Title VII and the Protection of Minority Languages in the American Workplace: The Search for a Justification

James Leonard

Follow this and additional works at: http://scholarship.law.missouri.edu/mlr

Recommended Citation
James Leonard, Title VII and the Protection of Minority Languages in the American Workplace: The Search for a Justification, 72 Mo. L. Rev. (2007)
Available at: http://scholarship.law.missouri.edu/mlr/vol72/iss3/2
Title VII and the Protection of Minority Languages in the American Workplace: The Search for a Justification

James Leonard*

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964, the principal statutory tool against race and gender discrimination, has a less famous prohibition against “national origin” discrimination. While the enacting Congress barely addressed the scope of this concept, the Equal Employment Opportunity Commission issued its Guidelines on Discrimination Because of National Origin interpreting Title VII’s national origin provision. The Guidelines essentially forbid employers from adopting work rules that create blanket prohibitions of languages other than English or less extensive rules that are not justified by business necessity. The EEOC’s Guidelines are a well-meaning attempt to create a welcoming society for immigrants. They are also, for both practical and philosophical reasons, a questionable idea.

Language discrimination claims are at odds with generally accepted beliefs that our laws should forbid discrimination because of race or gender in employment. To rely on a person’s race, ethnicity or sex in a personnel matter usually introduces an irrelevancy into an employment decision. Such qualities rarely bear on a person’s ability to perform a job. Consideration of immutable traits also involves unfair reliance on stereotypes rather than individual judgments. Communication on the job, in contrast, is a paramount concern for managers. While employers may not decline to hire an applicant simply because of her status as an immigrant, everyone agrees that workers must speak enough English to meet work standards. Since people can learn new languages, employers’ language-based employment decisions do not implicate an immutable trait nor act as a proxy for a protected category such

* Professor of Law, The University of Alabama School of Law. I have many people to thank. Dean Kenneth C. Randall and The University of Alabama School of Law Foundation supported this research through a generous grant. Bill Brewbaker, Mike Pardo, and Joanne Brant responded to earlier versions of this Article. Their criticism greatly improved the final product. Creighton Miller and Penny Gibson of Alabama’s Bounds Law Library provided crucial research assistance. Peggy McIntosh provided her usual expert help with the preparation of the manuscript. And, special thanks to Joanne Brant, in her capacity as my wife, for her encouragement of my work. Any errors, of course, remain my own.

2. See infra note 12 and accompanying text.
as national origin. 4 If employers have broad discretion to limit talking on the job to encourage productivity, why shouldn’t they have a similar power over the language content of conversations?

To be fair, the EEOC Guidelines on language in the workplace are not virulently anti-employer. They attempt to balance managerial demands with worker preferences by requiring that businesses demonstrate business necessity 5 for language restrictions. The effect of the Guidelines is to create private zones in the workplace, such as the break room, where employees may speak in a language of choice, but to confirm managerial control over operational areas. The justification for these rules, however, is not at all obvious since language does not share with race or gender the facts of irrelevance or immutability that justify interference with managerial discretion.

My purpose in this Article is to examine possible justifications for the EEOC’s language rules under Title VII. Part II provides necessary background information, describing the EEOC rule system as well as the three-generation process of English acquisition in immigrant families. The remainder of the Article is devoted to potential normative explanations for the EEOC rules. Part III asks whether the Guidelines promote equality interests while Parts IV and V question whether they vindicate personal autonomy or multicultural interests, respectively. I conclude that none of these arguments offers a sufficient justification for interfering with managerial judgments.

II. CONTEXT: LANGUAGE AND ITS LAW IN AMERICA

Any sensible debate over the federal role in controlling language use in the workplace requires a measure of background information, including an understanding of the scope of the EEOC rules. As I explain in Part II.A, Section 1606.7’s provisions create a scheme of limited regulation. The EEOC rules have the effect of creating public and private language zones within the workplace. In the former, e.g., work areas or offices, the rules tend to reaffirm managerial discretion because of legitimate supervisory needs. Private areas or moments in the workplace, e.g., the break room or lunch times, enjoy greater protections because of a supposedly diminished business interest in controlling workers’ conversations. Blanket prohibitions on a Language Other Than English (“LOTE”) are essentially forbidden. These regulations, however, take place against a background of rapid linguistic change in American society. Part II.B discusses this “assimilative linguistic dynamic” in which immigrant families abandon their original language for English by the third generation. Thus the EEOC rules work primarily for the benefit of

---


5. See infra notes 25-26 and accompanying text.
the immigrant generation, less so for the immigrants’ bilingual children and not at all for their English-speaking grandchildren.

A. The Nature and Scope of Title VII Language Rights

Title VII’s operative provision, § 703(a)(1), forbids discrimination in employment "because of [an] individual’s race, color, religion, sex or national origin." Section 703(a)(2) further outlaws attempts “to limit, segregate, or classify” employees on the same grounds. The text of the Act does not mention language discrimination claims; neither does the legislative history. The only toehold for language claims under Title VII is the rule against national origin discrimination.

There are plausible arguments that language is characteristic of national origin. For example, Judge Rubin – in route to denying a Title VII language claim – concedes in Garcia v. Gloor the “importance of a person’s language of preference or other aspects of his national, ethnic, or racial self-identification;” Judge O’Scannlain – traveling the same route in Garcia v. Spun Steak Co. – says that “[i]t cannot be gainsaid that an individual’s primary language can be an important link to his ethnic culture and identity.” Legislators, however, left too few references in the legislative history to clarify just what they meant by “national origin.”

Most likely, Congress understood national origin to mean the nation of one’s birth or ancestry and not derivative traits such as language. In 1964 Congress was trying to eradicate discrimination against African-Americans in

7. Id. § 2000e-2(a)(2).
9. See infra Part V.A.
10. 618 F.2d 264, 270 (5th Cir. 1980). See also Hernandez v. New York, 500 U.S. 352, 370 (1991) (Kennedy, J., plurality opinion) (“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.”).
11. 998 F.2d 1480, 1487 (9th Cir. 1993).
13. See, e.g., 110 CONG. REC. 2549 (1964) (Rep. Roosevelt) (national origin means “the country from which you or your forebears come from”). 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 only the nation of one’s birth or ancestry); Leonard, supra note 8, at 101-05 (same).
the labor market. America in that era was a white and black society divided approximately nine to one, respectively, between Caucasians and African-Americans. Waves of migrants from Latin America had yet to arrive. Thus, the situation addressed by the Title VII Congress was very different from today’s demographics where Hispanic-Americans form the largest minority community in America. Hispanic (and other) immigration has created language policy issues that didn’t exist in the monolingual Sixties.

Enter the EEOC. In the Fifth Circuit’s decision in Garcia v. Gloor, Judge Rubin opined that “the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice” and concluded that a bilingual plaintiff is not harmed by having to speak English. The Commission responded by issuing its Guidelines on Discrimination Because of National Origin. The Guidelines treat “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 ba-

14. See, e.g., 110 CONG. REC. 2556 (1964) (Sen. Humphrey) (Title VII intended “to extend to Negro citizens the same rights and the same opportunities that white Americans take for granted.”); id. at 7218 (Sen. Clark) (Title VII “simply eliminates consideration of color from the decision to hire or promote.”); id. at 13088 (Sen. Humphrey) (Title VII prohibits consideration of race in employment matters). The gender discrimination provision was apparently included as a poison pill by a Congressman from Virginia. See CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115-16 (1985).


17. 618 F.2d 264, 270 (1980).

sis 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.

(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.19

Employers must give workers adequate notice about the "general circumstances when speaking only in English is required and of the consequences of violating the rule."20

Under the Guidelines, language restrictions are generally treated as potential disparate impact claims. Since the landmark decision in Griggs, plaintiffs have been permitted to challenge superficially neutral rules that have a disparate impact on members of a protected class.21 The classic examples are employment aptitude tests that exclude African-Americans22 or physical requirements that tend to disqualify women from prison guard positions.23 Disparate impact is a plaintiff-friendly scheme. Plaintiffs need not establish any animus on the part of the employer.24 Once the plaintiff demonstrates the unequal impact of an employment practice, the burden of proof shifts to the defendant to demonstrate business necessity for the questioned rule or procedure.25

Section 1606.7 distinguishes between blanket and selective restrictions on the use of LOTEs at work. The "All Times" provision in subsection (a) presumes that requiring use of English at all times violates Title VII. There remains some question as to whether this formulation permits defendants to raise a business necessity defense. The text, unlike subsection (b), makes no reference to the business necessity defense that is normally available to de-

19. Id. (internal footnotes omitted).
20. Id. § 1606.7(c).
22. See, e.g., Griggs, 401 U.S. 424 (disallowing requirements that applicants have high school education or pass general intelligence test).
fendants in disparate impact claims. Thus one can reasonably interpret the language of the rule to create a conclusive presumption of discrimination. The EEOC’s commentary, however, implies that the Commission envisions that an employer would have a chance to defend its policy.26 Section 1606.7(b)’s “Certain Times” rule, however, explicitly permits a business necessity defense when English-only rules are applied selectively.

It is important to understand both the scope and the effects of the Guidelines’ prohibitions. Blanket prohibitions on LOTEs are forbidden by the regulations as a practical matter. Even if we assume that the Guidelines permit employers to raise a business necessity defense in support of an All Times rule, it is unlikely that such an argument will prevail. Title VII abso-lves practices with a disparate impact when the employer demonstrates that it is “job related for the position in question and consistent with business necessity.”27 If we interpret business necessity to require more than mere business advantage, i.e., that the practice at issue is “necessary to the safe and efficient operation of the business” and its justification is “sufficiently compelling,”28 employers will usually fail to meet their burden of proof. It is difficult to argue that there is a compelling need (as opposed to an advantage) to stop Spanish or Chinese conversations in the break area or the restroom. I suspect that litigation-shy employers often avoid such rules rather than incur the costs of defending a Title VII suit.

“Certain Times” rules are far more likely to survive the business necessity standard than an All Times provision. Section 1606.7(b) is fact sensitive, so let’s use a simple example. Say that management requires workers to use English on the shop floor but permits conversation in LOTEs in the lunch area and the parking lot. Here the employer can muster several plausible arguments that it’s important to have linguistic transparency while production is ongoing: efficient communication among workers, easy monitoring of worker interactions by supervisors, and so forth.29 Whenever the employer can portray a practice as efficient or customarily part of the supervisory functions, the policy should survive as a business necessity.

Section 1606.7 functionally divides the workplace into two zones: public and private. The former is the area of ongoing business operations (the factory floor, the office workroom, etc.) where workers spend most of their time. Here the Guidelines seem to tolerate English-only restrictions due to a demonstrable connection with efficiency and legitimate supervisory needs. The private zone consists of conversations in places or moments (the break

26. See Speak-English-Only Rules, 45 Fed. Reg. 85,634, 85,635 (Dec. 29, 1980) (noting that the Commission will “closely scrutinize” All Times rules but that stating that employers may require that English be spoken whenever justified by business necessity).
29. See infra notes 71-80 and accompanying text (discussing business reasons for comprehensive language restrictions).
room, personal telephone conversations, etc.) where business interests exist but take on diminished importance. Regulation of the latter in the form of an All Times rule is much more challenging to justify. The EEOC’s Guidelines, in short, are not a radical, wide-sweeping encroachment of management prerogatives. They are a modest plan for opening the workplace to employee’s language preferences in limited situations. But a narrow scope alone cannot justify these rules. They must still survive the normative analysis that I pose in Parts III, IV and V.

B. The Assimilative Linguistic Dynamic

Recent Hispanic immigration to the United States has created a fear that English may cease to be the national language. Samuel Huntington, for example, has speculated that one possible cultural outcome of immigration is the bifurcation of America along Spanish and English language lines. Evidence of a significant foreign language presence in the U.S. is not hard to find. According to the 2000 Decennial Census of Population, over 47 of 262.4 million persons (17.9% of the population over the age of four) spoke a LOTE in the home. Of these, nearly 28 million spoke Spanish. A distant second place goes to Chinese with slightly more than 2 million speakers. Census data thus suggest the possibility that language policy in the United States may be driven by issues of how to deal with the influx of Spanish speaking immigrants. Likewise we can expect initiatives at the federal level – if they occur – to reflect the growing political influence of Hispanic-American voters.

There is no empirical evidence, however, that Spanish is displacing English. The fact that one speaks a LOTE in the home is not inconsistent with English fluency or proficiency. Many persons who speak a LOTE in the home are bilingual and therefore have English as one of their native languages. In addition to gauging the presence of other languages within the population, the Census attempts to assess levels of English proficiency. A glance at the 2000 Census figures leaves little room for doubt that English

30. The discussion in this Subpart follows my treatment of the assimilative linguistic dynamic in Leonard, supra note 8, at 64-70.


remains the de facto national language. The Census Bureau’s questionnaire contained questions that gauged the language proficiencies of American citizens. Specifically, the Bureau asked whether a person over the age of four spoke a language other than English in the home and whether this person spoke English “very well,” “well,” “not well,” or “not at all.” 34 Prior censuses had asked about a person’s “mother tongue.” 35 That inquiry was discontinued beginning with the 1980 Census based on a conclusion that linguistic background provided insufficient information about present ability to speak English. 36

Any fears that immigration is creating a linguistically fractured society are quickly allayed by Census Bureau data regarding proficiency in English. For 2000, the Bureau reported that about 215 million persons age 5 or older spoke only English in the home. 37 They are perfectly fluent. If we add the 25.6 million persons who speak a LOTE in the home who also speak English “very well,” 38 we account for 91.9% of the population. Add to them the 10.3 million LOTE-speakers who speak English “well” 39 and we’re up to 95.8% of the populace having functional English skills or better. Only relatively small groups report speaking English “not well” (7.6 million or 2.9%) and “not at all” (3.4 million or 1.3%). 40 Another measure of English prevalence is census data regarding “linguistically isolated households,” i.e., homes where no one 14 years or older speaks English “very well.” 41 The Bureau reports that in 2000 only 11.9 million persons (4.5% of the population) were living under linguistic isolation. 42 The bottom line is that only one-twentieth

34. Id. The Census depends upon self-reporting of language proficiencies and does not provide definitions of proficiency levels. See id. It does, however, consider anyone reporting speaking less than “very well” to have some level of difficulty with English. See id. at 2. See also Robert Kominski, How Good is “How Well”? An Examination of the Census English-Speaking Ability Question, Presentation at the 1989 Annual Meeting of the American Statistical Association (Aug. 6-11, 1989), http://www.census.gov/population/socdemo/language/ASApaper1989.pdf (noting subjective nature of responses to language proficiency questions).

36. Kominski, supra note 34, at 1.
38. TABLE 1, supra note 32.
39. Id.
40. Id.
41. See LANGUAGE USE AND ENGLISH SPEAKING ABILITY: 2000, supra note 33, at 9-10 (defining linguistic isolation).
42. TABLE 1, supra note 32. See also LANGUAGE USE AND ENGLISH SPEAKING ABILITY: 2000, supra note 33, at 10.
of the population has significant trouble communicating in English. The capacity to communicate in English is nearly universal.

English has prevailed over the generations because of a seemingly inescapable pattern of linguistic assimilation by immigrants. An immigrant family’s transition to English has traditionally been a three-generation process. The first generation keeps its native language but learns English as well as it can; the second generation becomes bilingual, learning the parents’ language in the home and English elsewhere; the third generation tends to speak English as its sole native language.43

Studies of Hispanic immigrants suggest that linguistic assimilation is accelerating. McCarthy and Valdez determined that the three-generation paradigm applied to Mexican-Americans in California.44 About one-quarter of the immigrant generation spoke English well.45 Ninety percent of the second generation were proficient in English while 95% of the third had achieved proficiency.46 Indeed, over half of the third generation were English monolinguals.47 Veltman later studied all Hispanics and theorized that assimilation was telescoping into a two-generation process.48 Veltman concluded that the window for learning English usually closes within 15 years, with the actual degree of proficiency determined principally by length of stay in the United States and age at arrival.49 Teenage and adult immigrants tend to learn less English than young children.50 Veltman’s research is, notably, consistent with a conclusion that a hypothetical (though highly unlikely) cessation of Hispanic immigration would result in the decline or disappearance of Spanish in the United States within 15 years.51

Results from the 2000 Census dovetail with the conclusions of the McCarthy-Valdez team and Veltman. Consider the data correlating foreign birth with use of a LOTE in the home. Half (25.5 million or 54.3%) of the 47.0 million persons who speak a LOTE in the home are foreign born.52

45. Id. at 61.
46. Id.
47. Id.
49. Id. at 40.
50. Id.
51. Id. at 3.
Nearly three-quarters (15.7 million or 73.5%) of the 21.3 million who speak English less than “very well” were foreign born. Unfortunately we can’t take the comparison much farther. The Bureau’s definition of a LOTE doesn’t identify a person’s primary or dominant language. Instead, census workers had subjects identify themselves as speakers of a LOTE in the home whether they spoke that language either sometimes or always. Classification of ability to speak English in terms of “very well,” “well,” “not well,” and “not at all” depends on self perceptions and lacks precision. Nevertheless, the correlation between foreign birth and speaking English less than “very well” is too obvious to deny. Moreover, the fact that speakers of LOTEs report levels of English proficiency ranging broadly from “[n]ot at all” to “[v]ery well” is consistent with conclusions that immigrants themselves tend to achieve varying measures of English competency within 15 years of arrival.

What causes the assimilative dynamic? It is certainly not because English is an inherently better language. No one would argue that James Joyce is more subtle than Jorge Luis Borges or vice versa. The explanation is rather obvious. The United States transacts nearly all government, business, commercial, and cultural matters in English. True, individuals can choose to live in language enclaves that provide the sustenance of life, enable conversations with their neighbors and within their churches, and allow access to media (such as Univisión or Telemundo) in their native languages. Anything less basic, however, requires English. How can we understand public events, much less participate in them, without English? Or build a professional career? Do the media not bombard us with constant English language messages?

A more questionable contribution to English assimilation may come from “English Only” laws. As of this writing, twenty-seven states have some form of such laws. These initiatives are hardly uniform. Colorado, for example, uses sweeping language (“The English language is the official language of the State of Colorado.”) while the Georgia provision specifies

53. Id.
55. Id. at B-32.
56. See Leonard, supra note 8, at 69.
PROTECTION OF MINORITY LANGUAGES

broad exceptions. From my vantage, the Official English movement seems a strange brew of xenophobia, hysteria and sincere concern for the integrity of American society. But the channeling effect of such laws on public opinion should not be underestimated.

C. Practical Implications

As a practical matter, the Title VII language rules play a very limited role in protecting individual language preferences in the workplace and in preserving LOTEs against the ubiquitous assimilative pressures of English. Section 1606.7 exempts certain private moments of the workday, such as lunchtime in the break room, from the usual managerial discretion over employee behaviors. Demonstrable connections between language and most job responsibilities (which I discuss in Part III) preserve employers' freedom under the business necessity rule to prohibit use of LOTEs for the great majority of the workday. Add to the narrow scope of the rules the inexorable pressure of linguistic assimilation. Immigrant families for the most part have bilingual children and monolingual English-speaking grandchildren. The chief beneficiaries of Section 1606.7, therefore, are the immigrants themselves who in most cases speak English as a second language and simply find it easier to converse in a LOTE.

Should Title VII's limited protections for workers' language preferences disappear overnight, the practical consequences would be minimal. An English-only curtain would descend on some workplaces while other employers would remain indifferent to their employee's language choice in the break room. In either event, most immigrant employees would continue to collaborate with others in English and go home to their families where a different language is used. Their children will be fluent in English and receive an even more attenuated benefit from the Title VII rules. The grandchildren will not care. Title VII's language rules, in short, will not alter the process of linguistic assimilation in American society; they only soften the transition. I also question the extent of the individual burden on the immigrant worker. By any reasonable measure, the primary compensation for working a job is salary plus whatever benefits come with it. Choice of language for lunchtime

60. See, e.g., GA. CODE ANN. § 50-3-100(d) (West 2006) (establishing exceptions for public safety and administration of justice, foreign language instruction, promotion of tourism and trade, etc.).

61. The workplace of course has a social dynamic that many employees value independent of financial compensation. Vicki Schultz, for example, writing about sexual harassment notes the role of the workplace in the development of personal identity and affiliations. See Vicki Schultz, The Sanitized Workplace, 112 YALE L.J. 2061, 2069-70 (2003). See also CYNTHIA ESTLUND, WORKING TOGETHER 129 (2003) (noting importance of workplace in interpersonal relationships). Social aspects of the workplace are incidental to economic ones, however, in the obvious sense that a person will look for new employment opportunities quickly once the paychecks cease.
conversation may be personally important but for most persons is secondary to economic concerns. Besides, for workers who want an environment where they can hear and speak their native language, the home and perhaps the neighborhood are far more likely to fill this need.

Why then burden employers with the risks and costs of legal liability that only provide benefits to a transitional element of society? The EEOC language rules will likely fail to satisfy those who view government actions through utilitarian lenses. The Benthamite arithmetic is at best elusive. It is probably impossible to quantify the largely personal and cultural benefits conferred on speakers of LOTEs and simply difficult to measure the costs imposed on businesses – and the economy generally – of regulatory compliance, defense of claims, and loss of managerial discretion. Creating language rights in the workplace is not cost-free. It would be a mistake, however, to dismiss the Title VII rules out-of-hand as a kind but wasteful gesture toward a single generation. Employment laws are not strictly utilitarian exercises. In the next three Parts, I shall address three normative conceptions of law that may provide a justification for the EEOC language rules: equality interests, autonomy interests, and multiculturalism.

III. LANGUAGE RULES AND EQUALITY INTERESTS

American civil rights law famously promotes each citizen’s interest in equality. The “civil rights model” underlying the Supreme Court’s equal protection clause decisions and statutes such as Title VII amounts to a mandate that persons who are alike be treated alike. 62 Can this well-established goal of comparable treatment provide a normative justification for requiring employers to allow workers to speak in their preferred language? Spanish-speaking plaintiffs in the seminal Spun Steak case argued – unsuccessfully – that their employer’s language restrictions deprived them of a privilege enjoyed by native English speakers: “the ability to converse on the job in the language with which they feel most comfortable.”63 Language claims, however, are a poor match for the equality-driven underpinnings of Title VII. Race and gender are presumptively pointless in personnel decisions. When an employer relies on such traits, she discriminates against an otherwise qualified employee or applicant who is like others save for an irrelevant factor. Language use, however, is relevant to the performance of most jobs; 64

62. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (equal protection is essentially a direction that all persons similarly situated should be treated alike).
64. There are some jobs where a knowledge of English is not required for employment. I am not aware of any empirical studies attempting to measure the number of such jobs in the U.S. economy. I imagine, however, that most jobs requiring no English involve simple, repetitive tasks such as assembly line work, food processing or harvesting. Nearly all Title VII language claims are brought by bilinguals. In Spun
hence one cannot argue that language requirements or use restrictions treat persons who are alike differently. In the end, the better view of the EEOC Guidelines is that they promote cultural rather than equality interests.

There is a fundamental difference between Title VII's prohibition of race or gender discrimination and the EEOC's minority language protection rules. An employer's insistence that her workers speak only English on the job simply does not offend traditional notions of equality. As far as American employment discrimination law is concerned, we normally object to unequal treatment when it is based on immutable characteristics deemed irrelevant to the management of a workplace. Race is the paradigmatic example. Employer exclusions or distinctions based on race are offensive for two reasons. First, race is not a pertinent concern in hiring and retaining employees. The proper issue is whether someone can perform a job well enough to contribute to the profitability of an enterprise. The second concern is fairness. Since race is an immutable characteristic, we think it unfair to let a person be tarnished with inescapable stereotypes. The same concerns apply in most cases to gender and national origin strictly defined as the country of one's origin. In contrast, courts have rejected Title VII claims based on rules against personal choices such as hair styles that, while culturally or ethnically

---

Steak, for example, only two of twenty-four employees spoke only Spanish. See id. at 1483. One exception is EEOC v. Synchro-Start Products, Inc., where some of the plaintiffs were monolingual Polish and Spanish speakers. See 29 F. Supp. 2d 911, 912-13 (N.D. Ill. 1999).

65. I discuss the conceptual difficulties of fitting Title VI language claims into the civil rights model at greater length in Leonard, supra note 8.

66. Title VII also forbids discrimination on the basis of religion. Although some persons consider their religious beliefs inalterable, other have noted that the possibility of conversion or lapse makes religion a mutable trait. See, e.g., Robert Post, Prejudicial Appearances: The Logic of American Antidiscrimination Law, 88 CAL. L. REV. 1, 8 (2000) (law protects 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 believers can convert). On balance it may make more sense to view Title VII's religion clause as a First Amendment rather than an equality interest. See Kenji Yoshino, Covering, 111 YALE L.J. 769, 928-29 (2002); see also Leonard, supra note 8, at 88 n.184 (discussing religion and civil rights model of Title VII).


69. See supra note 13 and accompanying text (noting that Congress likely viewed "national origin" merely as the country birth or ancestry).
expressive, are voluntary behaviors and therefore do not implicate immutable traits. 70

Language is different on both counts. First, a knowledge of English is plainly relevant to job performance. No one would make a straight-faced argument that the ability to speak English is irrelevant or marginal to most jobs. English is the de facto national language. 71 Our commercial and government culture is Anglophone. The vast majority of commercial and governmental transactions, including communication, record keeping and client contact are performed in English. Advocates of minority language rights acknowledge that work rules may insist on use of English in typical business situations. 72 Likewise the EEOC’s greater tolerance of rules restricting use of LOTEs at certain times implies that use of English is often critical to the operation of a workplace.

But doesn’t the narrow focus of the EEOC rules – reaching only the private sphere of the workplace – avoid any clash with legitimate business interests? At first glance, one might conclude that personal interactions at work have so little effect on business operations that regulation of the former is irrelevant to the latter. Closer analysis reveals, however, that even work rules that require use of English at all times can serve a valid purpose. The EEOC views such restrictions as presumptively discriminatory. 73 The EEOC’s explanation of its rule against All Times policies is hardly enlightening. The text of the regulation states that blanket prohibitions against the language in which workers “speak most comfortably” disadvantages their employment opportunities. 74 Given the ubiquity of English among the American workforce, even among those who also speak a LOTE, this explanation lacks force. The key factor in gaining and keeping employment will be the employee’s ability to communicate in English at the level prescribed by the employer. More reasonably, the EEOC suggests that All Times rules may create a hostile work environment. 75 Hence the prohibition serves a prophylactic


71. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (striking down restriction on instruction in LOTEs but noting that the failure to learn English hinders a child’s ability to become fully participating citizens); Frontera v. Sindell, 522 F.2d 1215, 1220 (6th Cir. 1975) (English is the common national language); Gerald P. López, Learning About Latinos, 19 Chicano-Latino L. Rev. 363, 405 (1998) (English is the de facto national language).


73. See supra Part II.A.

74. 29 C.F.R. § 1606.7(a) (2006).

75. Id.
effect by creating free language zones (such as the break room) where the employer presumably has limited interests in restrictions.

While the EEOC's de facto ban on All Times rules may command sympathy for persons who want to have an easy chat over lunch, it is a mistake to dismiss All Times rules as inherent or even likely cases of discrimination under the traditional civil rights model. Employers have at least two important interests in requiring employees to speak English all the time. First, the rule serves a supervisory function. It is important for managers to know what employees think and say to each other. Workers may have important thoughts about the competence of fellow workers or managers or about unionization. Permitting conversations in a LOTE effectively disables the monolingual manager or pro-management workers from overhearing these comments.76

An English-only policy may also promote the legitimate business goal of achieving workplace harmony. Several Title VII language cases involve allegations that workers used conversations in a LOTE to create a hostile work environment. In Roman v. Cornell University, for example, the plaintiff had been instructed to refrain from conversations in Spanish after co-workers complained that she avoided English to exclude them from conversations.77 Maintaining tranquility among staff is not just a legitimate concern; it's an essential practice in a successful business.

One might think that the employer's interest in maintaining staff harmony is different in a business that requires its employees to communicate with its customers in a LOTE. I suspect that this happens a great deal in places with high rates of immigration such as the southwestern U.S. border.78 Professor Perea argues that once use of a LOTE is established in a workplace, it is unlikely to be disruptive.79 With respect, I suggest that this argument presumes too much good will within human nature. Conversations in a LOTE among workers are likely to arouse coworker suspicions even when conversations with customers would not.80

76. I discuss the point at greater length in Leonard, supra note 8, at 134.
78. See, e.g., Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980) (worker required to speak Spanish when appropriate with customers in a Brownsville, Texas lumber yard).
79. Perea, supra note 72, at 301-02.
80. See Leonard, supra note 8, at 133. A recent study on language exclusion in the workplace concludes that use of a different language by coworkers may result in
Language capacity is also sufficiently mutable to distinguish itself from the inalterable facts of race and gender. Recall the discussion of the assimilative linguistic dynamic in American society from Part II.B. Lack of fluency in English is generally confined to the immigrant generation itself; their descendants are fluent in English. Thus to the extent that Title VII promotes equality interests, it does so for the immigrant generation itself. The personal benefits to members of this group are not insubstantial. For immigrants, the gap between proficiency and fluency in English indeed creates a certain lifelong inequality of circumstances. Permission to converse in a LOTE during break times secures an advantage that they would not otherwise fully enjoy.

Negative effects of language restrictions on the immigrant generation, however, are different in quality from racial or gender exclusions. The classic restriction bars all members of a disfavored class from enjoying a desired benefit or confers a separate benefit as in *Plessy*. A requirement that a worker speak English even in the break room defines the workplace benefit of conversation in terms that are more difficult for the immigrant to meet. The burden, however, will vary among immigrant workers. All presumably spoke sufficient English to qualify for employment. Some will be more proficient in English than others. Most will learn more English as they become acculturated to life in the United States. The picture that emerges is not the wholesale exclusion of a group defined by immutable characteristics; rather, that of an immigrant generation who will enjoy the benefits of a monolingual workplace in varying measures according to individual circumstances. This is not the stuff of Jim Crow laws.

Attempts to analogize language to race or gender also fail to appreciate fully the assimilative language dynamic. Professor Perea argues that language capacity is "practically immutable." He points to studies indicating that certain Hispanics experienced difficulty in learning English and to analyses suggesting sociological and psychological impediments to learning a second language. He reviews one study finding that Mexican and Cuban im-

---

the ostracism of others. See Robert T. Hitlan, Kristine M. Kelly, Stephen Schepman, Kimberly T. Schneider & Michael A. Zárate, *Language Exclusion and the Consequences of Perceived Ostracism in the Workplace*, 10 GROUP DYNAMICS: THEORY, RES. AND PRAC. 56 (2006). The authors conclude, in pertinent part, that English speaking workers may experience the negative effects of ostracism by Spanish speaking coworkers, e.g., reduced commitment to an organization, lessened citizenship behaviors and increased perceptions of threats. *Id.* at 63-65. Since the study was based on roleplaying by 600 undergraduate students who had volunteered for extra course credit rather than actual workers, *see id.* at 58, one must take these results cautiously.

82. *Id.* at 280-84.
migrants experience difficulty in learning English\textsuperscript{83} and another concluding that half of Hispanic-origin residents over the age of 13 continued to speak Spanish as their primary language.\textsuperscript{84} Perea then points to several possible explanations for the failure to master English, including diminished receptivity to language after a "critical period" in youth,\textsuperscript{85} the "social distance" between language learners and the dominant culture,\textsuperscript{86} a "psychological distance" between the learner and the dominant group owing to feelings of self-doubt and confidence,\textsuperscript{87} and the effects of a history of discrimination against language minorities.\textsuperscript{88}

I find these explanations incomplete if not unconvincing. Yes, common sense and experience tell us that it’s tough to learn a new language once we reach a certain age. It’s also obvious that we retreat to our native language to express our most subtle or intimate thoughts. But even if we could determine with some precision whether and which of the various sociological and psychological factors impede language acquisition, we would still be left with a problem that affects primarily a single generation in highly individualized ways. There is little in this pattern that resembles the permanent, immutable, and intergenerational traits of race or gender.

Federal courts have generally rejected arguments that bilingual workers have an equality interest in speaking in a preferred language.\textsuperscript{89} The tendency

\textsuperscript{83}Id. at 280 (citing A. Portes & R. Bach, Latin Journey: Cuban and Mexican Immigrants in the United States 174, 180, 198 (1985) (two-thirds of men in study learned little or no English after six years)).

\textsuperscript{84}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.” Id. at 280 n.100.

\textsuperscript{85}Id. at 281 (citing, e.g., E. Lenneberg, Biological Foundations of Language (1967); S. Krashen, Second Language Acquisition and Second Language Learning 72 (1981)).

\textsuperscript{86}Id. at 281-82 (citing Schumann, Second Language Acquisition: The Pidginization Hypothesis, in Second Language Acquisition: A Book of Readings 261-67 (E. Hatch ed., 1978)).

\textsuperscript{87}Id. at 282 (citing Schumann, supra note 86, at 263-67; R. Gardner & W. Lambert, Attitudes and Motivation in Second-Language Learning (1972)).

\textsuperscript{88}Id. at 282-84. 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.

\textsuperscript{89}See, e.g., Garcia v. Spun Steak Co., 998 F.2d 1480, 1487 (9th Cir. 1993) (rejecting claim of bilingual plaintiffs on grounds that a bilingual may choose between languages and hence is not adversely affected by language restrictions); Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980) (same); Prado v. L. Luria & Son, Inc., 975 F. Supp. 1349, 1354 (S.D. Fla. 1997) (citing Gloor, 618 F.2d 264) (English-only policies lack adverse impact on bilinguals).
is to regard the bilingual worker as someone who has a choice of languages and therefore cannot be adversely affected by work rules requiring use of English. The leading case is *Garcia v. Spun Steak Co.* where bilingual plaintiffs challenged their employer’s rule that English be used in all work related activities. Defendant had adopted the limited English-only rule in response to complaints that certain workers were making derogatory remarks in Spanish about African- and Asian-American coworkers. The rule contained exceptions for breaks, lunch hours and other private times; thus plaintiffs were litigating the right to speak Spanish on the shop floor while working. Other facts supported their position: there was no requirement that they speak English when hired; and the work consisted largely of individualized, repetitive assembly line work where employees could apparently converse in Spanish without affecting performance.

Plaintiffs’ legal argument, in pertinent part, was that *Spun Steak*’s English-only rules created a disparate impact by depriving them of a benefit enjoyed by monolingual Anglophones: the privilege of speaking the language in which they were most comfortable. The Ninth Circuit disagreed. It reasoned that shop floor conversation, like any other work privilege, lay within the discretion of the employer. The employer chose to define the privilege narrowly as conversation in English. If so, the only question is whether bilingual workers had been deprived of the privilege. Since they spoke English, they were not disadvantaged, i.e., no harm, no foul.

*Spun Steak* of course did not analyze the plaintiff’s Title VII claims in the academic terms of cultural accommodations versus equality interests. It applied the requirement that plaintiffs in a disparate impact claim demonstrate a facially neutral rule that imposes a significantly adverse effect on a protected class of workers. One can quarrel with the court’s conclusion 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.’” The term bilingual lacks precise definition and many bilinguals are simply better at one language than the other. Nevertheless it’s fair to extrapolate from Judge O’Scannlain’s opinion an overarching premise that the ability of immigrants to learn English

90. 998 F.2d at 1483.
91. Id.
92. Id.
93. See id. (noting that plaintiffs were production line workers who stood at conveyer removing poultry and other meats and placing them into cases or trays); see also id. at 1487 (stating that privilege of small-talk is important).
94. Id. at 1487.
95. Id.
96. Id. at 1486.
97. Id. at 1487 (quoting Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980)).
creates a commonality between them and the larger workforce that in turn eliminates the need for legal protections based on difference or inequalities.\textsuperscript{98}

If the EEOC Guidelines do not advance traditional equality interests, then what do they accomplish? They confer an affirmative benefit on bilingual employees: the choice of a minority language in certain situations. The rules have the apparent intent of promoting a dignitary interest in the practice of an important aspect of culture. Section 1606.7(a) suggests this concern by its references to "the language [employees] speak most comfortably" and the possibility that speakers of LOTEs may experience "an atmosphere of inferiority, isolation and intimidation" without legal protections.\textsuperscript{99} The ultimate effect of these rules is to create an environment where workers at set times may feel comfortable using a LOTE. This sense of security derives not only from protection against employers' reprisals but also from the reactions of hostile coworkers. Some may also feel a sense of social approval from the fact of legal protection for LOTEs.

I will defer until Part V a more extensive discussion of the nature of culture. For the moment, let us assume that culture is the composite of a particular group's customary behaviors and that, in some cases, we would be inclined to say that ethnic groups have distinct cultures. Given this behavioral approach to culture, it is fair to say that promoting positive feelings about someone's native language or culture may generally be beneficial, but has nothing to do with screening out irrelevant and immutable traits from personnel decisions. Section 1606.7 simply represents the EEOC's decision to use its administrative authority to create and enforce cultural rights. Perhaps one could escape the argument that the Guidelines create cultural benefits by saying that the focus of the rule is the neutral, even laudable goal of increasing worker comfort. But the EEOC, and federal anti-discrimination law generally, is not concerned with worker discomfort unless related to the treatment of a protected class based on immutable traits that are occupationally irrelevant. And the text of Section 1606.7 makes clear that the Commission's concerns are inspired solely by disadvantages that may stem from an aspect of national origin.

\textsuperscript{98} Plaintiffs also argued that defendant's rule deprived them of their right to cultural expression. \textit{Id.} The Court rejected the argument summarily by stating that Title VII prohibits unequal treatment but does not confer substantive rights. \textit{Id.} I think this conclusion is correct, but it may appear to contradict my argument that Section 1606.7 creates rights to cultural accommodations. The contradiction diminishes, however, when we consider that the \textit{Spun Steak} court was interpreting Title VII directly and that later in the opinion it deemed the EEOC's Guidelines to be an improper interpretation of Title VII. \textit{Id.} at 1489-90. I have made this point elsewhere. \textit{See} Leonard, \textit{supra} note 8, at 108-14.

\textsuperscript{99} 29 C.F.R. § 1606.7(a) (2006).
IV. LANGUAGE RULES AND AUTONOMY INTERESTS

Let us turn from issues of equality to theories of personal autonomy as a potential justification for the Title VII language rules. Protection of individual interests against governmental and institutional authority is the province of "liberal democratic" or "Western liberal" theory. Liberal theory has for over three hundred years championed the paramount place of the individual vis-à-vis the government or major social institutions. Early liberals such as John Locke and John Stuart Mill were laissez-faire proponents, counseling against government interventions into private affairs except to protect property rights or to avoid harm to others. They were hardly carbon copies of each other: Locke was a social contractarian while Mills came to liberalism via utilitarianism. Still, we can see the seeds of contemporary liberalism in their toleration of individual beliefs and emphasis on self-betterment. The late Twentieth Century saw a revival of classical liberalism, inspired by fears about the rise of totalitarian states, in the writings of Frederick Hayek, Sir Karl Popper, Robert Nozick and Sir Isaiah Berlin.

For the most part, however, modern liberalism has abandoned the earlier laissez-faire capitalism in favor of government intervention that promotes individual interests. Contemporary "welfare liberals" attempt to provide a theoretical basis for protecting individual autonomy within societies that are

100. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT ch. IX, § 124 (1690) ("The great and chief end . . . of men's uniting into commonwealths . . . is the preservation of their property.").
101. John Stuart Mill, On Liberty, in THE BASIC WRITINGS OF JOHN STUART MILL 3, 11 (Modern Library ed. 2002) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.").
103. See generally id. at 777-87 (discussing Mill's relationship to Bentham's utilitarianism).
104. See generally JOHN LOCKE, A LETTER CONCERNING TOLERATION (Mario Montuori ed., 1963); see generally IAN WARD, INTRODUCTION TO CRITICAL LEGAL THEORY 81-83 (2d ed. 2004) (discussing Locke and toleration).
106. See, e.g., FRIEDRICH HAYEK, THE ROAD TO SERFDOM 88-100 (1944) (arguing that an unregulated market was necessary to preserve political liberties).
increasingly composed of persons with different, often irreconcilable beliefs. Speaking generally, they show an egalitarian distrust of unequal distributions of wealth and privileges, tolerate individual differences, insist on a large sphere of personal autonomy, emphasize dialogic interactions among citizens and reject laissez-faire economics. Welfare liberalism, in short, attempts to be a morally neutral philosophy that assigns significant life decisions to individuals with assistance from the state when useful.\footnote{See William Galston, Defending Liberalism, 76 Am. Pol. Sci. Rev. 621, 621 (1982).}

Can contemporary liberalism furnish a justification for restricting employer discretion to prohibit LOTEs in the American workplace? In this Part of the Article, I will review the positions of three leading modern liberals. The emphasis will fall on John Rawls since he was the pioneer of welfare liberalism and is considered by some the leading contemporary political philosopher.\footnote{See, e.g., Ben Rogers, John Rawls: A Leading Political Philosopher in the Tradition of Locke, Rousseau and Kant, He Put Individual Rights Ahead of the Common Good, Guardian, Nov. 27, 2002, available at http://www.guardian.co.uk/obituaries/story/0,3604,848488,00.html (obituary of John Rawls).} His work is also complete in the unfortunate sense that he died in 2002. Finally, subsequent liberal theorists have tended to present their own work as either a clarification or an improvement over Rawls' ideas.\footnote{See, e.g., RONALD DWORIN, JUSTICE IN ROBES 261 (2006) [hereinafter DWORIN, JUSTICE IN ROBES] (acknowledging debt to Rawls).} I will also review the theories of two other prominent liberal theorists: Ronald Dworkin and Bruce Ackerman.

Fitting language rights into the confines of contemporary liberal theory requires generous servings of speculation. Welfare liberals seem immune to the particular topic. Rawls simply ignores it. In Political Liberalism he assumes a closed society, i.e., one where citizens are “born into a society where they will lead a complete life.”\footnote{JOHN RAWLS, POLITICAL LIBERALISM 12 (Columbia Univ. Press 2005).} Thus by one stroke of selective abstraction, he avoids the linguistic challenges posed by immigration. Nor do Dworkin or Ackerman address the language question directly. Therefore it is necessary to extrapolate from their particular conceptions of autonomy a principle of protecting minority language rights in the workplace. In the end, though, it is doubtful that language rights are required by modern liberal schemes.

A. Language Rights and the Rawlsian Social Contract

Rawls' liberalism is founded on a social contract in which hypothetical representatives retreat to an original position where a “veil of ignorance” prevents knowledge of everyone’s actual or eventual stations in life.\footnote{Id. at 22-28.} These individuals then form a social contract that insures universal access to “pri-
mary goods," a term of art including basic civil liberties, freedom of movement and choice of occupation, adequate income and social bases of self-respect. Inequalities in the distribution of social goods must pass Rawls' Difference Principle, i.e., they must inure to the benefit of the least advantaged element of a society. This test is a compromise between equality and the benefits of efficiency.

Rawls' presumption of an equal distribution of goods tempered by his Difference Principle is as distant from a laissez-faire scheme as one can imagine. He is willing to view protection of personal property as a basic liberty necessary for personal independence and self-respect. He does not, however, extend similar protection to ownership of natural resources and means of production, leaving those issues to normal political processes. This mindset accommodates many government regulations that we nowadays take for granted such as exclusions from employment on account of race. In such cases, an employer's property rights or contractual relations with employees are deemed subordinate to the overarching social goal or promoting equal employment opportunity.

In addition to focusing on a closed society uncomplicated by the side effects of immigration, Rawls does not attempt to alter competing belief systems based on religion, philosophy, moral regimes or culture. Such differences, he argues, are part of the "background culture" of everyday life. His hypothetical original position requires that representative parties enter a social contract without knowing their actual personal situations both as to wealth or personal affiliation to comprehensive moral doctrines. This "veil of ignorance" is necessary to protect the bargaining process from the unequal advantages that arise in real life. He wants us to construct fair basic institutions within the "overlapping consensus" drawn from our competing belief systems.

But how can we do so, even hypothetically, in ignorance of the language that we will speak? Rawls' representative bargainers must understand each other to discover their overlapping consensus. Hence the ability to communicate – and as a practical matter a common language – is neither a social contingency to be veiled nor even a basic social institution; rather, it is logically a condition precedent to Rawls' social contract scheme. Rawls implicitly makes this point by limiting his scheme to a closed society. A plan to con-

115. Id. at 181.
116. Id. at 282-83.
117. Id. at 283.
118. Id. at 298.
119. Id.
120. See supra note 113 and accompanying text.
121. RAWLS, supra note 113, at 14.
122. Id. at 23-24.
123. Id. at 24-25.
firm minority language rights more closely resembles a treaty between two societies than a social contract for one.

Set aside for the moment the conceptual difficulties of tracing language rights back to Rawls' original position. After all, the original position is just a contrivance for ordering society along fair and just terms. Do the more general guidelines of Rawls' scheme justify government interventions to protect language choices in the workplace? Rawls is a dedicated egalitarian and champion of individual autonomy. He takes the Kantian view that individuals have the moral capacity to determine what is good. He insists that social structures must provide certain "primary goods" that permit individuals to develop their moral powers over a lifetime. Such goods include not only sustenance and traditional civil liberties (free speech, for example) but also "the social bases of self-respect." His Difference Principle bans inequalities that do not benefit the least advantaged class within a society. His ultimate aim is to find a system of fair social cooperation among free and equal citizens over the generations.

Asking how Rawls would react to a single statute such as Title VII is a bit awkward. Rawls' rather abstract theory focuses on the "basic structure of society" as embodied in a modern constitutional system as opposed to discrete pieces of legislation. Federal law, however, is remarkably free of overarching principles protecting minority language rights. Other than Title VII, federal efforts to protect speakers of LOTEs are limited to provisions in the Voting Rights Act prohibiting use of English literacy tests against persons educated in Puerto Rican schools and requiring that political subdivisions having a minority language community of more than 5 percent provide bilingual assistance in voting. There was previously a commitment to bilingual education that has apparently vanished with the No

124. Id. at 27.
125. Id. at 75-76.
126. Id. at 181.
127. Id. at 282.
128. Id. at 3.
129. Id. at 11 (internal quotation marks omitted).
Child Left Behind Act.\textsuperscript{135} It would be far more Rawlsian to ask whether each citizen has a primary right of expression in her native language subject to the needs of social institutions. But American language law at present offers no such general right for our evaluation. Any Rawlsian justification for Title VII must take that law as it is found.

Considerable difficulties arise when trying to fit language rights into Rawls' concept of autonomy. In the first place, it is hardly clear that the language desires of an immigrant generation are the sort of problem a Rawlsian scheme would try to fix. As just noted, Rawls assumes that citizens will be born in a particular society where they lead complete lives. He was concerned with finding fair terms for cooperation over the generations. Focusing on the varying disadvantages of a single generation seems tangential to this goal and complicates the already challenging task of finding an overlapping consensus in which to locate social institutions. It is far more likely that Rawls, had he addressed the matter, would have deemed the assimilative pattern of English acquisition to be an adequate solution to the ephemeral problem of promoting equal access to social institutions for immigrants and their families. We should therefore be dubious of the notion that a Rawlsian social contract must include a slate of minority language rights for workers.

It is equally trying to pigeonhole workplace language rights within the Rawlsian framework, particularly the limited scheme created by Title VII. Rawls' first principle of justice states that each person is entitled to a "fully adequate scheme of equal basic liberties" that includes traditional civil rights such as freedom of thought, conscience and association.\textsuperscript{136} His schedule of primary goods, i.e., things that are normally necessary to permit individuals to exercise their moral power to form a conception of the good,\textsuperscript{137} includes the same basic civil liberties.\textsuperscript{138} If a legislature enacted a law forbidding use of any LOTE in public fora and private places, much as Franco attempted to curb Catalán,\textsuperscript{139} Rawls might well have objected. Stripping a person of his native language interferes dramatically with the subtle and personal process of calculating what is good and with the universally acknowledged rights of free expression.

\begin{enumerate}
\item \textsuperscript{135} No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002). Title III of the Act emphasized the need for “immigrant children and youth [to] attain English proficiency . . . and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet.” \textit{Id.} § 3102(1), 115 Stat. 1425, 1690.
\item \textsuperscript{136} RAWLS, supra note 113, at 291.
\item \textsuperscript{137} \textit{Id.} at 307.
\item \textsuperscript{138} \textit{Id.} at 308.
\end{enumerate}
Shop rules requiring use of English, even at all times, don’t have the same effect. Work is only one aspect of life. Everyone is free to exercise his moral capacities after the whistle blows. Employer restrictions are roughly comparable to the “time, place and manner” restrictions that we accept under our First Amendment jurisprudence. Conversely, the language rights created by Title VII are so narrow—limited to break times and other facets of work that may not pass a business necessity test—that one wonders how they contribute meaningfully to individual self-development. Thus the Title VII language rules seem to do too much and too little under the Rawlsian regime. They neither help nor hinder our Kantian quest to form a concept of what is good. It is doubtful that they should be numbered among a schedule of Rawlsian primary goods.

Rawls also includes “[t]he social bases self-respect” among the primary goods. Self-respect, according to Rawls, gives us a “secure sense of our own value” and the conviction that our own conception of the good is worth carrying out. He also argues that self-respect depends upon the features of social institutions, defined broadly to include expectations in interpersonal conduct. The concept is hopelessly vague and therefore tantalizingly flexible. Can we stretch the notion of self-respect to include language rights in the workplace? I’m inclined to say no. Denying permission to speak in one’s native tongue will have a stigmatizing effect at least for some people. But again, it’s hard to see how the highly circumscribed language rights under Title VII can soften the stigma. The knowledge that work restrictions have some business justification and therefore are not indiscriminately targeted at a class of persons should also confine any stigmatizing effects. Besides, other aspects of life such as churches, private associations, friendships and neighborhood events conducted in a LOTE can instill the self-respect that Rawls insists upon. There seems to be no pressing need under Rawls’ scheme to create a principle that demands protections for language in the workplace.

If minority language rights don’t fit into Rawls’ menu of basic rights or the social bases of self-respect, then we’re left with the lesser problem of a mere inequality. Rawls’ concession to economic efficiency and administra-

141. RAWLS, supra note 113, at 308-09.
142. Id. at 318.
143. Id. at 319.
144. Whether stigma affects most or even a majority of persons who speak a LOTE is unknown to me. We can presume some persons are anxious to assimilate and are not bothered by having to use English. The balance is an empirical question for which I can find no statistical answers. See generally infra Part V.C. (discussing language and cultural identity).
tive demands is his Difference Principle.\textsuperscript{145} It provides, in pertinent part, that social and economic differences are acceptable only when they work to the greatest benefit of the least advantaged class.\textsuperscript{146} Even here the analysis is troublesome. How likely is it that persons demanding minority language rights would be the least advantaged class? If another group takes on this litmus role, the analysis of inequalities likely changes in quality as well as quantity. Suppose that persons with disabilities are deemed the least advantaged. A Rawlsian analysis would veer toward issues such as income redistribution and the availability of programs for rehabilitation and vocational training. In comparison to these concerns, the right to chat at break time in a language other than English seems trivial. Language minorities would also face the challenge of arguing that their largely personal and cultural preferences were more important than the largely economic concerns of persons with disabilities.\textsuperscript{147}

Application of the Difference Principle is further complicated by our inability to quantify cultural deprivations. We can measure the disadvantage of disability in the labor market, in a rough but useful way, by comparing the compensation of someone without a disability to a disabled worker with otherwise comparable credentials. Title VII, however, protects personal, cultural choices that are impossible to reduce to numbers. Could we ever conclude that the failure to protect language choices (assuming that native speakers of LOTEs are the least advantaged class) fails the “greatest benefit” test? Probably not. Rawls seems to equate social inequality with inferior economic or financial entitlements.\textsuperscript{148} Given that Title VII forbids differential pay rates based on race or national origin, there is no economic disadvantage associated with an English-only work rule. Comparing personal cultural deficits with economic or competing cultural claims (e.g., the concept that American national identity should be Anglophone) is too subjective to submit to a simple balancing test.

Equally important, we should be skeptical of claims that English-only work rules create inequalities that even trigger the Difference Principle. While employers may (and certainly have) impose restrictive policies out of

\textsuperscript{145} RAWLS, supra note 113, at 281-82.

\textsuperscript{146} Id. at 291.

\textsuperscript{147} This is not to say that persons with disabilities do not also have a dignitary interest that is served by integration into the institutions of society. See, e.g., Samuel R. Bagenstos, \textit{Subordination, Stigma, and “Disability,”} 86 VA. L. REV. 397, 436-45 (2000) (noting dignitary aspects of disability rights movements). Comparing their dignitary interests with those of language minorities, however, would at best be difficult.

\textsuperscript{148} See RAWLS, supra note 113, at 282-83 (discussing social inequality in terms of entitlements, earnings, taxation and fiscal or economic policies).
pure bias, languages rules – as argued variously above – serve legitimate economic and managerial interests. Given that bilinguals can by definition comply with these rules, there is a good argument that differential treatment of a serious kind has not occurred. Compliance with English-only shop rules entitles bilingual workers to the compensation and benefits attached to their positions. They are, in short, treated like everyone else. The cultural costs of compliance don’t appear to concern Rawls.

A final possibility is that persons in the original position would be naturally inclined to hedge their bets against loss of language rights. The argument might develop as follows. Imagine two people in the original position (behind the veil of ignorance) knowing that one will be the employer and the other a worker who would prefer to converse with other workers in her native language, but neither knowing her ultimate station. Wouldn’t they come away with a situation that looks a lot like the present EEOC rules? If we assume that the Rawlsian mindset indulges cultural needs to a greater extent than I have argued above, then this argument takes on some force.

I have doubts, however, that these hypothetical participants would hedge their cultural bets in the same way that persons would guard against impoverishment or race- and gender-bias. If we attribute knowledge that some citizens will be bilinguals with a desire to speak occasionally in their native language, we must also assume awareness of the assimilative linguistic dynamic, that individuals have a large measure of control over their mutable language practices and preferences, and that a monolingual workplace tends to be efficient. Rational persons could then conclude that business prerogative should outweigh the light, passing burdens of workplace language restrictions, i.e., that the promise of increased prosperity was more important than the opportunity to speak a language of choice. Of course the parties might still decide to protect the bilinguals’ preferences, but the uncertainty of this hypothetical process illustrates the difficulty of folding cultural issues into Rawls’ scheme.

B. Other Liberal Views

Rawls’ indifference to minority language rights is typical of the welfare liberals generally. Again, I don’t propose to scour the entire field for hints of sympathy toward such rights. A brief examination of two other leading liberals, Ronald Dworkin and Bruce Ackerman, should be adequate to establish the point. Since Rawls’ passing, Dworkin is probably the leading theorist of redistributionist liberalism. Unlike Rawls, Dworkin proceeds from general principles of equality rather than social contract theory. The distinction at

149. See, e.g., EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1071 (N.D. Tex. 2000) (finding that blanket prohibition of Spanish was motivated by racial and ethnic animus).

first glance might suggest that language differences may be less important than under a Rawlsian scheme. In the absence of a hypothetical contract to which the representative parties consent after negotiations, the need for a common language diminishes. The distinction, however, is theoretical at best and probably inconsistent with Dworkin's intentions. His "envy test" – described immediately below – presumes that persons in a hypothetical community can communicate dissatisfaction with their lot in life. As a practical matter, commonality of language serves the same instrumental role as for Rawls.

Dworkin's theory of equality of resources, set out most recently in *Sovereign Virtues*, calls for an initial equal distribution of goods, property and services.¹⁵¹ Equality is achieved when the distribution passes an "envy test," that is, when no one in a hypothetical community desires someone else's share more than his own.¹⁵² Subsequent inequalities in status inevitably occur as members of a community place their initial entitlements to work. Some may invest or labor while others prefer leisure.¹⁵³ At this point, those whose fortunes have dwindled, either absolutely or relatively, may well envy the position of their more industrious colleagues. But, says Dworkin, only certain types of differences should give rise to compensatory actions. Inequalities stemming from free choices of individuals do not merit compensation while those caused by circumstances outside of the person's control demand attention. Various strokes of "[b]lute luck,"¹⁵⁴ to use Dworkin's term, make up the latter category and include: handicaps,¹⁵⁵ inferior work skills,¹⁵⁶ and even uncontrollable cravings.¹⁵⁷ Once we determine that inferior results arise from circumstances rather than choice, Dworkin would have us close the gap by calculating how much a person would need to pay in a hypothetical insurance market to insure against that risk.¹⁵⁸ As a practical matter, the hypothetical premiums are collected in the form of taxes and distributed appropriately by the authorities.¹⁵⁹

Minority language rights seem alien to Dworkin's scheme. In an essay from 1985 about state support for art and culture, Dworkin observed that

¹⁵¹. *Id.* at 65-71.
¹⁵². *Id.* at 67. Dworkin reasons that the "envy test" is necessary since the initial shares may not be identical, e.g., there may only be 50 plover eggs on an island with 100 people. *See id.* at 67-69.
¹⁵³. *Id.* at 69-80 (individuals make significant life choices after initial equal distribution of resources).
¹⁵⁴. *Id.* at 73.
¹⁵⁵. *Id.* at 77-78.
¹⁵⁶. *Id.* at 83-99.
¹⁵⁷. *Id.* at 82-83.
¹⁵⁸. *Id.* at 73-83.
¹⁵⁹. *Id.* at 90-92, 99-109.
"[t]he center of a community's cultural structure is its shared language"\textsuperscript{160} and that societal cultures depend on a "shared vocabulary of tradition and convention."\textsuperscript{161} He further argued in favor of cautious state interventions to preserve language from "structural debasement or decay."\textsuperscript{162} His references to language here, however, have nothing to do with the issue of incorporating immigrant languages or their speakers into the mainstream of a society. Dworkin was concerned with maintaining a broad cultural framework within a society on which future generations could draw in forming their own cultural innovations.\textsuperscript{163} His assumption, echoed by other commentators, is that meaningful cultural developments require a range of choices.\textsuperscript{164}

Dworkin's primary concern is to shift financial resources when inequalities are caused by differences rather than choices. This concept offers little assistance to the worker who wishes to speak her native language on the shop floor. As a preliminary matter, the scope of difference is narrow. Workers get hired because they speak English well enough to perform their jobs. Speakers of LOTEs therefore are equal to other employees regarding job qualifications. Equally important, Title VII forbids differential wages based on national origin, hence a second point of equality between immigrants and the native born. If we focus on situations where speakers of LOTEs work side by side with native English speakers on a factory floor, nothing should trigger a financial redistribution under Dworkin's equality of resources theory.

There remains the question of more general vocational limitations caused by a lack of fluency in English. Consider the prosperous Cuban lawyer who decided to take his chances on a raft in the Caribbean rather than face a well-armed Revolutionary court in 1961 Havana. Now we have an instance where lack of fluency in English does foreclose work opportunities. He would not only lack a license to practice law in Florida but might also have a tough time getting through an American law school curriculum. Do we compensate him? Probably not. Although we can argue about how voluntary his departure from Cuba was, his decision to stay in the United State rather than move on to a Spanish speaking country is largely a matter of choice. True choices, according to Dworkin, don't merit redistribution.

I can think of only one instance where compensation would be theoretically proper: the child of immigrants – either born here or arriving at an early age – who is kept in a linguistically isolated household and never learns Eng-

\textsuperscript{161. Id. at 231.}
\textsuperscript{162. Id. at 230.}
\textsuperscript{163. Id. at 229 ("[W]e should] count ourselves trustees for protecting the richness of our culture for those who will live their lives in it after us.").}
\textsuperscript{164. See, e.g., Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights 83 (1995) [hereinafter Kymlicka, Multicultural Citizenship] (citing Dworkin, Matter of Principle, supra note 160, at 228, 231).}
lish well enough to get a job in most workplaces. I'm unsure how often this happens. The 2000 Census of Population indicated that 11,893,572 persons, i.e. 4.5% of the population over age 4, live in "linguistically isolated" households. 165 The latter are defined as homes where no one person 14 years or older speaks English at least "very well." 166 It is unclear how many of these persons are children who may miss exposure to English during a linguistically formative period. 167 My guess – based on the ubiquity of language assimilation, compulsory school attendance laws, and the well known tendency of the young to roam but also to watch hours of television each day – is that very few young persons remain so isolated that they escape the reach of English. And even if some do, it's hard to see how the limited rights created by the Title VII regulations could compensate them for lost occupational prospects. Educational programs for speakers of LOTEs would seem to be better tailored to close this gap.

Professor Ackerman's social justice theory accommodates language rights awkwardly at best and perhaps not at all. Like Dworkin, he rejects social contract theory in favor of general ethical principles. 168 The essence of his scheme is that citizens must engage in dialog to justify unequal distribution of scarce resources. He begins with an assumption that each person is entitled to an initial, equal share of a society's resources. 169 Deviations from the egalitarian norm must be justified by the beneficiary under certain ground rules that Ackerman calls "constrained power talk." 170 First, Ackerman's Rationality Principle states that when others challenge our right to a resource, we must articulate an explanation for our entitlement. 171 Failure to respond or to say something intelligible reveals a preference as illegitimate. 172 There is a second dialogic requirement. Justifications for privilege or unequal resources must meet his Neutrality Principle, that is, one may not defend an entitlement by saying either that her concept of the good is superior or by claiming an intrinsic superiority over another person. 173

How does this rather general charter for the liberal state apply to a specific claim for minority language rights in the workplace? It's not altogether clear. Ackerman offers a highly egalitarian scheme that places a heavy burden on anyone asserting an "inegalitarian distribution of worldly advan-

165. See Table 1, supra note 32.
167. Id. (noting that linguistically isolated households are those where no person over 14 speaks English at least very well but may include younger persons who do speak English).
168. BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 5-6, 99-100 (1980).
169. Id. at 16, 57.
170. Id. at 8.
171. Id. at 4.
172. Id. at 8.
173. Id. at 11.
He does not aim only at government actions and powers; private powers must also meet his tests of justification. On the other hand, Ackerman is pursuing the highly abstract goal of attaining an equal distribution of material resources for each citizen (as well as other liberal requirements for the ideal liberal states such as freedom from genetic domination and liberal education). He doesn’t explore in any depth issues that are pertinent to the language controversy such as the extent to which freedom of contract permits employers to set language rules or whether civil rights laws should overturn contractual prerogatives.

Let us nevertheless try to tease an answer out of Ackerman’s generalities. What if we ask the employer to justify the privilege of requiring her employee to use English at all times? A knee-jerk response that “It is my business and I’ll do what I damn well please” will not meet the Neutrality Principle since it implies that the owner prefers her own conception of the good (e.g., all Americans should speak English) or some innate superiority (e.g., workers should respect the managerial class). Does she meet the Neutrality Principle by arguing that it’s more efficient to conduct all communications in one language? Probably not. Ackerman rejects personal advantage as a justification for an unequal share of property. It’s a short analytical leap from Ackerman’s stricture on the distribution of property to limitations on its use. Indeed, favoring management would privilege its conception of the good (efficiency, profitability) over the worker’s (ease of conversation). The score: Worker 1, Management 0.

But what if we begin the inquiry by forcing the worker to justify his purported right to use a particular place for his cultural benefit? If the worker justifies his demands by saying that he requires at least some personal space during break times to retreat to the comfort of his native tongue, don’t we then violate the Neutrality Principle by favoring this conception of the good? Now we have a tie score: Worker 1, Management 1.

There is little in Ackerman’s treatise to indicate precisely how he would break the conceptual deadlock. Using the term “transactional flexibility,” Ackerman favors free use of property to achieve one’s ends once egalitarian prerequisites such as an initially equal share have been met. This concept requires that we respect the judgment of property owners about how they pursue their own goals. Imposing language restrictions for the sake of efficiency might be a legitimate way of achieving rent seeking goals (assuming, of course, a level playing field). On the other hand, Ackerman recognizes that the imperfections of existing societies often subject certain groups to

174. Id. at 16.
175. Id. at 19.
176. Id. at 15-16.
177. Id. at 168-200.
exploitation, thus calling for compensatory programs such as affirmative action.\textsuperscript{178}

The better view, in my opinion, is to treat the protective Title VII regulations as too remote from Ackerman's concerns. His egalitarianism focuses on economic concerns. Workers who demand a right to speak a LOTE already enjoy protection under Title VII against attempts to pay them lesser wages or benefits because they speak a LOTE as their native language. Any efforts to do so are easily categorized as "national origin" discrimination. (Presumably they were hired because they already spoke English well enough to do their jobs). Rather, the bilingual workers are demanding a cultural right. Government management of cultural concerns (such as those promoted by the EEOC Guidelines) seems to clash with Ackerman's desire to permit autonomous individuals to chart their own lives. One final point: Ackerman suggests in one passage that the dialogic approach requires commonality of language.\textsuperscript{179} His point, however, has little to do with the problem of multilingual societies; rather, he appears to be concerned with the tendency of participants to dialogue in an evasive manner.

C. A Summing Up

In spite of its variations, welfare liberalism is ultimately concerned with the paramount place of the individual in society and the consequent need to prevent government from interfering with personal decisions except under narrowly defined, supportive circumstances. As liberalism has evolved since the Seventeenth Century, the emphasis has shifted from Locke's determined efforts to preserve property rights to the welfare liberals' attempts to cultivate individual autonomy in an egalitarian setting. But even if we prefer the redistributionist systems of Rawls, Dworkin and Ackerman to the radically individualist neo-classicism of Hayek or Nozick, the former are hardly cordial to ideas that cast cultural desires as a concern of the state. The liberal mindset leaves culture, like religion and philosophy, to individual conceptions of the good. The normative basis for Title VII's language regulations, therefore, must lie elsewhere, in theories that authorize state interventions to promote cultural identification.

V. LANGUAGE RIGHTS AND MULTICULTURALISM

If liberalism provides scant hope to proponents of linguistic accommodations, are there competing norms that might provide a justification for Title VII's language regulations? In this Part, I examine multiculturalism as a normative explanation for Title VII's attempt to protect worker language preferences. Multicultural theory would seem a promising avenue for propo-

\textsuperscript{178} Id. at 231-72.
\textsuperscript{179} Id. at 78-79.
nents of Title VII’s language rules. Multiculturalists generally believe that all
cultures, at least longstanding ones, have something important to contribute to
the human experience and hence are owed equal respect. Consequently, so
the argument might go, a society must give proper recognition to its constitu-
ent cultures, including rules that guarantee speakers of minority languages the
opportunity to use their native tongues at established times.

Multiculturalism provides a powerful normative justification for the Ti-
itle VII language rules – and indeed for more sweeping measures – so long as
we accept its core precepts. I review the multicultural case in Parts V.A and
V.B, where I respectively examine the dynamics of multiculturalism relating
to language and then apply them to Title VII. Nonetheless, as argued in Part
V.C, certain key multicultural assumptions are troubling, particularly the
conclusions that language is inextricably linked with culture and that mem-
bers of minority cultures require recognition of their cultural identity by the
larger society for their well-being.

A. Multiculturalism and Language

Like most philosophies, multiculturalism is not monolithic. Theorists
working within this school of thought stake out a variety of positions on key
issues such as the significance of individual autonomy, the extent of accom-
modation for minority cultures or the desirability of maintaining cultural en-
claves within larger societies. Perhaps it is best to begin with a definition. I
use the term “multiculturalist” in reference to theorists who have dismissed
the traditional liberal’s faith in government neutrality as fantasy and who
advocate – to varying degrees – accommodation of minority cultures.

Such a definition is, to say the least, uncommonly broad. One subgroup
of multiculturalists, variously called “liberal culturalists,” “liberal multi-
culturalists,” or “soft pluralists,” keeps its ties to traditional liberalism by view-
ing cultural accommodations as a means of permitting self-definition by ena-
bling a reasonable range of social attachments. Will Kymlicka is the most
prominent exponent of this position. Other multiculturalists emphasize –
again to varying degrees – cultural integrity over individual autonomy.
Charles Taylor, for example, focuses on the individual’s need for his way of
life to receive public recognition and on the importance of intergenerational

180. CHARLES TAYLOR ET AL., MULTICULTURALISM: EXAMINING THE POLITICS OF
RECOGNITION 66-68 (Amy Gutmann ed., 1994) [hereinafter TAYLOR,
MULTICULTURALISM]; Diane Ravitch, Multiculturalism: E Pluribus Plures, 59 AM.
181. See, e.g., Eric J. Mitnick, Individual Vulnerability and Cultural Transformation,
182. See, e.g., id. at 1639.
183. See, e.g., KYMLICKA, MULTICULTURAL CITIZENSHIP, supra note 164, at 75;
see also Rodriguez, supra note 130, at 134 (positing theory of “fluid civic identity”
and arguing for language accommodations to facilitate participation in public life).
survival of cultures. Iris Marion Young goes even further toward a group-centered vision by advocating culturally differentiated citizenship. Any discussion of multiculturalism runs the risk of stripping away the nuances that distinguish its advocates’ views. Given that caveat, there are points of general agreement (as well as divergence) in the multicultural community sufficient to discuss the limited issue of language rights.

Multiculturalists uniformly agree that culture is constitutive of individual identity to some extent. The gist of their thinking is that we are culturally conditioned to interpret the world. Will Kymlicka has argued at length that identity is grounded in one’s cultural context. Culture, he argues, “provides the spectacles through which we identify experiences as valuable.” Or, as Margalit and Raz put it: “[f]amiliarity with a culture determines the boundaries of the imaginable.” Yael Tamir adds that cultural affiliations endow institutions with meaning. These observations are hardly novel. No modern political theorist, to my knowledge, makes a serious argument that perceptions of self are independent of experience. We all view the world and ourselves through the lenses of friendships, educations, readings, social circles, travels, religious or philosophical beliefs and so forth. As Charles Taylor argues, the “crucial feature of human life is its fundamentally dialogic character;” we develop our identities collaboratively in social contexts.

Precisely why human beings are inclined to a socialized identity is beyond my knowledge. Perhaps our thoughts are genetically predisposed to

184. See TAYLOR, MULTICULTURALISM, supra note 180, at 32-37 (discussing dialogic development of human identity); id. at 37-44 (discussing politics of difference and need for recognition of equal cultural worth); id. at 58-59 (discussing survival of culture in context of Quebec).


187. Avishai Margalit & Joseph Raz, National Self-Determination, 87 J. PHIL. 439, 449 (1990); see also Joseph Raz, Multiculturalism: A Liberal Perspective, in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 155, 163 (1994) (“[M]embership in their cultural group is a major determinant of [individuals’] sense of who they are; it provides a strong focus of identification; it contributes to what we have come to call their sense of their own identity.”).

188. YAEL TAMIR, LIBERAL NATIONALISM 72 (1993).

189. TAYLOR, MULTICULTURALISM, supra note 180, at 32.

190. Faced with the ultimate question of why people are so bonded to their cultures, Will Kymlicka has also punted. See KYMLICKA, MULTICULTURAL CITIZENSHIP, supra note 164, at 90 (causes of cultural attachment “lie deep in the human condition”
reflected our current social situation. Margalit and Raz, as well as Kymlicka, make the interesting observation that a person's cultural membership is secure because it does not depend on accomplishment.\footnote{1} Even a prisoner's sense of worth can rise with the fortunes of her cultural group. The argument has intuitive merit, but we also have to concede that group membership becomes a burden when civilizations decline. The reflected glory of fifth century Athenian civilization must have dimmed considerably when the Spartans tore down the walls in 405 B.C. Some theorists suggest that shared identities promote desirable feelings of trust and solidarity\footnote{2} while others note the impulse to transcend mortality by passing culture on to one's descendants.\footnote{3} Whatever the value of these explanations, it is important to distinguish between predispositions toward cultural affiliations and essentialist arguments that one cannot alter her cultural conceptions. (I will return to this point in Part V.C.).

Regarding the theme of this Article, some commentators argue specifically that language itself is constitutive of identity. They argue that language takes on social significance beyond its functional role of transmitting information or data. The following quotation from the sociolinguist Joshua Fishman, in the specific context of ethnic cultural identity, neatly captures the view of language as an essential 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 expressor 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 \ldots\ [S]ince language is the prime symbol system to begin with and since it is commonly relied upon \ldots to enact and call forth all ethnic activity, the likelihood that it will be recognized and singled out as symbolic of ethnicity is great indeed.\footnote{4}

\footnote{1} Margalit & Raz, supra note 187, at 447-49; Kymlicka, Multicultural Citizenship, supra note 164, at 89 ("[C]ultural identity provides an 'anchor for \ldots self-identification and the safety of effortless secure belonging.'") (quoting Margalit & Raz, supra note 187, at 447-49).

\footnote{2} See Kymlicka, Multicultural Citizenship, supra note 164, at 90.

\footnote{3} See id.; see also Taylor, Multiculturalism, supra note 180, at 52-56 (discussion of Quebec).

Many agree. So do I, but argue below that the connection between language and culture is not inevitable and is subject to immediate evolutionary pressure in the case of immigrants.

After concluding that language is constitutive of identity, the next step in the multiculturalist program can be loosely termed “accommodationist.” Cultural concessions are necessary to combat the tendency toward single society-wide cultures. Will Kymlicka has observed that modern societal cultures (which he defines as “meaningful ways of life across the full range of human activities”) are institutionally embodied. In other words, cultural dictates are funneled through and amplified by schools, media, government programs, businesses, and so forth. As Dworkin points out, cultures have a “shared vocabulary of tradition and convention.” Development of societal cultures reflects the need of modern economies for an efficient and adaptable workforce, the need of the state for citizens with a sense of common identity and willingness to sacrifice and, finally, a homogenizing force that facilitates equality of opportunity. Language survival, however, is particularly sensitive to cultural and political context. Kymlicka argues convincingly that any language that is not used in the public realm will disappear under the pressure to learn the language used in educational institutions, government and businesses.

We needn’t look far for verification. Statistics set out in Part II.B of this Article indicate that in the United States an assimilative linguistic dynamic reliably drives out LOTEs.

Creating accommodations for language is context specific. As well as having a common language, cultures tend to be territorial. National minorities such as the Quebecois or the Catalonians tend to occupy distinct territories. The feeling among multiculturalists is that such cultures deserve protection both because they represent fully functioning cultures that provide mean-


196. See infra Part V.C.
197. KYMLICKA, MULTICULTURAL CITIZENSHIP, supra note 164, at 76.
198. DWOR kinetic, Matter of Principle, supra note 160, at 231.
199. KYMLICKA, MULTICULTURAL CITIZENSHIP, supra note 164, at 77.
200. Id. at 78.
ingful lives to their adherents and because members of national minorities should not be assimilated against their will. The mechanics of protecting national subcultures are conceptually (though not politically) simple: a nation cedes sufficient autonomy to the national minority to establish or maintain a societal culture. Spain, for example, has constituted "autonomous communities" with co-official languages for six regions, including the Catalonians and the Basques.

Accommodating the linguistic preferences of immigrants poses a far greater challenge, both philosophically and practically. Since immigrants choose to come to a new country, they arrive with the expectation that they must adjust to a new culture and in most cases learn a new language. It is no doubt difficult to leave behind the culture that invested life with meaning elsewhere, but the expectation of change is not unfair in the same sense as requiring Catalonians to speak Spanish in their homes or in their local schools. It may be unfair to hold refugees to the same standard since they have fled their homes unwillingly. But, short of concentrating refugees according to country of origin or language, I'm not sure what remedy exists. Some might argue that most immigrants are in reality economic refugees. There is some truth in this argument, but I doubt that anyone can devise a workable test to sort out genuine involuntary migrations from the desire for economic advantage. And maybe assimilation is a fair trade for a minimally decent life.

For most immigrants, and certainly those coming to the United States, multiculturalists focus on smoothing the transition from the original culture to the prevailing American way of life. It is hard to spot a comprehensive plan in the multiculturalist literature, but one finds references to the need for poly-ethnic measures such as anti-discrimination laws, positive portrayals of immigrants and ethnic minorities in the media, and exemptions from Sunday blue laws. There also exist strong sentiments that public policy should encourage immigrants to maintain their native languages and pass them on to their children. Bilingual education is a particular favorite.

Multiculturalists, finally, diverge on the ultimate purpose of their social program. Liberal multiculturalists such as Kymlicka or Joseph Raz are, in their heart of hearts, still liberals. Their willingness to create group-

201. Id. at 79.
202. See, e.g., Renwick McLean, Spain's Chief Tries to Keep Risky Pledge To Catalonia, N.Y. TIMES, Feb. 6, 2006, at A10 (describing political difficulties of extending regional autonomy in Spain).
203. See Kash, supra note 139, at 659.
204. KYMLICKA, MULTICULTURAL CITIZENSHIP, supra note 164, at 96-97.
205. Id. at 97.
206. See, e.g., Silvestrini, supra note 186, at 52 (noting importance of bilingual education and language generally to Latino groups); cf. KYMLICKA, MULTICULTURAL CITIZENSHIP, supra note 164, at 97 (noting evidence that immigrant children are more likely to learn English if use of mother tongue is not discouraged).
differentiated rights arises from the belief that individuals should have meaningful choices among societal cultures. Accommodation of cultures, whether in the case of national minorities or immigrants, creates a context of choice by which individuals may elect to remain within their own traditions or opt for a competing culture. While cultural rights may exist only by virtue of membership in a particular group, they vest in the individual. Members of minority cultures thus retain a right of exit independent of the desires of their former cultural communities. Other theorists place greater emphasis on group integrity and interests. Charles Taylor, commenting on Quebec as a national minority, defends the argument that societies may act to survive. Implicit in Taylor's argument is the understanding that group imperatives take precedence over individual desires. Iris Marion Young's scheme of differentiated citizenship proposes a deepening of the democratic process by means of group-specific representation in political institutions.

B. Title VII and Multiculturalism

Several aspects of Title VII's language rules are consistent with multicultural thought. Indeed, the drafters of Section 1606.7 appear steeped in the multicultural tradition. The regulators justify their ban of All Times language restrictions by stating that "[t]he primary language of an individual is often an essential national origin characteristic." Since language is an essential cultural trait, attempts to eliminate its use wholesale must be viewed as "a burdensome term and condition of employment." Such policies may likewise "create an atmosphere of inferiority, isolation and intimidation."

Much of the multicultural agenda appears in these phrases. First, the regulators are engaged in the process of protecting minority cultures. They say explicitly that language is an essential cultural trait that must be protected. Implicit in this statement is the understanding that minority cultures themselves are worthy of protection, not just the single aspect of language. Section 1606.7 is an administrative elaboration on the statutory prohibition against national origin discrimination. The EEOC had the option of framing a rule around the narrow concept that Title VII merely forbade discrimination on the fact of being born elsewhere and not on associated cultural traits. As noted above, the legislative history of Title VII indicates that Congress took a

207. KYMLICKA, MULTICULTURAL CITIZENSHIP, supra note 164, at 82-83.
208. JOSEPH RAZ, THE MORALITY OF FREEDOM 207-09 (1986); Mitnick, supra note 181, at 1638.
209. TAYLOR, MULTICULTURALISM, supra note 180, at 58-59.
210. See IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 5-6 (2000) (describing "deep democracy"); id. at 121-53 (arguing for group-specific political representation).
211. 29 C.F.R. § 1606.7(a) (2006).
212. Id.
213. Id.
similarly narrow view (to the extent of its cursory discussions of the topic).\textsuperscript{214} Instead, the EEOC opted for the broader, culturally protective approach. It is true that much of the multicultural effect of these rules is lost because of the EEOC's functional concession to Certain Times rules that are supported by business necessity.\textsuperscript{215} As a theoretical matter, however, All Times rules present a situation where functional concerns are diminished\textsuperscript{216} and purely cultural concerns such as language choice may predominate.

In spite of its limited scope, there is much in Section 1606.7 to gladden the multicultural heart. Liberal culturalists can point to the implicit acknowledgment that cultural affiliations are important and to the explicit statement that language is a cultural marker. The Title VII rules likewise constitute a discrete accommodation of immigrant culture. No doubt the liberal culturalists would prefer a more ambitious plan of accommodations that stretches across all public institutions, but the Title VII rules are at least a step in the right direction. The functional exceptions embodied in the Certain Times rules should be acceptable in light of the culturalists' acknowledgment that it is fair for immigrants to make adjustments to a society that they voluntarily enter.\textsuperscript{217} Above all, Section 1606.7 effectuates Kymlicka's goal of creating a context of choice in which a person may sustain an older identity or choose a new one.

Section 1606.7 also advances the program of the group-oriented multiculturalists, but only to a limited extent. Charles Taylor has written at length about the importance of recognizing cultural ties.\textsuperscript{218} His concept of the "politics of recognition" originates in his assertion that individual identity is formed dialogically through our interactions with others.\textsuperscript{219} The formation of identity can therefore be affected, often injuriously, when others fail to recognize – or “misrecognize” – aspects of one's identity, including cultural affiliations.\textsuperscript{220} A failure to attribute equal dignity to a person or her group causes a loss of dignity through assimilation.\textsuperscript{221} The tendency of Section 1606.7 to create private spheres within the workplace (breaks times, lunches, etc.) where workers may choose to speak in a LOTE plainly confers some

\textsuperscript{214} See supra notes 6-16 and accompanying text.
\textsuperscript{215} 29 C.F.R. \textsection{} 1606.7(b) (2006); see generally supra note 72 and accompanying text.
\textsuperscript{216} But see supra notes 76-80 and accompanying text (arguing that All Times rules may serve rational goals).
\textsuperscript{217} See supra note 199 and accompanying text.
\textsuperscript{218} Appreciation of the importance of cultural recognition is not limited to multiculturalists. Neo-liberal Sir Isaiah Berlin, for example, acknowledged the importance of cultural recognition political dynamics. See Isaiah Berlin, Two Concepts of Liberty, in LIBERTY 200-08 (Henry Hardy ed., 2002) [hereinafter Berlin, Two Concepts].
\textsuperscript{219} See supra note 189 and accompanying text.
\textsuperscript{220} TAYLOR, MULTICULTURALISM, supra note 180, at 25, 37-43.
\textsuperscript{221} Id. at 37-43.
measure of dignity on those conversations. After all, the government says it is "OK," so it must be a legitimate and respectable thing to do. In light of the assimilative linguistic dynamic of American society, however, the EEOC rules should contribute little to the survival of minority languages or cultures over the generations.

C. Multiculturalism and Language Policy

Taken on its own terms, multiculturalism provides a powerful argument for the EEOC Guidelines. But there are reasons to doubt the strength of those suppositions. First, while language unquestionably is an important ingredient of a particular culture, multicultural views tend to overrate its contribution while underestimating the change dynamic that affects all cultures. Second, I question the harm that would be done to individual bilingual immigrants if workplace accommodation such as Section 1606.7 had never been promulgated. Finally, I can find no principled basis to elevate multicultural mandates over restrictive schemes, such as English Only, that arise from communitarian or civic republican mindsets.

Let's return briefly to the quotation from Joshua Fishman in the previous subpart. He uses elevated prose to argue that language is constitutive of ethnic culture, employing such terms as "expressor of patrimony," "sanctity-by-association," and "prime symbol." To judge by Fishman's account, language and culture are inseparable. Is this so? It is obvious that choice of language in many contexts is significant aside from the specific information transmitted. To take an easy example: when the Queen addressed the Quebec legislature in 1964 at the height of the Quiet Revolution, she spoke mostly in French, making an implicit but important assertion about the dual nature of Canadian society. "The Confederation was founded," she said, "by two races, and I think it appropriate to speak in the languages of both Cartier and MacDonald." General Franco's suppression of Catalán, Galician and Basque in public fora provides a negative example of the same phenomenon. Use of Spanish in Barcelona even for a weather forecast was a reminder that the Republican side had lost the Civil War.

Sometimes the linguistic embodiments of culture are so subtle that we are shocked when we finally encounter them. In James Joyce's *A Portrait of the Artist as a Young Man*, Stephen Daedalus' preoccupation with the Irish language leads to a devastating moment when he considers the word "tundish." Contrary to his assumptions that it was an Irish term for funnel, he discovers that tundish is English:


224. *See supra* note 139 and accompanying text.
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!225

So little of Irish is left, Daedalus realizes, that he can only rage in *Portrait* that his ancestors were stripped of their own language. "They allowed a handful of foreigners to subject them. . . . When the soul of a man is born in this country there are nets flung at it to hold it back from flight. You talk to me of nationality, language, religion. I shall try to fly by those nets."226

But how strong is this correlation? "Constitutive" is a strong word. It implies that the loss of language will diminish or destroy the essence of a group or its individual members. Cultural transformations occur naturally and constantly. Culture, including language, is not an abstract essence. It is a utilitarian set of shared behaviors that allow us to cope with our environment. Steven Pinker, the Harvard cognitive psychologist, argues in *The Blank Slate* that culture is "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."227 Culture is a practical response to environment that changes as the need arises.228 Thus when we speak of the role of language within culture or ethnicity, we necessarily address a phenomenon that is constantly evolving rather than a static quality forever sealed in the amber of icons, phrases and choreographed behaviors.

Cultural shifts in America often have an ethnic dimension. The focus of the recent immigration debate has been Hispanic migrants and to a lesser extent Asian immigrants. Most persons would regard these categories of immigrants as ethnic groupings. For purposes of this Article, however, I shall draw no distinction between culture and ethnicity. In many cases our notions of ethnicity have a racial component that is biological.229 Social and economic disadvantage from immutable characteristics, however, is already forbidden by Title VII. Rather, I am concerned with the transformations of one particular behavior associated with immigrants who may also have ethnic status. Once we pare away the biological aspects of ethnicity, we are left with a core of customs and procedures that fall into Pinker’s behavioral con-

226. Id. at 237-38.
228. PINKER, supra note 227, at 66. See also THOMAS SOWELL, MIGRATIONS AND CULTURES: A WORLD VIEW 387 (1996) (cultures compete with each other as better or worse ways of achieving goals).
cept of culture. Ethnicity, moreover, tends to get lost in the crowd of other categories associated with culture. Professor Appiah notes that cultural recognition, which he correlates with "social identity," corresponds also to race, religion, and regions of origin.\(^{230}\)

Assimilative linguistic patterns in the United States are a signal example of cultural adaptation. Immigrant families make a practical decision to adapt to the reality that a knowledge of English is essential to participate and prosper in American society. By the second generation, immigrants speak English fluently. Such linguistic adaptation is hardly surprising: the alternative is isolation and poverty. Neither is it surprising that the third generation has abandoned the old language. No matter how important Dutch or Arabic may have been to the grandparents' concept of themselves, the grandchildren were born in an Anglophone society. Their relationships from birth have been formed and expressed in English. Outside of family contacts, it would serve little purpose for them to maintain the traditional language of their ancestors. The attempt would be futile in most cases. As Will Kymlicka points out, languages do not survive unless a societal culture requires their use in multiple institutions.\(^{231}\) That fact that many prominent Latino writers, such as Julia Alvarez,\(^{232}\) Ana Castillo,\(^{233}\) Denise Chavez,\(^{234}\) Sandra Cisneros,\(^{235}\) Esmeralda Santiago,\(^{236}\) and Cristina Garcia\(^{237}\) write in English was inevitable.

Shifts in language, however, do not necessarily mean that a particular culture will come to an end. Indeed, many cultural identities have flourished in spite of the imposition of a new language. Consider the following excerpt from Yeats' Easter, 1916:

```
Was it needless death after all?
For England may keep faith
For all that is done and said.
We know their dream; enough
To know they dreamed and are dead;
And what if excess of love
Bewildered them till they died?
I write it out in a verse —
MacDonagh and MacBride
```

---

230. APPIAH, supra note 105, at 117.
231. KYMLICKA, MULTICULTURAL CITIZENSHIP, supra note 164, at 78.
233. See, e.g., ANA CASTILLO, SO FAR FROM GOD 214 (1993).
236. See, e.g., ESMERALDA SANTIAGO, WHEN I WAS PUERTO RICAN (1994).
These verses refer to the uprising against British rule on Easter Day, 1916. The sentiments are quintessentially Irish, nationalistic and intense in spite of being rendered in English rather than Gaelic. They illustrate that group identities can persist even when external forces have imposed a new tongue. Ubiquity of English cannot make Dublin another London.

Rather, social groupings persist so long as the group itself and outsiders acknowledge group identity. Professor Appiah summarizes the dynamics of collective identity as follows. First, there must be a social conception of the group, i.e., the members must meet certain ascriptive criteria, expectations about appearance, beliefs or behavior. Second, members must internalize collective labels as part of individual identity. Finally, members of groups must be treated as such, e.g., one's relationship with a gay person must be in part influenced by the fact of homosexuality.

I am more than skeptical that the substitution of LOTEs by English will have a substantial effect on group cultural identity within the United States. Language, yes, is often a cultural marker. But it is one thing to say that language characterizes a group and quite another to say that group identity will suffer or cease if its customary language changes to English. Does anyone seriously believe that Hispanic-Americans or Asian-Americans will no longer persist as a distinct social grouping once a majority becomes monolingual Anglophones? The same is probably true of any "thick" social identity. Iris Marion Young cogently points out that social groups are defined by a sense of identity rather than a set of shared attributes. The larger society will continue to recognize group identity in conformity with the dynamics described by Appiah. America will remain a diverse society of recognizable social components, language notwithstanding.

239. APPIAH, supra note 105, at 66-67.
240. Id. at 68.
241. Id.
Within the context of linguistic assimilation and the dynamics of group recognition, the Title VII language rules play a negligible role. English continues to swallow up LOSEs while social identities persist so long as the groups themselves and the public at large concur in their identity. So why build a dyke if the sea will soon overflow it? Social and economic pressures to assimilate to the Anglophonic mainstream confine the beneficial effects of the EEOC rules to the immigrant generation. Yet we should not dismiss those benefits hastily. Statutory protections restricted to one generation have an ephemeral patina, but that doesn’t mean that they are unimportant to the individual beneficiaries.

Displacing a native language with another tongue has a sharp emotional dimension. Ariel Dorfman – known primarily in the U.S. for his play Death and the Maiden – writes about his difficult transition from an English speaker to Spanish and then to bilingualism. In his autobiography Heading South, Looking North, Dorfman relates his family’s escape from Argentina in 1943 and his immersion in English during a New York childhood. After an initial resistance to Spanish on moving to Chile, he swears off English as a political gesture. He is forced to escape from Chile after Pinochet’s coup, resettles in the United States and ultimately accepts his bilingualism. Eventually, he writes, “my two languages call a truce after forty years of ranging for my throat [and] decide to coexist.”

Perhaps as evidence of this coexistence, Dorfman simultaneously published a Spanish version of his work: Rumbo al Sur, Deseando el Norte.

Dorfman’s experience as an Argentine who grows up in New York then relocates to Chile only to return to the U.S. later is, I concede, unusual but the difficulties of linguistic and cultural transition are transcendent. More typical of the American experience is the essayist Richard Rodriguez, who learned English in a California elementary school. In Hunger of Memory, Rodriguez writes movingly about the distancing effect of his immersion in English from his parents, immigrants from Mexico who never mastered the language but wanted it for their children. He comments on the eerie silence in his home caused by the generational division of languages:

My mother and father . . . responded differently, as their children spoke to them less. She grew restless, seemed troubled and anxious at the scarcity of words exchanged in the house. . . . By contrast, my father seemed reconciled to the new quiet. Though his English improved somewhat, he retired into silence. At dinner he spoke very little. One night his children and even his wife help-

245. Id. at 270.
lessly giggled at his garbled English pronunciation of the Catholic Grace before Meals. Thereafter he made his wife recite the prayer at the start of each meal, even on formal occasions, when there were guests in the house.247

(The critical legal scholar Richard Delgado dismisses Rodriguez as a “defector,”248 but this judgment is too harsh.)

Title VII rules permitting limited use of LOTEs in the workplace soften the angst of an individual’s transition into an Anglophone culture to some degree. Section 1606.7 is the sort of polyethnic accommodation that Will Kymlicka has in mind when he addresses the needs of immigrants moving into a new culture. Indeed, from the liberal culturalist view, the Title VII rules strike an admirable balance between the individual’s need for a supportive context in which to practice a chosen culture and the reality of immigrant transition. The rules do little to satisfy the hard pluralists’ desires for intergenerational survival of culture, but at least they provide some level of personally reassuring official recognition for one’s language and culture.

So why not accept the Title VII rules as a humane gesture toward some members of a generation in transition? Perhaps we should, but the reasons have less and less to do with multiculturalism once the focus shifts from preservation of minority languages to individual comfort. We are also justified in raising purely utilitarian concerns about the usefulness of the Title VII rules in creating a supportive environment for immigrants or preserving other ways of life. To the extent that a minority language is personally significant, it is most likely to be practiced in the home and in ethnically identifiable neighborhoods. As already noted in Part II.B, the 2000 Census determined that 19.7% of Americans spoke a LOTE in the home. Regular use of a language in the home among family and neighbors is far more likely to ease the soul and to preserve a cultural milieu than occasional conversations at work. The effect of Section 1606.7’s protections seem marginal in context and the benefits hardly worth the cost of interfering with workplace organization. Speakers of LOTEs nearly always have significant alternative venues for their native languages.

Effects of language transitions at the individual level are also, I suspect, overstated. The nation’s assimilative linguistic dynamic suggests that immigrants take a more practical view of language than the academy. A recent survey by the Pew Hispanic Center indicated that 57% of Latinos thought that immigrants must speak English to become a part of American society while 92% thought that teaching English to the children of immigrants was “very


Acknowledgment of the importance of English doesn’t necessarily preclude a belief that retention of a LOTE is significant to one’s identity. Nevertheless the acceptance of English as an aspect of American identity paired with the inevitable disappearance of LOTEs within immigrant families strongly points toward altering concepts of individual identity. Simple logic tells us that if language is an indispensable cultural trait, then related cultural identities should disappear with those languages. But this vanishing obviously has not happened. The better interpretation is that membership in distinct cultural or social groups in America depends less on language than other points of unity, and that social identities evolve in response to American social forces.

Multiculturalists acknowledge that social metamorphosis is inevitable but insist that the decision to change should lie within the minority group. I suggest, so far as language goes, that this is precisely what is happening in the United States: a practically inspired, largely voluntary movement toward English. The response, no doubt, is that the decisions are hardly voluntary but are made under the duress of social pressure and economic need. I do not dispute the point, but reply that the argument begs the question of whether the government should take an interventionist attitude toward cultural matters. If one accepts the assumptions of multiculturalism, the question of cultural accommodations becomes self-answering. But is the desire for multicultural outcomes anything more than a preference that must gain political support?

In the final analysis, multicultural approaches to language are as arbitrary as any competing theory. I discern no compelling reason to prefer multicultural inspired accommodations to more restrictive approaches to language in the workplace. Compare the multiculturalist’s desire to shelter immigrant languages with the civic republican’s agenda of vindicating majority interests at the expense of individual or minority interests. Civic republicanism is probably the least hospitable among contemporary political theories toward minority language rights. The centerpiece of its thinking is the need to forge a common heritage and sense of community. Although deliberative participation of all citizens is crucial to the civic republican visions, the ultimate manifestation of this theory is a cohesive national identity shared by the people. The power to shape collective identity, so goes the theory, lies with the majority. The English Only movement fits quite comfortably within civic republican theory.

250. Kymlicka, MULTICULTURAL CITIZENSHIP, supra note 164, at 100.
253. See Rodriguez, supra note 130, at 150-51.
255. Rodriguez, supra note 130, at 149.
Multiculturalists predictably reject the corporatist vision of civic republicanism but cannot offer a compelling argument that their vision is superior to civic republicanism, or for that matter, to welfare or neo-classical liberalism. Indeed, endorsement of any of these competing philosophies depends on one’s assumptions about the relationship among individuals, social groups and national society. I suspect that we all choose our philosophies because we desire their outcomes, then reason backwards. At any rate, the multiplicity of philosophies and political theories in contemporary society has created a welter of social choices.

Clashes among these competing ideas on language invoke Sir Isaiah Berlin’s observations about “value pluralism.” Berlin’s greatest contribution to political theory was the notion that our moral universe is planted thick with ideas that are contradictory and irreconcilable. His cure was to create a substantial private realm through negative freedoms, i.e., “the ability to choose as you wish to choose, because you wish so to choose, uncoerced, unbullied, not swallowed up in some vast system,” to protect us from the grand ideas of others that we cannot accept. Not all will agree with Berlin’s libertarian solution to the threat of unwanted ideas. It is more difficult, however, to reject his observation that norms are generally self-justifying. Multiculturalism at best represents a value choice, but only one.

VI. CONCLUSION

Section 1606.7 is a rule in search of a justification. As a practical matter it will not role back the tide of English nor is it likely to affect cultural identification. As a theoretical matter, the rule lacks normative force. It fails to advance equality interests as traditionally conceived nor does it promote the autonomy interests protected by contemporary liberalism. Even its contributions to multicultural goals are slight. The most we can say for the Title VII language rules is that they have the imprimatur of the EEOC and that Congress has not seen fit to disturb them.

Language, on the other hand, is a genuine concern in the American workplace, one that would be left to traditionally acknowledged managerial discretion but for the EEOC Guidelines. Language accommodations, moreover, are a zero-sum game. Management’s power to order the workplace in an efficient fashion recedes as we grant individual workers a right to converse in a language other than English at set times and places during the workday.

256. Berlin, Two Concepts, supra note 218, at 212-17.
257. ISAIAH BERLIN, FREEDOM AND ITS BETRAYAL: SIX ENEMIES OF HUMAN LIBERTY 103-04 (Henry Hardy ed., 2002).
258. For a recent, respectful critique of Berlin’s value pluralism, see DWORKIN, JUSTICE IN ROBES, supra note 112, at 105-16 (viewing Berlin’s concept of liberty as too restrictive).
259. See Leonard, supra note 8, at 105-08.
Title VII's logic views an employer's attempts to manage break time conversations as unsupported by business necessity. As I argued in Part III, however, even All Times restrictions can serve important business interests by promoting harmony in a diverse workplace and collecting valuable information about employees' thoughts. The EEOC rules interfere with these valid objectives.

Little would be lost if the Title VII language rules were abolished. I do not believe that there would be a stampede toward exceptionless language restrictions in the workplace. Bilingual immigrants who suddenly found themselves in English-only shops would still go home at the end of the day where they may speak their first language among other native speakers, watch newscasts from the old country on satellite TV, and get respite from the Anglophone world when they so desire. They might even seek new jobs. Title VII will not stop the riptide of English from pulling their descendants farther away linguistically. And if certain immigrants remain a distinct ethnic or social group, it will be so in spite of, rather than because of, language. It is possible that Title VII could become an effective tool of multiculturalism if it became part of a broad array of minority cultural rights but that, alas, is the topic of a different article.