an administrative response to national origin discrimination. The guidance drew on accumulated evidence regarding the "systematic lower achievement of minority group children and the existence of large numbers of segregated ability-grouping and special education classes"[105] and endeavored to combat

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[100] *See* L. Ling-Chi Wang, Lau v. Nichols*: History of a Struggle for Equal and Quality Education*, *in* The Asian American Educational Experience: A Sourcebook for Teachers and Students 58, 62–66 (Don T. Nakanishi & Tina Yamano Nishida eds., 1995).

[101] *Id.* at 59–60.

[102] 414 U.S. 564 (1974).

[103] *See* Rachel F. Moran, *The Story of* Lau v. Nichols*: Breaking the Silence in Chinatown*, *in* Education Law Stories 111–57 (Michael A. Olivas & Ronna Greff Schneider eds., 2007); *see also* Davies, *supra* note 94, at 147–65 (citing Shirley Hufstedler papers from Carter Presidential Library in Atlanta, Georgia); Del Valle, *supra* note 9, at 235–48; Gary Orfield, The Reconstruction of Southern Education 89 (1969); Leon Panetta, Bring Us Together: The Nixon Team and the Civil Rights Retreat 335–56 (1971); Skrentny, *supra* note 7, at 179–229.

[104] Memorandum from J. Stanley Pottinger, Dir., Office for Civil Rights, Dep't of Health, Education & Welfare, to School Districts with More than Five Percent National Origin-Minority Group Children (May 25, 1970), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/lau1970.html, *archived at* http://perma.cc/K7Q8-6BTX. The memorandum was subsequently published in the Federal Register. Identification of Discrimination and Denial of Services on the Basis of National Origin, 33 Fed. Reg. 11,595 (July, 18 1970).

[105] *Bilingual Education Act: Hearings Before the Gen. Subcomm. on Educ. of the Comm. on Educ. and Labor, House of Representatives*, 93rd Cong. (1974) (statement of Martin Gerry, Acting Director, Office for Civil Rights).

"common practices that have the effect of denying equality of educational opportunity to Spanish-surnamed pupils" in breach of Title VI.[106] The guidance asked schools to develop and assess their own bilingual education programs and required schools to take "affirmative steps" to open up their instructional programs to language minority students wherever the "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."[107] In defense of its authority to issue the guidelines, the OCR pointed to Title VI itself and the Fifth Circuit's announcement that it would give "great weight" to the OCR's guidelines in *United States v. Jefferson County*.[108]

According to Steinman, there was little coordination between Legal Aid's strategy and the OCR regulatory response.[109] Steinman became aware of the OCR memo shortly before *Lau* was to be decided but after oral arguments had closed. Although his recollection is vague thirty years later, Steinman remembers a phone call from someone at the OCR that may have alerted him that the memo, which had been in the works for more than a year, would soon be issued.[110] This account matches with unofficial accounts from OCR regional attorneys in San Francisco and is consistent with other accounts of the *Lau* litigation.[111] According to Paul Grossman (recently retired Chief Civil Rights Attorney, but a young staff attorney at the

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[106] Identification of Discrimination and Denial of Services on the Basis of National Origin, 33 Fed. Reg. at 11,595.

[107] *Id.* The OCR guidance endeavored to combat "common practices which 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"; and (3) parents were to be kept informed of school activities through notification "in a language other than English." *Id.*

[108] 372 F.2d 836, 847 (5th Cir. 1966). *Jefferson* was the culmination of judicial review over a series of cases evaluating agency authority in school desegregation under Title VI.

[109] Interview with Ed Steinman, Att'y for Kinney Lau, in S.F., Cal. (Nov. 4, 2008).

[110] *Id.*

[111] Although there is some contestation among scholars and activists about the ordering of events, the overwhelming evidence suggests that bureaucrats played the pioneering role. Martin Gerry, a young attorney working for Leon Panetta in the HEW Office for Civil Rights in 1968, responded to community dissatisfaction with the classification of Spanish-surnamed students as white for purposes of school desegregation. Gerry later claimed in congressional testimony for the Equal Educational Opportunities Act ("EEOA") that the compliance review "was in part prompted by complaints from community groups that the Office had failed to investigate and identify discriminatory aspects of school district operations which often resulted in the segregation of national origin minority children within schools and denial to them of equal educational opportunity." *Equal Educational Opportunities Act: Hearing on H.R. 13,915 Before the H. Comm. on Educ. and Labor*, 92nd Cong. 3 (1972); *see also* Interview with Paul Grossman, Chief Civil Rights Att'y, Office for Civil Rights, Dep't of Health, Education & Welfare, in S.F., Cal. (Aug. 5, 2008).

time), the language rights theory came from San Francisco and travelled to national headquarters with Martin Gerry, Leon Panetta, and Stanley Pottinger, who were all working within the San Francisco branch of the OCR.[112] It may have been mere coincidence that the San Francisco OCR office was located just blocks from Steinman's Legal Aid office and that the OCR office got wind of the as-of-yet insignificant lawsuit. However and whenever Steinman became aware of the imminent memo, Steinman takes 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.[113]

Eventually, the litigation-based and administrative challenges converged on appeal. In the Ninth Circuit, the federal government intervened on the side of the *Lau* plaintiffs because it had an interest in ensuring that the SFUSD follow its Title VI guidance.[114] Although the government's Title VI argument did not prevail in the Ninth Circuit, it would become a critical part of the litigation strategy going forward. On appeal to the Supreme Court, Steinman and Pottinger (now representing the OCR in his new position as Assistant Attorney General for Civil Rights within the Department of Justice) split their oral argument into two parts. Steinman argued that SFUSD practices violated the Equal Protection Clause of the Fourteenth Amendment. Pottinger argued that they violated Title VI as interpreted by the OCR.[115] At the urging of the Justices, statutory issues overshadowed the constitutional ones during oral argument.[116] The OCR pleaded 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."[117] The OCR then defended its regulatory authority in several ways. First, the OCR built the case for agency deference by citing prior instances in which agency rulemaking authority had been upheld.[118]

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[112] Interview with Paul Grossman, Chief Civil Rights Att'y, Office for Civil Rights, Dep't of Health, Education & Welfare, in S.F., Cal. (Aug. 5, 2008).

[113] Interview with Ed Steinman, *supra* note 109.

[114] *See* Reply Brief of Petitioners, Lau v. Nichols, 414 U.S. 563 (1974) (No. 72-6520), 1973 WL 172358; Memorandum for the United States as Amicus Curiae, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172359; Brief for the Petitioners, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172369.

[115] Oral Argument, *Lau*, 414 U.S. 563 (No. 72-6520), *available at* http://www.oyez.org/cases/1970-1979/1973/1973_72_6520, *archived at* http://perma.cc/8E26-LU8A.

[116] *See id.*

[117] Memorandum for the United States as Amicus Curiae, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172359, at *14.

[118] The petitioner's brief cites *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), a parallel lawsuit defending OCR's desegregation strategy, and *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). Brief for the Petitioners, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172369, at *47–48. Although neither OCR nor the Supreme Court cite to *Skidmore* (the leading case on judicial deference to agency guidance at that time) for their assertions of agency authority, they roughly follow its framework of judicial deference. In this framework, 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

Second, it alluded to the origins of the OCR policy guidance in compliance reviews as evidence of the agency's expertise in the matter.[119] Third, it justified its threat of cutting off funding to public schools under the statute itself, specifically section 601 of the Civil Rights Act.[120] The OCR's interpretations of its own authority were backed by the National Education Association, which stated in an amicus brief that the OCR "regulations have the force of law."[121]

In response, the SFUSD conceded the factual record and argued their good faith.[122] They claimed to offer equal educational opportunities to English-speaking and non-English speaking students because their curriculum was offered on the same terms and conditions.[123] Notwithstanding their good faith efforts to serve non-English speaking students, the SFUSD argued that neither the Equal Protection Clause nor Title VI of the Civil Rights Act required the court to impose affirmative duties on the school district to provide "special assistance to children who do not speak English adequately" in the absence of discriminatory intent.[124] As opposed to state-created racial discrimination, the school district characterized the case as involving "students with a language difficulty which is directly related to the accidents of birth — national origin, native tongue of parents, and exposure to ambient verbal communications in other tongues than English. It is a difficulty not of the school district's making."[125]

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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, 323 U.S. 134, 140 (1944)); *see also supra* notes 15 and 52.

[119] Brief for the Petitioners, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172369, at *45–46; *cf.* Jorge Rangel & Carlos Alcalá, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 2 (1972) (detailing relationship between Chicano segregation in Texas schools, compliance reviews, and May 25 memorandum).

[120] Brief for the Petitioners, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172369, at *44–45. Section 601 of Title VI prohibits discrimination based on race, color, or national origin in any "program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2006).

[121] *See* Brief Amicus Curiae of the Childhood and Government Project in Support of Petitioner Children, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172360; Brief for San Francisco Lawyers' Committee for Urban Affairs as Amicus Curiae in Support of Petitioners, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172362; Brief of American Jewish Congress et al., Amici Curiae, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172364; Brief of Amici Curiae MALDEF, American G.I. Forum, League of United Latin American Citizens, Ass'n of Mexican American Education, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172365; Brief for the National Education Ass'n and the California Teachers Ass'n as Amici Curiae, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172366; Brief Amicus Curiae of the Center for Law and Education, Harvard University in Support of the Petitioners, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172367; Brief Amicus Curiae of the Puerto Rican Legal Defense & Education Fund, Inc., in Support of Petitioners, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172368.

[122] Brief of Respondents, *Lau*, 414 U.S. 563 (No. 72-6520), 1973 WL 172357, at *1–2.

[123] *See id.* at *4.

[124] *Id.* at *9 ("This is the extent of the regulation's application. Should they be interpreted to extend beyond regulating constitutional violations, then they have been adopted in excess of the congressional delegation of authority and are invalid.").

[125] *Id.* at *2.

The Supreme Court sided with the students. "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."[126] The majority concluded, "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."[127] With regard to regulatory authority, the Court said, "By section 602 of the Act [the Department of Education] is authorized to issue rules, regulations, and orders to make sure that recipients of federal aid under its jurisdiction conduct any federally financed projects consistently with section 601."[128] Without questioning whether the Department of Education acted pursuant to its substantive rulemaking authority when issuing its guidelines,[129] the Supreme Court deferred to the OCR's substantive interpretation of Title VI as requiring an affirmative effort to accommodate non-English speaking students.

The reception to the OCR's policy guidance was overwhelmingly, though not uniformly, positive. As to legal effect, the initial guidelines on national origin gained strength through their positive reception in courts and by Congress. Congress's subsequent codification of *Lau* in the Equal Educational Opportunity Act of 1974[130] reinforced the Supreme Court's findings and, by extension, the OCR. The Tenth Circuit's decision in *Serna v. Portales Municipal Schools*[131] followed *Lau* in the same year. In terms of practical effect, the regulatory strategy was also quite successful. Continuing with its regulatory boldness, the OCR's follow-up to the *Lau* litigation was a memo designed to describe appropriate remedies that would satisfy the Supreme Court's *Lau* mandate.[132] While no specific remedy had been urged by

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[126] *Lau*, 414 U.S. at 566.

[127] *Id.* at 568 (emphasis added) (citation omitted).

[128] *Id.* at 567. Section 601 gives the Department of Education authority to promulgate regulations prohibiting discrimination in federally assisted school systems. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VI, § 601, 78 Stat. 241, 252.

[129] This second inquiry would be required today under *Mead*, which asks not only whether Congress delegated rulemaking authority to the agency but also whether the agency intended to use it. United States v. Mead Corp., 533 U.S. 218, 235 (2001). In response to the first inquiry, the Court correctly noted that Congress delegated to the OCR substantive rulemaking powers under section 602 of Title VI. As a practical matter, however, it is not entirely clear that the OCR intended to use its rulemaking authority to enact the guidance. The OCR first engaged in extensive factfinding. Based on that factfinding, it made bold statements about what Title VI required for successful implementation: the right to access public education through the integration of non-English speaking students into mainstream classrooms, the development of transitional language courses, and bilingual-bicultural curriculums that maintain and even promote minority languages. But the OCR never engaged in notice and comment rulemaking, and in their briefs to the Supreme Court they relied directly on section 601.

[130] 20 U.S.C. § 1703 (2012).

[131] 499 F.2d 1147, 1154 (1974) (stating that, under its inherent equitable power, a court could properly establish a program for elimination of discrimination).

[132] *See* Memorandum from William L. Smith, Acting Assistant Sec'y for Civil Rights, Dep't of Educ., to OCR Senior Staff (Apr. 6, 1990), *available at* http://www2.ed.gov/about/

the *Lau* plaintiffs or ruled upon in the Supreme Court litigation,[133] the OCR remedies became the de facto compliance standards and bilingual education became the favored approach for remedying national origin discrimination for non-English speaking students. Within the first year after the litigation commenced, the OCR opened compliance reviews in thirty districts in various states based on possible violations of its 1970 compliance guidance.[134]

The second OCR memo specifying bilingual education as the remedy for national origin discrimination fared less well. Opponents of bilingual education disagreed with the federal government's intrusion into the regulation of local schools more than they disagreed with the philosophy of bilingual education.[135] Emblematic of this resistance, *Regulation* magazine opined:

> Providing such special treatment for some of our disadvantaged fellow citizens is, in many cases, unquestionably sound social policy; but doing so under the guise of constitutional or statutory proscriptions against "discrimination" has considerable cost. It cheapens the currency of constitutional rights; it removes a large number of social judgments from the political process and entrusts them to the federal bureaucracy or the courts; and it tends to prevent needed flexibility . . . .[136]

An unpublished lawsuit[137] challenging agency authority to install bilingual education through an informal memorandum prompted the OCR to publish a

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offices/list/ocr/docs/lau1990_and_1985.html, *archived at* http://perma.cc/WC55-3P3W (describing the purpose of the post-*Lau* memorandum titled Task Force Findings Specifying Remedies Available for Eliminating Unlawful Discrimination under *Lau v. Nichols* (1975) (available at National Archives Pacific, San Bruno, Cal.)).

[133] The Supreme Court accurately declared that "no specific remedy [wa]s urged upon [the Court]," *Lau*, 414 U.S. at 564, and remanded to district courts for determinations of the instructional strategies that ought to be used to protect language minorities, *id.* at 569.

[134] *See* U.S. Dep't of Health, Educ. & Welfare, HEW NEWS, May 25, 1972, HEW-B78, at 2–3 (mentioning thirty ongoing OCR compliance reviews and noting that ten districts began to take remedial actions after negotiating with OCR). The issued guidance summarizes the compliance review process. Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970).

[135] An education report in the *National Journal* explains Congress's delay of the issuance of formal regulations until the Reagan Administration took office: "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, Inst. of Governmental Studies, *Education Report: Are Federal Bilingual Rules a Foot in the Schoolhouse Door*, 12 NAT'L J. 1736 (1980).

[136] An issue of *Regulation: AEI Journal on Government and Society* included a staff editorial criticizing the development of bilingual education. The op-ed states in its opening paragraph that, "Whatever the merits of the current [bilingual education] proposal as policy, its presentation as a civil rights measure deserves a closer look in itself, because that reveals some of the more general problems associated with the elaboration of civil rights regulation in recent years." Editorial, *Bilingual Education: The New Accent in Civil Rights Regulation*, 4 REG. 5, 7 (1980).

[137] Complaint, Nw. Arctic Sch. Dist. v. Califano, No. A-77-216 (D. Alaska, Sept. 29, 1978) (described in internal memoranda of OCR held in NCLR Archives, Stanford University

notice of proposed rulemaking ("NPRM") that would replace the unofficial OCR remedies memo, presumably to strengthen the procedural safeguards in an increasingly judicialized climate.[138] The NPRM proposed bilingual education as the required method of instruction in schools with the requisite number of national origin minority students. These rules, however, never came into being because the NPRM was withdrawn once President Reagan's Secretary of Education took office and found the proposed rules to be intrusive on state and local authority.[139] OCR put into effect nonprescriptive compliance standards that required the agency to evaluate school districts on a case-by-case basis.

The OCR policy guidance and compliance strategy remain in effect today. While the legal principle initiated in the 1970 guidelines and then buffered in *Lau v. Nichols* and the EEOA remains good law, the remedy of bilingual education provided for in the internal memorandum was somewhat eroded by the subsequent legal precedent. A Fifth Circuit case, *Castañeda v. Pickard*,[140] lowered the burden on school districts to demonstrate that their educational plan could meet regulatory standards for compliance.[141] Castañeda cuts back on the practical effect of OCR regulation by granting school districts wider discretion to choose curricular alternatives to bilingual education. What is unchanged, however, is the regulatory framework for investigating and ensuring compliance with Title VI.[142]

The overall success of *Lau v. Nichols*, as it turns out, hinged on regulatory authority and represented a triumph for the bureaucrats who wielded it. For the National Education Association and school districts to characterize the OCR guidelines as *legal* authority almost certainly represented an expansion of existing civil rights and regulatory authority. Typically, policy innovation via regulatory guidance represents elaborations of existing statutory rights rather than expansions of rights. But here, in the context of language rights, the statutory text and legislative history of the 1964 Civil Rights Act

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Green Library, Stanford, Cal., and Moran, *supra* note 103, at 111). The lawsuit was subsequently withdrawn. The *Northwest Arctic* litigation is described in Moran, *supra* note 103, at 137–38.

[138] The 1980 NPRM is described in the OCR's official policy regarding the treatment of national origin minority students who are limited English proficient. *See* Memorandum from William L. Smith, *supra* note 132.

[139] *See id.*

[140] 648 F.2d 989 (5th Cir. 1981).

[141] *Compare id.* at 1010 (looking to whether the school district took "appropriate action"), *with* Lau v. Nichols, 414 U.S. 563, 565 (1974) ("[Section 71 of the California Education Code] also states as 'the policy of the state' to insure 'the mastery of English by all pupils in the schools.' And bilingual instruction is authorized 'to the extent that it does not interfere with the systematic, sequential, and regular instruction of all pupils in the English language.'").

[142] Skeptics of Title VI's continuing power point to constraints placed on disparate impact theories of discrimination after *Alexander v. Sandoval*, 532 U.S. 275 (2001). *See, e.g.*, *infra* note 272. While *Sandoval* undoubtedly has limited Title VI enforcement, it has mostly done so by eliminating *private* enforcement of rights articulated in the statute; *regulatory* enforcement of these rights remains intact. 532 U.S. at 285.

include almost no discussion of the definition of national origin. Language rights became a concrete concept through OCR's statutory interpretation in the course of implementing regulatory guidance.

D. EEOC's Interpretation of Title VII As Eliminating English-Only Workplace Policies Founders on Implementation

Developing responses to language barriers in workplaces proved even more difficult than in schools. The Title VII framework for dismantling and preventing racial discrimination grew out of court decisions trying to balance institutional commitments to racial inclusion with the business necessities of private employers. These efforts gradually expanded from initial efforts to eradicate discriminatory intent to efforts to eliminate the effects of this discrimination.[143] Despite the initial success of programs to boost representation of racial minorities in workforces, it was unclear how the EEOC could open workplaces to national origin minorities with limited English abilities. Even among those possessing legal status and basic job qualifications, employees lacking language abilities would not be competitive in skills tests or interviews administered in English. Once hired, discrimination on the job against non-English speaking workers based on their actual or perceived national origin sealed them off from advancement. Some workers faced intentional discrimination or harassment from supervisors and coworkers on the basis of their language ability or accent. Others found their job performance negatively reviewed by employers or customers, even where language skills were not essential to their job. Some employers formalized their unspoken expectations for an English-speaking workforce in workplace policies restricting the use of native languages at work, but others maintained de facto language policies.[144]

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[143] The expansion of disparate treatment to include disparate impact is examined by Professor Olatunde Johnson. *See* Johnson, *supra* note 98, at 133–45. The rise of affirmative action policies is described as part of this trajectory as well. *See* SKRENTNY, *supra* note 31, at 89–100; 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 AM. J. SOC. 709, 720–22 (2004).

[144] 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 U.S. Constitution to declare English as the official language or the successful California proposition to ban bilingual education. S.J. Res. 72, 97th Cong. (1981) (failed constitutional amendment); Schools and School Districts — English Language in Public Schools — Initiative Statute, 1998 Cal. Legis. Serv. Prop. 227 (West) (California proposition banning bilingual education in most cases). 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 that are usually left to the discretion of private employers, and job qualifications, of course, serve as legally permissible grounds for hiring and firing. The problems associated with language discrimination in the workplace are compounded by the not uncommon use of language ability as a proxy for racial minority status, itself a prohibited basis for discrimination under Title VII.

In comparison to the OCR's success in the education context, the EEOC failed to secure similar regulatory rights for non-English speaking workers in employment discrimination law under the Civil Rights Act of 1964, despite nearly identical statutory language in Titles VI and VII. Title VII was, in many ways, the centerpiece of the Civil Rights Act. In addition to regulating the hiring, firing, and workplace practices of private employers,[145] it created an independent commission to ensure that those employers did not run afoul of civil rights laws.[146] Congress debated the substance and structure of the EEOC against a background of social unrest and across changing presidential administrations.[147] Political compromises made to attain the bill's passage resulted in murkiness in the Title's provisions concerning the EEOC's implementation and enforcement powers. For example, Congress constrained the EEOC's ability to issue substantive rules by giving the EEOC only procedural rulemaking powers.[148] The Commission issued a slew of regulations in its early days, in an effort to reduce the size of its backlog and to clarify its expectations of employers. These regulations were presumably issued as procedural rules. The philosophy behind the strategy was simple: the clearer the compliance standards, the fewer the violations; the more violations resolved administratively, the less reliance on slow and costly litigation. Because of a congressional limitation on the EEOC's ability to issue substantive analyses of the Civil Rights Act, however, the agency is constrained to issuing guidances.

By far, the focus of EEOC's early actions was on racial discrimination.[149] Comparatively little action was taken on national origin, religion, or gender.[150] With an ambiguous text and little legislative history to guide its interpretation, the EEOC entered into its enforcement of national origin discrimination with few dictates.[151] The congressional record shows little dis-

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[145] Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000 (2006).

[146] The EEOC was an independent, bipartisan five-person commission created for the specific purpose of consolidating and enforcing civil rights 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. *See* GRAHAM, *supra* note 31, at 177–204. More recent histories have been written about various aspects of the EEOC's work. *See generally* FARHANG, *supra* note 34; SKRENTNY, *supra* note 31; Robert Lieberman, *Ideas, Institutions, and Political Order: Explaining Political Change*, 96 AM. POL. SCI. REV. 697 (2002); Pedriana & Stryker, *supra* note 143.

[147] *See* GRAHAM, *supra* note 31, at 97–99.

[148] *See* 42 U.S.C. §2000e-12 (2006); 2 EMPLOYMENT DISCRIMINATION COORDINATOR § 71:9 (search "WestlawNext" for "2 Emp. Discrim. Coord. Analysis of Federal Law § 71:9"); *see also* text accompanying note 64.

[149] *See* FARHANG, *supra* note 34, at 132; RUBY Y. WEINBRECHT ET AL., EEOC, THE EEOC DURING THE ADMINISTRATION OF PRESIDENT LYNDON B. JOHNSON: NOVEMBER 1963–JANUARY 1969, at 106 (1968).

[150] *Compare* WEINBRECHT ET AL., *supra* note 149, at 107–72 (describing early compliance actions based on racial discrimination), *with id.* at 231–45 (describing early actions related to sex, religion, and testing).

[151] Elsewhere, I have found that while "national origin" appeared for the first time in federal legislation in 1957, it had existed in state level civil rights laws going back to Franklin

cussion of the national origin provision. Representative Roosevelt attempted to provide a definition by saying, "May I just make very clear that national origin means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country."[152]

Courts interpreting the legislative history of the term "national origin" were likewise inconclusive about Congress's intended meaning. In the only Supreme Court case to interpret "national origin," *Espinoza v. Farah Manufacturing*,[153] the Court constrains itself to a cramped definition of the term and opines that the record on the meaning of national origin is "quite meager in this respect."[154] The Commission initially took the safe route, navigating the uncharted waters of national origin discrimination by importing established theories of liability from race and sex cases into its national origin jurisprudence. For example, Title VII generally prohibits discrimination in hiring, promotion, or firing decisions.[155] In making those decisions, however, employers may be permitted to discriminate if they can show that there was a "legitimate nondiscriminatory reason" for distinguishing on this basis. For example, an employer could specify a preference on the basis of a protected category if the preference is considered "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[156] Courts interpreting the bona fide occupation qualifications statutory language have provided this example in the context of national origin: a French restaurant might legally favor a French chef on the basis of her national origin.[157]

D. Roosevelt's administration and in immigration law since the 1920s. *See generally* Ming H. Chen, Nation of Immigrants or New Civil Rights Movement? (March 2006) (unpublished conference paper) (on file with the Harvard Law School Library). Initially, the term was likely directed at Eastern- and Southern-European immigrants. In federal civil rights law, the adoption of "national origin" in the 1957 and 1964 Civil Rights Acts appears to have been part of civil rights boilerplate language. The influx of new groups and mobilization of identity politics, however, made the national origin category more salient after 1965. *See* Stephen M. Cutler, Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1170 n.26 (1985) (claiming that the first federal use of "national origin" is in the 1957 Civil Rights Act language defining the duties of the U.S. Commission on Civil Rights).

[152] 110 CONG. REC. 2549 (1964).

[153] 414 U.S. 86 (1973).

[154] *Id.* at 88–89. 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. *Id.* at 89. Justice Brennan's concurrence in *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), in contrast, says that the line between ancestry and national origin discrimination "is not a bright one," but that the two often coincide. *Id.* at 614 (Brennan, J., concurring).

[155] *See* 42 U.S.C. § 2000e-2 (2006); JOEL FRIEDMAN, CASES AND MATERIALS ON THE LAW OF EMPLOYMENT DISCRIMINATION 36–44 (8th ed. 2011).

[156] 42 U.S.C. § 2000e-2.

[157] *E.g.*, Swint v. Pullman-Standard, 624 F.2d 525, 535 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 273 (1982); Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 298 (N.D. Tex. 1981); *cf.* Gupta v. Walt Disney World Co., 256 F. App'x 279, 282 (11th Cir. 2007) ("Disney's explanation that Gupta was not allowed to work at the Norwegian restaurant because Gupta was not 'culturally authentic' is not direct evidence of illegal [national origin] discrimination.").

The EEOC released its first specific guidance on national origin discrimination in 1970.[158] The 1970 EEOC policy guidance defined national origin discrimination under Title VII to mean the denial of employment due to "an individual's, or his or her ancestor's, place of origin; or because an individual has physical, cultural, or *linguistic* characteristics of a national origin group."[159] There is little documentary evidence about where the Commission got the idea for interpreting national origin as including linguistic traits. The major civil rights organizations of the time were focused on racial discrimination in the workplace. The few thinking about national origin minorities focused on citizenship eligibility requirements and the inclusion of Hispanics in public offices.[160] There is also an absence of documentary evidence about the motivations of the EEOC Commissioners who sought to advance a theory of language rights for national origin minorities: there were no alarming studies, high-profile incidents, or political pressures from Congress or the White House about language as a component of national origin discrimination comparable to those in the bilingual education case study. Very few EEOC charges were taken on the basis of national origin discrimination in the 1960s and none on the basis of language discrimination.[161] The EEOC's official history states that "[f]or a variety of reasons related to the unique historical circumstances of immigrant populations, there have traditionally been fewer charges filed with the EEOC alleging national origin discrimination than on other bases."[162] Paul Burstein, a sociologist who studies the EEOC, confirms this record; he lists few national origin charges before the late 1960s.[163]

Enforcement of language rights for workers gained salience in the late 1970s and 1980s with increased challenges to workplace policies prohibiting workers from speaking Spanish on the job.[164] In early cases challenging employers' actions against employees for violating English-only policies, the employees took the position that English-only policies constituted de facto

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[158] Guidelines on Discrimination Because of National Origin, 35 Fed. Reg. 421 (Jan. 13, 1970) (to be codified at 29 C.F.R. § 1606.1).

[159] *Id.* 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,* however, it does not include discrimination based on citizenship. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973) ("Aliens are protected from illegal discrimination under the [Civil Rights] Act [of 1964], but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage.").

[160] *See generally* Risa Goluboff, The Lost Promise of Civil Rights (2010).

[161] *Cf.* Weinbrecht et al., *supra* note 149 (describing history of early EEOC enforcement and making no mention of language discrimination charges).

[162] *Celebrating the 40th Anniversary of Title VII*, EEOC (June 24, 2004), http://www.eeoc.gov/eeoc/history/40th/panel/expanding.html, *archived at* http://perma.cc/93TY-JRMM. *See also* Pedriana & Stryker, *supra* note 143.

[163] *See* Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 Am. J. Soc. 1201 (1991).

[164] *See* Del Valle, *supra* note 9, at 118 ("The principal manifestation of the ambivalence felt toward language-minority workers has been the proliferation of English-only workplace rules enforced by employers of bilingual employees.").

discrimination.[165] The EEOC agreed with this interpretation in its 1970s implementation efforts. As noted above, the EEOC had enacted a guidance extending national origin discrimination to language in 1970. The 1970 guidance, however, was issued several years before the EEOC participated in the enforcement action that led to the first federal court decision to address English-only workplace policies — *Saucedo v. Brothers Well Service*,[166] in which the EEOC tried to rely on the interpretation laid out in the 1970 guidance.[167] In *Saucedo*, a Texas district court recognized the disparate impact of such rules on language minorities. The employer, Brothers Well, dismissed Saucedo, a bilingual Mexican-American employee, for asking his coworker where to place a heavy metal part in Spanish.[168] Brothers Well claimed that the deviation from English jeopardized the safety and teamwork of its employees.[169] Although the court did not preclude all English-only policies, the court agreed with Saucedo that such policies have a potentially disparate impact on ethnic minorities: "A rule that Spanish cannot be spoken on the job obviously has a disparate impact upon Mexican-American employees. Most Anglo-Americans obviously have no desire and no ability to speak foreign languages on or off the job."[170] The Court further held that the employer applied the English-only rule in a discriminatory manner and did not prove the English-only rule was a business necessity.

In the 1980s, the EEOC's regulatory authority increasingly encroached on the terrain of private employers and federal courts in the context of challenges to English-only policies. The issue of authority — who decides and on what legal basis — stood squarely at the center of *García v. Gloor*,[171] the most prominent federal court case to challenge English-only workplace policies under Title VII from this time period.[172] *Gloor* involved a lumber yard that imposed a rule prohibiting employees from speaking Spanish on the job unless they were communicating with Spanish-speaking customers; the rule did not apply to communication during breaks.[173] Hector García, a bilingual employee at the lumber yard, testified that on June 10, 1975, he was asked a question by another Mexican-American employee about an item requested by a customer and he responded in Spanish that the article was not available.[174] Alton Gloor, an officer and stockholder of Gloor, overheard the conversation. "Thereafter Mr. García was discharged."[175] Gloor said that

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[165] *See, e.g.*, Saucedo v. Brothers Well Serv., Inc., 464 F. Supp. 919 (S.D. Tex. 1979).
[166] *Id.*
[167] *Id.* at 923.
[168] *Id.* at 921.
[169] *Id.*
[170] *Id.* at 922.
[171] 618 F. 2d 264 (5th Cir. 1980).
[172] *Id.* at 268–69 ("No authority cited to us gives a person a right to speak any particular language while at work.").
[173] *Id.* at 266.
[174] *Id.*
[175] *Id.*

García's discharge was for a combination of job-related deficiencies as well as for violation of the English-only rule.[176] While he said the company's English-only policy was not strictly enforced, he also claimed that García had violated it "at every opportunity since the time of his hiring according to his own testimony."[177] "In addition to offering this evidence to justify firing Mr. García, Mr. Gloor testified that there were business reasons for the language policy."[178] Among others, Gloor claimed English-speaking customers objected to communications between employees that they could not understand.[179] Gloor also claimed the rule would permit supervisors, who did not speak Spanish, to oversee the work of subordinates better.[180] "The district court found that these were valid business reasons and that they, rather than discrimination, were the motive for the rule."[181] García claimed that, while he was capable of speaking both English and Spanish, Spanish was his primary language so that the English-only rule was difficult to follow.[182] Moreover, 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.[183] In amicus briefs on García's behalf, attorneys from the EEOC and the League of United Latin American Citizens of the United States sought a broad ruling to protect bilingual workers from language discrimination.[184]

The Fifth Circuit ruled against García's interpretation of Title VII, saying that the plain language of Title VII did not establish the meaning of national origin discrimination and that "neither the statute nor common understanding equates national origin with the language that one chooses to speak."[185] While the court recognized 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.[186] Even if it had been, the court failed to see the harm in regulating the speech of bilingual employees, as such employees lacked any substantive privilege to speak their preferred language on the job. The court said "[García's] argument . . . reduces itself to a contention that the statute commands employers to permit employees to speak the tongue they prefer. We do not think the statute permits that interpretation, whether the

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[176] *Id.*
[177] *Id.* at 267.
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.* at 266.
[183] *Id.* at 268.
[184] Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 12, *García*, 618 F.2d 264 (No. 77-2358); Brief of the League of United Latin American Citizens of the U.S. Amicus Curiae at 9, *García*, 618 F.2d 264 (No. 77-2358).
[185] *García*, 618 F.2d at 268.
[186] *Id.*

preference be slight or strong or even one closely related to self-identity."[187] It bears noting that by claiming that there was no established link between national origin discrimination and English-only policies, the court was discrediting the EEOC's prior positions on English-only policies as nonauthoritative.[188] The court also critiqued the agency's reliance on its 1970 guidance because the guidance did not speak squarely to the issue of English-only policies; it merely spoke to discrimination based on linguistic characteristics and left the implications for English-only policies to inference. Directly attacking the agency's rulemaking authority, in dicta, the court questioned the EEOC's authority and expertise to elucidate the meaning of national origin discrimination in a manner that went beyond the statute.[189] The case turned out to be a loss for García and perhaps even more so for the EEOC with respect to regulatory authority.[190]

After the litigation subsided, on December 29, 1980, the EEOC responded to the critique in *Gloor* by revising its 1970 guidelines to more explicitly address English-only policies.[191] The 1980 EEOC interpretation lessens the burden on employees to prove the discriminatory intent of language policies.[192] Two sections are particularly noteworthy. First, the 1980 interpretation reaffirmed the Commission's 1970 definition of national origin discrimination as denial of equal employment opportunity because of an individual's linguistic characteristics.[193] Second, the 1980 interpretation said that statutory section 1606.7 makes English-only rules prima facie evidence of discrimination, making it easier for employees to prove that the motivation for such policies was unlawful discrimination.[194]

Returning to the notion of administrative law in action from section I.C, the EEOC had promulgated its 1970 Guidance on National Origin Discrimination as a set of interpretative rules, which would typically fall into the APA exception for notice and comment procedures (meaning that such procedures would not be required). While not required to do so, the EEOC bolstered its agency procedures when it used the notice and comment process to revise its national origin guidance in 1980. The EEOC's voluntary solicitation of comments generated voluminous public commentary, even

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[187] *Id.* at 271.

[188] "While the EEOC has considered in specific instances whether a policy prohibiting the speaking of Spanish in normal interoffice contacts discriminates on the basis of national origin, it has adopted neither a regulation stating a standard for testing such language rules nor any general policy, presumed to be derived from the statute, prohibiting them." *Id.* at 268 n.1 (citation omitted).

[189] *Id.* at 271.

[190] To clarify, as a result of losing, the EEOC was unable to use English-only policies as prima facie evidence of national origin discrimination in that case.

[191] Guidelines on Discrimination Because of National Origin, 45 Fed. Reg. 85,635 (Dec. 29, 1980) (to be codified at 29 C.F.R. pt. 1606).

[192] *See id.* at 85,636.

[193] *Id.*

[194] *Id.*

though the EEOC did not claim to be enacting binding regulations.[195] Also, the agency's position in 1980 was consistent with its earlier interpretation in 1970.[196] While not decisive, consistency and the extent of deliberative process were factors courts used at the time to determine the persuasiveness of agency guidance. Congress's implicit consent to subsequent interpretations would also have been persuasive to courts. When Congress later amended Title VII to clarify the standards for proving disparate impact discrimination after *Wards Cove Packing Co. v. Atonio*,[197] the Senate discussed the national origin guidelines and decided not to alter them. Senator Dennis DeConcini, in response to his Arizonan constituents' concerns about English-only policies, asked Senator Edward Kennedy whether the national origin guidelines would remain in effect during Senate floor debate. Kennedy replied affirmatively that the guidelines had been effective and so the 1991 amendments would not affect their validity.[198]

Public comments on the 1980 guidelines, voluntarily solicited rather than required by the APA, indicated that many private individuals opposed the proposed guidelines.[199] In particular, some worried that the policy would stoke an anti-immigrant backlash.[200] The staff of *Regulation* magazine wrote to criticize the EEOC's "questionable administrative interpretation(s)" of Title VII as encompassing affirmative action and prohibiting English-only workplace policies.[201] It rejected the gradual and "elusive" process of ex-

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[195] EEOC, Guidelines on Discrimination Because of National Origin; Proposed Guidelines: Comments (EEOC Library Archives Collection, 1980).

[196] *Cf.* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973) (declining to defer to EEOC guidelines because EEOC flip-flopped on the definition of national origin); Pub. Emps. Ret. Sys. v. Betts, 492 U.S. 158, 171 (1989) (noting agency's interpretation may be entitled to special deference if its interpretation is consistent).

[197] 400 U.S. 642 (1989).

[198] 137 Cong. Rec. S15, 489 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy).

[199] *E.g.*, Letter from Peggy K. Kramer to Eleanor Holmes Norton, Chairperson, EEOC (Sept. 19, 1980), *in* Guidelines on Discrimination Because of National Origin, *supra* note 195 (private citizen opposed to Guidelines). Bound volumes are contained in the EEOC library and also held at NARA II. *See also* Michael Patterson, García v. Spun Steak Company: *English-Only Rules in the Workplace*, 27 Ariz. St. L.J. 227, 287 (1995) ("The Commission carefully solicited comments from federal entities and the public at large to assure that the process included 'interested persons' in 'all stages of [the] rulemaking process.'" (citation omitted)). Minutes of the 1980 EEOC Commissioner meetings characterize the revision of the 1970s guidelines as "minor." Consequently, the proposed guidelines were approved swiftly and unanimously (5-0), with a concerted effort to make them available for public comment during the week of September 16, 1980 (Hispanic Heritage Week). The hearings generated a large number of public comments from businesses, public interest groups, and individual citizens. For further inquiry, original documents were obtained from the EEOC Headquarters Library in Washington, D.C. and are on file with the author.

[200] *E.g.*, Letter from Peggy K. Kramer to Eleanor Holmes Norton, *supra* note 199 ("Why promote HATE from the majority (English speaking people) against these people by proposing such an unnecessary guideline?"); Letter from Vincent A. Borlaug to EEOC Executive Secretariat, *in* Guidelines on Discrimination Because of National Origin, *supra* note 195 ("this regulation, if enforced, will stir up wide-spread ill will and unrest").

[201] 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

tending 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,"[202] the magazine complained. Staff within the EEOC continued to debate their stance on *Gloor* in updating their compliance manual, which included as an example of national discrimination a fact pattern counter to the Fifth Circuit's holding.[203]

During subsequent enforcement efforts that relied on the 1980 guidance, circuit courts wavered in their reception to the EEOC's interpretation. The Ninth Circuit, a jurisdiction hearing many language cases, vacillated in its support. In *Jurado v. Eleven-Fifty Corp.*,[204] for example, the Ninth Circuit found no evidence of discriminatory treatment when a Spanish-speaking radio disk jockey was fired after unsuccessfully using Spanish on air as part of an effort to boost the number of Hispanic listeners.[205] It substantially based its opinion on the Fifth Circuit's interpretation in *Gloor* and incidentally disregarded the EEOC guidelines insofar as the court held that Jurado failed to present a prima facie case of discrimination.[206] One year later, however, the Ninth Circuit did follow the EEOC guidance in *Gutierrez v. Municipal Court of the Southeast Judicial District*.[207] In *Gutierrez*, the Ninth Circuit expressly adopted the EEOC guidelines' conclusion that English-only rules are inherently discriminatory and thus constitute prima facie evidence of discrimination.[208] The *Gutierrez* decision supporting the EEOC guidelines was vacated[209] prior to Supreme Court review and, in any case, was overturned in *Garcia v. Spun Steak*.[210] *Spun Steak* explicitly rejected the EEOC guidelines on the grounds that they contravened congressional intent with regard to the definition of national origin:

> In holding that the enactment of an English-only while working policy does not inexorably lead to an abusive environment for

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hiring quotas, it took offense at what it perceived as "a questionable administrative interpretation." Editorial, *Bilingual Education: The New Accent in Civil Rights Regulation*, 4 REG. 5, 5–8 (1980).

[202] *Id.*

[203] Interview with Ernie Heffner, EEOC Office of Legal Counsel Staff Att'y, in Washington, D.C. (Sept. 16, 2009) (Heffner served as primary author for the compliance manual for national origin discrimination). As of November 2013, the EEOC was holding public hearings on its national origin documents and soliciting public input. *See* Press Release, EEOC, EEOC Meeting Highlights Challenges to Title VII National Origin Enforcement (Nov. 13, 2013), *available at* http://eeoc.gov/eeoc/newsroom/release/11-13-13.cfm, *archived at* http://perma.cc/J78F-D9ZS.

[204] 813 F.2d 1406 (9th Cir. 1987).

[205] *Id.* at 1410 ("We find insufficient evidence that the English-only order was racially motivated.").

[206] *Id.* at 1409, 1411.

[207] *See* 838 F.2d 1031 (9th Cir. 1988).

[208] *Id.* at 1040.

[209] Mun. Court of the S.E. Judicial Dist. v. Gutierrez, 490 U.S. 1016 (1989).

[210] 998 F.2d 1480 (9th Cir. 1993).

> those whose primary language is not English, we reach a conclusion opposite to the EEOC's longstanding position . . . . [W]e are not bound by the Guidelines . . . . We will not defer to an administrative construction of a statute where there are compelling indications that it is wrong.[211]

Spun Steak created division within the Ninth Circuit and a split with the Tenth Circuit,[212] among other courts.[213] The confused state of the law continues to this day, with no signs that the Supreme Court intends to step in to resolve the splintered interpretations.

The legacy of the EEOC implementation of its policy guidance is one of limited legal effect evidenced by the inability of the EEOC to garner unified or stable support from courts and to sustain enforcement actions on its own. The practical effect of EEOC guidance, however, is stronger than its tepid legal effect. The EEOC continued to press its guidance in administrative challenges to English-only policies, with some leading to favorable settlement outcomes for non-English speaking workers despite the nonprecedential nature of the underlying guidance. For example, the EEOC's enforcement actions have resulted in damages for non-native English speaking workers ranging from $133,000 to $2.44 million, as well as injunctive relief in some cases. The actions have shaped the policies and practices of a variety of employers, such as long-distance telecommunications carriers,[214] medical service providers,[215] manufacturing companies,[216] hair salons,[217] and

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[211] *Id.* at 1489. The dissenting opinion agreed with the majority along these lines: "EEOC regulations are entitled to somewhat less weight than those promulgated by an agency with Congressionally delegated rulemaking authority." *Id.* at 1490 (Boochever, J., dissenting).

[212] *See* Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006). While *Maldonado* recognized that English-only rules could be construed as inherently discriminatory, the court expressly stated that it was not adopting the EEOC guidelines. *Id.* at 1305.

[213] *See, e.g.*, Gonzalez v. Salvation Army, No. 89-1679-CIV-T-17, 1991 WL 11009376 (M.D. Fla. June 3, 1991), *aff'd without opinion*, 985 F.2d 578 (11th Cir. 1993) (unpublished table decision) (district court opinion glosses over EEOC guidelines and burden shifting analysis in reaching its decision that English-only rules are not discriminatory where the employee has some ability to speak English); Long v. First Union Corp., 86 F.3d 1151 (4th Cir. 1996) (unpublished table decision). For a discussion of more court decisions on English-only workplace rules after *Maldonado*, see Andrew Robinson, *Language, National Origin, and Employment Discrimination: The Importance of the EEOC Guidelines*, 157 U. PA. L. REV. 1514, 1522 (2009); and Robyn Stoter, *Discrimination & Deference: Making a Case for the EEOC's Expertise with English Only Rules*, 53 VILL. L. REV. 595 (2008).

[214] EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1077–78 (N.D. Tex. 2000) (granting a $700,000 award in damages on behalf of thirteen Latino employees); *see also* Press Release, EEOC, Court Speaks: English Only Rule Unlawful; Awards EEOC $700,000 for Hispanic Workers (Sept. 19, 2000), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-19-00.cfm, *archived at* http://perma.cc/82LN-NQJ8.

[215] *Settlement Resolves Sexual Harassment, Retaliation, 'English-Only' Policy Complaints*, DAILY LABOR, Nov. 20, 1998, at A-7; *see also* Press Release, EEOC, Delano Regional Medical Center to Pay Nearly $1 Million in EEOC National Origin Discrimination Suit (Sept. 17, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-17-12a.cfm, *archived at* http://perma.cc/E7AR-DZQB (reporting a $975,000 settlement on behalf of Filipino-American hospital workers against Delano Regional Medical Center).

others.[218] Some commentators believe that the EEOC's continued enforcement of its national origin guidance, as well as the robust settlements it has procured, has strengthened protections for language minorities in the workforce,[219] and the EEOC has continued to reinforce its commitment to

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[216] Press Release, EEOC, EEOC Reaches Landmark 'English-Only' Settlement; Chicago Manufacturer to Pay Over $190,000 to Hispanic Workers (Sept. 1, 2000), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-1-00.cfm, *archived at* http://perma.cc/GPB8-NTCW (reporting a recent settlement against Watlow Batavia, Inc., where defendant had to pay $192,500 to eight Hispanic former employees).

[217] T. Shawn Taylor, *English-Only Dispute Ends in Settlement*, CHI. TRIB. (July 31, 2002), http://articles.chicagotribune.com/2002-07-31/business/0207310129_1_english-only-regis-corp-hair-salons, *archived at* http://perma.cc/6AWV-BH5C (reporting a $240,000 settlement against a chain of hair salons in Chicago on behalf of six former Hispanic employees).

[218] *See, e.g.*, EEOC v. Synchro-Start Prods., Inc., 29 F. Supp. 2d 911, 914–15 (N.D. Ill. 1999) (rejecting a motion to dismiss a claim of national origin discrimination against the defendant company on account of its English-only policy, finding that the EEOC's guidelines, which state that the presence of an English-only policy creates the inference of national origin discrimination, validly interpreted Title VII, and distinguishing the case from *Spun Steak*, which was not binding on the court); Complaint, EEOC v. Sephora USA, No. 03 CV 8821 (S.D.N.Y. Nov. 7, 2003) (challenging the enforcement of an English-only policy in a class action suit against Sephora Cosmetics); Allen Smith, *EEOC Settlement Reflects Rise in Challenges of English-Only Policies*, 54 HR MAG. 26 (Apr. 21, 2009) (discussing the EEOC's settlement of *EEOC v. Royalwood Care Center LLC*, CA No. CV 05-6895 ABC (PLAx) (C.D. Cal.), in which Royalwood Care Center had to pay its Hispanic employees up to $450,000, as well as provide various training programs); Cindy Waxer, *English-Only Policies Can Translate into Problems for Employers*, WORKFORCE (Jan. 5, 2004), http://www.workforce.com/articles/english-only-policies-can-translate-into-problems-for-employers, *archived at* http://perma.cc/3FJZ-PAM8 (reporting a $1.5 million settlement against Colorado Central Station Casino, and noting that "hefty settlements might slow the spread of English-only policies"); Press Release, EEOC, EEOC Settles English-Only Suit for $2.44 Million Against University of Incarnate Word (Apr. 20, 2001), http://www.eeoc.gov/eeoc/newsroom/release/4-20-01.cfm, *archived at* http://perma.cc/5D2F-6G4T; Press Release, EEOC, EEOC Sues Arizona Diner for National Origin Bias Against Navajos and Other Native Americans (Sept. 30, 2002), http://www1.eeoc.gov//eeoc/newsroom/release/9-30-02-c.cfm, *archived at* http://perma.cc/R8FZ-GF9A (discussing the EEOC's still ongoing first ever English-only lawsuit brought by the Commission on behalf of Native Americans); Press Release, EEOC, Melrose Hotel, Berwind Property Group, to Pay $800,000 to Settle National Origin Bias Suit by EEOC (Mar. 16, 2006), http://www.eeoc.gov/press/3-16-06a.html, *archived at* http://perma.cc/T6V2-LER8; Press Release, EEOC, Mesa Systems to Pay $450,000 to Settle EEOC National Origin Discrimination Lawsuit (Sept. 30, 2013), http://www.eeoc.gov/eeoc/newsroom/release/9-30-13a.cfm, *archived at* http://perma.cc/M5TJ-8CC6 (discussing the EEOC's settlement with Mesa Systems, Inc., a moving and storage company, on behalf of Hispanic workers who were subject to verbal abuse and a restrictive language policy).

[219] *See, e.g.*, Cristina M. Rodriguez, *Language Diversity in the Workplace*, 100 Nw. U. L. REV. 1689, 1736 (2006) (reviewing recent cases and settlements regarding English-only policies, and stating, "Recent court victories may also explain the willingness of some employers to settle, despite the paucity of court victories for plaintiffs."); Press Release, EEOC Settles English-Only Suit for $2.44 Million Against University of Incarnate Word, *supra* note 218 (reporting that the number of discrimination charges about English-only policies filed with the EEOC and local Fair Employment Practices Agencies has been increasing, with a nearly 500% increase between Fiscal Year 1996 and Fiscal Year 2000); *cf.* LAWYERS ALLIANCE FOR N.Y., "SPEAK ENGLISH ONLY" WORKPLACE RULES: PROCEED WITH CAUTION (2007), *available at* http://www.lawyersalliance.org/pdfs/news_legal/July_07_English-only_Rules_FINAL.pdf, *archived at* http://perma.cc/KM2M-YCWT (advising employers to be cautious of implementing English-only policies, discussing the EEOC's guidance about English-only policies, and stating that demanding or discriminatory English-only rules may result in severe consequences like monetary settlements).

this end.[220] These settlements illustrate the value of guidances and the ability of agencies wielding guidances to advance civil rights.

IV. Governing By Guidance

Abstracting key elements of the language rights case studies, this Article demonstrates that civil rights agencies were the engine of civil rights expansions on behalf of language minorities. More specifically, these institutional actors used guidances to innovate on existing civil rights protections. Their interpretations of broadly-worded civil rights statutes enabled them to articulate language rights where the statutory text did not clearly provide for them. This account of the development of language rights draws attention to the phenomenon of governing by guidance, a heretofore neglected subject in the historiography of the Civil Rights Act. The case studies illuminate the time period following the enactment of the Civil Rights Act as a moment when the practice of governing by guidance was used to great effect.[221]

This Article also offers a nuanced explanation for differences in the ability of the OCR and the EEOC to govern through guidance. Comparing the case studies, the Article finds that agencies relied on courts to instantiate the legal effect of their guidances, even if the framework for judicial review was not yet well settled. Courts functioned either to sustain agency guidances (in schools) or to stall them (in workplaces) during enforcement actions. In keeping with the assumptions of modern administrative law, the interaction between courts and agencies mattered critically to whether language rights articulated in guidances could survive, and accounts for some of the divergence between the two case studies. The reason for differences does not end there, however. The Article additionally finds that agencies forged meaningful civil rights protections independent of the judiciary. In the absence of a clear doctrinal test to distinguish binding agency rules from nonbinding agency guidances, agency guidances gained traction through their practical effects even more than by asserting legal control over the administration of language rights in schools and workplaces.[222]

A. Agency Guidance Instrumental in Civil Rights Protection

This section extracts from the case studies the elements of governing by guidance. First, agencies took the lead in statutory interpretation to extend

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[220] Press Release, EEOC, Mesa Systems to Pay $450,000 to Settle EEOC National Origin Discrimination Lawsuit, *supra* note 219 (reporting EEOC Chair Jacqueline Berrien's statement, "In its Strategic Enforcement Plan, the EEOC made it a priority to protect workers who are the most vulnerable . . . . This settlement is an important demonstration of this renewed commitment.").

[221] *See supra* sections III.C–D.

[222] *Id.*

the promises of the Civil Rights Act to language minorities. Created by Title VI for the purpose of ensuring equal educational opportunity, the OCR exercised its expert judgment on the statutory meaning of the statute's national origin discrimination prohibition and its relevance to the needs of non-English speaking schoolchildren.[223] The OCR had conducted extensive review of the conditions in the schools in question, consulted with experts on education of LEP students, and collaborated with parents of LEP schoolchildren about their goals for their children before enacting guidance pursuant to section 601.[224] The OCR enacted guidance on the basis of these investigations outside the notice and comment procedures. Like the OCR, the EEOC used guidance to elaborate on Title VII's national origin discrimination provision.[225] Although it was not required to undertake notice and comment procedures in enacting interpretive guidance, the EEOC held public hearings and published its guidance in the Federal Register.

The interpretive exercise in which agencies engage is necessarily a creative process that gives rise to meaningful legal protections.[226] In agencies, the use of policy documents to interpret the meanings of vague statutory terms is a core function, whether the interpretation takes the form of notice and comment rules or interpretive rules exempt from APA requirements. Most scholars, ranging from those with great tolerance for administrative policy entrepreneurship[227] to those who are generally conservative about agency power,[228] accept this interpretive function of agencies as necessary and justified. These scholars recognize that Congress is often unable to write statutes with sufficient specificity for the underlying policies to be implemented. The reasons are many. Congress may not have contemplated a specific issue. The legislative process may have led to rushing, compromise, and either deliberate or implicit delegation of details to agencies.[229] Lan-

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[223] *See supra* section III.C.

[224] Interview with Paul Grossman, Chief Civil Rights Att'y, Office for Civil Rights, Dep't of Health, Educ. & Welfare, in S.F., Cal. (Aug. 5, 2008).

[225] *See supra* section III.D.

[226] *See supra* text accompanying notes 33–37.

[227] William N. Eskridge & Kevin S. Schwartz, Chevron *and Agency Norm-Entrepreneurship*, 115 YALE L.J. 2623, 2623–24 (2006) (arguing that *Chevron* requires judges to defer to virtually all agency interpretations if not inconsistent with statutory plain meaning). This interpretation is grounded in the executive branch's own lawmaking authority and also draws upon the authors' notion that agencies are especially empowered to apply fundamental norms contained in super-statutes that encapsulate fundamental rights such as civil rights.

[228] Professor Robert Anthony refers to interpretive rules as the one exception to the general proposition that nonlegislative rules should not be used to bind the public. *See* Anthony, *supra* note 50, at 1313. Other scholars adopting similar views presume that agency interpretation is circumscribed by congressional intent because Congress must have delegated lawmaking authority to an agency for agencies to legitimately exercise power.

[229] *See generally* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 594 (2002) (describing political realities of the drafting process and specifically citing interviews with legislative staffers who agree that language should be "as clear as it can be" and yet see deliberate ambiguity as an equally powerful force working against clarity due to an absence of consensus on a particular point in a bill).

guage can simply be indeterminate. Also, in the face of complex or unresolved policy judgments, Congress may prefer to delegate rulemaking authority to agencies. The House and Senate Committee Reports on the Civil Rights Act indicate that Congress viewed discrimination as such a topic:

> Employment discrimination as viewed today is a far more complex and pervasive phenomenon . . . . In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful.[230]

Notwithstanding the vital role of agencies, the case comparison suggests that agency expertise and deliberative process in the promulgation of guidance was necessary, but not sufficient for judicial acceptance. The justifications offered by courts for the divergent treatment of OCR guidance and EEOC guidance during this time period do not extensively reference the process used by agencies enacting guidance or Congress's intent to delegate rulemaking authority to the agencies.[231] The expertise rationale, however, predates these case studies and survives beyond it. Professor Ronald Krotoszynski has pointed out that, for decades, the U.S. Supreme Court directed lower courts to review agency work product with some measure of deference on the theory that agencies possess superior expertise over the matters within their jurisdiction, so long as the particular agency work product reflects this specialized expertise.[232] The question is usually what level of deference courts should apply.[233] For example, the Supreme Court held to the expertise rationale in another EEOC case, *Meritor Savings Bank, FSB v. Vinson*,[234] stating that "Guidelines . . . 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[235] Even in *Spun Steak*, the Ninth Circuit explained that it did not lightly reject EEOC guidelines because guidelines constitute a body of experience.[236] Precepts of judicial review laid out in the APA also accord with the historical practice of respecting agency expertise. In the *Chevron* case and its progeny, the Supreme Court presumes that Congress intends to delegate interpretive authority in the face of statutory ambiguity: "Deference . . . is premised on the theory that a statute's ambiguity constitutes an implicit

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[230] S. Rep. No. 92-415, at 5 (1971); *see also* H.R. Rep. No. 92-238, at 8 (1972) (cited in Hart, *supra* note 65, at 1952).

[231] *See supra* notes 15 and 52.

[232] *See* Ronald J. Krotoszynski, Jr., *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 Admin. L. Rev. 735, 736, 739 (2002) ("When an agency decision appears to be the product of this specialized expertise, reviewing courts must afford some measure of deference to the agency's decision.").

[233] *See id.* at 736.

[234] 477 U.S. 57 (1986).

[235] *Id.* at 65 (citation omitted).

[236] 998 F.2d 1480, 1489 (9th Cir. 1993).

delegation from Congress to the agency to fill in the statutory gaps."[237] Thus, Congress invites agencies to help clarify "interstitial . . . legal question[s]."[238] In addition, where Congress has not definitely resolved an important policy issue, modern courts properly defer to agencies.[239] The rationales crystallized in modern administrative law support the agency practices that fostered the development of language rights, even if the cases themselves were not relied upon at the time. The next section elaborates on the relationship between courts and agencies in governing by guidance.

B. Guidance's Legal Effect Interdependent with Courts

As explained in section IV.A, this Article has focused on a time period when doctrines of deference figured less prominently in the acceptance of agency guidance than they do now. Still, the case studies show that courts functioned either to sustain agency issuances (in bilingual education) or to stall them (in workplace language policies) during enforcement actions. Thus, courts mattered to the agencies' effectiveness, even if the framework for judicial review of agency interpretations was not well developed. Two competing philosophies about the relationship between courts and agencies are apparent in the case studies that illustrate divergent pathways of governing by guidance.

1. Schools: Integrated Remedial Model.

In schools, courts and agencies became interdependent in the implementation of agency guidance. In his dissent in the seminal case *Alexander v. Sandoval*,[240] Justice Stevens described the interdependent relationship between courts and agencies in the Title VI context as an "integrated remedial scheme,"[241] where courts defer to and enforce agencies' promulgated guidances and provide agencies' requested remedies. The Supreme Court in *Lau v. Nichols* satisfied itself that the statutory grounds for protecting language minorities existed within Title VI[242] such that the articulation of language rights constituted the details of policy implementation — matters within the

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[237] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

[238] Barnhart v. Walton, 535 U.S. 212, 222 (2002); *see also supra* note 222.

[239] *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."); Laurence H. Silberman, Chevron — *The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990) ("*Chevron*'s rule — that the federal judiciary must defer to an agency's reasonable construction of a statute . . . is simply a sound recognition that a political branch, the executive, has a greater claim to make policy choices than the judiciary.").

[240] 532 U.S. 275 (2001).

[241] *Id.* at 304, 310 n.20 (Stevens, J., dissenting).

[242] 414 U.S. 563, 566 (1974) ("We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 of the Civil Rights Act of 1964.").

agency's discretion. Without classifying the OCR memo as binding or nonbinding and without citing a specific standard of review, the majority respected the agency's decision to require schools to bridge language gaps. The majority acknowledged the rulemaking authority of the OCR under section 602 of the Civil Rights Act,[243] although it was not entirely clear whether it relied upon it. The majority referenced the OCR guidelines on national origin that require school districts receiving federal funds to "'rectify the language deficiency in order to open' the instruction to students who had 'linguistic deficiencies'" within its section 601 discussion, suggesting reliance on the underlying statute.[244] The section 602 rulemaking discussion included the Court's conclusion that "it seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority . . . which denies them a meaningful opportunity to participate in the educational program — all earmarks of the discrimination banned by the regulations."[245] Whether the Court relied on statutory authority or regulatory authority, strictly speaking, it carved out a sphere for agency influence through the use of guidelines.

The concurring opinion by Justice Stewart more squarely addressed the issue of legal authority behind the OCR guidance. It rested language rights on regulatory grounds, positing as "the critical question" whether the regulatory guidelines promulgated by the OCR went beyond the authority of section 601.[246] As its test, the Court upheld the validity of a regulation promulgated under a general authorization provision such as section 602 "'so long as it is reasonably related to the purposes of the enabling legislation.'"[247] Justice Stewart then credited the OCR memorandum as a "'consistent administrative construction'" of remedial legislation and claimed that such guidance is "'entitled to great weight.'"[248]

After *Lau,* Title VI transformed from an administrative enforcement mechanism for protecting constitutional rights into a judicial mechanism for enforcing administrative rules defining a wide variety of forms of discrimi-

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[243] *Id.* at 567 ("By § 602 of the [Civil Rights] Act, HEW is authorized to issue rules, regulations, and orders to make sure that recipients of federal aid . . . conduct any federally financed projects consistently with § 601.").

[244] *Id.* (citation omitted).

[245] *Id.* at 568. The Court's reference to "regulations" apparently refers to the OCR guidance. The majority opinion follows up this analysis with an analogy to contract law, rather than a discussion of regulatory authority that might take place today under *Mead* or other *Chevron* Step Zero decisions. It states that the school district "contractually agreed to 'comply with Title VI . . . and all requirements imposed by or pursuant to the Regulation' of HEW . . . which are 'issued pursuant to that title'" and concludes that "'simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.'" *Id.* at 568–69 (citation omitted).

[246] *Id.* at 571 (Stewart, J., concurring).

[247] *Id.* (citation omitted).

[248] *Id.* (quoting Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972); Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971)).

nation.[249] Under the latter 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*.[250] Justice Stevens, in his dissent in *Sandoval* reviewing Title VI thirty years later, characterized the interdependence of agency rulemaking and judicial enforcement after *Lau* as an integrated remedial model on the basis of the text and structure of Title VI:

> Section 601 does not stand in isolation, but rather as part of an integrated remedial scheme. Section 602 exists for the sole purpose of forwarding the antidiscrimination ideals laid out in § 601. The majority's persistent belief that the two sections somehow forward different agendas finds no support in the statute. Nor does Title VI anywhere suggest, let alone state, that for the purpose of determining their legal effect, the "rules, regulations, [and] orders of general applicability" adopted by the agencies are to be bifurcated by the Judiciary into two categories based on how closely the courts believe the regulations track the text of § 601.[251]

With the clarity of hindsight, Justice Stevens's dissenting opinion recognizes federal agencies' broad powers to issue "prophylactic rules" for the purpose of realizing the vision of Title VI.[252] Whereas section 601 deals with explicit and unambiguous discrimination using a static approach toward enforcement, section 602 addresses subtle forms of discrimination through a dynamic approach. Section 602 delegates to agencies the "'complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems'" to warrant federal intervention.[253] This approach builds into the law flexibility and the capacity for nuanced assessments about complex problems. The integration of court enforcement and agency rulemaking, in Justice Stevens's view, "reflects a reasonable — indeed inspired — model for attacking the often-intractable problem of racial and ethnic discrimination."[254] Using the integrated remedial model, ad-

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[249] *See* Melnick, *supra* note 6, at 33.

[250] Alexander v. Sandoval, 532 U.S. 275, 305–07 (2001) (Stevens, J., dissenting).

[251] *Id.* at 304.

[252] *Id.* at 305.

[253] *Id.* (citation omitted).

[254] *Id.* at 306. In contrast, Justice Scalia, writing for the majority in *Sandoval*, criticized this gradual creation of implied rights of action. *Id*. at 291 (majority opinion). Scalia claimed that the Court had never explicitly recognized a private right of action to enforce agency rules that sweep more broadly than the text of Title VI *unless* Congress had independently authorized them. *Id*. Unlike the Fifth Circuit in *García v. Gloor*, 618 F. 2d 264 (5th Cir. 1980), Scalia did not find the agency's substantive interpretations invalid; he just did not find regulatory requirements enforceable in court. "Agencies may play the sorcerer's apprentice but not the sorcerer himself," he concluded. 532 U.S. at 291. An agency's quest to fulfill the goals of Title VI rested on the legislature's purpose, not on the regulatory purpose of informal requirements. Scalia thus removed from the equation any discussion of the broader enterprise in which regulatory agencies engage, not to mention the context-specific difficulties of regulating a problem as intractable as discrimination or as consequential as rights.

ministrative agencies today define and gather evidence about "discrimination" in a variety of contexts. They monitor the compliance of thousands of public and private organizations and redress noncompliance, costing millions of dollars. The scope of the regulatory enterprise makes federal courts highly dependent on administrative agencies.

2. Workplace: Court Constraints.

In contrast to the integrated remedial model advanced in schools, courts constrained the role of guidance in the workplace. In the multiple instances in which courts addressed EEOC statutory interpretations on national origin discrimination, their rationale centered on the agency's limited rulemaking and enforcement powers.[255] As explained previously, in the critical decisions referencing the EEOC's English-only guidelines, the circuit courts questioned the EEOC's ability to engage in substantive rulemaking under Title VII.[256] While some discussion of EEOC's lack of substantive rulemaking powers is to be expected, given the legislative history of the EEOC, certain exercises of interpretive and procedural rulemaking by the EEOC are entitled to deference.[257] As Professor Melissa Hart explained in an article discussing deference to the EEOC generally,

> [T]he Court's lack of deference to the EEOC is part of a broader picture: The Court has established a bifurcated structure of administrative deference that leaves much of the kind of interpretation that the EEOC most often engages in with the "power to persuade" but not the "power to control."[258]

Professor Hart concludes that "even within this framework the EEOC receives remarkably little respect from the Court."[259] While Professor Hart is not specifically discussing the Title VII national origin guidelines, her analysis of judicial deference to the EEOC seems applicable to the English-only opinions.

In addition to limiting rulemaking authority, the EEOC's hybrid enforcement scheme limits the agency's enforcement authority. Rather than relying exclusively on agency enforcement, Title VII enables private litigants to obtain a right-to-sue letter that funnels compliance into the federal

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[255] Melissa Hart describes the inconsistent standards of deference afforded by the Supreme Court to the EEOC. She theorizes that the Court adopts idiosyncratic and results-driven levels of deference for EEOC rulings because it substitutes its own expertise in discrimination for the EEOC's. Hart, *supra* note 65, at 1938; *see also* John S. Moot, *Analysis of Judicial Deference to EEOC Interpretative Guidelines*, 1 ADMIN. L.J. 213 (1987).

[256] *See supra* notes 192–220 and accompanying text.

[257] *See* 42 U.S.C. § 2000e-12(a) (2006) (granting EEOC "authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter"); *supra* text accompanying notes 66–70.

[258] Hart, *supra* note 65, at 1937 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[259] *Id.*

courts.[260] The transfer of enforcement authority from agencies to courts differs from the Title VI approach that pairs bureaucratized decisionmaking and judicial review. The EEOC's reliance on private litigation as an enforcement strategy is vulnerable to the same dysfunctions as courts generally have in an adversarial legal system: fragmentation, unpredictability, incrementalism, and expense.[261] In the end, the legacy of the EEOC's effort to govern by guidance is mixed. The EEOC tried to advance language rights on behalf of language minorities against significant odds, and it succeeded for a while via the 1970 guidance. Yet for a variety of reasons, those initial efforts to govern through guidance were not enough to endure subsequent litigation challenges and changed political conditions.[262]

C. Guidance's Practical Effect Independent of Courts

While the case study comparison illuminates the relationship of courts and agencies as a distinguishing feature of the EEOC's and OCR's attempts to govern through guidance, judicial acceptance does not fully capture the distinction. As described in section IV.B, courts did not clearly discuss the standard of review in the critical language rights cases, let alone cite to *Skidmore* or other doctrines of deference stressed in modern administrative law.[263] Also, the policies and procedures underlying such discussions arguably disfavor the level of deference afforded by courts given that the EEOC more closely followed notice and comment procedures than the OCR and yet received less persuasive weight. This section claims that the *practical* ef-

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[260] Sean Farhang provides a thorough discussion of the development of the private litigation model of enforcement under Title VII. Farhang highlights the political compromises that led to a hybrid model with shifting emphasis on public and private enforcement from its enactment in 1964 to its revisions in 1972 and 1991. In particular, he notes the irony of civil rights advocates' and Republican legislators' changing attitudes toward private enforcement over the years, with civil rights advocates becoming more protective of the private enforcement model following the unexpected success of a growing civil rights bar and a rightward shift in the executive branch when Nixon took office. FARHANG, *supra* note 34, at 228–31. As it turned out, and against expectation, the private litigation model generally led to vigorous enforcement and resounding successes in courts from 1965 to 1976. Private enforcement of Title VI disparate impact theories, upon which language rights partly rely, became available during this time period. It remains available for disparate treatment cases, but has not been available for disparate impact cases since 2001. *See supra* text accompanying notes 252–254; 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 135 (Denice C. Morgan et al. eds., 2005).

[261] Professor Bob Kagan enumerates several pathologies of litigation. These tendencies were the very reason that the Civil Rights Act aimed to move litigation into administrative processes. ROBERT KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 29–31 (2003) ("[T]he mechanisms of American adversarial legalism — the very kinds of mechanisms that yielded *Brown v. Board of Education* and the prison reform decisions, and that sometimes free the unjustly accused — produce irrational, unjust, and inefficient outcomes as well.").

[262] Some reasons could be the changed political conditions by the 1980s, the EEOC's reputation as a weak agency, or the EEOC's institutional design. *See supra* section III.D.

[263] *See supra* note 15 and text accompanying note 52.

fects of agency guidance serve as an important insight into understanding the significance of agency guidance.

The underlying assumption in this section is that agencies' assertions of the existence of language rights under the Civil Rights Act were meaningful even without having clear legal effect — at least at the time they were accepted and in the absence of contrary legal precedent. As a matter of administrative law, the substantial impact test was used for many years preceding the now dominant legal effects test.[264] The substantial impact test "entailed invalidating rules that, despite satisfaction of the legal effects test, had a substantial impact on regulated parties."[265] Courts required that agencies issuing rules that had a substantial impact undergo notice and comment procedures. Once again, the critical language rights decisions do not clearly distinguish the OCR and EEOC issuances from regulations, let alone specify the proper test to do so. Still, the logic of substantial impact might help to explain greater resistance to the EEOC English-only rules than to the OCR guidelines. Businesses invoked the affirmative defense of business necessity when confronted with EEOC guidance,[266] while schools generally conceded the need for language accommodation, despite disagreement about the proper remedies.[267]

Another dimension of understanding governing by guidance is grasping the practical effect of a guidance on the agency itself.[268] Setting aside for the moment the agency's intention to bind regulated entities with their guidances, agencies may use guidances to articulate the agency's interpretations of what is statutorily required during prospective enforcement actions. These legal positions may not have *independent* legal effect, but they may nonetheless take on legal characteristics insofar as they are the agency's interpretations of what the statute requires when the agency engages in enforcement actions. While agencies can change their legal stances relatively easily — indeed that is one reason they use guidance in lieu of more formalized rulemaking — they often prefer to maintain a consistent legal stance in their guidances in order to improve their credibility with courts. In this way,

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[264] The legal effects test was established in *PG&E v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974).

[265] Thomas Fraser, *Interpretive Rules: Can the Amount of Deference Accorded Them Offer Insight into the Procedural Inquiry?*, 90 B.U. L. Rev. 1303, 1312 (2010). Fraser explains that the substantial impact test was established in *Cabais v. Egger*, 690 F.2d 234 (1982). The D.C. Circuit subsequently disavowed *Cabais* after *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), because "it engrafted additional procedures on agency action beyond those contemplated by the APA." *Id.* at 558.

[266] *See supra* notes 165–193 (EEOC discussion).

[267] The original OCR memo laying out language rights as part of national origin discrimination is still in place and continues to shape the regulatory framework of Title VI compliance. More recently, the impact of the *Lau* remedies memo on schools has been diluted by *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), which permits schools to choose the curricular means of satisfying the OCR guidance — thereby absolving the requirement of bilingual education.

[268] The impact on agencies test was established by *United States Telephone v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994).

the agency commits itself to the legal position articulated in its officially nonbinding guidance. Although the agency's legal position may not receive the same level of deference as an officially binding rule, the position articulated in the guidance is treated by the agency *as if* it were legal precedent, taking on law-like characteristics as a practical matter.[269] Both the OCR and EEOC bound themselves to the legal positions taken in their guidances on national origin discrimination. The OCR continues to cite to the original 1968 memorandum calling for inclusion of language minorities in classrooms in its enforcement actions.[270] The EEOC relies on its revised guidance and on the national origin sections of its compliance manual, which have maintained the same position on English-only rules in the workplace and until recently have remained unchanged with regard to the language dimension of national origin discrimination.[271]

Part IV has credited regulatory agencies, through the issuance of guidances, with protecting civil rights. Guidances served as the vehicle for statutory interpretation and administrative enforcement, critical tasks that concretized rights implied but not fully realized in statutory form. The lessons of history tell us that, as a matter of legal effect, the OCR guidance articulated rights for language minorities more successfully than did the EEOC guidances. The Supreme Court enshrined the OCR guidance in case law and Congress codified the result. This gave weight to the OCR's prophylactic rules and made the regulatory rights of language minorities stick. This remained true even as the specific remedy of bilingual education eroded and even as civil rights enforcement premised on Title VI regulations have come under more recent challenge.[272] In contrast, the legal effect of the

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[269] Robert Anthony complained that practically binding guidance is problematic because it binds the public, even if that binding effect on the public is incidental to binding the agency. Anthony, *supra* note 50.

[270] *See, e.g.*, William L. Smith, *Policy Regarding the Treatment of National Origin Minority Students Who Are Limited English Proficient*, OFFICE OF CIV. RTS. (Apr. 6, 1990), https://www2.ed.gov/about/offices/list/ocr/docs/lau1990_and_1985.html, *archived at* http://perma.cc/X2V6-GVPH.

[271] *National Origin Discrimination*, EEOC, http://www.eeoc.gov/laws/types/nationalorigin.cfm, *archived at* http://perma.cc/8EVQ-9MN9 (last visited Apr. 7, 2014).

[272] The viability of the *Lau* remedies founded on Title VI regulatory policy following *Alexander v. Sandoval* is uncertain. In *Sandoval*, the Supreme Court found no implied private right of action to enforce Title VI regulations prohibiting laws with a disparate impact on protected minorities in a case that let stand an Alabama state law limiting driver's license tests to English. 532 U.S. 275, 291–92 (2001) (limiting section 602 agency authority to enact regulations not tied to statutory rights and restricting enforcement of those regulations to the agencies, as opposed to private individuals). This conclusion was challenged by Rachel Moran in her article on the "undoing" of *Lau*, which ultimately concluded that the *Lau* remedies survived *Sandoval*. Rachel Moran, *Undone By Law: The Uncertain Legacy of* Lau v. Nichols, 16 BERKELEY LA RAZA L.J. 1, 10 (2005) ("Despite recent incursions, the heart of *Lau,* in particular, its naming of linguistic exclusion, survives."). In the core of her description of legal challenges to *Lau*, she recounts *Guardians Ass'n v. Civil Service Commission of New York*, 463 U.S. 582 (1983), as potentially undercutting *Lau's* assumption that Title VI addresses both discriminatory intention and disparate impact. Moran, *supra*, at 4–6. She then explains that while *Alexander v. Choate*, 499 U.S. 287 (1985), permitted disparate impact actions to remain if premised in regulation (even if not in statute), the 2001 decision *Alexander v. Sandoval*

EEOC's regulatory guidance on English-only policies in the workplace proved vulnerable to judicial challenges such as *García v. Gloor* from the outset and never gained traction in other circuit courts — suggesting that the language rights expressed in the EEOC guidance never achieved independent legal effect. Not to be overlooked, both the OCR and EEOC guidances governed most successfully through practical effect. Agency guidances from the OCR and EEOC bind their respective agencies to this day in their compliance standards, investigations, and enforcement actions. So doing, they influence the practical realities for language minorities in today's schools and workplaces.

Conclusion

What do the lessons of history portend for the modern moment, when civil rights laws once again seem in need of updating? By the 1980s, the effort to roll back civil rights targeted regulatory excess as well as the underlying social vision of equality. Some might argue that the rollback continues today. This begs the question whether agency-promulgated rights are a sound foundation for legal change. Consider first that language rights likely would not have developed as part of the civil rights movement — or would not have developed as rapidly and with as little resistance — had they not taken hold in civil rights agencies. Setting aside the unique political climate that made policy reform possible in the 1960s, legislators were largely unaware of the language gaps that barred non-English speakers from equal opportunity. Courts that heard challenges raising these difficulties lacked the expertise and capacity to respond quickly or effectively without the partnership of the agencies themselves. And social movement pressure among the newly arrived simply could not have matched the historic struggle of the black civil rights movement. A regulatory strategy enabled rapid response to demographic change and a tailored approach sensitive to policy context and complexity.

Reflecting on 1960s civil rights laws, the U.S. Commission on Civil Rights accurately observed that "[c]ivil 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

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pulled the rug out from private enforcement of disparate impact theories of liability precisely because they are based on regulation rather than statute. Some commentators have suggested that 42 U.S.C. § 1983 (permitting a private right of action to any person who, under color of state law, is deprived "of any rights, privileges, or immunities secured by the Constitution and laws") provides an alternative way to enforce Title VI regulations. *See, e.g.*, Bradford Mank, *Using §1983 to Enforce Title VI's Section 602 Regulations*, 49 U. Kan. L. Rev. 321 (2001). Moran disagrees, however, and notes that subsequent section 1983 litigation and efforts to limit congressional delegation authority under s ection 5 of the Equal Protection Clause further weaken the possibility of enforcing rights grounded in regulations rather than statutes. She suggests that the Equal Educational Opportunity Act is a more promising source of legal authority for the *Lau* precedent. Moran, *supra*, at 6–10.

existing laws work."[273] It was true then, and it is *mostly* true now. In areas ranging from voting rights to immigration reform, the nation awaits federal action. This Article suggests that policy reformers might helpfully shift their gaze from Congress to regulatory agencies within the executive branch as the guardians of civil rights. Agencies can reinterpret the promises of civil rights statutes without needing to directly confront the hurdles of partisan politics in Congress and they are relatively more insulated from politics than the White House. In essence, the lesson of language rights emerging on the fiftieth anniversary of the Civil Rights Act of 1964 is that agency guidances enable the law to keep pace with changing circumstances and assist the ongoing quest for equal opportunity. Undoubtedly, agencies can do more to advance civil rights than just promulgating guidance, and other forms of governance can bring distinct advantages, but we would be left with far less in the absence of governing by guidance.

[273] U.S. Comm'n on Civil Rights, Ten Years After the Voting Rights Act (1975) (available at National Archives II, College Park, MD).