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

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Although there has been widespread celebration of the fiftieth anniversary of *Brown v. Board of Education*,[1] there has been relatively little recognition of the thirtieth anniversary of *Lau v. Nichols*.[2] *Brown* rested on a finding that intentional segregation of public school students by race violates the equal protection clause of the Fourteenth Amendment. *Lau* pushed beyond a paradigm of intentional harm to attack exclusionary practices, whether or not motivated by a discriminatory purpose. The Supreme Court's decision in *Lau* was based not on a constitutional wrong, but on a violation of Title VI of the Civil Rights Act, as interpreted by the Office for Civil Rights (OCR). The statute, along with OCR's interpretation, barred school practices that have the effect of excluding children from the educational process based on language, where language is a proxy for race, ethnicity, or national origin.

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

I.
THE *LAU* DECISION

The *Lau* case was filed on behalf of 2,856 Chinese-speaking students in the San Francisco school system, nearly two-thirds of whom received instruction only in English. Although the school district offered special language assistance to Spanish-speaking students, it did nothing to accommodate Chinese-speaking students. In demanding relief, the plaintiffs relied not only on the equal protection clause but also on Title VI as interpreted by OCR.[3]

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1. 347 U.S. 483 (1954).
2. 414 U.S. 563 (1974), *rev'g*, 483 F.2d 791 (9th Cir. 1973).
3. 414 U.S. at 565. The plaintiffs also brought claims under California law, 483 F.2d at 793.

Passed in 1964, Title VI provides that "[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."[4] In response to civil rights protests and ongoing unrest, Congress enacted the omnibus bill to target segregation and discrimination in the South. With its focus on the subordination of Blacks, Title VI did not specifically address the problems of linguistic minorities.[5]

Even so, in 1970, OCR, a federal agency charged with enforcing Title VI, concluded that its broad mandate of non-discrimination reached language barriers that "exclude[] national origin-minority group children from effective participation in the educational program offered by a school district."[6] According to OCR's understanding, language could serve as a proxy for race, ethnicity, and national origin and should not be used to mask illicit discrimination on these grounds. Moreover, students harmed by a school's language policy need not prove discriminatory intent to prevail; the effect of exclusion sufficed to establish a Title VI violation.[7] OCR mandated that school districts "take affirmative steps to rectify the language deficiency in order to open its instructional program to [linguistic minority] students."[8] Despite this federal demand for special instruction, San Francisco, along with most districts, continued to offer little, if any, assistance, and OCR lacked the resources to enforce its requirement.[9]

As a result, the *Lau* litigation was an important test of whether OCR could successfully broaden Title VI's protections. By bringing the lawsuit against the San Francisco school system, Chinese-speaking students hoped to give OCR's interpretation real force. At first, it appeared that these efforts would be thwarted. Both the trial judge and the court of appeals ruled against the students, rejecting their statutory and constitutional claims under federal and state law. The district court, though sympathetic to the students' plight, concluded that the San Francisco school system had discharged its legal obligations by making "the same education...available on the same terms and conditions" as it did to others enrolled in the district.[10] The court of appeals agreed, distinguishing the impact of state-mandated segregation from language difference. In the court's view, government officials had taken steps to keep public schools racially identifiable, but "the language deficiency suffered by [these Chinese-speaking students] was not caused directly or indirectly by any State action."[11] For that reason, the Ninth Circuit found the plaintiffs' interpretation of equal protection and Title VI, one that directly reflected OCR's views, "extreme"[12] because it failed to recognize that children arrive at school with "different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any

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These state law claims will not be discussed in detail here.

4. 42 U.S.C. § 2000d (2003).

5. Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1266 (1988).

6. Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (1970). *See generally* Peter Margulies, *Bilingual Education, Remedial Language Instruction, Title VI, and Proof of Discriminatory Purpose: A Suggested Approach*, 17 COLUM. J.L. & SOC. PROBS. 99, 115-16 (1981) (recounting the history of administrative interpretations of Title VI).

7. Moran, *supra* note 5, at 1266-67.

8. Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595.

9. Moran, *supra* note 5, at 1267-68.

10. Lau v. Nichols, 483 F.2d 791, 793 (9th Cir. 1973), *rev'd*, 414 U.S. 563 (1974).

11. *Id.* at 798.

12. *Id.* at 794.

contribution by the school system."[13] In the Ninth Circuit's view, the school was not required to rectify all of these differences and disadvantages.[14]

The United States Supreme Court reversed, relying heavily on OCR's views about the scope of Title VI's coverage. In adopting OCR's interpretation, the Court noted that Congress had authorized the agency to interpret and enforce Title VI.[15] Moreover, the San Francisco school district had agreed to abide by OCR's requirements when it accepted federal funds.[16] The Court did not determine whether the San Francisco school system had denied the students equal protection under the Fourteenth Amendment, nor did the Justices order any specific remedy.[17] Instead, the Justices urged the school district to apply its expertise to devise appropriate accommodations for the Chinese-speaking students.[18] Because there was no finding that the district's actions were motivated by animus, the Court presumably remained optimistic that school officials would act in good faith to redress the problem of language difference.

The Court relied on several key principles to reach the decision in *Lau*. First, Congress had the power to prohibit behavior that does not necessarily amount to a constitutional violation.[19] The Constitution prohibits intentional wrongs but does not reach actions taken in good faith that have a racially adverse effect.[20] Even so, under section 5 of the Fourteenth Amendment, Congress has been empowered to rectify inequality by recognizing disparate impact claims.[21] Second, Congress exercised this power when enacting Title VI of the Civil Rights Act; that is, the statute reaches not just intentional discrimination but also acts with an adverse effect.[22] As a result, the federal government could police possible wrongdoing even when a discriminatory purpose was difficult to prove. Third, a federal enforcement agency's understanding of the scope of civil rights protection was legitimate and authoritative.[23] Because Congress had delegated enforcement responsibilities to OCR, the Court deferred to its conclusion that Title VI reached exclusionary language policies.[24] Fourth, private individuals like the Chinese-speaking students in San Francisco could sue to ensure that Title VI's mandates

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13. *Id.* at 797.

14. *Id.* The Ninth Circuit emphasized the importance of state action in segregation cases, whether de jure or de facto. *Id.* at 799. Because the California constitution appeared to reach both intentional and unintentional acts, the court of appeals could not dismiss the plaintiffs' claim under state law simply because the San Francisco school district lacked any invidious motivation in denying students special language assistance. Instead, the court had to distinguish between state action and inaction to dismiss both the state and federal claims. *Id.*

15. 414 U.S. at 566-68. In their concurrence, Justices Stewart and Blackmun as well as Chief Justice Burger noted that agency interpretations were "entitled to great weight." *Id.* at 569, 571 (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Udall v. Tallman, 380 U.S. 1 (1965)).

16. *Lau*, 414 U.S. at 568-69.

17. *Id.* at 566, 569.

18. *Id.* at 567.

19. *See id.*

20. *Lau* did not reach this issue because the Court looked at Title VI, not the equal protection clause in arriving at the decision. *Id.* at 566. Cases handed down shortly thereafter made the intent requirement clear. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229 (1976).

21. At the time of the *Lau* decision, the Court took a broad view of these congressional powers. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966). The Court has since taken a far more restrictive approach to the scope of congressional authority to enforce the Fourteenth Amendment under section 5, as will be discussed later. *See infra* notes 41 - 42 and accompanying text.

22. *Lau*, 414 U.S. at 568.

23. *See id.* at 567.

24. *Id.*

were met.[25] These private rights of action supplemented federal enforcement actions and were seen as critically important given the limited resources of agencies like OCR.[26] Fifth and finally, in light of this history of congressional action and agency interpretation, the school district's exclusive reliance on English-language instruction wrongfully excluded non-English-speaking children from access to the curriculum in violation of Title VI.[27]

II.
THE FATE OF THE *LAU* DECISION: UNDONE BY LAW

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

The Court first undercut *Lau*'s assumption that Title VI addresses both intentional discrimination and disparate impact. *Guardians Ass'n v. Civil Service Commission*[28] held that Title VI authorizes compensatory relief only for purposeful wrongs, not actions with adverse effects.[29] The Justices hastened to add that *Lau* technically remained good law because it was predicated not just on the statute but also on OCR's interpretation.[30] Though *Guardians Ass'n* produced a fragmented and somewhat confusing set of opinions, the Court's doctrinal position was subsequently clarified in *Alexander v. Choate*.[31] There, the Court indicated that although Title VI itself did not support a disparate impact claim, agency regulations could rely on this theory of liability.[32]

Lau suffered another blow in 2001 when the Court decided *Alexander v. Sandoval*.[33] In that case, the Justices held that there is no private right of action under Title VI disparate impact regulations.[34] In the Court's view, Congress did not use clear and unambiguous language to establish a private right to sue based on disparate impact regulations, nor did the rights-based nature of these entitlements automatically imply an individual remedy in federal courts.[35] Now, if federal agencies interpret Title VI as reaching actions with adverse effects, it is up to those agencies to file legal actions based on this theory.[36] After *Sandoval*, then, private plaintiffs can sue only for intentional discrimination, an action already available under the Fourteenth Amendment.

Some legal commentators believe that plaintiffs can still use 42 U.S.C. § 1983

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25. *See id.* at 564.

26. Rebecca E. Zeitlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 214-15 (2002).

27. *Lau*, 414 U.S. at 568.

28. 463 U.S. 582 (1983).

29. *Id.* at 593.

30. *Id.* at 591-92.

31. 469 U.S. 287 (1985).

32. *Id.* at 294.

33. 532 U.S. 275 (2001).

34. *Id.* at 293.

35. *Id.* at 289.

36. *Id.* at 290.

to sue under Title VI disparate impact regulations.[37] Section 1983 provides that a person who, under color of state law, is deprived of "any rights, privileges, or immunities secured by the Constitution and laws" can bring a private right of action in federal court.[38] However, the Court has been increasingly parsimonious in allowing § 1983 actions when a private lawsuit cannot be brought under the statute itself.[39] Because Title VI no longer permits a person to sue based on a disparate impact regulation, the Court could very well conclude that there is no right to be free of such adverse effects under § 1983 either. As a result, if federal civil rights agencies are too overburdened to file an action, children will be left without recourse under Title VI unless they can establish discriminatory intent.

These decisions substantially weaken *Lau*'s foundation, and the Court has dropped hints that additional challenges remain. First, there have been suggestions, particularly in the *Sandoval* case, that agencies do not have the authority to promulgate disparate impact regulations because the language of Title VI does not support such an interpretation.[40] Second, the Justices have indicated that Congress itself may lack the power under section 5 of the Fourteenth Amendment to authorize an enforcement regime that goes beyond core constitutional violations to punish adverse racial effects.[41] In other words, Congress must limit itself to prohibiting intentional discrimination, just as the Constitution does. So far, the Court has avoided a direct confrontation with Congress over the scope of its authority to recognize disparate impact claims as a means to combat racial and ethnic discrimination. Instead, the Court has honed arguments about the limits of congressional power in areas less central to the Amendment's original aim of dismantling the legacy of slavery. For instance, the Justices have rejected provisions of the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Violence Against Women Act, and the Religious Freedom Restoration Act, each time insisting that Congress overstepped its constitutional bounds.[42] The issue of Congress's authority to outlaw disparate impact discrimination may be engaged if Congress amends Title VI in response to the Court's recent decision in *Sandoval*. Legislation had been pending in the House and Senate in 2004 but died in committee.[43] For now, any direct confrontation seems unlikely as proposals to

37. *See, e.g.*, Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under Section 1983?*, 69 BROOK. L. REV. 163, 165 (2003); Case Comment, *Save Our Valley v. Sound Transit*, 117 HARV. L. REV. 735, 740-42 (2003). For an opposing view, *see* Charles Davant IV, *Sorcerer or Sorcerer's Apprentice?: Federal Agencies and the Creation of Individual Rights*, 2003 WIS. L. REV. 613, 615 (concluding that "regulations that purport to create privately enforceable individual rights [pursuant to § 1983] usually will be contrary to statutory law and not entitled to deference").

38. 42 U.S.C. § 1983.

39. *See, e.g.*, Gonzaga v. Doe, 536 U.S. 273, 282-86 (2002).

40. *See Sandoval*, 532 U.S. at 281-82.

41. Robert Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 13 (2003) (concluding that the Court has applied restrictions on congressional power under section 5 of the Fourteenth Amendment "with devastating effect"); John Arthur Laufer, *Note: Alexander v. Sandoval and Its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613, 1640-48 (2002) (describing the renunciation of congressional power to promulgate disparate impact protections as the "unofficial holding" of *Alexander v. Sandoval* and explaining the roots of the Court's skepticism about section 5 of the Fourteenth Amendment).

42. Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (disability); United States v. Morrison, 529 U.S. 598 (2000) (gender); City of Boerne v. Flores, 521 U.S. 507 (1997) (religion); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (age).

43. Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, H.R. 3809, 108th Cong. (2d Sess. 2004); S. 2088, 108th Cong. (2d Sess. 2004); Bill Tracking Report, H.R. 3809, Cong. Inf. Serv. (2004); Bill Tracking Report, S. 2088, Cong. Inf. Serv. (2004).

reinvigorate Title VI are not apt to pass in a Republican-controlled Congress.[44]

In sum, then, *Lau* rests on increasingly shaky legal ground. First, the Court has questioned congressional power to define racial discrimination to encompass disparate impact as well as intentional wrongdoing. Second, the Court has held that the language of Title VI itself does not reach adverse effects but instead applies only to purposeful discrimination. Third, the Justices have hinted that federal agencies may lack the authority to interpret Title VI as a basis for filing disparate impact actions. Fourth, the Court has concluded that individuals cannot bring a private right of action under Title VI to challenge policies and practices that have adverse racial effects but must instead allege racial animus. After all these judicial incursions, only the central finding of fact in *Lau* remains uncontested; that is, an English-only curriculum can be exclusionary whether or not school officials act with an intent to harm linguistic minority students.

III.
ALTERNATIVES TO TITLE VI: DOES *LAU*'S UNDOING MATTER?

Lau is not the only source of federal legal protection for English language learners. If alternative provisions offer ample protection, *Lau*'s undoing would not seriously jeopardize students' rights. The Equal Educational Opportunities Act (EEOA),[45] the First Amendment[46] guarantee of free speech, and the English Language Acquisition, Language Enhancement, and Academic Achievement Act[47] (hereinafter the English Language Acquisition Act) are the most promising possibilities for replacing *Lau*'s Title VI disparate impact regime. Yet, none of these affords a perfect substitute for the anti-discrimination protections in *Lau*.

The best alternative source of protection is the EEOA. Enacted by Congress to codify the *Lau* decision, the statute explicitly adopts an effects rather than an intent test in defining wrongful discrimination.[48] Moreover, the EEOA includes an express private right of action, enabling individuals to bring suit if federal agencies fail to enforce the law.[49] Although no educational remedies are specified, the EEOA empowers students and their parents to rely on a disparate impact theory when challenging instructional practices in federal court. These features of the EEOA clearly have been critical in keeping *Lau*'s legacy alive despite the retrenchment under Title VI. There are some important limits on the scope of the EEOA's protections for linguistic minority students, however. Because the statute addresses only those actions that exclude children from access to instruction, it does not reach some educational policies that would be covered by Title VI. For instance, in *GI Forum v. Texas Education Agency*,[50] limited-English-proficient students challenged high-stakes testing that disproportionately barred them from obtaining a high school diploma. Without reaching the merits of the students' disparate impact claim, the federal district court judge held that they had no cause of

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44. In fact, in 2005, a bill was introduced to nullify Executive Order 13166, which requires that federal agencies provide assistance in languages other than English. S. 557, 109th Cong. (1st Sess. 2005). The bill cited *Sandoval* as "eliminating any legal basis" for the order. *Id.* § 1(3).

45. 20 U.S.C. §§ 1701-21 (2004).

46. U.S. CONST. amend. I.

47. 20 U.S.C. §§ 6811-71 (2004).

48. 20 U.S.C. § 1703; *see generally* Moran, *supra* note 5, at 1271-72 (describing history of enactment of EEOA as a congressional codification of *Lau*).

49. 20 U.S.C. § 1706.

50. 87 F. Supp. 2d 667, 668 (W.D. Tex. 2000).

action under the EEOA because the testing process was an evaluative procedure, not part of the instructional program.[51]

Just as arguments about the limits of congressional power can be made regarding Title VI, similar questions can be raised about the EEOA. Recently, a legal commentator has argued that the EEOA violates the Eleventh Amendment.[52] The Eleventh Amendment gives states immunity from private lawsuits in federal court when states have not consented to be sued. Congress can abrogate this immunity pursuant to the legitimate exercise of constitutional powers under section 5 of the Fourteenth Amendment.[53] Congress must make its intent to abrogate state immunity clear and unequivocal, and the abrogation must be congruent with and proportional to demonstrable constitutional violations.[54] Otherwise, the federal government cannot authorize private lawsuits against states in federal court.

The EEOA does not expressly abrogate state immunity, thus giving rise to the first possible basis for an Eleventh Amendment challenge. Assuming that this objection can be overcome, the EEOA does invoke congressional powers granted pursuant to the Constitution as authority for enacting the statute.[55] This general statement will likely suffice, even though section 5 is not specifically mentioned.[56] However, the EEOA bans disparate impact and not just intentional misconduct, thereby exceeding the scope of an equal protection violation.[57] To justify imposing liability for unintentional violations, Congress must show that its abrogation of state immunity is congruent with and proportional to documented constitutional misconduct.[58] However, in 1974, the Nixon administration promoted the EEOA as anti-busing legislation, a package of educational remedies that could be used to counter mandatory school desegregation.[59] As a result, the legislative findings emphasize the failings of busing, rather than the wrongs done to non-English-speaking students.[60] In fact, to the extent that bilingual education issues were addressed at all, the focus was on local districts and officials, not state decision-makers.[61] The Court therefore could find that disparate impact claims against state educational agencies and officials are neither congruent with nor proportional to

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51. *Id.* at 680. There are ways to argue that high-stakes testing is a component of the instructional process, particularly when the results are used to diagnose the need for special services, such as tutoring and summer school. The federal district court, however, made a bright-line distinction between the process of instruction and its outcome, the award of a diploma. Rachel F. Moran, *Sorting and Reforming: High-Stakes Testing in the Public Schools*, 34 AKRON L. REV. 107, 125 (2000).

52. U.S. CONST. amend. XI; Geoffrey Landward, Note, *Board of Trustees of the University of Alabama v. Garrett and the Equal Education Opportunity Act: Another Act Bites the Dust*, 2002 BYU EDUC. & L.J. 313, 323 (2002).

53. U.S. CONST. amend. XIV, § 5; Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

54. Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996) (establishing a two-part test for congressional abrogation of state sovereign immunity); City of Boerne v. Flores, 521 U.S. 507, 519-520 (1997) (establishing the congruence and proportionality test).

55. 20 U.S.C. § 1702.

56. *See* EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (finding a statute need not specifically refer to § 5 or the 14th Amendment so long as congressional intent to act pursuant to those powers is otherwise discernible).

57. 20 U.S.C. § 1703.

58. *See* City of Boerne, 521 U.S. at 519-520 (requiring congruence and proportionality between the injury to be remedied and the means adopted where Congress proscribes actions that are not expressly unconstitutional).

59. Jonathan D. Haft, *Assuring Equal Educational Opportunity for Language-Minority Students: Bilingual Education and the Equal Educational Opportunity Act of 1974*, 18 COLUM. J.L. & SOC. PROBS. 209, 233-34, 236 (1983).

60. 20 U.S.C. § 1702; Landward, *supra* note 52, at 330.

61. 20 U.S.C. § 1702; Landward, *supra* note 52, at 328-29.

demonstrated constitutional wrongs in the legislative record.

Should such an Eleventh Amendment challenge succeed, the EEOA would no longer be available to challenge state policies in federal court. Instead, litigators would be forced to bring suits district by district, a time-consuming and burdensome task. As a result, some actions would be entirely beyond the reach of private lawsuits under federal law. Consider, for instance, the adoption of statewide laws and regulations that control the delivery of bilingual education services.[62] Today, if students are dissatisfied with these provisions, they cannot bring an equal protection or a Title VI claim unless they allege intentional discrimination. If the Eleventh Amendment challenge to the EEOA holds up, plaintiffs would have to abandon a disparate impact theory under this statute as well as Title VI. So, the sole basis for a statewide challenge would be discriminatory intent. The EEOA would be available only if local districts produced adverse effects in the instructional program when implementing state provisions, and these lawsuits would have to be brought on a district-by-district basis.

A far less promising source of legal protection than the EEOA is the First Amendment, which protects students' and teachers' free speech rights. First Amendment arguments have enjoyed some limited success in litigation challenging official English laws as an undue burden on individual speech rights.[63] However, in the public school setting, rights of expression are circumscribed to permit the learning process to take place. Although students do not relinquish their First Amendment protections at the schoolhouse gate, the Supreme Court has shown an increasing willingness to allow school officials to regulate student expression if the restrictions are reasonably related to pedagogical goals.[64] In fact, the Court's deferential stance has permitted a great deal of censorship to take place in the name of preserving civility. Under the circumstances, a federal court would be unlikely to find that mandating English-language instruction violates a student's right to speak a language other than English, especially if the goal is to promote English-acquisition. Even if the instruction has some exclusionary effects, these would have to be so severe that the policy is no

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62. For a description of recent state initiatives to limit the use of native-language instruction for linguistic minority students in the public schools, see William N. Myhill, *The State of Public Education and the Needs of English Language Learners in the Era of "No Child Left Behind,"* 8 J. GENDER RACE & JUST. 393, 423-25 (2004). These initiatives have passed in Arizona, California, and Massachusetts but failed in Colorado. *Id.*

63. In *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990), *aff'd en banc sub nom. Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), *vacated as moot sub nom. Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), a federal district court held that Arizona's official English measure violated the First Amendment because it had a chilling effect on public employees' ability to communicate with constituents who spoke a language other than English. 730 F. Supp. at 313-16. After a series of appeals regarding the reviewability of the decision, the Ninth Circuit upheld the trial court's holding. 520 U.S. at 62. However, because the plaintiff had resigned from her state job and the lawsuit was not filed as a class action, the United States Supreme Court ultimately concluded that the issue was moot and vacated the judgment. *Id.* at 67-92. For a general discussion of the relevance of First Amendment protections to official English laws in light of this decision, *see* Michael W. Valente, *One Nation Divisible By Language: An Analysis of Official English Laws in the Wake of* Yniguez v. Arizonans for Official English, 8 SETON HALL CONST. L.J. 205, 212-31 (1997). Recently, the Oklahoma Supreme Court focused on the need to communicate with government officials in finding that an official English initiative violated the state constitution. The court noted that Oklahoma's protections guard free speech rights more vigilantly than does the United States Constitution. In re: Initiative Petition No. 366, 46 P.3d 123, 126-28 (Okla. 2002).

64. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that educators may exercise editorial control over student speech in school-sponsored activities as long as their actions are reasonably related to legitimate pedagogical concerns); Bethel School District No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (reaffirming that the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings).

longer reasonably related to pedagogical aims.

Teachers, as employees charged with educating pupils about particular subjects, also must curb their speech on school grounds to promote the learning process. As a result, public school instructors are not likely to lodge a successful First Amendment challenge to English-language immersion policies. For example, after California voters passed Proposition 227,[65] which mandates intensive English instruction for all students with limited proficiency, teachers challenged a provision that subjected them to lawsuits if they delivered instruction that was not "overwhelmingly" or "nearly all" in English.[66] The teachers contended that the threat of a lawsuit had a chilling effect on their First Amendment speech rights, particularly given the vagueness of terms like "overwhelmingly" and "nearly all" in English.[67] In *California Teachers Ass'n v. State Board of Education*, the Ninth Circuit court of appeals noted that teachers enjoy limited rights of expression in the classroom.[68] The court reviewed three competing First Amendment standards in this area: (1) Teachers have no free speech rights in the classroom; (2) Teachers have no protection unless they are speaking on a matter of public concern; and (3) Regulation of teachers' speech must be reasonably related to legitimate pedagogical concerns.[69] Without deciding which standard was appropriate, the court of appeals concluded that plaintiffs had no viable cause of action under any of the tests, including the last and most generous one.[70] According to the Ninth Circuit, Proposition 227's terms were not so vague that they would significantly chill legitimate speech in the classroom.[71] Moreover, the court held that the state's pedagogical interests in promoting English-language acquisition outweighed teachers' free speech rights.[72] As the decision explained:

> Because any speech potentially chilled by Proposition 227 enjoys only minimal First Amendment protection, assuming it enjoys any protection at all, and because it is the state's pedagogical interests that are paramount in this context, any vagueness contained in Proposition 227 is even less likely to jeopardize First Amendment values.[73]

Finally, the English Language Acquisition Act is an unpromising substitute for *Lau*'s enforcement regime as well. This Act is not an anti-discrimination statute but instead is a grant-in-aid program designed to support research, development, innovation, and service delivery in the area of bilingual education and intensive English instruction. The law does not confer enforceable rights on students, and it certainly does not create an express right of action. Instead, the Act establishes administrative performance and accountability requirements.[74] With respect to civil rights, the Act merely states that it should not be interpreted in a manner inconsistent with other protections.[75] Nor is there a basis for finding an implied right of action under the statute. Because the Act is

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65. Proposition 227, 1, 1998 Cal. Legis. Serv. (West) (codified at Cal. Educ. Code 300-340 (West Supp. 1999)).
66. Cal. Teachers Ass'n v. State Bd. of Educ., 271 F. 3d 1141, 1146 (9th Cir. 2001).
67. *Id.* at 1152.
68. *Id.* at 1154.
69. *Id.* at 1149 n.6.
70. *Id.* at 1155.
71. *Id.* at 1156.
72. *Id.* at 1154.
73. *Id.*
74. 20 U.S.C. §§ 6811-6971.
75. *Id.* at § 6847.

spending legislation, Congress must put grant recipients on clear notice that acceptance of funds will leave them open to private lawsuits.[76] There is no provision in the statute that would seem to satisfy this requirement.

In sum, then, neither the EEOA, the First Amendment, nor the English Language Acquisition Act offers a perfect substitute for *Lau*'s Title VI enforcement paradigm. The EEOA continues to provide substantial protection in gaining access to the curriculum, and litigants can look to state courts and state law to challenge other facets of language policy and practice. Yet, plaintiffs can no longer depend on Title VI's comprehensive, national anti-discrimination regime. When language barriers stand in the way of access to non-instructional resources and activities, such as meeting high-stakes diploma requirements or receiving ancillary school services, *Lau*'s undoing has real consequences for English language learners who increasingly find the federal courthouse doors closed. Although these students theoretically can turn to the political process for a remedy, neither they nor their parents typically have the clout to demand responsive policymaking. In fact, more and more, these families are losing one of their greatest sources of leverage in dealing with state and local officials: the threat of litigation.

CONCLUSION

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

76. *See, e.g.*, Pennhurst State Sch. v. Halderman, 451 U.S. 1, 17-22 (1981) (rejecting a grant-in-aid statute designed to help those with mental disabilities as the basis for a private right of action); *but cf.* Jackson v. Birmingham Bd. of Educ., 125 S.Ct. 1497, 1509-10 (2005) (*Pennhurst*'s clear notice requirement is not an obstacle to a private right of action when intentional sex discrimination, including retaliation, is alleged under Title IX).