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Enforcing the Equal Employment Opportunity Commission Guidelines on Discrimination because of National Origin: The Overextension of English-Only Rules in Garcia v. Spun Steak Co.

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Comment

Enforcing the Equal Employment Opportunity Commission Guidelines on Discrimination Because of National Origin: The Overextension of English-Only Rules in *Garcia v. Spun Steak Co.*

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The English-speaking majority's attempts to standardize the English language comprise a recurring theme throughout American history.[1] This insecurity in relation to minority languages, and the corresponding concern with ensuring the supremacy of the English language,[2] resurfaced following the

1. *See* Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992). Perea describes a historical "myth of linguistic homogeneity" that perpetuates the official English movement and the perception that American languages other than English are "foreign." *Id.* at 272. According to Perea, the legal definitions of American identity often involve elements of ethnicity, including the recent attempts to define English as the official American language. *Id.* at 328-71.

Senate Judiciary subcommittees held hearings in 1984 and 1986 on proposed constitutional amendments to make English the official language of the United States. *Id.* at 341. Thus far, official English proponents have failed to secure either an official English federal statute or an amendment to the Constitution making English the official language in America. *Id.* at 341-42. The passage of many state laws in the 1980s and the possibility of a federal statute, however, arguably establish the necessity for a federal constitutional amendment. *Id.* at 341-42 & n.407. *But see id.* at 356-71 (arguing that official English laws create invidious classifications that violate the Equal Protection Clause).

2. *See* Michele Arington, *English-Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J.L. & POL. 325, 326 n.11 (1991) (noting that several commentators argue that the English-only proponents focus disproportionately on Hispanics and that the movement constitutes a backlash against the wave of Hispanic immigrants); *see also* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 309 (1986) (noting that "distrust of the members of a different cultural group flows from fear, not just of the unknown but the fear that outsiders threaten our own acculturated views of the natural order of society"); Perea, *supra* note 1, at 346-47 (asserting that the official English movement exemplifies the erroneous belief that "national unity depends on ethnic unity").

most recent wave of immigration from Latin America and Asia.[3] Reflecting this trend, employers have implemented rules that require employees to speak English in the workplace.[4] In response, the Equal Employment Opportunity Commission ("EEOC")[5] promulgated guidelines ("EEOC Guidelines"),[6] inter-

3. *See* Note, *"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345, 1346 n.6 (1987) (noting correlation between support for the English-only movement and states with high concentrations of non-English speakers).

Since 1961, immigration from Mexico and Asia has increased, while immigration from Europe has decreased. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 10 (108th ed. 1988). A recent study predicts that the dramatic increase in the number of Hispanic workers experienced during the 1980s will continue. Peter Cattan, *The Growing Presence of Hispanics in the U.S. Work Force*, MONTHLY LAB. REV., Aug. 1988, at 9. The report projects that Hispanics will represent 10% of the American workforce by the year 2000. *Id.* at 10.

4. Linda M. Mealey, Note, *English-Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory Under Title VII*, 74 MINN. L. REV. 387, 392 & n.22 (1989) (discussing the increase in English-only workplace policies).

5. Title VII empowers the EEOC to prevent any person from engaging in any unlawful employment practice. 42 U.S.C. § 2000e-5(a) (1988). The Commission must serve notice and investigate when a complainant files a charge. § 2000e-5(b). If the EEOC determines that there is reasonable cause to believe that the charge is true, the agency must attempt to settle the charge informally. *Id.* If the EEOC fails to secure an acceptable conciliation agreement, the EEOC may bring a civil action against any respondent except a government or governmental agency. 42 U.S.C. § 2000e-5(f)(1).

6. EEOC Guidelines on Discrimination Because of National Origin "define[ ] national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1 (1993). Specifically, the EEOC Guidelines address English-only rules:

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

29 C.F.R. § 1606.7 (footnote omitted). Title VII authorizes the EEOC to issue procedural regulations. 42 U.S.C. § 2000e-12(a) (1988).

The Supreme Court has ruled that, consistent with congressional intent, courts should give "great deference" to EEOC guidelines. Griggs v. Duke Power

preting Title VII of the Civil Rights Act[7] and declaring that English-only rules create a presumption of discriminatory impact based on national origin.[8] An employer may rebut this presumption by articulating nondiscriminatory business justifications.[9]

In September 1990, the Spun Steak Company ("Spun Steak") adopted a policy that forbade speech on the job in any language other than English.[10] After the company disciplined

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Co., 401 U.S. 424, 433-34 (1971) (upholding EEOC Guidelines on Employment Testing Procedures); *see also* EEOC v. Commercial Office Prods., 486 U.S. 107, 115 (1988) (stating that "EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-31 (1975) (adopting EEOC Guidelines on Employment Selection Procedures).

7. Title VII provides:

> (a) It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1988). Congress, however, provided a narrow exception: An employer may discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." § 2000e-2(e)(1).

Although Title VII does not explicitly define the term "national origin," during House discussion Representative Roosevelt defined it as "the country from which you or your forebears came from." 110 CONG. REC. 2549 (1964); *see also* Mealey, *supra* note 4 (arguing that the definition of national origin should include linguistic characteristics).

Although Congress failed to define "national origin" discrimination, Congress has provided a definition of sex discrimination. In 1978, Congress added § 701(k) to Title VII:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . .

42 U.S.C. § 2000e(k) (1988).

8. *See supra* note 6 (stating text of EEOC Guidelines); *infra* notes 30-53 and accompanying text (discussing the burden-shifting framework for disparate impact analysis).

9. *See infra* notes 30-53 and accompanying text (discussing the burden shifting framework for disparate impact analysis).

10. Garcia v. Spun Steak Co., 998 F.2d 1480, 1483 (9th Cir.), *reh'g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994). In response to the Supreme Court's request for input, the Clinton Administration submitted a

two employees, Priscilla Garcia and Maricela Buitrago, for speaking Spanish during working hours, the EEOC found reasonable cause to believe the company violated Title VII.[11] Consequently, these employees and their union filed suit under Title VII on behalf of themselves and all Spanish-speaking employees at Spun Steak,[12] contending that the company discriminated with respect to their "terms, conditions, or privileges of employment."[13] Although the Ninth Circuit had embraced the EEOC Guidelines in a 1988 decision,[14] the *Spun Steak* court rejected the EEOC Guidelines under a "disparate impact" analysis.[15] Thus, the Ninth Circuit became the first and only circuit to address an intra-employee English-only rule and permit an employer to adopt a discriminatory policy without a business justification.[16]

This Comment argues that the Ninth Circuit's failure to characterize Spun Steak's English-only rule as a prima facie case of disparate impact discrimination pursuant to the EEOC Guidelines reflects inadequate consideration of Title VII's legislative history and the considerable deference the Supreme Court

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brief asserting that English-only rules discriminate based on national origin and that they must be justified by business necessity. Nevertheless, the Court denied the President's request to review *Spun Steak*. *Employment: Administration Urges Supreme Court to Rule on Legality of English-Only Rules*, Daily Report for Executives (BNA), June 6, 1994, *available in* Westlaw, BNA-DER Database, 1994 DER 106 d32.

11. *Id.* at 1483-84. *See generally supra* notes 5-6 (discussing the EEOC's role in employment discrimination disputes).

12. *Spun Steak*, 998 F.2d at 1484.

13. *Id.*; *see also supra* note 7 (stating text of 42 U.S.C. § 2000e-2(a)). The trial court concluded that Spun Steak's language policy violated Title VII because it "disparately impacted Hispanic workers without sufficient business justification." 998 F.2d at 1484. The EEOC filed an amicus brief in response to Spun Steak's appeal to the Ninth Circuit. *Id.*

14. Gutierrez v. Municipal Court, 838 F.2d 1031, 1040-41 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989). The *Gutierrez* court applied the EEOC Guidelines and held that an employer must demonstrate business necessity before the employer may enforce a limited English-only rule. *Id.*; *see also infra* notes 80-84 (discussing *Gutierrez*).

15. 998 F.2d at 1484-90; *see also infra* notes 30-53 and accompanying text (describing the disparate impact theory of recovery under Title VII). Although the court conceded that any adverse effects caused by the English-only policy will be suffered by those of Hispanic origin, the court denied that the policy caused any significant adverse impact. 998 F.2d at 1486-89.

16. *See* Garcia v. Spun Steak Co., 13 F.3d 296, 296 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc). Judge Reinhardt argued that *Spun Steak*'s "misguided removal of [EEOC] protection, based largely on two judges' subjective judgment that the discriminatory impact of English-only rules is 'not significant,' seriously undermines one of the basic goals of Title VII." *Id.* at 299.

attributes to federal agencies. Part I examines the history of Title VII, as well as the elements and applications of the two theories of employment discrimination the Supreme Court has delineated. Part II discusses the holding and reasoning in *Garcia v. Spun Steak Co.*, with particular focus on the Ninth Circuit's rejection of the EEOC Guidelines. Part III contends that recognition of English-only policies as discriminatory practices based on national origin advances Title VII's sweeping objective of eliminating any and all forms of employment discrimination on the basis of race, color, religion, sex, or national origin. This Comment concludes that the federal courts should clarify the discriminatory status of English-only policies by requiring employers to provide business justifications for these policies. Such a requirement would reinforce judicial deference to administrative agencies and minimize national origin discrimination that has accompanied increasing diversity in the American workplace.

I. THE TREND TOWARD RECOGNIZING HOSTILE WORK ENVIRONMENTS AS TITLE VII VIOLATIONS

A. THE ORIGIN OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Historically, employers had the freedom to use whatever hiring and employment policies they desired.[17] In 1964, however, Congress enacted the Civil Rights Act ("Act") to equalize employment opportunities and conditions.[18] Title VII of the Act prohibits employment discrimination based on "race, color, religion, sex, or national origin."[19] Since Title VII's enactment, Supreme Court decisions repeatedly have held that the Act's

17. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 212-14 (2d ed. 1992) (noting underrepresentation of racial minorities and women in desirable areas of the workplace due to historical absence of regulation in selection methods).

18. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992)). *See generally* ROTHSTEIN ET AL., *supra* note 17, at 214-22 (discussing the passage of the Civil Rights Act).

19. *See supra* note 7 (stating text of 42 U.S.C. § 2000e-2(a)); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."). The Court has asserted that "Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . . and ordained that its policy of outlawing such discrimination should have the

plain language permits and even requires the broadest possible definition of "discrimination."[20]

B. The Two Theories of Employment Discrimination

In *Griggs v. Duke Power Co.*,[21] the Supreme Court established that Title VII prohibits two types of discriminatory treatment by employers: practices that constitute intentional disparate treatment,[22] and practices that appear facially neu-

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'highest priority.'" Franks v. Bowman Transp. Co., 424 U.S 747, 763 (1976) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1944)).

20. Connecticut v. Teal, 457 U.S. 440, 448 (1982) (noting that Title VII "speaks, not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment opportunities" (footnote omitted)); Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975) (noting that Title VII is "a complex legislative design directed at a historic evil of national proportions"). In *Rogers v. EEOC*, the court explained:

> This language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.

454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). Title VII does not specifically define "discrimination." *See* 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992). The legislative history of Title VII, however, provides assistance. A memorandum by Senators Clifford P. Case and Joseph S. Clark, the bipartisan Senate floor managers for Title VII of the 1964 Act, asserted that § 2000e-2(a) in itself "defined the employment practices prohibited by the title." 110 Cong. Rec. 7212-13 (1964). Senators Case and Clark explained:

> [Discrimination] is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 [enacted as § 2000e-2(a)] are those which are based on any five of the forbidden criteria . . . .

Id. at 7213; *see also* Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. Davis L. Rev. 769, 780-94 (1987) (arguing that Congress adopted an expansive definition of discrimination); Stephen M. Cutler, Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 Yale L.J. 1164, 1165 (1985) (arguing that courts should use a trait-based approach, instead of an approach based on immutable characteristics, to fulfill the purposes of Title VII because discrimination begins with the attachment of arbitrary or extraordinary significance to human differences). The House Report accompanying the 1972 amendments described "employment discrimination" as a "complex and pervasive phenomenon" and stated that "[e]xperts familiar with the subject generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs." H. Rep. No. 238, 92d Cong., 2d Sess. 8, *reprinted in* 1972 U.S.C.C.A.N. 2137, 2144.

21. 401 U.S. 424, 436 (1971) (holding that employer's high school education and testing requirements violated § 703(a)(2) of Title VII).

22. *See infra* notes 24-29 and accompanying text (explaining disparate treatment discrimination).

tral, but nonetheless produce discriminatory consequences based on a classification that Title VII proscribes.[23]

1. Disparate Treatment Theory

The Court applies disparate treatment theory to review employer decisions based on personal judgment or subjective criteria.[24] If the plaintiff establishes a prima facie case of intentional discrimination,[25] the burden shifts to the employer to assert a legitimate, nondiscriminatory business reason for such treatment.[26] Economic motives do not justify discriminatory conduct; rather, the employer must demonstrate that the discriminatory policy fits the narrow bona fide occupational qualification ("BFOQ") exception.[27] If the employer establishes a BFOQ, the

23. 401 U.S. at 431. The Court explained that Congress requires the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431. "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432. Consequently, the Court determined that a plaintiff need not always prove intentional discrimination to establish an employer's violation of Title VII. *Id.* at 436; *see also* notes 30-53 and accompanying text (describing disparate impact theory).

24. In International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), the Court explained that disparate treatment is "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Id.* at 335 n.15.

25. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (providing criteria to establish a prima facie case of discrimination). The complainant bears the initial burden of establishing a prima facie case by showing that: she belongs to a class protected under Title VII; she applied for and was qualified for the job for which the employer was seeking applicants; she was rejected despite her qualifications; and, after rejecting her, the employer continued to seek applications from persons with the complainant's qualifications for the position in question. *Id.* at 802. *See also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (clarifying the burdens of proof and production for plaintiffs and defendants). According to the *Burdine* Court, once established, the prima facie case creates a presumption that the employer unlawfully discriminated against the employee. *Id.* at 254-55; *see also* Diaz v. AT & T, 752 F.2d 1356, 1361 (9th Cir. 1985) (determining that the burden of establishing a prima facie case of discrimination is not "onerous" and only requires the production of evidence that "suggests" that the employment decision was based on an illegal criterion).

26. *McDonnell Douglas Corp.*, 411 U.S. at 803. The Court in International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 205 (1991), held that the narrow BFOQ defense requires application of the "essence of the business" test. *Id.* at 1205.

27. *See* 42 U.S.C. § 2000e-2(e)(1); Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1107-09 (1983) (per curiam) (holding the valid stereotype that wo-

plaintiff may show that the employer's stated reason is pretextual.[28] Thus, the plaintiff retains the ultimate burden of persuasion for a claim of intentional discrimination.[29]

2. Development of Disparate Impact Theory

Underlying disparate impact theory is the Court's recognition that some employment practices, adopted without a discriminatory motive, nonetheless operate as functional equivalents of intentional discrimination.[30] Under Title VII, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[31] Accordingly, the elements of proof necessary under disparate impact analysis differ from those under the disparate treatment theory of recovery.[32]

The Supreme Court first directly addressed the criteria for disparate impact claims in *Griggs v. Duke Power Co.*,[33] in which a class of African-American employees challenged its employer's requirement that persons acquire a high school diploma or pass a standardized intelligence test to qualify for advancement or transfer.[34] The Court found that neither criteria bore a significant relationship to successful job performance and that both re-

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men live longer than men insufficient to constitute a BFOQ that would permit the employer to compel individual women to contribute more money to their voluntary pension accounts than similarly situated men).

28. *McDonnell Douglas Corp.*, 411 U.S. at 804.

29. *Burdine*, 450 U.S. at 253.

30. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-87 (1988) (holding that disparate impact analysis applies to a discretionary promotion system).

31. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

32. *Watson*, 487 U.S. at 986-87. "The factual issues and the character of the evidence are inevitably somewhat different when the plaintiff is exempted from the need to prove intentional discrimination." *Id.* at 987.

33. 401 U.S. 424 (1971); *see also* James E. Jones, Jr., *The Development of the Law Under Title VII Since 1965: Implications of the New Law*, 30 RUTGERS L. REV. 1, 1 (1976) (describing how most cases that preceded *Griggs* involved procedural or minor issues). After *Griggs*, the Court further developed the criteria for analyzing disparate impact cases by articulating a three-part test in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The plaintiff bears the initial burden of establishing a prima facie case of discrimination by presenting evidence that a particular employment practice adversely affected members of a protected class. *Id.* at 425 (citing *McDonnell Douglas Corp.*, 411 U.S. at 801-05). If the plaintiff succeeds in making a prima facie case, the burden shifts to the employer to prove that the practice was job related and served a necessary business function. *Id.* If the employer meets this burden, the case shifts back to the employee to show that nondiscriminatory practices would serve the employer's legitimate business interest. *Id.*

34. *Griggs*, 401 U.S. at 427-28.

quirements perpetuated a long-standing practice of excluding a greater proportion of African-American applicants than white applicants.[35] Thus, the *Griggs* Court explained that the "touchstone [of disparate impact analysis] is business necessity."[36] Following *Griggs*, courts have recognized disparate impact arising out of other selection devices, including minimum height and weight requirements,[37] nepotism,[38] and accent.[39]

Disparate impact evidence usually includes competing explanations of statistical disparities, rather than specific incidents of discriminatory actions.[40] Statistics showing ethnic imbalance between the composition of an employer's workforce and the composition of the relevant labor market are probative "because such imbalance is often a telltale sign of purposeful dis-

35. *Id.* at 431. Section 703(h) of Title VII provides that an employer may use "any professionally developed ability test provided that such test . . . is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h) (1988). The *Griggs* Court deferred to the EEOC's interpretation of this section in holding that the company's tests did not meet the requirement that they be job-related. 401 U.S. at 436.

36. 401 U.S. at 431. The business necessity defense applied in disparate impact cases represents a more lenient standard for the employer than the BFOQ defense. International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 198 (1991).

37. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 328-32 (1977) (holding that statutory height and weight standards adversely impacted female applicants).

38. *See, e.g.*, Banilla v. Oakland Scavenger Co., 697 F.2d 1297, 1304 (9th Cir. 1982) (holding that an employer's shareholder plan restricting ownership to family members, all of whom were of Italian ancestry, violated 42 U.S.C. § 2000e-2(a)), *cert. denied*, 467 U.S. 1251 (1984).

39. *See, e.g.*, Carino v. University of Oklahoma Bd. of Regents, 750 F.2d 815, 819 (10th Cir. 1984) (finding discrimination where an employer demoted the plaintiff from position as dental lab supervisor because of his foreign accent); Berke v. Ohio Dep't of Pub. Welfare, 628 F.2d 980 (6th Cir. 1980) (finding national origin discrimination against an employee demoted due to his Filipino accent). *But cf.* Fragante v. City of Honolulu, 888 F.2d 591 (9th Cir. 1989). The *Fragante* court concluded that the City based its rejection of an applicant with a Filipino accent on the BFOQ of effective communication rather than national origin discrimination. *Id.* at 599.

40. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988). For instance, the EEOC generally regards selection of less than 80% of a protected group as evidence of adverse impact. Uniform Guidelines on Employer Selection Procedures, 29 C.F.R. § 1607.4(D) (1993).

The Court has acknowledged that the utility of statistics to establish a prima facie case of disparate impact depends on "all of the surrounding facts and circumstances." International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 (1977). Statistics are much more likely to be determinative in disparate impact cases, where the object is to prove discriminatory effect. In disparate treatment cases, comparative evidence is more helpful. *See supra* notes 24-29 and accompanying text (discussing elements of disparate treatment).

crimination."[41] More recently, the Court held that courts may apply disparate impact analysis to subjective or discretionary, as well as objective, employment practices.[42]

In the late 1980s, however, a series of Supreme Court decisions began to narrow the scope of Title VII.[43] Specifically, in *Wards Cove v. Atonio*,[44] the Court shifted the burden regarding business necessity to the employee by requiring plaintiffs to specify which challenged employment practice caused the alleged disparity.[45] The Court also lowered the standard to establish a business necessity defense.[46] Consequently, a number of legislators resolved to correct this jurisprudence, particularly the *Wards Cove* decision, that had "weakened the scope and effectiveness of Federal civil rights protection"[47] regarding employment discrimination.[48]

3. Disparate Impact Following the Civil Rights Act of 1991

The Civil Rights Act of 1991 ("1991 Act")[49] reversed parts of seven Supreme Court decisions that were adverse to alleged vic-

41. *Teamsters*, 431 U.S. at 340 n.20.

42. *Watson*, 487 U.S. at 989-91. The *Watson* Court applied disparate impact analysis to a bank's informal promotion criteria based on the subjective judgment of supervisors. *Id.*

43. *See infra* notes 44-50 and accompanying text (discussing Congress's response to Supreme Court decisions that weakened federal civil rights protection).

44. 490 U.S. 642, 650-55 (1989) (holding that statistical evidence showing a high percentage of nonwhite workers in an employer's cannery jobs and a low percentage of such workers in noncannery positions failed to establish a case of disparate impact).

45. *Id.* at 656-57.

46. *Id.* at 659.

47. Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(2), 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981 note (Supp IV. 1992)).

48. *See generally* Robert A. Robertson, *The Civil Rights Act of 1991: Congress Provides Guidelines for Title VII Disparate Impact Cases*, 3 GEO. MASON U. CIV. RTS. L.J. 1, 15-57 (1992) (discussing the legislative history of the 1991 Act). Introducing the civil rights bill, Senator Kennedy noted that the Supreme Court recently made a "series of rulings that mark an abrupt and unfortunate departure from its historic vigilance in protecting civil rights." 136 CONG. REC. S1018 (daily ed. Feb. 7, 1990) (statement of Sen. Kennedy). The summary accompanying the bill stated that the statute would restore the *Griggs* rule. *Id.* at S1021.

49. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.). The 1991 Act provides in part:

> Sec. 2. Findings.
>
> The Congress finds that-
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> (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

tims of employment discrimination.[50] The 1991 Act added a new section to Title VII constituting Congress' first statutory guideline for disparate impact cases.[51] Section 703(k) declares unlawful any employment practice resulting in disparate impact unless the employer can "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[52] Thus, the 1991 Act shifted the burden of

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(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additicnal protections against unlawful discrimination in employment.

Sec. 3. Purposes.

The purposes of this Act are-

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

42 U.S.C. § 1981 note (Supp. IV 1992). The 1991 Act passed after a two-year struggle in Congress. *See* Robertson, *supra* note 48, at 15-57.

50. Civil Rights Act of 1991, § 3(4), 42 U.S.C. § 1981 note (Supp. IV 1992); *see also* Robertson, *supra* note 48, at 10-15 (discussing the enactment of the 1991 Civil Rights Act in response to a series of Supreme Court decisions that narrowed Title VII protection).

The 1991 Act implicitly overrules six Court decisions in addition to *Wards Cove*. *Civil Rights Act of 1991—Analysis*, 9 BNA Employee Rel. Wkly. No. 44, at S-1 (Nov. 11, 1991). The Bureau of National Affairs summarized the 1991 Act as "a pointed message to the conservative-dominated court that its overall judicial attitude on the subject of civil rights is not what Congress has in mind." *Id.*; *see also* 136 CONG. REC. S1024 (daily ed. Feb. 7, 1990) (statement of Sen. Packwood) (stating that the Supreme Court "needs a clear signal from Congress that employment discrimination is unacceptable in all forms and under all circumstances, and that Congress expects the Court to reflect that in its decisions").

51. *See* Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 912-13 (1993). Congress's decision to codify disparate impact as a separate cause of action, and its decision to shift the burden of proof to the defendant in the second stage of litigation, indicate dissatisfaction with the Court's attempt to merge disparate impact and disparate treatment doctrines in *Wards Cove*. *Id.* The 1991 Act suggests that the Court should interpret the "business necessity" standard more broadly than it might have done in the absence of Congressional approval. *Id.*

52. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. IV 1992). This section overruled the *Wards Cove* holding that the plaintiff has the burden of proving the absence of business necessity after establishing a prima facie case of disparate impact.

production regarding business justification back to the employer and effectively returned disparate impact analysis to the pre-*Wards Cove* standard.[53]

C. EEOC Guidelines and Recognition of Discriminatory Conditions of Employment

1. Deference Owed to EEOC Guidelines

Section 706 of Title VII authorizes the EEOC to administer the statute.[54] Accordingly, the EEOC has issued official, although nonbinding, guidelines by which courts may evaluate employers' compliance with the Act.[55]

Although the EEOC guidelines are nonbinding, the Supreme Court stated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[56] and later in *Rust v. Sullivan*,[57] that courts owe agency interpretations great deference.[58] Specifically, courts must accord an EEOC guideline "great deference" in the absence of "compelling indications that it is wrong" or "inconsistent with an obvious congressional intent not to reach the employment practice in question."[59] For example, the Court in *Meritor Savings Bank v. Vinson*[60] embraced the EEOC's definition of "hostile environment" sexual discrimination.[61]

See Wards Cove v. Atonio, 490 U.S. 642, 658-60 (1989). The complainant may also establish disparate impact by showing the availability of a less discriminatory alternative practice that the employer has refused to adopt. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

53. After the 1991 Act, to establish a prima facie case of disparate impact, plaintiffs must show that a specific policy of the employer has an adverse impact on a protected group under Title VII. 42 U.S.C. § 2000e-2(k)(B)(i) (Supp. IV 1992).

54. 42 U.S.C. §§ 2000e-5, 2000e-12 (1988 & Supp. IV 1992); *see also* supra note 5 (discussing EEOC authority under Title VII).

55. *See supra* note 6 (discussing judicial deference to EEOC guidelines).

56. 467 U.S. 837, 842-44 (1984) (holding that if a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer represents a permissible construction of the statute").

57. 500 U.S. 173, 184 (1991) (holding that the construction of Title X by the Secretary of Health and Human Services "may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent").

58. *Id.* (quoting *Chevron*, 467 U.S. at 842-43).

59. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973).

60. 477 U.S. 57, 64-67 (1986) (holding that sexual harassment that creates a hostile or abusive condition of employment constitutes sex discrimination under Title VII).

61. *Id.* The EEOC Guidelines on Discrimination Because of Sex set out two types of sexual harassment claims: quid pro quo and hostile environment har-

2. EEOC Guidelines Addressing English-Only Rules

Following an increase in the number of employees who speak a primary language other than English, several employers have instituted English-only workplace rules.[62] Because challenges to English-only policies have focused on disparities in the "terms, conditions, or privileges of employment" under section 703(a)(1) of Title VII,[63] rather than on barriers to hiring or promotion, such claims differ from most disparate impact cases decided thus far.[64] The timing of the promulgation of relevant EEOC guidelines[65] and the passage of the 1991 Act[66] further complicate this issue. Although the Supreme Court has acknowledged that language can function as a surrogate for race and national origin for purposes of equal protection analysis,[67]

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assment. 29 C.F.R. § 1604.11(a) (1985). The guidelines prohibit harassment that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.* § 1604.11(a)(3). The hostile environment standard requires both an objectively hostile or abusive environment and the victim's subjective perception of harassment. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993). The court must consider all of the circumstances in each case and no single factor is determinative. *Id.* at 370-371. The Court has not associated abusive environment discrimination with either disparate treatment or disparate impact theory. Furthermore, the employer's defense to such claims involves the employer's response to the harassment, rather than a business necessity or BFOQ standard.

62. *See* Mealey, *supra* note 4, at 392 & n.22 (discussing the increase in English-only workplace rules).

63. 42 U.S.C. § 2000e-2(a)(1).

64. *See* Garcia v. Spun Steak Co., 998 F.2d 1480, 1485 (9th Cir.) (noting case law analyzing disparate impact only under § 2000e-2(a)(1)), *reh'g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994).

65. *See infra* text accompanying notes 73-74 (discussing the promulgation of Guidelines on Discrimination Because of National Origin).

66. *See supra* notes 47-53 and accompanying text (discussing the remedial purpose of the 1991 Act).

67. Hernandez v. New York, 500 U.S. 352 (1991). Holding that persons of Mexican descent constitute a distinct class for purposes of equal protection analysis, the plurality stated: "It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis." *Id.* at 371. *Hernandez* indicated that strong links exist between language and ethnicity. *Id.* The Court avoided the language discrimination issue, however, by finding that the prosecutor struck prospective Spanish-speaking jurors because of their demeanor as well as their bilingualism. *Id.* at 369. *See also* Andrew P. Averbach, Note, *Language Classifications and the Equal Protection Clause: When is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. REV. 481 (1994) (discussing language classifications under equal protection analysis).

the Court has yet to address expressly the issue of English-only employment policies under Title VII.[68]

The first court to confront an English-only rule held that requiring employees to sacrifice such individual self-expression violated Title VII.[69] In contrast, in *Garcia v. Gloor*,[70] the Fifth Circuit reached the opposite conclusion.[71] The *Gloor* court, however, explicitly limited itself in holding "only that an employer's rule forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin" if an employee's noncompliance with the rule fails to relate to the employee's personal preference and not to the employee's ability to comply.[72]

In response to *Gloor*, the EEOC promulgated Guidelines on Discrimination Because of National Origin,[73] which distinguish *Gloor* and provide that proof of the existence of an English-only policy establishes a prima facie case of disparate impact.[74] Subsequently, the Ninth Circuit cited with approval the EEOC Guidelines in *Jurado v. Eleven-Fifty Corp.*,[75] in which the employer radio station dismissed a bilingual radio announcer for disobeying a rule that forbade speaking Spanish on the air.[76] Nevertheless, the court rejected plaintiff's theories of disparate impact and disparate treatment[77] because the language rule

68. *Spun Steak*, 998 F.2d at 1485.

69. Saucedo v. Brothers Well Serv., Inc., 464 F. Supp. 919, 922 (S.D. Tex. 1979) (holding that discharging an employee for violating an English-only rule disparately impacted Mexican-American employees and that no business necessity existed).

70. 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

71. *Id.* at 266. The court distinguished national origin from ethnic or sociocultural characteristics. *Id.* at 269 (rejecting a discrimination challenge to a rule prohibiting sales employees from speaking Spanish on the job, unless used in communicating with Spanish-speaking customers).

72. *Id.* at 272. The court also declared that "[o]ur opinion does not impress a judicial imprimatur on all employment rules that require an employee to use or forbid him from using a language spoken by him at home or by his forebears." *Id.* The court found that the plaintiff's noncompliance with the English-only rule was a matter of personal preference. *Id.* at 270.

73. 45 Fed. Reg. 85,632, 85,634-35 (1980) (codified at 29 C.F.R. § 1606.7 (1991)). The EEOC specifically noted that no guideline existed when the Fifth Circuit decided *Gloor*. *Id.* *See also supra* note 6 (stating text of EEOC Guidelines).

74. *See supra* note 6 (stating text of EEOC Guidelines).

75. 813 F.2d 1406, 1411 (9th Cir. 1987).

76. *Id.* at 1408-09. The station fired Jurado for refusing to comply with the station's decision to change his broadcasting format to English only. *Id.*

77. In rejecting Jurado's disparate impact claim, the court denied that the English-only rule disproportionately disadvantaged Hispanics. *Id.* at 1412.

constituted a BFOQ for one particular position[78] and the parties did not genuinely dispute that the employer based the programming decision on business concerns.[79]

The following year, in *Gutierrez v. Municipal Court*,[80] the Ninth Circuit rejected the *Gloor* analysis and followed the EEOC Guidelines, overturning a municipal court judges' mandate that court employees speak English during working hours.[81] The court characterized the language discrimination as a burdensome employment condition based on national origin.[82] The Supreme Court vacated that decision as moot, however, without indicating how to analyze English-only workplace rules.[83] Thus, until *Garcia v. Spun Steak Co.*, *Gutierrez* was the only case to apply the EEOC Guidelines to a general workplace language policy.[84]

II. *GARCIA v. SPUN STEAK CO.*

In *Garcia v. Spun Steak Co.*,[85] the Spun Steak Company instituted a policy prohibiting speech other than English on the

78. *Id.* at 1411 (describing the policy as a "limited, reasonable and business-related English-only rule").

79. *Id.* at 1410. The court found insufficient evidence that racial bias motivated the English-only policy because a previous bilingual format had failed to improve the radio station's ratings and the employer articulated marketing, ratings, and demographic concerns for the rule. *Id.* The court also declined to compare Jurado to another radio announcer because the two programs involved different formats and audiences. *Id.*

80. 838 F.2d 1031, 1038-40 (9th Cir. 1988) (holding that an English-only rule for court employees had a disparate impact based on national origin and no business justification existed), *vacated as moot*, 490 U.S. 1016 (1989).

81. *Id.* at 1039.

82. *Id.* The court applied the EEOC's business necessity standard and rejected the municipal court's five proposed justifications for the rule. *Id.* at 1041-44. For example, the court held that the municipal court's assertion that the English-only rule promoted racial harmony was "unsupported by the evidence." *Id.* at 1042. Furthermore, the court held that existing ethnic/racial fears cannot justify a discriminatory classification. *Id.* at 1043. The court also rejected the contention that an official English amendment to the California Constitution constituted business necessity. *Id.* at 1044.

83. *Gutierrez*, 490 U.S. at 1016. The validity of a court's analysis remains unaffected when a case is vacated as moot. *See* 13A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2D § 3533.10 (1984).

84. *Compare Gutierrez*, 838 F.2d at 1040 (discussing application of EEOC Guidelines to intra-employee workplace policy), *with* Garcia v. Spun Steak Co., 998 F.2d 1480, 1483 (9th Cir.) (stating Spun Steak's English-only workplace policy), *reh'g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994).

85. 998 F.2d 1480 (9th Cir.), *reh'g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994).

job.[86] The Spanish-speaking employees brought suit, contending that the employer's policy disparately impacted them[87] in violation of Title VII's prohibition against discrimination in "terms, conditions, and privileges of employment," a section 703(a)(1) claim.[88] In characterizing the issue as whether the policy caused significant adverse effects, the court conceded that the English-only policy disparately impacted the Hispanic workers.[89] Nevertheless, the court held the policy's adverse impact

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86. *Id.* at 1483. After receiving complaints that some employees harassed and insulted other workers in a language they could not understand, the company's president instituted the following English-only policy:

> [I]t is hereafter the policy of this Company that only English will be spoken in connection with work. During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish. However, we urge all of you not to use your fluency in Spanish in a fashion which may lead other employees to suffer humiliation.

Id. Spun Steak adopted an additional rule prohibiting any "offensive racial, sexual or personal remarks." *Id.* The employer concluded that such a policy would promote racial harmony at work, improve work quality, and increase worker safety. *Id.*

87. *Id.* at 1484; *see also supra* notes 30-53 and accompanying text (describing disparate impact discrimination). Twenty-four of Spun Steak's 33 employees spoke Spanish. 998 F.2d at 1483. Almost all of the Spanish-speaking employees were Hispanic. *Id.* Although two employees did not speak English, the remaining Spanish-speakers had varying degrees of English fluency. *Id.* The company never required a specific degree of proficiency in English as a condition of employment. *Id.*

After Spun Steak sent warning letters to Garcia and Buitrago for speaking Spanish, and prohibited them from working next to each other, the two employees and their union, Local 115, filed discrimination charges with the EEOC. *Id.* The EEOC investigated and determined that there was reasonable cause to believe Spun Steak violated Title VII by adopting the English-only rule and by retaliating when Garcia, Buitrago, and Local 115 complained. *Id.* at 1483-84. Garcia, Buitrago, and Local 115 proceeded to file suit against Spun Steak on behalf of all of the Spanish-speaking employees. *Id.* at 1484.

88. 998 F.2d at 1485. The Spanish-speaking employees did not attempt to prove that Spun Steak intentionally discriminated against them as required to establish a disparate treatment case. *Id.* Although previous disparate impact cases focused on barriers to hiring and promotion under § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2), the Spun Steak employees alleged a violation of § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1). *Id.*; *see also supra* note 7 (stating text of 42 U.S.C. § 2000e-2(a)). *Spun Steak* represents the Ninth Circuit's first attempt to apply disparate impact analysis to claims under § 703(a)(1). 998 F.2d at 1485.

89. 998 F.2d at 1486. The court conceded:

> [I]f the English-only policy causes any adverse effects, those effects will be suffered disproportionately by those of Hispanic origin. . . . It is of no consequence that not all Hispanic employees of Spun Steak speak Spanish; nor is it relevant that some non-Hispanic workers may speak Spanish. If the adverse effects are proved, it is enough under Title VII that Hispanics are disproportionately impacted.

Id.

insufficient to violate Title VII.[90]

As a threshold matter, the Ninth Circuit held that employees who spoke both Spanish and English failed to establish a prima facie case of disparate impact for an English-only policy.[91] The *Spun Steak* majority discussed and rejected the three arguments the Spanish-speaking employees used to demonstrate the policy's adverse effect.[92] The court first rejected the employees' contention that the English-only policy denied them the right to cultural expression.[93] The majority asserted that Title VII addresses disparities in the treatment of workers, but does not confer substantive privileges such as self-expression.[94] The employees also argued that the English-only policy caused a disparate impact because it prevented them from conversing in their preferred language on the job, a privilege that Spun Steak extended to native-English speakers.[95] Focusing upon the employees' ability to comply with the policy, the court concluded that the employer may define the privilege of conversing on the job narrowly because bilingual employees can comply with the rule and still enjoy the privilege.[96]

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90. *Id.* at 1485. The court rejected the proposition that a "burdensome term or condition of employment or the denial of a privilege would 'limit, segregate, or classify' employees in a way that would 'deprive any individual of employment opportunities' or 'otherwise adversely affect his status as an employee' in violation of section 703(a)(2)." *Id.* (quoting 42 U.S.C. § 2000e-2(a)(2)). Furthermore, the court denied the rule had an adverse impact under § 703(a)(1). *See infra* notes 91-97 (describing the court's analysis of the employees' disparate impact claim).

91. *Spun Steak*, 998 F.2d at 1489-91. The majority held that a court must consider all of the circumstances of the particular factual context to determine whether English-only rules "are enforced in such a draconian manner that the enforcement itself amounts to harassment." *Id.* at 1489. The court remanded the issue of whether the language policy disparately impacted employees with a limited English proficiency. *Id.* at 1490. The court determined that there was a genuine issue of material fact as to whether the policy adversely affected non-English speakers. *Id.*

92. *Id.* at 1486-90.

93. *Id.* at 1487.

94. *Id.* (citing Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)).

95. *Spun Steak*, 998 F.2d at 1487.

96. *Id.* at 1487-88 (citing Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1412 (9th Cir. 1987)). The court noted that "privileges of employment" are, by definition, granted at the employers discretion; therefore, the employer may define the limits of privileges. *Id.* at 1487. The majority quoted a Fifth Circuit decision for the proposition that "[t]here is no disparate impact with respect to a privilege of employment 'if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference.'" *Id.* (quoting *Gloor*, 618 F.2d at 270).

The court also rejected the employees' argument that the policy created an atmosphere of inferiority and isolation under the hostile working environment theory applied in sexual harassment cases.[97] The majority acknowledged that in rejecting the employees' attempt to establish a prima facie case of disparate impact based on the existence of an English-only policy, "we reach a conclusion opposite to the EEOC's long standing position."[98] Nevertheless, the court asserted that nothing in the language[99] nor legislative history of Title VII's section 703(a)(1) sustained the EEOC's English-only Guidelines.[100] Rather than identify specific evidence that the EEOC Guidelines represent an impermissible construction of the statute,[101] the majority broadly asserted that the Guidelines contravene congressional intent.[102] The *Spun Steak* court objected to the EEOC Guidelines' presumption of disparate impact, stating that the plaintiff must prove the alleged discriminatory effect before the burden shifts to the employer to establish a business necessity.[103] In so deciding, the court claimed to follow Fifth and Ninth Circuit precedent.[104] In contrast, Judge Boochever's dissenting opinion advocated embracing the EEOC Guidelines, both because of the deference traditionally accorded to the EEOC and because of the employer's ability to specify business justifications with relative ease.[105]

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97. *Id.* at 1488. The court explicitly refused to "adopt a per se rule that English-only policies always infect the working environment to such a degree as to amount to a hostile or abusive work environment." *Id.* at 1489.

98. *Id.* at 1489.

99. *Id.*

100. *Id.* at 1489-90. The court stated that there is no discussion of English-only policies in the legislative history to Title VII, and no other discussion indicating that courts must presume English-only policies discriminatory. *Id.*

101. *See supra* notes 56-59 and accompanying text (discussing judicial deference to agency construction of statutory provisions).

102. *Spun Steak*, 998 F.2d at 1489-90. The court asserted that Congress intended to strike a balance between the prevention of discrimination and the preservation of the employer's independence. *Id.*

103. *Id.* at 1490.

104. *Id.* at 1487. *See infra* part III.C (arguing that the court misapplied precedent).

105. *Id.* at 1490-91 (Boochever, J., dissenting). Judge Boochever recognized that the EEOC deserves great deference:

> It is hard to envision how the burden of proving [an atmosphere of inferiority, isolation and intimidation based on national origin] would be met other than by conclusory self-serving statements . . . . The difficulty of meeting such a burden may well have been one of the reasons for the promulgation of the guideline. On the other hand, it should not be difficult for an employer to give specific reasons for the policy . . . . The lack of directly supporting language in § 703(a)(1) or the legisla-

III. AGENCY DEFERENCE AND RECOGNITION OF ENGLISH-ONLY WORKPLACE RULES AS NATIONAL ORIGIN DISCRIMINATION PROHIBITED BY TITLE VII

The EEOC Guidelines' presumption of national origin discrimination reflects the agency's conclusion that, in general, rules prohibiting the use of foreign languages adversely impact protected groups.[106] The *Spun Steak* majority disregarded the EEOC Guidelines and applied a narrow interpretation of national origin discrimination, but failed to provide persuasive reasons for ignoring the traditional deference courts attribute to EEOC guidelines.[107] The court's refusal to embrace the EEOC's interpretation of Title VII is erroneous because the court failed to articulate congressional intent that rendered the agency's interpretation of the statute impermissible. Furthermore, the court ignored the Supreme Court's determination that the "EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference."[108] Finally, the *Spun Steak* majority erred by misconstruing prior caselaw.

A. The Administrative Interpretation of Title VII Is Entitled to Great Deference in the Absence of Contrary Congressional Intent

In invalidating the EEOC Guidelines, the *Spun Steak* majority abandoned the *Chevron-Rust* rule that prohibits courts from disturbing an agency construction of a statute if the agency's interpretation reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress's expressed intent.[109] Although the *Spun Steak* court acknowledged that only "compelling indications that it is

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tive history of Title VII, relied on by the majority, does not in my opinion make the guideline "inconsistent with an obvious congressional intent not to reach the employment practice in question."

Id.

106. Gutierrez v. Municipal Court, 838 F.2d 1031, 1040 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989); *see also supra* note 6 (stating text of EEOC Guidelines).

107. *See supra* notes 6, 56-61 and accompanying text (citing cases declaring that an EEOC guideline is entitled to great deference in the absence of compelling indications that the guideline is wrong).

108. EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988) (per curiam) (citation omitted).

109. Rust v. Sullivan, 500 U.S. 173, 184 (1991); *see also supra* notes 56-59 and accompanying text (discussing judicial deference to agency interpretations).

wrong" justify the rejection of an EEOC guideline,[110] the court made only a superficial effort to meet this standard.

In its brief discussion of the "compelling" reasons for invalidating the EEOC Guidelines, the majority asserted that the Guidelines contravene congressional reluctance to infringe on the independence of employers except regarding discriminatory practices.[111] In addition to ignoring the burden-shifting framework for disparate impact analysis,[112] the court's conclusion fails to consider the EEOC Guidelines' focus on discriminatory practices.[113] Moreover, the *Spun Steak* court offered only the broad congressional policy of balancing employees' rights against those of the employer,[114] rather than "an obvious congressional intent not to reach the employment practice in question."[115] Because "[i]t is well established that legislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining [agency] regulations,"[116] the court

110. Garcia v. Spun Steak Co., 998 F.2d 1480, 1489 (9th Cir.) (quoting Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973)), *reh'g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994).

111. 998 F.2d at 1489-90. The court noted that Congress could not have enacted Title VII without the support of legislators who traditionally resisted the federal regulation of business. *Id.*

112. *See supra* notes 30-53 and accompanying text (discussing the framework of disparate impact analysis).

113. The Guidelines represent a codification of the agency's findings regarding discriminatory language policies. Gutierrez v. Municipal Court, 838 F.2d 1031, 1040 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989); *see also supra* note 6 (stating text of EEOC Guidelines).

114. *Spun Steak*, 998 F.2d at 1490. The court maintained that presuming an English-only policy disparately impacts employees contravenes the congressional policy of striking a balance between preventing discrimination and preserving the employer's independence. *Id.* Moreover, the court objected to the EEOC Guidelines based on the irrelevant and undisputed proposition "that a plaintiff in a disparate impact case must prove the alleged discriminatory effect before the burden shifts to the employer." *See id.*

115. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973).

116. Rust v. Sullivan, 500 U.S. 173, 189-90 (1991). In *Rust*, the Court explained that the statements the petitioners relied upon were "highly generalized" and did not "directly address the scope" of the relevant provision. *Id.* at 188-89. Just as the relevant statute in *Rust* omitted specific directions regarding the Secretary's implementation of the statute, Title VII excludes any limit on the definition of national origin discrimination or the EEOC's responsibility for implementing the statute. *Id.*; *see supra* notes 6-7 (discussing EEOC's authority under Title VII and stating text of 42 U.S.C § 2000e-2(a)). Judge Boochever's dissent in *Spun Steak* criticized the majority's reliance on the absence of directly supporting language in Title VII or its legislative history. *Spun Steak*, 998 F.2d at 1491 (Boochever, J., dissenting) (quoting *Espinoza*, 414 U.S. at 94).

erred in asserting that the EEOC Guidelines conflict with congressional intent.[117]

B. The EEOC Guidelines Encompass a Reasonable Construction of Title VII

The *Spun Steak* court failed to recognize that "the EEOC's interpretation . . . need only be reasonable to be entitled to deference."[118] In refusing to apply the EEOC's interpretation of Title VII, the court ignored the legislative history of Title VII. Furthermore, the court's holding that English-only rules do not adversely impact certain employees overlooks the need to apply a strict business necessity standard to prevent hostile working environments. Finally, the court failed to appreciate the intimate relationship between language and national origin.

1. The EEOC Guidelines Reflect the Legislative History of Title VII and Corresponding Caselaw

Although the *Spun Steak* court asserted that nothing in the legislative history of Title VII supports a presumption of discriminatory impact for English-only rules,[119] the language and history of the Act require the opposite conclusion.[120] Congress intentionally defined discrimination in the least limiting terms without proscribing specific practices to meet the growing complexity of employment issues.[121] Indeed, the EEOC promul-

117. In *Espinoza*, for example, the Court invalidated an EEOC guideline providing that Title VII prohibits an employer from discriminating based on citizenship against a lawful alien resident and held that a lawful alien could not become a federal employee. 414 U.S. at 90. The Court pointed to statutes that demonstrated congressional intent contrary to the EEOC guideline. *Id.* at 90-91. The *Spun Steak* majority, by contrast, revealed no evidence that following the enactment of Title VII, Congress intended to exclude English-only rules from the definition of national origin discrimination. *See* 998 F.2d at 1480-90. Indeed, Congress has refused to adopt a federal English-only rule. *See supra* note 1 (discussing failed attempts to make English the official language of the United States).

118. EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988) (per curiam); *see also supra* notes 56-59 and accompanying text (discussing judicial deference to agency interpretations).

119. *Spun Steak*, 998 F.2d at 1490.

120. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."); *see generally supra* notes 19-20, 47-53 and accompanying text (discussing the legislative history of Title VII).

121. *See supra* notes 18-20, 23 and accompanying text (discussing congressional intent in enacting Title VII); *cf.* Rust v. Sullivan, 500 U.S. 173, 184 (1991)

gated the Guidelines pursuant to Title VII's specific mandate that the EEOC effectuate the Act.[122] Furthermore, the majority's analysis in *Spun Steak* conflicts with the Ninth Circuit's own concession that courts must interpret broadly Title VII's provisions.[123]

The Supreme Court has recognized that Congress, through the 1964 Act[124] and subsequent Title VII amendments,[125] targeted the entire spectrum of discriminatory employment conditions.[126] Despite Congress's failure to specify how a court should determine whether a facially neutral selection standard is discriminatory,[127] the pro-plaintiff 1991 amendments[128] indicate that "discrimination is unacceptable in all forms and under all circumstances, and . . . Congress expects the Court to reflect that in its decisions."[129] Accordingly, Congress intended to define "national origin" broadly.[130]

The Ninth Circuit also erroneously cited the absence of legislative history specifically addressing Title VII's applicability to English-only policies as support for its decision.[131] According to the Supreme Court, "[i]f a statute is 'silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' "[132] The majority's logic suggests that Congress must consider every possible violation of every statute it enacts.

(holding that the broad language of the relevant statute and Congress's broad directives permitted the agency's construction where Congress left broad terms undefined).

122. *See* 42 U.S.C. § 2000e-12(a) (1988).

123. *Spun Steak*, 998 F.2d at 1485.

124. *See supra* notes 19-20, 23 and accompanying text (discussing Title VII's broad purpose).

125. *See supra* note 7 (discussing the broad definition of sex discrimination under 1978 amendments); *supra* notes 47-53 and accompanying text (discussing the remedial purpose of the 1991 Act).

126. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986). *See* 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. 1992) for text of Title VII.

127. *See supra* notes 49-53 and accompanying text (describing the remedial purposes of the 1991 Act).

128. *See supra* notes 49-53 and accompanying text (describing the remedial purposes of the 1991 Act); *see also* supra note 19-20, 23 (discussing the broad scope of Title VII).

129. 136 CONG. REC. S104 (daily ed. Feb. 7, 1990) (statement of Sen. Packwood).

130. *See supra* notes 18-20, 23 and accompanying text (discussing Title VII's broad purpose).

131. Garcia v. Spun Steak Co., 13 F.3d 296 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc).

132. Rust v. Sullivan, 500 U.S. 173, 184 (1991) (quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984));

Rather than list every conceivable discriminatory act, Congress drafted Title VII expansively and authorized the EEOC to respond to employment discrimination as new issues surface.[133] Thus, the majority's analysis reveals an erroneously narrow view of EEOC authority and "challenge[s] the EEOC's ability to enact rules codifying its findings regarding specific discriminatory practices."[134]

2. The Importance of the Business Necessity Defense to Prevent Hostile Working Environments

The EEOC's determination that English-only rules establish a prima facie case of national origin discrimination constitutes a reasonable interpretation of Title VII considering that the "touchstone [of disparate impact analysis] is business necessity."[135] Indeed, in enacting the 1991 Civil Rights Act, Congress redirected the courts to eliminate employment discrimination[136] by codifying the *Griggs* standard and returning the burden of proof for business necessity to the employer.[137] The *Spun Steak* court, however, failed to appreciate the basic issue in cases involving English-only rules: whether the employer's use of a specified language as a condition of employment is legitimate.

a. *The Similarity Between Sexual Harassment Discrimination and Language Discrimination*

Recognition of the adverse impact of English-only rules parallels the Supreme Court's recognition that sexual harassment

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see also supra notes 56-59 and accompanying text (describing judicial deference to agency interpretations).

133. *See supra* notes 19-20 (describing the legislative history of Title VII); notes 54-59 and accompanying text (describing the role of a federal agency under *Chevron* and EEOC power under § 706).

134. Garcia v. Spun Steak Co., 13 F.3d 296, 296 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc).

135. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The Court noted: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited." *Id.* Indeed, "Congress has made [job] qualifications the controlling factor so that race, religion, nationality, and sex become irrelevant." *Id.* at 436; *see also* Averbach, *supra* note 67, at 483 (noting utility of the business necessity standard to distinguish between classifications that "use language to promote business efficiency, and those that impermissibly use language to differentiate along ethnic lines.").

136. *See supra* notes 49-53 and accompanying text (discussing the 1991 Act).

137. *See supra* notes 47-53 and accompanying text (discussing the 1991 Act's remedial purpose).

constitutes a per se discriminatory condition of employment.[138] Although Title VII does not expressly address sexual harassment,[139] the Supreme Court adopted an EEOC guideline addressing sexual discrimination and recognized that Title VII protects the right to work in an environment free from harassment based on gender.[140] Accordingly, courts must examine the totality of the circumstances in a particular workplace to determine whether workplace constitutes a "hostile" or "abusive" environment based on sexual status.[141]

The language policy in *Spun Steak* involves a more blatant form of discrimination than sexual harassment because the rule explicitly prohibits use of the Spanish language while working,[142] and burdens only members of minority language groups.[143] Because business necessity constitutes the "touchstone" of disparate impact analysis,[144] and because courts must assess all of the circumstances in a particular workplace to determine whether that workplace constitutes a hostile environ-

138. *See supra* notes 60-61 and accompanying text (discussing hostile environment discrimination in Supreme Court cases). The Supreme Court has not explicitly recognized hostile environment discrimination under either disparate treatment or disparate impact analyses. Nevertheless, the Court's recognition that "a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality" favors the EEOC Guidelines' presumption of discriminatory impact based on the likelihood that English-only policies create hostile environments. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993); *see also supra* note 6 (stating text of EEOC Guidelines).

139. *See* 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992).

140. *See supra* notes 60-61 and accompanying text (discussing hostile environment discrimination).

141. *Harris*, 114 S. Ct. at 371. Title VII permits the plaintiff to use all evidence to demonstrate a pattern or practice of discrimination, regardless of whether the practice relates directly to the acquisition or loss of an employment benefit. *Id.* Indeed, the Court emphasized that several factors are relevant to the determination of whether the employee found the environment abusive and that no single factor, particularly psychological harm, is required. *Id.* The central issue is whether sex-related conduct was "unwelcome," not whether it was "voluntary." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1985). Similarly, the central issue in a national origin discrimination involving an English-only policy should be whether the English-only policy adversely impacts an employee, not whether the employee possesses the ability to speak English.

142. The rule involves disparate treatment on its face by targeting minority language groups. *See supra* note 86 (stating text of Spun Steak's English-only policy). Consequently, employers may monitor these groups much more closely than employees belonging to the English-speaking majority.

143. *See infra* part III.B.3.b (discussing the language policy's exclusive impact on protected groups).

144. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

ment,[145] courts should shift the burden to the employer to assert business reasons in support of an English-only policy.[146]

b. *The Effect of the Framework of Disparate Impact on the EEOC Guidelines*

The *Spun Steak* majority asserted that the EEOC Guidelines amount to "a per se rule that English-only policies always infect the working environment [to the same degree]."[147] The court's objection to the Guidelines' presumption of disparate impact, based on the undisputed and irrelevant proposition that plaintiffs have the burden of proving the discriminatory impact of challenged policies, ignores the burden-shifting framework of Title VII analysis.[148] If and when the employee demonstrates a prima facie case of discrimination, the burden shifts to the employer to provide nondiscriminatory reasons for the policy or practice.[149] A presumption of discrimination for English-only rules does not imply that such a policy will have the same effect in every case.[150] Rather, a rebuttable presumption recognizes the relative ease with which an employer may point to specific non-discriminatory reasons for the policy.[151] In the absence of the EEOC presumption, an employee bears the difficult task of proving discriminatory impact through self-serving, subjective statements.[152]

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145. *Harris*, 114 S. Ct. at 371.

146. Because the court in *Spun Steak* dismissed the prima facie case of disparate impact, it did not proceed to the second step of disparate impact analysis. Garcia v. Spun Steak Co., 998 F.2d 1480, 1486-87 (9th Cir.), *reh'g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994). If the court had shifted the burden to the employer, the 1991 Act would require the employer to justify its English-only policy. *See supra* notes 49-53 and accompanying text (describing the remedial purpose of the 1991 Act).

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

148. *See supra* notes 30-53 and accompanying text (describing the framework of disparate impact analysis). The court's criticism makes sense in the context of a conclusive presumption, but not in the context of the rebuttable presumption applied in disparate impact analysis.

149. *See supra* notes 30-53 and accompanying text (describing the burden shifting framework of disparate impact analysis).

150. *See supra* notes 36-53 (discussing the business necessity defense).

151. *See Spun Steak*, 998 F.2d at 1490 (Boochever, J., dissenting) (noting an employee's difficulty establishing discrimination in the absence of the EEOC Guidelines).

152. It appears that the real basis for the majority's rejection of the EEOC presumption involved substantive disagreement with the Guidelines. A court's preferences, however, are irrelevant in evaluating the validity of agency interpretations. *See supra* part III.A (discussing *Chevron* and the deference courts habitually accord administrative interpretations).

3. The Inextricable Ties Between Language and National Origin

In rejecting the EEOC presumption of disparate impact for English-only rules, the *Spun Steak* majority focused on the assertion that English-only rules do not adversely affect certain employees sufficiently to violate Title VII.[153] The court's exclusion of the English-only rule from the definition of national origin discrimination erroneously minimizes the interests of language minorities, deeming those interests too insubstantial for recognition under Title VII.[154] As one commentator observed, "[l]anguage is the lifeblood of every ethnic group. To economically and psychologically penalize a person for practicing his native tongue is to strike at the core of ethnicity."[155]

a. *The Inherence of Language in the Definition of National Origin*

In denying the adverse impact of English-only rules,[156] the *Spun Steak* court mischaracterized language as a mutable char-

153. *Spun Steak*, 998 F.2d at 1487-88. *But see* Cutler, *supra* note 20, at 1166-67 (arguing that a definition of national origin discrimination that includes the concept of discrimination on the basis of national origin-linked traits recognizes that employers may draw distinctions among individuals of the same ancestral origin as well as individuals of different ancestral origins).

154. *But see supra* note 67 (explaining that constitutional protection extends to those who speak languages other than English). Just as proficiency in a particular language may serve as a proxy for race under equal protection analysis, language may serve as a proxy for national origin. Title VII should protect the rights of language minorities to a greater extent than the Equal Protection Clause because most English-only laws would survive equal protection challenges in the absence of showing discriminatory intent. Arington, *supra* note 2, at 334 (arguing that because language may serve as a proxy for national origin, the EEOC Guidelines represent a reasonable interpretation of Title VII).

155. James Harvey Domenedux, Comment, *Native-Born Acadians and the Equality Ideal*, 46 LA. L. REV. 1151, 1167 (1986).

156. *Spun Steak*, 998 F.2d at 1486-89. The Court, in *Espinoza v. Farah Manufacturing Co.*, similarly declined to follow an EEOC guideline where there was "no indication in the record that Farah's policy against employment of aliens had the purpose or effect of discriminating against persons of Mexican national origin." 414 U.S. 86, 92 (1973). In *Espinoza*, however, the worker hired in place of Espinoza possessed a Spanish surname, and there was no suggestion that the company refused to hire aliens of Spanish-speaking background while hiring those of other national origins. *Id.* at 92-93 & n.5. In contrast, Spun Steak instituted a condition of employment that disproportionately impacted the Hispanic employees. *Spun Steak*, 998 F.2d at 1486. Moreover, the *Espinoza* Court articulated an obvious congressional intent not to reach the employment practice in question. 414 U.S. at 92. The *Spun Steak* court, however, failed to meet that standard. *See supra* part III.A (discussing deference to agency interpretations).

acteristic involving a mere matter of personal preference.[157] To the contrary, the ease with which an individual may alter his or her conduct does not directly correlate with the importance an individual attaches to that conduct.[158] For instance, both language and religion shape an individual's identity and perceptions of the world.[159] Individuals use language or follow religion as a matter of preference, and they may alter either trait. Although religion is arguably a mutable characteristic, Title VII expressly prohibits discrimination based on religion.[160] Thus, the mutability of a characteristic is not the proper inquiry.

Characterizing the ability to speak in one's chosen language as a privilege given at the employer's discretion[161] minimizes the importance people attach to language.[162] Language involves both a means of communication and a societal symbol valued as a fundamental aspect of national origin.[163] Governmental establishment of language policies entails extensive psychological

157. *Spun Steak*, 998 F.2d at 1487-89. *But see* Bayer, *supra* note 20, at 839 (arguing that mutability doctrine erroneously presumes "that the interests of the discriminatees are too unimportant and too insubstantial for cognizance by a federal court applying a federal statute"); Cutler, *supra* note 20, at 1166 (arguing that if courts permit employers to favor employees who are more similar to themselves, or more assimilated, Title VII becomes a statute that, at best, coerces job applicants to assimilate and, at worst, prevents unassimilated applicants from securing employment). Indeed, the legislative history of Title VII indicates that Congress intended broad construction of the protected classifications, including mutable characteristics. *See supra* part III.B.1 (explaining the compatibility between Title VII's legislative history and the EEOC Guidelines).

158. *See* Bayer, *supra* note 20, at 839 (arguing that the alterability of behavior or custom "provides few clues regarding the personal importance attached"). Indeed, the *Spun Steak* court failed to show that discrimination based on a mutable characteristic, such as choice of language, interferes less than immutable characteristic discrimination with respect to terms and conditions of employment.

159. *See id.* (arguing that individual dignity and personal freedom are often inseparable from immutable characteristics and that courts should not dismiss employees' claims that an employer's racially or ethnically premised rules unjustly restrict personal integrity and expression).

160. *See* 42 U.S.C. § 2000e-2(a).

161. *See Spun Steak*, 998 F.2d at 1487 (describing intra-employee conversations as a privilege).

162. The close relationship between an individual's primary language and the culture derived from his national origin is not eliminated merely because the individual is bilingual. Karst, *supra* note 2, at 354-57.

163. *See* Perea, *supra* note 1, at 350-57. Perea argues that an understanding of the symbolic meaning of language requires an examination of the legal treatment of ethnicity and different American languages. *Id.* Because the English language symbolizes the dominant culture's ethnicity, laws standardizing the English language enforce the dominance of the America's core culture and marginalize other American cultures, particularly Hispanic culture. *Id.* at 369.

and cultural implications.[164] For instance, an individual's accent establishes the speaker as a member of a national origin group, preventing individuals from being similarly situated.[165] Individuals often target groups with a primary language other than English for discrimination based on language.[166] Thus, courts have recognized that adverse employment decisions on the basis of an employee's accent may violate Title VII.[167]

Stating that language is a characteristic that an individual may, by definition, easily change wrongly presumes that an individual forced to make a change or forego an employment opportunity endures little or no harm.[168] Indeed, the Supreme Court refuted the idea that the existence of discrimination depends on the ability to choose between subordinating one's language preference and looking for employment elsewhere.[169] Title VII pro-

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164. *See id.*

165. *See* Karst, *supra* note 2, at 352. Karst explains that "distinctive language sets a cultural group off from others, with one consistent unhappy consequence throughout American History: discrimination against members of the cultural minority." *Id.* For example, Americans respond less favorably to a speaker with a Spanish accent than one with a British accent. *Id.*

166. *Id.* at 354-57.

167. *See supra* note 39 and accompanying text (discussing discrimination based on accent). For example, in Fragante v. City of Honolulu, 888 F.2d 591, 595 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990), the Ninth Circuit recognized the close ties between accent and national origin:

> Accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person's national origin that caused the employment or promotion problem but the candidate's inability to measure up to the communications skills demanded by the job.

Id. at 596.

168. *See* Karst, *supra* note 2, at 351-57 (arguing that an individual's native language remains an important part of her ethnic identity and a means of affirming ties to her original culture once she assimilates into American society); *see also* Garcia v. Spun Steak Co., 13 F.3d 296, 298 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc). Judge Reinhardt remarked that the majority's analysis shows insensitivity to the facts and history of discrimination. *Id.* Because some of the most objectionable discriminatory rules are the least obtrusive in terms of one's ability to comply, courts should not measure the adversity of consequences by the employees' ability to comply with the rule. *Id.* For instance, although one may readily comply with a rule requiring certain individuals to sit in the back of a bus, such a rule is clearly discriminatory. *Id.*

169. *See* Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1081-82 (1983) (per curiam). The Court held a pension annuity program discriminatory on the basis of gender where it secured female retirees less in monthly payments than similarly situated male retirees. *Id.* The Court rejected the employer's alleged justification that the employees were not required to join the retirement plan,

hibits an employer from forcing an employee to choose between discriminatory and nondiscriminatory terms and conditions of employment.[170]

Moreover, Congress intended to define discrimination in the broadest possible terms and to encompass *all* discrimination based on race, color, religion, sex, and national origin.[171] Excluding a type of discrimination based on national origin from Title VII's scope because the discrimination targets mutable aspects of that classification frustrates Title VII's purpose.[172] Consequently, courts should adopt the EEOC Guidelines recognizing that speech in one's native tongue involves the expression of one's ethnicity and affects an individual's perceptions of her environment.[173]

b. *The Exclusive Impact of English-Only Rules on Members of National Origin Groups*

The Ninth Circuit characterized Spun Steak's language policy as nondiscriminatory even though the policy effectively made blatant distinctions on the basis of national origin.[174] Characteristics directly related to a classification protected by Title VII, however, deserve the same treatment as the protected group.[175]

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emphasizing that *individual* females may predecease similarly situated males and receive less benefits despite equal contribution. *Id.* at 1076-77; *see also* Bayer, *supra* note 20, at 790 (arguing that *Norris* stands for the proposition that Title VII prohibits discriminatory employment practices based upon stereotypical assumptions regarding race, gender, national origin, or religion, unless justified by statutory defenses).

170. *Norris,* 463 U.S. at 1081 n.10 (holding that Title VII forbids all discrimination concerning conditions or privileges of employment "not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice"); *see also* Bayer, *supra* note 20, at 791 (arguing that the availability of nondiscriminatory alternatives neither mitigates the illegality of offering options based on a proscribed classification, nor alters the fact that this introduces an impermissible criterion).

171. *See supra* notes 19-20 and accompanying text (discussing the sweeping purpose and scope of Title VII).

172. *See supra* notes 19-20 and accompanying text (discussing Title VII's purpose).

173. *See* Perea, *supra* note 1, at 350-56 (arguing that language is a social symbol that may be manipulated to achieve social or political goals).

174. Garcia v. Spun Steak Co., 998 F.2d 1480, 1490 (9th Cir.), *reh'g denied,* 13 F.3d 296 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 2726 (1994).

175. *See* Cutler, *supra* note 20, at 1173. Courts should apply a trait-based approach to root out employment practices that discriminate against the least assimilated members of a national origin group solely because of the extent they possess stereotypical traits. *Id.* Under a trait-based analysis, the court would sustain a disparate impact claim based on a single criterion, even where it negligibly impacted the relevant national origin group, if the employee dem-

For instance, the Supreme Court recently emphasized that "discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex," and a classification based on pregnancy "must be regarded, for Title VII purposes, in the same light as explicit sex discrimination."[176] Under Title VII disparate treatment analysis, an employer may discriminate on the basis of sex, which includes pregnancy, only where the employer demonstrates the very narrow BFOQ defense.[177] Accordingly, for the purposes of Title VII, "on the basis of sex" includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."[178]

Similarly, discrimination on the basis of national origin should include discrimination on the basis of language and accent. Just as discrimination on the basis of pregnancy has an exclusive adverse effect on women,[179] discrimination in the use of primary languages other than English burdens only members of protected groups with a primary language other than English.[180] Thus, the explicit acceptance of discrimination based on

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onstrates an adverse impact upon the least assimilated individuals of the relevant group. *Id.* at 1172 n.36.

176. International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 198-99 (1991).

177. *Johnson Controls*, 499 U.S. at 200; *see also supra* note 27 (describing BFOQ defense).

178. *See* 42 U.S.C. § 2000e-2(a); *Johnson Controls*, 499 U.S. at 199 & n.3.

179. *See Johnson Controls*, 499 U.S. at 199.

180. English-only rules have a disparate impact on particular national origins because they impose an adverse employment condition on a significantly higher percentage of employees belonging to a certain national origin group in comparison to non-protected employees. Employees who speak only English will never suffer the adverse effects of an English-only rule. Employers will never discipline or discharge them for violating the rule. Indeed, the *Spun Steak* court acknowledged that if the policy caused any adverse effects, the Hispanic workers disproportionately bear those effects. Garcia v. Spun Steak Co., 998 F.2d 1480, 1486 (9th Cir.), *reh'g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994). The courts held it a violation of the Age Discrimination in Employment Act to choose between two individuals within the protected group on the basis of their age. *See* Cutler, *supra* note 20, at 1167 & n.16. Similarly, employers with English-only policies discriminate based on national origin even where some members of the protected group bear no adverse impact. Cutler argues:

> [I]mprecision in measurability cannot justify neglect of the real differences among individuals and the real discrimination suffered by the least assimilated of those individuals. To treat the national origin group as a uniform, singular entity is to deny the force of Title VII's antidiscrimination protection to those who need it most.

Id. at 1167-68.

pregnancy as a violation of the Civil Rights Act suggests the reasonableness of the EEOC Guideline on English-only policies.[181]

C. THE *SPUN STEAK* COURT MISAPPLIED PRECEDENT

The *Spun Steak* court misapplied *Gloor*[182] and *Jurado*,[183] leading authorities regarding English-only rules.[184] Not only did no EEOC guideline exist for the Fifth Circuit to consider when deciding *Gloor*,[185] but the EEOC actually promulgated its Guidelines in response to *Gloor*.[186] Indeed, the *Gloor* court explicitly limited its holding[187] and suggested that the court would have deferred to a federal regulation stating a standard by which to evaluate language restrictions.[188] Moreover, the court in *Jurado* cited with approval the precise guideline that *Spun Steak* rejected[189] and held it did not apply to the particular case simply because English speech constituted a BFOQ for the job in question.[190] Because *Spun Steak* differs significantly from *Gloor* and *Jurado*, the Ninth Circuit erred in adopting the narrow holdings of these two cases.

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181. Arguably, the pregnancy analogy supports closer scrutiny of English-only policies under disparate treatment analysis and provides even greater support for the EEOC's direction to analyze such rules under the more lenient disparate impact analysis. The exclusive impact of English-only policies on language minority groups parallels disparate treatment analysis, which requires the employer to meet the tougher BFOQ standard for business justifications. *See supra* notes 26-28, 36 and accompanying text (distinguishing the BFOQ and business necessity defenses).

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

183. Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987).

184. Garcia v. Spun Steak Co., 998 F.2d 1480, 1487-88 (9th Cir.), *reh'g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994).

185. *See supra* notes 70-72 and accompanying text (describing *Gloor* and noting the absence of an EEOC regulation for the *Gloor* court to apply).

186. *See supra* notes 73-74 and accompanying text (describing the EEOC's response to *Gloor*).

187. *See supra* note 72 and accompanying text (stating *Gloor*'s holding).

188. *See Gloor*, 618 F.2d at 268 & n.1. The Fifth Circuit reasoned that the EEOC had "adopted neither a regulation stating a standard for testing such language rules nor any general policy, presumed to be derived from the statute, prohibiting them. We therefore approach the problem on the basis of the statute itself and the case law." *Id.* at 268 n.1.

189. Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1411 (9th Cir. 1987).

190. *Id.* In *Jurado*, the radio station's limited English-only rule passed the BFOQ standard because it "was a programming decision motivated by marketing, ratings, and demographic concerns." *Id.* at 1410. By contrast, the Spun Steak Company neither required its employees to speak or understand English as a condition of employment, nor contended that it constituted a BFOQ. Garcia v. Spun Steak Co., 998 F.2d 1480, 1483 (9th Cir.), *reh'g denied*, 13 F.3d 296 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994).

Furthermore, the *Gutierrez* court applied the EEOC Guidelines to an intra-employee workplace rule that mirrored Spun Steak's policy.[191] Both employer policies concerned intra-employee conversations rather than the sale or distribution of the employee's product.[192] In holding the EEOC's business necessity test the proper standard to determine the validity of English-only rules,[193] the *Gutierrez* court noted the considerable deference warranted by the EEOC guidelines,[194] Title VII's broad remedial purpose,[195] and the close ties between certain minority groups and language.[196] Significantly, the court also distinguished both *Gloor*[197] and *Jurado*.[198] Although the *Gutierrez* decision does not bind the Ninth Circuit,[199] precedent favors application of the EEOC interpretation.

CONCLUSION

In the past few decades, American society has undergone dramatic changes in its recognition of civil rights, particularly in the employment context. Following the enactment of the 1964

191. The municipal court's rule provided that "[t]he English language shall be spoken by all court employees during regular working hours while attending to assigned work duties, unless an employee is translating for the non-English speaking public. The rule does not apply to employees while on their lunch hour or work breaks." Gutierrez v. Municipal Court, 838 F.2d 1031, 1037 (9th Cir. 1988).

192. *Compare Gutierrez*, 838 F.2d at 1041 (discussing the intra-employee policy instituted by the municipal court), *with Spun Steak*, 998 F.2d at 1483 (stating Spun Steak's English-only policy). Because of the sweeping nature of the English-only policy and the direct adverse effect on the workplace environment, the *Gutierrez* court held that "ease of compliance has little or no relevance; certainly, it is not a factor that could preclude a finding of disparate impact." 838 F.2d at 1041.

193. *Gutierrez*, 838 F.2d at 1041.

194. *Id.* at 1039 n.7.

195. *Id.* at 1040 n.12.

196. *Id.* at 1039.

197. *Id.* at 1041.

198. *Id.* at 1041 n.13.

199. *See Spun Steak*, 998 F.2d at 1487 n.1. The court noted that because the Supreme Court vacated *Gutierrez* as moot, the *Spun Steak* court need not follow its reasoning. *Id.* Nevertheless, the court neither criticized the *Gutierrez* reasoning directly, nor offered an explanation for the Ninth Circuit's drastic deviation from previous deference to EEOC interpretations. *Id.* Indeed, Judge Reinhardt's dissent from denial of rehearing en banc noted that Gutierrez quit her job before the appeal reached the Supreme Court. 13 F.3d 300, 301 (9th Cir. 1993). Because *Gutierrez* might have remained binding precedent within the Ninth Circuit but for the employee's job decision, the decision represented the court's official opinion and, as such, deserved more than a dismissive footnote in *Spun Steak*. *Id.*

Civil Rights Act, courts aggressively acknowledged Congress's objective of eradicating discriminatory employment practices. After this reformatory trend began to backslide in the late 1980s, Congress, in 1991, redirected the courts to reduce the employee's burden in proving a case of discrimination.

In *Garcia v. Spun Steak Co.*, the Ninth Circuit failed to understand and incorporate into its decision congressional intent. Instead, the majority weakly asserted that the EEOC Guidelines construing English-only rules as national origin discrimination conflict with Title VII. This Comment proposes that the federal courts correct the Ninth Circuit's interpretation of English-only policies under Title VII. Employment decisions, conditions, or qualifications premised on or implicating race, color, religion, sex, or national origin, including English-only rules, are discriminatory. To acknowledge the facially discriminatory aspect of such policies, courts must adhere to the EEOC Guidelines treating language rules as a prima facie case of disparate impact. Such recognition is not only reasonable, but also necessary to further the purpose of Title VII and to prevent employers from discriminating based on the expression of ethnic traits.