

## LANGUAGE DIVERSITY IN THE WORKPLACE

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### INTRODUCTION

In March of 2005, the manager of a Dunkin' Donuts in Yonkers, New York, stirred some local controversy when he posted a sign inviting customers to complain if they heard employees behind the counter speaking a language other than English.<sup>1</sup> A day later, the manager removed the sign, responding to vociferous complaints that it amounted to discrimination. While the mini-drama was not itself an unusual event—English-only rules have become increasingly common in the American workplace—the episode did not follow the predictable script. The manager, who acted on his own, was himself a native Spanish speaker—an immigrant from Ecuador. He claimed he had posted the sign in response to customer complaints

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<sup>1</sup> Jim Fitzgerald, *Foreign-Born Doughnut Shop Manager Issues English-Only Edict*, ASSOCIATED PRESS, Mar. 18, 2005.

about employees behind the counter acting disrespectfully by speaking Spanish in the presence of customers. But the outcry that prompted the manager to remove the sign came not from the employees whose speech had been curtailed, nor from groups representing their interests, but from the very clientele the manager thought he had been serving. The people of the neighborhood immediately denounced the policy as discriminatory, coming to the defense of the Latino, Egyptian, and Filipino employees. And while Dunkin' Brands, Inc. requires employees who interact with the public to be fluent in English, the company immediately issued a statement distancing itself from the manager's action, emphasizing that "having employees that speak the languages of the local neighborhood . . . can be a key element in creating a hospitable environment." The company took no disciplinary action against the manager, and the episode ended looking like nothing more than a big misunderstanding.

Though the Dunkin' Donuts affair came to a quick resolution, the event was part of a larger trend that has emerged in recent years in workplaces across the country. It has become increasingly common for employers to adopt English-only rules that prohibit workers from speaking languages other than English under certain circumstances. Such rules represent, in many ways, the private sector versions of the official English laws on the books of states across the country. But whereas the official English movement traffics largely in the rhetorical and symbolic, the emergence of the English-only workplace rule suggests that the language debate in the United States has very practical implications for the ways millions of people interact with others in certain public spaces, such as the workplace. The existence of private language regulation also underscores that lofty concepts like the definition of national identity are worked out not only through high-profile oratory and grandstanding, but also through everyday interpersonal interactions.

English-only rules in the workplace have taken a variety of forms.<sup>2</sup> Some rules govern only official work time; others cover any and all conversations in the workplace. Some rules are set by formal corporate policies, but, more often than not, they are informally adopted by managers in the workplace itself. They appear most often in the consumer services sector, but they also have appeared in other workplaces, such as hospitals, offices, and on assembly lines. The nature of the English-only rule differs from workplace to workplace, but even a minor and informal incident like the one in Yonkers suggests that regulation in the form of an English-only rule amounts to more than an ordinary behavior code for the workplace. Rules regulating language use implicate a complex web of social relationships that intersect in society's workplaces: relationships between individual customers and workers, to be sure, but also relationships among workers, be-

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<sup>2</sup> For a more detailed discussion of the various types of English-only policies employers have adopted, see *infra* notes 19–38 and accompanying text.

tween workers and their communities, and between the public and the commercial settings in which a community's life is lived out. In a multi-ethnic environment, an English-only imperative offers employers a simple mechanism for mediating these many relationships. But, as I contend throughout this Article, this mechanism imposes significant social costs that justify resisting the English-only impulse.

In this Article, I treat the English-only workplace rule as a manifestation of the desire by certain parties—employers, employees, and segments of the public—to control the social dynamics of the workplace. Through my analysis, I seek two kinds of understanding.<sup>3</sup> First, how might we characterize the consequences of these rules? Understanding their effects and responding accordingly will contribute not only to debates concerning the rules that employers adopt to govern the workplace, but also to the development of a conceptual framework for understanding the cultural consequences of immigration generally. This Article thus represents part of a larger attempt on my part to understand how the multilingualism fueled by immigration is reshaping our social and political spaces.<sup>4</sup> Second, what does a study of the English-only workplace rule reveal about Title VII as a source for governing workplace relations in an increasingly pluralistic society? By illuminating the cultural dimension of the immigration debate, this study will shed light on how dilemmas generated by our pluralistic demography, other than language conflict, might be resolved.

In brief, I argue that the consequences of the English-only rule with which we should be most concerned are social, not individual, in nature. The interest we should focus on protecting in the workplace is not the individual worker's freedom of expression—the interest courts routinely dismiss in rejecting challenges to English-only rules—but his or her interest in free association and social bonding, both with fellow workers and with the community beyond the workplace. Securing this freedom will require protecting the individual characteristics or behaviors that facilitate association, which will include establishing a legal presumption against English-only rules. Such a presumption ultimately will promote the social objective that

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<sup>3</sup> In discussing the English-only rule phenomenon, I am concerned not with the employer's setting of English fluency or proficiency as a condition of employment in the first place—it would be an uphill battle to demonstrate that an English-language requirement, in the majority of cases, is anything but a legitimate job requirement, or a bona fide occupational qualification. *Cf.* *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980) (noting that it may be unlawful for an employer to refuse to hire a worker who does not speak English if the job for which he or she would be hired does not require the ability to communicate in English). Few, if any, cases challenging English-language proficiency requirements appear to have been brought, suggesting either that they are few and far between; that the EEOC does not view such cases as likely to succeed and therefore does not pursue them; or that the people who would have standing to bring such claims have little, if any, awareness of their legal rights or little, if any, ability to access the legal system. Moreover, the fact that this country's workplaces are full of immigrants who do not speak English suggests that employers often subordinate any reluctance they might have to hiring such workers to their need for labor.

<sup>4</sup> See Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687 (2006).

animates this Article—the idea that the cultural burdens of immigration and pluralism must be shared by all members of the population.

Title VII has been the primary framework through which advocates and courts have assessed the validity of English-only rules. But a close consideration of how the federal courts have resolved English-only workplace disputes underscores that Title VII provides workers with no realistic mechanism for articulating their social interests, or their interests in association. At the same time, through the business necessity justification, the statute does allow employers to express their own conceptions of the social interests at stake in the workplace. Though Title VII's inadequacy as a framework for assessing English-only rules may be lamentable, it would be misguided to attempt to reorient Title VII jurisprudence or to attempt to amend the statute itself to address language rules directly. Other actors, particularly state and local lawmakers, are in a better position to deal with the salient associational concerns that arise from English-only and other similar forms of regulation.

More specifically, in identifying social impact as the more serious consequence of the English-only rule, I mean social in three senses of the word. First, the rules interfere with important associative dynamics in the workplace itself, or the process of social bonding that takes place among workers.<sup>5</sup> Second, they create a rift between the workplace and the community, detaching the important public space of the workplace from the identity of the community in which it is situated. Third, rules of this kind compromise the ability of minority language communities to sustain themselves, because they force the use of non-English languages out of public spaces and into the familial sphere. The English-only phenomenon thus highlights that employer regulation of certain behaviors interferes not just with employees' expressive interests, or their interests in displaying individuality through certain behavior, but also with their associative interests, or their interests in social bonding, both in and out of the workplace. Protecting the individual worker's freedom to speak non-English is not just a matter of personal identity, but of communal identity.

While the individual's expressive interests certainly deserve recognition in some contexts,<sup>6</sup> protecting the associative dimension of practices

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<sup>5</sup> To be clear, in using the terms "association" and "solidarity," I am not referring to or commenting on the freedom to associate or build solidarity in order to form a union that will engage in collective bargaining, as understood in the context of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151–169 (2006). Instead, I am referring to a more interpersonal process of forming social ties, friendships, and esprit de corps among employees. For a discussion of association and solidarity with reference to the purposes of the NLRA, see *infra* notes 62–63, 66–70 and accompanying text.

<sup>6</sup> For instance, workers' speech rights are clearly protected in chapter 7 of the NLRA, 29 U.S.C. § 157 (2006), which provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

typically characterized as personal has a clear social value that justifies interfering with the employer's prerogatives. The worker's associative interests should be protected, because the workplace functions not just as a commercial setting, but as a social institution. It is the site where we spend most of our waking hours and develop many of our salient relationships. Workplaces constitute spaces within, not apart from, communities; not only does a given workplace itself have a relationship to the community in which it is located, but the relationships formed within the workplace are interlaced with those that exist outside of it. What is more, employers in the English-only cases invoke harmony among workers and the interests of customers to justify their practices, in effect standing in for the public to regulate the social phenomenon of bilingualism. Employers thus control the behavior of their employees in a manner that has external social consequences. Though the employer, in expressing these interests, is also articulating what he has determined is best for the bottom line of his business, the bottom line is inextricable from social assumptions about the propriety and desirability of non-English in public spaces.

But requiring employers, customers, and workers to tolerate a certain amount of linguistic cacophony in the workplace would do more than promote workers' associative interests. Requiring all people to embrace some level of linguistic dissonance in the workplace would require the public at large to reorder its expectations with respect to the linguistic dynamics of the workplace, thus spreading the cultural burden of immigration across the population with some degree of evenness. Put slightly differently, there is a widespread and reasonable social expectation that immigrants will learn English in order to become productive members of society. But treating English-only rules with skepticism would be a way of requiring all people, not just the immigrant and his descendants, to share in facing the cultural consequences of immigration, including multilingualism. This claim is not a call for surrender to demographic forces, but a simple expression of the need to adapt our principles of integration to reflect who we are becoming as a people—to alter our expectations of our aesthetic and linguistic surroundings in light of an evolving population. Understanding what is at stake in the controversy over the English-only workplace rule thus will give content to the debate over how best to absorb the cultural effects of large-scale immigration, a debate that rages at a high level of abstraction in popular and political discourse.<sup>7</sup>

I frame this issue within the broader context of immigration for two reasons. First, though the three-generation pattern of linguistic assimilation

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<sup>7</sup> See *infra* notes 257–65 and accompanying text (discussing how congressional debates over the cultural dimension of immigration tend to feature a great deal of abstract rhetoric concerning American national identity). See generally SAMUEL P. HUNTINGTON, WHO ARE WE?: THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 18–19 (2004) (discussing the crisis of identity facing the United States in this century as a result of the arrival of large numbers of Spanish-speaking immigrants).

still fairly describes language assimilation today,<sup>8</sup> the constant influx of immigrants ensures that non-English speakers will continue to be prevalent in the United States, even as particular family lines assimilate.<sup>9</sup> Second, language difference represents perhaps the starkest cultural consequence of immigration.<sup>10</sup> Hearing a language one cannot understand immediately and viscerally calls one's attention to difference and the possibility of separation from others. As immigrants themselves well know, entering a world where all transactions occur through an unfamiliar medium can be disorienting, leaving the linguistic outsider with a sense of powerlessness.<sup>11</sup>

As studies of the workplace have underscored, linguistically complex workplaces create pressure to “suppress linguistic differences,”<sup>12</sup> because language, an obvious marker of changes brought on by immigration, “crystallizes resentment and anxiety.”<sup>13</sup> Because of the characteristics described above, the workplace represents a space where we are likely to see a significant amount of sorting of the cultural effects of immigration. In other words, it is in workplaces and commercial spaces that people come into contact with the human dimension of immigration, both as workers and as patrons. Understanding language conflict in the workplace, therefore, will contribute to our understanding of the cultural meaning of immigration, and vice versa.

In devising the appropriate law reform response to the English-only phenomenon, the basic objective should be to erect a presumption of invalidity. The primary framework employees have relied on to challenge English-only rules has been Title VII of the Civil Rights Act of 1964<sup>14</sup>—a framework that has given rise to a very different way of thinking about English-only rules than the conception I advance. In assessing these rules, courts have focused primarily on the rules' impacts on the rights of individual workers. The resulting caselaw has produced an anemic understanding

<sup>8</sup> According to this pattern, the first generation is dominant in non-English, the second generation is bilingual with a preference for English, and the third generation is English dominant. See RICHARD ALBA & VICTOR NEE, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* 219 (2003).

<sup>9</sup> For a detailed discussion of this phenomenon, see Rodríguez, *supra* note 4, at 690–92.

<sup>10</sup> Ultimately, while immigration is not the only source of language difference in the United States, it is the primary source. Language diversity in the United States today also comes from domestic, or citizen, sources—namely Puerto Ricans, Hawaiians, and Native Americans. Historically, language diversity in the Southwest also has stemmed from sources other than immigration; the Mexican-American population has ties to the territory that pre-date statehood.

<sup>11</sup> For a discussion of the use of English-only rules to ameliorate these effects as they are felt by employees who are native speakers of English, see *infra* notes 309–16.

<sup>12</sup> Michael Lichter & Roger Waldinger, *Producing Conflict: Immigration and the Management of Diversity in the Multiethnic Metropolis*, in *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA* 147, 163 (John David Skrentny ed., 2001) [hereinafter *COLOR LINES*].

<sup>13</sup> *Id.* at 164.

<sup>14</sup> 42 U.S.C. § 2000e (2006).

of the social significance of English-only rules in the workplace. While Title VII grants the employer leeway through the business necessity defense to defend one particular set of social interests, the statute provides employees with no comparable avenue to articulate the social concerns as they see them. Though it may be possible to shift the legal presumption regarding these rules by pushing for a shift in Title VII analysis, or for an amendment to Title VII itself, better strategic and conceptual options exist. Our focus should be on how states and municipalities, through legislation, might limit the authority of employers to impose English-only rules, as well as on how other organizations and institutions involved in advising employers about how to manage personnel, such as the Society for Human Resource Management, might urge a shift in presumption.<sup>15</sup>

Finally, emphasizing the distinction between associative and expressive interests highlighted by the English-only cases also could prove to be of instrumental value in resolving disputes over the accommodation of other, non-immigration-related personal characteristics in the workplace. Today, other than language, religion is the interest or characteristic that generates the most friction in the workplace. Believers may seek to pray or proselytize in the workplace, or they may seek exemptions from performing a job function that interferes with their religious commitments, as the much-reported-on Christian pharmacists who refuse to dispense birth control have done. Focusing on the employees' associative interests might help chart a course through this minefield of claims. The distinction between association and expression will help clarify what is at stake with employers' regulation of different employee behaviors. In addition, it can serve as a guide to state and local lawmakers, who seem increasingly willing to protect certain personal interests in the workplace—a willingness reflected in recent legislation banning English-only rules and protecting certain religious practices in the workplace.<sup>16</sup>

To develop these claims, this Article proceeds in three parts. In Part I, I establish what I call the social case for a multilingual workplace. I consider the effects of English-only rules on various forms of social bonding and establish the normative basis for restraining employers from imposing such rules. In the process, I explore the meaning of bilingualism as a both personal and social phenomenon, and spell out the associative versus expressive distinction as a mechanism for resolving disputes surrounding cultural traits in the workplace. In Part II, I assess the Title VII litigation that has grown up around English-only workplace rules over the last two dec-

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<sup>15</sup> Both California and Illinois have passed laws prohibiting employers from imposing English-only rules absent an overriding business necessity. The Texas legislature also has considered adopting similar legislation. For discussion of this legislation, *see infra* notes 271–83 and accompanying text.

<sup>16</sup> *See, e.g.*, National Council of State Legislatures, Pharmacist Conscience Clauses: Laws and Legislation (May 2006), available at <http://www.ncsl.org/programs/health/conscienceclauses.htm> (listing the variety of state laws that regulate the rights of pharmacists to refuse to fill prescriptions or provide services for ethical, moral, and religious reasons).

ades and lay out the flaws in the federal courts' understanding of the impact of English-only rules. In Part III, I consider whether Title VII should play any role at all in managing debates over pluralism in the workplace, and establish why state and local legislation would be more consistent with the conceptual framework I develop in Parts I and II than a reinvented Title VII.

### I. THE SOCIAL CASE FOR THE MULTILINGUAL WORKPLACE

In this Part, after explaining the English-only phenomenon in some more detail, I establish the shape that the language rules of the workplace ought to take. Through this extended consideration of how to manage linguistic diversity in the workplace, I identify the values and interests that employers and lawmakers should take into account when making decisions about how best to manage pluralism in the workplace. I begin by considering the status of the workplace as a social institution and why that status justifies constraining the employer's ability to control the dynamics of his workplace. I then consider the interests of employees and employers implicated by linguistic diversity. Exploring the English-only rule phenomenon offers a good starting point for the larger project of grappling with workplace pluralism, because language diversity presents a particularly challenging case. Linguistic pluralism, after all, affects the processes of communication in a direct and profound way.

In adopting their English-only workplace rules, employers arguably express a fundamental human impulse. Scholars of language conflict have identified, in many different contexts, a seemingly inexorable drive toward linguistic homogeneity: "We generally respond to the Babel of languages in the world by seeking to carve out a space in which only 'our' language is spoken."<sup>17</sup> In other words, attempts to create safe spaces where mutual intelligibility is always possible, even if not required, reflect a common human dynamic.<sup>18</sup> The problem with this impulse, of course, is that linguistic homogeneity is not naturally occurring. Particularly in multiethnic societies, such homogeneity must often be engineered.

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<sup>17</sup> Marc Shell, *Language Wars*, 1 *NEW CENTENNIAL REV.* 1 (2001). As Shell notes,

the academic discussion of language and international politics has been dominated by responses to a single sort of "space," the territory of the nation-state. And, since the early nineteenth century, that national space or territory has been defined by the ideal of linguistic nationalism: the idea that peace and justice demand that all speakers of a given language secure a national homeland where that language is supreme.

*Id.* at 2.

<sup>18</sup> This impulse manifests itself in a wide variety of ways, including in the assumptions people make about what the law requires. A recent letter to *Slate* magazine's advice columnist highlighted not only the assumption that the speaking of non-English is rude, but also the belief that the law, or the powers-that-be, should have something to say about it. The letter complains about Filipino co-workers speaking Tagalog and then queries whether a law exists prohibiting such behavior in federal buildings. See *Dear Prudence*, *SLATE*, July 28, 2005, <http://slate.msn.com/id/2123487>.

The English-only impulse long has been present in commercial settings. One of the first cases to consider the civil rights implications of English-only rules actually concerned a rule applied to customers, rather than workers. In the 1973 case *Hernandez v. Erlenbusch*, several Chicano patrons brought suit against the owners of a tavern in a small Oregon town, challenging their policy of prohibiting patrons from speaking languages other than English while seated at the bar.<sup>19</sup> The house rule directed bartenders to escort non-compliant customers to one of the establishment's back booths, and to raise the volume on the juke box to drown out their conversation. According to the tavern owners, they devised the English-only rule in response to "fear on the part of the white clientele that the Chicanos [were] talking about them."<sup>20</sup> The rule thus "served everyone's interests"<sup>21</sup> by keeping the peace in a public place frequented by both of the town's ethnic groups. The federal district court, however, found this justification unpersuasive, holding that the plaintiffs' civil rights, protected by § 1982, had been violated. In the court's view, the English-only rule "deprive[d] Spanish-speaking persons of their rights to buy, drink and enjoy what the tavern has to offer on an equal footing with English-speaking consumers."<sup>22</sup>

Today, legal and market pressures have made attempts to regulate the linguistic behavior of customers largely a thing of the past.<sup>23</sup> But the claim that keeping the peace requires controlling the speaking of non-English in

<sup>19</sup> 368 F. Supp. 752 (D. Or. 1973).

<sup>20</sup> *Id.* at 754.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 755. The court found that the rule violated the customers' § 1981 rights "to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens," as well as their § 1982 rights to "have the same right . . . to . . . purchase . . . personal property." *Id.* The court further noted that, just as these statutes prohibited the relegation of black citizens to the back seats of busses, they restrained business owners from ordering Spanish speakers out of the earshot of English-speaking customers. *Id.*

<sup>23</sup> Note, however, that the current and vigorous debate over immigration reform has emboldened at least one business owner, who has received some media attention, to demand that even his customers speak English. The *Philadelphia Inquirer* reported recently on the decision by a famous local cheesesteak vendor to post a sign in his shop informing customers: "This is America. When Ordering, Speak English." See Gaiutra Bahadur, *An Old Struggle to Adapt to a New Country's Ways*, PHILA. INQUIRER, May 30, 2006, available at <http://www.philly.com/mld/inquirer/news/loca/14697552.htm?template=contentModules/print.story.jsp>. The vendor's motivation appears to include resistance to the expectation that he adapt to the presence of immigrants in his community. See *id.* (quoting business owner's comment: "They want us to adapt to these people. What do you mean, 'Press 1 for Spanish'? English period. Case closed. End of discussion. You *better* make it the official language."). It is certainly possible that the current climate of high anxiety over immigration has given rise to other similar incidents around the country. But since *Hernandez*, and for the moment, cases litigating business owners' attempts to regulate the language spoken by their customers do not appear to have arisen. What is more, the employers in some of the English-only workplace cases discussed below do not appear to impose language restrictions on customers, even as they impose them on employees, whom they also permit to speak in languages other than English to customers. See, e.g., *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 939 (E.D. Va. 1995).

the commercial sphere is alive and well. Thirty years after *Hernandez v. Erlenbusch*, the sentiment that foreign languages spoken in commercial spaces are invasive—that they upset the peaceful pursuit of commerce by irritating English-speaking clientele—is expressed.<sup>24</sup> But rather than target customers, most house English-only rules regulate the behavior of employees. Like the Oregon tavern owners, employers who adopt English-only rules cite the need to promote cooperation in the workplace and to protect customers and workers alike from the anxiety that they are being talked about in languages they cannot understand.

Contemporary English-only rules run the gamut from formal to informal.<sup>25</sup> In at least one case, the rule has come down to franchise managers as corporate policy. According to a 2003 complaint filed by the EEOC in federal court in New York City, the Sephora Corporation, which sells cosmetics, maintains an English-only policy prohibiting employees from speaking non-English during working time.<sup>26</sup> In other instances, managers (like the manager of the Yonkers Dunkin' Donuts) issue mini-workplace codes, or English-only edicts, of their own volition, giving notice in the form of a sign in the break room, or somewhere else in the workplace. In still other cases, the “rules” emerge as workplace norms enforced through informal reprimands by supervisors and fellow employees to “speak English, please.”

The adoption of English-only rules has not been limited to a particular industry, nor have the rules been applied only to particular types of workers. But the cases that have come into public view, either as the result of EEOC enforcement and litigation efforts or through investigative reporting, have a few characteristics in common. First, with the exception of the Sephora Corporation's alleged corporate policy, English-only rules tend to appear in relatively small settings. Second, with the exception of a few cases involving assembly line workers,<sup>27</sup> the cases tend to arise in workplaces where employees interact with the public in some way. Many of the cases implicate settings where the public and the employees of the workplace come into regular and close contact—workplaces such as a New York hotel,<sup>28</sup> a Colorado casino,<sup>29</sup> a Chicago hair salon,<sup>30</sup> a Virginia bank,<sup>31</sup> and

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<sup>24</sup> See *infra* notes 309–25 and accompanying text (discussing cases in which employers justified English-only rules as responses to claims by employees or customers that the speaking of languages they did not understand made them uncomfortable).

<sup>25</sup> For a detailed discussion of various different types of English-only rules, see *infra* Part II.

<sup>26</sup> See Miriam Jordan, *Testing ‘English Only’ Rules: Employers Who Require Workers to Speak English Can Face Discrimination Suits*, WALL ST. J., Nov. 8, 2005, at B1 (reporting that Sephora considers the EEOC's claims to be groundless and denies that it ever had an English-only rule).

<sup>27</sup> See, e.g., *Garcia v. Spun Steak*, 998 F.2d 1480, 1489 (9th Cir. 1993) (involving English-only rule in meatpacking plant); see also *infra* note 187 (citing settlement in case involving assembly line workers in manufacturing plant in Illinois).

<sup>28</sup> Complaint, *EEOC v. Melrose Hotel Co.*, No. 04 CV 7514 (S.D.N.Y. Sept. 23, 2004).

the Yonkers franchise of Dunkin' Donuts. But English-only rules also have appeared in workplaces where less consumer-oriented activity takes place—a radio station<sup>32</sup> and a hospital<sup>33</sup> in California, a local church in Pennsylvania,<sup>34</sup> and the offices of a Dallas-based long-distance service provider<sup>35</sup> and of a medical services company in the Bronx.<sup>36</sup> And employers in settings that are not primarily workplaces, but where employees have regular contact with non-employees, also have imposed English-only requirements on their workers, such as the management company of a New York City co-op building that ordered its porters to speak only English.<sup>37</sup>

Finally, the English-only rules adopted by employers have been broadly restrictive, as well as narrowly targeted. Like the state laws declaring English the official language of government, some employers' rules restrain more behavior than others. In the most restrictive instances, workers are prohibited from speaking non-English during every facet of the workday. In other cases, workplace regulations permit employees to communicate with one another during breaks or mealtimes as they please, but nonetheless require the speaking of English while employees are on the clock, regardless of whether they are engaged in a work-related conversation. The least restrictive rules require only that actual business-related communication be conducted in English, permitting employees to speak other languages in non-business-related conversation. Still other employers carve out exceptions to their rules for those workers unable to speak English at all.<sup>38</sup>

English-only rules appear to have emerged initially in significant number in the early 1980s,<sup>39</sup> and the number of complaints about such rules has increased since then. From 1996 to 2000, complaints lodged with the

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<sup>29</sup> *Colorado Casino to Pay \$1.5 Million to Settle EEOC National Origin Bias Case*, DAILY LABOR, July 21, 2003, at A-10 [hereinafter *Colorado Casino to Pay*].

<sup>30</sup> *See EEOC Alleges Chicago Hair Salon Violated Title VII with English-Only Rule*, DAILY LABOR, Dec. 21, 1999, at A-8 [hereinafter *EEOC Alleges*].

<sup>31</sup> *See Long v. First Union Corp. of Va.*, No. 95-1986, 1996 WL 281954, at \*1 n.3 (4th Cir. May 29, 1996).

<sup>32</sup> *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987).

<sup>33</sup> *Dimaranan v. Pomona Valley Hosp. Med. Ctr.*, 775 F. Supp. 338 (C.D. Cal. 1991).

<sup>34</sup> *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 731 (E.D. Pa. 1998).

<sup>35</sup> *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066 (N.D. Tex. 2000).

<sup>36</sup> *Settlement Resolves Sexual Harassment, Retaliation, 'English-Only' Policy Complaints*, DAILY LABOR, Nov. 20, 1998, at A-7.

<sup>37</sup> *English Only, Por Favor*, N.Y. TIMES, Oct. 9, 2005, at 14–15 (describing management company's English-only rule and the residents' outrage over the policy).

<sup>38</sup> For examples of these different types of policies, see discussion *infra* notes 142–99 of court cases and settlements in which various English-only policies have been at issue.

<sup>39</sup> The Fifth Circuit appears to have been the first Court of Appeals to address the legality of English-only rules. *See Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

EEOC concerning English-only rules quintupled.<sup>40</sup> National origin-related complaints, which often include a challenge to an English-only rule, today represent the fastest growing source of complaints to the EEOC.<sup>41</sup> Complaints concerning English-only rules have not appeared uniformly across the country, however. The six states that accumulated the highest number of complaints between 1995 and 2005 were New Mexico, Delaware, Florida, Colorado, Arizona, and Texas.<sup>42</sup> The trends in each of these states followed a similar pattern in these years.<sup>43</sup> The number of complaints reached its peak between 2002 and 2004, except in Texas, where the peak was reached right at the turn of the century. And, with the exception of Florida, the number of complaints has declined in the last one to two years. As a general matter, the number of complaints filed appears to have correlated with the size of the state's Latino population, with the outlying exception of Delaware.<sup>44</sup>

Media accounts document this phenomenon and suggest that ever-increasing immigration to this country continues to prompt the proliferation

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<sup>40</sup> See, e.g., Carlos R. Soltero & Keith Strama, *English-Only Rules in the Workplace in Texas*, 64 TEX. B.J. 130 (2001) (noting the increasing commonality of English-only workplace rules in Texas); Maria Shim, *English-Only Cases Multiply*, NAT'L L.J., Oct. 23, 2000, at B1 (noting the increase in complaints to the EEOC and attributing the rise to a number of factors, including EEOC outreach to employees and employers' attempts to resolve tensions among groups of workers by responding to workers' complaints concerning fellow employees' speaking of non-English).

<sup>41</sup> See *Colorado Casino to Pay*, *supra* note 29 (noting that national origin charges increased by 28% from 1995 to 2002); see also Karyn-Siobhan Robinson, *English-Only Rule Costs Casino \$1.5 Million in EEOC Settlement* (2003), [http://www.shrm.org/hrnews\\_published/archives/CMS\\_005129.asp](http://www.shrm.org/hrnews_published/archives/CMS_005129.asp) (noting that national origin filings based on English-only rules climbed from 32 in 1996 to 228 in 2002).

<sup>42</sup> I have drawn the conclusions detailed in this paragraph based on data acquired from the EEOC through a Freedom of Information Act request made on July 20, 2005, and data from the 2000 Census recording total and Latino population numbers by state. To calculate the number of complaints per capita, I divided the total number of complaints filed in each state between 1995 and 2005, either with the EEOC or a state or local employment law agency, with the total population of the state as recorded in the 2000 Census. For state-by-state population data, see <http://www.census.gov>.

<sup>43</sup> I charted the trend in each state by dividing the number of complaints filed with federal, state, and local agencies in each year between 1995 and 2000 with the state's total population as recorded in the 2000 Census.

<sup>44</sup> This conclusion represents a very preliminary assessment of the data available. I have compared the number of per capita complaints per state with the percentage of each state's population that is Latino, as recorded in the 2000 Census, and found a correlation. Of course, California, whose population has the second highest proportion of Latinos in the country, has not had a high number of complaints per capita, though the raw numbers of complaints filed in California is the highest in the nation. But New Mexico, the state with the highest proportion of Latinos in its population, also has the highest number of English-only complaints per capita. Though conclusions about why this correlation might exist are beyond the scope of this Article, it is worth noting that New Mexico is perhaps the only state to have given languages other than English public and official status. See Rodríguez, *supra* note 4, at 747-48 (discussing decision by the New Mexico Supreme Court requiring accommodation of jurors who do not speak English based on the recognition of the rights of English and Spanish speakers in the state constitution).

of English-only regulation by employers.<sup>45</sup> In recent years, the EEOC, in addition to promulgating rules that define what constitutes a legitimate English-only policy,<sup>46</sup> has made challenging restrictive language requirements a litigation priority.<sup>47</sup> And human resource organizations, such as the Society for Human Resource Management, also have taken note of the increasing use of English-only rules, and responded by developing model English-only policies to conform to EEOC Guidelines.<sup>48</sup>

But at the same time that the English-only rule is becoming a common feature of workplace culture, employment and management journals document employers' increasingly aggressive recruitment of bilingual employees.<sup>49</sup> While the demand for bilingual employees exists at the managerial and executive levels due to the increasingly global reach of many American companies, the need for such employees in the United States has become most apparent in the consumer-services sector—the sector where English-only rules are most likely to appear.<sup>50</sup> Indeed, in some markets, such as South Florida, employers treat bilingual ability less as an added plus than as

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<sup>45</sup> See *infra* notes 187–99 and accompanying text (discussing reports of suit filings and settlements in English-only cases).

<sup>46</sup> See *infra* notes 200–05 and accompanying text (discussing EEOC regulation).

<sup>47</sup> See Press Release, U.S. Equal Employment Opportunity Comm'n, Court Speaks: English Only Rule Unlawful; Awards EEOC \$700,000 for Hispanic Workers (Sept. 19, 2000), available at <http://www.eeoc.gov/press/9-19-00.html> (noting that cases involving English-only rules, restrictive language policies, and language or accent discrimination are litigation priorities for the Commission).

<sup>48</sup> See English-Only Language Policy, [http://www.shrm.org/hrtools/policies\\_published/CMS\\_013464.asp](http://www.shrm.org/hrtools/policies_published/CMS_013464.asp); see also Joan M. Canny, *Managing Language Diversity Essential in South Florida*, 21 S. FLA. BUS. J. 42 (2001) (offering employers suggestions on how to handle language diversity in the workplace and observing that, while having a common language for work-related communications would be helpful, the language used need not always be English and could vary between different departments, shifts, or work crews); Ross L. Fink, *American Firms Lash out at Foreign Tongues*, 83 BUS. & SOC'Y REV. 24 (1992) (observing that growing linguistic diversity is having a major impact on the delivery of health care services and encouraging healthcare organizations that ultimately adopt English-only rules to show concern for employees' free speech rights, as well as their interests in being free from harassment in the workplace); Gillian Flynn, *English-Only Rules Can Cause Legal Tongue Ties*, 74 PERSONNEL J. 87 (1995) (urging employers to examine their English-only rules closely); S. Craig Moore, *English-Only Rules in the Workplace*, 15 LAB. LAW. 295, 307 (1999) (providing guidelines for framing English-only rules in the workplace).

<sup>49</sup> These sources suggest anecdotally that employers of various kinds actively recruit bilingual workers. See, e.g., Julian Teixeira, *More Companies Recruit Bilingual Employees*, EMP. MGMT. TODAY, Fall 2004, available at <http://www.shrm.org/ema/EMT/articles/2004/Fall04teixeira.asp> (discussing language-based recruitment efforts by employers). That said, a recent survey conducted by the Pew Hispanic Center found that “there are no strong economic payoffs in the U.S., on average, from proficiency in Spanish” and that “there are no economic returns to fluency in non-English languages in the U.S.” PEW HISPANIC CTR., SURVEY BRIEF: BILINGUALISM 5 (2004), available at <http://pewhispanic.org/files/reports/15.9.pdf>. Whether speaking a non-English language boosts bilinguals' economic prospects does not, of course, bear directly on whether the speaking of non-English should be permitted in the workplace, and the study also did not indicate that bilingual ability undermines employment opportunities.

<sup>50</sup> See *infra* notes 138, 189–99 and accompanying text.

a job requirement.<sup>51</sup> And the demand is not just for Spanish speakers, but for speakers of Chinese and Vietnamese on the West Coast, and French and Portuguese on the East Coast.<sup>52</sup>

Of course, these two parallel trends are less in ironic tension with one another than they are of a piece. While it is by no means clear that the same employers systematically and simultaneously adopt bilingual hiring requirements and English-only workplace rules (though there have been some reported cases of overlap<sup>53</sup>), both the expansion of bilingual recruiting and English-only workplace rules reflect that a demographic reordering is occurring in this country. This reordering is the result both of the high levels of immigration that have characterized the last two decades<sup>54</sup> and of the increasingly global character of business. Changing demography has made language ability a business necessity and given rise to language conflict at the same time. Workplace culture, like popular and political culture, is being transformed as a result. Though these two trends in the treatment of multilingualism by American employers may appear to pull in opposite directions, they are both confirmations that the workplace, like any other social institution, will simultaneously embrace and resist changes in its underlying structure.

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<sup>51</sup> See *Colorado Casino to Pay*, *supra* note 29.

<sup>52</sup> See Teixeira, *supra* note 49. Teixeira describes the creative recruiting techniques that some employers have employed to find bilingual workers, including participating in local Hispanic organizations and holding “open houses” for bilinguals in order to target specific groups for their language skills. *Id.*

<sup>53</sup> See, e.g., *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066 (N.D. Tex. 2000); *Long v. First Union Corp. of Va.*, No. 95-1986, 1996 WL 281954, at \*1 n.3 (4th Cir. May 29, 1996).

<sup>54</sup> Recent studies of immigration and assimilation document the phenomenon that has created these new linguistic circumstances. The foreign born and their children now constitute approximately 20% of the population in the United States. It has been estimated that 36% of the residents of New York City were born outside the United States. See NEW YORK CITY DEPARTMENT OF PLANNING, *THE NEWEST NEW YORKERS 2000: IMMIGRANT NEW YORK IN THE NEW MILLENNIUM* xi (2004) (discussing the foreign-born population of New York City as of the year 2000) (an executive summary of the report is available at [http://www.nyc.gov/html/dcp/html/census/nny\\_exec\\_sum.shtml](http://www.nyc.gov/html/dcp/html/census/nny_exec_sum.shtml)).

The fact that immigrant groups live mostly in large states—namely California, Florida, New York, Texas, and Illinois—“magnif[ies] the regional impacts of immigration,” meaning that the cultural consequences of immigration are felt that much more acutely, because the immigration is concentrated. See ALBA & NEE, *supra* note 8, at 9; see also Marcelo Suárez-Orozco, *Everything You Ever Wanted to Know About Assimilation but Were Afraid to Ask*, in *THE NEW IMMIGRATION: AN INTERDISCIPLINARY READER* 67, 74 (Marcelo Suárez-Orozco et al. eds., 2005) (“While immigrants have always concentrated in specific neighborhoods, we are witnessing today an extraordinary concentration of large numbers of immigrants in a handful of states in large urban areas polarized by racial tensions.”). Though this regional concentration is inescapable, it is also the case that a statistically significant number of immigrants have been bypassing the traditional gateway cities and states to settle in suburban and rural communities, as well as in states that have not received much immigration historically—one of the unique characteristics of the wave of immigration that began in the early 1990s. See Mary C. Waters & Tomás R. Jiménez, *Assessing Immigrant Assimilation: New Empirical and Theoretical Challenges*, 31 *ANN. REV. SOCIOLOG.* 105, 107, 109 (2005). Though the regional impact of immigration is still quite pronounced, I explore in Part III, below, the implications of this new feature of immigration to the United States.

### A. Language and Association in the Workplace

To understand how employees' interests in association and social bonding play out in the workplace, it is essential to consider what it means to have relationships in a workplace. What is it about the workplace that makes it a common site for conflict among society's different groups? Which features of the workplace should guide us in determining how to resolve those conflicts? Which features of bilingualism should we keep in mind as we attempt to understand how language rules might interfere with association? In this section, I offer a conception of the workplace as a social institution and argue that permitting linguistic and cultural fragmentation to be seen and experienced in that setting is essential. Throughout this section, I assume English-only rules take the form of blanket prohibitions on the speaking of non-English. In Part III, when discussing the employer's interest in some form of language regulation, I complicate the picture by discussing the various shapes English-only rules have taken and could take.

1. *The Workplace as Social Institution.*—As I have explained in other work, I conceive of the workplace as a critical site of public participation in social life.<sup>55</sup> Life in the workplace consists of much more than the one-on-one economic transaction. The conceptual separation of the public, political realm from the private, commercial realm obscures the fact that most people's daily lives, as they are lived out in public, are lived out in the workplace. And in this dimension of the public sphere, individuals and communities engage in self definition.

In her work on sexual harassment law, Vicki Schultz has emphasized the importance of the workplace to human development. She has written:

For most people, working isn't just a way to earn a livelihood. It's a way to contribute something to the larger society, to struggle against their limits, to make friends and form communities, to leave their imprint on the world, and to know themselves and others in a deep way. . . . [W]ork isn't simply a sphere of production. It is also a source of citizenship, community, and self-understanding.<sup>56</sup>

Work and the workplace constitute significant parts of the lives and identities of individuals. The workplace offers us a venue not only for giving meaning to our lives, but also for forming important personal relationships that complement our existing social networks based on ties to family and friends.<sup>57</sup>

Workplaces also often stand as fixtures in communities. Many employers have *presence* in the communities in which they are located: From

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<sup>55</sup> Rodríguez, *supra* note 4, at 720–21, 755–56.

<sup>56</sup> Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2069–70 (2003).

<sup>57</sup> See CYNTHIA ESTLUND, WORKING TOGETHER 129 (2003) (“Workplace relationships may begin as ‘the most attenuated of personal attachments,’ but they often yield bonds of empathy and affection that transcend family, neighborhood, racial, and ethnic identities.”).

the employer in the company town, to the managers of major social institutions such as hospitals, to the local franchise of a large company, to the small business owner, employers occupy significant social spaces. Employers, therefore, are not just profit seekers, but managers of social interaction. Workplaces are not just sites of economic exchange, but places where the members of a community relate to one another, acting out social mores and developing community values.

Cynthia Estlund's important recent work on the dynamics of the workplace further underscores the social and, hence, participatory nature of the workplace.<sup>58</sup> She demonstrates that today's workplace is likely to be the primary and perhaps only place where people of diverse backgrounds meet and form meaningful relationships.<sup>59</sup> Though workplaces are "only moderately integrated," they nonetheless represent the site of the most likely interaction among groups in the United States today.<sup>60</sup> This process of integration happens less and less in other community spaces, such as schools, churches, and civic associations,<sup>61</sup> and may actually provide a partial explanation for the rise of English-only rules. The emergence of these rules highlights that many workplaces in this country are likely to be linguistically diverse and suggests that the workplace is often a site for the negotiation of social differences.

Given these features of the workplace, it is important to be attentive to the ways in which the rules that govern the workplace impact relationships among workers, as well as social relationships more generally. In fact, this very insight informs the variety of regulatory regimes that already govern the workplace. The fact that economic and social relations, as they play out in the workplace, affect the socioeconomic interests of individuals, as well as social structures and inter-group relations, helps justify regulation of the employer's prerogatives. Along with general public health and safety regulation, various civil rights statutes at the local, state, and federal levels regulate the employer's decisionmaking authority, with respect both to hiring and to how the employer treats his employees and constructs his workplace. Similarly, the National Labor Relations Act ("NLRA")<sup>62</sup> gives workers an opportunity for self-government in the workplace. The statute protects their freedom of expression and association, enabling them to engage in collec-

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<sup>58</sup> See generally *id.*

<sup>59</sup> See *id.* at 10. As Professor Estlund has noted:

The single most promising arena of racial integration, at least for adults—is the workplace. This is not to say that the typical workplace is genuinely integrated, but that even the partial demographic integration that does exist in the workplace yields far more *social* integration—actual interracial interaction and friendship—than any other domain of American society.

*Id.*

<sup>60</sup> See *id.* at 9.

<sup>61</sup> See *id.* at 8–9 (noting the persistence of residential segregation, the racial separation of public schools, and the homogeneity of churches and synagogues, particularly among blacks and whites).

<sup>62</sup> 29 U.S.C. §§ 151–169 (2006).

tive bargaining and exercise a level of control over the terms of their employment.<sup>63</sup> In short, each of these regimes, in their conception and subsequent elaboration, embodies particular social objectives, which the law strives to balance against employer sovereignty, or the presumption against government intervention that protects private property and private contractual relations.

To translate my concern for the potential anti-social consequences of English-only rules into a set of legal presumptions, I tap into the normative underpinnings of this legal framework. In particular, though I advocate primary reliance on state and local forms of regulation,<sup>64</sup> the public oversight I propose in this Article has important presuppositions in common with the civil rights goals embodied in Title VII, as well as with the solidarity building aims of the NLRA. The authors of Title VII, for instance, sought to ensure basic equality of economic opportunity for all by prohibiting employers from discriminating against members of particular socially salient groups. Out of a concern that people not be denied opportunities on the basis of race, gender, and other related characteristics, Title VII limits the employer's authority to decide who to hire and constrains the employer's ability to adopt employment practices that treat employees from protected groups worse than others. As scholars have emphasized, the application of this basic principle to the private sector has "assigned the workplace an important integrative function that no other major societal institution can perform well."<sup>65</sup> For reasons I explain in Parts II and III, I discourage turning to Title VII as the vehicle through which to express opposition to English-only rules. But the statute's overarching civil rights objectives and its pursuit of those objectives through restraints on employers' governance of their workplaces is of a piece with my objectives: protecting employees' associative interests and promoting burden shifting in those institutions where our society's diverse groups come into contact with one another.

The NLRA also advances social objectives I share. Section 7 of the Act protects the rights of employees to "self organization" and to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>66</sup> The law thus holds out the promise of protecting workers' efforts to associate and cooperate with one another to defend their interests. To this end, the law protects employees' expressive inter-

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<sup>63</sup> See ESTLUND, *supra* note 57, at 135.

<sup>64</sup> I emphasize in Part II that Title VII does not provide an adequate framework for channeling the English-only issue and argue in Part III that state and local regulation of the particular practice with which I am concerned would be more appropriate.

<sup>65</sup> ESTLUND, *supra* note 57, at 129.

<sup>66</sup> 29 U.S.C. § 157 (2006).

ests, including their right to distribute and post union literature<sup>67</sup> and discuss work-related issues in certain areas of the workplace.<sup>68</sup> These rights to expression and association are, of course, granted to enable workers to engage in the particular act of collective bargaining, not to associate in the more general terms I lay out in this Article. The NLRA's actual legal framework is thus inapposite for my purposes (though to the extent that an employer adopts an English-only rule to prevent workers from organizing, section 7 might provide an actual doctrinal hook for a legal challenge).<sup>69</sup> But, more importantly, the labor law embodies principles of employee agency, or the idea that employees should have some control over the terms of their employment—a basic value that runs throughout my examination of the English-only practice. It also aims to protect employees' capacity to build solidarity with one another for collective ends, a principle that dovetails with my interest in allowing employees to decide the terms, including the linguistic terms, of their relationships with one another.<sup>70</sup>

Of course, if we regard the workplace as a public social institution where important relationships are formed, we might consequently understand the English-only rule as a defensible outcome of the negotiation of social difference that occurs within the workplace. Diversity in the workplace underscores the need for mechanisms that reduce friction and build solidarity among different groups. To build this solidarity, it might make sense to search for points of commonality, and a logical point in an English-dominant society is the English language. Even if individuals in a given workplace come from wildly diverse ethnic, religious, or class backgrounds, they nonetheless can connect with one another through communication and, hence, through language. Indeed, though critical of English-only rules,<sup>71</sup> Estlund suggests that the existence of a common language among workers can enhance sociability and cooperation.<sup>72</sup>

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<sup>67</sup> See, e.g., *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121 (2d Cir. 1986) (holding that a ban on distribution of literature that promoted the union and used derisive language to describe “scabs” violated NLRA).

<sup>68</sup> See ESTLUND, *supra* note 57, at 163 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)).

<sup>69</sup> See *infra* notes 125–29 and accompanying text (discussing how union organizers effectively use languages other than English to communicate with and organize immigrant workers).

<sup>70</sup> Cf. ESTLUND, *supra* note 57, at 163–64 (discussing the law's protection of collective voice as a starting point for enabling employees to “secure for themselves outlets for sociability,” and observing that “empowerment of employees should nudge managers toward greater reliance on trust and cooperation and away from intensive monitoring by threat”).

<sup>71</sup> See *id.* at 97. Estlund points out that because language is closely linked to ethnicity and national origin, English-only workplace rules are suspect under Title VII. She also emphasizes that they “burden already disadvantaged minorities” in the workplace and interfere with the “freedom of workers to communicate with each other within language groups.” *Id.*

<sup>72</sup> See *id.* (“Where language differences make conversation difficult or impossible, one of the main engines of social connectedness is stalled. And where language differences dictate social interactions—

Some employers strive for this cooperation by encouraging English-language acquisition by employees who do not speak English—a growing practice in some sectors.<sup>73</sup> This impulse is laudable, though probably costly for most employers.<sup>74</sup> Because of ease of administrability, more employers choose to address multilingualism in their workplaces by adopting a bright-line English-only rule, which may well seem like the perfect solution to the communication problem, at least in workplaces where most employees speak some English.

But, in my view, restrictive as opposed to accommodating rules are ultimately inconsistent with solidarity building in a diverse public institution. In the sections that follow, I offer a distinct conception of how to build solidarity in a diverse workplace. My conception depends both on an appreciation of the relationship between bilingualism and socialization, as well as on a more complex understanding of interpersonal dynamics in the workplace than the worldview that informs the English-only impulse.

2. *The Social Dimension of Bilingualism.*—To more fully understand the relationship between language use and solidarity building, or why the English-only rule interferes with that process, it helps to understand something about the nature of bilingualism and language contact. As an initial matter, it is reductive to talk about language diversity in the workplace in terms of a dichotomy between monolinguals and bilinguals. Language ability exists on a spectrum. Because linguistic assimilation is a gradual process, the ability to speak English is a matter of degree.

Some individuals who have the capacity to speak English in some contexts may not be effective communicators in English in others. And many immigrants who have developed the capacity to speak and understand English may nonetheless remain much more effective communicators in their native languages. Adults who enter the United States after a certain age may become functional in English but never achieve fluency. The ability to

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for example, if Spanish-speaking workers socialize only with each other—those differences may re-create ethnic ‘segregation’ within an integrated workforce.”)

<sup>73</sup> See, e.g., Miriam Jordan, *Employers Provide Language Aid; Hot New Gadget Helps Teach Employees English Using Recording and Playback*, WALL ST. J., Nov. 8, 2005, at B13 (describing the interest of employers in the hotel and fast-food sectors in helping employees learn English, and describing new “gadgets” designed to help non-English speaking workers learn English and English-speaking managers learn Spanish).

<sup>74</sup> Estlund suggests that fostering intergroup ties in the workplace depends not just on measures taken by employers themselves, but also on the input of other social actors—namely, the public schools. She writes, “[T]he importance of intergroup ties in the workplace raises the stakes in [the bilingual education] debate. One of the things schools should be doing is building the language skills that students will need to communicate with their eventual co-workers in diverse workplaces.” ESTLUND, *supra* note 57, at 97–98. Consistent with the burden shifting framework I propose below, those skills include not only English-speaking ability on the part of non-native English speakers, but also ability in languages other than English on the part of native English speakers. For a discussion of how schools can contribute to these broader social objectives through the design of their language education programs, see Rodríguez, *supra* note 4, at 764–65.

speak English thus does not always signify preference for or comfort in English. And, even for those who grow up or arrive at an early age in the United States and for whom English is a native or primary language, there may nonetheless be contexts in which the ability to express oneself depends on the ability to code switch, or engage in the practice whereby speakers of more than one language alternate between them. Though widespread non-English usage may be rare among fully bilingual employees,<sup>75</sup> the existence of a broad range of English-language ability among employees means that non-English will be used to varying degrees in the workplace. In other words, language diversity in the American workplace is not just the result of the diversity of actual languages, but also of the diversity of language abilities and preferences.

But what does bilingualism signify? At least three features of bilingualism, as articulated in the linguistics literature on the subject, are relevant to our consideration of the English-only rule. First, while its extent is not altogether clear, it is safe to assume that bilingualism has an effect on the formation of the individual's personality. In the literature, it is not firmly established whether bilinguals possess two personalities in two different languages, or a single, integrated personality that finds expression in two languages.<sup>76</sup> But some linguists have suggested that the bilingual does not develop two parallel identities, but rather integrates his two cultures into a single identity, within which aspects of both cultures closely interrelate.<sup>77</sup> At the same time, evidence exists suggesting that choice of language may implicate different aspects of one's personality; i.e., it may well be the case that bilinguals present themselves differently in different contexts to emphasize different sides of themselves.<sup>78</sup> Quite apart from the phenomenon of code switching, then, we can assume that the regulation of bilingualism is tantamount to the regulation of personality—something I take to be more fundamental in a psychological sense than regulation of mere personal preferences.

Second, being bilingual means belonging to two different speech communities.<sup>79</sup> The non-English speech community thus forms part of the

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<sup>75</sup> See PEW HISPANIC CTR., *supra* note 49, at 2 (stating that, “English is far and away the dominant language of U.S. commerce and trade, and dominates U.S. workplaces. English/Spanish bilingual Latinos report that they largely speak English in the workplace. About 60% of bilingual Hispanic workers usually speak more English than Spanish at work (29%), or use only English at work (33%). Widespread Spanish language usage at work is relatively rare among bilingual workers. About one in ten report speaking ‘more Spanish than English’ or ‘only Spanish’ at work . . .”).

<sup>76</sup> See John Edwards, *The Importance of Being Bilingual*, in BILINGUALISM: BEYOND BASIC PRINCIPLES 30 (Jean-Marc Dewaele et al. eds., 2003).

<sup>77</sup> See JOSIANNE F. HAMERS & MICHAEL H.A. BLANC, BILINGUALITY AND BILINGUALISM 239 (2000); see also *id.* at 220 (noting that bilinguals develop a different cultural identity than monolinguals and that bilingualism does not lead to any perceived contradiction between membership in the two groups).

<sup>78</sup> See Edwards, *supra* note 76, at 32.

<sup>79</sup> *Id.* at 29.

social context in which one's individual personality is embedded.<sup>80</sup> While it is difficult to isolate the particular role that language, as opposed to other community characteristics, plays in forming this context, linguists note that "language tends to link personalities and operate on their socially overlapping spheres."<sup>81</sup> Bilingualism does not simply produce "idiosyncratic dispositions."<sup>82</sup> The condition of being bilingual is not just personal, but social.<sup>83</sup>

Of course, the importance of language relative to other factors will vary from group to group, as some groups define themselves with reference to other points of commonality, such as shared history, religion, or other ethnic characteristics.<sup>84</sup> But this variation does not diminish the social element of the bilingual identity. This community-based conception of bilingualism is supported by evidence that bilinguals have a more acute sense of cultural sensitivity than those in the linguistic "heartland."<sup>85</sup> The common sense intuition that bilinguals straddle two communities<sup>86</sup> is heightened by the linguist's observation that bilinguals are "borderers" who possess a heightened sense of tolerance by virtue of their ability to interact with different speech communities.<sup>87</sup>

Complicating this reality is the fact that, in a multilingual society, the different speech communities to which one might belong are not discrete or easily separable. Instead, they are overlapping. They meet in what literary scholar Mary Louise Pratt has called contact zones, or the "social spaces where cultures meet, clash, and grapple with each other, often in contexts of highly asymmetrical relations of power."<sup>88</sup> The workplace, as one of the few remaining social spaces where people of different races and ethnicities come into meaningful contact with one another, represents a natural contact zone—particularly those workplaces in the services sector where workers interact with the public at large.

The English-only workplace rule represents a product of the inevitable clash in the contact zone—a first attempt to grapple with a growing cultural pluralism by declaring that the workplace belongs to one particular speech community. The English-only rule constructs a common community where everyone speaks the same language. But this community, which theoretic-

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<sup>80</sup> *Id.* at 30.

<sup>81</sup> *Id.* at 31.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 30.

<sup>84</sup> See HAMERS & BLANC, *supra* note 77, at 202.

<sup>85</sup> See *id.* at 239.

<sup>86</sup> *Cf.* Hernandez v. New York, 500 U.S. 352, 370–72 (1991) (observing that bilinguals serve to bring two communities together but ultimately holding that prosecutors could strike potential jurors based on their ability to speak another language).

<sup>87</sup> See HAMERS & BLANC, *supra* note 77, at 239.

<sup>88</sup> See Mary Louise Pratt, *Arts of the Contact Zone*, in *WAYS OF READING* 527, 530 (David Bartholome & Anthony Petrosky eds., 1999).

cally overlaps and connects most others, is not necessarily the community where communication is the most robust, because everyone in it does not speak English with the same level of facility or enthusiasm. More importantly, the idea that a public space could be reserved for one particular type of interaction resists the reality that, in a pluralistic society, speech communities bleed into one another. Because linguistic communities do not have discrete boundaries and are made up of people who travel in and out of them, trying to rid public institutions of their linguistic complexity by constructing an overlapping speech community that does not otherwise exist is probably an exercise in futility.

Finally, it seems clear that bilingualism can create tensions or contradictions for the bilingual individual. The individual bilingual is himself a contact zone, where two different speech communities have a foothold. Each of the languages that a bilingual speaks is thus a necessary part of the resources he uses to socialize, making it difficult to separate one from the other. But in a society with an overwhelmingly dominant common language, the bilingual is nonetheless forced to “split” his language in ways monolinguals find difficult to understand. Language has both an obvious functional significance and an emotional significance, which stems from the kinship attachments it creates. The so-called “monolingual-majority-group speakers in their own mainstream” never experience a split between the instrumentality and symbolism of language, but minorities experience that split on a daily basis when forced to choose between the languages they speak, using English most often at work and in public life and a mix of English and their minority language on more private occasions.<sup>89</sup>

Though this split might seem to threaten emotional strain or anomie for the bilingual, some linguists are quick to point out that low self-esteem is not the necessary outcome of a bicultural experience. It emerges instead when the process of socialization takes place under social and cultural conditions hostile to bilingualism and biculturalism.<sup>90</sup> In other words, to the extent that bilingualism has negative effects on bilingual individuals, those effects may well be functions of the social conditions that channel the bilingualism.<sup>91</sup> The literature suggests that though “the bilingual develops a unique identity different from the monolingual, [that identity] can nonetheless be harmoniously adjusted if society allows it.”<sup>92</sup> These concerns are likely to be the most poignant for children who confront ambivalence toward their emerging bilingualism in the public schools. But English-only

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<sup>89</sup> See Edwards, *supra* note 76, at 40–41.

<sup>90</sup> See HAMERS & BLANC, *supra* note 77, at 213.

<sup>91</sup> A recent study by the Pew Hispanic Center suggests that bilingual individuals fare as well as their native-English-speaking counterparts in the workforce, suggesting that while the inability to speak English has serious economic consequences, being bilingual is not itself a barrier to economic success. See PEW HISPANIC CTR., *supra* note 49, at 5 (“The economic outcomes of bilingual speaking adult Latinos are very similar to their Latino counterparts who only have a strong command of English.”).

<sup>92</sup> HAMERS & BLANC, *supra* note 77, at 239.

workplace rules can also be characterized as part of the process of socialization that determines how a bilingual individual adjusts to his bilingualism. The English-only rule disrupts the harmonious adjustment by taking away one of the important tools of socialization.

All of these observations about the nature of bilingualism suggest that bilinguals experience language and, hence, language regulation differently than monolinguals. The employers who devise the English-only rules, the employees and the customers who demand them, and the courts that have concluded that English-only rules have no meaningful impact on bilinguals are probably more likely to be monolingual than the workers the rules regulate.<sup>93</sup> The imposition and approval of these rules can thus be described uncontroversially as a form of cultural discrimination by the majority. In these cases, it seems clear that the decisionmakers and the public at large value certain behaviors (monolingualism) and devalue others (bilingualism) in a manner that reflects their own cultural predispositions. In other words, these decisionmakers “may fail to respect or even to recognize the ways the behavior of others is part of a different cultural value system.”<sup>94</sup> Of course, whether we make the leap from simply identifying certain practices as embodying cultural discrimination as a sociological matter to declaring the same practices to be discrimination as a legal matter presents its own question. The point to keep in mind here is that language positions people socially, but in a way that may be difficult to see, particularly when a single language is as dominant as English is in the United States.

### *B. Diversity, Burden Sharing, and Solidarity in the Workplace*

Counterintuitively, the insights elaborated above suggest that the best way to approach diversity in the workplace, even when the goal is to promote solidarity and cross-group understanding, is to permit and enable fragmentation. To justify this claim, I develop an argument for what I call

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<sup>93</sup> According to the 2000 U.S. Census, one in five residents in the United States speaks a language other than English. James Crawford, National Association for Bilingual Education, *Making Sense of Census 2000* (2005), <http://www.nabe.org/research/demography.html>; see also Hyron B. Shin et al., *Language Use and English Speaking Ability: 2000*, in CENSUS 2000 BRIEF (U.S. Census Bureau 2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf> (presenting language data from the 2000 U.S. Census). While that 20% figure is substantial, approximately 80% of the population is therefore monolingual. Even if we do not assume that positions of power—judgeships and management—are likely to include fewer speakers of non-English than the public at large, the decisionmakers behind English-only rules will be drawn from a population that is 80% monolingual in English.

<sup>94</sup> Richard Lempert & Karl Monsma, *Cultural Differences and Discrimination: Samoans Before a Public Housing Eviction Board*, 59 AM. SOC. REV. 890, 891 (1994). Lempert and Monsma studied instances of Samoan tenants arguing before the Hawaii Housing Authority over various infractions, including late payment of rent. They found that whereas the housing authority often credited the excuses of non-Samoans for late payment (such as having to pay for emergency room visits or unexpected car repairs), the board regularly rejected the excuses of Samoans, which typically involved the fulfillment of their cultural obligations (sending money to relatives in Samoa and paying for funerals and other family events in Samoa). *Id.*

cultural burden sharing. Burden sharing takes seriously the idea of the workplace as a social institution and expects participants in the workplace to make certain accommodations for one another's forms of socialization.

*1. Sharing the Cultural Burden.*—I begin with the premise, articulated by Charles Black in a canonical essay on *Brown v. Board of Education*, that we must associate in public with those who are there.<sup>95</sup> The very basic obligations of citizenship include acknowledging and dealing on respectful terms with those we encounter in the public sphere. I would extend this principle to hold that it means associating with people in a way that takes them as they are. After all, to set conditions on one's willingness to interact with others would be to escape the obligations that attend the inhabiting and using of public spaces. Such conditions are, for all intents and purposes, excuses for either excluding or ignoring those who cannot or will not meet those conditions. In other words, for any one person or group to demand that others conform to a predetermined script of appropriate behaviors before interaction will be permitted amounts to a rejection of the fact that we live in society. Put slightly differently, to expect that one can enter the public sphere without having to encounter and manage people of different cultures is unreasonable and impractical. As a pragmatic matter, getting on with the work of any one institution will be easier if we abandon the ephemeral goal of molding our environment into the space of our dreams. The perfectionist impulse, or the demand that people be other than who they are, stands in the way of actually doing business with the terms that we have, rather than those we wish we had.

In taking this approach, I understand and embrace the fact that a certain amount of friction will result, for the simple reason that, in a diverse society, people are different. But the inevitability of friction does not absolve participants in the public sphere of the obligation to help diminish this friction. With respect to language rules, speakers of non-English have an obligation to communicate with their English-speaking colleagues in a mutually intelligible manner, i.e., in English, even when that communication might prove difficult. But the reciprocal obligation requires monolingual English speakers to engage in a bit of personal accommodation of their own—to tolerate the speaking of non-English in their presence.

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<sup>95</sup> See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429 (1960). In this classic essay, Black defends the Court's decision in *Brown v. Board of Education*, 349 U.S. 294 (1955), by arguing that common sense alone would have suggested to anyone at the time that Jim Crow was intended to subordinate blacks, eschewing as laughable the notion that segregation was a neutral practice, as well as the conclusion, enshrined in *Plessy v. Ferguson*, 163 U.S. 537 (1896), that the harms of segregation were subjective. Black, *supra*, at 429. He introduces the compelling idea that there is no freedom in the public sphere "not to associate." *Id.* He emphasizes that individuals have an obligation to interact with one another, suggesting that classes of citizens cannot be rendered invisible by being separated from the more powerful majority. *Id.*

English-only rules in the workplace are sometimes motivated by an absence of this type of reciprocal tolerance. One of the common rationales given for the imposition of English-only workplace rules is that they encourage civility in the workplace by preventing the rude practice of speaking a language others in the vicinity do not understand.<sup>96</sup> Employers adopt English-only rules in an effort to harmonize the workplace by removing a personal characteristic deemed alienating to others. A recent case in Pennsylvania highlights this practice. In defending its English-only rule against a challenge brought by its Polish-speaking housekeeper, a church parish contended that it adopted the rule because speaking a language others do not understand is “offensive and derisive” behavior.<sup>97</sup> The district court, in turn, characterized the rule as enforcing civility in the workplace.<sup>98</sup> For the plaintiff to speak a language other employees and church members could not understand, in their presence, would have been alienating to them.<sup>99</sup> Good social relations in the multilingual setting required the enforcement of an English-only policy.

In thinking about this standard of civility, it is worth noting that no court appears to have assumed the inverse of the civility claim—that it would be offensive to a non-English speaker to be surrounded by people speaking English. Both the court’s conclusion and the more general assumption that people in the workplace will come to understand one another better if the workplace is structured around certain commonalities reflect the social dominance of English. This asymmetry in expectations reflects a sense of entitlement based on this social dominance of English. It also reveals a belief on the part of the court and the parish that the burden to ameliorate the cognitive dissonance felt by monolingual English speakers when they hear an unfamiliar language falls on the speaker of non-English. The English-only rule thus exemplifies the assumption that our public spaces should be English speaking.

On the one hand, there is arguably nothing objectionable about behaving in accordance with this social reality. But it is also true that the conception of civility expressed in cases like the suit against the Pennsylvania church is based on nothing more than a sociological fact, and that a second sociological fact—the presence of languages other than English in communities across the country—could just as easily be used to justify a different

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<sup>96</sup> See, e.g., *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 731 (E.D. Pa. 1998).

<sup>97</sup> *Id.* The employer’s 12(b)(6) motion to dismiss was denied on the ground that, although the plaintiff did not present a prima facie case of national origin discrimination under Title VII, her claim of retaliatory discharge would still be valid if she could prove that she reasonably believed the English-only rule was discriminatory at the time she challenged it. *Id.* at 737.

<sup>98</sup> See *id.* at 736.

<sup>99</sup> *Id.*; cf. *Long v. First Union Corp. of Va.*, No. 95-1986, 1996 WL 281954, at \*1 n.3 (4th Cir. May 29, 1996) (quoting bank manager’s memo detailing English-only policy: “This all boils down to common courtesy. How would you feel if everyone around you were speaking and laughing aloud in a language that you could not understand.”).

expectation: namely, that the presence of languages other than English be tolerated. While a burden is appropriately placed on the bilingual speaker when he or she interacts with others who speak only English, the basic premise that we must associate with people, in public, as we find them also requires the acceptance of certain disharmonies.

We can then move from this idea of burden sharing on the interpersonal level to a broader conception of social burden shifting. The process of absorbing the cultural consequences of immigration must involve shared burdens, both for fairness reasons and because the process of assimilation will be facilitated by the majority's willingness to accept some of the costs of the process.<sup>100</sup> The cultural burden borne by the immigrant is heavy and inescapable. Members of the receiving society, who are themselves direct participants in the processes of migration, must also be willing to take on certain cultural responsibilities. Framed slightly differently, we might think of legal requirements that protect people's ability to use languages other than English in the public sphere as ensuring that certain matters of public concern are articulated. Permitting languages other than English to be spoken in the public sphere allows speakers of non-English to announce their presence publicly. This public presence, in turn, gives speakers of different languages status and thus the ability to counteract efforts to demean their origins.<sup>101</sup>

In defending fragmentation in the workplace, I do not mean to dismiss the possibility that striving to identify and privilege points of commonality might have benefits, nor do I reject the idea that building and sustaining homogeneous communities could be appropriate in some circumstances.<sup>102</sup> But the workplace, because it is part of a public sphere where different sectors of society not only interact, but also seek economic opportunities, differs dramatically from a private association, club, or familial setting, in which the desire for homogeneity is more legitimately expressed. The

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<sup>100</sup> I use the word "assimilation" to describe the process by which immigrants adjust to living in a new society, not to convey a belief that immigrants should shed the cultural characteristics of their countries of origin to become American. This usage is consistent with the terms used by social scientists who study immigrants in the United States. See, e.g., PEW HISPANIC CTR., SURVEY BRIEF: ASSIMILATION AND LANGUAGE 1 (2004), <http://pewhispanic.org/files/reports/15.10.pdf>.

<sup>101</sup> In *Maldonado v. City of Altus*, the plaintiffs, city employees, made a similar claim (ultimately rejected by the court) in their challenge to the city's English-only policy: that their speaking of Spanish was a matter of public concern protected by the First Amendment. See 433 F.3d 1294, 1310–11 (10th Cir. 2006) (reversing district court's grant of summary judgment, in part, and permitting employees' Title VII claims against city's English-only policy to go forward).

<sup>102</sup> See, e.g., MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 39 (1983) ("The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life. If this distinctiveness is a value, as most people . . . seem to believe, then closure must be permitted somewhere.").

paradigm for the workplace, therefore, should be one of open borders and shared burdens, not one of closed communities and cultural comfort.<sup>103</sup>

The debate over English-only workplace rules represents one site where some of this burden shifting should occur. The dissonance or alienation associated with hearing an unfamiliar language is precisely the cost that the monolingual English-speaking majority should be expected to bear in a society that depends upon and encourages immigration and claims to value tolerance.<sup>104</sup> Requiring people to accept this cost will give effect to the idea that people's expectations of their institutional surroundings should change as their demographic surroundings evolve.<sup>105</sup>

People eventually will assimilate this cost into their aesthetic sense of what constitutes normal life on the job. In other words, permitting the cracks in the social dominance of English to be seen and experienced will have learning effects, transforming linguistic cacophony from an anxiety-producing phenomenon into the familiar. This intuition finds support in the growing literature discussing the ways in which antidiscrimination law helps reduce the implicit biases people hold against members of different groups.<sup>106</sup> One insight, supported by considerable social science evidence, states that "simply by increasing the level of population diversity in workplaces, educational institutions, and organizations, existing antidiscrimination law almost certainly tends to reduce the level of implicit bias in these environments."<sup>107</sup> This theory suggests that, over time, permitting linguistic diversity in the workplace will help dissipate some of the concerns employers address when they adopt English-only rules. This learning process, which the law can be used to encourage, is itself part and parcel of the phe-

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<sup>103</sup> Cf. Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 267–68 (1987) ("Drawing a line between public and private is often problematic, but it is clear that clubs are normally at one end of the scale and states at the other. So, the fact that private clubs may admit or exclude whomever they choose says nothing about the appropriate admission standards for states.")

<sup>104</sup> Cf. Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1104 (2005) (arguing that, in certain contexts, we should "turn[] the tables" on the majority, ensuring that "members of the majority experience what it is like to be deprived of the comfort—and power—associated with their majority status," which presumably will foster tolerance and fairness).

<sup>105</sup> Cf. *Garcia v. Spun Steak*, 13 F.3d 296, 296 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of reh'g en banc) (emphasizing that Ninth Circuit, "with its enormous immigrant population," had become only circuit in the country in which an employer could adopt a discriminatory English-only rule without even advancing a business necessity to justify rule).

<sup>106</sup> For a discussion of the literature on unconscious bias, see generally Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. (forthcoming 2006), available at [http://ssrn.com/abstract\\_id=897553](http://ssrn.com/abstract_id=897553). To be sure, the English-only rules I discuss are very much the product of openly admitted trepidation monolingual English speakers feel about the speaking of languages other than English. But the insights of this literature are nonetheless on point.

<sup>107</sup> See *id.* at 19; cf. ESTLUND, *supra* note 57, at 19 (observing that the mandate of gender equality "means that men and women increasingly find themselves working together as peers or in roles that reverse the traditional gender hierarchy," and that "[t]hat experience is bound to spill over into gender relations in the society and even within the family").

nomenon of assimilation, and it is a necessary part of managing diversity in a society that receives high levels of immigration.

In calling for burden shifting as a way of dealing with the cultural conflict generated by immigration, it should thus be clear that I advocate more than assisting recently arrived immigrants who are in the process of acquiring English-language skills. Most reported English-only cases involve bilingual workers, or workers who do not require accommodation to communicate. In other words, the debate is not simply about helping individuals overcome barriers to entry; it is about accommodating those with the capacity to participate largely unaided.<sup>108</sup>

To be sure, the non-English-speaking immigrant presents us with the easier case for accommodation. The normative justification for policies that help non-English speaking immigrants deal with language barriers stems from the basic American creed of equal opportunity. Elaborate federal, state, and local regulatory networks require agencies and public employers to provide a wide array of language-access services, including courtroom translation and interpretation,<sup>109</sup> English language education programs in the public schools,<sup>110</sup> translation of essential government services,<sup>111</sup> and language assistance on the job.<sup>112</sup> Such policies make it possible for non-

<sup>108</sup> Of course, to point to the accommodation of immigrants as an easy theoretical case is not to deny that people with limited English-proficiency too often lack the services they need to navigate an unintelligible English-speaking world. In addition to the standard resource constraints and institutional decisionmaking that render the provision of language services to immigrants a low priority, some states have attempted, through their public laws, deliberately to inhibit access to important governmental services, thereby severely complicating the lives of non-English speakers. *See Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999) (noting that Alabama Department of Public Safety's decision to stop giving driver's license exams in languages other than English, in light of the English-only amendment to the state constitution, significantly impaired non-English speaker's ability to engage in activities basic to daily life), *rev'd on other grounds sub nom. Alexander v. Sandoval*, 532 U.S. 275, 285, 293 (2001) (holding that Title VI does not create a freestanding private right of action to enforce disparate-impact regulations and making clear Court's rejection of its prior interpretation in *Lau v. Nichols*, 414 U.S. 563 (1974), with respect to reach of Title VI); *Yñiguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (emphasizing severe effects Arizona's restrictive English-only amendment would have on state's ability to serve significant swaths of the public while striking the amendment down on grounds that it violated First Amendment rights of state employees), *vacated as moot*, 520 U.S. 43 (1997). But the normative case against these measures is strong. Basic principles of fairness, compassion, and integrationism are easily invoked to justify accommodationist measures.

<sup>109</sup> *See, e.g.*, Court Interpreters Act, 28 U.S.C. § 1827(b)(1) (2006).

<sup>110</sup> *See, e.g.*, Equal Educational Opportunities Act, 20 U.S.C. § 1703(f) (2006) (making unlawful "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs").

<sup>111</sup> *See, e.g.*, New York, N.Y., Local Law No. 73, ch. 10, § 8-1003 (2003) (amending the city's administrative code to require city agencies and their contractors to provide free language-assistance services to limited English proficient individuals).

<sup>112</sup> *See, e.g.*, Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000) (setting forth Department of Labor guidelines from the Clinton era instructing recipients of federal financial assistance to accommodate "persons with limited English proficiency" in the workplace).

English speaking immigrants to live and to have a fighting chance in the marketplace.

But the employer's regulation of workers fully fluent in English poses theoretically different and more difficult questions than the legal rules and practices that deny immigrants language access services. Individuals with the capacity to speak English have the ability to engage in self-help, or the ability to comply with language restrictions, making accommodationist practices more difficult to justify. Accommodation simply does not follow as logically from the bilingual's social position as it does from the non-English speaker's. The debate over English-only rules thus requires us to consider not just whether the mainstream should be open to all, but also whether Americans are right to resist the reshaping of so-called mainstream culture that bilingualism represents.

Understanding the effects of English-only rules, then, is about defining what the American cultural mainstream should look like. Precisely for this reason, a focused consideration of the English-only workplace rule will illuminate the broader question of how to deal with other forms of behavior that stem from deeply held cultural and personal affiliations. How far should the law go in policing the ways in which social actors, such as employers, construct the mainstream through their formal and informal policies governing the spaces and people under their control?

2. *The Costs of Burden Sharing.*—In calling for this shift in people's expectations, I recognize two particularly significant arguments in favor of the claim that English-only rules offer sensible tools for promoting cooperation in the workplace. First, bilinguals are uniquely positioned to reduce tensions in the workplace by speaking English, so perhaps they should have a duty to mitigate. Leaving aside the fact that many English-speakers prefer or are more comfortable in other languages, bilinguals with the capacity to speak English are equipped to adapt to a monolingual environment, or to conform to the linguistic practices that are common to the largest group of people in the workplace.

Second, limiting employers' discretion to use English-only rules as one mechanism for managing a diverse workforce will sometimes be in tension with other objectives of the civil rights laws. As the Title VII cases on the subject reveal, employers often claim that English-only rules are necessary to prevent employees from using non-English languages to intimidate fellow workers.<sup>113</sup> In other words, an English-only rule might help prevent race-based or sexual harassment from taking a particular form—the form of a hostile, non-English-speaking environment. In addition, in an environment made up of speakers of multiple languages, the English-only rule puts all minorities on a kind of equal footing, ensuring that the language most

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<sup>113</sup> See *infra* notes 311–16 (discussing employers' claim that English-only rules are necessary to promote harmony in workplace).

likely to be common to everyone in the workplace is the common language of the workplace itself. Some workplaces will be diverse not just in a binary sense, with English and one other language being present, but also in a multivalent sense, with a variety of languages present. In many of these instances, one minority may be dominant and therefore capable of isolating another minority.

But perhaps the most serious potential civil rights implication that could result from linguistic diversity in the workplace is the possibility that it will intensify the competition immigrants create for English-dominant minorities, such as linguistically assimilated Hispanics or Asians, or African Americans.<sup>114</sup> The use of non-English languages in the workplace could keep employees who do not speak that language out of in-groups in the workplace, or force them out of the workplace altogether.<sup>115</sup> Both of these consequences would thwart the integrative function a multiethnic workplace might otherwise perform. They might also exacerbate inter-ethnic tensions by heightening the sense that immigrants are taking away Americans' jobs.<sup>116</sup>

With respect to the first cost, it simply underscores what I already have emphasized—that this debate implicates our understanding of what our mainstream institutions ought to look like. The burden sharing I advocate, which would require tolerance of the non-English languages spoken by bilinguals, despite their capacity to mitigate, would introduce into the debate over language regulation the concept developed by linguists known as the “communicative burden.”<sup>117</sup> The idea of the communicative burden captures the fact that all people, including speakers of the majority language, bear a responsibility for helping to facilitate mutual understanding in situations where factors such as different accents or the speaking of different languages introduce friction into interpersonal interaction.

The English-only rule places the communicative burden entirely on one party. Indeed, we typically assume that the burden of communication falls on the speaker with the non-dominant accent or language, who bears the responsibility for making himself understood.<sup>118</sup> Naturally, the non-

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<sup>114</sup> See Lichter & Waldinger, *supra* note 12, at 163 (noting that network recruiting in immigrant-dense industries, such as furniture manufacturing and hospitality, has produced a monolingual, Spanish-speaking workforce, which “impedes access to anyone who doesn’t speak Spanish”); cf. Hugh Davis Graham, *Affirmative Action for Immigrants? The Unintended Consequences of Reform*, in COLOR LINES, *supra* note 12, at 53–54 (exploring the conflict between “traditional” civil rights concerns and immigration by discussing the ways in which the benefits of affirmative action have accrued to the foreign born, as opposed to native-born minorities).

<sup>115</sup> See Lichter & Waldinger, *supra* note 12, at 157.

<sup>116</sup> See, e.g., *id.* at 157 (recording the observation that African Americans do not last very long in the furniture industry in Southern California because “[t]hey don’t want to be a minority”).

<sup>117</sup> See ROSINA LIPPI-GREEN, ENGLISH WITH AN ACCENT: LANGUAGE, IDEOLOGY, AND DISCRIMINATION IN THE UNITED STATES (1997).

<sup>118</sup> See Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991), for a discussion of the categorization of accents

English-speaker should attempt to learn English. Bilinguals should be willing to use English in linguistically mixed situations and refrain from using their ability to speak a non-English language to separate themselves from their co-workers. But the communicative burden runs both ways. At the very least, monolingual English speakers should tolerate the speaking of languages other than English in their presence. In a multilingual society, the concept of the communicative burden must include acceptance of the fact that one may not always understand what is happening in one's environment. Everyone, including the bilingual, will find him or herself in this position at some point, because of the multilingual character of our population; a Spanish-speaking bilingual, while able to understand conversations in English and Spanish, may also find himself in the presence of Korean, or Polish, or Tagalog. And there is no principled reason (only a hegemonic one) for monolingual English speakers to never have the sense of being in the linguistic minority.

In fact, introducing the idea of the communicative burden into the workplace setting could help address the problem of inter-group aversion more generally. Studies of multi-ethnic workplaces sometimes suggest that aversion to and anxiety over difference is common to all groups: Though immigrants display some of the same aversions to working with African Americans as native-born whites do, native-born whites and blacks also share an aversion to their immigrant counterparts, particularly when it comes to the question of language use.<sup>119</sup> But overcoming this aversion requires two-way compromise. Employers should be permitted to require employees who speak languages other than English to engage their co-workers across linguistic lines, through English, when engaged in common tasks. At the same time, native English speakers, whether white, black, Latino, or Asian, should be required to suppress some of their aversion as well—a requirement that can be expressed through the rejection of blanket English-only rules.

As for the issue of competing civil rights objectives, whether such conflicts arise will depend, in part, on whether the industry in question is made up of a workforce that includes multiple minority groups.<sup>120</sup> But to the extent that such workplaces exist, it is not clear why an English-only rule would resolve the conflicts that arise within them. The first and most obvious response to the claim that such rules are necessary to prevent harassment is that blanket language restrictions offer a dramatically overinclusive mechanism for dealing with abusive uses of language. It may be more difficult for supervisors who speak only English to police for harassment if

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into the comprehensible and the non-comprehensible, and the failure of members of the majority to open themselves up to comprehension.

<sup>119</sup> See Lichter & Waldinger, *supra* note 12, at 148.

<sup>120</sup> See *id.* at 155–56 (noting that linguistic and educational differences, as well as the phenomenon of network hiring, tend to separate blacks and Latinos, but noting that “in larger organizations, such as hospitals or department stores,” contact tends to occur).

employees are speaking in a language other than English. But for the use of non-English to work as a form of harassment, it must be accompanied by tone or body language that actually makes it comprehensible as harassment to the individual being targeted and, hence, to anyone in charge of preventing harassment. Second, it is by no means clear that an English-only rule actually would make the workplace more harmonious. Particularly if the larger minority's preference is for non-English, English-only rules are likely to foster inter-group resentment.

Finally, the notion that the speaking of languages other than English drives native-born minorities out of the workplace parallels the commonly heard argument that immigration is to blame for the low wages and limited opportunities of Americans at the bottom of the socioeconomic ladder. But just as immigration represents but one of the forces that affect the opportunities of low-wage workers,<sup>121</sup> the barriers that language difference might create are but one of the factors that affect employment opportunities for minorities in the labor markets of population centers to which immigrants gravitate.<sup>122</sup> Allowing employers to adopt English-only rules is simply unlikely to have much effect on broader trends in hiring. Language difference may sometimes be the catalyst for conflict in the workplace itself, but it is not the underlying structural cause of interethnic competition in the workforce more generally. In the end, it seems unlikely that expecting English-dominant minorities to bear some of the cost of the burden shifting described above would contribute significantly to the reduction of other minorities' employment opportunities.

3. *Building Solidarity In and Out of the Workplace.*—The justification for an English-only rule is not limited to the reduction of friction in the workplace. Establishing points of commonality within a diverse workforce also serves the goal of generating solidarity among workers, a particularly important objective in an institution where diverse groups come together and significant relationships take shape. To justify a presumption against English-only rules, it is not enough to establish that such a presumption enforces important norms of tolerance and burden sharing. It is also important to explore the value that the ability to use non-English has to bilingual employees and to a multilingual public.

In a general sense, the idea that solidarity in the workplace depends on all people speaking the same language at all times implies that everyone in

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<sup>121</sup> See Eduardo Porter, *Cost of Illegal Immigration May Be Less Than Meets the Eye*, N.Y. TIMES, April 16, 2006, at 33 (“Even economists striving hardest to find evidence of immigration’s effect on domestic workers are finding that, at most, the surge of illegal immigrants probably had only a small impact on wages of the least educated Americans—an effect that was likely swamped by all the other things that hit the economy, from the revolution in technology to the erosion of the minimum wage’s buying power.”).

<sup>122</sup> See generally Lichter & Waldinger, *supra* note 12 (discussing network versus bureaucratic hiring).

the workforce is engaged in a simultaneous conversation. To be sure, requiring employees to engage each other and the workplace's clientele through a common language, which more often than not will be English, always will be necessary to ensuring communication across linguistic lines. But the claim that mutual intelligibility is always necessary and desirable elides the fact that interactions in the workplace tend to be layered.

In reality, life in the workplace, like life elsewhere in a diverse and decentralized society, consists of a multitude of overlapping social interactions, where multiple linguistic transactions occur simultaneously, sometimes involving the same person or people. Imagine the hair or nail salon, where employees simultaneously converse with each other and the customer—the conversational equivalent of code switching; or the doctor's lounge in a hospital where many different social conversations, as well as conferences about shared patients, or other clinical matters, take place at the same time; or the department store in any American city, where shoppers communicate privately with one another in one language, at the same time that they seek assistance from clerks in English, who may at the same time be carrying on conversations with each other in yet another language. All of these conversations can happen at once, and in multiple languages, without everyone in the workplace space needing to understand what has been said by every speaker.

If we understand the workplace in this multilayered sense, then the contribution of the English-only rule to the building of solidarity seems much less obvious. The multilayered insight makes clear that bonding can happen through different means among different assortments of people—that co-worker bonding is not a monolithic process. And if we understand solidarity broadly and not in terms of fostering a single conversation, we begin to see how the use of non-English in the workplace can actually facilitate the development of solidarity by allowing subgroups of workers to communicate with one another in the manner that is most comfortable, natural, and efficient. In fact, this multilayered conception of the workplace makes English-only rules start to appear disruptive. Fear of discipline or surveillance will restrain the bilingual worker in his interactions with certain fellow employees and the public.<sup>123</sup> Moreover, the trend toward language regulation reflects the impulse, identified by Vicki Schultz, to sanitize the workplace—or to scrub out the elements of affective life from work life, for fear that the former might disrupt the latter.<sup>124</sup> But employees

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<sup>123</sup> See, e.g., *EEOC v. Premier Operator Servs.*, 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000) (“On a daily basis, the Hispanic employees of Premier were faced with the very real risk of being reprimanded or even losing their jobs if they violated the English-only rule, even if such non-compliance were to be inadvertent. There was no comparable risk posed by the policy for defendant’s non-Hispanic employees.”).

<sup>124</sup> See Schultz, *supra* note 56, at 2069 (“Even more is at stake than whether or not people can form close friendships at work: The larger question is whether we as a society can value the workplace as a realm alive with personal intimacy, sexual energy, and ‘humanness’ more broadly. The same impulse

have an interest in bringing aspects of their affective life into the workplace, in large part because it facilitates the process of bonding with co-workers.

Interestingly, sensitivity to linguistic differences among employees has had solidarity building effects of the more traditional, union-building type in some contexts. In her study of union organizing among hotel workers in San Francisco, for example, anthropologist Miriam Wells explored how cultural and national diversity in the workforce has transformed organizing efforts by unions.<sup>125</sup> To advance their solidarity building and collective action promoting goals, organizers have adjusted their techniques based on the ways in which ethnicity “structures the social relations within different hotel occupations.”<sup>126</sup> In sectors such as housekeeping, where workers’ relationships revolve around a common language or background, organizers speak those workers’ native languages, and identify leaders within each of the social subgroups that makes up the sector. Organizers then rely on these leaders to facilitate communication between the union and the members of each social subgroup, and encourage these leaders to work together to develop a set of concerns shared by the sector as a whole.<sup>127</sup>

In other words, taking account of salient social groupings in the workplace and then relying on the forms of socialization important to those workers, such as their language, can facilitate the creation of common cause across ethnic groups.<sup>128</sup> This study’s conclusions thus help illuminate the multilayered nature of interaction that characterizes most work settings. They also underscore that making an effort to respect the way individuals group themselves socially, whether through language or other characteris-

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that would banish sexuality from the workplace also seeks to suppress other ‘irrational’ life experiences such as birth and death, sickness and disability, aging and emotion of every kind.”)

<sup>125</sup> Miriam J. Wells, *Immigration and Unionization in the San Francisco Hotel Industry*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 109, 122 (Ruth Milkman ed., 2000).

<sup>126</sup> *Id.* at 124.

<sup>127</sup> *See id.* at 123. In other sectors, such as food service, where affiliations among workers cut across ethnic lines and where workers all speak English, organizing efforts do not take ethnicity into account. *See id.* And in still other sectors, such as dishwashing, a pan-ethnic social grouping that centers around the Spanish language has emerged, such that even non-Latinos speak Spanish, and all organizing occurs in Spanish. *See id.* at 124.

<sup>128</sup> This salience is reflected in the phenomenon Wells describes whereby union contracts have moved beyond “the narrow conditions of work” to address the social situations of particular groups. In the case of immigrant workers, this shift has included acknowledgment of their limited ability to speak English, as well as their “multilinguality.” *Id.* at 129. Indeed, the importance workers place on being permitted to speak their native languages is reflected in a clause negotiated by the union Wells studied in its 1986–89 contract. The contract provided that “in cases where it is appropriate to a particular job and where it is advantageous to the Hotel to have a position staffed by a multilingual employee, the Hotel recognizes this as an asset.” *Id.* at 126. Wells refers to this provision as “highly valued by workers,” and suggests that it was negotiated in response to supervisors insisting that employees speak only English on the job, which workers experienced as “gratuitous and belittling, as well as dishonest, since, given the substantial share of foreign-born guests, employers benefited from their multilinguality.” *Id.* at 126–27.

tics, can produce genuine solidarity over issues of common concern. As Wells puts it, “to ground union solidarity in the natural relations of acquaintanceship and trust among workers . . . organizers will need to attend to the varied ways that immigrant backgrounds affect social relations at work.”<sup>129</sup>

Of course, if we set solidarity building, in and out of the workplace, as our goal, a conception of the workplace that perpetuates subgroups is subject to the critique that it promotes self segregation in the workplace. Such segregation makes it less likely that cross-cultural relationships will form in and out of the workplace. The cost of such segregation in the workplace, in particular, seems all the more serious in light of Estlund’s work, discussed above. Under this view, employers who impose English-only rules are not simply acting in their perceived self interests, but arguably in the social interest as well, by facilitating cross-group relationships through the requirement that everyone speak the same language.

But while the apprehension over self-segregation reflects legitimate concerns, there are at least two reasons to reject it as a basis for imposing an English-only requirement on the workplace. On the one hand, there are intuitive reasons to believe that the assumption of self-segregation is overblown. Whether or not employees of different groups enter the workplace with the intention of forming social relationships with their co-workers, relationships will form naturally through the process of actually working together. Working together will give rise to a desire to cross linguistic boundaries in the non-job-related contexts of the workplace.<sup>130</sup> What is more, given that many workplaces consist of workers with various degrees of English language ability, prohibiting the speaking of other languages may actually interfere with communication between those who speak little or no English and those who speak only English; without the bilingual as a facilitator, a significant bridge between two groups of people in the workplace is lost.

On the other hand, people also should be free to develop the social relationships of their choosing in the workplace. Speaking the same language is no guarantee of affinity. Indeed, one study of workplaces in Southern California revealed that tension among Latino immigrants from different parts of Latin America pervaded the workplace—a phenomenon that comes as a surprise to many non-Latino managers.<sup>131</sup> Nor is there any guarantee that people will not still affiliate with their own group, regardless of whether they are forced to speak English even when another language

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<sup>129</sup> *Id.* at 128.

<sup>130</sup> *See, e.g.*, PEW HISPANIC CTR., *supra* note 49, at 2 (noting the dominance of English-language usage by bilingual Latinos in the workplace, suggesting that Latino bilinguals either prefer to speak English or speak English in order to communicate with their monolingual colleagues, indicating that Latino bilinguals do not tend to separate themselves from their colleagues through linguistic means).

<sup>131</sup> Lichter & Waldinger, *supra* note 12, at 158.

would be more natural. People tend to seek out others with similar interests or backgrounds, and two major determining factors of commonality are race and culture. As noted above, resisting this tendency through regulation may be counterproductive; prohibiting workers from speaking the language that is most natural to them seems likely to engender resentment, or a sense of second class status. Language regulation is also coercive and infantilizing. Employees in a given workplace may ultimately decide to cross cultural boundaries, or they may form relationships primarily within their own cultural spheres. But resistance of the sort I advocate to regulation of language usage places confidence in the good will of employees, rather than in the ex ante judgments of the employer, to make this decision.

And by enabling freedom of association in the workplace, my framework also promotes important associative interests outside the workplace. English-only rules have several consequences that extend beyond the interests of employees qua employees—consequences that can be prevented by restraining employers from adopting English-only rules. First, ridding the workplace of characteristics such as multilingualism creates a structural mismatch between the workplace and the community in which it is located and in which it may have a significant presence. Second, by not allowing speakers of non-English to use their language in the workplace setting, employers make it that much more difficult for communities in which non-English is spoken to sustain the linguistic ties that give them their particular character. In other words, by eliminating a sphere of life in which non-English operates as a functional language, employers speed the process of linguistic assimilation.

For many observers, these potential consequences of English-only rules may seem like welcome ones. But for reasons I explain in detail elsewhere, this possibility is one we should lament and strive to avoid.<sup>132</sup> The existence of vital linguistic subcommunities and bilingual individuals who can cross between those communities and other sectors of society is important to facilitating the process of immigrant assimilation. In addition, linguistic subcommunities enrich the lives of their members and add to the associative options available to individuals. We therefore should attend to how the rules governing important institutions like the workplace affect communities outside the workplace—something employers are unlikely to take into consideration, given that their focus will be on how to maximize

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<sup>132</sup> In *Language and Participation*, *supra* note 4, I make pragmatic as well as identity-based arguments against rules that speed assimilation through coercion. In brief, maintaining bilingual capacity, in individuals and in communities, is essential to ensuring that immigrant communities integrate into American society. Bilinguals perform an essential bridging function between non-English speaking communities, which immigration will keep replenishing, and society at large. *See id.* Indeed, this capacity for bridging is reflected in the account of union organizing in San Francisco discussed above. What is more, maintaining a diversity of linguistic communities gives the United States an advantage abroad in both business and in international relations, and the persistence of vital linguistic communities makes our cultural life and the lives of individuals richer, not poorer.

workplace output without regard to spheres that are only ancillary to the workplace.<sup>133</sup>

Transforming resistance to language regulation into a set of best practices for employers would not preclude leaving employers with the discretion to take disciplinary action against employees who use language difference to harass other workers, or to exacerbate social tensions in the workplace. Within the framework I articulate, employers would remain free to apply English-only rules to particular workers who have displayed a pattern of aggressive behavior, using a language other workers do not understand in order to isolate or intimidate, or to particular work settings where such behavior has been observed. The framework would make room, for example, for the outcome in cases such as *Dimaranan v. Pomona Valley Hospital Medical Center*, in which a district court in the Ninth Circuit rejected the challenge of a Tagalog-speaking nurse to a no-Tagalog requirement, finding that the head of the ward where she worked had adopted the rule in response to the plaintiff's abusive behavior toward the other nurses in the ward.<sup>134</sup> My framework, instead, rejects prophylactic rules through which employers enshrine a general discomfort with the unfamiliar, thereby imposing anti-social constraints on the workplace.

## II. MOVING BEYOND THE TITLE VII PARADIGM

As befits the distinctively American transformation of the workplace described above, civil rights litigation has become an important mechanism for evaluating language rules in the workplace. Many workers who have been affected by English-only rules have turned to Title VII to challenge them, and it has been through Title VII litigation that the social significance of these rules has begun to be understood, at least by lawyers. Any consideration of English-only workplace rules must therefore explore how this body of law has shaped our understanding of the meaning and legitimacy of English-only rules in the workplace.

For the most part, plaintiffs have challenged English-only workplace rules under Title VII's disparate-impact theory of liability. Plaintiffs typically contend that English-only rules have a disparate impact on national origin minorities—one of the classes singled out by Title VII for protection. At the end of the day, most plaintiffs in lawsuits involving English-only rules articulate the harm they have experienced as Title VII requires them to

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<sup>133</sup> It may be the case that community-minded employers will have altruistic tendencies to respect the interests of the communities they serve, and some employers, in adopting English-only rules, may well believe they are serving the interests of the community by promoting the use of English (though no employer in the Title VII cases that have been litigated has come forward with this type of justification). It is nonetheless reasonable to assume that preserving linguistic subcommunities is unlikely to rise to the top of most employers' lists of objectives.

<sup>134</sup> 775 F. Supp. 338 (C.D. Cal. 1991), *withdrawn*, No. 89 4299 ER (JRX), 1993 WL 326559 (C.D. Cal. Mar. 17, 1993).

do—in dignitary terms and citing the language of harassment and oppression to describe the impact of workplace language policies.<sup>135</sup>

I do not doubt the sincerity of most such claims; it is not hard to imagine feeling demeaned or disadvantaged by an order to cease using one's native language because of the stress it causes others.<sup>136</sup> But my aim in the preceding Part was to demonstrate that the dignitary effects of the English-only rule are not the sole, or even the primary, consequence of language rules. Even if the dignitary harms such rules cause are not severe enough to motivate any single individual to seek employment in a workplace without language rules, the rules nonetheless threaten alienation in a manner that has social consequence. With their fixation on the dignitary interests of the individual, the federal courts in Title VII cases have missed what is perhaps the most serious consequence of the English-only workplace rule: the creation of a social space that is both less fluid than and less reflective of the social dynamics of the world that surrounds it. But a consideration of the Title VII litigation that has been pursued nonetheless will be instructive. An analysis of the reported cases will sharpen our sense of what is at stake for the employer, employees, immigrant communities, and an American society at large struggling to make sense of diversity in the workplace.

#### A. *The Parameters Set by Title VII*

For decades, courts have been categorizing English-only cases with suits that allege trait-based discrimination, or discrimination on the basis of characteristics that correlate with race or sex, such as hair and dress styles.<sup>137</sup> As early as 1973, the *Hernandez v. Erlenbusch* court framed the English-only question as a kind of second-generation antidiscrimination problem. The court observed that while the more “overt forms of racial discrimination” had been cast aside, racially discriminatory *attitudes* remained

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<sup>135</sup> Indeed, opponents of such rules have made the dignitary claim in various forms. See, e.g., 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 (1998) (calling for the amendment of Title VII to include language); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994) (arguing that Title VII should be amended to include traits associated with ethnicity); Matsuda, *supra* note 118 (detailing the harms caused by accent-based discrimination).

<sup>136</sup> At the same time, it seems quite likely that for any given individual who has the capacity to speak English, a language restriction in the workplace might not be experienced as a significant dignitary harm. Many individuals may well regard such rules as standard operating procedure in an English-dominant society—a cost they are obligated to accept, and certainly not a cost high enough to motivate them to seek alternative employment. For other individuals, other sorts of behavioral restrictions, such as the requirements that one wear a funny uniform, or refrain from making personal phone calls, may seem far more demeaning. In other words, the fact that language restrictions restrain individual self-expression or demean those who speak other languages does not necessarily distinguish them from many other types of behavior restrictions in the workplace.

<sup>137</sup> See *infra* notes 142–50 (discussing Title VII cases in which courts have dealt with language in terms of national origin).

and were embodied in the sentiments of the tavern owners and the customers they claimed to represent.<sup>138</sup> The court emphasized that the civil rights laws were limited tools with which to handle social attitudes concerning racial minorities,<sup>139</sup> but nonetheless concluded that such laws have a role to play in determining whether, when, and how race-based or cultural traits should be regulated or protected. Though the § 1982 matter at issue in *Hernandez* appears to be settled, the underlying question with which that court struggled—how to deal with the racial discrimination that may lurk behind policies that regulate personal characteristics—still vexes courts and scholars.<sup>140</sup>

Among scholars, exploring the assimilationist expectations the law imposes on bearers of cultural traits—particularly traits over which individuals are thought to have control, such as language usage by a bilingual—has become central to understanding how law and society encourage or require assimilation. As Kenji Yoshino has argued,

[T]he contemporary forms of discrimination to which racial minorities and women are most vulnerable often take the guise of enforced covering. A member of a racial minority cannot be sanctioned for failing to convert or to pass without having a Title VII employment discrimination claim. But he can be sanctioned for failing to cover—for wearing cornrows, for lapsing into Spanish, or for speaking with an accent.<sup>141</sup>

Whether one believes that all, most, or few assimilationist expectations are legitimate, the need to make sense of the social status of salient cultural traits remains a critical civil rights issue, particularly in light of the immigration trends I discussed at the outset of this Article.

Of course, any such discussion necessarily will run up against the difficulty of determining *which* traits should be protected. Should we protect all, some, or none of the traits that might be correlated to race or ethnicity? Should we focus on how pervasively a personal characteristic is held or claimed by particular communities? Language may be a characteristic more universally held by national origin or racial minorities than particular hair or dress styles. But, then, should we consider with what level of regard particular individuals hold their various personal characteristics? Language usage may be critical to one worker, whereas another might consider his or

<sup>138</sup> *Hernandez v. Erlenbusch*, 368 F. Supp. 752, 753 (D. Or. 1973).

<sup>139</sup> *Id.* at 754 (“[T]his case illustrates the difficulty inherent in judicial responses to the subtleties of racial attitudes when confined to the crude statutory implement of a damage award.”).

<sup>140</sup> See Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002). In his identification and analysis of the phenomenon of “covering,” the version of assimilation whereby a person neither hides nor alters his underlying identity, but rather downplays it, Yoshino explores the pressures law and society place on women, minorities, and gays to suppress characteristics correlated with their identities. See *id.* But see RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* (2005) (criticizing theories of antidiscrimination law that treat race as culture and therefore focus protection on so-called “cultural traits,” such as grooming practices).

<sup>141</sup> Yoshino, *supra* note 140, at 781.

her manner of dress, or self-presentation, to be at the core of his or her identity. And should we also be concerned with the effects of certain personality characteristics on the workplace?

*1. Failed Legal Challenges.*—As the following discussion will make clear, courts have answered these questions by invoking the concept of immutability. Courts are more likely to treat traits over which the bearer has no control as protected by Title VII than traits individuals can alter or suppress. Perhaps this immutability standard offers the best way through these thorny issues—a way that keeps a lid on what otherwise would be an endless litany of trait-based complaints. As I explain below, however, not only does the immutability standard not really address the core problem with English-only rules, but the English-only cases offer an alternative means of sorting through the cultural trait cases that will offset some of the arbitrariness of the courts' focus on immutability.

Two courts of appeals cases, by and large, have set the parameters of the debate in the language context. The Fifth Circuit had the first say in its 1980 decision, *Garcia v. Gloor*.<sup>142</sup> The court made clear its view that Title VII was not intended to protect employees against all arbitrary employment practices, noting that Title VII “does not forbid employers to hire only persons born under a certain sign of the zodiac.”<sup>143</sup> The court went on to emphasize that Title VII’s prohibitions are directed only at certain forms of discrimination, or discrimination based on “race, color, religion, sex, or national origin.”<sup>144</sup> In defining national origin, the court noted that it was not to be confused with “ethnic or sociocultural traits.”<sup>145</sup> According to the court, with the exception of religion:

[T]he discriminations on which the Act focuses its laser of prohibition are those that are either beyond the victim’s power to alter . . . or that impose a burden on an employee on one of the prohibited bases. . . . Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. . . . But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer’s choice of how to run his business than to equality of employment opportunity.<sup>146</sup>

In other words, because an employee (at least a nominally bilingual one) has control over the language she speaks, an employer’s rule prohibiting that employee from speaking non-English does not fall within the category of employment practices Congress intended Title VII to prohibit.

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<sup>142</sup> 618 F.2d 264 (5th Cir. 1980).

<sup>143</sup> *Id.* at 269.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* (quotation omitted).

The Ninth Circuit's analysis in its 1993 case, *Garcia v. Spun Steak Co.*,<sup>147</sup> solidified the conventional legal wisdom on the subject. The *Spun Steak* court acknowledged that English-only rules could have a disparate impact on national origin minorities when applied to workers unable to speak English, or workers unable to comply with the rules.<sup>148</sup> But, the court concluded, workers with the capacity to comply with English-only rules, i.e., bilinguals, cannot rely on the existence of such rules to establish the prima facie case necessary for carrying forward with a disparate impact claim.<sup>149</sup> Put slightly differently, such rules may well have a disparate impact on national origin minorities, but only when the minorities in question lack the capacity to speak English at all. Bilinguals, on the other hand, will not make it past the prima facie case stage of their Title VII case by citing the mere existence of an English-only policy.

Of course, the effects of English-only rules, when applied to bilinguals, are almost as likely to be felt disproportionately by national origin minorities as when the rules are applied to non-English speakers. And so the court's distinction between monolinguals and bilinguals makes little analytical sense, unless we understand the *impact* on each of the two groups as distinct. Some courts' willingness to understand the impact on non-English speakers as a legally cognizable one arguably reflects the intuition that disabling an employee from speaking altogether would be inhumane—that it would effectively force his or her complete withdrawal inward. When the courts perceive that employees have the capacity to adjust to an English-only regime however, the connection between the harm felt by the plaintiff and the objectives of the civil rights laws is severed. As the Fifth Circuit concluded in *Gloor*, there can be “no disparate impact if the rule” is one that employees can readily observe; non-observance becomes “a matter of individual preference.”<sup>150</sup> The ability to comply—to engage in self-help, as discussed in Part I—renders the effects of such rules mere inconveniences. The disparate-impact theory of liability, under this view, does not protect workers against asymmetrical burdens of all kinds; mere inconveniences, no matter whom they affect, are simply not legally cognizable.

Before we consider why this individualized conception of harm is misguided, it is worth pausing on the courts' reasoning in the English-only cases to come to a clear understanding of what that individualized conception is. The Ninth Circuit's split decision in *Spun Steak* is particularly helpful in unwrapping what the courts understand to be at stake, as it lays out

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<sup>147</sup> 998 F.2d 1480 (9th Cir. 1993).

<sup>148</sup> See *id.* at 1488 (“As applied ‘[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home,’ an English-only rule might well have an adverse impact.” (quoting *Gloor*, 618 F.2d at 270)); see also *Gloor*, 618 F.2d at 270 (noting that language might be an immutable characteristic for those who are not multilingual, suggesting that such individuals might be able to demonstrate the impact required for liability under Title VII).

<sup>149</sup> See *Spun Steak*, 998 F.2d at 1487–88.

<sup>150</sup> 618 F.2d at 270.

and rejects various theories of legal harm. The plaintiffs in the case—Spanish-speaking, bilingual workers at a meatpacking plant<sup>151</sup>—claimed that the company’s rule, which prohibited them from speaking Spanish except during their free time, imposed a burdensome term of employment “and denie[d] them a privilege of employment that non-Spanish-speaking workers enjoy[ed].”<sup>152</sup> The court began by explaining the disparate impact theory of liability. According to the court, workplace rules that impose harsher burdens on certain groups, regardless of whether those burdens reflect the intent to treat the group differently, “may operate as barriers to equality in the workplace.”<sup>153</sup> At the same time, in constructing his *prima facie* case, a plaintiff must show that the employer’s policy had a discernible impact on the terms and conditions of employment and then prove that the impact was actually significant.<sup>154</sup>

In the panel majority’s view, none of the theories of harm offered by the plaintiffs rose to the requisite level of significance. First, Title VII does not protect the worker’s ability “to express [his] cultural heritage” on the job.<sup>155</sup> The plaintiffs’ claims to this effect, under the court’s analysis, reflected an unfounded expectation that Title VII protect his purely expressive interests. The substance of both the claim and the court’s rejection of it was that speaking a language other than English is intended to signify a kind of ethnic solidarity. Leaving aside for the moment that the speaking of English is never characterized as an expression of culture, the court easily dispensed with the plaintiffs’ claim to celebrate his identity.

Second, though the court recognized that the ability to converse in the workplace constitutes a privilege of employment, and a particularly significant one in an assembly line job, the plaintiffs’ ability to speak English, in the court’s view, was sufficient to guarantee the privilege.<sup>156</sup> Just as an employer can ban the discussion of inappropriate topics, he can regulate the language in which conversation takes place.<sup>157</sup> Here, again, the court recognized the employer’s authority to regulate the manner of expression on the

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<sup>151</sup> *Spun Steak*, 998 F.2d at 1488. One of the original plaintiffs was a monolingual Spanish speaker who stated in her deposition that she was not bothered by the rule “because she preferred not to make small talk on the job.” *Id.* The Court found, given this and other evidence, that the district court’s grant of summary judgment for the plaintiffs was inappropriate and that remand was necessary to determine whether the policy adversely affected her. *See id.* In addition, the employer permitted the clean-up crew, which included one employee who spoke no English, to communicate in Spanish while on the job and authorized the foreman to speak Spanish, as well. *Id.* at 1483.

<sup>152</sup> *Id.* at 1485.

<sup>153</sup> *Id.* (“[Title VII’s] phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent to strike at the entire spectrum of disparate treatment . . .” (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1985)) (suggesting that the disparate impact theory of liability was intended to be far reaching)).

<sup>154</sup> *See id.* at 1486–88.

<sup>155</sup> *Id.* at 1487.

<sup>156</sup> *See id.*

<sup>157</sup> *See id.*

job and then assumed that the speaking of another language is analogous to the expression of ideas or opinions. The court's only linguistic or expressive concern seemed to be whether the employer effectively had silenced the worker. Nothing short of a constructive gag order could have legal implications for the purposes of Title VII.

Finally, in dismissing the plaintiffs' claim that the rule gave rise to an isolating and intimidating environment, the court rejected the EEOC's guideline that presumes such rules to be discriminatory.<sup>158</sup> The court reasoned that whether such rules infected the workplace to the point of creating a hostile environment represents an entirely factual question, not a conclusion that can simply be presumed.<sup>159</sup> In the court's estimation, because the Spanish speakers at the Spun Steak company had the ability to comply with the rule, its enforcement did not threaten to exacerbate workplace tensions or to isolate the affected workers.<sup>160</sup>

By and large, the district courts in other circuits have followed the *Gloor* and *Spun Steak* lines of analysis.<sup>161</sup> In *Kania v. Archdiocese of Philadelphia*, for example, the court rejected a challenge brought by a church's Polish-speaking housekeeper to the church's English-only policy, foregrounding her ability to speak English.<sup>162</sup> Though the policy applied "at lunch, on break, and in non-public areas" of the workplace,<sup>163</sup> the court hewed closely to the volition theory of impact.

<sup>158</sup> *See id.*

<sup>159</sup> *See id.*

<sup>160</sup> *See id.*; *cf.* *Long v. First Union Corp. of Va.*, No. 95-1986, 1996 WL 281954 (4th Cir. May 29, 1996). The appellants in *Long* alleged that the manager of the bank where they were employed told them they were forbidden from speaking Spanish, except when assisting Spanish-speaking customers. 1996 WL 281954, at \*1. After orally reiterating the prohibition, the bank manager issued a memo to all bank employees outlining the rule as "bank policy." When one of the Spanish-speaking employees refused to sign the memo, she was subjected to disciplinary action. The district court rejected the employees' claims, and the Fourth Circuit found that there was no direct evidence of retaliation against the worker and granted summary judgment to the employer. *Id.*

<sup>161</sup> *See, e.g., Long v. First Union Corp. of Va.*, 894 F. Supp. 933 (E.D. Va. 1995). The district court in this case rejected plaintiffs' challenge, citing the employer's claim that it adopted the policy because the Spanish-speaking employees were creating a hostile environment through the speaking of Spanish. Following the Fifth and Ninth Circuits, the court concluded that the plaintiffs had failed to prove the existence of adverse effects from the policy and rejected the notion that the plaintiffs had the right to express their cultural heritage on the job. For the court, the fact that the bank sought to hire Spanish speakers for their language ability was evidence that the employer's benign explanation for its rule was credible. *See id.*; *see also Tran v. Standard Motor Prods., Inc.*, 10 F. Supp. 2d 1199 (D. Kan. 1998) (rejecting plaintiff's claims on grounds that there was no evidence of a hostile work environment because the rules were not strictly enforced (some employees were still able to speak Vietnamese openly) and accepting employer's claim that rule was necessary to ensure that all employees understood each other, to prevent injury through effective communication, and to prevent workers from feeling they were being talked about by others).

<sup>162</sup> 14 F. Supp. 2d 730 (E.D. Pa. 1998) (dismissing Title VII challenge to English-only rule on a 12(b)(6) motion, in light of plaintiff's failure to state a claim on which relief could be granted, given the absence of unlawful disparate impact).

<sup>163</sup> *Id.* at 731.

Two instructive asymmetries emerged from the court's analysis in *Kania*. First, though the court's holding that the plaintiff had failed to make out a prima facie case of discrimination obviated the need for an analysis of the employer's business justification, the court nonetheless criticized the worker for thinking it would be permissible to speak Polish on the job, observing that the employer had the authority to prohibit the speaking of non-English on the grounds that it is offensive to speak a language others in the parish could not understand.<sup>164</sup> Here, again, the idea of self-help looms large, for the court does not entertain the flipside of the rationale it accepts—that it would be offensive to speak English around a non-English speaking member of the parish. The asymmetry implicit in the court's reasoning either reflects a sense of entitlement based on the social dominance of English (which would clearly and sensibly justify speaking English in the presence of those who do not understand English), or a belief that the burden to ameliorate the cognitive dissonance that arises when more than one language is spoken in a single space falls on the bilingual speaker.

Second, the court notes that the plaintiff did not come forward with evidence that the rule created a hostile environment,<sup>165</sup> which certainly begs the question of what evidence, other than self-serving statements on the part of the plaintiff, could be expected of her.<sup>166</sup> At the same time, the court assumed that the speaking of languages other than English would cause harm—that the non-Polish speakers of the parish would take offense at or be alienated by hearing the church housekeeper speak in her native language. For this court, the intrusiveness of the non-English language was self-evident, whereas the hostility of a rule that prohibited one from using non-English had to meet undefined but apparently exacting standards of proof. Indeed, courts such as this one have turned the hostile work environment theory of discrimination on its head by using the very same theory to amplify the employer's authority to regulate the workplace for the sake of the monolingual English speaker.

2. *The EEOC's Successes.*—At the same time that *Spun Steak* seems to stand as the preeminent authority in this area, in recent years, some disagreement over the legality of English-only rules has emerged in the courts, and the EEOC has settled a number of high-profile suits challenging the English-only practice. One court, for example, has taken issue with other courts' rejection of the EEOC guideline, which provides that an English-only rule creates an "inference" that national origin minority employees

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<sup>164</sup> See *id.* at 736; *cf. Long*, 1996 WL 281954. As noted above, see *supra* note 99 and accompanying text, the memo outlining the bank's policy expressed a similar sentiment: "This all boils down to common courtesy. How would you feel if everyone around you were speaking and laughing aloud in a language that you could not understand." *Id.* at \*1 n.3.

<sup>165</sup> *Kania*, 14 F. Supp. 2d at 735–36.

<sup>166</sup> See, e.g., *EEOC v. Synchro-Start Prods.*, 29 F. Supp. 2d 911, 914 (N.D. Ill. 1999).

have been disadvantaged. In *EEOC v. Synchro-Start Products*,<sup>167</sup> the court heard a Title VII suit brought by Spanish- and Polish-speaking workers challenging a rule that required employees to speak only English during the workday. On the employer's motion to dismiss, the court began its analysis by taking note of the overwhelming weight of authority in the federal courts on the subject.<sup>168</sup> But the court then made clear that it was "writing on a clean slate."<sup>169</sup> It could go beyond the easy case of the non-English speaking employee and find it possible to impose liability "across a broader spectrum," perhaps even protecting those workers who could readily comply with the company's English-only policy.<sup>170</sup> In reaching this conclusion, the court ultimately credited the EEOC's guideline and ordered the employer to answer the EEOC's complaint.<sup>171</sup>

Another court has expressed skepticism of the dominant view that bilinguals are not harmed by English-only rules. In 2000, a magistrate judge in Dallas awarded thirteen Latino employees \$700,000 in damages after finding the English-only rule of Premier Operator Services, a long distance service, unlawful.<sup>172</sup> The rule, which the employer primarily applied to Mexican-American employees it had hired *because of* their Spanish speaking ability, banned the speaking of languages other than English at all times, including during lunch and other breaks.<sup>173</sup>

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 912–13.

<sup>169</sup> *Id.* at 913.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 914–915. In crediting the EEOC's guideline, the court took issue with the Ninth Circuit's rejection of the guideline. *Id.* (citing *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993)). This difference of approach implicates an important subtext of these decisions: the scope of the EEOC's authority to define what constitutes national origin discrimination. The Ninth Circuit's view in *Spun Steak* was that the EEOC, by presuming that an English-only rule creates a hostile environment, had shifted the burden of proof, which Title VII places on the plaintiff, onto the employer. *See* 998 F.2d 1480. According to the court in *Synchro-Start*, however, the rule merely moves the inquiry to the second step prescribed by Title VII—to the inquiry into the employer's business necessity justification. *See* 29 F. Supp. 2d at 914. The court noted that the EEOC's guideline makes sense, for the only way an employee can prove the negative effects of an English-only rule would be through conclusory and self-serving statements. The guideline, in the court's view, represents a reasonable way of expressing this reality. *Id.*

<sup>172</sup> *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066 (N.D. Tex. 2000); *see also* *Rivera v. Baccarat, Inc.*, No. 95 Civ. 9478 MBM JCF, 1997 WL 777887 (S.D.N.Y. 1997) (order denying defendant's motion to exclude evidence); Press Release, U.S. Equal Employment Opportunity Comm'n, *supra* note 47. In *Rivera*, a magistrate judge rejected an employer's motion to exclude evidence of any policy by the employer forbidding its employees from speaking languages other than English on the job. 1997 WL 777887. In permitting the evidence as part of a broader Title VII and ADEA suit, the court observed that even *Spun Steak* recognized the relevance of some English-only rules to a finding of national origin discrimination. The court emphasized that the enforcement of English-only rules could rise to the level of harassment, exacerbating tensions in the workplace, even if the policy on its own was not sufficient to prove discrimination. *Id.*

<sup>173</sup> *Premier Operator Servs.*, 113 F. Supp. 2d at 1068–69.

The key development in this case was the court's expression of ambivalence with respect to the immutability paradigm. The court initially observed that our society's most discriminatory practices, such as segregated bathrooms and water fountains, have been unobtrusive in terms of ability to comply.<sup>174</sup> In other words, a worker's ability to abide by the rule is not itself proof that the rule does not have pernicious consequences. At the same time, the court relied heavily on expert testimony by a linguistics professor from the University of Pittsburgh, who testified that "adhering to an English-only requirement is not simply a matter of preference for Hispanics, or other persons who are bilingual speakers, but that such restraint can be virtually impossible in many cases."<sup>175</sup> She emphasized that bilinguals code switch, or switch from English to their native or primary language, when engaged in informal conversation with members of their cultural group.<sup>176</sup> The court credited these claims and concluded that code switching cannot simply be "turned off."<sup>177</sup>

But then, even after establishing immutability, the court went on to explore the effects of the English-only rule on the dynamics of the workplace. The rule required supervisors to monitor conversations and threaten employees with discipline, practices that could result in oppressive surveillance. The court characterized the rule as a tool of intimidation and emphasized that the rule, by definition, created a heightened risk of termination for the Spanish-speaking employees.<sup>178</sup> The court seemed to be suggesting that the rule created an anxiety-tinged atmosphere for bilingual employees, who were forced to be on guard constantly to avoid violating the policy.<sup>179</sup> The court awarded the plaintiffs compensatory and punitive damages and thus cleared a narrow path for employees seeking to challenge English-only rules in the workplace.<sup>180</sup>

In addition to challenging the prevailing view that bilinguals' use of non-English is a matter of choice, this case signals disagreement with other courts' rejection of the EEOC's conclusion that English-only rules presumptively create a hostile working environment.<sup>181</sup> In this same vein, the

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<sup>174</sup> *Id.* at 1075 (citing *Spun Steak*, 13 F.3d at 298 (Reinhardt, J., dissenting from denial of reh'g en banc)).

<sup>175</sup> *Id.* at 1069–70.

<sup>176</sup> *Id.* at 1070.

<sup>177</sup> *Id.* In addition, the court emphasized that the English-only rule imposed a stigma on the Mexican-American employees, which was compounded by the fact that the posting of the language policy was accompanied by a sign advising that "[a]bsolutely no Guns, Knives or Weapons of any kind" were allowed on the premises, thus identifying Spanish-speaking with threatening behavior. *Id.* at 1068–69.

<sup>178</sup> *Id.* at 1075–76.

<sup>179</sup> *Id.* at 1070, 1075–76.

<sup>180</sup> *Id.* at 1077–78.

<sup>181</sup> Despite rejecting the hostile environment claim, the Ninth Circuit nonetheless acknowledged that an English-only rule could become part of a larger work environment hostile to national origin minorities. *See Garcia v. Spun Steak*, 998 F.2d 1480, 1489 (9th Cir. 1993).

Tenth Circuit recently reversed a district court's grant of summary judgment to the city of Altus, Oklahoma, which had adopted an English-only policy for its employees.<sup>182</sup> The court found that the plaintiff employees had produced evidence on which a reasonable juror could rely to find that a hostile work environment existed.<sup>183</sup> The fact that their manager had informed them of the policy in private, for fear that other employees would learn of it and use it to harass plaintiffs, suggested to the Court that the city knew the policy might become the source of a hostile work environment.<sup>184</sup> And, in fact, plaintiffs testified that they had been taunted as a result of the policy and been made to feel like second-class citizens.<sup>185</sup>

The Tenth Circuit's conclusion that the very fact of the policy could reasonably be construed as an "expression of hostility to Hispanics," coupled with the court's willingness to take account of plaintiffs' subjective impressions, moves the Tenth Circuit, like the Dallas magistrate judge, beyond the *Spun Steak* court's grudging acceptance of the possibility that a hostile work environment claim might be viable.<sup>186</sup> The Tenth Circuit thus has suggested a viable Title VII strategy for challenging English-only rules, albeit one that requires plaintiffs to characterize their work experiences as ones of marginalization.

That this particular door has been left open may be influencing the EEOC's case selection as it pursues its national enforcement strategy against English-only rules. Indeed, in addition to this emerging dissension in the federal courts, the EEOC continues to challenge employers' language practices. In November 1998, the EEOC reached a \$133,000 settlement with and secured injunctive relief against two medical service providers in the Bronx in a suit arising from those employers' English-only rules.<sup>187</sup> The case began as a sexual harassment charge, the investigation of which led to the discovery of the unwritten English-only policy, under which employees were told to speak English at all times, apparently because a supervisor was unable to understand Spanish.<sup>188</sup> According to the plaintiffs, workers were ordered to end phone conversations in Spanish, whether the calls were per-

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<sup>182</sup> See *Maldonado v. City of Altus*, 433 F.3d 1294, 1306 (10th Cir. 2006).

<sup>183</sup> See *id.*

<sup>184</sup> See *id.* at 1304.

<sup>185</sup> See *id.*

<sup>186</sup> See *id.* at 1304–05. The *Spun Steak* court acknowledged that an English-only rule might become part of a larger work environment hostile to national origin minorities. See *Garcia*, 998 F.2d at 1489.

<sup>187</sup> *Settlement Resolves Sexual Harassment, Retaliation, 'English-Only' Policy Complaints*, DAILY LABOR, Nov. 20, 1998, at A-7 [hereinafter *Settlement Resolves*]; see also Press Release, U.S. Equal Employment Opportunity Comm'n, *supra* note 47 (documenting \$192,500 settlement in English-only lawsuit against Watlow Batavia, an Illinois subsidiary of Watlow Electrical Manufacturing Co., in case in which eight former assembly line workers in suburban Chicago plant challenged their employer's English-only policy).

<sup>188</sup> See *Settlement Resolves*, *supra* note 187.

sonal or work-related.<sup>189</sup> And, in 1999, the Commission brought suit against a Chicago hair salon alleging that the salon employed discriminatory rules to “wipe out” its Hispanic hair stylists.<sup>190</sup> At the heart of the salon’s practices, the EEOC claimed, was management’s practice of repeatedly warning stylists not to speak Spanish under any circumstances.<sup>191</sup>

Recent court victories may also explain the willingness of some employers to settle, despite the paucity of court victories for plaintiffs.<sup>192</sup> In a particularly high profile case, the EEOC negotiated a \$1.5 million settlement in a suit against a Colorado casino alleging that it “verbally harassed and subjected a class of Hispanic employees to unlawful ‘English-only’ Rules.”<sup>193</sup> The language requirements had arisen informally within the managerial hierarchy when the human-resources director, without the knowledge of the casino owner, instructed supervisors in the housekeeping department that English was the official language of the casino. Workers alleged that managers and other employees shouted “English, English” at them in the hallways,<sup>194</sup> creating a climate of distress and embarrassment. As part of the settlement, the EEOC required the casino to make clear that no blanket prohibition against the speaking of non-English governed the workplace,<sup>195</sup> thereby ameliorating the isolation effects of the limitation.

In 2003, on the heels of these settlements, the New York City office of the EEOC brought two class action suits challenging the enforcement of broad English-only rules in the workplace. In its claim against a local outpost of the Sephora Cosmetics franchise, the Commission bases its theory of liability on the claim that the store deprived plaintiffs of equal employment opportunities and otherwise adversely affected their status as employees.<sup>196</sup> In the complaint, employees at a New York City store allege that they were told by management employees to speak English, including at break times. After the employees filed charges with the EEOC about the policy, corporate headquarters issued a nationwide memo reminding its retailers of the company’s English-only rule.<sup>197</sup>

In March 2006, the EEOC settled the case it had brought in 2003 against the Upper East Side’s multi-star Melrose Hotel, whose management had established a rule requiring employees to speak only English at all times, including during breaks. The Hotel agreed to pay thirteen plaintiffs \$800,000 in damages, and the consent decree that resulted from the settle-

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<sup>189</sup> *See id.*

<sup>190</sup> *EEOC Alleges, supra* note 30.

<sup>191</sup> *See id.*

<sup>192</sup> *See supra* notes 187–90 (discussing recent settlements in English-only cases).

<sup>193</sup> *Colorado Casino to Pay, supra* note 29.

<sup>194</sup> *See id.*

<sup>195</sup> *See id.*

<sup>196</sup> Complaint, *EEOC v. Sephora USA*, No. 03 CV 8821 (S.D.N.Y. Nov. 7, 2003).

<sup>197</sup> *See id.* at ¶ 8.

ment prohibits the company that owned the hotel, which closed in July 2005, from adopting English-only rules for its employees.<sup>198</sup> In its original complaint, the Commission offered two legal theories to support its claim that the rule constituted national origin discrimination. According to the plaintiffs, the rule not only imposed discriminatory terms and conditions of employment, it also gave rise to a hostile work environment under which employees had been reprimanded even for speaking Spanish to Spanish-speaking hotel guests.<sup>199</sup>

In sum, these efforts of the last several years represent part of a national strategy by the EEOC to target English-only workplace rules. As noted previously, the EEOC's position long has been that English-only rules may constitute unlawful national origin discrimination under Title VII.<sup>200</sup> In some versions of its compliance manuals, the Commission has observed that, "such rules, under certain circumstances, operate to disadvantage an individual's employment opportunities and to create a discriminatory working environment."<sup>201</sup> What is more, from the EEOC's point of view, an English-only rule may serve as a red flag indicating that other discriminatory practices exist or could emerge in the workplace.<sup>202</sup> As a result, the Commission has issued guidelines stipulating that a rule requiring employees to speak only English *at all times* presumptively violates Title VII as "a burdensome term and condition of employment,"<sup>203</sup> and that employers may adopt rules requiring employees to speak English at *certain times* only "where the employer can show that the rule is justified by business necessity."<sup>204</sup> The guidelines require employers to give employees notice of their rules in the form of specific instructions as to when only English may be spoken, in recognition of the phenomenon of code switching. As the

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<sup>198</sup> See Press Release, U.S. Equal Employment Opportunity Comm'n, Melrose Hotel, Berwind Property Group, to Pay \$800,000 to Settle National Origin Bias Suit by EEOC (March 16, 2006), available at <http://www.eeoc.gov/press/3-16-06a.html>.

<sup>199</sup> Complaint, EEOC v. Melrose Hotel Co., No. 04 CV 7514 (S.D.N.Y. Sept. 23, 2004). Plaintiffs sought a number of forms of relief, including a permanent injunction against the practice, an order to the employer that it carry out equal employment opportunities, front pay and reinstatement, past and future non-pecuniary losses, and punitive damages. *Id.*

<sup>200</sup> See U.S. Equal Employment Opportunity Comm'n, EEOC Compliance Manual § 13V(c) (2002), available at <http://www.eeoc.gov/policy/docs/national-origin.html>.

<sup>201</sup> U.S. Equal Employment Opportunity Comm'n, 2 EEOC Compliance Manual § 623.2(a) (1993). The current version of the EEOC Compliance Manual, *supra* note 200, does not contain this language.

<sup>202</sup> See, e.g., 29 C.F.R. § 1606.7(a) (2004) ("Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak more comfortably . . . may also create an atmosphere of inferiority, isolation, and intimidation based on national origin which could result in a discriminatory working environment."); Jaqueline M. Jacobson, *English-Only Rules and the Effect of the Business Necessity Defense on the Business Employer*, 5 J. SMALL & EMERGING BUS. L. 265, 270, 282 (2001) (citing the EEOC's guideline and noting that the "EEOC assumes that the reason for the rule is a form of national origin discrimination").

<sup>203</sup> 29 C.F.R. § 1606.7(a).

<sup>204</sup> *Id.* at § 1606.7(b).

EEOC puts it, “[i]t is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language.”<sup>205</sup>

So, despite the weight of the Fifth and Ninth Circuit decisions, and despite having its own interpretation of Title VII, and, by extension, its expertise, repeatedly questioned, the EEOC continues to pursue these suits. A number of factors might explain this persistence. First, the EEOC could be banking on exposure of such rules being bad business for employers who depend on an increasingly linguistically diverse public, such as the Colorado casino. Second, legal trends may be on the EEOC’s side, with some courts showing a willingness to scrutinize English-only rules, particularly when the rules are accompanied by evidence of harassment, and some states passing statutes prohibiting the imposition of English-only rules absent a legitimate business justification.<sup>206</sup> Finally, as the number of such complaints increases, the variety of circumstances demonstrating the harms of such rules multiplies, thus providing the EEOC with variations on the typical fact patterns with which to test the courts’ understanding of the concept of harm. But whatever the explanation may be, it is clear that the fight over the English-only workplace rule continues, largely through Title VII-related activity. At this point, then, to advance the debate, it is necessary to complicate our understanding of how these rules affect the workplace and its participants by understanding in some more detail why the parameters set by Title VII and the EEOC are inadequate for addressing this issue as understood from the perspective outlined in Part I.

### B. Title VII’s Inadequacies

The harms claimed by plaintiffs and dismissed by courts in the English-only cases fall into three categories: (1) interference with the expression of one’s cultural heritage; (2) entrenchment of unequal working conditions; and (3) creation of a hostile environment. I will consider each interest in turn, establishing where the courts go wrong in their rejection of each one. But I conclude with the claim that each of these interests, formu-

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<sup>205</sup> *Id.* at § 1606.7(c). Since formulating its guidelines, the EEOC has issued one decision declaring that a business’s absolute prohibition on speaking non-English was unlawful, *see* EEOC Dec. No. 81-25, 1981 EEOC LEXIS 7 (1981), and one decision approving a narrowly drawn rule, *see* EEOC Dec. No. 83-7, 1983 EEOC LEXIS 2 (1983). The EEOC found the rule to be permissible for two reasons. It applied only to employees working with potentially dangerous substances and equipment in areas where “constant and open communication” was required to avoid accidents and injuries to employers, and it applied only to conversations conducted in the course of performing a job duty. *See id.* In other words, under the EEOC’s view, the inquiry into business necessity will always be relevant, and the concept of necessity requires that the employer present a meaningful case, rather than a mere assertion, of necessity.

<sup>206</sup> Illinois and California have passed statutes prohibiting employers from passing English-only rules absent an overriding business necessity, and, in recent years, the Texas legislature has considered adopting a similar measure. For a discussion of these measures, *see infra* notes 271–83 and accompanying text.

lated using the frameworks provided by Title VII, fails to capture what is ultimately most objectionable about language regulation in the workplace—that such regulation represents a potentially destructive form of social engineering. Plaintiffs in these suits are, of course, constrained by the fact that they must fit their claims into Title VII’s paradigm of individual harm. But understanding the limitations of their claims helps expose the limitations of the Title VII framework.

*1. Expression, Immutability, and Choice.*—In approaching the claim that English-only rules interfere with the expression of cultural heritage, the courts begin by emphasizing that Title VII does not protect the employee’s expressive interests.<sup>207</sup> But the way the analysis proceeds in these cases suggests that courts cannot help but recognize that an expressive interest—albeit a limited one—is at stake. As noted in the previous section, when it comes to the application of English-only rules to non-English speaking workers, the courts acknowledge that these rules do interfere with those workers’ expressive interests.<sup>208</sup> The inability to use the only language one knows translates into the harm of social isolation or dehumanization. While the crux of the finding of liability is that this harm falls disproportionately on a protected category of workers, the distinction between non-English speakers and bilinguals is made not on the basis of the worker’s membership in that category, but on the weight of the expressive interest. In most courts’ view, the only burden with legal significance imposed by English-only rules is the inability to speak at all.

The conception of immutability behind this distinction is complex and a function of the expressive interest. The courts define immutability in the language cases by freezing the inquiry at a precise moment in time: Though a non-English speaker’s language ability is not in actual fact immutable (most people have the capacity to learn another language), it is thought to be constructively immutable. It would be unreasonable to expect a non-English speaking worker, for at least some of the period of time during which he remains a non-English speaker, to comply with an English-only requirement, because to do so would be to silence him.

For someone who understands English, however, the refusal to comply with an English-only rule is tantamount to a particular kind of self-expression—not the most basic kind that makes us human, i.e., speaking to others in a language we know, but a more rarified and therefore less protected form of communication: *cultural* self-expression.<sup>209</sup> The ability to understand English, therefore, marks the divide between protected and unprotected expressive interests. Once someone has developed the capacity to

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<sup>207</sup> See, e.g., *Garcia v. Spun Steak*, 998 F.2d 1480, 1487 (9th Cir. 1993).

<sup>208</sup> See, e.g., *id.* at 1488; *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980).

<sup>209</sup> See *supra* text accompanying notes 55, 207 (discussing courts’ rejection of challenges to English-only rules on the ground that Title VII does not protect a right to cultural self-expression).

speak English, the speaking of another language instantly becomes a matter of personal preference, and the rules that govern language are thus categorized with other employer practices that regulate voluntary behavior.<sup>210</sup> As Robert Post has pointed out, these types of claims ultimately look less like calls for fair and equal treatment and more like the assertion of a right of personal self-determination.<sup>211</sup>

But the literature on bilingualism, discussed above, suggests that employers' regulation of language use is distinguishable from other restrictions on expression through self-presentation that an employer might impose. In language usage, the psychological intertwines with the social. The use of a mother tongue, then, is both an emotional and a social act different in kind from an assertion of a purely personal right to self-determination. As noted in Part I, language use is simultaneously embedded in personality and intimately linked to a process of socialization that is ongoing—a process that does not end once the acquisition of a language (English) is complete. Bilingualism thus operates as a kind of filter and framework for individuals' interactions with one another.

These observations underscore that both plaintiffs and courts mischaracterize the employee's expressive interest as an interest in articulating or celebrating cultural *heritage*. The impulse or desire to use a particular language when speaking to particular people does not reflect an interest in celebrating an inherited identity, or a national origin; it reflects the use of an actual, living thing. In both its functional and symbolic dimensions, language use signifies a decision about how best to communicate with someone else; language use has an emotional significance that infuses both the decision to use it and the interactions framed by it.<sup>212</sup>

The phenomenon of code-switching only underscores that language usage is fundamentally about making oneself understood in context, not peppering one's speech with stylized allusions to one's ethnicity. So whether code switching suggests that language usage by bilinguals is a matter of choice or not, it at least highlights that language usage is not a matter of self-presentation. It is a learned social practice. The speaking of a language ultimately represents more than an expression of an underlying iden-

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<sup>210</sup> Cf. Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, in *PREJUDICIAL APPEARANCES* 45 (Robert C. Post et al. eds., 2001) ("It seems to be important that grooming and dress codes regulate voluntary behavior, for courts tend to conceptualize employees who present themselves in ways that violate established gender grooming and dress conventions as asserting a 'personal preference' to flout accepted standards.").

<sup>211</sup> *Id.*

<sup>212</sup> Indeed, my suspicion is that the workers who have framed their interest in speaking their mother tongue as an expression of heritage do not actually understand their language use in these terms until after the employer has imposed the restriction and the decision has been made to litigate. The experience of being prohibited from speaking one's native tongue forces the articulation of the interest in the most personal terms available, and the requirements of Title VII channel the grievance into the language of heritage-based identity.

tity, or the wielding of an emblem of culture—the forms of expression associated with other cultural characteristics.<sup>213</sup>

2. *Equality in the Workplace.*—The second and third interests often invoked by employees are two different versions of the claim that English-only rules deny equal opportunity in the workplace. Employees' claims that English-only rules impose unequal working conditions and create a hostile environment thus tend to bleed into one another. Again, the courts generally dismiss them by emphasizing that compliance with the rule constitutes nothing more than an inconvenience for the bilingual worker.<sup>214</sup>

With respect to the unequal conditions claim, the alleged inequality is typically framed as a deprivation of a privilege given to native speakers of English—the ability to converse on the job in the language in which the employee feels most comfortable.<sup>215</sup> The courts deal with this type of claim in a generally non-responsive manner. They treat the English-only rule as a kind of time, place, and manner restriction on the exercising of this privilege, in two ways. First, just as the employer may “proscribe certain topics as inappropriate during working hours or may even forbid the use of certain words, such as profanity,” the employer may regulate the language of speech.<sup>216</sup> Second, courts treat the English-only restriction as a regulation of the terms of actual job performance, which apply to all workers. In *Spun Steak*, for example, the Ninth Circuit supported its framing of the issue in this way by referring to a prior precedent in which the court had rejected a disc jockey's disparate impact claim based on his employer's insistence that he not use Spanish in his radio broadcasts.<sup>217</sup>

But these responses ignore plaintiffs' equality concerns altogether. The first time, place, and manner justification reframes the issue as a question of civility or job performance, rather than tackling the fact that workers who speak and prefer languages other than English are denied a privilege monolingual English speakers simply take for granted. Whereas a regulation of profanity is a burden shared by all workers, an English-only rule deprives only certain workers of the freedom to speak in the language they prefer. Under the guise of addressing this concern, the courts rely on one type of civility concern—concern for the use of profanity or substantively

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<sup>213</sup> Of course, by emphasizing the uniquely social dimension of bilingualism, I do not mean to suggest that other cultural characteristics, such as hair or dress styles, are not understood by their bearers as fundamental expressions of identity, nor do I mean to imply that the suppression of certain cultural characteristics can never constitute pretextual discrimination. But both language and bilingualism are unique in their relationship to personality formation and socialization, and the regulation of language usage, therefore, has unique consequences.

<sup>214</sup> See, e.g., *Garcia v. Spun Steak*, 998 F.2d 1480, 1487–88 (9th Cir. 1993); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1412 (9th Cir. 1987).

<sup>215</sup> See, e.g., *Spun Steak*, 998 F.2d at 1487.

<sup>216</sup> *Id.*

<sup>217</sup> See *id.* (citing *Jurado*, 813 F.2d at 1412).

inappropriate discussion—to justify a much broader form of regulation that imposes a comprehensive limitation on the speech of workers.

The second time, place, and manner justification also elides the equality concern by conflating the employer's interest in having the substance of the job performed in English—the legitimate interest in having a disc jockey speak English to reach an audience of English speakers—with the regulation of all speech in the workplace, regardless of whether that speech relates to the employer's essential mission.<sup>218</sup> In both instances, the courts essentially understand the unequal conditions claim as a claim by employees to say what they want. The immutability framing of the issue abets this analysis, because it allows courts to treat bilingual employees' concerns as matters of choice and self-determination. But this framing allows courts to ignore the ways in which English-only rules limit the capacity of workers to interact with one another by preventing them from using an entire comprehensive medium—their language. The English-only rule amounts to a systematic rejection of a pervasive form of interpersonal interaction, different in kind from declaring uncivil words or topics off limits, or requiring employees to stay focused on the job when performing actual job functions.

The significance of such comprehensive limitations on the interpersonal dynamics of the workplace was clear to a different panel of the Ninth Circuit in its 1994 *Yñiguez v. Arizonans for Official English* decision, in which the court struck down the official English amendment to the Arizona state constitution passed by the voters through a ballot initiative.<sup>219</sup> In *Yñiguez*, the court emphasized that limiting an employee's ability to speak on the job by prohibiting the use of languages other than English was not just coercive, but coercive in a particular way. The English-only restriction on the public-employee plaintiff limited her capacity to do her job by stifling the natural interpersonal dynamics of the workplace. The rule prevented her from speaking a language other than English—something that may well have facilitated her dealings with co-workers and the public seeking services. Though the Ninth Circuit based its finding of First Amendment liability on the constraints the rule imposed on state employees' abilities to do their jobs, its concern was clearly social: the English-only rule suddenly made the public workplace less accessible to certain segments of the population.

Though courts have not been receptive to unequal conditions claims, plaintiffs have been moderately more successful with the hostile environ-

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<sup>218</sup> Cf. Kim Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147 (2004) (arguing that the courts' rulings in sex discrimination cases are based not on a meaningful conception of what certain businesses require, but on broader conceptions of the nature and type of work opportunities men and women should face and the degree of control customers should have over the services they receive).

<sup>219</sup> 69 F.3d 920 (9th Cir. 1995), *vacated as moot*, 520 U.S. 43 (1997). The Arizona Supreme Court invalidated the amendment on substantially similar grounds in *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998).

ment theory of workplace inequality.<sup>220</sup> Even in this context, however, significant inequalities in the way courts treat language use have emerged. To be sure, in rejecting employees' Title VII hostile environment claims, some courts have contemplated that English-only rules, under certain circumstances, might corrupt the dynamics of the workplace,<sup>221</sup> and the *Maldonado* court entertained the possibility that an English-only policy itself, and not just the effects of the policy, "may create or contribute to the hostility of the environment."<sup>222</sup> Most courts will not, however, infer "isolation, inferiority, or intimidation" from the existence of a rule itself.<sup>223</sup> At most, an English-only rule will serve as a piece of evidence in a hostile environment case. Other forms of discrimination, such as draconian enforcement or taunts by fellow employees, must accompany the existence of the rule for a prima facie case of hostile environment to be made.

This approach, however, rejects the assumption that the EEOC has long made—that English-only rules presumptively create a hostile environment. As noted in Part I, this demand requires employees to come forward with evidence, other than their own conclusory statements, that English-only rules isolate. Recall the case of the Polish-speaking church housekeeper, whose claim a federal district court rejected on the ground that she had the capacity to comply with the archdiocese's English-only rule,<sup>224</sup> and the asymmetry that emerged from the court's analysis of the rule. The court was willing to assume the harm the employer claimed to be regulating—that the non-Polish speakers of the parish would be alienated by hearing Polish spoken around them<sup>225</sup>—but not the harm claimed by the Polish employee told not to speak Polish. Whereas the intrusiveness of the non-English language is self-evident, bilinguals, in order to prove that an English-only rule creates a hostile environment, must present objective evidence of acts related to, but not coterminous with, the existence and regular enforcement of the rule. The courts demand that bilingual plaintiffs prove harm, but then reject the possibility that the primary harm imposed by the rules is a purely subjective one. Language usage is presumed to create hostile conditions, but language suppression is not. These assumptions reflect important social circumstances, namely the dominance of English. But for reasons I discuss in Part I, it is important to modify these assumptions with

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<sup>220</sup> See *supra* notes 182–95 (discussing hostile environment cases).

<sup>221</sup> See, e.g., *Spun Steak*, 998 F.2d at 1489.

<sup>222</sup> See *Maldonado v. City of Altus*, 433 F.3d 1294, 1304–05 (10th Cir. 2006); see also *id.* at 1306 (noting that the EEOC's rationale that an English-only policy in itself may create an atmosphere of inferiority, isolation, and intimidation is entitled to respect).

<sup>223</sup> See, e.g., *id.*

<sup>224</sup> *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730 (E.D. Pa. 1998) (dismissing Title VII challenge to English-only rule on 12(b)(6) motion, in light of plaintiff's failure to state a claim on which relief could be granted, given the absence of unlawful disparate impact).

<sup>225</sup> *Id.* at 735–36.

other salient social realities, namely the linguistic diversity of our population.

3. *Beyond Title VII.*—Ultimately, the most significant aspect of the Title VII cases, taken as a whole, is the courts' emphasis on choice as the decisive factor in determining the viability of a civil rights claim. The Ninth Circuit in *Spun Steak* prefaced its conclusion in favor of the employer with a citation of the Fifth Circuit's authoritative declaration: "It is axiomatic that the language a person who is multi-lingual elects to speak at a particular time is . . . a matter of *choice*."<sup>226</sup> The Fifth Circuit, in *Gloor*, had made clear its belief that Title VII was not intended to protect characteristics over which individuals exercise control, emphasizing that the civil rights laws do not "prohibit all arbitrary employment practices," but rather focus on prohibiting discrimination on the basis of traits that are "beyond the victim's power to alter."<sup>227</sup> To the extent that courts have deviated from this line, they have justified that deviation, in part, by problematizing the idea of choice through reliance on expert testimony that casts doubt on the belief that bilinguals have complete control over the language they speak.<sup>228</sup>

The idea of choice thus frames the debate over workplace language regulation—a frame that makes sense when the English-only issue is channeled through Title VII litigation. But this doctrinal back and forth and its fixation on the nature of the choice in question is largely beside the point—a distraction. The framework Title VII gives us for evaluating employers' regulations for their civil rights implications is not adequate for addressing the issue. Even if a strong argument, relying on existing law and a more nuanced conception of choice, could be formulated to show that the courts' disparate-impact analysis should be coming out differently, relying on Title VII to come to terms with the English-only workplace rule will be fraught, for a variety of reasons.

First, because Title VII lists a set of protected categories, courts must focus their analysis on whether the people challenging a given employment rule fall within the categories Title VII was meant to protect, rather than on the more important bottom line, i.e., what is wrong with the employment practice at issue. In the context of English-only rules, then, courts are forced to grapple with whether language rules function as discrimination on the basis of "national origin," the statutory category on which the English-only lawsuits are based. But "national origin" is the least well understood of the statuses listed in Title VII, in part because the legislative history does not speak with any amount of detail to its meaning,<sup>229</sup> but also because the

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<sup>226</sup> *Spun Steak*, 998 F.2d at 1487 (emphasis added) (quoting *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980)).

<sup>227</sup> *Gloor*, 618 F.2d at 269.

<sup>228</sup> See *supra* notes 175–77 and accompanying text.

<sup>229</sup> See *Gloor*, 618 F.2d at 268 n.2 ("The statute's legislative history concerning the meaning of 'national origin' is 'quite meager.'"); James Leonard, *Bilingualism and Equality: Title VII Claims for Lan-*

concept of national origin has no obvious definition. One view in the courts appears to be that national origin refers to where one was born or where one's parents were born.<sup>230</sup> When taking this approach, the courts effectively rely on the idea of immutability to define the statute's terms. But the *fact* of one's birthplace seems to be quite beside the point in the cases that arise, where neither workers nor employers seem to even care whether the former were born in Mexico, Poland, the Philippines, or the United States.<sup>231</sup> The absence of a statutory definition has ensured confusion in the courts over the statute's coverage.<sup>232</sup>

Second and more importantly, the criticisms I have advanced of the courts' analysis of English-only rules ultimately reflect profoundly social concerns, which operate on the three levels I discuss in Part I.<sup>233</sup> But Title VII is not able to capture the social effects—the associative effects—of the English-only rule. Because of the legal constraints that have grown up around Title VII—constraints that include not just the “national origin” lan-

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*guage Discrimination in the Workplace*, 38 U. MICH. J.L. REFORM 57, 101 (2004) (discussing minimal congressional debate on the meaning of national origin and the absence of indications that Congress was concerned with cultural traits such as language).

<sup>230</sup> The Fifth Circuit in *Garcia v. Gloor*, for example, noted that “[n]o one can change his place of birth (national origin), the place of birth of his forebears (national origin), his race or fundamental sexual characteristics.” 618 F.2d at 269; *see also* Perea, *supra* note 135, at 817–21 (concluding that Title VII's legislative history indicates that Congress thought national origin referred to place of one's birth).

<sup>231</sup> *See* Perea, *supra* note 135, at 839 (noting that discrimination experienced by national minorities is based on ethnic traits, not on the fact of their place of birth); *see also* Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 577 (1995) (observing that understanding national origin to mean place of birth is less relevant today, given that few actors discriminate so overtly in a post-civil rights world).

<sup>232</sup> *See* Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 328 (1997) (discussing this confusion); Wayne N. Outten & Kathleen Peratis, *National Origin Discrimination*, 676 PLI/Lit 291, 296 (2002) (“Although national origin as a prohibited ground of discrimination is a secure feature of the ‘litany’ of protected groups . . . we are today nevertheless aware of the uncertainty of its content.”). It is, of course, wholly appropriate for courts facing Title VII cases to consider whether Congress intended Title VII to apply to English-only rules and bilingual workers qua bilingual workers. But this question, legitimate within the Title VII universe, has so distanced the analysis of English-only rules from an inquiry into what language rules actually mean for workers that we need an alternative framework.

<sup>233</sup> First, they operate at the level of the interpersonal within the workplace; fear of discipline or surveillance will restrain the bilingual worker in his interactions with fellow employees and the public. *See, e.g.*, *EEOC v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000) (“On a daily basis, the Hispanic employees of Defendant were faced with the very real risk of being reprimanded or even losing their jobs if they violated the English-only rule, even if such non-compliance was inadvertent. There was no comparable risk posed by the policy for Defendant's non-Hispanic employees . . .”). Second, English-only rules create a structural mismatch between the workplace and the community of which it is a part. Third, by not allowing speakers of non-English to use their language in the workplace setting, employers make it that much more difficult for communities in which languages other than English are spoken to sustain the linguistic ties that give them their particular character. In other words, by eliminating a sphere of life in which non-English languages remain functional, employers speed the process of linguistic assimilation. For reasons I explain elsewhere, this social consequence of English-only workplace rules is one we should lament. *See* Rodríguez, *supra* note 4, at 723–25.

guage of the statute (which could be amended), but also the legal culture surrounding the issue of civil rights (which would be far more difficult to alter)—it has been difficult for bilinguals to make individualized claims successfully. In any one case, absent other evidence of harassment, bilingual employees will have a hard time demonstrating individualized harm, even though it seems clear that English-only rules impose a burden on bilingual individuals that the courts are discounting.

The two primary, existing critiques of the courts' reasoning in the English-only cases reflect the understandable tendency to view conflicts that arise from culture clash in the workplace through the lens given us by Title VII. Like the court in *EEOC v. Premier Operator Services*,<sup>234</sup> some critics deny that bilingualism is a matter of choice and that the standard disparate-impact analysis should apply to English-only rules.<sup>235</sup> Others suggest that Title VII be amended to include language and other national origin characteristics to make clear that employers may not discriminate on the basis of those traits.<sup>236</sup>

Neither of these approaches, however, offers an adequate response to the way the courts have framed the language cases. Both approaches keep us focused on the essential framework created by Title VII. The first argument simply accepts the terms of the immutability debate. It is based on what may well be an overdrawn or disprovable theory of code switching, stretched for the purposes of undermining English-only rules, and it requires courts to make particularly specific judgments about social science evidence far outside their realm of expertise. And the second response would not necessarily end the debate, because it would not close off the possibility of distinguishing between non-English speakers and bilinguals on the theory that English-only rules as applied to bilinguals do not cause harm. In other words, the concept of “discrimination based on language” could still be defined in terms of choice, because restricting the language usage of bilinguals could still be treated as a *de minimis* inconvenience, rather than as harmful discrimination.

Quite simply, it is time to step outside the Title VII framework. By looking for a way through this issue that simultaneously avoids the choice question and captures the social effects of English-only regulation, I hope to advance two important paradigm shifts. First, the immutability of characteristics should not be the touchstone of our attempts to decide which cultural characteristics to protect. I consider the idea expressed by Judge Reinhardt in his dissent from the denial of rehearing in *Spun Steak*—that the ability to comply with a rule is not necessarily a measure of the adverse

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<sup>234</sup> 113 F. Supp. 2d at 1069.

<sup>235</sup> See, e.g., Mark Colón, Note, *Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees*, 20 YALE L. & POL'Y REV. 227, 251 (2002).

<sup>236</sup> See Perea, *supra* note 135, at 809.

effects of that rule—to be self-evident.<sup>237</sup> After all, as he points out, it was not impossible for blacks to comply with the rule that they sit at the back of the bus.<sup>238</sup> This pointed example reflects the realization that the ability to “accede” to a demand, in Yoshino’s words,<sup>239</sup> does not mean that the demand does not act in some negative way on the person forced to comply.<sup>240</sup> The issue of choice is beside the point. In stepping outside Title VII’s choice paradigm, then, I assume that requiring individuals to make certain types of choices may nonetheless be coercive. While all choices are on some level coerced (or at least constrained), it is important to identify when the coercion becomes undesirable, and when the law can be used to ameliorate the coercion.

Second, the paradigm shift signaled in *Grutter v. Bollinger*<sup>241</sup> also should be acknowledged. In *Grutter*, the Supreme Court reoriented affirmative action jurisprudence from a backward looking search for discrimination into a forward looking consideration of the social value of racial and ethnic diversity. The move arguably rejects the constitutional parallel of the choice paradigm, or the colorblind theory of equality. Indeed, the courts’ focus on choice in the Title VII context echoes the colorblind conception of equality that has long been challenged by advocates and scholars.<sup>242</sup> The notion that individuals have no control over certain characteristics—namely race—has fed a central tenet of contemporary equal protection doctrine: that these traits are morally irrelevant. This irrelevance, in turn, supports the principle that the state (through the Constitution) and employers and public accommodations (through statutory law) should be prohibited from making race-conscious decisions, absent a compelling justification. This colorblindness casts doubt on measures that accommodate racial or culture-based differences out of fear that such accommodation might actually mask invidious discrimination.

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<sup>237</sup> See *Garcia v. Spun Steak*, 13 F.3d 296, 298 (9th Cir. 1993).

<sup>238</sup> See *id.* This analogy, of course, has its limitations. Understood in its social context, this requirement was clearly imposed on the basis of race, and so this example looks more like an instance of disparate treatment than disparate impact. But even if the requirement had been the result of a seemingly neutral policy, the point remains the same: the rule humiliated blacks, and the fact that it was an easily obeyed rule did not diminish the humiliation.

<sup>239</sup> See Yoshino, *supra* note 140, at 779.

<sup>240</sup> For other critiques of the courts’ reliance on the immutability standard in trait-based discrimination cases, see Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 839 (1987) (observing that the ability to comply with a rule does not tell us how important that trait is to the individual); Roberto J. González, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195 (2003) (noting that mutability does not mean that a person required to suppress a particular trait does not experience adversity and arguing that the requirement of demonstrating impact should be done away with altogether in disparate impact cases).

<sup>241</sup> 539 U.S. 306 (2003).

<sup>242</sup> See, e.g., Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 18 (1991).

In upholding the University of Michigan's affirmative action plan in *Grutter*, however, the Court offered up an equal protection analysis that suggests a quite different way of thinking about the connection between difference and equality—an approach that begins by declaring compatible the requirements of the Equal Protection Clause and the state's interest in promoting a diverse student body.<sup>243</sup> The precise doctrinal issue in the case was whether the state's interest in diversity was sufficiently compelling and its use of race sufficiently limited to satisfy the requirements of the Fourteenth Amendment, or to overcome the presumption, built into the Equal Protection Clause through the Court's jurisprudence, that race-conscious decisionmaking promotes inequality.<sup>244</sup> In finding the state's practice constitutional, the Court ultimately characterized Michigan's pursuit of diversity not as a value to be balanced against equality, but as a value whose pursuit actually promotes equality in two important ways. Not only does the pursuit of diversity in the classroom add intellectual value to the life of the University and help break down the stereotypes that entrench inequalities by facilitating interaction among society's different groups, but the visible inclusion of those groups in the student body also confers social legitimacy on the University qua public institution.<sup>245</sup>

This reorientation in affirmative action jurisprudence is significant for my purposes, because both the idea of undermining stereotypes through exposure and the idea of social legitimacy conferred through diversity are based on the assumption that *recognizing* certain socially salient characteristics is valuable in shaping and filling institutions.<sup>246</sup> By extension, then, rendering those characteristics invisible either through exclusion or suppression might actually undermine the legitimacy of certain institutions. What is more, neither of the equality goals embodied in the diversity interest depends on giving special protection or solicitude only to those characteristics that are immutable and whose exclusion would therefore be more problematic. Indeed, diversity, as the Court and the University of Michigan both defined it, depends not only on the inclusion of racial minorities, but also on the incorporation of students who possess a wide array of personal characteristics, many of which are not immutable in the way race is immu-

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<sup>243</sup> See *Grutter*, 539 U.S. at 325.

<sup>244</sup> See *id.* at 326–27.

<sup>245</sup> *Id.* at 330, 332 (“[T]he Law School’s admissions policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races’ . . . . In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools ‘cannot be effective in isolation from the individuals and institutions with which the law interacts.’” (internal citations omitted)).

<sup>246</sup> For a discussion of why the workplace should be considered one of these institutions, see *supra* notes 55–63 and accompanying text.

table.<sup>247</sup> Whether a quality is thought to be valuable in the diversity calculus does not depend on whether that quality is freely chosen. The characteristic's value, instead, stems from its social salience. Immutable characteristics, such as race, are certainly socially salient. But so are changeable characteristics, such as linguistic or religious identity, or commitment to public service, athletics, or music, for that matter.<sup>248</sup>

To be sure, the Court, in defining diversity, was not suggesting that these other salient qualities should be treated the same way for the purposes of equal protection analysis, triggering strict scrutiny, for example. And, in authorizing universities to rely on race-conscious decisionmaking but then declaring that such use should be limited in time,<sup>249</sup> the Court simultaneously underscored the centrality of race to the pursuit of equality and reinforced the colorblind paradigm—both factors that highlight the immutable aspect of race. But the end result the Court identified as compelling—the diverse student body—will remain compelling even after race-consciousness is no longer necessary to its achievement.

In other words, the idea that, as a matter of social equality, we should be concerned primarily with the effects of powerful decisionmakers' actions on characteristics that are not a matter of choice arguably has been deemphasized by a Court focused on a different objective—maintaining the legitimacy of important social institutions given the social contexts of our diverse demography. While the idea of choice is still relevant to understanding *how* certain policies affect different groups—e.g., we might be more concerned with admissions policies that exclude racial minorities than those that exclude oboe players because of the immutability factor—choice should not be the all-important pivot around which the legitimacy of different social practices turns. The Court's development of the diversity idea thus helps us to see that in deciding how to treat salient differences in a manner that promotes social equality, simple heuristics like the choice versus immutability paradigm will not always provide the best answers. The achievement of certain compelling social objectives, such as facilitating meaningful interaction among different social groups, will involve accom-

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<sup>247</sup> See *Grutter*, 539 U.S. at 336–38 (discussing University's holistic review process).

<sup>248</sup> The inclusion of these types of talent-based qualities helps highlight the limited use of immutability in determining which characteristics the law should protect. Musical talent, athletic ability, and intelligence are pretty close to immutable characteristics in that we are born either with or without them. But to observe that we cannot will ourselves to be athletically gifted does not mean that it would be impermissible for a coach to keep us off her squad because she would be discriminating on the basis of an essentially immutable characteristic. In other words, calling something "discrimination" depends as much on the social context in which the decision is being made as it does on the extent to which the basis for the discrimination is something over which the individual has control.

<sup>249</sup> *Grutter*, 539 U.S. at 342–43.

modating socially salient characteristics, regardless of whether those characteristics are immutable.<sup>250</sup>

In order to determine how English-only workplace rules should be policed, then, it becomes necessary to leave the standard doctrinal debates aside. When we consider English-only rules free of the constraints of Title VII, we can face directly their harms for workers, regardless of whether national origin includes language, or whether the workers in question have no, some, or complete control over their speaking of non-English. And we can give direct consideration to the extent to which English-only rules have social consequences, or affect the social interests of workers, rather than focusing simply on whether they violate the individual's right to be free from discrimination as defined by Title VII.

### III. DIVERSITY MANAGEMENT THROUGH LAW REFORM

Having established the case against the comprehensive English-only rule, and having considered why the existing Title VII framework does not properly address the rule's real harms, it now becomes important to discuss how the law should address the English-only phenomenon. Stepping outside of Title VII's boundaries permits us to reframe language policy and diversity management in two important ways. First, it allows us to see the issue in more appropriate institutional and geographic terms. Second, we need no longer be bound by the requirements of the immutability paradigm and can instead focus on how personal characteristics relate to the critical social and solidaristic interests implicated in disputes over workplace pluralism.

#### *A. Language Rules and Decentralization*

As I have explained at length elsewhere, matters of language policy and efforts to manage cultural diversity should be conceptualized through the lens of decentralization—a lens that makes it possible to deal with a complex phenomenon without resort to the blunt instrument of a uniform, national rule.<sup>251</sup> Within this decentralized framework, there nonetheless will be a role for Title VII to play. First, English-only rules often form part of broader national origin claims by employees. In a claim alleging disparate treatment on the basis of national origin—a claim that should continue to be litigated through Title VII—the existence of an English-only rule may be important evidence of an employer's more pervasive unlawful employment practices. Second, the courts' intuition discussed in Part II—that English-only rules have a legally cognizable impact when applied to workers who

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<sup>250</sup> For an analysis of how *Grutter* might affect the evaluation of affirmative action in the employment context, see Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. OF EMP. & LAB. L. 1 (2005).

<sup>251</sup> See Rodríguez, *supra* note 4, at 720–21, 758–65.

do not speak English—should be preserved. In other words, Title VII sets a baseline for the treatment of language in the workplace that regards rules tantamount to no-speaking rules for certain workers as presumptively suspect; such rules erect serious barriers to the equal treatment and advancement of affected workers and should therefore not be tolerated—certainly not on a disparate basis, and probably not at all. The interest in basic communication—in the ability simply to speak on the job—represents an interest that is almost certainly uniform among non-English speaking workers in the United States. Because this interest is, in a sense, “de maximis,” it makes sense to treat it as a federal norm that generally trumps the employer’s prerogatives.

Though the impact of English-only rules on bilingual employees may not be as significant as the impact on non-English speakers, that impact is not *de minimis*, as the courts often assume. But unlike the interest of the individual who does not speak English, the interests of bilinguals and the communities in which they live are not uniform. For some communities in some parts of the country, the interest in preserving one’s native language and in using it in the public sphere will be strong. Others might fully embrace the expectation of linguistic assimilation, inside and outside the home. Different communities will have different groups competing in the workplace. In some cities, diversity will be thick, and in others it may just involve a single minority group. In some localities, the tensions among groups may be high and the need for a unifying mechanism correspondingly great. In other places, the very presence of such tensions might require strong resistance to homogenizing legal rules. In other words, the linguistic dynamics of any given community are sufficiently complex to require a more nuanced decisionmaking mechanism than the one Title VII offers.

Reform efforts at the state and local level offer that mechanism. Because the nature of language diversity in the workplace is likely to differ from region to region, it makes sense to have the issue worked out in state and local governments, where people have a more direct stake and involvement, and where the process of adapting to diversity can reflect community concerns. By resisting the temptation to resort to federal norms, a decentralized law reform response will help ensure that the decisions made on the subject reflect the inevitable local variations described above. A decentralization of the energies put into Title VII litigation and a reframing of the issue as a state issue might also encourage regulatory competition among states seeking to attract immigrant labor—competition that will improve the quality of life for immigrants in workplaces across the country. Though immigration remains regionally concentrated,<sup>252</sup> immigrants are increasingly settling in suburban and rural communities outside the traditional

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<sup>252</sup> See Suárez-Orozco, *supra* note 54, at 74 (noting that 85% of the Mexican immigrant population resides in Texas, California, or Illinois).

gateway cities,<sup>253</sup> drawn by employment opportunities across the country. States and, more importantly, localities may find that ensuring hospitable work environments through policies such as prohibitions on English-only rules will help attract the labor they need, particularly if activists put energy behind state and locally based efforts. Finally, decentralizing this issue will have democracy-enhancing benefits beyond ensuring a more responsive policy process, because it offers an avenue for states and localities to participate in the immigration debate by which they are directly affected.<sup>254</sup>

Put slightly differently, continuing to frame the issue of language diversity in the workplace in Title VII terms would be a long-term strategic mistake for anyone interested in flexible reform designed to adjust the law to our changing demography. Title VII litigation offers mixed possibilities for success; despite recent court victories and settlements for English-only plaintiffs, continued litigation seems unlikely to truly shift the presumption against English-only rules. Of course, a national *legislative* rule that establishes a presumption against the English-only practice would provide the most comprehensive protection of workers' interests. As noted in Part II, some commentators have suggested amending Title VII to include language or other cultural characteristics to accomplish this objective.<sup>255</sup> But assuming this particular issue could even make it onto the national legislative agenda—a possibility about which I am skeptical—pursuing this course would thrust the language issue onto the national stage, where debates over language policy tend to be distorted and ultimately incompatible with the normative goals I have outlined in this Article.<sup>256</sup>

Distortion occurs at the national level, because participants in national language policy debates rapidly conflate the underlying policy issue—in this case, whether employers should be free to regulate the language of the workplace—with the question of whether English should be declared the official, national, or common language of the United States. Genuine policy questions tend to be obscured quickly by grandiose posturing on the meaning of American national identity. Attempts to define a national identity in a country as vast and diverse as this one are fraught, to say the least, and the national identity trope ultimately stifles debate over the underlying policy problem. One side of the debate relies on an extraordinarily generalized description of American society and culture (that we have been able to

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<sup>253</sup> See Waters & Jiménez, *supra* note 54, at 106–07.

<sup>254</sup> See Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 192 (2005) (arguing that if “regulations are not the result of the decisions of the persons affected by them, then those persons have been deprived of self-rule in a way that injures their dignity and deprives them of a political education”).

<sup>255</sup> See Perea, *supra* note 135, at 809.

<sup>256</sup> In the current climate, for example, in which immigration enforcement and border protection represent high priorities for many members of Congress, a Title VII-based reform strategy on language issues, which inevitably would be conflated with concerns over unlawful immigration, would be misguided.

function as a nation only by outgrowing linguistic pluralism) and the other side on multicultural rhetoric (that we are a nation of many peoples and cultures). Each of these pat statements is necessarily divorced from the demographic complexity that defines and distinguishes the country's countless multi-ethnic communities, and thus does nothing to advance the policy debate.

The recent debate in the Senate over immigration reform offers a telling case in point. In the midst of the Senate's extended consideration of the legalization of unauthorized immigrants, a potential guest worker program, and a comprehensive overhaul of a highly technical and complex immigration system, the Senate took a detour into the realm of cultural symbolism by passing two amendments declaring English the national or common language of the United States.<sup>257</sup> Immigration-related debates tend to surface this sort of assertion of national unity through "defenses" of the English language,<sup>258</sup> and it is therefore inevitable that such debates will take place at the national level, given Congress's plenary control over substantive immigration law. But it can be counterproductive to pursue other language policy objectives, such as the regulation of English-only rules in the workplace, at the national level for reasons underscored by the Senate's recent foray into the language question.

Republican Senator James Inhofe of Oklahoma introduced the first of two language amendments, declaring that "[t]he Government of the United States shall preserve and enhance the role of English as the national language of the United States of America."<sup>259</sup> But in addition to this bit of symbolism, the amendment also contained language with potentially serious policy consequences. Language in the amendment could be read to relieve federal agencies and recipients of federal funds of some of their current legal obligations to provide translation, interpretation, and multilingual signage for persons with limited English proficiency.<sup>260</sup> But these are the very

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<sup>257</sup> See Jonathan Weisman & Jim VandeHei, *Senate Votes English as 'National Language,'* WASH. POST, May 19, 2006, at A01.

<sup>258</sup> Another example of this phenomenon arose in a recent floor debate over a proposal by the D.C. City Council to permit non-citizens to vote in local elections. The discussion quickly devolved into speeches about how immigration and the "cult of multiculturalism" threaten American national identity and security. See 150 CONG. REC. H5958, H5964 (daily ed. July 19, 2004) (statement by Rep. Tom Tancredo) ("It is citizenship, it is the concept of a nation State that we are today debating. Whether or not its existence can be assured, certainly we do not know, but I can guarantee my colleagues this, that the threats to its existence are great and are exacerbated by the cult of multiculturalism and unrestrained immigration.").

<sup>259</sup> 152 CONG. REC. S4724 (daily ed. May 17, 2006) (statement of Sen. Inhofe) (introducing "Language of the Government" amendment).

<sup>260</sup> Senator Inhofe's amendment reads, "Unless otherwise authorized or provided by law, no person has a right, entitlement, or claim to have the Government of the United States . . . perform or provide services, or provide materials in any language other than English." *Id.* The critical question raised by this language is what constitutes "law." We can safely assume it includes existing congressional statutes, such as the bilingual ballots provision of the Voting Rights Act, 42 U.S.C. §§ 1971-1974(e)

services that operate as mechanisms of assimilation by helping immigrants and other people with limited English-speaking ability function as members of our society. Language services also enable entities that interact with non-English speakers—such as health care providers, emergency services providers, public health officials, police, and public schools—to carry out their missions. In other words, the Inhofe amendment could disrupt the legal basis of a system of services on which our public health, safety, and welfare depend.

But the debate over this serious matter of language policy inevitably became intertwined with ponderous rhetoric about the need to rally around the English language to promote national unity.<sup>261</sup> This feature of the debate, in turn, arguably complicated efforts to resist the counterproductive policy, because the policy was linked to emotional statements about common culture that are difficult for politicians to oppose.<sup>262</sup> Indeed, the mere introduction of a language policy matter into congressional debate can create pressure for legislators otherwise inclined to adopt accommodationist policy to also make symbolic statements about the primacy of the English language, which are themselves problematic in certain contexts. Democratic Senator Ken Salazar of Colorado, for example, introduced an amendment to prevent the policy damage that could have been dealt by the Inhofe amendment, but did so with similar symbolic language declaring English the “common and unifying language of America.”<sup>263</sup> Without this symbolic

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(1994), or the Court Interpreters Act, 28 U.S.C. § 1827(b)(1) (2006). But if “law” does not include executive orders, then Inhofe’s amendment would obviate a Clinton-era executive order, affirmed by President Bush, that requires federal agencies and recipients of federal funds “to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons.” Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000). Legislative history suggests that Senator Inhofe intended precisely this outcome. *See* 152 CONG. REC. S4754 (daily ed. May 18, 2006) (statement of Sen. Inhofe) (“Here we are making clear that there is no legal basis for Executive Order 13166 that purported to direct services and materials in languages other than English.”).

<sup>261</sup> *See, e.g.*, 152 CONG. REC. S4609 (daily ed. May 16, 2006) (statement of Sen. Inhofe) (“Our country is made up of immigrants from all over the world, immigrants who have joined together under common ideas, common beliefs, and a common language to function as ‘one nation under God.’ . . . As we allow great numbers of immigrants . . . into the country, we are overwhelming the assimilation process and creating what some have called ‘linguistic ghettos.’ . . . By not requiring immigrants to assimilate and learn English, we are also undermining our unity and importing dangerous, deadly philosophies that go against our American ideals.”); 152 CONG. REC. S4737 (daily ed. May 18, 2006) (statement of Sen. Alexander) (“This amendment is as important as any amendment which is being offered because it helps take our magnificent diversity and make it something even more magnificent. It recognizes that only a few things unite us: our principles, found in our founding documents, and our common language.”).

<sup>262</sup> A number of Democrats did, in fact, oppose the amendment, but they are treading on politically treacherous territory, and it remains to be seen whether they can maintain their positions as the immigration bill goes to the House-Senate conference committee.

<sup>263</sup> 152 CONG. REC. S4813 (daily ed. May 18, 2006) (recording introduction of Senator Salazar’s “Preserving and Enhancing the Role of the English Language” amendment). Senator Salazar’s amendment defines law as “including provisions of the U.S. Code, the U.S. Constitution, controlling judicial

statement, it seems unlikely that Senator Salazar's amendment curing the policy problems of the previous amendment would have attracted enough votes to pass. Though the statement is essentially a truism and therefore uncontroversial on its face, the context in which it was made gave it an aggressive, divisive quality.<sup>264</sup> It was the product of political momentum to assert a particular conception of American identity in the midst of a difficult and heated national debate about who has the right to live, work, and belong in the United States.<sup>265</sup>

It is, of course, possible that state and local lawmakers will appeal to similar rhetoric. But, as a general matter, they are less likely to feel the need to articulate a national identity through their policy than members of Congress, for obvious structural reasons. More importantly, because of the regional concentration of the country's language diversity, decentralized political processes are more likely to produce language policy that reflects an appreciation of minority interests than national debates. For many members of Congress and their constituents, the language question really is just an abstraction. The idea of meaningful and pervasive linguistic diversity, in the workplace or in any other institution, can only be hypothetical, or something experienced in some other corner of the country. The regional nature of the phenomenon means that appreciation for what is actually at stake is not distributed evenly across the country.<sup>266</sup> Addressing the chal-

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decisions, regulations, and Presidential Executive Orders," *see id.*, and thus cures the potential dangers of the Inhofe amendment.

<sup>264</sup> To be sure, Senator Salazar sought to address the potential divisiveness of the law by defining English as the common language, which suggests merely that it is the language most people speak in common, rather than the national language, which equates the nation, the entity called the United States, with English. But these subtle shifts in language are arguably not sufficient to alter the core, hegemonic message of the amendment.

<sup>265</sup> For a more detailed discussion of official English laws, see Rodríguez, *supra* note 4, at 752–54. *See also* Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 138–40 (2001) (discussing the absence of a need to declare English the national language).

<sup>266</sup> Of course, by suggesting that it would be counterproductive to have a national language policy, I do not mean to suggest that a discussion of language policy should not occur across the country, or that any one city, state, or region would not learn from what has been attempted elsewhere. I emphasize only that the workplace debate, in particular, and linguistic and cultural diversity issues, in general, will be better addressed by decisionmaking bodies that are more likely to be working from lived experience with linguistic diversity, rather than those able to approach it primarily through abstraction and generalization.

To be sure, one of the basic benefits of centralization is coordination. If it really were the case that the absence of a national language policy meant that no common language would exist in the United States, then tackling language policy regionally, as opposed to nationally, might not make sense. But, as I have explained elsewhere, perhaps the biggest canard perpetrated by the official English movement is the notion that the status of English as the common American language is in danger. First, sociologists of the current wave of immigration have documented that the three-generation pattern of linguistic assimilation that has obtained throughout most of American history is still at work. Second, the social dominance of English in the United States is hardly imperiled, not because of any official English declaration, but because of powerful market forces, global in scope, that make knowledge of English critical

lenges posed by linguistic diversity in the workplace by introducing language-related amendments to Title VII, for example, would generate a congressional debate that reflects these distortions and could result in codifying them into national rules.

The appropriate lawmaking response to the rise of the English-only rule, in light of Title VII's limitations, thus will be state and local legislation designed to restrain employer discretion to impose language rules on the workplace. As noted above, by placing my faith in a decentralized decisionmaking process, I make the predictive judgment that localities are more likely to produce the substantive results I seek, and in a manner that involves the relevant players in the decisionmaking process.<sup>267</sup> Again, local processes are more likely to reflect the interests of minority language communities. Local bodies are more likely to have an incentive than a centralized government to take into account the community and individual interests of minority groups, because those groups' power will be more concentrated. More concretely, the movement for non-citizen political participation has proven to be far more viable on the local level,<sup>268</sup> and the process of organizing immigrants is easier and generally more effective at the local level. Of course, the dramatic demonstrations held this spring in cities across the country by immigrants and advocates seeking to influence congressional debate over immigration reform highlighted the very real possibility of national, concerted action with the power to influence the course of national debate.<sup>269</sup> Moreover, because Congress controls immigration policy, immigrants and their advocates must organize and lobby at the national level. But such national action is difficult to sustain. And, more importantly, when seeking to advance the social, economic, and cultural interests of immigrants (as opposed to addressing matters of substantive immigration law), advocacy organizations are likely to find more direct influence and success at the local level, where stakes are smaller and often more concrete than at the national level.<sup>270</sup>

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not just to economic and educational advancement, but also to daily living in the United States. See Rodríguez, *supra* note 265, at 138–40.

<sup>267</sup> See, e.g., Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 192 (2001) (defending significant local autonomy and arguing that regional interests are best addressed through cooperation among distinct localities rather than through centralization).

<sup>268</sup> See RON HAYDUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN AMERICA* 41–55 (2005).

<sup>269</sup> See, e.g., Nina Bernstein, *In the Streets, Suddenly, an Immigrant Groundswell*, N.Y. TIMES, March 27, 2006, at A14 (reporting on the immigration rallies and their potential political influence).

<sup>270</sup> See, e.g., Emilie Cooper, *Embedded Immigrant Exceptionalism*, 18 GEO. IMMIGR. L.J. 345, 367 (2004) (underscoring the importance of advancing immigrants' welfare interests at the state level in light of successes in California, attributed in part to the "smaller scope" of the campaign and "the ability of advocates to respond to the unique political environment within the state"); Rebecca Smith et al., *Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 602 (2004) ("At the state level, authorities often have greater appreciation of immigrant workers' contribution to the local economy. They often have closer experience with the kinds of abuses

On the workplace issue in particular, state lawmakers already have begun picking up the slack from the federal civil rights regime. In 2001, for example, the California legislature passed a law regulating employers' authority to adopt English-only rules. In several hearings held during the consideration of the legislation, supporters characterized their efforts as addressing an issue growing in importance "along with the number of employees in California who speak languages other than English."<sup>271</sup> Comments also noted that the "lack of enforcement of federal EEOC guidelines" and the ambiguities engendered by conflicting federal court interpretations as to what types of English-only laws are permissible made state action advisable.<sup>272</sup> A response from the state legislature, it was thought, "would provide a clear state policy on the issue," giving guidance to local employers and state courts.<sup>273</sup>

The California law amends the state's Government Code to make it unlawful for an employer to "adopt or enforce a policy that limits or prohibits the use of any language in any workplace" unless the restriction was justified by a business necessity and the employer had notified the employees of the circumstances under which the language rule applied.<sup>274</sup> In addition to creating a presumption against English-only rules, the statute defines business necessity narrowly. The employer must have an "overriding legitimate business purpose such that the language restriction is necessary to the safe and efficient operation of the business."<sup>275</sup> In addition, the language restriction must "effectively fulfill[] the business purpose it is supposed to serve," and the employer must show that no alternative practice exists "that would accomplish the business purpose equally well with a lesser discriminatory impact."<sup>276</sup> In other words, the interests the employer can invoke to justify his rule are limited, and they must satisfy a stringent tailoring re-

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immigrants suffer, and a better understanding of the duty of agencies and police authorities to protect all local residents." For a detailed discussion of the various steps local and state governments can take to protect the interests of immigrants, including securing equal employment rights and language access services, see generally Smith et al., *supra*.

<sup>271</sup> See Workplace Language Policies: Bill Analysis of A.B. 800 Before the Cal. Assembly Comm. on Labor and Employment, at 2-3 (April 18, 2001), available at [http://info.sen.ca.gov/pub/01-02/bill/asm/ab\\_0751-0800/ab\\_800\\_cfa\\_20010424\\_153612\\_asm\\_comm.html](http://info.sen.ca.gov/pub/01-02/bill/asm/ab_0751-0800/ab_800_cfa_20010424_153612_asm_comm.html) [hereinafter Bill Analysis of A.B. 800].

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> See Act to Add Section 12951 to the Government Code, Relating To Employment Discrimination, 2001 Cal. Legis. Serv. 295, § 2(a) (codified at CAL. GOV'T CODE § 12951(a) (Deering 2006)). Comments in the legislative history of the Act noted the "lack of enforcement of federal EEOC guidelines," and observed that because the federal courts have been varied in their interpretation of when an English-only policy is permissible, "a state statute would provide a clear state policy on the issue and give guidance to state courts regarding English-only policies." See Bill Analysis of A.B. 800, *supra* note 271.

<sup>275</sup> See CAL. GOV'T CODE § 12951(b).

<sup>276</sup> *Id.*

quirement that contrasts noticeably with the way business necessity is defined for the purposes of Title VII.

The legislative history of this measure reveals a number of motivations for responding to a growing employer practice with a clear presumption against that practice. Some of the same claims made by Title VII plaintiffs and rejected by the federal courts were raised by participants in the process. Arguments that have failed to carry the day in the Title VII context were given effect by the California legislative process, which was unconstrained by the highly developed, existing federal legal regime. For instance, in addition to seeking clarity in the law, the Attorney General of the state echoed the expressive claims made by some Title VII plaintiffs, observing that “employees generally should not be forced to relinquish their fundamental rights of free expression when they pursue a livelihood.”<sup>277</sup> The record also contains testimony from the ACLU employing language similar to the EEOC guidelines: “Forced suppression of one’s native language,” the ACLU observed, “creates an oppressive and intimidating workplace.”<sup>278</sup> Relying on complaints concerning English-only rules received by other civil rights organizations, the ACLU also emphasized that permitting languages other than English to be spoken in the workplace can be good for business. Not only is it the case that bilinguals often communicate more efficiently in their native language, but it also hurts morale to burden employees with the threat of monitoring for improper language use.<sup>279</sup>

In 2004, the Illinois legislature passed similar legislation, amending the state’s Human Rights Act to prohibit employers from restricting employees from speaking non-English in communications “unrelated to the employee’s duties.”<sup>280</sup> An employer in Illinois may not, for example, prohibit an employee from discussing a previous night’s television program in a language other than English.<sup>281</sup> Among the reasons given by the legislation’s sponsor to support its enactment was his view that protecting employees’ freedom in this way would enhance their quality of life and unify

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<sup>277</sup> Bill Analysis of A.B. 800, *supra* note 271, at 3.

<sup>278</sup> Workplace Language Policies: Bill Analysis of A.B. 800 Before the Cal. Assembly Comm. on Judiciary, at 5 (April 24, 2001), available at [http://info.sen.ca.gov/pub/01-02/bill/asm/ab\\_0751-0800/ab\\_800\\_cfa\\_20010423\\_102622\\_asm\\_comm.html](http://info.sen.ca.gov/pub/01-02/bill/asm/ab_0751-0800/ab_800_cfa_20010423_102622_asm_comm.html).

<sup>279</sup> *Id.* at 4–5 (noting complaint received by employees at a tax service provider in San Jose and emphasizing that “[e]mployees complain that the pace of their work is slowed when they are forced to speak to a client in a non-English language and then speak in English to a co-worker who speaks the same non-English language”).

<sup>280</sup> 2003 Ill. Laws 217. The statute defines language to mean native language and to exclude “slang, jargon, profanity, or vulgarity.” *Id.* A similar bill, establishing that an employer “commits an unlawful employment practice if the employer requires an employee who is bilingual or multilingual to speak only English while at the workplace,” was introduced in the Texas legislature but did not become law. See H.B. No. 3379, 78th Leg., Reg. Sess. (Tex. 2003).

<sup>281</sup> See *New Illinois Law Declares Blanket “English-Only” Work Rules Unlawful Discrimination*, EMP. L. UPDATE (Matkov Salzman, Chicago, Ill.), Jan. 2004, at 1.

people of varied backgrounds, presumably because of the mutual respect for one another's practices reflected in the law.<sup>282</sup>

In pointing to these laws as models, I recognize that state and local governments may not all go the way of Illinois and California. It may well be that drives to pass legislation prohibiting English-only rules mirroring the Illinois and California legislation will fail, as has been the case in Texas.<sup>283</sup> More seriously, when state and local governments engage in debates over how to manage the effects of immigration—cultural or otherwise—they may produce outcomes that undermine the worldview I outline in Part I. In the most recent of the English-only cases, for example, a federal court, relying on Title VII, questioned an English-only policy imposed by the city of Altus, Oklahoma, on its employees.<sup>284</sup> While it seems highly unlikely that local or state legislatures would adopt laws *requiring* private employers to adopt English-only rules, state and local governments may pass English-only laws governing the language usage of their own employees, imposing the same dynamics on public workplaces that I criticize in Part I.

Moreover, some of the most notorious measures in recent memory limiting immigrants' access to public services and restricting the use of non-English in the public sphere have been passed by state and local voters. California's Proposition 187,<sup>285</sup> Arizona's restrictive English-only law eventually struck down by the Ninth Circuit and the Arizona Supreme Court,<sup>286</sup> and the bilingual education bans passed in states such as California and Massachusetts<sup>287</sup> all reflect the fact that substantive outcomes inconsistent with the normative positions I have taken can emerge from state and local processes. The state and local voters living in parts of the country where immigration and language diversity are concentrated are more directly affected by the cultural consequences of immigration, which sometimes leads to particularly vehement expressions of English-only or anti-immigrant sentiment—sentiment that might otherwise be muted at the national level.

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<sup>282</sup> See State of Illinois, Senate Transcript, 93rd Gen. Ass., Reg. Sess., Mar. 20, 2003, at 79–80, available at <http://www.ilga.gov/senate/transcripts/strans93/09300022.pdf> (“[T]his piece of legislation undoubtedly brings this country more together, . . . but more importantly it unifies the people of the great County of Kane in places like Batavia and Aurora and all the Latinos and Asians and other folks from foreign countries that live in our home districts. This only enhances the quality of life for all those people that we represent in our home districts that work in the restaurants, that work cleaning the hotels, that work cleaning our offices, that work in the factorias, that work in the tire shops . . .”).

<sup>283</sup> H.B. 3379, 78th Leg., Reg. Sess. (Tex. 2003) (no committee action was taken).

<sup>284</sup> See *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006).

<sup>285</sup> See 1994 Cal. Legis. Serv. Prop. 187 (West).

<sup>286</sup> *Yñiguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (striking down Arizona's English-only Amendment on free speech grounds), *vacated as moot*, 520 U.S. 43 (1997); *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998) (invalidating the amendment on similar grounds).

<sup>287</sup> See, e.g., Charu A. Chandrasekhar, Comment, *The Bay State Buries Bilingualism: Advocacy Lessons from Bilingual Education's Recent Defeat in Massachusetts*, 24 CHICANO-LATINO L. REV. 43, 43 (2003).

But a decentralized strategy will be preferable nonetheless. Restrictionist sentiments are more likely to be counterbalanced at the local and state levels than at the national level by a pragmatism and compassion that stems from familiarity with immigrants, minority groups, and their concerns. Second, issues like language restrictions in the workplace, which may be of little consequence at the level of national political debate, will receive more attention at smaller levels of government. Indeed, as emphasized above, discrete cultural issues quickly become subsumed by abstract and counterproductive national identity debates when raised at the national level. And, finally, both public opinion and public policy at the state and local levels will be easier to repeal, modify, or expand than national legislative rules, meaning that the debate over these issues is less likely to be overtaken by inertia or disinterest at the lower levels of authority. In the end, pursuing a vindication of the interests I assess in this Article through federal channels would represent a misallocation of time, energy, and resources.

### *B. Devising Workable Rules for Employers*

In Part I, I assumed for the sake of argument that English-only rules take the form of blanket rules applied to all hours of the workday and all parts of the workplace. This type of blanket prohibition, however, does not cover the full range of real world practice. What is more, the states that have passed laws restricting the English-only practice permit employers to adopt English-only rules if justified by business necessity.<sup>288</sup> In developing a law-reform response to the English-only rule, it is therefore important to consider whether rules narrower than blanket prohibitions should be permitted, and to define the interests employers might legitimately invoke to justify such rules. In other words, what types of English-only rules should be allowed to pass legal muster, and under what circumstances can employers adopt them?

I already have identified two candidates for narrowly targeted rules: a disciplinary rule that addresses a pattern of behavior through which non-English-speaking employees harass and isolate fellow workers through their use of language, and a uniform requirement that employees engaged in common tasks address each other in a mutually intelligible language, which in most workplaces will involve the use of English.<sup>289</sup> In this section, to flesh out the interests employers might invoke to justify English-only rules, I consider the three primary rationales employers have advanced in litiga-

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<sup>288</sup> See *supra* notes 274–76 and accompanying text (discussing the business necessity justification permitted by the California statute prohibiting English-only workplace rules); see also Salzman, *supra* note 281, at 1 (noting that the Illinois Department of Human Rights, the agency that investigates complaints concerning the new law, provides that narrow language restrictions can be justified by business necessity but that the agency’s rules do not provide definitive guidance on this question).

<sup>289</sup> See *supra* note 132 and accompanying text and Parts I.B.2–3.

tion to defend their rules.<sup>290</sup> First, some employers claim the rules are necessary to promote safety and efficiency in the workplace.<sup>291</sup> Second, employers often justify the rules as means of establishing harmony among workers.<sup>292</sup> And, finally, employers have made the claim that English-only rules are necessary to ensure customer satisfaction.<sup>293</sup>

But before considering each of these rationales, I note that I assume, for the sake of argument, that most employers who adopt language restrictions do so because the rules promote profitability and not as the result of irrationality or prejudice. To the extent that employees would feel harmed enough by an English-only rule to leave a workplace where a rule has been imposed, the employer will internalize this cost. But while I do not take a position on the rationality of existing English-only rules, I examine critically the reasons employers have given for adopting them. My aim is to provide guidance for other employers who might be contemplating English-only rules, as well as for legislators considering how to define a business necessity justification, and personnel and activist organizations seeking to advise employers on when to adopt such rules.

This guidance will be particularly important because, even in circumstances where individual employees would not feel sufficiently aggrieved by an English-only rule to seek another job (signaling to the employer that an English-only rule might be profitable), the social consequences I describe in Part I could still result from an English-only rule. Employers have no reason to take into account the effects of their language rules on relations in the workplace that do not affect their bottom line, much less on communities and relationships outside the workplace. Consistent with the burden shifting framework I propose in Part I, my claim is that our policy goals should include ameliorating these social consequences, even if it means cutting into the employer's business prerogatives.

To the extent that this interference compromises efficiency gains employers might make by adopting English-only rules, that disruption should only be temporary. The customer and employee complaints that typically

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<sup>290</sup> The arguments offered by employers to justify their English-only rules parallel the claims usually made by proponents of English as the official language: the institutions of a multiethnic society, for efficiency's sake, require a common coin of conversation; an official language will create an affective bond among people of diverse backgrounds and therefore promote not only social harmony, but also adherence to a common objective. In addition to advancing their own economic interests, then, employers who adopt these practices act as proxies for the public, responding to public attitudes by regulating the behavior of participants in the workplace.

<sup>291</sup> See, e.g., *Maldonado v. City of Altus*, 433 F.3d 1294, 1299 (10th Cir. 2006); *Garcia v. Spun Steak*, 998 F.2d 1480, 1483 (9th Cir. 1993); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1042 (9th Cir. 1988).

<sup>292</sup> See, e.g., *Maldonado*, 433 F.3d at 1299; *Spun Steak*, 998 F.2d at 1483; *Gutierrez*, 838 F.2d at 1042–43; *Long v. First Union Corp.*, 894 F. Supp. 933, 939 (E.D. Va. 1995); *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 736 (E.D. Pa. 1998).

<sup>293</sup> See, e.g., Fitzgerald, *supra* note 1 (discussing Dunkin' Donuts affair); see also Lichter & Waldinger, *supra* note 12, at 163–64 (discussing customer aversion to “foreign” tongues).

lead employers to adopt English-only rules stem from an undifferentiated anxiety over conversations in languages English-speakers cannot understand. But, over time, the shift in presumption I propose will perform an educative function. Consistent exposure to the unfamiliar eventually will transform what seems hostile and uninviting into the usual and the customary.<sup>294</sup>

1. *Managing the Workplace.*—Like the state interests in national security or public health, safety and efficiency of job performance are invoked as the quintessential interests of the party imposing restrictions on the behavior of those he governs. But like the categories of national security and public health, the idea of job safety and efficiency is often invoked talismanically, or in a manner that discourages courts from inquiring into the actual link between the challenged rule and the asserted interest. In truth, the category of “safety and efficiency” encompasses many different needs that should be understood as distinct, but that courts often conflate in their assessments of English-only rules.

As noted in Part I, even the EEOC, whose position long has been that the existence of an English-only rule is sufficient to establish a prima facie case of discrimination, recognizes that safety concerns can justify the imposition of an English-only rule on the workplace. The Commission, for example, has approved a rule as applied to employees working with potentially dangerous substances and equipment in areas where “constant and open communication” was required to avoid accidents and injuries to employers.<sup>295</sup> Critical to its finding, however, was the fact that the rule applied only to conversations conducted in the course of performing a job duty.<sup>296</sup>

The specificity of the EEOC’s opinion suggests—rightly, in my view—that “safety” cannot simply be invoked. The concern for safety must be demonstrated, and the rule must be tailored to meet the purported need.<sup>297</sup>

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<sup>294</sup> See *supra* notes 106–07 and accompanying text (discussing the learning effects that requiring employees and customers to hear languages other than English will have).

<sup>295</sup> EEOC Dec. No. 83-7, 1983 EEOC LEXIS 2 (1983).

<sup>296</sup> *Id.*

<sup>297</sup> The EEOC’s expectation that a tailoring requirement be met reflects its conclusion that the interests affected by English-only rules are in the heartland of what Title VII protects. Though the federal courts rarely, if ever, reach the business necessity stage of the analysis because of their conclusion that bilinguals cannot even make the prima facie case, the courts’ assessments of the employer’s interest clearly and directly inform their analysis of the impact question. See *supra* notes 157, 164–66 and accompanying text (noting that courts conclude no prima facie case has been made but address employer’s interests in the process of evaluating plaintiff’s claims nonetheless). Perhaps because the courts do not officially reach the business necessity phase of the inquiry, they tend to accept the employer’s proffered interest without engaging in the kind of tailoring analysis reflected in the EEOC’s opinions. Several commentators have taken the courts to task for failing to treat the business necessity question as anything but a rubber stamp of the employer’s litigating position. See, e.g., *Garcia v. Spun Steak*, 13 F.3d 296, 296–98 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of reh’g en banc); Matsuda, *supra*

In other words, the presumption is against a general prophylactic language rule; a specific safety concern cannot be addressed by a general prohibition on the speaking of non-English. Underlying this expectation of tailoring rests a key insight: a reviewing body must attempt to understand the circumstances of the workplace in order to determine the legitimacy of the safety interest. Indeed, it is not altogether clear that English-only rules always will promote safety; in a linguistically mixed workplace, both the ability to communicate in multiple languages and the freedom to do so in response to emergencies that arise might well be more conducive to worker safety than a prohibition on the speaking of languages other than English.

The efficiency defense, while conceivably related to the promotion of safety, is, at its core, a claim that the employer should be free to determine what is required for optimal job performance. The concern for efficiency takes at least one of two forms: the employer claims either that the use of a single language is necessary for the employer to run the business effectively, or that supervisors must be able to monitor employee performance, which in turn requires that employees speak a language the supervisor can understand.<sup>298</sup>

Both of these rationales relate directly to the completion of the employer's essential mission, and neither explanation relies on a generalized interest in regulating the interpersonal dynamics of the workplace. On their face, then, these rationales are the most compelling. At the same time, employers often justify blanket prohibitions with reference to safety and efficiency but without an explanation of how the rule is actually linked to the professed goal. In these cases, the safety and efficiency rationale operates as a kind of cover for the less compelling claim that the employer should be free to structure workplace social dynamics in a broader sense.

With respect to the first conception of efficiency, the employer is on his strongest ground when the performance of the actual job function requires the speaking of English. In *Jurado v. Eleven Fifty Corp.*, for exam-

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note 118, at 1356 (proposing an inquiry into the nature of the particular job at issue in accent discrimination cases).

<sup>298</sup> Variations on these justifications were used to defend the policy in *Spun Steak*. 998 F.2d 1480, 1483 (9th Cir. 1993). The employer in *Spun Steak* claimed to have adopted the English-only rule for a variety of reasons. *Id.* As noted above, the employer believed the rule would promote safety, because the use of Spanish distracted certain workers when they were operating heavy machinery. *Id.* The employer also noted that the rule would enable the USDA inspector in the plant, who only spoke English, to exercise his oversight functions. *Id.* Finally, and perhaps most importantly, the employer adopted the rule in response to complaints that certain workers used Spanish to harass and insult co-workers with racist comments. The employer thus adopted an English-only rule in the course of exercising what the Ninth Circuit referred to as his prerogative to define the privileges of employment narrowly, *id.* at 1487, or according to the terms the employer thought would best resolve tensions in the workplace. I discuss the racial harmony dimension of this justification in more detail below. See *infra* notes 312–17 and accompanying text. The point to note here is that the racial harmony justification is related to the employer's interest in defining the terms of employment to ensure that his business runs smoothly, or without the tensions among workers that might cause disruption in the workplace.

ple, the Ninth Circuit rejected a disc jockey's claim that Title VII protected his freedom to inject Spanish into his radio broadcasts.<sup>299</sup> In the court's view, the employer's ability to reach an English-speaking audience with appropriate programming overcame any interest the disc jockey might have had in speaking Spanish on the job.<sup>300</sup> The English-only requirement in this particular case was easily defensible, not only because it related directly to the performance of the job, but also because the rule was limited to job performance itself and had no effect on the use of non-English in the workplace generally. Often, however, courts conflate the legitimate interest in having the substance of the job performed in a particular way with the interest in regulating the interpersonal dynamics of the workplace—a form of regulation whose connection to the successful completion of the job mission is hardly apparent.<sup>301</sup> In other words, as scholars have pointed out in the sex discrimination context, the courts' willingness to accept the employer's justification often has little to do with a "meaningful conception of what certain businesses actually require," and more to do with courts' more general intuitions about employees' legitimate expectations and the legitimacy of customer preferences.<sup>302</sup>

The second conception of efficiency—that supervisors must be able to understand the conversations of their employees—makes pragmatic sense. Particularly when more than one non-English language is spoken in the workplace, the connection between having a common workplace language and an employer's ability to monitor what goes on in the workplace seems solid. There is therefore no complete answer to this justification.

But under my burden shifting framework, its rationality is also not a sufficient reason to think of this justification as the ultimate trump. First, as I explain in Part I, the link drawn between the need to supervise and the need to have a blanket English-only requirement assumes that conversation in the workplace takes one monolithic form—a form where all conversations are relevant to job performance and must be understood by everyone in the workplace.<sup>303</sup> It also suggests that the employer, through his supervisors, must be able to understand what employees say at all times. In reality, interactions in the workplace are more layered: many conversations happen

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<sup>299</sup> 813 F.2d 1406, 1411 (9th Cir. 1987).

<sup>300</sup> *See id.*

<sup>301</sup> *See, e.g.,* Garcia v. Spun Steak, 998 F.2d 1480, 1487 (9th Cir. 1993). In observing that privileges of employment, such as speaking in a certain language on the job, are within an employer's discretion to define, the Ninth Circuit cites *Jurado v. Eleven-Fifty Corp.* *Id.* (citing *Jurado*, 813 F.2d at 1412). Though the court cites *Jurado* for the proposition that the bilinguals, who can comply with English-only orders, suffer mere inconveniences as opposed to the denial of equal opportunity, *id.* at 1487–88, by citing *Jurado*, the court conflates the employer's interest in having the central job function carried out in English with the employer's interest in the regulation of workplace conversation more generally.

<sup>302</sup> *See* Yuracko, *supra* note 218, at 212.

<sup>303</sup> *See supra* Part I.B.3.

at once, and those conversations include the personal and private, the job-specific, and everything in between.

What is more, the same employers who impose English-only rules also hire workers for their ability to speak to customers in other languages, or at least permit employees to use non-English with customers.<sup>304</sup> This inconsistency suggests that the supervision claim reflects not only an interest in workplace efficiency, but also a desire to control the social dynamics of the workplace. Indeed, the claim that supervisors must always be able to understand employee conversations suggests the arrival of the Panopticon in the workplace. The claim is tantamount to banishing privacy altogether, because it suggests that all types of conversations must be understandable and therefore subject to being overheard by supervisors.<sup>305</sup>

The need to oversee the workplace effectively, while real, should not be understood as totalizing. A presumption against English-only rules will not deprive employers of their ability to supervise the workplace. Such a presumption may create incentives for employers to hire bilingual supervisors.<sup>306</sup> But the recent employment trends highlighted at the outset of this Article suggest that it would not be unreasonable to expect employers to make this type of adaptation.<sup>307</sup> The fact that the American workplace is full of employees who do not speak English at all suggests that employers find ways to handle the oversight problems engendered by language barriers. Given the employer's ability to adapt, then, such regulations reflect

<sup>304</sup> See, e.g., *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1043 (9th Cir. 1988); *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980); *EEOC v. Premier Operator Servs.*, 113 F. Supp. 2d 1066, 1068 (N.D. Tex. 2000); *Long v. First Union Corp.*, 894 F. Supp. 933, 938 (E.D. Va. 1995).

<sup>305</sup> Cf. *Matsuda*, *supra* note 118, at 1397 (arguing that when certain accents are deemed inappropriate for the workplace, a power move is being made: the employer's policing of workplace differences reflects a need to control the workplace by demanding that others control themselves when they speak).

<sup>306</sup> These incentives may disadvantage the monolingual English speaker. But general incentives toward bilingualism are, on balance, a positive social development—as employers themselves are increasingly recognizing in the hiring decisions they make—because they foster exchange and interaction among society's various groups. What is more, such incentives are particularly important in employment contexts where workers who do not speak English are often employed—not just for the business itself, but for the health and safety of the worker. Finally, creating incentives in the direction of multilingualism as opposed to monolingualism serves a broader social agenda whose articulation is beyond the scope of this paper, but which is implicit in my emphasis on tolerance and burden shifting throughout. See *Rodríguez*, *supra* note 4, at 719–40.

<sup>307</sup> In suggesting this possibility, I am aware of the fact that such incentives will advantage one type of worker (the bilingual) at the expense of another (the monolingual English speaker). While this development may be salutary for immigrants and their descendants (census figures suggest that nearly one in five residents of the United States speaks a language other than English, see *Shin et al.*, *supra* note 93), it may also have class and race implications that undermine the goal of securing an integrated workplace. Ultimately, this risk will be a cost that the reform I suggest might impose. But I believe it is a justified cost that can and will be remedied by changes in attitude with respect to language education for all people, not just those with limited English proficiency. Indeed, it is probably not a coincidence that two-way bilingual education programs have emerged in places such as Miami-Dade County, where employers increasingly view bilingual ability as a basic job qualification. See *Rodríguez*, *supra* note 4, at 764–65.

reasonable constraints on employer discretion, or reasonable costs to expect an employer to bear. The existence of a presumption against English-only rules ultimately will encourage employers to think more carefully about the dynamics of their particular workplace when crafting language regulations.<sup>308</sup>

2. *Protecting the Interests of Co-Workers and Customers.*—The second and third rationales typically invoked to defend English-only rules—the promotion of workplace harmony and responsiveness to customer preferences for hearing only English—have less to do with the effective performance of particular job functions than with managing the interpersonal dynamics of the workplace.<sup>309</sup> The employer, when he relies on these justifications, makes claims that are difficult to assess about morale and subjective preferences. And it is in these instances that the employer engages in what I call private language regulation. These regulations may well contribute to his profit margin by keeping certain workers and segments of the public happy, but they do so by perpetuating public anxieties I have argued should be resisted.<sup>310</sup>

When relying on the workplace harmony justification, employers claim that employees who speak only English feel intimidated when they hear languages they do not understand, or worry that they are being talked about or disparaged by other employees.<sup>311</sup> This interest also has been articulated as a concern for workplace civility, or the concern that the act of speaking a language in the presence of those who do not understand it is somehow of-

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<sup>308</sup> See ACLU Found. of N. Cal. et al., Guidelines and Questions for California Employers Considering the Use of Workplace “Speak-English-Only” Rules (2002) [hereinafter Guidelines for Employers], <http://www.aclunc.org/language/guidelines.pdf> (instructing employers on how to craft their language rules in order to comply with California’s 2002 statute prohibiting English-only rules absent an overriding business necessity). Of course, by advocating such constraints in service of what I believe to be a compelling social agenda, I am by no means claiming that employers should not be allowed to demand that English-speaking employees speak English to their supervisors, or in other contexts such as group meetings, or when employees are engaged in tasks that involve others who do not speak their non-English language. In other words, English-only rules limited to particular contexts will be more likely to survive a searching business necessity inquiry than the more common blanket rule.

<sup>309</sup> The Society for Human Resource Management has noted that common issues for employers “include complaints from employees who fear they are being mocked when co-workers speak in languages they don’t understand; [and] customers who are frustrated by employees with heavily accented English.” Society for Human Resource Management, Issues Brief: Language Policy in the U.S. (Nov. 1999), <http://www.shrm.org/trends/briefs/language/language5.asp>; see also Guidelines for Employers, *supra* note 308.

<sup>310</sup> See Rodríguez, *supra* note 4, at 726–28 (discussing the value of being challenged by the unfamiliar).

<sup>311</sup> See, e.g., Maldonado v. City of Altus, 433 F.3d 1294, 1300 (10th Cir. 2006); Garcia v. Spun Steak Co., 988 F.2d 1480, 1483 (9th Cir. 1993) (noting that the employer adopted the English-only rule in response to complaints that bilingual workers were harassing and insulting co-workers in Spanish, and thus to promote racial harmony); see also *supra* notes 96–99, 120; *infra* notes 312–17 and accompanying text (discussing cases in which employer relied on this type of justification).

fensive.<sup>312</sup> Most courts regard this concern for employee morale in the face of cognitive dissonance as a legitimate and enforceable norm.<sup>313</sup> The workplace harmony justification, ultimately, is the micro-version of the claim that a multilingual society requires a national official language to keep people united in common cause. Employers adopt English-only rules not only to preempt the potentially alienating effects of multilingualism in the workplace, but also to ensure good relations in the workplace.

As I acknowledge in Part I, employers should be free to promote cooperation among employees and protect employees from harassment.<sup>314</sup> To these ends, targeted disciplinary rules, or requirements that workers engaged in common tasks use a common language, will be permissible.<sup>315</sup> But courts have permitted the harmony justification to sweep much more broadly. As is the case with arguments for official English in government institutions, the workplace harmony justification assumes that employees (citizens) are engaged in a single conversation that must occur on the same terms, or that each transaction in the workplace (the polity) is a discrete one to which all workers (all citizens) must be parties. But again, as I explain in Part I, life in the workplace, like life in a diverse and decentralized society, consists of a multitude of overlapping social interactions, where multiple linguistic transactions occur simultaneously, sometimes involving the same person or people. As Mari Matsuda emphasizes in her work on accent discrimination and Title VII, the legitimacy of an employer's interest in promoting workplace harmony turns on the character of the workplace and the tasks performed within it.<sup>316</sup> The fact that most workplaces are characterized by layered conversations warrants skepticism of broad language restrictions justified by generalized harmony claims.

The final, frequently invoked justification for the English-only rule is the desire to cater to customer preferences—a defense used by employers primarily in the service sector. On the one hand, this interest would seem to belong in the heartland of employer discretion. Title VII caselaw very clearly acknowledges the employer's authority to define the image he would like his business to project. In 2004, for example, the First Circuit rejected a Costco clerk's demand that her employer exempt her from its policy barring facial jewelry.<sup>317</sup> She argued, as a member of the Church of

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<sup>312</sup> *Kania v. Archdiocese of Phila.*, 14 F. Supp. 2d 730, 736 (E.D. Pa. 1998).

<sup>313</sup> *Cf. Post*, *supra* note 210, at 35–39 (observing that certain gender norms, such as the proper standards of grooming and dress, are seen as “significant and uncontroversial” by those who “implement[] the law,” such that courts in Title VII cases permit employers to enforce such norms through their rules, even though those norms might perpetuate gender stereotypes).

<sup>314</sup> *See supra* Parts I.B.2–3 (discussing the potential civil rights implications of permitting linguistic diversity in the workplace).

<sup>315</sup> *See supra* note 132 and accompanying text and Part I.B.3 (offering these types of rules as potentially valid forms of regulation by employers).

<sup>316</sup> *See Matsuda*, *supra* note 118, at 1369.

<sup>317</sup> *See Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004).

Body Modification, that her religion required her to wear facial piercings. The court concluded, however, that the accommodation she sought would “adversely affect the employer’s public image,” and that the employer had “made a determination that facial piercings, aside from earrings, detract from the ‘neat, clean and professional image’ that it aims to cultivate.”<sup>318</sup> As one scholar has observed, these “reaction qualifications,” or criteria imposed by the employer based on his or her prediction of how people will react to the presence or absence of the qualification, “are crucial to a wide spectrum of jobs.”<sup>319</sup> Because many modern day business transactions depend on interpersonal interaction, “the entire point of many jobs is to elicit the appropriate reaction.”<sup>320</sup>

Of course, the law does not permit employers to anticipate all negative reactions by customers. Title VII very clearly limits the employer’s authority to decide that negative customer reactions to race or gender (at least in some contexts) justify a refusal to hire members of the disfavored groups, or a decision to place all employees of a particular race in positions with minimal customer contact. An employer cannot decide to project an all-white image of his business. Through Title VII, the courts thus have developed a set of expectations for customers—that their preferences, whether widely shared or idiosyncratic, bear some rational relationship to otherwise legitimate expectations.<sup>321</sup>

Though courts appear willing to permit the regulation of customer preferences, it remains difficult to generalize from existing cases about which reaction qualifications fall on the permissible side of the line. As legal scholar Kim Yuracko has shown in the gender context, not only do courts not treat all customer preferences alike, but it also can be difficult to discern a principled pattern in these cases. Other students of the workplace have explained this line-drawing difficulty by pointing out that “moral intuitions about counting reaction qualifications do not seem to follow any easily identifiable pattern and may not even produce high consensus responses among morally reflective persons.”<sup>322</sup> According to Yuracko, a court’s willingness to permit an employer to give effect to customer preferences through his workplace policies correlates closely to how serious or weighty the court believes the customer preference to be.<sup>323</sup> Customer con-

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<sup>318</sup> *Id.* at 136.

<sup>319</sup> Alan Wertheimer, *Jobs, Qualifications, and Preferences*, 94 ETHICS 99 (1983).

<sup>320</sup> *Id.* at 100 (“Reaction qualifications refer to those abilities or characteristics which contribute to job effectiveness by causing or serving as the basis of the appropriate reaction in the recipients.”).

<sup>321</sup> But even this line, which seems clear, in reality offers a rather fuzzy boundary. American Airlines’ policy prohibiting its flight attendants from wearing corn rows, for example, has been upheld as within the employer’s discretion, despite the fact that the plaintiff’s preference for the hairstyle correlated with her race. *See Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981) (holding that an employer policy prohibiting the wearing of cornrows was not a violation of Title VII).

<sup>322</sup> *See* Wertheimer, *supra* note 319, at 103.

<sup>323</sup> *See* Yuracko, *supra* note 218, at 190–93.

cerns that are central to one's sense of self, or to personal integrity, such as the preference to be attended in an assisted living facility by someone of the same gender, are more likely to be protected than concerns for less personal matters.<sup>324</sup> Yuracko ultimately contends that the more closely connected a preference is to the idea of "human flourishing,"<sup>325</sup> the more likely a court will be to regard it as a preference to which customers are entitled.

Amidst this confusion, the question remains: Should the fear that customers will be turned off by the speaking of non-English by service employees constitute a business necessity justification? The contours of the answer will depend, in part, on whose perspective we adopt in assessing the question.

The employer may well believe he has an interest in creating a "safe" space for his clients—a space that he creates in deference to customer preferences. But a rule that applies to all employers will prevent any single employer from losing business to discriminating competitors. And the idea that an employer will lose business if his employees speak languages other than English in front of customers is a dubious proposition in any case, because creating a linguistically safe space will be difficult. Most employers would not impose language constraints on their customers, meaning that a safe space would be hard to secure in any case. Indeed, given that an employer would run into serious § 1982 problems were he to attempt to control the private conversations of his customers—recall *Hernandez v. Erlenbusch* and the Oregon tavern<sup>326</sup>—the imposition of an English-only rule on employees is an underinclusive means of achieving a safe space. In the end, English-only rules tend to arise in multilingual environments where employees have been hired in many cases precisely for their ability to serve non-English speaking customers.<sup>327</sup>

As for the customer, he may have a substantial interest in actually being served in a language he understands, but nothing in the framework I propose prevents the employer from requiring his employees to do business with the customer in a particular language. But it is hard to see the weight of the customer's interest in being shielded from hearing other languages, or of his interest in understanding what others in his environment are saying when he is not a direct participant in the conversation. The customer does not inhabit the workplace in the same manner as the employee, and the former's ability to form social relationships with the people around him is much less likely to be affected by service workers' use of languages he does not understand. The thinness of this interest becomes all the more apparent if we think of the legitimacy of customer preferences in terms of their con-

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<sup>324</sup> *Id.* at 191–96.

<sup>325</sup> *Id.* at 201–02.

<sup>326</sup> See *supra* notes 138–39 and accompanying text.

<sup>327</sup> See *supra* note 53 and accompanying text.

nection to human flourishing, which is unlikely to depend on being shielded from hearing languages one does not understand.

The social interest in requiring people in their capacity as consumers to accept a certain amount of cultural dislocation is, in my view, of far greater significance than the customer's personal comfort.<sup>328</sup> The expectation that people adjust to the demographic changes around them should be at its highest in public settings where people engage in free activity, such as workplaces where consumers and the service provider interact. The asymmetry problem I discuss in Part II—the assumption that the speaking of non-English is alienating to English-speakers, but that the reverse is not true—is at its most correctable in the commercial setting. Laws of the kind I advocate would establish the expectation that customers tolerate all of the linguistic preferences around them, thus spreading the burden of not understanding across the population. Given that the public's interest in private language regulation is so weak, it makes sense to preclude employers from acting as proxies for the public if such restraint can advance important social objectives.

It should be clear that the framework I propose would not rob employers of all discretion to regulate language use in the workplace. Rules that relate directly to safety and efficiency will generally be permissible, as long as the employer does not conflate job performance with interpersonal interests. While prophylactic rules in the name of workplace harmony should be subject to serious, subjective inquiry that takes into account the layered interactions of the workplace, language-based disciplinary measures may well be within the scope of the employer's legitimate discretion. Finally, language regulation in response to customer preferences will almost never be legitimate, unless the regulation is of the primary, transactional interaction between the customer and the service provider.

My hope, ultimately, is that the Dunkin' Donuts affair will be typical—that misunderstandings will be clarified by open communication and community-inspired tolerance, rather than through the heavy hand of the law. We want to limit our imposition of legal constraints on the workplace, not only because employers must be allowed to use their judgments to run their businesses, but also because relationships in the workplace should be fluid. But advancing associative interests in the workplace, in many cases, is in tension with the interest in preventing culture clash, which manifests itself in similarly heavy-handed efforts by employers to regulate social behaviors. In these instances, the background principles of the law have a role to play in shaping employer behavior. This influence will operate not only, and not even primarily, through litigation, but through the creation of default presumptions that will filter through to employers in the form of guidelines by personnel organizations like the Society for Human Resource Manage-

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<sup>328</sup> For a discussion of the burden shifting idea I advance, *see supra* notes 95–105 and accompanying text.

ment<sup>329</sup> and activist organizations like the ACLU, who have already helped define guidelines for employers seeking to manage the language diversity in their workplaces.<sup>330</sup>

### C. Association and Workplace Pluralism

In addition to helping us understand language dynamics in the workplace, the English-only cases point toward a framework with the potential to resolve other workplace-related conflicts that involve personal characteristics similar to language usage. The association versus expression dynamic that the English-only cases reveal could be applied to draw lines separating the sorts of behaviors that deserve the protection of the law from the characteristics that should remain wholly within the discretion of employers. The principle of association, as I define it here, is not simply about the individual's desire or need to express something about his or her identity, but about his or her ability to maintain important social ties—an interest that justifies regulation.

This distinction between expression and association, by narrowing the universe of protected traits, will help combat the commonly lodged critique that the use of the law to protect cultural traits will flood courts with a litany of claims to special status. What is more, prioritizing the associative over the expressive will help avoid the other commonly invoked negative consequence of essentialization, or the process of assuming that cultures or social groups can be reduced to certain core characteristics.<sup>331</sup> In my view, this fear is actually overblown. To suggest that a trait is correlated with a group, or is important expressively to many members of a group, does not assume that every member of that group possesses the characteristic, nor does it imply that to be an authentic member of the group, one must express him- or herself through that characteristic. But by focusing on the associative side of the distinction, we move the debate out of the context of identity and its performance and into the realm of the interpersonal and communal, where regulation is on firmer ground.

While a full accounting of how the association principle might help resolve disputes similar to the English-only case is beyond the scope of this Article and a subject for future work, we can at least speculate at this stage about how some of the most well-known types of cases might come out. In the expressive category, I would place characteristics such as hair and dress

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<sup>329</sup> See Society for Human Resource Management, *supra* note 309 (noting that “[e]mployers must balance productivity and safety concerns with the needs of diverse groups of employees who speak a variety of languages”).

<sup>330</sup> See, e.g., Guidelines for Employers, *supra* note 308. The recommendations made to employers to help ameliorate language conflict in the workplace include encouraging the employer to familiarize herself with EEOC guidelines, to consider offering English classes to employees for whom English is not their first language, and to work with educators to include foreign language classes in core curriculums. See *id.*; see also Society for Human Resource Management, *supra* note 309.

<sup>331</sup> See generally FORD, *supra* note 140.

style. I do recognize that the choice to express oneself through such characteristics may well reflect an individual's declaration that he identifies himself with a social or cultural group—that he understands those forms of expression to be required for full acceptance into that group. Stated in more general terms, expression and association are not unrelated concepts, but rather sit at two ends of a spectrum, with the former being essential to the latter. That said, characteristics like hair styles, while suggesting points of commonality that might draw individuals to one another, do not facilitate interpersonal interaction in any direct sense, nor do they directly connect their individual bearers to others.

Other behaviors that more closely resemble associative characteristics might include organizing prayer groups or Bible study, or engaging in the proselytizing of fellow workers. These are both practices that seek engagement with others in the workplace but that are also essential to sustaining a pre-existing community outside the workplace. Of course, like non-English language usage, such behaviors may be experienced by co-workers as intrusions or as harassment. The case of religion is particularly vexing, because it takes us into the realm of deeply held personal beliefs, or of conscience, in a way language does not—a factor that cuts both in the direction of giving religion more protection, as well as in the direction of protecting people from religion. But the associative nature of many religious practices is arguably a reason to take seriously the idea that the law should protect at least some religious interests of employees, for the reasons suggested by the language cases. Enhancing people's ability to interact socially and to sustain communities and communal ties, particularly in the marketplace, is a legitimate concern of the polity. The practices or behaviors that facilitate this process deserve our attention.

#### CONCLUSION

A close look at English-only rules and the Title VII litigation to which they have given rise reveals that employees have important solidaristic, associative interests, both in the workplace itself and in the intersection of the workplace with the community at large. When we think about whether to protect employees' cultural or personal characteristics in the workplace, it is these interests, rather than individual employee's freedom of expression, with which the law should be concerned. Title VII, however, provides workers with no realistic mechanism for articulating social, associative interests. While this defect may be lamentable, a federal legal approach to this issue would be misguided in any case, and the preferable form of action would be to create a presumption against English-only rules through state and local regulation. In the end, understanding the associative dynamics of the English-only workplace rule will help shape a coherent approach to managing the cultural consequences of immigration. The burden shifting framework I propose will help us come to terms with how unprecedented levels of immigration are reshaping our social and political spaces by re-

quiring all members of society to treat these changes as the normal conditions of their everyday lives.

