

University of Michigan Journal of Law Reform

Volume 38

2004

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Recommended Citation

James Leonard, *Bilingualism and Equality: Title VII Claims for Language Discrimination in the Workplace*, 38 U. MICH. J. L. REFORM 57 (2004).

Available at: <https://repository.law.umich.edu/mjlr/vol38/iss1/3>

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BILINGUALISM AND EQUALITY: TITLE VII CLAIMS FOR LANGUAGE DISCRIMINATION IN THE WORKPLACE

James Leonard*

Linguistic diversity is a fact of contemporary American life. Nearly one in five Americans speak a language other than English in the home, and influxes of immigrants have been a constant feature of American history. The multiplicity of languages in American society has touched nearly all aspects of American culture, and specifically has added new and important challenges to the American workplace. Chief among these new concerns are the growing number of legal claims centered around language discrimination in the workplace. The common vehicle for these claims has been Title VII, and there is considerable support in the academic literature for the proposition that Title VII should be read to confer a right on bilingual employees to use a preferred language in the workplace when English is not necessitated by business or safety concerns.

This Article examines the usefulness of Title VII as a framework to address the growing number of language discrimination claims, and concludes that Title VII is an awkwardly adapted vehicle to address these types of workplace concerns. Title VII is based on a civil rights model that promotes even-handed treatment of employees, and does so through methods of proof that reflect a historically informed skepticism about an employer's motivations when dealing with a protected class of persons. Workplace language rules, in contrast, rarely involve stereotypes and normally are pertinent to an employer's operations. To confer a right to speak in a preferred language goes beyond Title VII's mandate of equal treatment and amounts to the creation of positive rights that are unconnected with equality in the workplace.

Part I of this Article introduces the reader to the nature of workplace language claims and their judicial disposition. Part II surveys the language competencies of Americans, relying primarily on results reported in the in the 2000 Census. Results indicate a high degree of English proficiency in the United States, indicating that the key issue in language policy is a bilingual's desire to speak in a native tongue, rather than providing for masses of persons who can't speak English. Part III examines the anti-discrimination concepts which underlie Title

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VII, finding that these concepts strongly embody the “civil rights model” which regards characteristics such as race and gender as improper bases for workplace decisionmaking. Part IV asks whether the civil rights model embodied in Title VII works with language discrimination claims, concluding that it does not. Language is fundamentally different from race, ethnicity, gender, or even national origin. The characteristics of mutability and relevance take language discrimination claims outside the realm of Title VII’s civil rights model. Part V offers concluding remarks.

I. INTRODUCTION

“Foreign language” is an obsolescent term in Twenty-First Century America. Public Schools continue to impose “foreign language” requirements while colleges and universities often maintain “foreign language” departments. Nevertheless, the notion that tongues other than English are alien in the United States is increasingly difficult to support. Today nearly one-fifth of all Americans speak a language other than English in their homes. The presence of so many languages and modes of expression adds a critical dimension to American society. Important choices must be made about how we accommodate the language preferences of the bilingual and immigrant citizens across the span of American society: schooling, government services, and telecommunications, to pick a few examples. This Article focuses on the challenges of bilinguality in the workplace.

Influxes of immigrants have been constant throughout American history. The United States Citizenship and Immigration Services (successor to the Immigration and Naturalization Service) counted 68,217,481 immigrants to the United States from 1820 through 2002.¹ At first the majority of newcomers arrived from Europe (38,816,282),² but recent statistics indicate that Latin America and Asia are now the primary sources of immigrants. From 1991 through 2000, for example, 4,486,806 immigrants from Latin America³ and 2,795,672 from Asia⁴ made up roughly 80% of

1. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, 2002 YEARBOOK OF IMMIGRATION STATISTICS, IMMIGRANTS 11 at <http://uscis.gov/graphics/shared/aboutus/statistics/IMM02yrbk/IMM2002.pdf> (on file with the University of Michigan Journal of Law Reform).

2. *Id.* at 14.

3. *Id.* The term “America,” as used here, refers to the new world other than the United States. *Id.* This figure includes 191,987 persons from Canada. Presumably most are Anglophones although a significant number may be Francophone Quebecquois.

4. *Id.*

the total number of immigrants (9,095,417).⁵ The current influx of people from Latin America and Asia can be viewed as the continuation of a longstanding pattern of opening the country periodically for the purpose of meeting labor demands⁶. Each past wave of immigration, except for arrivals from the British Isles or Canada, brought millions of individuals who spoke an array of languages other than English.⁷ The current wave of immigrants is the same except for one important aspect: prior groups were expected to, and did, assimilate prevailing cultural norms, including the use of English.⁸ It is now rare to hear anyone speaking Ukranian or Polish in a Detroit factory or suburb, for example.

Our present attitude toward non-English languages, however, is different. There is a tendency to view the old assimilationist mandate as the tool of xenophobic nativists, which is certainly true in part.⁹ We are also inclined to view language as an aspect of race or ethnicity. Some, moreover, see attempts to discourage the use of other languages as a violation of civil rights. The old consensus that persons coming to this country should adopt English as a badge of citizenship has fallen apart. More to the point of this Article, the weight of contemporary legal scholarship views attempts by employers to control their employees' choice of language as wrong.¹⁰

The courts, in contrast, normally have sided with employers in disputes over workplace language restrictions. Judicial dispositions of workplace language claims have been naïve at best, and perhaps a bit disingenuous. The leading case is *Garcia v. Spun Steak*.¹¹ Two

5. *Id.*

6. See Patricia E. Dilley, *Taking Public Rights Private: The Rhetoric and Reality of Social Security Privatization*, 41 B.C. L. REV. 975, 992 (2000) ("The United States, despite its heritage as a 'nation of immigrants,' historically has alternated periods of xenophobia with periods of relaxed immigration standards to meet industrial and agricultural labor needs."); see also JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* 114 (2d ed. 1963) (noting opposition to immigration regulation by industrialists needing cheap labor).

7. Juan F. Perea, *Demography and Distrust: an Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 274 (1992) (noting that post colonial immigration to the United States has introduced peoples with different cultures and languages).

8. See, e.g., JOHN J. MILLER, *THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED THE ASSIMILATION ETHIC* 22-63 (1998) (discussing assimilative forces in American history).

9. See, e.g., *id.* at 64-115 (discussing tension between assimilationist and multicultural philosophies).

10. See, e.g., Juan F. Perea, *Killing Me Softly, With His Song: Anglocentrism and Celebrating Nouveaux Latinas/os*, 55 FLA. L. REV. 441 (2003). See generally *infra* Part IV.B-D (discussing workplace language restrictions).

11. 998 F.2d 1480 (9th Cir. 1993).

bilingual¹² employees brought a Title VII challenge to their employer's rule that English be used in all work related activity. Neither side in *Spun Steak* could command the absolute sympathy of a disinterested observer. Management imposed the rule after receiving complaints that two workers were making derogatory, racist comments in Spanish about an African- and a Chinese-American coworker.¹³ It is difficult to fault an employer's concern for promoting racial harmony on the shop floor. The rule was not absolute: Workers were free to speak in Spanish during breaks, lunch, and on "[their] own time."¹⁴ The majority of workers were faced with the burden of having to curtail speech in their native language. Judge O'Scannlain's opinion readily concedes that "primary language can be an important link to [one's] ethnic culture and identity."¹⁵

While the result in *Spun Steak* was correct in my opinion, the case was resolved in a facile manner. While the court agreed that the facially neutral rule at issue was subject to disparate impact analysis, it tempered its reasoning by insisting that the rule's effect on the plaintiff must be significantly adverse.¹⁶ *Post hoc ergo propter hoc*: none of the plaintiff's arguments could ever meet this heightened standard. The employer's language restrictions could not affect a right to cultural expression because workers had no rights of self-expression in the workplace.¹⁷ The court also rejected a conclusion that English-only policies created a *per se* hostile work environment under the *Meritor Savings Bank*¹⁸ rationale, finding such a factual question inappropriate for summary judgment.¹⁹

Most interestingly, the court determined that the plaintiffs' bilinguality put them on par with native English speakers. The plaintiffs had argued that the defendant's rule had affected them by taking away a work privilege of speaking in a language in which they were most comfortable.²⁰ The court's response was two-fold. It began by declaring that workplace privileges were within the discretion of the employer. In this case, the *Spun Steak* Company was free to limit the conversational privilege to English (and presumably

12. See *id.* at 1483 (the defendant's work force consisted of thirty-three employees, of whom twenty-two were bilingual and two spoke only Spanish).

13. *Id.*

14. *Id.*

15. *Id.* at 1487.

16. *Id.* at 1486.

17. *Id.*

18. 477 U.S. 57 (1986).

19. *Spun Steak*, 998 F.2d at 1488-89.

20. *Id.* at 1487.

Sanskrit) if it wished. The plaintiffs were left on par with the other Anglophone employees. The court regarded language as a decision within the control of a bilingual person. In terms reminiscent of a priest proclaiming the primacy of free will, the court stated that “[i]t is axiomatic that ‘the language a person who is multi-lingual elects to speak at a particular time is . . . a matter of choice.’”²¹ If a bilingual worker can choose to speak in English, then he has not been affected by the rule. The fact that bilinguals may have a tendency to revert to their native tongues is an inconvenience, but hardly the significant impact required by Title VII.²²

Spun Steak was a carefully crafted opinion. It was designed to spare the federal courts the difficult task of evaluating the interests of the parties by placing the presumably light burden of conformity on bilingual employees. This approach subsequently has been followed by nearly all federal circuits considering Title VII language discrimination claims.²³ It is also a deeply unsatisfying method for resolving such an important issue of workplace and anti-discrimination policy. Even if we assume that bilinguals may chose between languages at a given moment, the *Spun Steak* analysis cuts off consideration of significant issues. The *Spun Steak* mentality preempts discussion of what equal treatment in the workplace means in the context of language. No one would say that the ability to use a segregated restroom makes the effect of such a practice insignificant. As a factual matter, the plaintiffs in *Spun Steak* had a different experience from the strictly Anglophone employees. Dismissing their suit because of an ability to speak English in the alternative derails a useful discussion of whether the customary presumptions of civil rights laws apply to language claims.

Measuring employees’ equality interests in speaking their preferred language in the workplace is a difficult proposition. Differing views on the nature or strength of these interests, and the competing interests of employers, will inevitably lead to good faith disagreements. At the risk of seeming a throwback in an increasingly diverse society, I conclude that evenly applied employer rules mandating the use of English in the workplace may be a legitimate, non-discriminatory strategy for managing a linguistically complicated workforce. My argument rests on the ultimate conclusions that individuals have the capacity to comply in most

21. *Id.* (quoting *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980)).

22. *Id.* at 1488.

23. *See infra* Part IV.A (reviewing language discrimination claims brought under Title VII).

instances with such rules; that language restrictions serve neutral and rational goals; and that such restrictions are far less likely to serve as a cover for animus or bias than rules touching on race, ethnicity, gender, or other immutable characteristics.

The plan of this Article is as follows. Part II surveys the language competencies of Americans, relying primarily on results reported in the 2000 Census. Although the Census elicits limited information, it has the virtue of being recent and comprehensive. Results indicate a high degree of English proficiency in the United States. Although 17.9% of the population age five or older speak a language other than English at home, nearly 96% of all persons older than four believe that they speak English with competency.²⁴ Thus the key issue in language policy is not providing for masses of persons who can't speak English; rather, we must address the problems of the bilinguals' desire to speak their native tongues.

Part III takes a critical look at the use of anti-discrimination concepts underlying Title VII. That statute embodies the "civil rights model," which regards characteristics such as race and gender as improper bases for workplace decisionmaking. Our concept of discrimination and its harms derives from constitutional equal protection claims. Collectively these decisions portray distinctions based on inalterable traits, such as race and gender, as causing dignitary as well as economic injury. Furthermore, the Supreme Court has shown concern over the unfairness of relying on stereotypes, and generally has viewed consideration of immutable characteristics as pointless.²⁵ In sum, decisions influenced by unchangeable traits are suspicious and presumptively discriminatory; persons who have been judged by such criteria, moreover, need government protection. To enforce these constitutional precepts, the Supreme Court has developed a system of institutional skepticism (i.e., strict and heightened scrutiny) to be applied whenever government actors use suspicious classifications.²⁶ I will then trace these anti-discrimination principles into Title VII.

Part IV is the lynchpin of the Article. Here I ask whether the civil rights model works with language discrimination claims. The answer is no. Language is fundamentally different from race, ethnicity, gender, or even national origin. In Part IV(A), I address the threshold question of whether the framers of Title VII intended to

24. See *infra* Part II (discussing English language competency of United States population).

25. See generally *infra* Part III (discussing Supreme Court's development of the civil rights model).

26. See generally *infra* Part III.A.3 (discussing strict and intermediate scrutiny).

create language discrimination claims, and conclude that the rule against “national origin” discrimination does not reach this far. Part IV(B) considers whether language is a mutable characteristic. I argue that language is an alterable trait. In most circumstances, individuals have the capacity to learn and use a new language effectively. I also reject the argument that language and culture are inextricably linked. Part IV(C) argues that workplace language rules, even those that require the use of English at all times, can serve a rational purpose and hence present little risk that suspicious irrelevancies will creep into workplace decisionmaking. My analysis concludes, in Part IV(D), that the characteristics of mutability and relevance take language discrimination claims outside the realm of Title VII’s civil rights model. Bilingual employees are not defenseless against stereotypes that arise from facts they cannot alter; hence, the civil rights model’s distrust of decisions based on immutable traits does not come into play. Language rules likewise lack the aura of irrelevance that makes racial or gender classifications suspect. Persons who speak a language other than English may well suffer from racial or ethnic discrimination, but that is a separate matter. Part V offers concluding remarks.

Before moving on, let me emphasize what this Article does not do. I am concerned with the issue of language rights as an equality interest. Equality is a matter of ensuring that everyone who is alike receives equal treatment. Disagreements over the application of this concept are inevitable, as demonstrated by the persistence of Title VII and equal protection claims, but most would agree that the proper result leaves comparable persons on an equal footing. Support for minority language rights, however, is not limited to equality models. Multiculturalism, for example, reflects a belief that all cultures have something valuable to say about the human experience.²⁷ Immigrants, according to this view, should receive accommodations to ease the transition into their new society.²⁸ Contemporary American legal and other scholars would tend to fit this concept under the rubric of promoting diversity in the workplace. Whether the American workplace should be remade through such devices as positive language rights is a complicated and controversial matter that I will leave for another time and place.

27. See, e.g., CHARLES TAYLOR ET AL., *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 66–68 (1994); Diane Ravitch, *Multiculturalism: E Pluribus Plures*, 59 *AM. SCHOLAR* 337, 340–41 (1990).

28. WILL KYMLICKA, *POLITICS IN THE VERNACULAR* 29–31, 162–72 (2001).

II. THE NUMBERS: ENGLISH LANGUAGE PROFICIENCY IN CONTEMPORARY AMERICA

How well the American population as a whole speaks English influences the development of laws and policies that govern language in the workplace. At its simplest level, language policy should address the issues of lowering barriers to economic opportunity for those who speak English less than fluently. American government has done quite little to improve the lot of persons who are not proficient in English. Our principal initiative has been to devise bilingual public school programs that accommodate school-age children whose primary language is one other than English. Amending the Bilingual Education Act, the Education Amendments of 1974 established a clear preference that bilingual education be made available to school children with limited English proficiency.²⁹ Bilingual education's benefits have been hotly disputed.³⁰ Federal support for such practices, moreover, began to recede in the 1980s³¹ and was significantly curtailed in the recent

29. See Education Amendments of 1974, Pub. L. No. 83-380, § 702, 88 Stat. 484 (1974):

The Congress declares it to be the policy of the United States, in order to establish equal educational opportunity for all children . . . to encourage the establishment and operation, where appropriate, of educational programs using bilingual educational practices, techniques, and methods . . . which are designed to meet the educational needs of [limited English proficiency] children; and to demonstrate effective ways of providing, for children of limited English-speaking ability, instruction designed to enable them, while using their native language, to achieve competence in the English language.

Id.

30. See, e.g., MILLER, *supra* note 8, at 174–208 (concluding that bilingual education has been a failure); RICHARD RODRIGUEZ, HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ 26–27 (1981) (drawing on personal experience to argue that bilingual education simplistically fails to distinguish between public and private individualism); Walter Huddleston, *The Misdirected Policy of Bilingualism*, in LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 114, 115 (James Crawford ed., 1992) (arguing that bilingualism has lost its role as a transitional strategy and has become a bicultural mandate).

31. See, e.g., Rachel F. Moran, *Bilingual Education, Immigration, and the Culture of Disinvestment*, 2 J. GENDER RACE & JUST. 163 (1999) (criticizing federal retreat from bilingual education); Recent Legislation, *Education—English Immersion—Colorado Voters Reject an English Immersion Ballot Initiative.—Amendment 31: English Language Education*, in *Legislative Council of the Colorado General Assembly, 2002 Ballot Information Booklet 18–20*, 69–74, 116 HARV. L. REV. 2709, 2711 (2003) (describing erosion of federal support for bilingual education in the Eighties).

No Child Left Behind Act of 2001.³² Other than certain non-discrimination regulations issued by the EEOC under Title VII,³³ practically nothing has been done to accommodate persons who speak a language other than English in the workplace. Nor should this be surprising: it is generally accepted that the ability to speak English is a necessary job requirement for the majority of occupations in the United States.³⁴

Once English proficiency—for whatever reason—reaches a level where most workers speak the language well, different concerns arise. Workers who can communicate effectively in English do not need laws to protect them against non-existent language deficiencies. Instead, we begin to confront issues of bilingualism in the workplace. Here the law must weigh management's interest in controlling the work environment against the worker's desire to speak in a preferred language. A decision to confer language-based rights on workers who already speak proficient English must reflect a value judgment that choice of language has personal, social, or cultural value that supersedes an opposing business interest. This Article addresses the issue of whether the equality interest underlying Title VII is sufficient to overcome an employer's customary prerogative to set work rules. Although not the focus of this paper, alternative theories, such as multiculturalism, may come into play as justifications for creating or protecting bilingual environments.

So, what is the state of English in America? It's thriving. Results from the 2000 Decennial Census of Population and Housing tend to establish that English proficiency is commonplace in Twenty-First Century America.³⁵ English has become, if one can tolerate the irony of the phrase, the *lingua franca* of America. The Census Bureau's long form questionnaire for 2000 included questions that permitted the Bureau to determine the language proficiencies of the American

32. Pub. L. No. 107-110, 115 Stat. 1425 (2002). Title III of the Act lists among its purposes a desire "to help ensure that children who are limited English proficient, including immigrant children and youth, *attain English proficiency*, develop high levels of academic *attainment in English*, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." *Id.* at 1690 (emphasis added).

33. See *infra* Part IV.A.3 (discussing EEOC anti-discrimination guidelines for workplace language restrictions).

34. See generally *infra* Part IV.C (discussing relevance of language to work).

35. See generally U.S. Census Bureau, *Language Use and English Speaking Ability 2000: Census 2000 Brief*, available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf> (on file with the University of Michigan Journal of Law Reform) [hereinafter *Census Brief*] (describing questions relating to language on 2000 Census).

population five years of age or older.³⁶ Composite statistics for the United States reveal that 46,951,595 of 262,375,152 persons over the age of four (17.9% of the population) speak at least one “Language Other Than English” (“LOTE”) at home.³⁷ The majority of this group (28,101,052) speak Spanish, but many other languages are in use.³⁸ 10,017,989 persons speak “Other Indo-European languages,” including French (1,633,838), German (1,383,442), and Italian (1,000,370).³⁹ “Asian and Pacific Island languages” account for 6,960,065 at-home speakers, among whom 2,022,143 speak Chinese, 1,224,241 the Philippine language of Tagalog, and 1,009,627 Vietnamese.⁴⁰ A final category for “Other languages” totals 1,872,489 and includes such tongues as Navajo (178,014), Arabic (614,582), and Hebrew (195,374).⁴¹ Thus, nearly one in five Americans wakes to say “buenos días,” “bonjour,” or a similar phrase instead of “good morning.”

There is significant variation in language usage by state. Some jurisdictions are tight pockets of English monolingualism. In Mississippi, for example, a mere 3.6% of residents speak a LOTE at home.⁴² Alabama reports a 3.9% rate.⁴³ Other states, in contrast, are astonishingly multilingual. In California, 39.5% of the population speaks a LOTE in the home.⁴⁴ Other states with high rates of non-English home usage are New Mexico (36.5%), Texas (31.2%), New York (28.0%), Hawaii (26.6%), Arizona (25.9%), New Jersey (25.5%), Nevada and Florida (each with 23.1%), and Rhode Island (20.0%).⁴⁵ For the most part, these jurisdictions are home to Spanish speakers. California, for example, is home to 8,105,505 Spanish speakers, representing 65.3% of the state's 12,401,765 persons who

36. *See id.*

37. U.S. Census Bureau, *2000 Census of Population and Housing, Summary Tables on Language Use and English Ability: 2000 (PHC-T-20)*, Table 1, *Language Use, English Ability, and Linguistic Isolation for the Population 5 Years and Over by State: 2000*, available at <http://www.census.gov/population/cen2000/phc-t20/tab01.pdf> (on file with the University of Michigan Journal of Law Reform) [hereinafter Table 1].

38. *See id.*

39. U.S. Census Bureau, *2000 Census of Population and Housing, Summary Tables on Language Use and English Ability: 2000 (PHC-T-20)*, Table 5, *Detailed List of Languages Spoken at Home for the Population 5 Years and Over by State: 2000*, available at <http://www.census.gov/population/cen2000/phc-t20/tab05.pdf> (on file with the University of Michigan Journal of Law Reform) [hereinafter Table 5].

40. *Id.*

41. *Id.*

42. Table 1, *supra* note 37.

43. *Id.*

44. *Id.*

45. *Id.*

speak a LOTE at home.⁴⁶ Texas has 5,195,182 Spanish speakers, or 86.4% of 6,010,753 persons who speak a LOTE at home.⁴⁷ Given these numbers, it is hardly surprising that the leading Title VII language discrimination decisions originated in the Fifth and Ninth Circuits, which cover large parts of the traditionally Spanish speaking Southwest.⁴⁸

One might conclude from the variety of languages spoken that America is in danger of becoming a Tower of Babel. Yet there is little actual risk of America turning into a society that cannot communicate with itself. English is our de facto common language. Deficiency in English is the exception. The Census Bureau reports that for residents age five or older in 2000, some 215,423,557 spoke only English in the home, and 25,631,188 persons who spoke a LOTE at home claimed to speak English "Very well."⁴⁹ Together these groups represent nearly 91.9% of the pertinent population.⁵⁰ If we add those persons who speak a LOTE in the home but also speak English "Well" (10,33,556),⁵¹ we account for 95.8% of the population. A small core of citizens reported English language deficiencies, with 7,620,719 (2.9%) identifying themselves as speaking English "Not well" and 3,366,132 (1.3%) as "Not at all."⁵² Similarly, the Census reports that only 11,893,572 persons (4.5%) live in "Linguistically isolated" households.⁵³ The latter are defined as homes where no one person fourteen years or older speaks English at least "Very well."⁵⁴ One can easily sympathize with the situation of persons who have not acquired a functional level of English. Ironically, such persons are more likely to find employment in undesirable positions and are less likely to bring Title VII claims.⁵⁵

Although the 2000 Census provides only a snapshot of language proficiency in a single year, it does tend to bear out earlier studies

46. Table 5, *supra* note 39.

47. *Id.*

48. *See, e.g.*, *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993); *Gutierrez v. S.E. Jud. Dist. County of L.A. Mun. Ct.*, 861 F.2d 1187 (9th Cir. 1988), *vacated as moot* by 490 U.S. 1016 (1989); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

49. Table 1, *supra* note 37.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Census Brief, *supra* note 35, at 10.

55. Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2182 (1994) (noting that immigrants with limited English skills are more likely than others to work in sweatshops and are kept silent by their sense of vulnerability).

indicating that English language acquisition is an inevitable aspect of American residency. Traditionally, the immigrant's pathway to mastering English has been a three-generation affair. The first generation retains a foreign tongue as its primary language; the second generation is bilingual; the third speaks English as its native language.⁵⁶ Studies of linguistic assimilation by Hispanic immigrants show an even faster rate of mastering English. The first, by McCarthy and Valdez in 1986, concluded that the three generation paradigm applied to Mexican-Americans in California.⁵⁷ They observed that among the immigrant generation, including those who had been in the United States for only a short time, about one-quarter spoke English well.⁵⁸ By the second generation, over 90% were proficient in English, and by the third, around 95% had achieved proficiency.⁵⁹ Over half of the third generation are monolingual English speakers.⁶⁰ A later study by Veltman in 1988 focused on all Hispanics and suggested that assimilation for this group was collapsing into a two-generation process.⁶¹ He also concluded that the English acquisition process generally ends within fifteen years. The actual degree of proficiency is determined primarily by the immigrant's length of stay in the United States and his or her age at arrival, with the result that those who come as older teenagers or adults will enjoy a lesser degree of proficiency in English than their younger companions.⁶² Veltman's conclusion can be read to support the proposition that a cessation of Hispanic immigration would result in the decline or disappearance of Spanish in the United States within fifteen years.⁶³

Census results confirm in a rough way the conclusions of the McCarthy-Valdez and Veltman studies, that acquisition of English proficiency is a transitional aspect of immigration. Data from 2000 indicate that for the population age five or older, birth outside of the United States is a significant factor in English language profi-

56. Carol Schmid, *Language Rights and the Legal Status of English-Only Laws in the Public and Private Sector*, 20 N.C. CENT. L.J. 65, 71 (1992) (citing KEVIN F. MCCARTHY & R. BURCIAGA VALDEZ, CURRENT AND FUTURE EFFECTS OF MEXICAN IMMIGRATION IN CALIFORNIA 65 (1986)).

57. *Id.* at 61-65.

58. *Id.* at 61.

59. *Id.*

60. *Id.*

61. CALVIN VELTMAN, THE FUTURE OF THE SPANISH LANGUAGE IN THE UNITED STATES 3, 66 (1988).

62. *Id.* at 40.

63. *Id.* at 3, 44-45, 66-67.

ciency. Of the 46,951,595 who speak a LOTE in the home, over half (25,497,023 or 54.2%) are foreign born.⁶⁴ Significantly, of the 21,320,407 persons who speak English less than "Very well," nearly three-quarters (15,672,816 or 73.5%) were foreign born.⁶⁵ Precise comparisons of 2000 Census data and the McCarthy-Valdez and Veltman studies are impossible. The Census's definition of a LOTE unfortunately does not distinguish a person's primary or dominant language. Census workers were instructed to have respondents identify themselves as speakers of a LOTE in the home whether they spoke that language either sometimes or always.⁶⁶ Also, classification of ability to speak English "Very well," "Well," "Not well," and "Not at all" in the Census depended on the respondent's self perceptions.⁶⁷ Nevertheless, the foreign born persons account for such a high percentage of persons who speak English less than very well—73.5%—that is difficult to dismiss the positive connection between native birth and facility in English. Moreover, the range of English proficiency within the rather broad category of speaking "Less than very well" is consistent with conclusions that immigrants themselves tend to achieve varying measures of English competency within fifteen years of arrival.

Ultimately, English wins out over its competitors in American society. The reasons are obvious: American government, business, and culture are conducted in English. Twenty-seven states have adopted some form of "English-only" laws.⁶⁸ Although the official English movement reflects, in my opinion, a questionable combination of xenophobia and sincere concern for the integrity of American society, the channeling effect of such laws on public life is unavoidable. Without a knowledge of English, how can one understand the law or public events, much less participate in them? The need for English to ensure career advancement creates an irresistible incentive to master the language, if not to prefer it. The more ambitious will also know that English has become the de

64. U.S. Census Bureau, *2000 Census of Population and Housing, Summary Tables on Language Use and English Ability: 2000 (PHC-T-20), Table 6, Language Spoken at Home and Ability to Speak English by Nativity for the Population 5 Years and Over by State: 2000*, available at <http://www.census.gov/population/cen2000/phc-t20/tab06.pdf> (on file with the University of Michigan Journal of Law Reform) [hereinafter Table 6].

65. *Id.*

66. U.S. Census Bureau, *2000 Census of Population and Housing, Summary File 3, Technical Documentation*, available at <http://www.census.gov/prod/cen2000/doc/sf3.pdf> (on file with the University of Michigan Journal of Law Reform).

67. *Id.*

68. U.S. English, Inc., *Towards a United America, Official English: States with Official English Laws*, at <http://www.us-english.org/inc/official/states.asp> (on file with the University of Michigan Journal of Law Reform).

facto international language of trade and commerce. There is also the pervasive mass media, from billboards to television to the web. We are enveloped by a continuous stream of commercially generated or sponsored information and images. Those messages are, for the most part, in English. There is a touching passage in Sandra Cisneros' *The House on Mango Street* where a mother, who has attempted to maintain Spanish in the home, dissolves into tears when she hears her son, who is just learning to speak, sing a Pepsi jingle that he has heard on television.⁶⁹ Transition is difficult, but also enabling.

III. TITLE VII AND THE ANTI-DISCRIMINATION MODEL

Nearly all federal claims attacking workplace language restrictions are brought under Title VII of the Civil Rights Act of 1964. Section 703(a)(1) of the Act deems it unlawful 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*."⁷⁰ In the following section, the Act prohibits efforts "to limit, segregate, or classify" employees, with resulting loss of job opportunities, on account of the same forbidden criteria.⁷¹ Conspicuously missing is any reference in the text of the statute to language or a definition of "national origin." The legislative history is equally silent.⁷²

Plaintiffs have proceeded on the theory that language is an aspect of national origin. One can hardly blame plaintiffs' attorneys for exploiting a readily available cause of action in the absence of specific legislation dealing with workplace language restrictions. However one feels about the wisdom of language discrimination claims, Title VII is an awkward device for judging them. Title VII is based on an anti-discrimination model that promotes equality interests by targeting employment practices that are likely to be

69. SANDRA CISNEROS, *THE HOUSE ON MANGO STREET* 74-75 (1984).

70. 42 U.S.C. § 2000e-2(a)(1) (2001) (emphasis added).

71. 42 U.S.C. § 2000e-2(a)(2) (2001).

72. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88-89 (1973) (finding legislative history of "national origin" discrimination is slight). See generally Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 817-21 (1994) (reviewing legislative history and concluding that Congress understood national origin in Title VII to mean the nation of one's birth or ancestry); *infra* Part III.B2. (discussing legislative history of national origin provision).

prejudicial. Likely prejudicial practices include those that relate to immutable characteristics such as race, or those that involve stereotypes. Language, in contrast, is not an immutable trait, is normally relevant to job performance, and is less likely to invoke stereotyped thinking by employers. In short, it does not resemble other equality interests that the anti-discrimination model attempts to protect.

In this Part of the Article, I will discuss the goals and the mechanics of the “civil rights model” on which Title VII is based. I defer until Part IV of my argument the idea that language claims do not fit the anti-discrimination precepts of Title VII. Part III(A) lays out the assumptions and goals of the antidiscrimination model as first developed in the context of constitutional equal protection claims. Next, in Subpart B(1), I track these principles into Title VII. Finally, in Subpart B(2), I examine how the judicially elaborated “disparate treatment” and “disparate impact” methods of proof reflect the assumptions of the civil rights model.

A. The Antidiscrimination Model in General

Prior to the passage of Title VII, employment was viewed largely as a private, contractual matter that gave employers wide discretion in making personnel decisions, including the power to make irrational or prejudicial employment decisions.⁷³ The Act represented a finding by Congress that employer discretion needed to be curtailed in order to rectify the inferior social and economic status of African-American citizens.⁷⁴ In the process, Congress also included protections based on religion, sex, and national origin. Title VII’s prohibition of racial and other discrimination embodies the “anti-discrimination” or “civil rights” model.⁷⁵ The essence of this approach is the belief that ensuring equality requires a large scale response to the unjustified attitudes held by large portions of society

73. See Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 NW. U. L. REV. 1497, 1515–16 (2002).

74. *Id.*

75. See Paul Brest, *The Supreme Court 1975 Term, Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1 (1976) (noting Civil Rights Act of 1964, Voting Rights Act of 1965, and Fair Housing Act of 1968 were based on antidiscrimination model); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1659 (1996) (stating Age Discrimination in Employment Act, Pregnancy Discrimination Act, and the employment provisions of the Americans with Disabilities Act were “based on the anti-discrimination model pioneered by the Civil Rights Act of 1964”).

towards certain of its other members.⁷⁶ The antidiscrimination model rests on three intermediate conclusions that set the scope and contours of the law's reaction to bias. First, that the purposeful consideration of race and other immutable characteristics is unfair since it subjects individuals to group judgments that they cannot escape, individual merit notwithstanding. The resulting injuries, moreover, work dignitary as well as economic harms. Second, the concept of bias cannot be limited to instances of animus or hostility, but also includes superficially benign manifestations, such as stereotyped thinking. Finally, consideration of immutable characteristics is in most cases irrelevant to valid decisionmaking. Since these concepts were initially and remain most fully developed in constitutional law, let us begin the discussion there.

1. *Constitutional Antidiscrimination Principles*—At its simplest, the constitutional requirement of equal protection is a command to government actors that people who are alike should be treated alike.⁷⁷ It reflects a conclusion that group judgments fail to appreciate infinite individual variations.⁷⁸ Equality of treatment, however, is an abstract principle that is difficult to apply in a complex social context. Who can say with metaphysical certainty that a group of citizens who were denied government benefits are truly different from the group who received them? We eliminate these conceptual traps by deferring to government classifications in social and economic matters, employing the well known “rational basis” test to vindicate government choices in nearly all instances.⁷⁹ Distinctions based on race, gender, and other immutable traits are, however, treated differently.

76. See, e.g., Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 23 (2000) (proposing that civil rights model was grounded on the premise that minorities, including persons with disabilities, are denied opportunities because of irrational stereotypes and archaic social structures).

77. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982))); *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) (arguing that equal protection “emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.”).

78. See, e.g., *Orr v. Orr*, 440 U.S. 268, 283 (1979) (striking down an Alabama statute permitting alimony only for women because it wrongly characterized all women as dependent in family relationships). See generally *infra* Part III.A.2.b (discussing constitutional restraints on stereotyping).

79. See, e.g., *Cleburne*, 473 U.S. at 440–41 (arguing social and economic legislation is presumed to be valid if rationally related to legitimate state interest); see also JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.3 at 687 (7th ed. 2004) (rational basis test is used for general economic legislation).

Equal protection principles recognize that certain classes of persons are likely to be subjected to improper discrimination and therefore require enhanced protection from government action. In *Carolene Products* (an otherwise unappetizing decision about the shipment of milk mixed with vegetable oil in interstate commerce), the Supreme Court in a footnote left open the possibility that the usual presumption that legislation is proper should bend when laws touch “discrete and insular minorities.”⁸⁰ Justice Stone suggested that a “more searching judicial inquiry” might be appropriate because prejudice against minorities impedes the normal political processes that ordinarily provide protection to citizens.⁸¹ As elaborated by later decisions, the Court refers to a set of factors, sometimes called the “*Carolene* factors,” when deciding whether a particular classification should receive enhanced judicial review: (1) a history of discrimination;⁸² (2) immutability of defining characteristics;⁸³ and, (3) political powerlessness.⁸⁴ Thus far, race, national origin, gender, alienage, and illegitimacy have qualified for some level of enhanced scrutiny.⁸⁵

An important qualification of equal protection is its focus on the attitudes and motivations of government actors. The Court has consistently required plaintiffs to establish a discriminatory purpose in order to prevail on an equal protection claim. The leading case is *Washington v. Davis*.⁸⁶ At issue was an examination, given to police force applicants by the District of Columbia, which blacks failed at a higher rate than whites. Justice White’s opinion refused to find that a facially neutral policy with discriminatory impact violated equal protection rules. He insisted on a showing of some discriminatory purpose.⁸⁷ Although the requirement of a

80. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

81. *Id.*

82. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) (“[C]ertain groups, indeed largely the same groups, have historically been ‘relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’”) (citations omitted); *see also Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 303 (1978) (opinion of Powell, J.); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

83. *See, e.g., Lyng*, 477 U.S. at 638; *Plyler*, 457 U.S. at 217 n.14; *Rodriguez*, 411 U.S. at 28.

84. *See, e.g., Lyng*, 477 U.S. at 638; *Plyler*, 457 U.S. at 217 n.14; *Murgia*, 427 U.S. at 313; *Rodriguez*, 411 U.S. at 28.

85. *See* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 9.3.2 (race and national origin), § 9.4.1 (gender), § 9.5.2 (alienage), § 9.6 (non-marital children) (2nd ed. 2002).

86. 426 U.S. 229 (1976).

87. *Id.* at 239.

discriminatory purpose is the subject of much academic criticism,⁸⁸ the Court has continued to demand proof of such intent.⁸⁹

The Court's insistence on locating equal protection violations in the attitudes of government officials has not, however, reduced the requirement of intent to a simplistic concept. Rather, the Court's decisions have recognized that prejudice is a subtle phenomenon that reveals itself in many ways. An extended discussion of the Court's equal protection jurisprudence is well beyond the scope of this Article. For present purposes, it is sufficient to focus on two aspects of the Court's constitutional thinking in this area. The first is the Court's broad conception of discrimination, which views bias as both a dignitary and an economic harm, defines bias broadly to include its more benign manifestation in stereotyping, and regards immutable traits as largely irrelevant to valid government decisions. Second, there is the system of scrutiny by which we judge equal protection claims. The Court's decisions reflect a deep suspicion of attempts by government actors to employ classifications based on immutable characteristics. I will argue later in Subpart B(1) that these two assumptions of equal protection jurisprudence also underlie Title VII.

2. *The Nature and Harms of Prejudice in the Constitutional Context*

a. "*Prejudices, Biases, Antipathies, and the Like.*"⁹⁰ *Bias as a Dignitary Harm*—Bias poisons a society and is perhaps the ultimate embodiment of the *malum in se*. The effects of prejudice are readily apparent. Minorities and other targeted groups are denied equal opportunities to compete for the economic, social, and political benefits that society affords to others. There is, however, a more subtle and equally harmful effect: antipathies tend to diminish the humanity of groups of persons by communicating a message of "differential worth."⁹¹ On several occasions the Court has voiced concern that classification by immutable trait conveys a

88. See CHEMERINSKY, *supra* note 85, § 9.3.3.2 at 684–85.

89. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (finding statistics indicating that prosecutors seek death penalty more often for black defendants is not evidence of discriminatory intent, which must be established in individual cases); *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (finding there was insufficient evidence that at-large election of city council members resulting in election of few blacks reflected discriminatory purpose); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 278–80 (1979) (finding discriminatory impact by gender was not proof of discriminatory purpose).

90. JEROME FRANK, *LAW AND THE MODERN MIND* 147 (1930) (arguing that judges should receive training in psychology to understand better the effect of the judges own thought processes on the decision).

91. See *Brest*, *supra* note 75, at 7; *Kim*, *supra* note 73, at 1516.

message of inferiority to a disfavored group and subjects individuals to undeserved and sometimes painful stigma.

In *West Virginia v. Strauder*, the Court set aside a state law that excluded blacks from juries.⁹² Although the Court based its decision in part on the defendant's right to have a jury drawn from a cross-section of the community, it also emphasized the Fourteenth Amendment's purpose of protecting black citizens "from legal discriminations, implying [their] inferiority in civil society."⁹³ Justice Harlan's dissent in *Plessy* turns on the same argument.⁹⁴ Chief Justice Earl Warren's opinion in *Brown v. Board of Education* provides the most eloquent statement of this principle.⁹⁵ He said: "To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁹⁶ By the 1985 decision in *City of Cleburne v. Cleburne Living Center, Inc.*, the Court could say without a second thought that classification by race, alienage or national origin conveys a view that "those in the burdened class are not as worthy or deserving as others."⁹⁷

b. Stereotyping by Immutable Traits—Applying enhanced scrutiny to official actions relying on immutable characteristics also encompasses a constitutional policy against stereotyping. While stereotyping may be more benign than outright hatred, the harm is still significant. It is unfair to impose judgments about a group upon an individual when that person is precluded from escaping a group judgment due to the immutability of the defining characteristic. While the concern is general to the Court's equal protection jurisprudence,⁹⁸ it comes out distinctly in the redistricting and peremptory challenge cases, and above all in the Court's gender discrimination opinions.

92. 100 U.S. 303, 308 (1880).

93. *Id.* at 303. *See also* *Peters v. Kiff*, 407 U.S. 493, 499 (1972) (proposing exclusion of blacks from jury creates stigma).

94. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) ("What can more certainly arouse race hate, what can more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?").

95. 347 U.S. 483, 494 (1954).

96. *Id.*

97. 473 U.S. 432, 440 (1985).

98. *See, e.g., City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.").

Beginning in the early Nineties, the Court decided a series of cases that attempted to determine when and how to apply strict scrutiny to racially inspired election districts.⁹⁹ While these cases as a group are remarkably unenlightening, one can fairly summarize them as follows. Strict scrutiny is required whenever race is used to draw election districts,¹⁰⁰ but only when race is the predominant factor.¹⁰¹ For those districting decisions that are the fruit of purely racially conscious action, however, the Court has voiced concern that such configurations are based on stereotypes about voting behavior. In *Shaw v. Reno*, Justice O'Connor responded to Justice Souter's argument that racial gerrymandering was harmless unless it diluted voting strength by arguing that such practices reinforced racial stereotypes and signaled to elected representatives that they represented racial groups rather than their whole constituency.¹⁰² Similarly, in *Miller v. Johnson*, Justice Kennedy noted that racially conscious districting presumes that members of the targeted group "think alike, share the same political interests, and will prefer the same candidate at the polls,"¹⁰³ thus committing the very racial stereotyping that equal protection forbids. Even though the challenged districts in *Shaw v. Reno* and *Miller* might be taken to advantage minority voters generally, in the Court's mind the undesirable cost of such aggregate benefits is to reduce individual members of such groups to xerox copies.

Rejection of stereotyping is also an important element of the Court's peremptory challenge cases. The Court has forbidden the discriminatory use of peremptory challenges in juror selection, holding that the exclusion of members of racial groups must be justified by a racially neutral explanation. The classic situation, *Batson*, involves prosecutorial exclusion of members from the defendant's racial group,¹⁰⁴ although the Court has extended the prohibition to civil cases¹⁰⁵ and to challenges by criminal defendants.¹⁰⁶ Significantly, the Court views discriminatory strikes as a

99. See *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

100. See CHEMERINSKY, *supra* note 85, § 9.3.5.3 at 717-20.

101. *Id.*; *Miller*, 515 U.S. at 920; see also *Bush*, 517 U.S. at 958-59 (proposing that strict scrutiny applies when all other legitimate districting principles are subordinated to race) (citing *Miller*, 515 U.S. at 916); cf. *Easley*, 532 U.S. at 241-43 (holding that the use of race is permissible for political reasons, e.g., to create a safe Democratic district).

102. *Shaw*, 509 U.S. at 650.

103. *Miller*, 515 U.S. at 920 (quoting *Shaw*, 509 U.S. at 647).

104. *Batson v. Kentucky*, 476 U.S. 79 (1986).

105. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

106. *Georgia v. McCollum*, 505 U.S. 42 (1992).

violation of the prospective juror's right, such that discrimination may occur even though excluded jurors and defendants are of different races.¹⁰⁷ Racially motivated peremptory challenges presume that the excluded potential jurors cannot assess a case fairly or dispassionately.¹⁰⁸ The Court has been unwilling to accept this assumption. Justice Kennedy says in *Edmondson* that "if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution."¹⁰⁹ Even Justice Scalia, whose opinion in *Holland v. Illinois* refused to hold that the Sixth Amendment's requirement that a jury be composed of a fair cross-section of the community forbids peremptory challenges, states in dicta that a prosecutor's assumption that a black juror cannot be impartial violates the Equal Protection Clause.¹¹⁰

Stereotyping is the primary concern in constitutional gender discrimination claims. In one line of cases, the Court has set aside state laws that presume that women are economically dependant on their husbands. In *Orr v. Orr*, for example, the Court struck down an Alabama law that permitted women, but not men, to receive alimony.¹¹¹ The Court remarked that the Alabama scheme impermissibly assigned women to a "dependent role"¹¹² in family relationships. *Weinberger v. Wiesenfeld* disallowed a rule under the Social Security Act that permitted widowed mothers, but not fathers, to receive social security based on the income of the deceased spouse,¹¹³ observing that the rule was based on the stereotype that a husband's income alone was vital to family support.¹¹⁴

In another set of gender cases, the Court rejected as a misguided stereotype the notion that women are destined for particular vocations. In *Mississippi University for Women v. Hogan*,

107. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 406–08 (1991).

108. Cf. *Hernandez v. New York*, 500 U.S. 352 (1991) (plurality opinion) (quoting *Batson*, 476 U.S. at 89). In *Hernandez*, a plurality of the Court sustained a prosecutor's challenge of Spanish-speaking members of the venire on grounds that might rely on direct witness testimony rather than a translation supplied by a court supplied interpreter. The prosecutor argued that the exclusions were based on individualized assessments of credibility, which the Court accepted as a sufficiently race-neutral explanation. *Id.* at 359–63.

109. *Edmonson*, 500 U.S. at 630.

110. 493 U.S. 474, 484 n.2 (1990).

111. 440 U.S. 268 (1979).

112. *Id.* at 278.

113. 420 U.S. 636 (1975).

114. *Id.* at 643; see also *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980) (disallowing state program that automatically awarded benefits to widows but forced widowers to demonstrate need or physical incapacitation); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (striking down section of Federal Old-Age, Survivors, and Disability Insurance Benefits program automatically permitting women benefits based on husband's income, but requiring the latter to demonstrate that wife had contributed over half of support).

the Court overturned a state nursing school's policy of admitting only women.¹¹⁵ Justice O'Connor was unimpressed with the State's argument that the restrictive admissions policy was intended to remedy past discrimination against women, and saw the rule as perpetuating a stereotype that nursing was woman's work.¹¹⁶ Justice Ginsburg's opinion in *United States v. Virginia* found that the Virginia Military Academy's exclusion of women was based on unjustified stereotypes about the "different talents, capacities, or preferences of males and females."¹¹⁷ The recent decision in *Hibbs v. Nevada Department of Human Resources*,¹¹⁸ in which the Court rejected a sovereign immunity challenge to the Family and Medical Leave Act, also turns on the rejection of stereotyping. Chief Justice Rehnquist's opinion sustains the gender-neutral leave provisions of the FMLA as valid section 5 legislation since they target the unconstitutional stereotype that women are the primary care givers in the family.¹¹⁹

c. Irrelevance of Immutable Characteristics—Last, the equal protection cases presume that consideration of immutable characteristics is rarely relevant to proper decisionmaking. The assumption that race-conscious decisions turn on irrelevant considerations is long-standing. It is implicit in the elder Justice Harlan's dissent in *Plessy*, where he argued that race is constitutionally irrelevant to the enjoyment of civil rights.¹²⁰ More recently in *Cleburne v. Cleburne Living Center, Inc.*, Justice White stated assuredly that "when a statute classifies by race, alienage, or national origin [such] factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy"¹²¹ Last term Justice O'Connor's opinion in *Grutter v. Bollinger* maintained the firm presumption that racial classifications rest on irrelevancies and are acceptable only upon proof of a compelling state interest.¹²² The

115. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

116. *Id.* at 729–30.

117. 518 U.S. 515, 533 (1996); *cf.* *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding program of male-only draft registration and deferring to legislative and executive authority in military affairs).

118. 538 U.S. 721 (2003).

119. *Id.* at 1979.

120. *Plessy*, 163 U.S. at 554–55 (Harlan, J., dissenting).

121. 473 U.S. 432, 440 (1985).

122. 539 U.S. 306, 326 (2003);

Because the Fourteenth Amendment "protect[s] persons, not groups," all "governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed

view that race is presumptively immaterial to state action has become hornbook law.¹²³

Regarding race as irrelevant in most cases reflects common sense. Why should there be racial distinctions, for example, in government benefit programs? Why should concepts of due process vary with the ethnicity of a defendant? There is no reason other than a desire to recognize racial differences. Returning to Justice White's comments in *Cleburne*, a racial category is most likely a mask for bias. The scant likelihood that racially motivated actions are truly relevant justifies strict scrutiny for racial categories. Occasionally racially conscious state actions will meet this test. The University of Michigan Law School's admissions policy was judged to meet the compelling interest of achieving a diverse student body.¹²⁴ In most cases, though, the government rule will fail.¹²⁵

In matters of gender, we also remain skeptical of the utility of classification. The *Cleburne* Court's discussion of intermediate scrutiny included a comment that gender "generally provides no sensible ground for differential treatment."¹²⁶ Justice Ginsburg's remarks in *United States v. Virginia* acknowledged that gender classifications do not equate with racial categories for all purposes,¹²⁷ and that there are certain enduring variations between the sexes, e.g., physical differences.¹²⁸ Nonetheless, the VMI decision's insistence that purported gender differences be screened for "artificial constraints,"¹²⁹ and that defendants offer an "exceedingly persuasive" justification¹³⁰ for their actions make it unlikely that gender classifications will survive.

judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed."

Id. (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

123. See, e.g., *CHEMERINSKY*, *supra* note 85, § 9.1 at 646 (2002).

124. *Grutter v. Bollinger*, 539 U.S. 306, 331–35 (2003).

125. See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (holding minority business participation provisions of federal contract fail strict scrutiny), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding minority business enterprise program lacked remedial purpose and thus failed strict scrutiny).

126. *Cleburne*, 473 U.S. at 440–41 ("[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.") (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion)).

127. *United States v. Virginia*, 518 U.S. 515, 532 (1996).

128. *Id.* at 533.

129. *Id.*

130. *Id.*

3. *The Constitutional Response: Skepticism*—In response to the equal protection mandate of the Fourteenth and Fifth Amendments, the Court has fashioned a system of scrutiny by which allegations of discrimination against state actors are evaluated. The mechanics of the system are familiar and require only brief description. Classifications touching on purely social or economic matters get minimal scrutiny, a.k.a. rational basis review, under which the rule in question is presumed proper and the plaintiff must show that it advances no proper state interest.¹³¹ The application of minimal scrutiny usually means that a claim is a loser, although there have been exceptions.¹³² If government action involves a classification by race, ethnicity, gender, or another immutable trait, however, a presumption of irregularity sets in.

Greatest skepticism is reserved for the so called “suspect” classifications including race¹³³ and alienage.¹³⁴ Any other attitude would be strikingly naive, given the history of systematic racial discrimination including chattel slavery, Jim Crow laws, de jure segregation and so forth.¹³⁵ The defendant has the burden to show a compelling state interest for the classification and demonstrate that the scheme is narrowly tailored to meet such a goal.¹³⁶ There is a second level of “intermediate” or “heightened” scrutiny that the Court applies to classifications based on gender¹³⁷ or illegitimacy.¹³⁸

131. See, e.g., *Fed. Communications Comm'n v. Beach Communications, Inc.* 508 U.S. 307, 315 (1993) (stating plaintiffs must negate all conceivable justifications for legislative classification).

132. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a state constitutional provision forbidding pro-gay statutory actions under rational basis review); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (voiding a zoning ordinance under rational basis review).

133. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“It should be noted . . . that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (applying strict scrutiny to a minority enterprises program under federal contract); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (applying strict scrutiny to use of racial factors in a child custody determination).

134. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (holding state law improper for forbidding welfare payments to aliens); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (finding a state law unconstitutional for denying commercial fishing licenses to aliens).

135. See, e.g., *Palmore*, 466 U.S. at 432 (“Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns.”).

136. See, e.g., *Plyler*, 457 U.S. at 217 (requiring the State to demonstrate that a classification is “precisely tailored to serve a compelling governmental interest”).

137. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (applying heightened scrutiny to an all-male admission policy at a state-run military academy).

138. See, e.g., *Clark v. Jeter*, 486 U.S. 456 (1988) (applying intermediate scrutiny to strike down a law requiring illegitimate children to establish paternity within six years).

Here Government actors must identify a substantial or important state interest to which the distinction is substantially related.¹³⁹ The less demanding test of intermediate scrutiny concedes a greater likelihood that such classification may be proper. Either level of enhanced scrutiny involves strong reservations about the motivations underlying state action, which are decidedly absent when courts judge social or economic legislation under the deferential rational basis standard.

Mistrust of the motives underlying suspect classifications is explicitly acknowledged in the Court's opinions.¹⁴⁰ In *Adarand*, for example, Justice O'Connor explains that the Court's strict scrutiny cases reflect an abiding skepticism about racial classifications that demands an exacting examination of their underlying purpose.¹⁴¹ She sets out her views at greater length in *Croson*, stating:

[T]he purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.¹⁴²

Strict scrutiny is thus the Court's way of "operationalizing" skepticism about racial and other classifications based on immutable traits.¹⁴³ At times the use of strict scrutiny may seem excessive. There are arguments that racially sensitive programs, such as public construction contract set asides, that were adopted for seemingly innocent or remedial reasons should be judged under a

139. See, e.g., *Hibbs v. Nevada Dep't. of Human Res.*, 123 S. Ct. 1972, 1978 (2003); *Lehr v. Robertson*, 463 U.S. 248, 266-67 (1983); *Craig v. Boren*, 429 U.S. 190, 197-99 (1976); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

140. See, e.g., *Grutter*, 539 U.S. at 324-27 ("[A]ll racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny.") (internal quotes omitted).

141. *Adarand*, 515 U.S. at 223; see also, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285 (1986) (plurality opinion, Powell, J.) ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination."); *Fullilove v. Kluznick*, 448 U.S. 448, 491 (1980) (Burger, C.J.); *id.* at 523 (Stewart, J., dissenting) ("[O]fficial action . . . treat[ing] a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid.")

142. *Croson*, 488 U.S. at 493.

143. Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1230 (2002).

less strenuous standard.¹⁴⁴ The court's decision in *Metro Broadcasting* attempted to customize scrutiny to take account of such benign government actions by applying intermediate scrutiny to an FCC program for minority ownership of broadcast licenses.¹⁴⁵ When *Metro Broadcasting* was overruled in *Adarand*, the Supreme Court expressed concerns that "despite the surface appeal of holding benign racial classifications to a lower standard . . . it may not always be clear that a so-called preference is in fact benign."¹⁴⁶ The Court's skepticism about suspect classifications remains so great that the recent decision in *Grutter*, in which the University of Michigan Law School's affirmative action plan survived strict scrutiny, was based on the compelling state interest in creating a diverse student body, not in integration *per se*.¹⁴⁷

B. The Antidiscrimination Model and Title VII

Title VII was enacted as part of the Civil Rights Act of 1964, the first significant civil rights legislation of the Twentieth Century. It was an ambitious and broadly fashioned attempt to extend to American society generally the non-discrimination precepts that the Fifth and Fourteenth Amendments could impose only on government entities.¹⁴⁸ Title II of the Act sought to eliminate discrimination in public accommodations, while Title VI focused on federally funded activities. The employment provisions of Title VII were inspired by the poor economic status of black citizens in American society during the Sixties.¹⁴⁹ Proponents of the Act repeatedly emphasized during the legislative process and floor debates the economic disparities that discrimination had imposed

144. See, e.g., Anderson, *supra* note 143, at 1237 ("That a law embodies a racial preference is not significant in itself, but only for what it suggests about the underlying purpose, conception, or effects of the law.").

145. *Metro Broad., Inc.*, 497 U.S. at 563–66, overruled by *Adarand*, 515 U.S. 200 (1995).

146. *Adarand*, 515 U.S. at 226 (internal quotation marks omitted).

147. *Grutter*, 539 U.S. at 328–29.

148. See, e.g., George Rutherglen & Daniel R. Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467, 470 (1988) (arguing that the Civil Rights Act of 1964 intended to extend constitutional prohibitions against public discrimination to private actors).

149. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202 (1979) (asserting Congress' primary concern in enacting Title VII was to improve employment opportunities for black citizens).

on African-Americans.¹⁵⁰ Title VII, however, is concerned with far more than achieving economic parity between the races. On key points, the employment provisions of the Act reflect the expansive view of discrimination developed in the equal protection context, as well as its reliance on skepticism as the principal tool for ferreting out bias.

1. *Title VII's Concept of Bias*—Human dignity was a primary concern for the framers of Title VII. The Act's vaguely worded prohibition of discrimination "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"¹⁵¹ gives no hint to the Twenty-First Century reader of the racial crisis of the early Sixties. During the 1950s, the politically insulated federal courts had taken the lead in the fight against racism in school desegregation cases, beginning with the landmark decision in *Brown v. Board of Education*,¹⁵² while the elected branches shied away from the controversy. During the Eisenhower administration, Congress passed two tentative civil rights acts in 1957¹⁵³ and 1960.¹⁵⁴ In the meantime, the American South became a principal proving ground where black citizens, weary of unfulfilled promises of reform, began a campaign of non-violent protests such as the lunch counter sit-ins in Greensboro, North Carolina,¹⁵⁵ and the bus boycott in Montgomery, Alabama.¹⁵⁶ The

150. See, e.g., 110 CONG. REC. 7204 (1964) (statement of Sen. Clark) ("I suggest that economics is at the heart of racial bias. The Negro has been condemned to poverty because of lack of equal job opportunities. This poverty has kept the Negro out of the mainstream of American life."); 110 CONG. REC. 6547 (1964) (statement of Sen. Humphrey) ("At the present time Negroes and members of other minority groups do not have an equal chance to be hired, to be promoted, and to be given the most desirable assignments.").

151. 42 U.S.C. § 2000e-2(a)(1) (2001) (emphasis added).

152. 347 U.S. 483 (1954).

153. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957). The 1957 Act created the Civil Rights Commission, authorized the Department of Justice to seek remedies against discrimination in voting rights, made the provision for trial by jury in criminal contempt cases, and set qualifications for federal jurors. See *id.*

154. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960). The 1960 Act concerned, in pertinent part, obstruction of court orders, flight to avoid prosecution for damaging public buildings, federal election records and the scope of the Civil Rights Commission powers. See *id.*

155. See, e.g., WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR EQUALITY (1980) (recording history of sit-ins at Woolworth's lunch counter); JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 623 (3d ed. 1967) (describing sit-ins); HOWELL RAINES, MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED 80-81 (1977) (describing sit-ins); TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 271-73 (1988) (describing sit-ins).

156. See, e.g., BRANCH, *supra* note 155, at 143-205 (discussing Montgomery bus boycott); Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989) (same).

situation came to a head in Birmingham when the infamous Bull Connor loosed his dogs on a protest march by children on May 2, 1963. President Kennedy, against his better political judgment,¹⁵⁷ decided that principle had to prevail over his pessimistic assessment of the chances of getting a bill through Congress. He sent the Civil Rights Act to Congress on June 19 of the same year.¹⁵⁸

Title VII was only one part of the Civil Rights Act's broad civil rights initiative. The public accommodations provisions in Title II were more controversial and may well have been more important to proponents of civil rights,¹⁵⁹ judging from the fact that resistance in the South had targeted public accommodations such as the buses in Montgomery and lunch counters everywhere. The most controversial aspect of Title VII for the Eighty-Eighth Congress seems to have been whether to enforce the non-discrimination mandate administratively via cease and desist orders or by means of private causes of action brought in the courts.¹⁶⁰ Ultimately Congress compromised,¹⁶¹ opting for enforcement through the courts but endowing a new agency, the EEOC, with enforcement powers. There was also some sentiment that Title VII might exceed Congress's constitutional powers.¹⁶²

Contemporary events as well as the legislative history make clear that the Framers of the Civil Rights Act were reacting to overt, in-

157. CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 16 (1985) (quoting John Kennedy saying to his brother—and Attorney General—Robert: "If we're going to go down, let's go down on a matter of principle").

158. President Kennedy's message read in part:

Events of recent weeks have again underlined how deeply our Negro citizens resent the injustice of being arbitrarily denied equal access to those facilities and accommodations which are otherwise open to the general public. . . . Surely, in 1963, 100 years after emancipation, it should not be necessary for any American citizen to demonstrate in the streets for the opportunity to stop at a hotel, or to eat at a lunch counter in the very department store in which he is shopping

Reprinted in 1964 U.S.C.C.A.N. 2355, 2363.

159. *Id.* at 18 (quoting then-Senate Majority Leader Mike Mansfield).

160. *See, e.g., id.* at 22, 35 (describing early proposals with strong administrative enforcement powers).

161. *Compare* H.R. REP. NO. 88-914, at 92 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2409 (additional majority views of Rep. Kastenmeier) (expressing preference for administrative enforcement) *with id.* at 2426-27 (additional views of Rep. Meader) (arguing that House Judiciary Committee had not adequately considered effects of Title VII on management and labor); *see also id.* at 2477-78 (minority views of Rep. Poff and Rep. Cramer) (questioning powers of EEOC under Title VII).

162. *See id.* at 2475-77 (minority views of Rep. Poff and Rep. Cramer) (questioning constitutionality Title VII under Commerce and Privileges and Immunities Clauses).

vidious, and often violent displays of racial animus that were socially acceptable in many places.¹⁶³ Of course statutory guarantees of equal treatment in employment promote economic interests. Title VII envisions a labor market where participants can find desirable employment according to merit, regardless of race, gender, or other irrelevant characteristics. Much of the legislative debate involved a prolonged discussion of the economic loss black citizens suffered as a result of discrimination.¹⁶⁴ But there is also an obvious equality interest in preserving the dignity of individuals over the demeaning message of inferiority stemming from racial disqualifications in employment. In this sense, Title VII also seeks to prevent the same dignitary harms that the Court perceived in decisions such as *Strauder* or *Brown v. Board of Education*.¹⁶⁵

Fortunately, overt discrimination is less common in Twenty-First Century America than it was when Title VII was enacted.¹⁶⁶ A combination of progressive leadership, educational efforts, increasing business sophistication and expanding markets has led to the virtual elimination of open racial qualifications for employment, and most—though not all—gender based distinctions. Consequently much of the damage done to human dignity by explicit group-based disqualifications has disappeared. Workplace harassment claims are the exception. Title VII's ethic of non-discrimination has not filtered down evenly to the shop floor or to the office. In the typical case, and usually against the employer's stated policies, supervisors or coworkers engage in a pattern of abusive behavior because of the employee's race or gender.

Justice Rehnquist's seminal opinion recognizing hostile environment claims in *Meritor Savings Bank, FSB v. Vinson*¹⁶⁷ construed Title VII to protect employees from abusive working conditions even in the absence of pecuniary injury. In response to the bank's argument that Title VII protects only against "tangible loss of an economic character, not purely psychological aspects of the workplace environment,"¹⁶⁸ Justice Rehnquist reasoned that the language of Title VII could not be confined to economic injuries,¹⁶⁹ and that the

163. See Ann C. McGinley, *Viva La Evolución: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 418 n.7 (2000).

164. See, e.g., *Weber*, 443 U.S. at 202-04 (discussing legislative history of Title VII and concluding that Congress viewed the "crux of the problem" to be opening employment opportunities for black citizens).

165. See *supra* Part III.A.2.a (discussing constitutional treatment of bias as a dignitary injury).

166. See McGinley, *supra* note 163, at 418.

167. 477 U.S. 57 (1986).

168. *Id.* at 64 (internal quotation marks omitted).

169. *Id.*

EEOC's guidelines deeming sexual harassment to be discriminatory even without an economic *quid pro quo* were controlling.¹⁷⁰ By characterizing the issue as "the right to work in an environment free from discriminatory intimidation, ridicule, and insult,"¹⁷¹ Rehnquist located the harm in hostile environment claims strictly within the realm of dignitary interests. The *Meritor* decision thus parallels the concerns voiced in the Court's constitutional equal protection decisions over government actions that communicate a message of differential worth.

Like the equal protection cases, Title VII also attempts to eradicate reliance on stereotypes. Not surprisingly, most litigation on this point occurs in gender discrimination claims since recent history has forced employers to become sensitive to overt suggestions of racism. The leading case is *Price Waterhouse v. Hopkins*,¹⁷² in which the Court recognized that employer decisions based on gender stereotypes are actionable under Title VII. The plaintiff, Ann Hopkins, was a senior manager who had been passed over for partnership in a leading accounting firm. There were concerns, perhaps legitimate, that her abrasive personality unfairly affected the support staff. Certain partners, however, viewed her behavior as inappropriately masculine, objected to foul language from a woman, and advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."¹⁷³ In pertinent part, the Court was called upon to decide what constituted discrimination "because of" sex under Title VII.

Justice Brennan identified sex stereotyping as a form of gender discrimination that Congress intended to eliminate.¹⁷⁴ He specifically regarded stereotyping as unfair because it attributes group characteristics to an individual, thus preventing individual, merit-based evaluations of workers.¹⁷⁵ *Price Waterhouse* was neither the first

170. *Id.* at 65.

171. *Id.* at 65 (citing 45 Fed. Reg. 74,676 (1980)).

172. 490 U.S. 228 (1989).

173. *Id.* at 235.

174. *Id.* at 251.

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

Id. (internal quotation marks omitted).

175. *Id.*

nor last Title VII case in which the Court regarded sex stereotyping as discriminatory. In the earlier *Manhart* decision, the Court took for granted that Title VII forbade employment decisions based on stereotypes, and held that a defendant's practice of charging female employees higher pension contributions because of their greater average longevity improperly substituted a gender-based assumption for an individual determination.¹⁷⁶ The more recent decision in *Oncale*, in which the Court determined that Title VII hostile environment claims applied to male-on-male harassment,¹⁷⁷ involved facts that suggested a violent form of stereotyping. The plaintiff had been subjected to graphic, sexually suggestive assaults by other male employees who taunted him for being a homosexual,¹⁷⁸ and presumably not manly enough to work in the tough environment on an oil platform.

Title VII likewise parallels the equal protection cases' conclusion that race, gender, and other immutable characteristics are rarely relevant in the workplace. The irrelevance of race was established early in the case law. Chief Justice Burger's opinion in *Griggs* in 1971 noted that the enacting Congress intended that Title VII direct employers' attention toward actual job qualifications, "so that race, religion, nationality, and sex become irrelevant."¹⁷⁹ Justice Brennan's opinion in *Price Waterhouse* reiterated this point, specifically concluding that the language of Section 703(a)(1) forbidding discrimination "because of . . . sex" means that "gender must be irrelevant to employment decisions."¹⁸⁰ In rare cases consideration of race and like categories is permitted in the remedial phases of Title VII. The Court in *Weber*, for example, construed the Act to permit voluntary affirmative actions programs when there is history of discrimination in the relevant labor market.¹⁸¹ Racial and like categories are inevitably "relevant" in any attempt to correct

176. *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978).

It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.

Id. at 702.

177. *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75 (1998).

178. *Id.* at 77.

179. *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971); *see also Manhart*, 435 U.S. at 708 (noting that Title VII was designed to make race irrelevant).

180. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).

181. *Weber*, 443 U.S. at 209 (permitting voluntarily adopted private-sector affirmative action plans that eliminate "traditionally segregated job categories").

discrimination. Their use in Title VII parallels the equitable power of a federal court to fashion category-conscious decrees to remedy equal protection violations.¹⁸² The underlying conduct which prompts that remedy, however, is likely to involve decisions based on irrelevancies.

The limited nature of the BFOQ defense¹⁸³ also underscores the irrelevance of immutable characteristics¹⁸⁴ in the employment context. Section 703(e)(1) of the Act creates an affirmative defense: “[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”¹⁸⁵ The defense is conspicuously not available in cases of race discrimination, creating an inference that race can never be a valid workplace criterion.¹⁸⁶ Indeed, so far as sex discrimination claims go, the statutory concession that gender may be relevant parallels the assumption in the equal protection context that gender classifications are more likely than racial ones to be genuinely relevant, thus receiving only intermediate scrutiny by the courts.

182. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (affirming decree in school desegregation case utilizing racial enrollment quotas).

183. 42 U.S.C. § 2000e-2(e)(1) (2001). See generally Joanne C. Brant, “*Our Shield Belongs to the Lord*”: *Religious Employers and a Constitutional Right To Discriminate*, 21 HASTINGS CONST. L.Q. 275, 285–87 (1994) (summarizing Title VII’s BFOQ requirements).

184. The inclusion of religion among Title VII’s protected classes is curious. Unlike race, gender or national origin, religious affiliations are hardly immutable. Judge Ruben picks up on the difference in *Gloor* when he comments that Title VII does not protect mutable characteristics except religion, but had no reason to pursue the point in a language case. *Gloor*, 618 F.2d at 270. Several commentators have also observed that religion is the one mutable trait covered by Title VII. See, e.g., Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 8 (2000) (stating discrimination laws forbid discrimination based upon religious beliefs even though not immutable); Mark Strasser, *Unconstitutional? Don’t Ask; If It Is, Don’t Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375, 403 (1995) (noting that religion is not genetically determined and the believers can convert). One court has casually referred to religion in dicta as an immutable personal characteristic under Title VII. See *Rodriguez v. Taylor*, 569 F.2d 1231, 1236 (3d Cir. 1977). It is probably more sensible to assign Title VII’s prohibitions against religious discrimination to a First Amendment rather than Fourteenth (i.e. anti-discrimination) model, where concepts of immutability don’t come into play. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 928–29 (2002).

185. 42 U.S.C. § 2000e-2(e)(1) (2001).

186. See 110 CONG. REC. 2550–63 (1964) (rejecting amendment adding race to BFOQ provisions); cf. *Patrolmen’s Benevolent Ass’n v. City of New York*, 74 F.Supp.2d 321, 337 (S.D. N.Y. 1999) (noting that “no court has actually approved of a race-based BFOQ”).

Even though Title VII does acknowledge the possibility that a qualification based on sex or national origin may be apt, the presumption of irrelevance is still firm. Section 703(e)(1)'s language permitting gender classifications when "reasonably necessary to the normal operation of that particular business or enterprise"¹⁸⁷ has been construed narrowly to require a showing that the rule is necessary to the continuing viability of the employer's operations,¹⁸⁸ or that loss of the rule would destroy the "essence of the business operation."¹⁸⁹ Relatively few classifications will survive this test, again suggesting that gender and national origin distinctions in the workplace are largely beside the point.¹⁹⁰ The law on this point comports with common sense. On rare occasion, sex or national origin may make a difference in job performance. An impresario could argue that a man must play Henry V or the Duke of Exeter in the Shakespearean history. A restaurateur could insist that a Parisian be head chef of a French restaurant. Neither could get away with hiring only men for the clean up crews.

It is instructive to compare Title VII's insistence that immutable traits are largely irrelevant with the provisions of the Americans with Disabilities Act. The ADA explicitly treats disability as an important ingredient in a wide range of decisions. A few examples should suffice to make the point. Title I of the Act, which governs employment, limits protections to "qualified individual[s] with a disability"¹⁹¹ who are defined as persons who can perform the "essential functions" of the job in question with or without a reasonable accommodation.¹⁹² Regulations issued under Title II of the ADA (Public Services) prohibit provision of separate benefits or services unless necessary to give disabled individuals opportunities that are "as effective as those provided to others."¹⁹³ Title III, governing public accommodations, has a similar provision.¹⁹⁴ The

187. *Id.*

188. *Compare, e.g.,* *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (upholding gender restrictions on hiring of women as prison guards as necessary) *with* *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 203–04 (1991) (holding employer rule barring fertile women from jobs with risk of exposure to lead violates Title VII).

189. *Dothard*, 433 U.S. at 333.

190. See Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 Nw. U. L. REV. 731, 743–44 (2003) (stating that Title VII requires "direct competition between women and men" and that sex is rarely a BFOQ); see also 29 C.F.R. § 1604.2 (2004) (EEOC Guidelines on sex discrimination) (treating BFOQ defense narrowly).

191. 42 U.S.C. § 12112(a) (2000).

192. *Id.* § 12111(8).

193. 28 C.F.R. § 35.130(b)(1)(iv) (2003).

194. 42 U.S.C. § 12182(b)(1)(A)(iii) (2000) (prohibiting unnecessary separate benefits).

ADA generally depends upon a system of requiring covered entities to provide disabled individuals with accommodations that facilitate participation in important phases of public life.¹⁹⁵ All these provisions presume that consideration of a person's disabilities is not only relevant, but useful in decisionmaking. While the ADA is a civil rights statute in a general sense, it does not fit easily within the confines of the traditional civil rights model.¹⁹⁶

Finally, Title VII adopts to a great degree the constitutional view that discrimination is the product of intention. Section 703(a)(1) of the Act forbids discrimination "because of" race, etc. Claimants pursuing Title VII claims under a disparate treatment theory (discussed immediately below) are required to establish through direct or indirect evidence that the defendant acted with a prejudicial state of mind. Justice Brennan's opinion in *Price Waterhouse* posits that this requirement is met when an employer admits, were he to speak truthfully, that he acted because an employee or an applicant was a woman.¹⁹⁷ The assumption is that actions motivated by awareness of a protected characteristic reflect bias. Defenses to disparate treatment claims focus on dispelling the inference of prejudicial motivation. Employers are required to respond to an established *prima facie* case of discrimination by articulating a legitimate, non-discriminatory reason for taking an adverse action against the employee.¹⁹⁸ To the extent that the employers' actions are rational business practices, they are deemed to be unbiased. Disparate impact cases, in which the plaintiff argues that a superficially neutral practice unjustifiably disadvantages a protected group, do not require a showing of bias. I will argue below, however, that the disparate impact theory should also be regarded as raising an inference of bias.

2. *Skepticism and Modes of Proof Under Title VII*—As originally enacted, Title VII established an antidiscrimination mandate for employers, but was silent as to how claimants should prove that discrimination occurred. The omission was significant, although

195. See, e.g., *id.* § 12112(b)(5)(A) (requiring employers to make accommodation to known disabilities of employees).

196. For attempts to relate the ADA to the civil rights model, see, for example, Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 492-522 (1991); Diller, *supra* note 76; S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 CONN. L. REV. 603 (2001); Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L.J. 535 (2001); Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335 (2001).

197. *Hopkins*, 490 U.S. at 250.

198. See *supra* Part II.B.2.a (discussing burdens of proof in disparate treatment analysis).

expected: statutes establishing new principles or reordering large swaths of American society will often lack the practical guidance of a body of judicial decisions. Direct proof of discrimination is hard to come by. Most employers and managers, whether acting in good faith or bad, are smart enough not to use any phrases that might imply racial or other animus when discussing employment matters publicly.¹⁹⁹ They also do not leave notes in personnel files indicating that a worker has been fired for being black, female, or a Latina. Recognizing the difficulty of proof under these circumstances, the Court devised alternative means of proving discrimination that were eventually codified in Title VII by the Civil Rights Act of 1991: disparate treatment and disparate impact.²⁰⁰ Either test reflects the skeptical assumptions of the antidiscrimination model, already developed in the equal protection context, that employment criteria based on immutable traits are likely to be discriminatory.

a. Disparate Treatment—Recovery under a disparate treatment theory requires proof of discriminatory intent. Occasionally there is direct proof of animus, for example when a supervisor loses his composure and discharges a worker in a fit of racial epithets, or is overheard using phrases such as “Spanish hurts my ears.”²⁰¹ Such instances are, of course, rare, therefore most disparate treatment cases are made out under the *McDonnell Douglas* framework for demonstrating a *prima facie* case of discrimination. Speaking generally, the *McDonnell Douglas* framework raises an inference of discrimination when a plaintiff makes a threshold showing that he or she was similarly situated to other workers but was treated differently. The test is flexible and adapts to the specific employment context. In failure to hire cases, for example, plaintiffs may offer evidence that they: (1) are members of a protected class (e.g., a racial group); (2) applied for a job for which they were qualified; (3) were rejected; and, (4) the position remained open and the employer continued to seek applicants.²⁰² By offering such evidence,

199. 1 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 8.01[1], at 8–6 (2d ed. 1994) (employers are “too sophisticated to profess their prejudices on paper . . . before witnesses”); see also *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (noting that there is seldom “‘eyewitness’ testimony as to the employer’s mental processes”).

200. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2001) (setting burden of proof for disparate impact claims); see also 42 U.S.C. § 1981a(a) (2001) (permitting damages for intentional discrimination but not disparate impact claims).

201. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (holding that a plaintiff may establish discrimination through direct evidence).

202. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); see also *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981).

plaintiffs raise a *prima facie* case of discrimination that is sufficient to avoid summary judgment or motions to dismiss. Employers then must respond by articulating a legitimate, non-discriminatory reason for their actions.²⁰³ Once employers meet their burden of production, the *prima facie* case loses its significance, and the charge of discrimination is ready for trial, where the plaintiff carries the ultimate burden of persuasion.²⁰⁴ To pick another example, plaintiffs alleging discriminatory discharge may show: (1) membership in a protected class; (2) qualification for the job held; (3) discharge; and, (4) the position remained open and was ultimately filled by a member outside of plaintiff's group.²⁰⁵

McDonnell Douglas's shifting allocations of proof are a practical and reasonable response to the difficulties of acquiring evidence in an area of human interaction where subjective intentions are pervasive. Justice Powell reasoned in *Burdine* that raising a *prima facie* case eliminates the two most common nondiscriminatory reasons for an adverse employment action, i.e., that the plaintiff was unqualified for the position held or sought, or that no job vacancy existed.²⁰⁶ At this point, we should be getting suspicious of the employer's motives. Our experience in the equal protection cases has taught us that racially conscious decisions are likely to reflect prejudice at some level. *Burdine* carries this skepticism into Title VII by explaining that the *prima facie* case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."²⁰⁷ Establishing a *prima facie* case does not tell us specifically which concerns of the antidiscrimination model have been implicated in the present litigation. Our skepticism about the employer's actions, rather, is generalized and only requires that he now articulate some reasonable basis for his actions that explain away the possibility of animus, stereotyping or impermissible use of group characteristics.

As a practical matter, plaintiffs tend to avoid using the disparate treatment model in language discrimination claims. It is difficult to point to circumstances in the typical discharge case that give rise to an inference of animus. Workplace language rules are superficially neutral standards that are applied evenhandedly to every worker in

203. See, e.g., *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 253.

204. See, e.g., *Burdine*, 450 U.S. at 256; *Aikins*, 460 U.S. at 716.

205. See, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *Burdine*, 450 U.S. at 252-53.

206. See *Burdine*, 450 U.S. at 254.

207. *Id.* (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

a unit. Employers do not, for obvious reasons, discharge Chicano workers for speaking Spanish while tolerating Spanish conversations among the Anglo employees. Also, defendants who employ a significant number of workers who speak a LOTE probably do so because of the demographics of their local hiring pool.²⁰⁸ Chances are high that replacement workers will share the linguistic or ethnic traits of a discharged worker. This is not to say that discrimination does not occur when a worker is replaced by another of his own group. Just as the female plaintiff in *Price Waterhouse* was allegedly denied a partnership in a national accounting firm for being too macho,²⁰⁹ it is easily conceivable that one Chicano worker may be let go because his use of Spanish makes him seem uppity to a supervisor. Proof of this sort of animus, however, is elusive and rarely can be teased out of the *McDonnell Douglas* framework.

b. Disparate Impact—Disparate impact, a.k.a. adverse impact, is the usual basis for language discrimination claims under Title VII. Although often brought by individual plaintiffs, these claims are in effect miniature class actions alleging that an employer's facially neutral rule has a disproportionate and disadvantaging effect on a protected class of workers. To make out a *prima facie* case of disparate impact, the plaintiff must show that a challenged practice has an adverse impact on a protected group.²¹⁰ Height and weight requirements, for example, tend to have a disparate impact on female job applicants.²¹¹ Often the adverse impact is shown by statistical evidence.²¹² Once impact is established, the burden shifts to the defendant to prove a business necessity for the rule or practice at issue.²¹³ Should the employer bear its burden of persuasion as to business necessity, the plaintiff has a last chance to establish that the employer has failed to implement an alternative practice that meets business requirements but imposes a lesser burden on the protected class.²¹⁴

Disparate impact claims reflect antidiscrimination principles, though less obviously than claims brought under a disparate

208. See *supra* notes 36–46 and accompanying text (noting concentration of persons who speak a LOTE in ten states).

209. *Hopkins*, 490 U.S. at 235.

210. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

211. See, e.g. *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements for prison guard position tended to disqualify women applicants).

212. See 1 BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 87 (3d ed. 1996).

213. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

214. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2000).

treatment theory. Adverse impact plaintiffs are targeting facially neutral rules that by definition do not treat workers within protected groups differently. Moreover, the Court has refused from the beginning to impose any requirement that plaintiffs demonstrate prejudice or animus on the part of employers, either directly or by inference. Disparate impact theory debuted in 1971 in *Griggs*, where Chief Justice Burger stated: “[A]bsence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability,”²¹⁵ and that “Congress directed [Title VII toward] the consequences of employment practices, not simply the motivation.”²¹⁶ Although there is some reason to doubt that the enacting Congress contemplated disparate impact claims under Title VII,²¹⁷ the Civil Rights Act of 1991 eliminated any doubts by codifying them.²¹⁸ Recently in *Raytheon Co. v. Hernandez*, the Supreme Court reaffirmed that disparate impact claims require no showing that an employer had a subjective intent to discriminate.²¹⁹ Thus, *Griggs* and the Civil Rights Act of 1991 can be read to create a substantive prohibition against unnecessary employment practices, however motivated, that adversely affect minorities, women, and other protected groups.

By focusing on the protection of groups from the unintentional effects of neutral practices, the adverse impact theory appears to diverge from the anti-discrimination model’s rejection of employment decisions made with conscious regard to stereotypes or immutable characteristics. Disparate *treatment* plaintiffs are charged with the burden of proving circumstances from which one can justifiably infer animus or stereotyping. A *prima facie* case under disparate treatment theory will boil down to allegations that the aggrieved plaintiff was similarly situated to other workers who were not similarly disadvantaged by an employer’s actions. For example, a female plaintiff might allege that she was better qualified for a position but was passed over in favor of a male with inferior credentials. The permutations are infinite, but we are willing to

215. *Griggs*, 401 U.S. at 432.

216. *Id.*

217. See, e.g., Kingsley R. Browne, *The Civil Rights Act of 1991: A “Quota Bill,” a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. L. REV. 287, 293 (1993) (suggesting the Congress enacting the Civil Rights Act of 1964 would have rejected disparate impact claims).

218. See *supra* note 200 and accompanying text; see also 1 LINDEMANN & GROSSMAN, *supra* note 212, at 85 (discussing codification of disparate impact rules).

219. 124 S. Ct. 513, 519 (2003).

declare a *prima facie* case once the allegations are substantial enough to force a defendant to explain its actions.

In disparate impact cases, however, the mere existence of a disparity of effect along racial, ethnic or gender lines does not usually create a strong inference of prejudicial motivation. If differential treatment is the heart of discrimination, the application of uniform qualification standards or work rules regardless of a worker's identity does little to suggest a reliance on stereotypes or bias. Contrary group-related outcomes may well reflect a good faith decision by an employer that has "discriminatory consequences." To be clear, I am not suggesting that all disparate impact scenarios are innocent. The facts of *Griggs* suggested that the employer was using newly imposed requirements of high school diplomas and aptitude test scores to maintain a segregated workplace.²²⁰ I am suggesting, however, that in the run of cases disparate outcomes are far less indicative of prejudicial intentions.

Some commentators view disparate impact cases as a thinly disguised form of affirmative action.²²¹ There is some merit to this argument in light of the Supreme Court's pronouncements that disparate impact liability exists independent of an employer's intent.²²² Nevertheless, adverse impact analysis also serves the function of opening the courts to discrimination claims that would otherwise fail for lack of proof. As already stated, employers generally are not foolish enough to state an illegal motivation for an adverse employment decision. Indeed, well counseled employers say as little as possible when discharging an employee. Disparate treatment analysis fills much of the proof gap by permitting an inference of discrimination from unequal treatment. Inference by comparison, however, is not useful in situations where treatment is uniform. Hence our choice is either to concede that superficially neutral practices—however motivated—are outside the effective

220. Duke Power had organized its Dan River plant into five departments. Black employees were restricted to the Labor Department while the four other "operating" departments hired white workers. Beginning in 1955, all departments except Labor required a high school diploma for initial hires. After enactment of the Civil Rights Act of 1964, Duke Power lifted its restriction of black employees to Labor but also imposed a new requirement that transfers from Labor to other departments have a high school diploma. The fact that white pre-1955 hires without high school diplomas continued to work and advance in the operating departments created distinct suspicions about Duke Power's corporate motives. See *Griggs*, 401 U.S. at 427-28. Similarly Duke Power's decision to require successful scores on two aptitude tests for news hires in all departments except labor, as well as a high school diploma, seemed suspicious. See *id.* at 428.

221. See, e.g., Browne, *supra* note 217 (interpreting disparate impact as form of affirmative action).

222. Hernandez, 540 U.S. 40 (holding that disparate impact does not require showing of intent to discriminate).

reach of Title VII, or to erect a presumption that disparate outcomes are ill motivated. Disparate impact cases silently do the latter.

By raising a *prima facie* case upon a showing that a neutral rule adversely impacts a protected group, a disparate impact plaintiff in effect creates an evidentiary presumption that the rule has been influenced by an illegitimate consideration. A literal reading of *Griggs* and its progeny might lead one to believe that the undesirability of adverse consequences arising from workplace policies that cannot meet a business justification (without regard to stereotypes connected with immutable traits) is a sufficient basis for creating disparate impact liability. Accepting this argument, however, implicitly ratifies criticisms that disparate impact is a front for affirmative action. The better approach is to regard proof of adverse impact as evidence of discriminatory intent subject to rebuttal by the defendant. The burden-shifting scheme for disparate impact cases does so in practice. Title VII does not say this explicitly, but the presumption of wrongful motivation follows from the fact that the burden shifts to the employer affirmatively to demonstrate that the rule is “job related for the position in question and consistent with business necessity.”²²³ Business necessity represents a dividing line between legitimate and forbidden motivations. If an employer has acted in a commercially reasonable way, then we can safely release him from the presumption of prejudice.

Recast as a presumption of discriminatory intent, disparate impact claims partake of many aspects of the anti-discrimination model. The *de facto* denial of employment opportunities on racial and related grounds, even if ultimately justifiable, triggers concerns for the dignitary (and pecuniary) interests of certain classes of our citizenry. While unequal outcomes from neutral rules are less suspicious than those from differential treatment, our national history of discrimination against particular groups calls for some level of skepticism whenever employment practices yield a discriminatory result. It is not unreasonable to question whether stereotypes inspired by immutable characteristics have led to particular results in the workplace.

That said, I would not argue that our present system of disparate impact analysis is finely tuned to this task. For example, we place defendants in disparate impact claims under a burden of *persuasion* to offer a business justification whenever plaintiffs demonstrate

223. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2001).

that a neutral rule produces unequal outcomes for a protected class.²²⁴ Disparate treatment defendants, in contrast, are held to a lesser burden in responding to a *prima facie* case, namely to articulate a legitimate reason for a different outcome.²²⁵ The disparity of evidentiary burdens is remarkable, given that the inference of discrimination will normally be stronger in a disparate treatment case.

The concepts of “job relatedness” and “business necessity” are also not well defined. The legislative history of the Civil Rights Act of 1991²²⁶ indicates that Congress intended that these terms have the meaning attributed to them in the *Griggs* case, and that it meant to overturn the pro-defendant construction of *Wards Cove Packing Co. v. Antonio*, which asked only that employers demonstrate that a challenged practice “serve[], in a significant way, the legitimate employment goals of the employer.”²²⁷ The leading treatise on employment discrimination notes that, although it is clear that Congress intended in the 1991 Act to restore the status quo before *Ward’s Cove*, it is not evident that *Griggs* and other pre-*Wards Cove* decisions viewed “business necessity” as requiring a heightened showing of necessity.²²⁸ If business necessity does indeed entail more than a showing of business advantage, then one might argue that Title VII exceeds the antidiscrimination model’s focus on irrelevancy of immutable characteristics in favor of affirmative action.

224. See *supra* note 201 and accompanying text.

225. See *supra* note 191 and accompanying text.

226. See LINDEMANN & GROSSMAN, *supra* note 212, at 106 (reviewing legislative history of Civil Rights Act of 1991).

227. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 659 (1989).

228. 1 Lindemann & Grossman, *supra* note 212, at 107. Lindemann and Grossman note that language in *Griggs* implied that the terms “job related” and “business necessity” were synonymous:

[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

Id. (quoting *Griggs*, 401 U.S. at 431). They further note that the substantive requirements of these terms were left unclear, leading the lower courts to split interpretations. *Id.* (comparing *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971) (holding that the business necessity defense requires employers to prove that a practice is “necessary to the safe and efficient operation of the business”) with *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1280 (9th Cir. 1981) (holding that a defendant must show that the practice serves employer’s legitimate interest, but not that it is necessary or required)).

It is more reasonable, however, to view any heightened interpretation of job relatedness and business necessity as a prophylactic evidentiary requirement that reduces the possibility that employers will engage in the socially unacceptable consideration of irrelevancies, such as race or gender, in the workplace. A similar argument can be made regarding a plaintiff's rejoinder arguments that effective practices with less discriminatory impact are available to employers. One might say that Title VII is forcing a court to choose between two legitimate, rational practices. The response is similar: in the event that two practices can meet the employer's needs,²²⁹ adopting the one with less adverse impact decreases the likelihood that impermissible considerations taint workplace judgments.

At any rate, there is little wonder that plaintiffs in language discrimination cases have opted for the disparate impact strategy. First and foremost, adverse impact claims require no proof of animus, only disparate impact.²³⁰ The aforementioned difficulties of proving animus by direct or inferential means under a disparate treatment theory naturally lead language discrimination plaintiffs toward the adverse impact side of Title VII. There are other advantages. It is relatively easy to argue that a language minority has been affected by a workplace language rule. A rule requiring that workers communicate exclusively in English can safely be ignored by native-English speakers. Employees who speak Spanish as their native tongue must alter their speech behaviors to conform to the policy.²³¹ Most courts, however, have read Title VII to require a

229. Certain critical issues regarding practices with less impact are unresolved by the courts. There is no consensus on how effective a substitute practice must be, i.e., must the alternative be equally efficacious or no more costly? Second, there is disagreement over whether plaintiffs must show that employers had actual knowledge of the alternative. See generally *id.* at 87.

230. *Griggs*, 401 U.S. at 430–31 (1970).

231. See *Spun Steak*, 998 F.2d at 1486:

It is beyond dispute that . . . if the English-only policy causes any adverse effects, those effects will be suffered disproportionately by those of Hispanic origin. The vast majority of those workers at Spun Steak who speak a language other than English—and virtually all those employees for whom English is not a first language—are Hispanic. It is of no consequence that not all Hispanic employees of Spun Steak speak Spanish; nor is it relevant that some non-Hispanic workers may speak Spanish. If the adverse effects are proved, it is enough under Title VII that Hispanics are disproportionately impacted.

demonstration of significant impact on the protected group.²³² The *Spun Steak* court, for example, turned away a language discrimination claim on grounds that the effect on Spanish speaking employees was not significantly adverse.²³³ Once over this hurdle, however, the burden shifts permanently to the defendant to justify practices with discriminatory effects as “job related for the position in question and consistent with business necessity.”²³⁴ Even if the employer meets this ill-placed burden,²³⁵ the plaintiff has one more bite at apple, i.e., he may argue that a less restrictive option was available.

IV. TITLE VII LANGUAGE CLAIMS AND THE CIVIL RIGHTS MODEL

I have argued in the preceding Part that Title VII has developed around an anti-discrimination model that seeks to promote equality through taking certain tainted criteria out of an employer’s assessments. The key assumptions of the civil rights model are that decisions that touch on immutable characteristics, such as race or gender, yield results that are unfair because they demean, leave the individual unable to respond, and introduce irrelevancies into employment decisionmaking. The solution is a historically informed skepticism that is executed through the evidentiary presumptions of disparate treatment and adverse impact analysis.

Even proponents of minority language rights in the workplace must concede that Title VII is an awkward policy tool. Language discrimination claims rarely invoke the assumptions of the civil rights model. Even if we presume that language is an inseparable aspect of ethnicity or national origin (I will challenge this assumption momentarily), we must acknowledge that language is neither an immutable characteristic nor is it irrelevant to the proper management of the workplace. In fact, the vast majority of workers who speak a LOTE are bilingual and capable of communicating well in English. The problem is, therefore, not whether employees are being unfairly and irrationally judged; rather, the issue is whether

232. See *id.* at 1485 (citing *Spaulding v. University of Washington*, 740 F.2d 686, 705 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984) (“[T]he requirements of a prima facie disparate impact case . . . are in some respects more exacting than those of a disparate treatment case.”)).

233. *Id.*

234. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2001).

235. See *supra* notes 226–28 and accompanying text.

and to what degree employees should be granted a right to communicate in a language of their choice. The antidiscrimination model is not designed to answer questions of this sort.

In this Part, I argue that language discrimination claims do not fit the anti-discrimination model utilized by Title VII. Subpart A begins the analysis by examining the statute itself and its development by the courts. I review the legislative history of Title VII and conclude that the enacting Congress probably did not intend to offer protection against language discrimination. I also dismiss arguments that subsequent legislation or administrative agency actions have effectively broadened Title VII to reach language claims. I conclude Subpart A by examining issues that have been left open by the courts. My conclusion is that Title VII as presently construed cannot be stretched to reach language discrimination claims.

Beginning with Subpart B, I shift emphasis from what Title VII actually does to what it might do to promote the equality interests of workers who speak LOTEs. One key assumption of the civil rights model is that persons should be protected against consideration of certain defining conditions that are immutable and irrelevant. Subpart B argues that language is hardly an immutable trait, but instead a characteristic within personal control. Because individuals are capable of learning new languages—and in the American context have done so admirably well—the anti-discrimination model’s concerns over burdening them with inescapable stereotypes applies with diminished force. In limited instances, persons will tend to revert from English to their primary languages though a phenomenon called “code-switching.” Designing claims that reach these occasional lapses but not volitional behavior would be prohibitively difficult. I also review, with a large dose of skepticism, the related argument that use of one’s primary language is sometimes involuntary and language is an essential aspect of ethnic or cultural identity.

In Part IV(C), I move on to the employer’s case for workplace language restrictions. While language rules obviously burden employees who speak a LOTE as their primary language, they also serve important and neutral business purposes. Hence there is little reason to fear that irrelevant factors will taint an employer’s judgments. My ultimate conclusion, given in Subpart D, is that issues of language regulation in the workplace trigger so few of the interests protected by the civil rights model that it would be inap-

propriate to employ the skeptical framework of Title VII to such claims.

A. Does Title VII Embrace Language Discrimination Claims?

1. *The Original 1964 Enactment*—Language is not mentioned in the text of Title VII. The operative language of Section 703(a)(1) of the Act forbids discrimination in employment “because of such individual’s race, color, religion, sex, or *national origin*.”²³⁶ A companion provision, Section 703(a)(2), outlaws attempts “to limit, segregate, or classify” employees on the same grounds.²³⁷ Nor does the topic of language discrimination come up in the legislative history of the Act. The closest approximation is the Act’s recognition of “national origin” as a basis for discrimination. One can fashion arguments in the abstract that there is a relationship between an immigrant’s country of origin and his primary language. There is scant evidence, however, that the enacting Congress entertained them.²³⁸

Little was said during the Civil Rights Act’s journey through Congress to clarify the meaning of “national origin.” Direct discussion of the meaning of “national origin” is confined to two statements made during floor debate. Representative Roosevelt offered a restrictive opinion that national origin means “the country from which you or your forebears came from.”²³⁹ He apparently wanted to make clear that labor unions could utilize a language BFOQ for its own hires when the union was dealing with immigrant workers who spoke the language of their homelands.²⁴⁰ Representative Dent added that “[n]ational origin, of course, has nothing to do with color, religion, or the race of an individual.”²⁴¹ Dent further added that “[a] man may have migrated here from Great Britain and still be a colored person.”²⁴² The implications of protecting citizens from national origin discrimination also

236. 42 U.S.C. § 2000e-2(a)(1) (2001) (emphasis added).

237. 42 U.S.C. § 2000e-2(a)(2) (2001).

238. See *Espinoza*, 414 U.S. at 88–89 (characterizing the legislative history of “national origin” discrimination as slight). See generally Perea, *supra* note 72, at 817–21 (reviewing legislation history and concluding that Congress understood national origin in Title VII to mean the nation of one’s birth or ancestry).

239. 110 CONG. REC. 2549 (1964).

240. 110 CONG. REC. 2550 (1964).

241. 110 CONG. REC. 2549 (1964).

242. *Id.*

prompted scattered comments. Representative Rodino opined that national origin might be a bona fide occupational qualification for employees in an ethnic restaurant.²⁴³ Senator Humphrey stated that African-Americans had been denied access to public facilities because of "their ethnic origin, their national origin."²⁴⁴ Senator Dirksen thought that the national origin terminology might pose problems for defense contractors requiring security clearances.²⁴⁵ Congress appears to have equated national origin with "ancestry"; the latter term was deleted from the final version of the Act as redundant.²⁴⁶

There is no clue in the legislative history that Congress was concerned with ethnic or national traits such as language. Congressman Dent's statement separating the concept of national origin from color, religion, and race has been criticized as artificial.²⁴⁷ Perhaps he did overlook rather obvious connections between country of origin and a variety of traits such as ethnicity, religion, or language. Perhaps he felt that such qualities were protected by other terms within Title VII. Who knows? The accuracy of Dent's statement, however, has nothing to do with the task of divining Congressional intent. Nor should the lack of focus on language surprise us. Congress's prime motivation in forbidding racial discrimination in employment was to protect African-Americans from arbitrary and unfair exclusions from the labor market.²⁴⁸ America in 1964 was a black and white society. African-Americans constituted 10% of the population while Caucasians made up most of the balance.²⁴⁹ The great influx of immigrants from Latin America

243. 110 CONG. REC. 2549 (1964).

244. 110 CONG. REC. 12,580 (1964). *See also id.* at 6562 (statement of Sen. Kuchel) (referring to problems faced by "a Negro or a Puerto Rican or an Indian or a Japanese-American or an American of Mexican descent"); *id.* at 7375 (statement of Sen. Kennedy) (stating that his home state of Massachusetts had "absorbed every racial nationality group, from the Puritans to the Poles to the Puerto Ricans").

245. 110 CONG. REC. 6450 (1964).

246. *See* Espinoza, 414 U.S. at 89 (citing H.R. REP. NO. 914 (1964)).

247. *See* Perea, *supra* note 72, at 818 n.76 (citing Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 379 and Martha Minow, *Equalities*, 88 J. PHIL. 633, 635 (1991)).

248. *See, e.g.*, 110 CONG. REC. 2556 (1964) (statement of Sen. Humphrey) (explaining that the purpose of Title VII was "to extend to Negro citizens the same rights and the same opportunities that white Americans take for granted"); *id.* at 7218 (statement of Sen. Clark) ("[Title VII] simply eliminates consideration of color from the decision to hire or promote."); *id.* at 110 CONG. REC. 13,088 (statement of Sen. Humphrey) (explaining that Title VII makes race an illegal consideration in denial of employment).

249. *See* Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 958 (1995) (citing Bureau of the Census, U.S. Department of

had not yet occurred, and thus the situation was quite different from today where Hispanic-Americans form the largest minority community in America.²⁵⁰ Fluency in English was one of the few areas in which African-Americans did not encounter barriers to employment, implying that language preferences were not something that concerned Congress while enacting the Civil Rights Act of 1964. The Supreme Court has construed the national origin provision only once, holding that Title VII does not forbid discrimination on the basis of citizenship but recognizing that citizenship qualifications might be a pretext for national origin discrimination.²⁵¹

Some lower courts have accepted the equivalence of language and national origin for the sake of argument. Judge Rubin's opinion in *Garcia v. Gloor* acknowledges the "importance of a person's language of preference or other aspects of his national, ethnic or racial self-identification,"²⁵² although he would exclude mutable "ethnic or sociocultural traits" aside from religion from Title VII's concept of national origin.²⁵³ Other courts are somewhat more indulgent of the connection between national origin and language. Judge O'Scannlain's opinion in *Garcia v. Spun Steak Co.*, for example, concedes that "[i]t cannot be gainsaid that an individual's primary language can be an important link to his ethnic culture and identity."²⁵⁴

Arguments over the connection between language and national origin, however, have played no decisive role in the resolution of Title VII language cases. Generally such claims are disparate impact cases turned away for failure of proof. The lead case of *Spun Steak* is typical. Proceeding under an adverse impact theory, bilingual plaintiffs claimed that their employer's English-only policy

Commerce, Census of Population 1960, Characteristics of the Population, pt. 1, at 145 tbl. 44 (1964)).

250. The 2000 Census indicated that Hispanics constituted 12.5% of the population, compared with 12.3% for African Americans. See *Census PHC-T-1, Population by Race Alone, Race in Combination Only, Race Alone or in Combination, and Hispanic or Latino Origin, for the United States: 2000*, available at <http://www.census.gov/population/cen2000/phc-t1/tab03.pdf> (on file with the University of Michigan Journal of Law Reform). Hispanics numbered 37.4 million, or 13.3% of the population, in 2002. See U.S. Census, *The Hispanic Population in the United States: March 2002*, available at <http://www.census.gov/prod/2003pubs/p20-545.pdf> (on file with the University of Michigan Journal of Law Reform).

251. *Espinoza*, 414 U.S. at 91-93.

252. 618 F.2d 264, 270 (5th Cir. 1980). See also *Hernandez v. New York*, 500 U.S. 352 (1991) (plurality opinion, Kennedy, J.) ("Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond.").

253. *Id.*

254. 998 F.2d 1480, 1487 (9th Cir. 1993).

disadvantaged them by depriving them of the ability to express their cultural heritage on the job and by denying them a privilege of employment—conversations in a preferred language—that was available to English-speaking employees.²⁵⁵ Judge O’Scannlain acknowledged that the Spanish-speaking workers felt the adverse effects of the work rule disproportionately, but then reasoned that such consequences were not the actual, significant impact required by a disparate impact case.²⁵⁶ The asserted injuries were, in effect, requests for substantive privileges that other workers did not have. Unless conferred by an employer or a collective bargaining agreement, workers have no right to cultural expression or to conversation in any language.²⁵⁷ Hence the alleged injuries impact in a factual, but not a legal, Title VII sense.

Because most Title VII language actions are based on disparate impact, and since most employers retain vast discretion to set work rules, the *Spun Steak* analysis has obviated the need to decide the scope of “national origin.” The adverse impact requirement does not apply to disparate treatment claims, but these are rare in the language context.²⁵⁸ Recently the Court had the opportunity to decide whether national origin discrimination under Title VII included language discrimination, but instead resolved *Alexander v. Sandoval* by holding that plaintiffs had no private cause of action to enforce disparate impact claims.²⁵⁹ Given the federal courts’ coldness to Title VII language claims, I suspect that they would take a more restrictive view of “national origin” if a decision actually turned on the definition of this term.

A broad construction of “national origin” is not, I concede, inevitable. Legislation sometimes reaches situations that its framers never contemplated. In *Oncale v. Sundowner Offshore Services, Inc.*,²⁶⁰ the Court determined that Title VII reached same-sex sexual harassment. Justice Scalia’s opinion noted that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII,”²⁶¹ but concluded that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.”²⁶² A conclusion that

255. *Id.* at 1486–87.

256. *Spun Steak*, 998 F.2d at 1486.

257. *Id.*

258. *Jurado v. Eleven-Fifty Co.*, 813 F.2d 1406 (9th Cir. 1987) is a rare example of a language discrimination claim tried in part under a disparate treatment theory.

259. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

260. 523 U.S. 75 (1998).

261. *Id.* at 79.

262. *Id.* at 79–80.

language discrimination claims are embodied in Title VII, however, would require a remarkably elastic approach to “national origin.” Same-sex harassment bears an apparent relationship to sexual harassment in general, and can be reconciled with the text of Title VII forbidding discrimination “because of sex.”²⁶³ In contrast, the concept of “national origin” does not so evidently include use of language, nor does the statutory terminology necessarily embody it. An employer who hangs out a “No Irish Need Apply” sign would be properly sued by a plaintiff whose grandparents had forgotten their childhood Gaelic. There are arguments that language and race or ethnicity are inextricably linked, which I will take up in Part IV(B). Whatever their merit, there is nothing in the language or history of Title VII that suggests, much less compels them.

2. *The Civil Rights Act of 1991*—An argument that Title VII now embraces language discrimination claims comes not from the Civil Rights Act of 1964, but from the legislative debate surrounding the Civil Rights Act of 1991. The 1991 Act was intended largely to overrule a series of narrow interpretations of Title VII and other civil rights statutes from the Supreme Court’s 1988 term.²⁶⁴ During floor debate, Senator DeConcini asked Senator Kennedy about the effects of the 1991 Act on existing EEOC guidance. *The Guidelines on Discrimination Because of National Origin* had created a nearly conclusive presumption that work rules requiring the use of English at all times were discriminatory; rules demanding exclusive use of English only at certain times required that the employer show business necessity.²⁶⁵ Their colloquy was as follows:

Mr. DeConcini: I thank the Senator. I also have another matter that I would like to discuss. This is the issue of work place rules which require the speaking of only one language. Many of my constituents have brought to my attention an increasing problem with non job-related discipline and termination of people for speaking languages other than English in the workplace. Is the Senator aware of the EEOC regulations dealing with this problem?

263. 42 U.S.C. § 2000e-2(a)(1) (2001).

264. See Pub. L. No. 102-166, 105 Stat. 1071 (finding that the “decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), has weakened the scope and effectiveness of Federal civil rights protections”); see also, e.g., Carl Tobias, *Rehnquist or Rorty*, 20 HOFSTRA L. REV. 211, 213 (1991) (noting that Civil Rights Act of 1991 was intended to correct decisions from the 1988 Term of the Court).

265. EEOC Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.7.

Mr. Kennedy: Yes, the EEOC promulgated such regulations in 1980.

Mr. DeConcini: These regulations reflect the fact that the primary language of an individual is often an essential national origin characteristic. Does the Senator agree that these regulations found in 29 CFR 16067.7 [sic] provide a sound and effective method for dealing with this problem?

Mr. Kennedy: Yes, I agree that this regulation has worked well during the past 11 years it has been in effect.

Mr. DeConcini: Does the substitute to S. 1745 in any way adversely affect the EEOC regulation on language use in the workplace.

Mr. Kennedy: No, it does not.

Mr. DeConcini: Therefore, if S. 1745 is passed and signed into law by the President, the EEOC regulations would be consistent with [T]itle VII as amended by S. 1745.

Mr. Kennedy: That is correct.²⁶⁶

I will defer comment on the EEOC Guidance until the following section. For the moment, the important question is whether the floor debate regarding the EEOC regulations reveals an intent by Congress to expand Title VII to cover language discrimination claims. The answer is far from clear, but I doubt that this is so. Ideally a legislative decision to expand or clarify the scope of a statute would be expressed by an explicit textual charge, something like: "National origin discrimination under Section 703(a)(1-2) of this Act shall include claims of discrimination based on primary language." Such a formulation would undoubtedly establish plain statutory meaning to which the Supreme Court would likely pay significant deference.²⁶⁷ In the absence of direct statutory amendment, we would prefer a statement in a committee report

266. 137 CONG. REC. 15,489.

267. See, e.g., *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (applying plain meaning doctrine to disallow consideration of corrective measures in determining whether plaintiffs were disabled under the Americans with Disabilities Act.). See generally NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:01 (2002) (discussing plain meaning doctrine).

indicating a view that Title VII reached language claims,²⁶⁸ although this method of proof is hardly a guarantee of success.²⁶⁹ Here we have neither of the preferred expressions of legislative will. Instead, we have the opinion of two Senators confirming an agency rule but not precisely saying that Title VII directly forbids language discrimination.

At best, we can conclude that the 1991 Act drew language discrimination claims into the national origin category only by inference. One can argue that Congress legislates against a regulatory background that often gives content to statutory provisions. In *Heckler v. Turner*, for example, the Court construed a section of the Social Security Act dealing with calculation of "earned income" under the former AFDC program in line with a pre-existing HEW regulation excluding income tax withholdings from calculations, although the Act was silent as to the issue.²⁷⁰ The *Turner* Court pointed to the "administrative background" as an indication of Congress's intent.²⁷¹ Similarities between the Civil Rights Act of 1991 and the Social Security provision in *Heckler*, however, end quickly. Provisions relating to the calculation of earned income under the AFDC program fell within the focus of the 1981 Social Security Act amendments in OBRA (Omnibus Budget Reconciliation Act).²⁷² Language discrimination claims had little to do with the corrective purposes of the Civil Rights Act of 1991. The 1991 Act was intended largely to reinvigorate disparate impact claims after the Court had savaged them during its 1988 Term. Congress did so by explicitly codifying disparate impact claims. Expanding or clarifying the scope of national origin discrimination had nothing to do with the statutory agenda.

Although we often give deference to statements by committee chairmen or legislative sponsors during floor debate,²⁷³ Senator Kennedy's comments seem isolated. The Court's recent decision

268. See SINGER, *supra* note 267, § 11:14 (explaining that legislative committee reports "provide the key to general vindication, validation and acceptance of the legislative process."); 2A *id.* § 48:06 (reports of standing committees are sources for determining intent of legislature).

269. See, e.g., *Peirce v. Underwood*, 487 U.S. 552, 564-65 (1998) (holding that the House Committee report relating to 1985 re-enactment of Equal Access to Justice Act is not an authoritative statement of what the original enacting Congress intended in 1980); *Securities and Exchange Commission v. Sloan*, 436 U.S. 103 (1978) (holding that approval of SEC practice in committee report attendant too isolated to presume Congressional intent to alter meaning of re-enacted provision).

270. *Heckler v. Turner*, 470 U.S. 184, 195 (1985).

271. *Id.*

272. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357.

273. SINGER, *supra* note 267, § 48:14 (deference to statements of committeemen); 2A *id.* § 48:15 (deference to statements of bill sponsors).

in *Cline*, moreover, indicates a diminishing interest in crediting statements of bill sponsors.²⁷⁴ Respondents in *Cline* relied on statements of Senator Yarborough, a sponsor of the Age Discrimination in Employment Act of 1967, to argue that the Act protected younger workers from discrimination against older workers within the 40 year or older protected class.²⁷⁵ Justice Souter rejected the argument, reasoning that Yarborough's statements were the only treatment of the issue in the legislative history and were consistently contradicted by judicial interpretations.²⁷⁶ In other words, Yarborough was a solitary and mistaken voice. The Kennedy-DeConcini colloquy is a similarly isolated statement from a debate on a statute that did not address language claims and which referred to an EEOC regulation that the lower courts have largely rejected.²⁷⁷ At any rate, an equally plausible construction of the senatorial exchange is that they regarded the Guidance as a valid administrative agency action. This is an altogether different concept which we will now discuss.

3. *EEOC Guidelines*—Whatever ambiguity may inhere in the statutory concept of national origin, the EEOC has issued rules that unambiguously treat language discrimination as a violation of Title VII under prescribed circumstances. In its *Guidelines on Discrimination because of National Origin*, the Commission provides for “Speak-English-only rules” as follows:

(a) When Applied at all Times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.

274. General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004).

275. See *id.* at 1247.

276. *Id.* at 1247–48.

277. See *infra* Part IV.A.3.

(b) When Applied Only at Certain Times. An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.²⁷⁸

There is also a notice provision requiring that employers inform workers of the “general circumstances when speaking only in English is required and of the consequences of violating the rule.”²⁷⁹

Adopted in 1980 in response to the Fifth Circuit’s decision in *Garcia v. Gloor*,²⁸⁰ the Commission’s language regulation identifies English-only rules as potential variants of national origin discrimination. Section 1606.7 also equates language restrictions with other forbidden acts under Title VII by treating them as possible allegations of disparate impact. Section 1606.7(a) presumes that rules requiring use of English at all times violate Title VII. Unlike Section 1606.7(b), there is no reference to the business necessity defense that is normally available to defendants in disparate impact claims. One could read the “All Times” rule of Section 1606.7(a) as creating a conclusive presumption of discrimination. The EEOC’s commentary, however, seems to indicate that the Commission envisioned that an employer would have a chance to defend its rule.²⁸¹ Section 1606.7(b)’s “Certain Times” rule, with its explicit reference to the business necessity defense, fits more closely into disparate impact analysis.

Enforcement of the EEOC guidelines would place plaintiffs in a strong position to pursue language claims under a disparate impact theory. Yet claimants have been unsuccessful in persuading courts to defer to the EEOC language regulations. This outcome is hardly surprising. The easy path to judicial acceptance of agency rules can be reduced to two words: *Chevron* deference. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁸² the Court affirmed the principle that the federal courts should respect agency regulations whenever Congress has expressly delegated rulemaking power to the agency and the regulations are not “arbitrary, capricious or manifestly contrary to the statute.”²⁸³ Substantive regulations concerning Title VII promulgated by the EEOC do not get *Chevron* deference, since Congress only granted the EEOC power to make

278. 29 C.F.R. § 1606.7 (2003) (footnotes omitted).

279. 29 C.F.R. § 1606.7(c) (2003).

280. See 45 Fed. Reg. 85,635 (1980) (discussing *Garcia v. Gloor*).

281. See *id.* (“[T]he mere application of such a rule would shift the burden to the employer.”).

282. 467 U.S. 837 (1984).

283. *Id.* at 844.

procedural rules.²⁸⁴ At best, such regulations are entitled to *Skidmore* deference.²⁸⁵ The key factor is the rule's power to persuade. A court credits an agency's experience and expertise in enforcing a statutory scheme, and judges an agency rule by the "thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements. . . ."²⁸⁶

Skidmore, unlike *Chevron*, gives the courts wide latitude to accept or reject an agency rule. Frankly, the *Skidmore* standards for thoroughness, cogency, and consistency provide so little guidance that a cynical assessment of them is probably correct. Justice Stewart's comment in *Albemarle Paper* that EEOC guidelines were "entitled to great deference" has given way to more recent, restrictive applications, such as in *Sutton*.²⁸⁷ Justice O'Connor's opinion in *Sutton* exemplifies the present Court's increasingly skeptical attitude regarding agency actions. A person is disabled under the Americans with Disabilities Act upon proof that an impairment substantially limits a major life activity.²⁸⁸ The issue in *Sutton* was the effect of EEOC Interpretive Guidance indicating that corrective measures, such as spectacles, should not be considered in the test for substantial limitations. The Court dismissed the EEOC pronouncement in two steps. First, it indicated that no agency was authorized by Congress to issue regulations under the definitional section of the ADA—a debatable conclusion,²⁸⁹ but sufficient in itself to wave off *Chevron* deference. Second, the Court held that the EEOC's guidance, whatever respect it might be owed, was a misinterpretation of

284. See 42 U.S.C. § 2000e-12(a) (2001) (granting EEOC "authority from time to time to issue . . . suitable procedural regulations to carry out the provisions of this subchapter"). See also *General Elec. Co. v. Gilbert*, 429 U.S. 125, 140 (1976) (holding that the EEOC does not have general rulemaking authority under Title VII); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975).

285. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). See also *Christensen v. Harris County*, 529 U.S. 576 (2000) (holding that the agency's opinion letter lacking the force of law does not warrant *Chevron*-style deference).

286. *Id.* at 140. See also *Meritor Sav. Bank, FSB v. Vinson* 477 U.S. 57, 65 (1986) ("As an administrative interpretation of the Act by the enforcing agency, [EEOC sexual harassment guidelines] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.") (internal quotation marks and citations omitted).

287. *Sutton v. United Airlines*, 527 U.S. 471 (1999).

288. 42 U.S.C. § 12102(2) (2001).

289. *Id.* at 514–15 (Breyer, J., dissenting) (arguing that there is no evidence that Congress would not have wanted the EEOC to issue definitional regulations).

the plain meaning of the statute²⁹⁰ in spite of legislative history indicating that Congress had contemplated the opposite.²⁹¹

Sutton's willingness to couple *Skidmore* deference with the plain meaning rule spells trouble for those who wish to defend Section 1606.7. Courts wanting to avoid the effect of the EEOC regulation can argue plausibly that the statutory term "national origin" does not embrace language.²⁹² Even if we determine that "national origin" is an ambiguous term, resort to the legislative history does little to promote the EEOC's position. As discussed in Subpart A(1), *supra*, language concerns played no visible role in Congress's sparse discussion of national origin discrimination. Judge O'Scannlain's *Spun Steak* opinion, however, takes the analysis a step further. Noting that a court owes no deference to a regulation in the face of "compelling indications that it is wrong,"²⁹³ he faulted section 1606.7 for upsetting the implicit balance between worker rights and employer prerogatives. Specifically, he argued that section 1606.7's presumption that English-only policies have a disparate impact departs from the requirement that a plaintiff establish such an impact to raise a *prima facie* case.²⁹⁴

Judge O'Scannlain's criticisms of the EEOC rule have merit. Statements that Congress intended to strike a balance between worker and employer interests are too vague to resolve specific issues convincingly. The observation that the EEOC is improperly lightening the burden of plaintiffs is far more plausible. Under the *McDonnell-Douglas* scheme for disparate *treatment* cases, the typical plaintiff faces a rather minimal burden of establishing a *prima facie* case. Ease of proof is tolerable since a *prima facie* case only taxes the defendant with the need to articulate a neutral justification for its actions. The burden of proof remains at all times with the plaintiff. A *prima facie* case under disparate *impact*, however, shifts the burden of persuasion to the defendant. Imposing a higher evidentiary standard on the disparate impact plaintiff, i.e., a showing of actual and significant impact, is a reasonable precondition for shifting the burden of proof to the defendant. Section 1606.7 undercuts

290. *Id.* at 482.

291. *See, e.g.*, H.R. REP. NO. 101-485 (III) at 28 (1990) (Report of House Committee on the Judiciary) (instructing that in determining whether impairment is substantially limiting, it "should be assessed without considering whether mitigating measures . . . would result in a less-than-substantial limitation."); H.R. REP. No. 101-485 (II) at 52 (1990) (Report of House Committee on Education and Labor).

292. *See, e.g.*, *Spun Steak*, 998 F.2d at 1489 ("Nothing in the plain language of section 703(a)(1) supports the EEOC's English-only rule Guideline.").

293. *Spun Steak*, 998 F.2d at 1489.

294. *Id.* at 1489-90.

this procedural safeguard by putting the defendant to the proof of business necessity on an unproved allegation of differential impact. In dissent, Judge Boochever cast section 1606.7 as an enlightened evidentiary rule, a tie-breaker that reflects the difficulty of proving adverse impact and spares the court of hearing “conclusory self-serving statements of the Spanish-speaking employees or possibly by expert testimony of psychologists.”²⁹⁵ While Judge Boochever’s statements appeal to my view of expert psychological testimony as a commodity for sale on the market, Judge O’Scannlain has the better take. The notion of a “tie-breaker” seems inappropriate when disparate impact analysis is designed to subject plaintiffs to a substantial evidentiary test before the burden of proof shifts to defendants.

Section 1606.7 can likewise be faulted for finding impact when there may be none. As discussed in greater detail, *supra*, Judge O’Scannlain’s analysis turned on the failure of the plaintiffs to establish that the English-only rule had a significant impact on them. Allegations that plaintiffs were deprived of opportunities for cultural expression and conversation in their language of choice were insufficient since they involved activities to which they had no right in the workplace unless conceded by their employer.²⁹⁶ By reducing a *prima facie* case to an allegation of an English-only policy, the EEOC rule implicitly creates cultural and linguistic rights that do not otherwise exist. Section 1606.7 therefore improperly crosses the border between equality and affirmative action. This expansion of the statute is far too legislative to deserve deference. While proposals to endow workers with such rights have considerable academic support,²⁹⁷ these are not concepts that fit the equality model underlying Title VII. I suspect, incidentally, that much of the questionable testimony feared by Judge Boochever in *Spun Steak* would relate to discomfort over lost opportunities for cultural expression that are not covered by Title VII.

295. *Id* at 1490 (Boochever, J., dissenting in part).

296. *Spun Steak*, 998 F.2d at 1486.

297. See, e.g., Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997) (criticizing narrow application of Title VII to language claims); see also Mark Colon, Note, *Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees*, 20 YALE L. & POL’Y REV. 227 (2002). Juan F. Perea, *English-Only Rules and the Right to Speak One’s Primary Language in the Workplace*, 23 U. MICH. J.L. REFORM 265 (1990) (arguing that use of primary language should constitute a protected aspect of national origin under Title VII); Perea, *supra* note 72.

In a similar vein, section 1606.7 can also be criticized for mixing the concepts of disparate impact and hostile environment claims. Section 1607(a) deems rules applied at all times to be possible instances of hostile working environments. I would suggest that a presumption of discrimination is even more inappropriate for claims sounding in disparate treatment. Hostile environment plaintiffs have the fact-sensitive burden of demonstrating that the harassment was so "severe or pervasive as to alter the conditions of . . . employment."²⁹⁸

Perhaps one could rescue the EEOC's language rules by resort to the practice of deferring to agency interpretations that Congress has failed to correct. In *United States v. Rutherford*,²⁹⁹ the Court held that there was no exception for the terminally ill under the Federal Food, Drug and Cosmetic Act's pre-approval requirements for drugs. The decision turned in part on the failure of Congress to alter a longstanding Food and Drug Administration practice on this point.³⁰⁰ Certainly one could argue from the Kennedy-DeConcini dialogue that Congress was aware of the EEOC regulation and therefore that the rule deserves the deference of legislative acquiescence. At some point, however, the *Rutherford* approach must give way when the agency interpretation is simply wrong. *Rutherford* itself approved of administrative policies that "comport[] with the plain language, history, and prophylactic purpose of the Act."³⁰¹ The recent *Cline* decision affirms this limitation with its general statement that agency deference of any level does not come into play unless judicial rules for statutory construction fail to reveal Congressional intent,³⁰² and that no deference is

298. *Meritor*, 477 U.S. at 67 (internal quotation marks and citations omitted). See also *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (finding that Title VII reaches harassment "so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment") (internal quotation marks and citations omitted).

299. 442 U.S. 544 (1979).

300. *Id.* at 554 n.10.

[D]eference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives. Unless and until Congress does so, we are reluctant to disturb a longstanding administrative policy that comports with the plain language, history, and prophylactic purpose of the Act.

Id. (citations omitted). See also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 (1969) (finding that deference is owed when Congress refuses to respond to administrative construction).

301. *Rutherford*, 442 U.S. at 554.

302. *Cline*, 124 S. Ct. at 1248.

owed when an agency's interpretation is incorrect.³⁰³ As argued above, neither the plain meaning nor the legislative history of the 1964 Act show any intention to treat language restrictions as a form of national origin discrimination. Congress's failure to respond to section 1606.7 should have no more significance than its failure to respond to the dismissed regulation in *Cline*.

In sum, the federal courts of appeal,³⁰⁴ as well as several district courts,³⁰⁵ have properly declined to accept the EEOC's expansion of Title VII. Recent opinions by district courts in circuits in which the issue is open have shown a willingness to defer to the EEOC regulations.³⁰⁶ These contrary opinions in part involve issues that have been left open by the courts of appeal. A subject I will discuss in the next section.

4. *Open Issues*—*Spun Steak* and progeny have left open two significant issues. Specifically, these decisions have noted the possibility that a different result might ensue (1) in cases where languages restrictions were applied to monolingual workers, and (2) where the rule was imposed at all times instead of selectively.

In his *Spun Steak* opinion, Judge O'Scannlain acknowledged that an English-only policy might have a significant impact on a monolingual employee. The issue did not arise in *Spun Steak* because the plaintiff class apparently had a single Spanish-only employee to whom the English-only rule applied. There were also factual disputes sufficient to preclude summary judgment as to whether the rule was being enforced against her or whether she objected.³⁰⁷

303. *Id.* (“[W]e neither defer nor settle on any degree of deference because the Commission is clearly wrong.”).

304. *See, e.g.*, *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (rejecting Section 1606.7 as an improper interpretation of Title VII); *Long v. First Union Corp. of Virginia*, 86 F.3d 1151 (4th Cir. 1996) (unpublished disposition), *affirming* 894 F. Supp. 933, 940 (E.D. Va. 1995) (“The EEOC’s determination that the mere existence of an English-only policy satisfies the plaintiff’s burden of proof is not consistent with the drafting of the statute but is rather agency-created policy. The plaintiff still bears the burden of showing a prima facie case of discrimination.”).

305. *See, e.g.*, *Kania v. Archdiocese of Philadelphia*, 14 F.Supp.2d 730, 735 (E.D. Pa. 1998) (holding that the EEOC Guidelines exceed the scope of Title VII); *Prado v. L. Luria & Son, Inc.*, 975 F. Supp. 1349, 1354 (S.D. Fla. 1997) (citing *Garcia v. Gloor*, 618 F.2d 264 (5th Cir.1980)) (holding that English-only policies do not have an adverse impact on bilingual employees).

306. *EEOC v. Synchro-Start Products, Inc.*, 29 F.Supp.2d 911 (N.D. Ill. 1999); *EEOC v. Premier Operator Services, Inc.*, 113 F.Supp.2d 1066 (N.D. Tex. 2000). *See also Roman v. Cornell Univ.*, 53 F.Supp.2d 223, 236–37 (N.D.N.Y. 1999) (noting that a speak-English instruction may support an inference of national origin discrimination, although not case at hand).

307. *Spun Steak*, 998 F.2d at 1488.

Following Judge Rubin's lead in the pre-section 1606.7 *Gloor* decision, Judge O'Scannlain conceded that:

[N]on-English speakers cannot enjoy the privilege of conversing on the job if conversation is limited to a language they cannot speak. As applied "[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home," an English-only rule might well have an adverse impact.³⁰⁸

O'Scannlain probably felt obliged to concede the point. His logic that bilingual employees are not affected by language rules because of their power of choice inescapably means that monolingual workers cannot make such a choice and therefore suffer an adverse impact.

It is tempting to conclude that Title VII should protect monolingual employees. There are relatively few employees who speak only a LOTE. Most were hired in spite of an obvious inability to speak English, presumably because language was irrelevant to the type of work done. A few jobs, such as assembly line work or food processing, can be done without a word of English. Instructing a Spanish-only speaker to communicate exclusively in English, moreover, is tantamount to requiring silence and forbidding casual conversation. Because of their limited numbers, preserving claims by monolingual workers are not likely to expand business liability or litigation costs greatly.

Nevertheless, I would argue that Title VII cannot fairly be construed to reach these claims. We should not let an understandable sympathy for monolingual employees who must trudge on in silence interfere with the conclusion that Title VII was not designed by Congress to reach language claims. It is also hardly clear, at least for purposes of a presumption, that imposing an English-only policy on monolingual workers causes an adverse impact in the legal sense required by Title VII. The court in *Synchro-Start*, whose plaintiffs included a set of non-English speakers, attempted to distinguish the rule in *Spun Steak* by noting that the latter concerned bilingual employees.³⁰⁹ The difference escapes me. Monolingual workers, or those with limited English, obviously cannot choose to switch to English when they wish to speak. But why should the lack of choice matter if there is no prior right to have workplace conversations? The workers' lack of a right

308. *Id.* (citing *Gloor*, 618 F.2d at 270).

309. *Synchro-Start Prods., Inc.*, 29 F.Supp.2d at 912-13.

to cultural expression or language preference in *Spun Steak* is simply one manifestation of the fact that workers lack expressive rights generally.

Courts have also reserved judgment on English-only rules that are applied at all times. Nearly all national origin litigation has addressed English-only policies that were applied selectively. The English-only rule in *Spun Steak*, for example, did not apply during breaks or lunch times.³¹⁰ The rule in *Gloor* similarly excluded break times.³¹¹ Neither court was willing to carry its holding beyond the situation of a bilingual worker. *Gloor* left open the possibility of a different result for rules that “forbade *all* use of any language but English,”³¹² while *Spun Steak* opined that rules enforced in a “draconian” method might amount to harassment.³¹³ The issue arose in *EEOC v. Premier Operator Services, Inc.*,³¹⁴ where the employer had imposed a blanket prohibition on languages other than English. The court was influenced by the fact the Spanish-speaking employees were subject to “oppressive monitoring . . . even . . . in the lunch room or on a break,”³¹⁵ and that the policy served no apparent business purpose.³¹⁶

I again fail to see the legal significance of the factual distinctions. It is reasonable to assume that the plaintiffs in *Premier Operator*, who were bilingual, would want to pass their break time chatting in Spanish. The court’s analysis improperly diverges from *Spun Steak*’s requirement that they demonstrate a “legal” impact under Title VII. As grim as it may seem, the workers in *Premier Operator* had no independent right to converse at all during their break times. The fact that the language rule had no business justification should be irrelevant until plaintiffs demonstrate a significant adverse impact. Ironically, characterizing the rule in *Premier Operator* as an “All Times” restriction was unnecessary for two reasons. The court, relying on recent scientific research, rejected the foundational conclusion of *Gloor* and *Spun Steak* that use of language is a matter of choice for bilinguals (I’ll return to this point just below).³¹⁷ Second, there was convincing evidence of racial and ethnic

310. *Spun Steak*, 998 F.2d at 1483.

311. *Gloor*, 618 F.2d at 266.

312. *Id.* at 268 (emphasis added).

313. *Spun Steak*, 998 F.2d at 1489.

314. 113 F.Supp.2d 1066 (N.D. Tex. 2000).

315. *Id.* at 1075.

316. *Id.* at 1070.

317. *Id.* 1075–76.

animus on the part of the employer.³¹⁸ The claim could have been better tried as a direct evidence case.

B. Language as a Changing Characteristic

If Title VII cannot be interpreted to reach language discrimination claims, should Congress amend the Civil Rights Act to include them specifically? Any attempt to do so would be unwise. Language claims lack sufficient similarity to race and gender claims to fit Title VII's anti-discrimination precepts. There are two significant points of departure. First, Title VII locates discrimination in an employer's reactions to immutable characteristics. Yet, as I discuss in this subpart, language is remarkably mutable. Title VII also presumes that no sensible employer could rely on traits such as race or gender to make most personnel decisions. As I comment in Subpart C, however, language is undoubtedly a relevant workplace concern.

1. *The Power to Learn a New Language*—Immutable traits are a key concern of the civil rights model because we think it unfair to burden an individual with a group-based stereotype that he or she cannot escape.³¹⁹ As discussed at some length in Part III, *supra*, racial or gender classifications are treated skeptically in part because they prohibit individualized judgments of people and subject them to the economic and dignitary harms of bias. Language is different from race, gender, or ancestry. We expect language capacities to change over time. Monolinguals experience a burst of language acquisition as children and, ideally, spend their adult lives refining their verbal skills. Part II of this Article demonstrates that a similar process occurs with immigrants to this country, who tend to acquire competency in English within fifteen years of their arrival.

There are prominent examples of persons who were raised speaking other tongues but became masters of English style. The novelist Joseph Conrad, ne Józef Teodor Konrad Korzeniowski, was born in the Ukraine of Polish parents, learned French as a teenager in the merchant marine, and then English at age 21.³²⁰ His novel *Heart of Darkness* is a landmark of English literature, and

318. See, e.g., *id.* at 1071 (noting evidence of racial slurs).

319. See generally *supra* Part III.A.2.b (discussing unfairness on relying of immutable traits as a constitutional precept); Part III.B.1 (discussing unfairness on relying of immutable traits in Title VII context).

320. See 3 NEW ENCYCLOPEDIA BRITANNICA: MICROPAEDIA 547 (15th ed. 1985).

also was the inspiration for Francis Ford Coppola's film *Apocalypse Now*. Henry Kissinger conducted realpolitik as well, if not better, in English than his native German. Judge Alex Kozinski of the Ninth Circuit was born in Romania, but has managed to become, in the opinion of some, the leading humorist on the federal bench.³²¹ Those with fond memories of *Lolita* should be impressed that English was Vladimir Nabokov's second language after Russian.³²² There also is a parallel tendency to lose touch with one's native tongue when speaking a different language daily.³²³

Professor Perea argues that although language is not immutable in the same sense as race or sex, it is "practically immutable."³²⁴ Perea also takes issue with the conclusion in *Garcia v. Gloor* that a bilingual's use of language at a given moment is a matter of choice.³²⁵ His reasoning is based on studies of second-language acquisition which indicate that certain Hispanics experienced difficulties in learning English, and on papers postulating a variety of sociological and psychological impediments to learning a second language.³²⁶ Specifically, he points to one study indicating that Mexican and Cuban immigrants experience difficulty in learning English,³²⁷ and another finding that half of Hispanic-origin residents over the age of 13 continued to speak Spanish as their

321. See, e.g., *United States v. Syufy Enters.*, 903 F.2d 659 (9th Cir. 1990) (containing over 200 puns on movie titles); see also *Humor Guide, The Syufy Rosetta Stone*, 1992 B.Y.U. L. REV. 457 (explaining puns in *Syufy* decision). See generally David A. Golden, Comment, *Humor, the Law, and Judge Kozinski's Greatest Hits*, 1992 B.Y.U. L. REV. 507.

322. Ilan Stavans, *What the Night Tells the Day: Book Reviews*, 260 THE NATION 863 (June 12, 1995). Indeed, a surprising number of prominent authors have written outside of their native languages, including Manuel Puig, Samuel Beckett, Isak Dinesen, Eugene Ionesco, and Jorge Luis Borges. See *id.*

323. Of course no one forgets his native language. In reviewing scientific literature on bilingualism, Professor Mirande remarked:

I was born in Mexico and came to the United States at age nine. My first and most fundamental exposure to religion occurred in Mexico before I spoke English. Even though I have good command of English and my vocabulary in English is more extensive than in Spanish, I find it impossible to pray in English. Whenever I go to church (and it is not very often these days), or pray in another setting, I revert to Spanish. I also find it very difficult to write poetry or express my deeper emotions in English.

Alfredo Mirande, *Now That I Speak English, No Me Dejan Hablar ['I'm Not Allowed to Speak']*: the Implications of *Hernandez v. New York*, 18 CHICANO-LATINO L. REV. 115, 137 n.145 (1996).

324. Perea, *supra* note 297, at 280.

325. 618 F.2d 264, 270 (5th Cir. 1980).

326. Perea, *English-Only Rules supra* note 297, at 279-84.

327. *Id.* at 280 (citing A. PORTES & R. BACH, *LATIN JOURNEY: CUBAN AND MEXICAN IMMIGRANTS IN THE UNITED STATES* 174, 180, 198 (1985) (finding that two thirds of men in the study learned little or no English after six years)).

primary language.³²⁸ He then observes, quite reasonably, that adults and older adolescents have a harder time learning another language than the young.³²⁹ Perea points to several theories that attempt to explain this phenomenon, ranging among the existence of a “critical period” in youth whose passing makes language acquisition difficult,³³⁰ the difficulty imposed by “social distance” between learner and the language of the dominant culture that creates an unwillingness to learn,³³¹ a “psychological distance” between learner and the group speaking the dominant language caused by feelings of self-doubt and a failure of confidence in one’s ability to solve problems in a new language,³³² and, lastly, the effects of a history of discrimination against language minorities.³³³

Perea is correct that a person’s mother tongue will normally remain his primary language. Common sense, without recourse to the social sciences, tells us that we will resort to our mother tongue to express our most sophisticated, subtle, or intimate thoughts. It is also obvious that, the older we are, the more difficult it is to learn a new language. Beyond these propositions, I respectfully disagree with Professor Perea’s conclusions as they relate to language as an immutable characteristic. People who arrive in this country speaking a LOTE seem to have fewer problems with social and psychological distance than the studies would indicate. As set out in Part II of this Article, *supra*, data from the 2000 Census reveal that immigrants now learn English, and that their children master it. For practical purposes, any period of “practical immutability”

328. *Id.* (citing Grenier, *Shifts to English as Usual Language by Americans of Spanish Mother Tongue*, in *THE MEXICAN AMERICAN EXPERIENCE: AN INTERDISCIPLINARY ANTHOLOGY* 346, 350 (1985)). Professor Perea also notes that this source concluded that Hispanics “are shifting to English at a relatively fast pace.” Perea, *supra* note 297, at 280 n.100.

329. *Id.* at 280-81 (citing, e.g., Seliger, *Implications of a Multiple Critical Periods Hypothesis for Second Language Learning*, in *SECOND LANGUAGE ACQUISITION RESEARCH: ISSUES AND IMPLICATIONS* 11 (W. Ritchie ed., 1978); Whitaker, *Bilingualism: A Neurolinguistics Perspective*, in *SECOND LANGUAGE ACQUISITION RESEARCH: ISSUES AND IMPLICATIONS* 21, 29-30 (W. Ritchie ed., 1978)).

330. *Id.* at 281 (citing, e.g., S. KRASHEN, *SECOND LANGUAGE ACQUISITION AND SECOND LANGUAGE LEARNING* 72 (1981); E. LENNEBERG, *BIOLOGICAL FOUNDATIONS OF LANGUAGE* (1967)).

331. *Id.* (citing Schumann, *Second Language Acquisition: The Pidginization Hypothesis*, in *SECOND LANGUAGE ACQUISITION: A BOOK OF READINGS* 261-67 (E. Hatch ed., 1978)).

332. *Id.* at 282 (citing R. Gardner & W. Lambert, *ATTITUDES AND MOTIVATION IN SECOND-LANGUAGE LEARNING* (1972); Schumann, *Second Language Acquisition: The Pidginization Hypothesis*, in *SECOND LANGUAGE ACQUISITION: A BOOK OF READINGS* 263-67 (E. Hatch ed., 1978)).

333. *Id.* at 283-84. Perea does not cite a source or study specifically linking the history of discrimination against language minorities to difficulty in language acquisition but seems to infer such from the denial of educational opportunities to children from Hispanic and other groups.

will be confined to the immigrant generation itself.³³⁴ Within that generation, there is a range of English language ability. Although Census data are not as precise as we might desire, they do indicate that only 4.2% of the population speaks English less than very well. It is a fair inference, given that 11.7% of the population age five or older are foreign born,³³⁵ that immigrants are achieving English proficiency at a significant rate. Further, while English will not become the *primary* language of most immigrants, many, if not most, will learn sufficient English to function in American society. Language simply does not have the qualities of immutability and permanence that we attribute to race, ethnicity, or gender.

Viewing language facility as a changing quality knocks away one of the legs of the civil rights model. Civil rights laws target immutable traits because we deem it unfair to hold a person to assumptions about identity that he is powerless to alter. A race-based qualification communicates a message that members of the disfavored group are somehow inferior or less worthy than others. On an individual level, racial restrictions rob the individual of his chance to define his own worth and to meet neutral employment standards. Language requirements in the workplace are different from racial and like disqualifications. Without resort to stereotyping, they represent one of many terms of *inclusion* that an employer may impose on his workers. To mandate that workers speak in English or any other language during particular times or at certain places in the workplace, if anything, is an implicit statement that a worker and the linguistic minority to which he belongs are capable of meeting a requirement. In this sense, language requirements are no different from dress codes.³³⁶ Moreover, the power to comply with language requirements lies within the control of the individual worker. Remember that the primary challenge of language policy in the workplace is bilinguality. As noted, *supra*, nearly 96% of the population speaks English competently. In most cases, even workers who speak a LOTE have the ability to comply with English-only work rules. So far as the civil

334. See *supra* note 65 and accompanying text (stating that 73.5% of persons who speak English less than very well are foreign born).

335. *Supra* note 64, at tbl. 6.

336. See, e.g., *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D. N.Y. 1981) (rejecting Title VII claim involving grooming code on grounds that corn-rows are not an immutable, racially identifiable characteristic). The result in *Rogers* has, however, been greatly criticized. Caldwell, *supra* note 247 (disagreeing with *Rogers* and arguing for protections for "intersectional" identities, such as African-American women); see also, e.g., Stephen M. Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164 (1985) (arguing that Title VII should protect cultural traits associated with national origin).

rights model is concerned, there is a difference between a sign that says "No Irish Need Apply" and another that says "English Only on the Factory Floor!" There is no loss of dignity or economic opportunity with the latter.

2. *Code-Switching: Involuntary Reversions to Primary Language*—Central to the courts' rejection of language discrimination claims under Title VII is the conclusion that bilingual workers may freely chose to use English. Judge Rubin's statement in *Gloor* that "the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice"³³⁷ is later quoted in *Spun Steak*.³³⁸ In both decisions, the bilingual's ability to chose among languages countered any assertion that he had been denied a privilege of conversing in a preferred language. To the extent that a person can speak in English, he enjoys the same privilege as everyone else and therefore suffers no disparate impact.

A recent decision has challenged the conventional wisdom that bilinguals have free choice among their languages. The EEOC presented expert testimony in *Premier Operator Services, Inc.* regarding a linguistic phenomenon termed "code-switching."³³⁹ The gist of this theory is that bilingual persons, particularly those who grow up in bilingual environments, will tend to alternate between languages.³⁴⁰ Code-switching seems to have two distinct manifestations. First, when interacting within their linguistic community, bilinguals tend to mix languages, often alternating even within the same sentence.³⁴¹ An early study of Norwegian-Americans by Einar Haugen found that bilingual speakers often crossed languages unconsciously.³⁴² A more recent example comes from John Sayles' film *Lone Star*: "Era muy cabrón, that Charley Wade."³⁴³ Code-switching also refers to a tendency among bilinguals to

337. *Gloor*, 618 F.2d at 270.

338. *Spun Steak* 998 F.2d at 1487 ("It is axiomatic that the language a person who is multi-lingual elects to speak at a particular time is . . . a matter of choice.") (quoting *Gloor*, 618 F.2d at 270).

339. *EEOC v. Premier Operator Servs., Inc.*, 113 F.Supp.2d 1066, 1066-1070 (N.D. Tex. 2000). The expert witness was Dr. Susan Berk-Seligson, a professor of linguistics, Spanish language and culture at the University of Pittsburgh. *Id.* at 1069.

340. *Id.* at 1070 (summarizing expert testimony).

341. *Id.*; see also SHANA POPLACK, SOMETIMES I'LL START A SENTENCE IN SPANISH y *Termino en Español: TOWARD A TOPOLOGY OF CODE-SWITCHING* 3-5 (1979).

342. EINAR HAUGEN, THE NORWEGIAN LANGUAGE IN AMERICA: A STUDY IN BILINGUAL BEHAVIOR 63-65 (1969) (discussing speakers' awareness of mixing languages); see also HANS DUA, *Perspectives on Code-Switching Research*, 12 INT'L J. DRAVIDIAN LINGUISTICS 136, 136-37 (1984) (noting unconscious alternation between languages).

343. Margaret E. Montoya, *Lines of Demarcation in a Town Called Frontera: A Review of John Sayles' Movie Lone Star*, 27 N.M. L. REV. 223, 227 (1997) (quoting *Lone Star* (Castle Rock Entertainment 1995)).

respond in the last language heard. The latter situation may occur when a bilingual worker communicates to a customer in, say, Spanish, and then addresses a supervisor in the same tongue.³⁴⁴ *Gloor* may well have involved code-switching.³⁴⁵ In either event, code-switching theory regards shifts among languages as involuntary, and not within the bilingual's power of choice.³⁴⁶ The significance of code-switching is obvious: to the extent that bilinguals involuntarily revert to their primary language, their behaviors resemble the immutable traits that fall within the anti-discrimination model.

I am persuaded that code-switching theory has some merit. There appears to be considerable acceptance of the idea within the scientific literature.³⁴⁷ I'm also swayed by personal experience. I spent some time working as a graduate assistant in a Latin American bibliography center, where the language of work alternated between English and Spanish, with occasional use of Brazilian Portuguese. I can attest to the tendency of myself and my coworkers to continue conversations in the language in which they began, regardless of the individual's native language or level of competency in others. While this anecdotal example hardly confirms code-switching as scientific principle, and addresses only part of the code-switching phenomenon, it does, in my mind, make reliance on code-switching theory easier.

Let us then credit the theory of code-switching and move on to the next question: should this linguistic "rule" alter our view of the mutability of language for purposes of the anti-discrimination model? My response is yes, but only at the margins. Code-switching at best means that bilinguals in the workplace will lapse into their native language under limited circumstances. Shifting between languages will be infrequent in shops with language rules. Most workers will be able to monitor their speech patterns most of the time. While bilinguals may engage in language shifts unconsciously

344. See, e.g., *Premier Operator Servs.*, 113 F.Supp. at 1070 (noting worker testimony of a tendency to speak in Spanish after helping a Spanish-speaking customer).

345. Plaintiff in *Gloor* was hired for his ability to converse with Spanish-speaking customers. He was discharged after responding to fellow bilingual employee's question regarding a customer's request. See *Gloor*, 618 F.2d at 266. *Gloor* had a rule prohibiting employees from speaking Spanish on the job unless they were communicating with Spanish-speaking customers. *Id.* The opinion is not specific, but it is possible that Plaintiff had been addressed by his co-worker in Spanish, and likely that he had recently conversed with a customer in Spanish. *Id.*

346. *Id.* (relying on expert testimony that "adhering to an English-only requirement is not simply a matter of preference for Hispanics, or others who are bilingual speakers . . . [S]uch restraint can be virtually impossible in many cases").

347. See *supra* notes 340–42 and accompanying text.

in unstructured conversations, it is unreasonable to believe that work rules will not alter that behavior in most instances. Similarly, the chances that workers will instinctively respond to a statement or question in a LOTE are lower if work rules require English. The chances rise, of course, when customers or other outsiders do not speak English. In any case, most workers who speak a LOTE as their primary language will be able to comply with an English-only rule most of the time. Code-switching should result in occasional, good faith lapses.

Permitting claims for adverse employment actions based on slips of the tongue fits the civil rights model's focus on immutable traits. A lapse into one's native language under certain, narrow circumstances can be viewed as an immutable aspect of one's national origin. The question becomes how to design a cause of action narrow enough to cover such claims without allowing Title VII to reach instances of volitional behavior. Either the legislature, or more likely a regulatory agency could fashion language that forbade adverse employer reactions to involuntary uses of an employee's primary language. It would be difficult, however, to design a system of proof that would distinguish with any degree of reliability unavoidable lapses into a LOTE from voluntary or careless behaviors. Disparate treatment analysis is useless since it depends upon an inference of discrimination derived from differential treatment. When a worker is disciplined for even for a single instance of using a LOTE, there is rarely differential treatment from which we could infer either good faith or improper motive by the employer.

Approaching involuntary use claims through disparate impact analysis also seems inappropriate. Workplace language rules are broadly worded prohibitions requiring exclusive use of English at all times or certain times. They can be applied to workers who forget to use English once, as well as to persistent—and presumably willful—violators. A plaintiff could argue persuasively that language restrictions disproportionately affect persons whose primary language is a LOTE because of the bilingual's unavoidable tendency sometimes to slip out of English. While disparate impact analysis would indeed serve to invalidate rules that penalized workers for unavoidable behaviors, its effects would not stop there. Language rules that are properly applied against persistent violators are vulnerable to challenge because they also reach inadvertent speech of other employees. Disparate impact analysis runs the risk of converting a claim for inadvertent use of language into a general claim against English-only rules, thus taking the

claim well beyond the civil rights model's concern for inalterable characteristics.

One could argue that the business necessity defense serves to distinguish between volitional and accidental misuses of language. Defendants might be required to show, for example, a system of notice, warnings and progressive discipline that diminishes the possibility of punishment for isolated lapses into LOTEs. Even so, disparate impact analysis will not produce a good fit with the civil rights model. A progressive discipline policy that permits discipline after minimal violations, say a second instance of using a LOTE, would do little to distinguish good faith impulses from willful violations. As policies become more forgiving, for example by delaying punishment until multiple violations have been reported, employers would be disabled from reacting to avoidable violations of a workplace language rules in order to protect the few cases of good faith mistakes. Given that employers bear the burden of proof for a business necessity defense, one can confidently predict that they would adopt lenient discipline policies to better their chances in court should Title VII be extended to language claims. The effect of such practices, however, is difficult to reconcile with the civil rights model's emphasis on protections of individuals from bias directed toward immutable conditions. Requiring employers to demonstrate business necessity will either facilitate claims by persons who could have complied with English-only rules or will discourage employers from enforcing rules that fall outside of Title VII's proper reach. It also seems inappropriate to use a disparate impact approach, which focuses on the effects of a rule on a subgroup of employees, to resolve the highly individualized question of whether a worker's use of a LOTE was intentional, careless, or inadvertent. In any event, reliance on a business necessity defense is unlikely to be effective and will prevent employers from pursuing legitimate language work rules.³⁴⁸

At any rate, the present EEOC regulations cannot be applied to reach involuntary uses and nothing more. There is language in Section 1606.7 that seems compatible with code-switching theory. The "All-Times" rule in 1606.7(a) declares that "the primary language of an individual is often an essential national origin characteristic"³⁴⁹ while the notice provision posits that "[i]t is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their pri-

348. See *infra* Part IV.C (discussing employers' interests in English-only rules).

349. 29 C.F.R. § 1606.7(a) (2003).

mary language.”³⁵⁰ Nothing in the rule or commentary, however, evidences a specific awareness of code-switching as a linguistic or behavioral theory. More important, the prohibitions in Section 1606.7 are aimed at preserving choice of languages within the confines of business necessity, personal comfort³⁵¹ and self-esteem³⁵² rather than protecting employees against inadvertent reversions to their native tongues. The presumption against “All-Times” rules kicks in regardless of any employee’s ability to comply. Likewise, the “Certain Times” rule requires a business justification for language restrictions of any breadth. Ironically, the notice provision can be read as rejecting the concept of code-switching. Section 1606.7(c) seems to regard notice as an adequate response to an employee’s tendency to slip into his primary language. Enforcement of an unnoticed policy is considered evidence of discrimination. By implication, the rule considers notice an adequate cure. This is hardly consistent with code-switching theory’s insistence that language shifts are involuntary.

3. *Language as an Evolving Cultural Trait*—In the preceding subsections, I have attempted to demonstrate that language lacks the quality of immutability since it lies largely within personal control. The individual power to learn English in most cases eliminates the possibility that a workplace language rule will burden a worker with an inescapable stereotype comparable to those created by racial or gender conscious rules. Unlike the physical traits that we commonly identify with race, ethnicity or gender, language is one of many cultural expressions or customs that evolve within national origin groups.³⁵³ The key difference between the two is that culture, including language, changes in response to environmental factors while essentially physical characteristics such as color are constant. Cognitive psychologist Steven Pinker posits in *The Blank Slate* that culture is a utilitarian phenomenon, describing it as “a pool of technological and social innovations that people accumulate to help them live their lives, not a collection of arbitrary roles and symbols that happen to befall them.”³⁵⁴ He observes that cultural

350. *Id.* § 1606.7(c).

351. *Id.* § 1606.7(a) (noting that all-times prohibitions prevent employees from using language they speak most comfortably).

352. *Id.* (noting that all-times rules may create atmosphere of inferiority, isolation and intimidation).

353. *Cf.* 29 C.F.R. § 1606.1 (2003) (EEOC Guidelines on Discrimination Because of National Origin) (noting that national origin groups have physical, cultural and linguistic characteristics).

354. STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 65 (2002).

practices change when societies perceive that new approaches offer a better way.³⁵⁵ Cultural practices, in brief, continue so long as they help us.

Naturally one should expect particular national origin groups to alter their linguistic practices when conditions demand it. Shifts in language patterns of immigrants to the United States are a prime example of cultural adaptation. Immigrants come to this country with an expectation that they must learn English. A decision to forgo English in favor of the language of their country of origin would leave a newcomer in an untenable economic and social position. Predictably, as detailed in Part II, immigrants and their families learn to speak English within three generations and then use English as their primary language. Thus the immigrant group's linguistic culture shifts to bilinguality in response to immediate external needs. Eventually the original language fades away as assimilation into American society makes it unnecessary. Even Will Kymlicka, a prominent advocate of maintaining the societal culture of national minorities such as the Québécois or the Catalonians, treats immigrants as a separate case. He argues that, except in the case of refugees, immigrants to America implicitly accept participation in an English speaking society and it is, therefore, not inherently unfair to expect them to do so.³⁵⁶ More to my point here, Kymlicka acknowledges the practical constraint that an immigrant's success in American society depends on adapting to English speaking institutions.³⁵⁷

The implication for the civil rights model is that employer restrictions which touch on ephemeral cultural phenomena rather than truly immutable facts are far less likely to cause dignitary harms. Anti-discrimination principles are deeply concerned with protecting persons from the message that they somehow enjoy lesser worth than others. The negative message is intensified by the fact that the point of condemnation, such as race, is a permanent and inescapable condition. The sting of a "whites only" sign beside a restaurant door comes not only from a sense of exclusion today, but also from the cold realization that nothing may change over

355. *Id.* at 66; see also THOMAS SOWELL, *MIGRATIONS AND CULTURES: A WORLD VIEW* 387 (1996) ("[C]ulture . . . evolves under the stress of competing goals and competing cultures. Cultures . . . compete with one another as better and worse ways of getting things done . . .").

356. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 95-96 (1995). Kymlicka, however, argues forcefully that integration of immigrants also requires positive steps to insure their welcome, such as enforcement of anti-discrimination laws and cultural accommodations. See *id.* at 96-98.

357. *Id.* at 95-96.

the generations. Insult is compounded by a sense of futility. In contrast, a requirement that workers speak English takes place against a background of linguistic evolution toward English that each immigrant group to this county has voluntarily experienced. To require that a worker speak English on the job in America says far less about the worth of his national origin than the rule that Catalán could not be spoken publicly in Franco's Spain. Although restrictions against using LOTEs at work may strike some as denying cultural worth,³⁵⁸ they also confirm commonly held assumptions about assimilation into the larger society. The message is at worst ambiguous and is perhaps better viewed as an affirmation that new groups may participate in American society.

Language restrictions also tend not to convey messages of inferiority because languages are bad proxies for national origin or ethnicity. In order for a language rule to degrade a particular group, logically language must be an essential aspect of its national or ethnic identity. Indeed, many scholars have argued that language and ethnicity are closely related. Joshua Fishman, a sociolinguist, argues that language is constitutive of identity because of its role as a central cultural symbol:

[L]anguage is more likely than most symbols of ethnicity to become the symbol of ethnicity. [It] is the recorder of paternity, the expresser of patrimony and the carrier of phenomenology. Any vehicle carrying such precious freight must come to be viewed as equally precious ... in and of itself. The link between language and ethnicity is thus one of sanctity-by-association. . . . [S]ince language is the prime symbol system to begin with and since it is commonly relied upon . . . to enact, celebrate and 'call forth' all ethnic activity, the likelihood that it will be recognized and singled out as symbolic of ethnicity is great indeed.³⁵⁹

358. See, e.g., Ruiz Cameron, *supra* note 297, at 1364–65 (arguing that Spanish language is central to Hispanic identity).

359. Joshua A. Fishman, *Language and Ethnicity*, in LANGUAGE, ETHNICITY AND INTER-GROUP RELATIONS 15, 25 (Howard Giles ed., 1977); see also Henry L. Bretton, *Political Science, Language, and Politics*, in LANGUAGE AND POLITICS 431, 434 (William O'Barr & Jean F. O'Barr eds., 1977) (language facilitates development of social and economic relationships); RALPH FASOLD, THE SOCIOLINGUISTICS OF SOCIETY ix (1984) (language identifies group associations of speaker); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 351–52 (1986) (“[L]anguage is one of the ‘symbol spheres’ that define social groups.”); Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 Hous. L. REV. 885, 898–900 (1986); Comment, *Native-Born Acadians and the Equality Ideal*, 46 LA. L. REV. 1151, 1167 (1986) (“Language is the lifeblood of every ethnic group.”).

I agree with Fishman that language is part of a complex of cultural traits that define national origin or ethnicity at a particular time. Saying "Me siento orgulloso de ser Jalisciense!" adds a layer of meaning that the somewhat lame "I'm really proud that I'm from Jalisco" can never achieve. My quarrel with the language-as-culture theory is that it takes an unjustifiably static view of ethnic or national identity.³⁶⁰ Ironically, the belief that cultures are invariably dependent on a particular language is a stereotype. Cultures change as they adapt to new environments. This evolution, moreover, occurs both in immigrant and non-migrant cultures. If language is truly the lynchpin of cultural identity, then we should expect cultures to disappear or be drastically altered once the underpinning of language is removed. Yet there are many examples of civilizations that have maintained a distinct identity even after losing their native tongues.

Consider Ireland. Gaelic there has been effectively supplanted by English, although the Government has taken heroic steps to preserve Gaelic by instruction in the schools.³⁶¹ Principal newspapers such as the Irish Times are published in English. Many leading works of English literature have been written by Irishmen such as Yeats or Joyce. Even Sinn Fein speaks to the press in English. This is not to say that the passing of Irish has not prompted much soul searching. There is a telling moment in Joyce's *Portrait of the Artist as a Young Man* where Stephen Daedalus's preoccupations with the English and Irish languages³⁶² come to a head over the word "tundish," which he took to be an Irish word for funnel:

I looked it up and find it English and good old blunt English too. Damn the dean of studies and his funnel! What did he come here for to teach us his own language or to learn it from us? Damn him one way or the other!³⁶³

360. Fishman, *supra* note 359, notes that the ethnicity is subject to change regarding its content, group membership, and salience of characteristics, but concludes that ethnicity is an abiding feature of humanity for which language is the chief symbol. *Id.* at 29–34, 42.

361. Dan Barry, *Gaelic Comes Back on Ireland's Byways and Airwaves*, N.Y. TIMES, July 25, 2000, at A6 (noting substantial increase in all-Gaelic schools).

362. Of the Dean of English Studies at Dublin, Daedalus says:

His language, so familiar and so foreign, will always be for me an acquired speech. I have not made or accepted its words. My voice holds them at bay. My soul frets in the shadow of his language.

JAMES JOYCE, *A PORTRAIT OF THE ARTIST AS A YOUNG MAN* 189 (Viking Press 1964) (1916).

363. *Id.* at 251.

The irony is patent; the event or something like it was inevitable. Still, no one would say that Ireland, except perhaps in the North, lacks a distinctly Irish culture. Ireland's linguistic shift from Gaelic to English represents the normal process of cultural evolution in response to external pressures. Ireland would no doubt be different today had Henry II not invaded in 1171. Perhaps the French would have absorbed Ireland as they did Gaelic Brittany. The only certainty is cultural evolution.

Closer to home, I observe a similar process occurring among Hispanic³⁶⁴ immigrants to the United States. As noted several times above, Spanish speaking immigrants live in a bilingual culture that is likely to follow the established three generation transition from native tongue, to English as dominant, then to English as exclusive language. One can see evidence of the role that both languages play in contemporary Hispanic culture. On the one hand, there has been significant growth in the Spanish language press in the United States.³⁶⁵ Quality book stores, such as Borders or Barnes & Noble, usually have a "Libros en Español" section. Spanish language cable networks such as Univisión or Gala are commonly available on local cable or satellite systems. The renaissance of Spanish media is easily explained by the large market of readers and viewers for whom Spanish is their primary language.

On the other hand, expressions of Hispanic culture in English are increasingly common. A significant number of Hispanic literary authors write in English. A few examples should make the point. Many prominent Latino novelists, such as Julia Alvarez,³⁶⁶ Ana Castillo,³⁶⁷ Denise Chavez³⁶⁸ and Sandra Cisneros³⁶⁹ write primarily in English. Their works are translated into Spanish by others. Richard Rodriguez's autobiography, *The Hunger for Memory*, portrays the often wrenching alienation and difficulty of reconciliation that he experienced while moving into the mainstream of Anglophone society.³⁷⁰ The first line of the book is: "I have taken

364. This Article uses the term "Hispanic" guardedly. Newcomers from Mexico, Cuba, and the Dominican Republic, to take just a few examples, are likely to have had different experiences in their countries of origin. Thus, there will be cultural differences as well as commonalities.

365. Perea, *supra* note 297, at 278.

366. See, e.g., JULIA ALVAREZ, *HOW THE GARCIA GIRLS LOST THEIR ACCENTS* (1991); JULIA ALVAREZ, *IN THE TIME OF THE BUTTERFLIES* (1994).

367. See, e.g., ANA CASTILLO, *SO FAR FROM GOD* 214 (1993).

368. See, e.g., DENISE CHÁVEZ, *LOVING PEDRO INFANTE* (2001); DENISE CHÁVEZ, *THE LAST OF THE MENU GIRLS* (1991).

369. See, e.g., SANDRA CISNEROS, *CARAMELO* (2002); SANDRA CISNEROS, *LOOSE WOMEN: POEMS* (1994).

370. Rodriguez, *supra* note 30.

Caliban's advice. I have stolen their books. I will have some run of this isle."³⁷¹ The subtle reference to *The Tempest* suggests in a powerful way the situation of a man who has undergone cultural metamorphosis. As does the fact that it was written, inevitably, in English. The rules of cultural change apply in America as well as elsewhere.

It is increasingly difficult to detect disapproval of work rules forbidding LOTEs when the cultural background is shifting toward English. Most people would give a curious look to anyone who suggested that a work rule forbidding LOTEs degrades the Francophone culture of Huguenot descendants in South Carolina, or Swedish descendants in Minneapolis. The reason, obviously, is that the assimilation of these groups into the so called "dominant society" is complete. Assimilation is an ongoing process for national origin groups that are newly arrived, such as Hispanics or Asians. They are, nonetheless, subject to the same process of cultural assimilation as any other wave of immigrants. To say that their members must speak English at work, sometimes or even at all times, does not necessarily convey a message of lesser worth. In fact, workplace language rules have less and less to say about a national origin group as time passes and English becomes the group's dominant, if not exclusive, language.

C. Language as a Relevant Workplace Consideration

The civil rights model assumes that characteristics such as race and gender are essentially irrelevant to decisionmaking. We all agree intuitively that, as a general matter, race or gender should have no bearing on eligibility for government benefits, sentencing guidelines, the right to vote, or the ability to perform a job. Language, however, is plainly relevant to workplace decisionmaking. No one would argue seriously that the ability to speak English is unnecessary to most jobs in this country. Our business, commercial, and government culture is Anglophone.³⁷² In the typical case,

371. *Id.* at 3.

372. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (striking down restriction on instruction in LOTEs but affirming that failure to learn English hinders children from "becoming citizens of the most useful type and the public safety is imperiled"); *Frontera v. Sindell*, 522 F.2d 1215, 1220 (6th Cir. 1975) ("It cannot be gainsaid that the common, national language of the United States is English. Our laws are printed in English and our legislatures conduct their business in English. Some states even designate English as the

we expect that communication, recordkeeping, and client contact will be done in English. There are exceptions. The plaintiff in *Gloor* was hired because he was able to communicate with the Spanish-speaking customers of a lumber yard.³⁷³ Yet even if the ability to communicate in a LOTE is a job requirement, it is likely that English will also be necessary (as it apparently was in *Gloor*) to communicate with supervisors, to complete government reports, and so forth. Occasionally employers don't care whether their workers speak English.³⁷⁴ These exceptions, however, do not undermine the general propriety of considering language ability and use in the workplace.

Advocates of language rights agree that English is an important component of the typical workplace. Professor Perea provides the example of a Spanish-speaking sales clerk who refuses to speak English to exclusively Anglophone customers, acknowledging that the clerk is not doing his job.³⁷⁵ The EEOC's tolerance of rules restricting LOTES at certain times (instead of all times) likewise indicates that the use of English can be a critical ingredient in a successful workplace.³⁷⁶ The greater criticism is directed at rules requiring the use of English at all times, arguing that such provisions lack business justification under Title VII.³⁷⁷ I suggest that even an "All Times" rule can play a useful, neutral role in the workplace. Important benefits of such rules include avoiding disruptions among employees and facilitating supervision. Other applications of an "All Times" rule provide marginal yet genuine

official language of the state."); Gerald P. Lopez, *Learning about Latinos*, 19 CHICANO-LATINO L. REV. 363, 405 (1998) ("English has long been the de facto national language.").

373. See *Gloor*, 618 F.2d at 269; see also *Premier Operator Servs.*, 113 F.Supp.2d at 1068 (requiring that telephone operators be bilingual to serve Spanish-speaking customers).

374. See, e.g., *Spun Steak*, 998 F.2d at 1483 (noting that meat and poultry processor did not require a knowledge of English as a condition of employment, that twenty-four of thirty-three employees spoke Spanish of which twenty-two spoke English with varying degrees of proficiency, and that two spoke no English at all). A knowledge of English in the *Spun Steak* workplace was presumably less important since most of the work was done individually on an assembly line. The employer's motivation for imposing an English-while-working rule (i.e., while not on break or during lunch) had little to do with production: the employer had received complaints that Spanish-speaking employees were making derogatory remarks about African- and Chinese-American workers. *Id.* The employer believed that the English-only rule would also enhance safety and communication with USDA inspectors. *Id.* These added arguments, however, have the feel of something coming from a lawyer's office and not a plant supervisor's desk. It appears that at least some of the foremen in *Spun Steak* were bilingual. *Id.*

375. Perea, *supra* note 297, at 299.

376. See 29 C.F.R. § 1606.7(b) (2003) (permitting language restrictions at certain times if supported by business necessity).

377. See, e.g., Perea, *supra* note 297, at 299-317; see also 29 C.F.R. § 1606.7(a) (2003) (presuming that language restrictions applied at all times violates Title VII).

utility, such as enhancing workplace efficiency and safety. I emphasize that I am not arguing that such rules would meet the standards for a business necessity defense under Title VII.³⁷⁸ “All Times” rules would often run afoul of a heightened business necessity test or the plaintiff’s power to suggest an alternative with less impact.³⁷⁹ Such an analysis, however, presumes that language claims belong in Title VII and that they fit within the civil rights model. I argue instead that “All Times” rules serve rational goals independent of racial, ethnic or national origin considerations. If rules requiring use of English at all times are justifiable, then the less intrusive “Certain Times” rules are, *a fortiori*, rationally based.

1. Avoiding Workplace Disruptions—Maintaining harmony among workers is imperative in any place of employment. A key element in creating harmonious conditions is to avoid the perception of secretive communications among employees. Individuals have a well known tendency to feel marginalized, insulted, and even threatened when they believe that others are talking about them behind their backs. In an diverse workplace, there exists the specific possibility that Anglophones (of whatever race or ethnicity) will perceive that conversations by coworkers in a LOTE are targeting them on racial or ethnic grounds. It is tempting to dismiss negative reactions to conversations in another language as biased. One scholar had argued that “[t]here is no permissible reason why two employees’ private conversation in Spanish would be any more disruptive than the same conversation would be in English,” characterizing reactions to such conversations as based on negative feelings about the speakers of LOTES.³⁸⁰ With respect, I suggest that this viewpoint ignores a basic human tendency toward suspicion of the unknown that cuts across all racial or ethnic lines. Reactions to secret communications will be suspicious regardless of language.

There are many instances where employers have imposed English-only policies in response to actual or perceived uses of a LOTE to create hostile environments. In *Gutierrez*, the Municipal Court adopted a rule that its employees must speak in English when dealing with the public. The Court was motivated by a fear that employees might use Spanish “to convey discriminatory or insubordinate remarks and otherwise belittle non-Spanish-speaking

378. Cf. Perea, *supra* note 297, at 299–317 (evaluating English-only rules under Title VII business justification standard).

379. See *supra* Part III.B.2.b (discussing the business necessity defense).

380. See Perea, *supra* note 297, at 305.

employees.”³⁸¹ (There was apparently no evidence that such incidents had occurred).³⁸² The employer in *Spun Steak* adopted an English-only policy in response to complaints that two employees were using Spanish to make derogatory comments about African- and Chinese-American workers.³⁸³ In *Roman v. Cornell University*, the Plaintiff had been instructed to refrain from using Spanish after coworkers complained that she was avoiding English to exclude them from conversations.³⁸⁴ In *Kania*, a Roman Catholic parish adopted an English-only rule out of fear that non-Polish speaking parishioners would feel excluded.³⁸⁵ In *Long*, defendants argued that their English-only policy was inspired by employee complaints that “plaintiffs were making fun of them in Spanish.”³⁸⁶ Whether the English-speaking employees’ fears in these cases about the content of conversations in a LOTE were well founded is immaterial. Good management principles require that threats to workplace morale be addressed. While language restrictions may not be the only way to address such problems, they nonetheless serve a neutral and highly relevant function by eliminating a source of disruption in the workplace.

Professor Perea argues forcefully that workplaces which require its employees to communicate in a LOTE are different.³⁸⁷ Sales jobs, for example, may require that an employee deal with customers or clients in their preferred language. Perea argues that once a LOTE is established, it is unlikely to be disruptive and will actually promote cohesion in the workplace.³⁸⁸

I agree that approaching customers in their preferred languages is a good and often indispensable business practice. Interactions with outsiders, however, have little to do with relations among employees. A monolingual employee is less likely to be suspicious of a conversation in a LOTE between a coworker and a client than between two fellow employees. Thus, even in situations where LOTES are part of the working environment, English-only policies governing communications among employees bear a relationship to promoting morale.

381. *Gutierrez*, 838 F.2d at 1042.

382. *Id.*

383. *Spun Steak*, 998 F.2d at 1483.

384. 53 F.Supp.2d 223, 237 (N.D.N.Y. 1999).

385. *Kania v. Archdiocese of Philadelphia*, 14 F.Supp.2d 730, 736 (E.D. Pa. 1998).

386. *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 942 (E.D. Va. 1995), *aff'd* 86 F.3d 1151 (4th Cir. 1996). Plaintiffs in *Long* conceded that they had referred to coworkers in Spanish because they “did not want others to understand what they were saying.” *Id.*

387. Perea, *supra* note 297, at 301–02.

388. *Id.*

2. *Facilitation of Supervision*—Restricting employee communications to English is also a rational method of improving supervision of employees. At first glance, one might think that effective supervision could be obtained so long as managers and workers could communicate in English about job-related matters. Under this view, incidental worker conversations in a LOTE would be dismissed as irrelevant to the supervisory function.³⁸⁹ It is a mistake, however, to take such a narrow view of workplace supervision. Effective management requires that supervisors know what employees are saying and how they feel. Unless a supervisor is multi-lingual, conversations in LOTEs tend to deprive management of information that it needs to regulate the workplace. Workers may have concerns about the competence of fellow employees or certain managers, ideas that would improve production, or desires to unionize. They may also, as discussed in the preceding section, be using a LOTE as cover for improper comments about others. Permitting pockets of conversation in LOTEs creates a risk that employers will be deprived of information that they need to manage the often complex dynamic of the workplace. While not every employer may find English-only policies necessary, they are hardly irrelevant.

3. *Other Rational Applications*—It is possible to identify other applications of “All Times” rules as rational, even though their actual utility may be marginal. One can argue that exclusive use of English in the workplace promotes safety, although the positive impact of such a rule would probably be slight. Employees involved either in emergency response teams or hazardous occupations will normally be screened at the hiring stage for English proficiency as well as other communications skills. Rather, the primary advantage of an “All Times” rule might be that an exclusive English environment would improve the English skills of workers whose primary language is a LOTE. Better English in turn means that workers could be more responsive to English commands in an emergency situation. While I doubt that the effects on emergency response would be significant enough to lower insurance rates, it would be wrong to dismiss the goal as irrational or irrelevant.

A similar argument can be made that an “All Times” rule would increase efficiency by raising the language skills of workers. Workers with a better grasp of English are more flexible. For example, they can more easily receive on-the-spot instructions that

389. See, e.g., *id.* at 307–10.

allow them to do unfamiliar tasks temporarily. In-house training is likely to be more efficient as the trainees' English improves. It is also cost efficient for an employee to communicate with other employees in one-language rather than two or more. Again, although the benefits of enhanced English may be marginal, it is not irrational for an employer to want them.

Adopting an "All Times" policy to support the use of English as our national language may go too far. Defendants in *Gutierrez* argued that the ban on speaking English except to the public was justified by the fact that the United States and California were English-speaking entities.³⁹⁰ Interpreting the business necessity defense under Title VII, the Ninth Circuit rejected the argument reasoning that the Municipal Court's practice of serving the public in LOTEs was at odds with a purported policy of promoting a single language system.³⁹¹ Even using the more lenient concept of relevance that underlies the civil rights model, it is hard to say that using employees to promote a public policy initiative is sufficiently related to the operation of a business. This is all the more so when the public policy has not found expression in laws or regulations that require or even prefer communication in English. Professor Perea wonders whether expression of support for national or state policies can ever amount to a business justification of any sort.³⁹² On this point, I agree with him. The general utility of workplace language restrictions, however, contrasts sharply with the assumptions of irrelevance that underpin the antidiscrimination model.

D. Do Language Claims belong in Title VII?

The civil rights model is a mechanism for defending equality interests against biased actions. It targets decisions that are improperly motivated by inalterable characteristics, whether in the form of outright hostility or kinder-hearted stereotypes. As discussed in Part III of this paper, the anti-discrimination model is based on several assumptions. Consideration of certain fixed traits is unfair since individuals can never escape the disqualifying criterion in spite of individual merit. Unfairness is compounded by the fact that the trait in question is nearly irrelevant to sensible decisionmaking. The model also recognizes that discrimination causes

390. *Gutierrez*, 838 F.2d at 1042.

391. *Id.*

392. Perea, *supra* note 297, at 306.

dignitary injuries that are as serious as economic ones. Exclusions based on immutable characteristics are not only unfair, they are demeaning and leave an excluded person with the message: "you are different and undesirable." Employer actions that are based on fixed traits are bound to produce results that lack neutral, legitimate underpinnings and are instead the product of bias. Consequently, the Court has designed evidentiary tests, such as heightened scrutiny for constitution equal protection claims and the *McDonnell Douglas* framework under Title VII, that reflect a justifiable skepticism against decisions based on immutable traits.

Language simply does not fit the civil rights model. As I have demonstrated in this Part of the Article, language lacks the essential characteristics of immutability and irrelevance on which our anti-discrimination theories depend. If one can learn a new language, then language is hardly an immutable characteristic. Issues of fairness do not arise if the individual has the power to meet an expectation that English be spoken. Compliance with such requirements, moreover, serves as a means of inclusion into the larger society, negating any demeaning message of inferiority. In this sense, workplace language rules promote rather than interfere with equality interests. The well established tendency of immigrant groups in the United States to adopt English as their primary language within three generations also belies the possibility that language rules may affect a dignitary interest inherent in one's national origin status. Add to all this the fact that language rules serve neutral legitimate functions in the workplace. It is simply unrealistic to say that language restrictions should invoke the sort of suspicion that we rightly feel when employment criteria turn on race or gender.

Application of either of Title VII's inferential proof systems would do little to separate mean-spirited English-only rules from legitimate ones. Consider first the *McDonnell Douglas* system for establishing disparate treatment. Assume that an employer discharges a bilingual Hispanic worker for violation of an English-only work rule and then replaces her with another bilingual Hispanic. The discharged Hispanic worker will likely meet the criteria of being a member of a protected class who was qualified for the job and has been discharged. But will these facts permit an inference of discrimination based on language? Hardly. Without more, it's difficult to draw an inference of national origin discrimination when the replacement worker belongs to the same ethnic group and has the same bilinguality.

If the replacement worker is different, say a white, monolingual, Anglophone male, the inference of language discrimination is still elusive. We might be justified in inferring race or gender discrimination under these revised facts. When applied to cases of race or gender discrimination, the *McDonnell Douglas* test facilitates an inference of discrimination by eliminating the most likely legitimate explanations for a personnel action: lack of employee qualification or lack of an available position. Of course there may be perfectly legitimate reasons for the defendant's actions, but the suspicious nature of the circumstances set against a history of discrimination demands an inquiry into the employer's action.

In the case of an Hispanic worker replaced by a WASP after a language rule violation, however, the same suspicions do not come into play. Even acknowledging existence of code-switching, the more natural presumption in this situation is that the worker was discharged for failing to follow a policy. Unlike the race- or gender-plaintiff, the situation of the language claimant is not complicated by the fact that he cannot alter the trait upon which the defendant is acting. Indeed, the plaintiff was hired in most cases because he could speak enough English to perform the functions of the job. When one couples the fact that the typical plaintiff has the capacity to speak English with the relevance of language to workplace dynamics, it is difficult to view a discharge for violating the language rule of the shop as being motivated by national origin bias. The lack of prejudicial motivation continues under any conceivable combination of discharge and new hiring: the replacement worker of any ethnicity or national origin will normally speak English, creating at best an inference that the employer values the ability to speak in a particular language.

One might argue that the language rule at issue is nonetheless irrational or poorly fitted to the genuine requirements of the workplace, and that it is unfair to the discharged worker. The point has intuitive appeal. Most of us have held jobs in places that were run bizarrely. Under the *McDonnell Douglas* mindset, however, we don't require an employer to suggest a reasonable explanation for its action until an inference of discrimination is raised. This approach makes good sense. Title VII, and the antidiscrimination model, are concerned with irrational practices, but only those that can be linked to consideration of immutable characteristics. Irrationality alone is perfectly legal, at least so far as Title VII is concerned. To infer bias from irrationality turns the antidiscrimination model on its head.

Adverse impact reasoning also offers a problematic method of judging language discrimination claims. The essence of a Title VII disparate impact claim is that the burden of complying with a language restriction falls entirely on workers who speak a LOTE as their primary language, and must therefore be justified by the employer. As I argued in Part III(B)(2)(b), the disparate impact system furthers the antidiscrimination model by excusing direct proof of prejudice in circumstances where such evidence is hard to acquire. Adverse impact claims are most valuable when there exists a possibility that employers may be acting, consciously or unconsciously, on the basis of prejudices or stereotypes that have no relevance to the workplace. The continuous history of racial and gender discrimination in this country rightly prompts us to be vigilant, all the more so because the stubborn persistence of these biases is related to the immutability of the defining characteristic. Blacks and Latinos cannot become white by an act of will, nor can women as a practical matter become men. Our fear that subtle biases will work to the disadvantage of protected groups is so great that, after an easily established *prima facie* case, we require employers to demonstrate business necessity to sustain the challenged rule. A rule that is in fact unbiased may fail the business necessity test, yet we are willing to tolerate an over-inclusive approach because we fear that a less protective test would be more socially damaging.

The utility of disparate impact analysis diminishes as circumstances indicate that a neutral rule is less likely to reflect bias or irrationality. Such is the case with workplace language restrictions. It is not especially significant that an English-only rule disadvantages persons who speak a LOTE as their primary language, i.e., immigrants. Unlike the race- or gender-plaintiffs, who are as they are forever, language plaintiffs have it in their power to learn English. The fact of their employment is usually good evidence that they have met an express or implicit hiring requirement that they speak English well enough to do their jobs. Nor does it matter that the language claimant has better facility in a LOTE than in English. The typically litigated rule is one that requires all communication to be in English during prescribed hours. A worker can attain English proficiency that is adequate to meet such rules without becoming fluent. Language is a mutable characteristic. An immigrant's ability to speak English increases over time while his racial or ethnic identity is unaffected. Thus, when an employer adopts an English-only workplace regulation, there is considerably less reason to suspect that it is responding to unstated, or subconscious biases, and in turn

that such a rule reflects the irrelevance of ethnic or "national origin" biases. Add to this the fact that language restrictions often serve a legitimate function. To demand that employers point to a business *necessity* for such rules inevitably means that some unbiased decisions will fail the test, without the offsetting benefit that likely but difficult to detect instances of bias will be screened out.

Once we consider claims brought by native born speakers of LOTE, i.e., the immigrants' children and grandchildren, the justifications for using adverse impact analysis on language claims significantly weaken. Studies reviewed in Part II of this Article, as well as Census data, indicate that the first native-born generation tends to master English while the second prefers it to the family's original language. There is no reason to think that a work rule requiring persons fluent in English to speak English seriously burdens them or makes a statement about their differences. The lack of a substantial adverse effect implies that no hidden biases or stereotypes are at work. If so, there is little reason to protect the post-immigrant generation by providing them with an easily established *prima facie* case that imposes a demanding business necessity justification on employers. English language competence in the post-immigrant generation also illustrates that the connection between language and national origin evaporates over time. While members of the immigrant generation will maintain a LOTE as their primary language, this is not so of subsequent generations. Prohibitions on workplace language rules will thus benefit a minority of persons who claim a particular national origin. The limited effect on national origin groups again implies that English-only rules are not so inherently suspect that we can usefully subject them to disparate impact analysis.

V. CONCLUSION

In the final analysis, employer rules requiring that workers speak only English do not tread on equality interests as they are defined by American law. Workplace language rules, if anything, are a ruthless application of the equality principle. Everyone in the workplace is obliged to speak English at prescribed times and places. Nor do such rules arouse the same suspicion as actions focusing on immutable characteristics such as race or gender. The civil rights model that underlies Title VII views such classifications warily and for good reasons. Persons targeted by these tainted norms cannot escape them and must bear the financial and emotional weight of being judged

by standards that never make a meaningful difference. In a word, they are "unfair." Language, in contrast, is not an inalterable trait. People can and frequently do learn new languages. Bilinguals have the power to restrict themselves to English in most instances. No one suggests that language is irrelevant to the majority of workplaces in the country. There is little reason, therefore, to try to fit language discrimination claims into the equality driven vehicle of Title VII.

Many readers may feel that closing Title VII to language claims is nevertheless unjust. It is natural to have sympathy for anyone who must undergo the difficult task of restructuring deeply ingrained and long reinforced customs. We tend to regard idle workplace conversations as part of a private realm that employers should respect. Many people would regard discharge for violating a language rule as disproportionate to a trifling offense. Still others believe that cultural expressions such as language should be protected from employer discretion. These feelings, however reasonable, do not relate to equality principles. Relief from the application of uniform workplace language restrictions must reflect a decision to confer positive rights on workers that exceed a baseline requirement of equal treatment. Such a policy, moreover, would seem to require either an amendment to Title VII or a new statute. There is little indication that Congress, either in 1964 or later, intended to create language claims under Title VII.

Direct Congressional examination of the language issue would be beneficial. Courts are limited by the canons of interpretation to divining Congress's intentions as expressed in the text of a statute, and sometimes in the legislative history. Their power to consider and balance larger social interests, such as the desirability of creating cultural protections, is rightly limited. The legislative branch is also unencumbered by the judiciary's responsibility to decide the narrow dispute in front of it. Congress has the resources and the opportunity to take a broad view of the proper balance between cultural accommodations and the need for employers to manage their businesses effectively. Much as Congress decided in 1964 that employer discretions should yield to the precepts of equality in workplace, it might now determine that principles of accommodation should prevail for cultural expressions. Accommodation is the prevailing model for federal disability law, and, to a lesser degree, for claims of religious discrimination under Title VII. Perhaps accommodation should be the polestar light for language claims. Congress, however, not the courts, should decide the answer to this very important question.