

THE LESS THAN FAIR EMPLOYMENT PRACTICE OF AN ENGLISH-ONLY RULE IN THE WORKPLACE

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INTRODUCTION

The issue of whether an employer should be allowed to exclude Spanish, or any other language, from the workplace based on an employer's preference for English in the workplace presents an interesting public policy consideration. An English-only rule creates public policy concerns for the supporters of anti-discrimination or diversity related to the terms and conditions of employment. This Article advances the argument that a law or policy that prohibits discrimination in the workplace based on an employer's preference for English-only encourages cultural diversity. An English-only preference that is not job related or justified by business necessity rejects cultural diversity and sets in motion the ethnic or racial hostility often associated with the language one speaks. There have been several civil rights cases involving plaintiffs that were fired from their jobs for speaking Spanish in an English-only environment.

"Discrimination was once aimed at . . . the exclusion of all racial minorities."¹ According to Kenji Yoshino, the Civil Rights Act of 1964 anti-discrimination provision has made such categorical exclusions by employers very rare in 2006.²

Today, a new form of discrimination has replaced the race-based group exclusion.³ This new form of discrimination identifies the member of a group that declines to accept the opportunity to assimilate to dominant cultural norms.⁴ Yoshino asserts that current civil rights laws fail to protect employees against the requirement that they "assimilate to dominant norms."⁵ Although

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¹ Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES, Jan. 15, 2006, § 6 (Magazine), at 32.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

speaking English in the workplace is a dominant norm in America, the issue presented is whether an English-only rule in the workplace that is not job related or based on a business necessity is a type of overt discrimination that should be tolerated to accommodate an employer's preference for English. English-only rules in the workplace that are not job related or supported by a legitimate business justification unnecessarily impair society's interest in becoming a culturally diverse society. The law, as a matter of sound public policy, should prohibit English-only rules that simply accommodate an employer's preference and that unreasonably place a burden on America's interest in promoting cultural diversity.

Part I discusses the implication of an English-only rule as a proxy for promoting hostility towards an immigrant while undermining society's commitment to diversity. Part II asserts that Title VII of the Civil Rights Act includes language rights protection for workplace speakers discriminated against because of their national origin.

Part III presents an analysis of *Garcia v. Gloor*'s impact on English-only workplace rules under Title VII's prohibition against national origin discrimination. Part IV contends that the EEOC's guidelines, which presume that the English-only rule creates a presumption of national origin discrimination when it is not job related, should be given deference under a proper interpretation of *Griggs*' disparate impact theory. Part V argues that, independent of the EEOC guidelines addressing the issue of English-only rules, the rationale of the *Griggs* opinion requires lower courts to reject the *Gloor* decision because it is a self-evident truth that any English-only rule affects people of a national origin who prefer not to speak English. Part VI explores the Tenth Circuit's requirement that an employer demonstrate a legitimate business necessity for an English-only rule in order to defeat the presumption that the English-only rule creates a hostile work environment.

I. THE IMPLICATIONS OF ENGLISH-ONLY RULES AS A PROXY FOR PROMOTING HOSTILITY TOWARD IMMIGRANTS WHILE UNDERMINING SOCIETY'S COMMITMENT TO DIVERSITY

In today's culture, some want to make English the legal official language of the United States. Culturally English is America's dominant language, but English has never been certified as America's official language by Congress. It may prove very difficult to persuade Congress to enact legislation requiring employers to demonstrate that an English-only rule has to be job related. English-only rules in the workplace that do not serve a job related justification should be prohibited because English-only rules are often a poorly disguised proxy for a community's animus toward undocumented immigration.

New Jersey voters residing in Bogota in Bergen County went to the polls in November 2006 to support an ordinance adopting English as the official language of the borough.⁶ Bogota's mayor said that this vote was needed "to re-establish the fact that English is the official language of this country, while

⁶ Jennifer Weiss, *Making English Official Is on the Ballot in Bogota*, N.Y. TIMES, Aug. 27, 2006, § 14, at 2.

maybe not by law, certainly by heritage.”⁷ New Jersey is not currently among the twenty-seven states with English as the official language provisions, according to U.S. English, a group campaigning to make English America’s official language.⁸ In May of 2006, the United States Senate approved an amendment to immigration legislation that would name English as the official national language.⁹ Under existing federal law, the Bogota English as the official language ballot will appear on the ballot in English and Spanish.¹⁰

It is difficult sometimes to get current policy makers to think pragmatically about promoting cultural diversity through language. The issue of linguistic diversity developed prior to the American Revolution.¹¹ In 1753, Benjamin Franklin articulated anxiety about calling for interpreters in Pennsylvania because the state had a significant number of German settlers.¹² In addition, “Franklin [objected to] German schools, German newspapers, and German street signs.”¹³ The United States had not adopted an official language.¹⁴ The Continental Congress safeguarded multilingualism by not proclaiming English as America’s official language and by issuing important documents, “including the Articles of Confederation, in German and French.”¹⁵ However, the practice of multilingualism in America has always been incoherent.¹⁶

Arizona’s Democratic governor and its Republican-controlled legislature have entered a stalemate over teaching English in the state’s public schools.¹⁷ The decision in Arizona to forbid bilingual education in public schools is unmistakably a substitute for the immigration dispute.¹⁸ Arizona’s Governor, Janet Napolitano, concedes that there is a significant amount of anti-immigrant sentiment in the legislature right now: “[Legislators] are angry about the taxpayer dollars that are being used to educate illegal immigrants or the children of illegal immigrants.”¹⁹ It appears that some in Arizona believe that forcing the children of undocumented immigrants to speak only English in school may deter undocumented immigration into the state.²⁰ One of the challenges in convincing courts and legislatures to prohibit English-only rules that are not work-

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* “This point was not lost on the mayor. ‘This ballot question is going to appear in two languages,’ Mr. Lonagan said, ‘and I find that amusing.’” *Id.*

¹¹ Lori A. McMullen & Charlene R. Lynde, *The “Official English” Movement and The Demise of Diversity: The Elimination of Federal Judicial and Statutory Minority Language Rights*, 32 *Land & Water L. Rev.* 789, 790 (1997) (citing James C. Stalker, *Official English or English Only*, in *THE REFERENCE SHELF* 44, 44-52 (Bee Gallegos ed., 1994)).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 790-91 (citing Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 *MINN. L. REV.* 269, 285-86 (1992)).

¹⁶ *Id.* at 791.

¹⁷ John M. Broder, *Immigration Issue Plays Out in Arizona Education Fight*, *N.Y. TIMES*, Feb. 3, 2006, at A16.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

related is the unsupported assumption by some that any worker who wants to speak Spanish or another language at work cannot speak English, and the employee is apparently presumed to be an undocumented immigrant. However, that assumption is flawed because if the employee who wants to speak Spanish in the workplace is generally presumed to be an undocumented immigrant, then the employer must equally be presumed to engage in the practice of hiring undocumented immigrants as employees in violation of federal immigration laws.²¹

Whether English-only rules in the workplace serve as a popular proxy to prohibit those perceived to be undocumented immigrants from threatening America's identity as an English-speaking country is a fair question. However, America's current immigration and naturalization laws grant citizenship to immigrants who do not have the ability to speak English if the immigrant meets the age prerequisite or the disability requirement.²² The reasonable inference from the immigration and naturalization laws is that Congress does not equate the ability to speak English with the loyalty necessary to become an American citizen. After these immigrants become citizens without an understanding of the English language because of the age exemption,²³ these non-English speaking citizens have a right to enter the workforce in order to support themselves

²¹ 8 U.S.C. § 1324a (1) (2000). "It is unlawful for a person or other entity –

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

²² 8 U.S.C. § 1423 (2000).

(a) No person except as otherwise provided in this subchapter shall hereafter be naturalized as a citizen of the United States upon his own application who cannot demonstrate (1) an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language

(b)(1) The requirements of subsection (a) of this section shall not apply to any person who is unable because of physical or developmental disability or mental impairment to comply therewith . . . (2) The requirement of subsection (a)(1) of this section shall not apply to any person who, . . . (A) is over fifty years of age and has been living in the United States for periods totaling at least twenty years subsequent to a lawful admission for permanent residence, or (B) is over fifty-five years of age and has been living in the United States for periods totaling at least fifteen years subsequent to a lawful admission for permanent residence.

(emphasis added).

Subsection (a)(3) provides that

The Attorney General, pursuant to regulations, shall provide for special consideration, as determined by the Attorney General, concerning the requirement of subsection (a)(2) of this section with respect to any person who . . . is over sixty-five years of age and has been living in the United States for periods totaling at least twenty years subsequent to a lawful admission for permanent residence.

²³ *Id.* A person who is over fifty and who has resided lawfully in the United States at least fifteen years may qualify to be naturalized as a citizen of the United States without an understanding of the English language.

and their families. Under federal law an immigrant may become a lawful citizen without the ability to speak English.²⁴

English fluency is a hot-button subject in the United States debate about immigration.²⁵ Advocates of English-only rules insist immigrants “endanger America’s English-speaking identity.”²⁶ In April of 2006, President Bush said that the national anthem, the Star-Spangled Banner, “should only be sung and recorded in English.”²⁷ The U.S. Senate immigration bill contains two amendments: one proclaims that English is the national language and another acknowledges English as America’s “common and unifying tongue.”²⁸ Those language specific amendments were “instantly denounced by opponents as either racist or anti-Hispanic.”²⁹ Advocates of English only hope to affect immigration policies by discouraging immigrants from transplanting their old culture rather than assimilating into the American culture.³⁰ Supporters of the English-only movement contend that Latin Americans immigrating to Texas from countries that once were part of either Spain or Mexico prefer to transport their culture rather than assimilate into the U.S. culture.³¹

An English-only rule in the workplace is not an effective means to deter undocumented immigrants from entering the workplace in the United States. The English-only rules in the workplace should not have any effect on the hiring decisions of those employers who are already complying with federal law making the employment of unauthorized immigrants unlawful. However, the English-only rules in the workplace may serve as a very practical cover for an employer hiring an undocumented immigrant because the general public may be more likely to conclude that an immigrant who speaks English in the workplace is lawfully employed.

The “stars are aligned” for a new group to become the target of angry Americans because of its national origin.³² While “two-thirds of Americans believe that [the United States] is on the wrong track,” it is no surprise that the historical tool of blaming unpopular immigrants is being utilized.³³ The historical response to a feeling that America is on the wrong track is to engage in a “witch hunt for scapegoats.”³⁴ Because gay people are no longer the surefire

²⁴ *Id.*

²⁵ Lori Rodriguez, *Translating a Need, Language Barriers, Immigrants See English as Vital, but Work, Family Limit Time to Learn*, HOUS. CHRON., Sept. 18, 2006, at A1.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* See also Note, “Official English”: *Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345, 1345-46 (1987) (explaining that the English-only movement evolved from concerns that immigrants were no longer assimilating into American culture).

³² Frank Rich, Op-Ed., *How Hispanics Became the New Gays*, N.Y. TIMES, June 11, 2006, § 4, at 12.

³³ *Id.*

³⁴ *Id.*; Valerie L. Barth, Comment, *Anti-Immigrant Backlash and the Role of the Judiciary: A Proposal for Heightened Review of Federal Laws Affecting Immigrants*, 29 ST. MARY’S L.J. 105, 128-29 (1997).

scapegoats, Hispanics became political scapegoats in the 2006 election.³⁵ Congress has turned immigration reform into a culture war.³⁶ The current ugly immigration debate has produced a backlash against Hispanics as an at-risk minority group.³⁷

High profile politicians and public figures are “embracing a nativism and xenophobia” similar to the type this nation experienced in the 1920s “when the State Department’s [concerns] about the influx of ‘filthy’ and ‘unassimilable’ Jews [entering America] from Eastern Europe” inspired America to adopt its first immigration quota.³⁸ In the 1950s, a hostile deportation scheme called “Operation Wetback” was used to demean and insult undocumented Mexican workers by referring to them as “wetbacks.”³⁹ Fox News anchor Brit Hume described immigrant demonstrators waving Mexican flags as a “repellent spectacle” in April of 2006.⁴⁰ After being informed of a Spanish version of the Star Spangled Banner, Senator Lamar Alexander of Tennessee introduced a Senate resolution requesting that the national anthem be sung in English only.⁴¹ One commentator contends that Hume and Alexander intended to stir up animosity against Hispanics as an enemy of the American civilization.⁴² John B. Judis of *The New Republic* says the dominant fear in Arizona “has less to do with immigrants stealing jobs . . . than with [Hispanic immigrants] contaminating the culture by way of ‘Mexicanization.’”⁴³ “It’s the same complaint that’s been leveled against every immigrant group when the country is in this foul a mood,” according to Frank Rich.⁴⁴

Individuals use Title VII as a means for legal redress when discriminated against in the workplace. The legal avenue of Title VII national origin should be used to apply the job relatedness test to an English-only rule in the workplace. A pragmatic view of the Title VII provision granting protection to individuals against discrimination because of national origin, makes it clear that when America is in a “foul immigration mood” it will use English-only rules in the workplace and beyond as a proxy against specific immigrants because of either the real or perceived identity of their national origin. Employees often feel disadvantaged when an “English-only rule . . . require[s] that employees speak only English in the workplace at specific times during the work day” regardless of whether the requirement is job related.⁴⁵ Sometimes a plaintiff objects to an English-only rule as a violation of Title VII by alleging that

³⁵ Rich, *supra* note 32.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*; see also Nancy Cervantes, Sasha Khokha, & Bobbie Murray, *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 2-3 (1995) (using Operation Wetback as evidence of hostility towards Mexicans and those of Mexican ancestry).

⁴⁰ Rich, *supra* note 32.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Raechel L. Adams, Comment, *English-Only in the Workplace: A New Judicial Lens Will Provide More Comprehensive Title VII Protection*, 47 CATH. U. L. REV. 1327, 1329 (1998) (citing *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1409-10 (9th Cir. 1987) (a Hispanic

English-only rules unfairly segregate employees based on their national origin.⁴⁶ Title VII plaintiffs appropriately allege that the close connection between foreign nationality and foreign language creates an atmosphere⁴⁷ in the workplace where an English-only rule disproportionately and unfairly affects people of foreign origin.⁴⁸

II. TITLE VII OF THE CIVIL RIGHTS ACT INCLUDES LANGUAGE RIGHTS PROTECTION FOR WORKPLACE SPEAKERS DISCRIMINATED AGAINST BECAUSE OF THEIR NATIONAL ORIGIN

Linda M. Mealey and other commentators properly interpreted Title VII of the 1964 Civil Rights Act as protection for the language rights of individuals who are denied the right to speak their native language because of their national origin.⁴⁹ Congress enacted Title VII to prohibit employment discrimination based on national origin.⁵⁰ Title VII is designed to promote equality in employment opportunity by removing language barriers that serve as a proxy for discriminating against employees because of their national origin.⁵¹ Title VII fails to define clearly the expression “national origin” or the scope of the rights granted under the national origin provision.⁵² National origin discrimination should, at a minimum under Title VII, include discrimination against an employee by an employer because of the country from which an individual or an individual’s ancestors came.⁵³ Title VII makes it illegal to discriminate against employees because of national origin.⁵⁴ As an extension of this protection, an employee should have a right to speak in her primary language or any preferred language in the American workplace even though there is no specific language rights provision of Title VII of the Civil Rights Act of 1964.⁵⁵

disk jockey contended that complying with his employer’s rule to stop speaking Spanish would remove his ethnic identity)).

⁴⁶ *Id.* (citing *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980); noting that in *Gloor*, a “Mexican American lumber salesman challenged English-only rule as discriminatory because it denied him the right to converse in the language most familiar to him”; and providing that “in *Gloor*, the plaintiff argued that his language preference was grounded in his national origin. *See id.* Other plaintiffs have alleged that English-only rules discriminate on the basis of race.”). *Id.* at 1329-30 n.15.

⁴⁷ *Id.* at 1329-30.

⁴⁸ *Id.* at 1330 (citing *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 939 (E.D. Va. 1995); and noting that “bank employees of Hispanic origin claimed national origin discrimination and harassment because they were afraid to speak their native language once the bank instituted an English-only policy.” *Id.* at 1330 n.17.

⁴⁹ Linda M. Mealey, Note, *English-Only Rules and “Innocent” Employers: Clarifying National Origin Discrimination and Disparate Impact Theory Under Title VII*, 894 F. Supp. 933, 396-97 n.30 (1989) (citing Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000))).

⁵⁰ *Id.* at 397 (citing 42 U.S.C. § 2000e-2 (2000)).

⁵¹ *Id.* (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

⁵² *Id.*

⁵³ *Id.* at 397-98 n.35 (citing 110 CONG. REC. 2549 (1964) (statement of Rep. Roosevelt)).

⁵⁴ *Id.* at 398 n.39.

⁵⁵ Juan F. Perea, *English-Only Rules and the Right To Speak One’s Primary Language In The Workplace*, 23 U. MICH. J.L. REFORM 265, 266 (1990) (citing 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

In 1980, the Fifth Circuit, in *Garcia v. Gloor*, held that a rule limiting an employee's use of Spanish while working did not implicate Title VII.⁵⁶ However, eight years later, in 1988, the Ninth Circuit decided in *Gutierrez v. Municipal Court*, that a similar rule restricting the use of Spanish constituted national origin discrimination and was prohibited by Title VII.⁵⁷ Subsequently, in *Garcia v. Spun Steak Co.*, a 1993 case, the Ninth Circuit reversed its earlier position by holding that English-only rules in the workplace did not constitute national origin discrimination under Title VII.⁵⁸ Although the Supreme Court has not yet considered the permissibility of English-only rules in the workplace under Title VII, the Supreme Court will eventually have to resolve this important English-only issue under Title VII.⁵⁹

The Supreme Court has yet to address the merits of whether English-only rules in the workplace that do not serve any business purpose are permissible under Title VII's prohibition against national origin discrimination. Unfortunately, Title VII fails to protect an employee explicitly against discrimination based on the language he speaks. According to Professor Juan Perea, "[t]he fundamental question, therefore, is whether a person's primary language warrants protection under Title VII as an aspect of national origin."⁶⁰ Courts and commentators properly conclude that the national origin provision in Title VII is broad enough to grant employees protection against language based discrimination that often serves as a proxy for national origin discrimination.⁶¹ English-only litigation under Title VII is engaged in an uphill battle in the courts in spite of the EEOC's guidelines that clearly state that language discrimination may be properly considered as a legal cause of national origin discrimination.⁶²

Thirty-seven years ago the EEOC's examples of national origin discrimination in its general guideline failed to establish the needed "link between language and national origin" discrimination according to the analysis of one court.⁶³ The court concluded that the omission of the word "language" in Title VII's statutory definition indicated that Congress did not intend for a discrimi-

⁵⁶ *Id.* at 268-69. (citing *Gloor v. Garcia*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)).

⁵⁷ *Id.* (citing *Gutierrez v. Mun. Ct. of Se. Judicial Dist. County of Los Angeles*, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, Mun. Ct. of Se. Judicial Dist. County of Los Angeles v. *Gutierrez*, 490 U.S. 1016 (1989)).

⁵⁸ Lisa L. Behm, *Protecting Linguistic Minorities Under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 MARQ. L. REV. 569, 585 (1998) (citing *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993)).

⁵⁹ Perea, *supra* note 55, at 266.

⁶⁰ *Id.* at 273.

⁶¹ *See id.* at 273-76.

The courts have construed 'national origin' broadly to include characteristics that are correlated with national origin. Several courts, for example, have concluded that an employee's foreign accent, provided that it does not interfere with the employee's ability to perform his job duties, is not a legitimate justification for discrimination under Title VII.

Id. at 274 (citations omitted).

⁶² *See Adams*, *supra* note 45, at 1331-33.

⁶³ *Id.* at 1331-32.

nation claim to be premised on foreign language.⁶⁴ The court also made its ruling without the benefit of EEOC guidance on the link between national origin discrimination.⁶⁵

The EEOC guideline on national origin discrimination currently provides that discrimination because of national origin includes “the denial of equal employment opportunity . . . because an individual has the . . . linguistic characteristics of a national origin group.”⁶⁶ Although courts might accept that national origin may include language discrimination, plaintiffs still face an uphill battle in challenging an employer’s English-only rule under the scope of Title VII.⁶⁷

One commentator notes that even when the EEOC guidelines give rise to a presumption that a specific English-only rule is tantamount to national origin discrimination, the Ninth Circuit still requires plaintiffs to produce evidence supporting their specific claim of discrimination.⁶⁸ The EEOC’s expansive interpretation of Title VII’s prohibition against national origin discrimination appropriately includes protection against language discrimination.⁶⁹ The opinion held that Title VII’s national origin discrimination does not prohibit applying an arbitrary English-only workplace rule to a bilingual employee. The *Gloor* opinion conflicts with the EEOC’s interpretation of Title VII’s prohibition against national origin discrimination and the protection it offers a bilingual employee from an employer’s subjective rule prohibiting speaking Spanish. In *Garcia v. Spun Steak Co.*, the Ninth Circuit “explicitly rejected the presumption of discriminatory impact created by an English-only rule under the EEOC Guideline.”⁷⁰ The Ninth Circuit “refused to defer to [the EEOC’s] administrative agency’s statutory interpretation” because it believed that the presumptive interpretation disregarded congressional intent.⁷¹ The court explained that the EEOC presumption of discriminatory impact Guideline for an English-only rule was inconsistent with Congress’ express intent to “preserve employer prerogative in management decisions.”⁷²

Many scholars perceive the critical split in authority concerning the analysis of English-only rules is based on the burden shifting responsibilities of the Title VII litigants.⁷³ The EEOC Guideline seems to place the opening burden on the employer to present a legitimate justification for an English-only rule, while the court in *Spun Steak* went along with a traditional view of disparate impact case law and the 1991 Civil Rights Act, placing on the employee the first burden of proving that the employer’s English-only rule has had a discriminatory impact.⁷⁴

⁶⁴ *Id.* at 1332 (citing *Garcia v. Gloor*, 618 F.2d 264, 268-69 (5th Cir. 1980)).

⁶⁵ *Id.*

⁶⁶ *Id.* (quoting 29 C.F.R. §1606.1 (2006)).

⁶⁷ *Id.* at 1332-33.

⁶⁸ *Id.* at 1333.

⁶⁹ Behm, *supra* note 58, at 574.

⁷⁰ Adams, *supra* note 45, at 1347 (citation omitted).

⁷¹ *Id.* (citation omitted).

⁷² *Id.* (citation omitted).

⁷³ *Id.* (citation omitted).

⁷⁴ *Id.* (citation omitted).

III. WE MUST MARCH AWAY FROM THE RATIONALE OF *GARCIA V. GLOOR*

More than twenty-five years ago in *Garcia v. Gloor*, the Fifth Circuit rejected plaintiff Garcia's well-founded claim that the employer's English-only rule was hostile to his right to communicate in Spanish in the workplace.⁷⁵ Congress failed to identify the specific elements that constituted national origin discrimination under Title VII, and the issue of whether Congress intended to make language an element of national origin discrimination has not received an authoritative answer from the Supreme Court.⁷⁶

A. *Facts*

A detailed discussion of the facts in the *Gloor* opinion will reveal that a bilingual employee's refusal to speak English in the workplace was a significant factor in the employer's decision to fire him. Because of the heavy reliance on the rationale of *Gloor* by several courts in denying a bilingual employee language rights protection under Title VII national origin provision, recounting the *Gloor* facts is appropriate.

Hector Garcia completed through the first semester of tenth grade in a Texas public school.⁷⁷ He is fluent in English and Spanish.⁷⁸ Although Garcia was born in the United States, he always spoke Spanish at home.⁷⁹ In 1975, Gloor Lumber and Supply, Inc. ("Gloor") hired Garcia as a salesperson. Garcia won praise from management because of his work and received a bonus of \$250. On the other hand, evidence also revealed that Garcia's work performance was less than satisfactory.⁸⁰ Gloor's rule did not allow employees to speak Spanish on the job unless they were speaking to Spanish-speaking shoppers. A majority of Gloor's employees were bilingual, but several who worked in the lumberyard could not speak English.⁸¹ The English-only rule did not apply to the Spanish speaking employees who worked outside.⁸² The English-only rule also did not apply to work break discussions.⁸³ Garcia testified that Spanish is his primary language and for that reason the English-only rule was a hardship.⁸⁴ The facts suggest that the English-only rule was difficult for Garcia because it created an internal cultural struggle for him. Garcia testified that when he was asked by another Mexican-American employee concerning an item sought by a customer, he answered in Spanish that the item was not available.⁸⁵ Alton Gloor, an officer of Gloor, overheard the communication in Spanish. Subsequently, Garcia was fired for not speaking English.⁸⁶

⁷⁵ 618 F.2d 264 (5th Cir. 1980).

⁷⁶ Behm, *supra* note 58 at 573.

⁷⁷ *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 266.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

The Fifth Circuit agreed with the district court that Garcia was acceptably discharged because of several deficiencies.⁸⁷ Those flaws included the following failures: a lack of current inventory, not following procedure for replenishing the stock on display, not keeping his area clean, and not following the English-only rule.⁸⁸ In spite of the fact that the English-only rule was not strictly enforced, Garcia violated the rule.⁸⁹

Gloor offered four business reasons for the English speaking rules.⁹⁰ First, English-speaking customers disapproved of conversations between Spanish speaking employees that they did not comprehend. Second, because the pamphlets and trade literature were written in English rather than Spanish, employees engaged in selling should be fluent in English for reasons other than having conversations with English-speaking customers. Third, if employees who spoke Spanish as a primary language off the job were required to speak English only on the job, they would improve their English. Fourth, the English-only rule allows supervisors who do not speak Spanish to oversee the work of their bilingual subordinates.

The appellate court approved of the district court's holding that these four reasons constituted a valid business justification for Garcia's discharge.⁹¹ The Fifth Circuit in *Gloor* accepted the district court's conclusion that Garcia's discharge was based on a business justification and not national origin discrimination.⁹² As an employee Garcia had entered an employment contract with Gloor. Garcia contended before the EEOC that an English-only rule created a discriminatory condition of employment because it interfered with his freedom to contract on the same terms as Whites.⁹³

The EEOC supported Garcia's argument that English-only rules violate Title VII as well as the right to enter contracts on the same terms as Whites under 42 U.S.C. § 1981 and the provisions under 42 U.S.C. § 1985(c) that make it a conspiracy to interfere with one's civil rights.⁹⁴

B. *Fifth Circuit's Rationale*

The Fifth Circuit in *Gloor* saw the issue as simply deciding whether an English-only rule, as applied to Garcia, created a discriminatory condition of employment prohibited by Title VII.⁹⁵ The Fifth Circuit's treatment of the relevant issue in *Gloor* was misplaced. The plaintiff in *Gloor* was not merely raising a generalized grievance of discrimination about the terms and conditions of his employment. A proper characterization of the issue in *Gloor* asks whether Title VII's prohibition against national origin discrimination in employment applies to an English-only rule that forbids a bilingual employee, born in the United States, from speaking Spanish, his primary language, in the

⁸⁷ *Id.*

⁸⁸ *Id.* at 266-67.

⁸⁹ *Id.*

⁹⁰ *Id.* at 267.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

workplace when the employer has offered pretextual business reasons for the English-only rule.

In *Gloor*, the Fifth Circuit failed to frame the issue properly because it wrongly rejected the self-evident truth that under either Title VII, or a common understanding in both North America and South America, one's national origin is often closely linked with the primary language one is taught to speak. A person is not given a choice about the primary language he learns from his parents. Because one's primary language is so closely connected with both national identity and family identity, a bilingual employee should not be forced to choose between his primary language and English, unless the employer can demonstrate that there is no equally effective alternative to achieving his business purpose other than requiring the employee to speak English. The Fifth Circuit correctly stated that language could operate as a concealed basis for national origin discrimination, but it failed to realize that *Gloor* applied the English-only rule to Garcia in this manner.⁹⁶

Twenty-one years after the *Gloor* opinion, a case involving a similar challenge to an English-only rule by a resident plaintiff born in New Jersey who alleged that both Spanish and English were her primary languages, appeared before the court in *Rosario v. Cacace*.⁹⁷ A New Jersey state court held that the plaintiff failed to prove a case of discrimination based on national origin or ancestry under New Jersey's Law Against Discrimination ("LAD").⁹⁸ Although the *Gloor* opinion predated the adoption of the EEOC guidelines for an employer's English-only rule, its refusal to recognize language discrimination as prohibited by Title VII's national origin provision became the majority judicial rule, rather than the EEOC guidelines that recognize that under certain circumstances an English-only rule may violate Title VII's national origin provision. Without the benefit of reliable scientific data, the *Gloor* court concluded that a bilingual employee was obligated to obey an employer's language rule because it is simply a matter of language preference for a bilingual.⁹⁹ The *Gloor* court took the position that a bilingual employee could very easily comply with the English-only rule by simply deferring his or her preference for speaking Spanish in the workplace, rather than English as requested by the employer.¹⁰⁰

IV. THE EEOC'S GUIDELINES THAT PRESUME THAT AN ENGLISH-ONLY
RULE CREATES A PRESUMPTION OF NATIONAL ORIGIN DISCRIMINATION
WHEN IT IS NOT JOB RELATED SHOULD BE GIVEN DEFERENCE BECAUSE OF
THE IMPACT OF CODE SWITCHING AND A PROPER INTERPRETATION OF
GRIGGS' DISPARATE IMPACT THEORY

It is my view that a proper construction of the disparate impact analysis under *Griggs*¹⁰¹ demonstrates that an employer may not use an English-only

⁹⁶ *Id.*

⁹⁷ 767 A.2d 1023 (N.J. Super. Ct. App. Div. 2001).

⁹⁸ *Id.* at 1027.

⁹⁹ *Gloor*, 618 F.2d at 269.

¹⁰⁰ *Id.*

¹⁰¹ 401 U.S. 424 (1971).

rule without meeting the business necessity or job relatedness test independent of the EEOC guidelines.¹⁰² In 1980, when *Gloor* was decided, the EEOC had not adopted a regulation regarding English-only rules or any general policy prohibiting them.¹⁰³ On May 22, 1980, the day *Gloor* was decided, the EEOC had reflected on the issue of whether a policy barring the use of the Spanish language in regular interoffice communications discriminates on the basis of national origin, but the EEOC had not implemented a regulation or a general policy based on the national origin statute prohibiting an employer from eliminating the use of the Spanish language in the workplace.¹⁰⁴ Without the benefit of any EEOC guidelines addressing the issue of an employer requiring that English be spoken on the job by employees, the *Gloor* court approached the English-only problem on the basis of its understanding of the national origin provision in the statute itself and the existing case law.¹⁰⁵ The EEOC publicized its guidelines on the English-only rule seven months after the *Gloor* decision on December 30, 1980 and cited the *Gloor* opinion.¹⁰⁶ Because the ruling in *Gloor* came before the EEOC's formal guidelines regarding English-only rules,¹⁰⁷ the *Gloor* opinion should be superseded by the post-*Gloor* EEOC policy disagreeing with the holding in *Gloor*.¹⁰⁸ One commentator, Lisa L. Behm, agrees with David Wiley's conclusion that the *Gloor* opinion and its rationale should be rejected in favor of giving deference to the applicable EEOC guidelines on English only in the workplace.¹⁰⁹

The EEOC regulations provide that a rule demanding that employees speak only English at all times while in the workplace is a burdensome term and condition of employment.¹¹⁰ The primary language a person speaks is time and again a fundamental national origin attribute. A rule prohibiting employees in the workplace from speaking their primary language places that employee at a disadvantage, regarding employment opportunities, because of his national origin.¹¹¹ An employer rule requiring an employee to speak English at all times produces "an atmosphere of inferiority, isolation, and intimidation" because of an employee's national origin, which may well stimulate a discriminatory working environment.¹¹² Consequently, the EEOC presumes that an English-only rule violates Title VII.¹¹³ An employer could have a rule commanding employees to speak only in English at specific times if the employer can prove that the rule is "justified by business necessity."¹¹⁴ It is a widespread practice for "individuals whose primary language is not English to inadver-

¹⁰² See 29 C.F.R. § 1606.7 (2006).

¹⁰³ *Gloor*, 618 F.2d at 268 n.1.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ David T. Wiley, *Whose Proof?: Deference to EEOC Guidelines on Disparate Impact Discrimination Analysis of "English-Only" Rules*, 29 GA. L. REV. 539, 557 n.105 (1995).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 557 n.106.

¹⁰⁹ Behm, *supra* note 58, at 583 n.117.

¹¹⁰ 29 C.F.R. § 1606.7(a) (2006).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 29 C.F.R. § 1606.7(b).

tently switch speaking English to speaking [in] their primary language.”¹¹⁵ An employer with a business necessity for speaking English only at specific times has a duty to inform its employees of the common circumstances when speaking in English is required and of the consequences for violating the speak English at specific time rule.¹¹⁶ An employer that fails to notify its employees effectively of its rule, and takes adverse employment action against an employee based on a violation of the rule, produces incriminating “evidence of discrimination on the basis of national origin.”¹¹⁷

Gloor was decided before extensive research revealed the impact of linguistics on bilingual people.¹¹⁸ According to experts, the ability to change back and forth from English to another language is not simply a matter of preference for bilingual individuals whose primary language is not English.¹¹⁹ The process of going back and forth from English to one’s primary language is called “code switching.”¹²⁰ Code switching has been established as more of an unconscious act than a conscious act for a speaker returning to his or her primary language.¹²¹ Multilingual individuals who have acquired two or more languages as a child regularly and unconsciously switch between languages when speaking to members of their primary cultural unit.¹²² A study of bilinguals in the United States discovered that bilingual speakers habitually are not aware that they are alternating between two languages.¹²³ Studies reveal bilingual people engage in code switching “in order to achieve certain communicative goals and convey socio-semantic connotations.”¹²⁴ The majority rule upholding English-only rules because they are simply an issue of preference for the typical bilingual speakers is not supported by research addressing the code switching theory.¹²⁵

In *Rosario v. Cacace*, a New Jersey state court stated that *Gloor* is now the established majority judicial rule under Title VII of the Equal Employment Opportunity Act.¹²⁶ Under the *Gloor* rationale, adopted by a majority of federal courts, an English-only rule does not violate Title VII’s national origin provision because of the presumption that an English-only rule can unhesitat-

¹¹⁵ *Id.* § 1606.7(c).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1074 (N.D. Tex. 2000).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Mark Colón, *Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees*, 20 *YALE L. & POL’Y REV.* 227, 250 (2002) (citing *Premier Operator Servs.*, 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000) (expert testimony of Dr. Susan Berk-Seligson)).

¹²³ *Id.* (citing *Alfredo Mirandé, Now That I Speak English, No Me Dejan Hablar (“I’m Not Allowed to Speak”): The Implications of Hernandez v. New York*, 18 *CHICANO-LATINO L. REV.* 115, 146 (1996) (quoting EINAR HAUGEN, *THE NORWEGIAN LANGUAGE IN AMERICA* 65 (1969))).

¹²⁴ *Id.* (quoting Hans Dua, *Perspectives on Code-Switching Research*, 12 *INT’L J. DRUIDIAN LINGUISTICS* 136, 136-37 (1984)).

¹²⁵ *Id.* at 251 (citing Nancy Faires Conklin & Margaret A. Lourie, *A Host of Tongues: Language Communities in the United States* 6 (1983)).

¹²⁶ *Rosario v. Cacace*, 767 A.2d 1023, 1029 (N.J. Super. Ct. A.D. 2001).

ingly be observed by a fully bilingual employee and nonobservance is just a question of individual preference.¹²⁷ Professor James Leonard correctly asserts that most important to a court's dismissal of language discrimination claims under Title VII is the false conclusion that a bilingual worker may freely decide to speak English.¹²⁸ In *EEOC v. Premier Operator Services, Inc.*, a federal district court in Texas rejected the majority view that a bilingual exercises a free choice in speaking her language.¹²⁹ The court accepted the EEOC expert testimony that linguistic code switching denied bilinguals a freedom of choice in speaking opportunities.¹³⁰ "The significance of code switching is obvious: to the extent that bilinguals involuntarily revert to their primary language, their behaviors resemble the immutable traits that fall within the anti-discrimination model."¹³¹

However, Professor Leonard properly concludes that language is a mutable cultural characteristic because in practice it does not actually function like the inescapable stereotype of race or gender because language use is primarily within a person's control in spite of the fact that bilinguals will sometimes use their primary language involuntarily.¹³² The physical traits of race or gender are different from the language that evolves within national origin groups.¹³³ According to Professor Leonard, the key difference between race or gender and language is that the language of a culture may change as result of environmental factors while the essentially physical characteristic of skin color or gender of a group is perpetual.¹³⁴ Although language may not be an immutable characteristic, it is the essential fabric of identifying cultural and national origin such that an employer should not be permitted to restrict its use without first demonstrating that its English-only rule is related to job performance. By concluding that language is not an immutable characteristic like skin color, I do not intend to suggest that language rights are entitled to less protection than skin color. I think national origin language discrimination and skin color discrimination are equally suspect and should be given similar protection under the law.

Under the code switching theory, one's primary language has such a predominate influence on the language one speaks that a bilingual person sometimes involuntarily lapses into his native language under circumstances where the English-only rule requires an employee to speak English. Because the primary language of a bilingual employee has such a dominant influence on him, he is not aware of the fact that he has involuntarily lapsed into his native language. It is fundamentally unfair to allow an employer's arbitrary English-

¹²⁷ *Id.*

¹²⁸ James Leonard, *Bilingualism and Equality: Title VII Claims For Language Discrimination in the Workplace*, 38 U. MICH. J.L. REFORM 57, 121 (2004).

¹²⁹ *Id.* (citing *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1066-70 (N.D. Tex. 2000)). The expert witness was Dr. Susan Berk-Seligson, a professor of linguistics, Spanish language and culture at the University of Pittsburgh. *Id.* at 121 n.339.

¹³⁰ *Id.*

¹³¹ *Id.* at 122.

¹³² *Id.* at 125.

¹³³ *Id.* (citing 29 C.F.R. §1606.1 (2006) (EEOC Guidelines on Discrimination Because of National Origin) (noting that national origin groups have physical, cultural, and linguistic characteristics)).

¹³⁴ Leonard, *supra* note 128, at 126.

only requirement, that is not job related, to be used as a tool to discharge an employee for speaking his primary language on an involuntarily basis. Mr. Garcia, a bilingual, chose consciously to speak Spanish rather than English at work. The employer's rule allowed Garcia to speak Spanish during work breaks.¹³⁵ In *Gloor*, the court said that there was no authority presented that grants a person a legally cognizable right to speak Spanish or any other specific language at work.¹³⁶ The rules of the workplace may be established by the employer unless those rules are restricted by statute or other relevant legal principles.¹³⁷ The rejection of applicants for employment who cannot speak English may well be discriminatory if the job can be performed by a person lacking the ability to speak English.¹³⁸

V. INDEPENDENT OF THE EEOC GUIDELINES ADDRESSING THE ISSUE OF ENGLISH-ONLY RULES, THE RATIONALE OF THE *GRIGGS* OPINION REQUIRES LOWER COURTS TO REJECT THE *GLOOR* DECISION WHEN AN ENGLISH-ONLY RULE ADVERSELY AFFECTS AN INDIVIDUAL BASED ON THE GROUP IDENTITY OF HIS NATIONAL ORIGIN

Nine years before the unfortunate *Gloor* decision and its distrust of foreigners who are perceived to have originated from Mexico, the Supreme Court held, in *Griggs v. Duke Power*,¹³⁹ that an employer has a duty to demonstrate that employment tests that exclude a class of individuals protected from discrimination under Title VII, were job related.¹⁴⁰ Even without the benefits of the EEOC guidelines addressing the issue of English-only rules, both the spirit and rationale of the *Griggs* opinion require rejection of the *Gloor* decision. At a minimum, *Griggs* stands for the proposition that an employer cannot impose English-only rules in the workplace that are not job related on employees regardless of whether the affected employee is bilingual.¹⁴¹ Title VII's prohibition against national origin discrimination does not allow employers legally to adopt arbitrary English-only rules that disproportionately exclude individuals from employment opportunities because of their national origin, even if they are bilingual. An expansive application of the *Griggs* disparate impact theory would not limit its rationale to scored tests. "Congress did not intend [that] Title VII . . . guarantee a job to [employees] regardless of their qualifications."¹⁴² "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously

¹³⁵ *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980).

¹³⁶ *Id.*

¹³⁷ *Id.* at 268-69.

¹³⁸ *Id.* at 269.

The refusal to hire applicants who cannot speak English might be discriminatory if the jobs they seek can be performed without knowledge of that language, but the obverse is not correct: if the employer engages a bilingual person, that person is granted neither right nor privilege by the statute to use the language of his personal preference.

Id.

¹³⁹ 401 U.S. 424 (1971).

¹⁴⁰ *Id.*

¹⁴¹ *See id.*

¹⁴² *Id.* at 430.

to discriminate on the basis of racial or other impermissible classification.”¹⁴³ A requirement to speak English that is not job related is an unnecessary and arbitrary impermissible job classification that violates Title VII’s prohibition against national origin discrimination.¹⁴⁴

Under *Griggs*, after a plaintiff establishes a prima facie case that an English-only rule has a disproportionate impact on him because of national origin, the burden shifts to the employer to demonstrate that the required use of English as a term or condition of employment is job related. “Let us assume that, as contended by Mr. Garcia, there was no genuine business need for the rule and that its adoption by Gloor was arbitrary. The EEOC Act does not prohibit all arbitrary employment practices.”¹⁴⁵ Title VII provides that national origin is an impermissible basis for discrimination. Because language is a proper proxy for national origin status, under *Griggs*,¹⁴⁶ an employee who wants to demonstrate multicultural diversity in the workplace when the employer arbitrarily requires English only and that requirement is not related to the job or any other justifiable business purpose, creates a hostile work environment.

It is not unusual in today’s anti-immigration climate for public officials in general to display their resentment of undocumented immigrants by passing resolutions indicating that English is the official language of a governmental entity or city. On Monday, November 13, 2006, the Dallas, Texas suburb of Farmers Branch joined the fight against illegal immigrants by unanimously passing a resolution to make English its official language.¹⁴⁷ When speaking of the language resolution, Farmers Branch Councilman, Tim O’Hare said, “People remain[] free in Farmers Branch to communicate however they choose, but that city business would be done in English.”¹⁴⁸ Prior to O’Hare’s most recent anti-immigrant effort, some believed the anti-immigrant mood reached its peak in September 2006 after Farmers Branch’s City Council tabled certain measures viewed as hostile to undocumented immigrants.¹⁴⁹ It is a very disrespectful act that delays multicultural diversity for either a community or employer to arbitrarily require an individual not to speak the language of his national origin without a substantial justification.

¹⁴³ *Id.* at 431.

¹⁴⁴ *See id.*

¹⁴⁵ *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980).

¹⁴⁶ 401 U.S. 424 (1971).

¹⁴⁷ Thomas Korosec, *Dallas Suburb Targets Illegal Immigrants*, HOUS. CHRON., Nov. 14, 2006, at A1. “A Dallas suburb took the fight against illegal immigration into its own hands Monday when its City Council unanimously barred landlords from renting to undocumented tenants, making it the first city in Texas to take such a step.” *Id.*

¹⁴⁸ *Id.* at A4.

¹⁴⁹ *Id.*

Farmers Branch is following the lead of Hazelton, Pa., which earlier this year passed an ordinance to fine landlords who rent to illegal immigrants, deny business permits to companies that employ them and require tenants to register and pay for a rental permit. A federal judge has temporarily blocked enforcement of the Hazelton restrictions while he considers a lawsuit by the American Civil Liberties and others. O’Hare contends that illegal immigrants are a driving factor in the decline of Farmer Branch neighborhoods, and that cities have the right to act because the federal government has failed to secure its borders.

Id.

Professor Leonard contends that today's wave of immigrants differs from prior groups because they are not expected to adopt the existing cultural norms, which include speaking English.¹⁵⁰ "Our present attitude toward non-English languages, however, is different. There is a tendency to view the old assimilationist mandate as the tool of xenophobic nativists, which is certainly true in part."¹⁵¹ Today some view language as a characteristic of race or ethnic identity.¹⁵² "The old consensus that persons coming to this country should adopt English as a badge of citizenship has fallen apart."¹⁵³ The majority of recent legal scholarship portrays the efforts by employers to exercise arbitrary control over their employees' preference for language as wrong.¹⁵⁴

The courts, in contrast, normally have sided with employers in disputes over workplace language restrictions. Judicial dispositions of workplace language claims have been naïve at best, and perhaps a bit disingenuous. *Garcia v. Spun Steak* is an example of an opinion where the Ninth Circuit has sided with an employer in a workplace language rights dispute.¹⁵⁵ In *Garcia v. Spunk Steak*, Judge O'Scannlain's opinion readily concedes that "primary language can be an important link to [one's] ethnic culture and identity."¹⁵⁶ American courts must come to understand that the argument for using Title VII's national origin provision as a restriction on English-only rules in the workplace remains compelling because choices relating to language point to a person's right to treatment as an equal.¹⁵⁷ It is a basic, forward-looking American principle to grant each individual equal protection in the workplace.¹⁵⁸ Professor Drucilla Cornell and Professor William W. Bratton, Jr. contend "that legal suppression of Spanish is the functional equivalent of Jim Crow."¹⁵⁹ The great writer Jorge Luis Borges maintains that he could not have been successful without the ability to use the Spanish language.¹⁶⁰ For Borges, the Spanish language affected his life in a fundamental way both as "a man and as an art-

¹⁵⁰ Leonard, *supra* note 128, at 59 (citing *e.g.*, JOHN J. MILLER, THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED THE ASSIMILATION ETHIC 22-63 (1998) (discussing assimilative forces in American history)).

¹⁵¹ *Id.* (citing *e.g.*, MILLER, *supra* note 150, at 64-115 (discussing tension between assimilationist and multicultural philosophies)).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* (citing *e.g.*, Juan F. Perea, *Killing Me Softly, With His Song: Anglocentrism and Celebrating Nouveaux Latinas/os*, 55 FLA. L. REV. 441 (2003); *see generally, infra* Part IV. (discussing workplace language restrictions)).

¹⁵⁵ 998 F.2d 1480 (9th Cir. 1993).

¹⁵⁶ Leonard, *supra* note 128, at 60 (quoting *Garcia*, 998 F.2d at 1487).

¹⁵⁷ Drucilla Cornell & William W. Bratton Jr., *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 658 (1999). "Our ultimate conclusion is simple. Because legal suppression of language and legal sanction of segregation follow from the same cost economics, both Official and Workplace English impose a form of peonage on Latinos/as that is discriminatory." *Id.* at 659.

¹⁵⁸ *Id.* at 658-59.

¹⁵⁹ *Id.* at 659.

¹⁶⁰ *Id.* at 676.

In response to the question of whether or not he was "influenced" by the Spanish language, the great novelist Jorge Luis Borges exclaimed: I am inseparable from the Spanish language. My dreams, my aspirations as a writer are formed in Spanish. It's no exaggeration to say that the

ist.”¹⁶¹ Borges’ greatness as a writer might not have been realized in a workplace that required him to write his novels in English under the theory that Americans could only fully appreciate his work if they were originally composed in English. The Borges interview creates a reasonable inference that an employer’s English-only rule that is not job related may be counter productive because employees may be more creative and productive in the workforce when they have the freedom to work in the language of their choice.

However, I think the EEOC’s post-*Griggs* guidelines for an English-only rule is a natural and necessary result of the Supreme Court’s job relatedness reasoning in *Griggs* for cases establishing a disparate impact because of national origin. In 1999, twenty-eight years after the *Griggs* decision, in *EEOC v. Synchro-Start Products, Inc. (“Synchro-Start”)*,¹⁶² the federal district court properly articulated the self-evident truth, “any English-only rule unarguably impacts people of some national origins (those from non-English speaking countries) much more heavily than others.”¹⁶³ The EEOC filed suit under Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 against Synchro-Start on behalf of a group of employees, alleging unlawful discriminatory employment practices against employees because of their national origin.¹⁶⁴ The EEOC contended that Synchro-Start denied its employees equal employment in the workplace because of their national origin by commanding them to speak only English throughout the working hours.¹⁶⁵ The EEOC advanced the argument that Synchro-Start violated Title VII because it implemented the English-only rule without giving employees adequate notice of the consequences for violating the rule.¹⁶⁶ The EEOC was successful in defeating Synchro-Start’s motion to dismiss. The self-evident truth that an English-only rule has an impact on national origin was sufficient for the EEOC to survive Synchro-Start’s motion to dismiss, but because the English-only rules had been held valid in other federal Circuits, the *Synchro-Start* court gave an analysis of why it was rejecting the employer’s motion to dismiss.¹⁶⁷

Paul K. Hentzen¹⁶⁸ appropriately asserts the English-only rule received a correct interpretation in *Synchro-Start*. The *Synchro-Start* decision highlights the need to continue to refine Title VII to protect against discrimination in the context of an English-only rule. Hentzen argues that courts should expand the rationale of *Synchro-Start* to include strict scrutiny in the statutory burden-shifting plan Congress intended for disparate impact cases involving a chal-

man I am would not “be” who he is without Spanish. The writer I have become is unthinkable without the shape it has been given by the great traditions of Latin culture.

Id. (citing interview by Sonia Moria with Jorge Luis Borges, Buenos Aires, Argentina (May 1985)).

¹⁶¹ *Id.*

¹⁶² 29 F. Supp. 2d 911 (N.D. Ill. 1999).

¹⁶³ *Id.* at 912.

¹⁶⁴ *Id.* at 911 (citations omitted).

¹⁶⁵ *Id.* at 911-12.

¹⁶⁶ *Id.* at 912.

¹⁶⁷ *Id.*

¹⁶⁸ Paul K. Hentzen, Note, *EEOC v. Synchro-Start Products: The New Face of Disparate Impact Challenges to English-Only Workplace Rules*, 69 U. MO. KANSAS CITY L. REV. 439, 451 (2000).

lenge to an English-only rule under Title VII.¹⁶⁹ Employers should be required to defend the business necessity justification for an English-only rule under strict scrutiny. The strict standard gives teeth to the burden shifting formula under Title VII in a disparate impact claim challenging an employer's English-only requirement.¹⁷⁰ Courts should recognize that the "ability to comply" standard for bilingual employees is a discriminatory impairment when the employer fails to articulate a legitimate business justification under a strict scrutiny requirement.¹⁷¹

The three federal appellate courts approving an employer's English-only rule have rejected *Synchro-Start*'s argument that English-only rules could never violate Title VII's national origin provision.¹⁷² These three appellate decisions applied the English-only rule disparate impact analysis to bilingual employees.¹⁷³ Because plaintiffs alleged that *Synchro-Start*'s English-only rule may be invoked against those employees "who speak no English or whose ability to speak English is limited,"¹⁷⁴ the bilingual rationale adopted by those three federal appellate courts to approve an English-only rule does not apply to those who are not bilingual and speak a native language other than English.

Synchro-Start's English-only rule violates Title VII unless the employer demonstrates a business necessity for the rule.¹⁷⁵ When employees are obligated "to speak only English during working hours," that requirement could be presumed to violate Title VII under the "at all times" grouping of English-only rules under the EEOC guidelines.¹⁷⁶ Because the EEOC located *Synchro-Start*'s English-only rule under the "certain times" category the rule is not presumed to violate Title VII, but rather *Synchro-Start* as an employer must show a business necessity for its English-speaking requirement under the EEOC Guidelines.¹⁷⁷ The relevant case law reveals that the EEOC guidelines "constitute the administrative interpretation of [Title VII] by the enforcing agency and consequently are entitled to great deference."¹⁷⁸ In *Synchro-Start*, the court espoused the view that *Garcia v. Spun Steak* improperly rejected the EEOC's English-only Guideline "because that Guideline presumes in the absence of other proof that an English-only policy has a disparate impact, thus evoking a shift to the employer to demonstrate some business necessity for that policy."¹⁷⁹ The EEOC believes that an English-only rule produces an inference

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* "The 'business necessity' standard must be required to meet a very high level of scrutiny to prevent employers from skirting enforcement of the Civil Rights Act of 1964 and masking the discriminatory purpose of their English-only workplace rules with banal justifications." *Id.* at 452.

¹⁷¹ *Id.* at 453.

¹⁷² *Synchro-Start*, 29 F. Supp. 2d at 912.

¹⁷³ *Id.* at 912-13 (citing *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1488 (9th Cir. 1993); *Gonzalez v. Salvation Army*, 985 F.2d 578 (11th Cir. 1993) (unpublished opinion affirming findings of law and fact in 1991 U.S. Dist. LEXIS 21692, at *7 (M.D. Fla. May 28)); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980)).

¹⁷⁴ *Id.* at 913.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 913 n.7.

¹⁷⁷ *Synchro-Start*, 29 F. Supp. 2d at 913.

¹⁷⁸ *Id.* (quoting *Gilardi v. Schroeder*, 833 F.2d 1226, 1232 (7th Cir.1987)).

¹⁷⁹ *Id.* (citing *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489-90 (9th Cir.1993)).

that a person may be disadvantaged as an employee because of his national origin.¹⁸⁰ The EEOC's inference of national origin discrimination creates an evidentiary tie-breaker.¹⁸¹

If the only evidence placed before the fact finder were the existence of such a rule, with no explanation being proffered either way as to the reason for the rule or as to the manner in which it actually impacts, that level of evidentiary silence would call for a verdict in the employee's favor rather than the employer's on the element of disparate impact.¹⁸²

The issue of whether an English-only rule establishes a reliable inference of employment discrimination in the workplace is strictly a matter of administrative interpretation by the EEOC.¹⁸³ The EEOC has made a good faith effort to comply with legislative intent by sharing its knowledge and experience on how to prohibit and or limit national discrimination in the workplace.¹⁸⁴ Two relatively recent federal English-only rule cases involving courts in the Tenth Circuit will be discussed briefly.

VI. THE TENTH CIRCUIT REQUIRES AN EMPLOYER TO DEMONSTRATE A LEGITIMATE BUSINESS NECESSITY FOR AN ENGLISH-ONLY RULE TO DEFEAT THE PRESUMPTION THAT THE ENGLISH-ONLY RULE CREATES A HOSTILE WORK ENVIRONMENT

In *Barber v. Lovelace Sandia Health Systems*, a New Mexico federal district court granted defendant Lovelace Sandia Health Systems' motion for summary judgment in a disparate treatment claim.¹⁸⁵ The plaintiffs contended that Lovelace's no-Spanish policy represents a per se violation of Title VII.¹⁸⁶ However, the court concluded that Lovelace, the employer, presented a legitimate, non-discriminatory explanation for the no-Spanish policy in rejecting the challenge of plaintiff employees.¹⁸⁷

¹⁸⁰ *Id.* at 914.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ 185 409 F. Supp. 2d 1313, 1316 (D.N.M. 2005); Rule 56 of the Federal Rules of Civil Procedure provides for entry of summary judgment where "there is no genuine issue as to any material fact" and the defendant is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Summary judgment is appropriate if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Thomas v. IBM*, 48 F.3d 478, 484 (10th Cir. 1995). In applying this standard, the record and reasonable inferences there from are viewed in the light most favorable to the party opposing summary judgment. *See McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th Cir. 1998) (citing *Applied Genetics Int'l, Inc. v. First Affiliated Sec. Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990))." 409 F. Supp. 2d at 1326. Summary judgment is appropriate against any party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). 409 F. Supp. 2d at 1326.

¹⁸⁶ 1409 F. Supp. 2d at 1316.

¹⁸⁷ *Id.*

Title VII claims of disparate treatment discrimination based on circumstantial evidence are governed by the burden-shifting framework instituted in *McDonnell Douglas Corp. v. Green*.¹⁸⁸ Under *McDonnell Douglas*, a prima facie case of discrimination gives rise to a presumption that the employer unlawfully discriminated against an employee.¹⁸⁹ The presumption requires the defendant to produce an explanation to rebut the plaintiff's prima facie case. If the defendant provides a satisfactory explanation for its conduct, the presumption of illegal discrimination "drops from the case."¹⁹⁰ The plaintiff has the final burden of persuading the fact finder that the defendant engaged in prohibited discrimination under Title VII.¹⁹¹ The plaintiff may win by providing evidence that the defendant acted either with a discriminatory motive or that the declared reason for the employer's action was a pretext for discrimination, i.e., the facially non-discriminatory basis served as a facade for a decision motivated by unlawful discrimination.¹⁹²

The *Barber* decision pretends to give deference to the EEOC guidelines, under 29 C.F.R. § 1606.7(a), regulating the requirement by an employer that employees speak English at all times, by interpreting that guideline in a manner that makes it very easy for an employer to evade the presumption that the English at all time rule is illegal. Under the holding of *Barber*, an English-only rule in the workplace does not automatically constitute disparate treatment discrimination under 29 C.F.R. § 1606.7(a).¹⁹³ A federal court giving deference to the EEOC guidelines should concede that the EEOC's presumption of illegality under the *McDonnell Douglas Corp.* burden shifting requires an employer to defeat the presumption of illegality by a burden of persuasion rather than a burden of production.¹⁹⁴ A court that gives deference to the EEOC's guidelines would follow the lead of *EEOC v. Premier Operator Services, Inc.* and hold that an English-only rule applied at all times is a disparate treatment violation of Title VII's prohibition against national origin discrimination.¹⁹⁵ It is evident that the *Barber* court could not have been serious about prohibiting national origin discrimination under Title VII and giving deference to the

¹⁸⁸ 411 U.S. 792 (1993).

¹⁸⁹ *Barber*, 409 F. Supp. 2d at 1327 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (citing *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

¹⁹⁰ *Id.* (citation omitted)

¹⁹¹ *Id.*

¹⁹² *Id.* (citing *EEOC v. Flasher Co.*, 986 F.2d 1312, 1317 (10th Cir. 1992) (citation omitted)).

To establish a prima facie claim of disparate treatment based on national origin or color, the plaintiff must show: (i) that he is a member of a protected class; (ii) that he suffered adverse employment action; and (iii) disparate treatment among similarly situated employees. *Orr v. City of Albuquerque*, 417 F.3d 1144, 1149 (10th Cir. 2005). The third prong can be met by showing evidence sufficient to raise an inference of discrimination. See *id.* at 1152 ("The female Plaintiffs' evidence is sufficient to raise an inference of discrimination because they have 'presented admissible evidence that Defendant treated at least one non-pregnant employee . . . more favorably than [them].'" (quoting *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1197 (10th Cir. 2000)).

Id. at 1327-28.

¹⁹³ *Id.* at 1336.

¹⁹⁴ 1411 U.S. 792, 803.

¹⁹⁵ 113 F. Supp. 2d 1066, 1073 (N.D.Tex.2000).

EEOC Guidelines regarding English-only rules because of its holding that an employer has produced a legitimate business justification for its English-only rules at all times based on “complaints made by co-workers that they were uncomfortable when Spanish-speaking employees spoke Spanish in front of them.”¹⁹⁶ In a multicultural United States, discomfort in the workplace created by a person speaking Spanish, or any language other than English, simply cannot serve as legitimate business justification for an employer’s disparate treatment of an employee based on national origin. The court in *Barber* cited another case that concluded that an English-only policy in the workplace does not violate Title VII, in response to the plaintiffs’ contention that they were unaware of any cases upholding such a policy.¹⁹⁷ The *Barber* court cited to the case rejecting the EEOC’s position that an English-only policy applied at all times violated Title VII because the *Barber* court’s analysis demonstrates a hostility to the EEOC rules regulating an employer’s English-only policy.

Maldonado v. City of Altus expressly adopted the EEOC’s English-only guideline while addressing the diversity of legal issues that may arise when a city or governmental employer adopts an English-only rule.¹⁹⁸ The plaintiffs were employed by the City of Altus, Oklahoma and appealed a federal district court’s decision that granted defendant’s motion for summary judgment for all claims. Each claim had resulted from the city implementing an English-only rule for its employees.¹⁹⁹

¹⁹⁶ *Barber*, 409 F. Supp. 2d. at 1335.

¹⁹⁷ *Id.* at 1337.

The Court is aware of at least one case that has found that an English-only policy applied at all times did not violate Title VII. See *Long v. First Union Corp.*, 894 F. Supp. 933 (E.D.Va.1995). In *Long*, the plaintiffs were told not to speak Spanish at the bank except to assist a Spanish-speaking customer of the bank, similar to the policy here where the plaintiffs were told not to speak Spanish except to translate. See *id.* at 942. The plaintiffs in *Long* argued that an English-only policy applied at all times was a violation of Title VII. See *id.* at 940. The court declined to give deference to the EEOC guidelines, and found that such a policy was not a per se disparate impact violation of Title VII, and that the policy did not violate Title VII as the defendant had offered a sufficient business justification. See *id.* at 940-41.

Id.

In my opinion it appears that the court in *Barber v. Lovelace Sandia Health Sys.* actually refused to give deference to the EEOC Guidelines involving English-only rules because it failed to require the employer to meet the burden of persuasion that exists for a legitimate business justification to over the EEOC’s presumption of unlawful discrimination created by an employer’s rule requiring an employee to speak English at all times.

¹⁹⁸ 433 F.3d 1294, 1305-06 (10th Cir. 2006).

¹⁹⁹ *Id.* First, the plaintiffs alleged claims under both disparate-impact and disparate-treatment and maintained that the English-only policy discriminated against them because of their race and national origin in contravention of Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000e. Second, the plaintiffs alleged intentional discrimination under the Civil Rights Act of 1866, 42 U.S.C. § 1981. Third, the plaintiffs contended that the city retaliated against them for engaging in conduct protected under Title VII and 42 U.S.C. § 1981. *Maldonado*, 433 F.3d at 1308. Fourth, the plaintiffs filed claims under the Civil Rights Act of 1871, 42 U.S.C. § 1983, arguing that the policy deprived them of equal protection and freedom of speech.

The Tenth Circuit reversed and remanded the following of plaintiffs’ claims in favor of the city asserting disparate impact and disparate treatment under Title VII; intentional discrimination under § 1981; as well as a violation of equal protection under 42 U.S.C. § 1983. The appeals court affirmed summary judgment in favor of defendants on the 42 U.S.C.

The appellate court concluded that the plaintiffs alleged enough facts to support a disparate impact claim of discrimination under Title VII's hostile work environment theory.²⁰⁰ The appellate court held that an English-only rule itself, by evoking hostility by co-workers, "may create or contribute to the hostility of the work environment" under the disparate impact analysis if the policy is not job related.²⁰¹

"Here, the very fact that the City would forbid Hispanics from using their preferred language could reasonably be construed as an expression of hostility to Hispanics. At least that could be a reasonable inference if there was no apparent legitimate purpose for the restrictions."²⁰² City officials received the standard complaint that some non-Spanish speaking employees felt uncomfortable when co-workers spoke Spanish in their presence.²⁰³ The appeals court held that the standard lack of comfort complaint articulated by the city failed to meet the burden needed to show that the City's English-only policy had enough business justification to overcome the disparate impact it had on Hispanics because of their national origin.²⁰⁴

Although the English-only rule may improve communication in the workplace, Professor Cristina Rodriguez contends that fostering cooperation and solidarity among employees obliges employers to allow linguistic diversity in some contexts.²⁰⁵ Promoting genuine, long-term cooperation in the workplace depends on what Professor Rodriguez describes as "cultural burden sharing."²⁰⁶ Under the cultural burden sharing theory all participants in the workplace, not just the assimilating immigrant, take in particular aspects of the cultural effects of immigration.²⁰⁷ The Tenth Circuit's decision in *Maldonado*, by implication, requires an employer to share the cultural burden of immigration in the workplace by allowing employees to speak Spanish unless the employer articulates a legitimate business necessity for an English-only rule.²⁰⁸ The Tenth Circuit wisely concluded the mere fact that English speakers feel uncomfortable in the workplace when other employees speak Spanish in front of them, does not qualify as an adequate business justification under Title VII for an English-only rule.²⁰⁹ I think that, at a minimum, cultural burden sharing requires employees to accommodate other employees speaking Spanish when

§ 1983 freedom of speech issue and the question of qualified immunity. *Id.* at 1298. The plaintiffs contended that the city, a recipient of federal funds, violated Title VI by approving the English-only rule. Title VI forbids discrimination by federally funded programs. *Id.* at 1302. The appellate court affirmed the district court's dismissal of plaintiffs' Title VI claims because the plaintiffs failed to either plead or prove that the federal funding received by the city was for the purpose of making significant employment available. *Id.* at 1303.

²⁰⁰ *Id.* at 1304-05.

²⁰¹ *2Id.* at 1305.

²⁰² *Id.*

²⁰³ *Id.* at 1306.

²⁰⁴ *Id.* at 1307.

²⁰⁵ Cristina Rodriguez, *Language Diversity in the Workplace*, 100 Nw. U. L. Rev. 1689, 1711-12 (2006).

²⁰⁶ *Id.* at 1711-12.

²⁰⁷ *Id.* at 1714.

²⁰⁸ See *Maldonado v. City of Altus*, 433 F.3d 1294, 1306 (10th Cir. 2006).

²⁰⁹ *Id.* at 1307.

the employer has failed to establish a business justification for an English-only rule.²¹⁰

The plaintiffs argued that the city engaged in intentional discrimination prohibited by several federal statutes.²¹¹ The identical analytical framework was appropriate for all plaintiffs' theories of intentional discrimination.²¹² In this case the plaintiffs relied on more than just an inference of intent to create a hostile work environment. "There is evidence that management realized that the English-only policy would likely lead to taunting of Hispanic employees . . . there is evidence that during a news interview the Mayor referred to the Spanish language as 'garbage.'"²¹³ The Tenth Circuit held the record had enough evidence of intent to initiate a hostile environment and as a result the summary judgment on those claims for the city had to be set aside.²¹⁴ It affirmed the lower court's determination that the plaintiffs were retaliated against for engaging in conduct protected under Title VII and 42 U.S.C. § 1981.²¹⁵ The district court's rejection of the plaintiff's section 1983 First Amendment freedom of speech claim was affirmed on appeal. Normally, for an employee's work-related speech to rise to the level of a matter of public concern, the speech should be voiced with an eye to action, to promote the public welfare and not just to remedy a personal grievance.²¹⁶ The plaintiffs' First Amendment claim failed because they did not demonstrate the speech precluded by the English-only rule involved communications on matters of public concern.²¹⁷ There is no evidence that the English-only rule was intended to reduce communications on matters of public concern.²¹⁸ The Tenth

²¹⁰ *Id.*

²¹¹ *Id.*

Title VII, 42 U.S.C. § 1981, and 42 U.S.C. § 1983. As previously noted, Title VII bars discrimination in employment on the basis of race or national origin. Section 1981 provides equal rights to make and enforce contracts and to the benefits of laws for the security of persons and property. Section 1983 prohibits those acting under color of state law from depriving others of their federal rights; the right invoked by Plaintiffs is the right to equal protection of the laws under the Fourteenth Amendment.

Id. (citations omitted).

²¹² *Id.*

²¹³ *Id.* at 1308.

²¹⁴ *Maldonado*, 433 F.3d at 1308.

²¹⁵ *Id.*

Plaintiffs claim that their protected conduct was the June 18 letter, written by Sanchez and also signed by Ruben Rios and Lloyd Lopez. We assume that sending the letter was protected conduct for Plaintiffs Sanchez, Rios, and Lopez. But it is too great a stretch to infer that adoption of the English-only policy was retaliation for the letter. After all, the policy had already been imposed in the Street Department, where Sanchez, Rios, and Lopez worked – that is why Sanchez wrote the letter. And the citywide policy was no more stringent than the Street Department policy; if anything, it was more lenient.

Because of the lack of evidence of a causal connection, we agree with the district court that Defendants were entitled to summary judgment on the retaliation claims.

Id. at 1309.

²¹⁶ *Id.* at 1310.

²¹⁷ *Id.* at 1311.

²¹⁸ *Id.*

Circuit suggested that in certain limited circumstances, speaking Spanish itself might be considered a matter of public concern.²¹⁹

CONCLUSION

While “official English” has been a controversial subject since America’s beginning, for the first time in American history there is a likelihood that protection for minority language rights will continue to decline.²²⁰ In the early 1900s, minority language rights were predominantly local and state concerns.²²¹ In 2007, the English as America’s official language pressure groups speak with national implications for the language rights debate.²²² “That English-only rules have a discriminatory impact on bilingual Latinos ought to be beyond rational debate.”²²³ Employers should not be allowed to require English only in the workplace when that requirement can only rationally be explained as a prejudice or hostility toward a person because of his or her national origin. Courts should reject the rationale of the *Gloor* opinion and give true deference to the EEOC’s interpretation of the national origin provision of Title VII and its implications on the English-only rule, in order to promote cultural diversity by protecting the language rights of employees when the employer fails to produce evidence that an English-only rule serves a legitimate business purpose. I recommend that courts articulate the need for the employer always to meet the burden of persuasion in an English-only rule case because the right to speak one’s preferred language should be protected by more than the production of a plausible business justification.

²¹⁹ *Id.* at 1311-12.

Here, we do not question that Plaintiffs take pride in both their Hispanic heritage and their use of the Spanish language, nor do we question the importance of that pride. What we do question, because there is no supporting evidence, is that by speaking Spanish at work they were intending to communicate that pride, much less “to inform [an] issue [so] as to be helpful . . . in evaluating the conduct of government. *Id.* The dissent suggests that the Plaintiffs’ conversations in Spanish must be viewed in the context of “an on-going and evolving discussion on race relations.” Diss. at 10. That context might be relevant if there were any indication that the Spanish-language conversations began only as part of that discussion. One might then infer that Plaintiffs were trying to make a point by conversing in Spanish. But nothing in the record suggests that this was the case. The race-relations controversy is irrelevant in determining the meaning of the decision to converse in Spanish if it had no impact on the decision. One hearing the conversation would have no reason to draw an inference that speaking in Spanish now conveyed some new meaning.

Accordingly, we need not address the focus of the dissent – whether ethnic pride or ethnic discrimination is a matter of public concern.

Id.

²²⁰ Lori A. McMullen & Charlene R. Lynde, *supra* note 11, at 789.

²²¹ *Id.* (citing Jamie B. Draper & Martha Jimenez, *Language Debates in the United States*, in *THE REFERENCE SHELF: ENGLISH: OUR OFFICIAL LANGUAGE?* 10, 10 (Bee Gallegos ed., 1994)).

²²² *Id.*

²²³ Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1353 (1997). “People whose primary language is Spanish constitute a cognizable group – a ‘discrete and insular minority’ – who historically have been, and continue to be, subject to discrimination.” *Id.* at 1354.