1989

English-Only Rules and Innocent Employers: Clarifying National Origin Discrimination and Disparate Impact Theory under Title VII

Linda M. Mealey

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/1833

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenxx009@umn.edu.
Recently an increasing number of employers have adopted “English-only” rules that restrict employees' use of languages other than English in the workplace.¹ Many states also have declared English the official language of the state.² Although employers advance English-only rules as necessary for business purposes³ and legislators promote official-English amendments as necessary for the preservation of the English language,⁴ non-native speakers of English may view such actions with fear and distrust — as evidence of discrimination.⁵ Although employers may adopt such rules “innocently,” without any discriminatory intent, English-only rules nevertheless may constitute illegal discrimination under Title VII of the 1964 Civil Rights Act.⁶

Recent Supreme Court decisions⁷ draw into question the measure of protection afforded employees in the workplace⁸

1. See infra note 22 (discussing recent employee challenges to English-only rules in workplace).
2. See infra notes 19-20 and accompanying text (discussing official-English amendments).
3. See infra notes 112-14, 139-49 and accompanying text (discussing proffered business purposes).
5. Plaintiffs belonging to protected national origin groups have challenged these rules as national origin discrimination. See infra notes 22, 95. See also Ingwerson, Push for Official English on Ballot in 3 States, Christian Sci. Monitor, Oct. 27, 1988, at 5, col. 2 (noting Hispanic view of official-English amendments as form of “ethnic put-down”).
8. See Wermiel, Standards for Proving Bias Charges are Toughened in High Court Rulings, Wall St. J., June 6, 1989, at 30, col. 1 (stating that “effect
under the equal employment opportunity provisions in Title VII. The Court recently vacated as moot a Ninth Circuit Court of Appeals decision that invalidated an employer's English-only rule under Title VII. The Supreme Court also recently reformulated the standard for judging the validity of employment practices under Title VII. This decision reallocates the burden of persuasion and reduces the burden of proof of business justification for the employer, making discrimination more difficult for the employee to prove.

This Note argues that even in light of the recent Supreme Court decisions, Title VII protects employees from "innocent" employers who institute English-only rules with insufficient business justifications. This Note further argues that the definition of national origin should include linguistic characteristics, and that English-only rules, by proscribing certain linguistic characteristics, presumptively have a disparate impact on certain national origin groups. Based on these arguments, this Note demonstrates that many English-only rules violate Title VII as national origin discrimination. Part I of this Note examines the relationship between Title VII and the Equal Employment Opportunity Commission (EEOC) Guidelines on Discrimination Because of National Origin, the historical and recent developments in the disparate impact theory of liability under Title VII, and the judicial application of disparate impact theory to English-only rules. Part II analyzes the Supreme Court's new formulation of the disparate impact standard and illustrates how courts should apply it to English-only rules. Although perhaps tempted to defer to employers' business justifications for English-only rules, courts nevertheless must conduct a "reasoned review" under the new standard to determine the validity of such justifications. This Note concludes that a proper application of the new disparate impact standard will preclude the use of most facially neutral language restrictions that create burdensome conditions of employment for affected national origin groups.

11. Id. at 2124-27.
12. See infra note 42.
13. Atonio, 109 S. Ct. at 2126 (stating that "the touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice").
I. SCOPE OF PROTECTION FOR NATIONAL ORIGIN GROUPS

The increasingly multicultural and multilingual nature of the United States has engendered growing discontent within a large segment of the population. Some people perceive the increase in the size and the public presence of the Hispanic and Asian populations as a threat to "United States culture" and

14. Hispanic and Asian cultures have greatly influenced "U.S. culture" in many areas, including food, fashion, music, and architecture. See Pomice, It's a whole nuevo mundo out there, U.S. NEWS & WORLD REP., May 15, 1989, at 45 (stating that "mainstream media [is] becoming more Latinized"). The trend has been to accommodate non-speakers of English by offering services in various languages. For example, Pacific Bell Telephone Company soon will distribute promotional materials in nine languages. Pacific Bell to Expand Multilingual Services, U.S. ENG. UPDATE, July-Aug. 1988, at 6. AT&T now offers its customers long distance assistance in Spanish. Roundup, U.S. ENG. UPDATE, July-Aug. 1988, at 1. NBC produced the first Spanish language TV and radio advertisement. Id. Other languages appear in billboard advertisements as well. See B. PIATR, supra note 4, at 21; see also Lipman, Marketers Turn to Promotions to Attract Hispanic Consumers, Wall St. J., Sept. 21, 1989, at B6, col. 3 (stating that marketers spent $550 million in advertising to Hispanic population in 1988).


16. Three hundred thousand Hispanic immigrants entered the United States in 1987. Schmalz, Hispanic Influx Spurs Step to Bolster English, N.Y. Times, Oct. 26, 1988, at A1, col. 2. As of 1985, there were at least 13.2 million Spanish speakers in the United States. B. PIATR, supra note 4, at 26. This is a fourfold increase since 1960. Id. While the number of immigrants from Europe has decreased, the number from Asia and Mexico has increased. From 1961 to 1970, 135,000 immigrants came from China and Japan, 443,000 from Mexico, and 1,239,000 from Europe. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 10 (1988). In sharp contrast, from 1971 to 1980, 250,000 immigrants came from China and Japan, 637,000 from Mexico and only 801,000 from Europe. Id. In 1986, 43,000 immigrants came from China and Japan, 67,000 from Mexico, and 63,000 from Europe. Id.

At the state level, estimates indicate that by the year 2000, 45% of California's population will be composed of racial and ethnic minorities. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C.L. REV. 303, 304 n.6 (1986). In 1970, 5.9% of the population in Florida was Hispanic. Today, the figure is 12%. Hispanics compose 35% of the population in Miami, and 25% in both Denver and Tucson. Schmalz, supra, at A1, col. 2, B8, col. 3. Monterey Park, California, provides a striking example of the change in the population makeup. In 1960, 85% of the residents were Anglo, whereas in 1985, 40% were Asian, 37% Latino, 22% Anglo, and 1% Black. Ward, Language Problem Arises in City, L.A. Times, Nov. 23, 1985, at VAR-5, col. 1-2 (Orange Cty. ed.).
to the English language. Proponents of state and federal

17. "Those who react to cultural differences with fear or anger generally espouse nativist policies designed to repress the differences by excluding the ‘others’ from the country, by forcing them to conform to the norms of the dominant culture, or by relegating them to a subordinate status in society." Karst, supra note 16, at 311. See also Piatt, Toward Domestic Recognition of a Human Right to Language, 23 HOUS. L. REV. 885, 894-95 (1986) (arguing that monolinguals fear languages they do not understand and are hostile to recognition of right to use languages other than English). The fear that "Americans" will feel like outsiders in their own country prompted passage of a city ordinance in Monterey Park, California, requiring businesses, primarily Asian restaurants and shops, to include the roman alphabet in signs. Ward, supra note 16, at 5, col. 2.

"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." Karst, supra note 16, at 309. Cultural diversity, however, has never seriously threatened the survival of the American nation. Id. at 362. "It is hard to argue that linguistic separatism is really a threat to America, which is at once one of the most ethnically heterogeneous and linguistically homogeneous nations in the world." It's UnAmerican, THE ECONOMIST, Oct. 22, 1988, at 35. See also Ingwerson, supra note 5, at 5, col. 3 (noting that opponents of English-only movement state that “primacy of English is nowhere threatened”).

At the same time, Americans recognize that monolingualism puts the United States at a distinct disadvantage in international settings and that to function more effectively, the United States needs more English speakers fluent in foreign languages. In fact, “[s]everal years ago, the paucity of bright, bilingual Americans forced the State Department to drop a requirement that candidates for the foreign service be fluent in a second language. The reason was that too many talented people had to be passed over because of the requirement.” Gedda, Americans’ Lack of Foreign-language Skills Makes it Hard to Find Interpreters, Mpls. Star Tribune, Jan. 8, 1989, at 4E, col. 3. See also Piatt, supra, at 900 (stating that failure to produce functional bilinguals is a “crippling factor” in dealing with other nations); Rothberg, Governors Urged to Push International Education, St. Paul Pioneer Press, Feb. 26, 1989, at 10A, col. 1 (reporting that Governors’ Task Force on International Education noted lack of foreign language ability and advocated children learning foreign languages beginning in first grade).

18. One such proponent is U.S. English, a non-profit organization with 350,000 dues-paying members. Ferguson, The Bilingual Battle, Wall St. J., Apr. 29, 1988, at 22, col. 4. Former U.S. Senator S.I. Hayakawa founded U.S. English and Linda Chavez, a former Reagan-appointed staff director of the Civil Rights Commission, heads the organization. Id. at col. 5. U.S. English, a key organization in the official-English movement, publicly expresses its discontent with and fear of the erosion of the English language and Anglo culture. Wright, U.S. English, San Francisco Sunday Examiner & Chron., Mar. 20, 1983, at B9, col. 1. The organization lobbies for a federal constitutional amendment declaring English the official language of the United States. Id. U.S. English also seeks to restrict government funding for bilingual education and limit such education to short-term transitional programs. Id. The official-English movement also supports official-English constitutional amendments at the state level and uses such amendments to justify abolishing multilingual ballots and limiting bilingual education. See generally Note, "Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States, 100
constitutional amendments that declare English the official lan-

HARV. L. REV. 1345 (1987) [hereinafter Official English] (arguing that state declarations of English as the official language may be used to bar or dismantle bilingual programs). In the first election after California passed its official-English amendment in 1986, U.S. English was not able to challenge the optional bilingual ballots as unconstitutional because, although voters could request Spanish ballots, no one had done so in 20 years. Cox, supra note 15, at 10, col. 1.

19. At the local level, U.S. English is behind the grassroots movement to conduct petition drives to put official-English amendments on state ballots. Cox, supra note 15, at 1, col. 3. U.S. English claims that such amendments will prohibit actions that diminish the supremacy of English and will require state legislatures to take steps to preserve and enhance the use of English. Id. at 9, col. 2. In 1988, U.S. English collected over 210,000 signatures in Arizona, far exceeding the number needed to put the official-English measure on the ballot. Arizona Petition Drive A Success: Breaks State Record for Signatures, U.S. ENG. UPDATE, July-Aug. 1988, at 1.

To date, 17 states have declared English the official language of the state. In 1990 Alabama voters will consider a state constitutional amendment designating English the official language of the state. See 1989 Ala. Acts 461 (instructing the secretary of state to place an “English as official language of state” amendment on the June 5, 1990 statewide ballot). In the 1988 election, Arizona, Colorado, and Florida adopted state constitutional amendments to make English the official language of the state. File Facts, U.S. ENG. UPDATE, Nov.-Dec. 1988, at 3-4. Illinois declared “American” its official language in 1923. Official English, supra note 18, at 1346 n.7. Other states that have declared English their official language include Arkansas, California, Georgia, Hawaii, Indiana, Kentucky, Mississippi, Nebraska, North Carolina, North Dakota, South Carolina, Tennessee, and Virginia. B. Piat, supra note 4, at 22.


Other states, however, have defeated proposals to make English the official language. These include Louisiana, Oklahoma, and Wyoming. Cox, supra note 15, at 10, col. 3. In February, 1989, a bill was introduced in the Arizona legislature seeking to place a referendum on the 1990 general election ballot to repeal the 1988 official-English amendment. WESTLAW, State Net, BILLCAST.

The official-English movement also has influenced local communities. Prior to 1986, Fillmore, Los Altos, and Monterey Park, California, enacted local official-English ordinances to prohibit non-English signs on stores. Cox, supra note 15, at 9, col. 3.

20. Every year since 1981, Congress has considered a Constitutional English Language Amendment. Asian Law Caucus Reporter, Aug. 1988, at 1, col. 2. Although the Senate Judiciary Subcommittee on the Constitution has only heard the bill once, the Subcommittee will hold additional hearings. Id. at 1, col. 3. In 1989, four resolutions were introduced in the House proposing to amend the Constitution to establish English as the official language of the United States. H.R.J. Res. 23, 101st Cong., 1st Sess., 135 CONG. REC. H39 (daily
language argue that such amendments are necessary to encourage clear communication and the assimilation of immigrants. As more non-native speakers of English enter the workforce, employers increasingly institute rules requiring employees to speak only English in the workplace. Because the vast major-

21. See Schmalz, supra note 16, at A1, col. 2. One such proponent, U.S. English, is particularly concerned about the assimilation of Hispanic immigrants. Wright, supra note 18, at B9, col. 1. U.S. English claims its purpose is to counterbalance a perceived crisis created by an anti-assimilation movement. Id. U.S. English believes that leaders of the Hispanic bloc, among others, resist attempts to learn English, reject the "melting-pot concept, resist assimilation as a betrayal of their ancestral culture, and demand government funding to maintain their ethnic institutions." Id. One goal of the official-English amendments is to encourage immigrants to attend adult English classes. Cox, Citizen Movement Seeks to Proclaim English 'Official,' A Matter of Symbols, L.A. Daily J., Apr. 25, 1986, at 1, col. 2. Supporters of these amendments view the English language as the "cultural glue" that will unite the country. Id. at 20, col. 4. U.S. English claims that a person's culture should be maintained privately in the home, not in public. Beers, 'Us' and 'Them': Push to Make English 'Official' Goes Beyond the Issue of Language, L.A. Daily J., July 25, 1986, at 4, col. 3.

In response, opponents of U.S. English, such as the Mexican-American Legal Defense and Educational Fund (MALDEF), the National Council of La Raza, and Chinese for Affirmative Action, argue that immigrants and refugees do know the value of the English language, but that restrictions on native language use will not accelerate the learning process. Cox, supra, at 1, col. 2. These groups believe that groups like U.S. English invite racism and bigotry, id., and only create divisiveness. Beers, supra, at 4, col. 3.

Official-English amendments are not necessary to encourage the use of English. "[T]here is little evidence that Spanish speakers cling to their language any more fervently than did previous groups of immigrants." It's UnAmerican, THE ECONOMIST, Oct. 22, 1988, at 35. Studies show that Spanish speaking families in Miami are learning English as fast as previous immigrant groups. Ingwerson, supra note 5, at 5, col. 3. In fact, it is the continuing immigration of Hispanics that gives the impression that they are not learning English. Schmalz, supra note 16, at A1, col. 2; Note, The Proposed English Language Amendment: Shield or Sword?, 3 YALE L. & POL'Y REV. 519, 529 (1985) [hereinafter Shield or Sword].

In addition, these opponents of U.S. English view assimilation as being equivalent to Anglicization and refuse to accept Anglo culture as their primary culture. Beers, supra, at 4, col. 5. Henry Der of the San Francisco-based Chinese for Affirmative Action argues that U.S. English preys on people's anxiety over the large number of immigrants and takes advantage of people's intolerance for differences. Id.

22. Many employers have instituted English-only rules that restrict employees' use of non-English languages in the workplace. Telephone interview with Theresa Bustillos, supervising trial attorney for the Equal Employment Opportunity Commission (EEOC) (Los Angeles office) (Oct. 31, 1989). The increase in employers' use of English-only rules, however, is not matched by an
increase in court decisions involving English-only rules because most claimants resolve their cases before reaching trial. *Id.* For example, in 1984, 1985, and 1986, four monolingual Spanish speakers filed separate complaints with the EEOC against the Salvation Army in Los Angeles for imposing a rule that required employees to speak English on the work premises during work hours. *Id.* In 1987, the EEOC filed a complaint in district court, but resolved the dispute with the employer shortly thereafter. EEOC v. Salvation Army, No. CV 87-07846 DWW (C.D. Cal. filed Nov. 20, 1987) (stipulation settlement and dismissal, Mar. 10, 1988). The employer withdrew the English-only rule and removed the disciplinary notices from the employees’ files. Bustillos interview, *supra.* The rule required employees to speak English while talking to customers, supervisors, and other employees. *Id.* Whether the rule included lunches was unclear. *Id.* For repeated and *willful* violations of the rule, employees were subject to immediate discipline and possible discharge. *Id.* For repeated and *inadvertent* violations, the employer evaluated the employee’s English language capability to determine whether the employee could function satisfactory in the job. *Id.* See also Murphy, *Salvation Army Sued Over ‘English-only’ Rule,* L.A. Times, Nov. 27, 1987, § 2, at 1, col. 1 (discussing EEOC suit against Salvation Army).

More employers have implemented English-only rules recently because of the increasing Latino and Asian population in Los Angeles and the 1986 California constitutional amendment making English the official language. Telephone interview with Thomas Olmos, regional attorney for the EEOC (Los Angeles office) (Nov. 1, 1989). The EEOC is analyzing, for purposes of litigation, a major national retailer’s English-only rule. *Id.* The case is unusual because the rule has been in effect since 1974 and is not in writing. *Id.* The rule requires employees to speak only English during working hours. *Id.* The employer had threatened several office typists with discipline for speaking other languages. *Id.* The employer claims the rule is essential for allocating work fairly, supervising employees, conducting training, enhancing production, and maintaining good employee morale. *Id.*

In 1989, the American Civil Liberties Union (ACLU) and the Asian Pacific American Legal Center filed a complaint against Pomona Valley Hospital Medical Center on behalf of its Filipina nurses. Dimaranan v. Pomona Valley Hosp. Medical Center, No. CV 89-4299 ER(JRX) (C.D. Cal. filed July 18, 1989). The hospital instituted an English-only rule in 1988, but enforced it only against seven or eight of the hospital’s nurses. Telephone interview with Kathryn Imahara, staff attorney for the Asian Pacific American Legal Center (Los Angeles office) (Oct. 30, 1989). The hospital allowed the use of Spanish and Korean, but prevented the Filipina nurses from speaking Tagalog, their native language, on breaks, in the cafeteria, and on the phone. *Id.* Although a spokesperson for the hospital denied that such a policy existed, the nurses’ use of Tagalog resulted in negative personnel evaluations that could possibly result in termination. *Id.*

An employee filed a charge of discrimination with the EEOC in 1988 against the Executive Life Insurance Company in California challenging an English-only rule. Charge no. 340-89-0294, Dec. 22, 1988. The written rule required employees to speak English at all times and targeted employees who spoke Tagalog or Chinese. Imahara interview, *supra.* The EEOC settled the case with the employer in January, 1989. *Id.* The employer issued a policy statement that allowed employees to speak any language in the workplace. *Id.* Several other hospitals have English-only rules that require employees to pay 25¢ when caught violating the rule. *Id.* In reality, these hospitals enforce the
ity of United States citizens speak only English, such language restrictions affect most profoundly United States citizens whose primary language is not English.

Opponents of English-only rules advocate several constitutional and statutory theories to protect employees adversely affected by language restrictions in the workplace. Constitu-

tles almost exclusively against speakers of Tagalog and rarely against speakers of other languages. Id.

In 1988, an employee filed a charge of discrimination with the EEOC against the University of California-San Francisco, for instituting an English-only rule and for reprimanding employees who spoke to each other in Tagalog, Spanish, or any language other than English. Charge no. 370-88-0651, June 28, 1988 (conciliation agreement reached June 27, 1989). In June, 1989, the EEOC negotiated a settlement with the University, whereby the University restored a terminated employee to her former position and guaranteed an end to language discrimination in the workplace. Imahara interview, supra.

Some employers have expressly forbidden employees from speaking Spanish on the job. See Garcia v. Gloor, 618 F.2d 264, 266 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981); see also infra notes 100-116 and accompanying text (discussing Garcia). Other employers have banned non-English languages at all times or at all times except during breaks and lunches. For examples of rules that apply at all times, see Gutierrez v. Municipal Ct., 838 F.2d 1031, 1036 (9th Cir. 1988) (noting rule as originally promulgated applied at all times), vacated as moot, 109 S. Ct. 1738 (1989); Flores v. Hartford Police Dep't, 25 Fair Empl. Prac. Cas. (BNA) 180, 185-86 (D. Conn. 1981) (prohibiting other languages at police academy); Commission Decision No. 81-25, 27 Fair Empl. Prac. Cas. (BNA) 1820, 1821 (EEOC 1981) (requiring only English at work). For an example of a limited English-only rule, see Gutierrez, 838 F.2d at 1035 (English-only rule as litigated); infra notes 123-49 and accompanying text (discussing Gutierrez). For a discussion of English-only rules in the workplace, see B. Piatt, supra note 4, at 66-73.

23. In 1980, the population of the United States was 210,247,455. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, 1980 CENSUS OF POPULATION, Table 256 (1984). At that time, 187,187,415 people, 89% of the U.S. population, spoke only English at home and 23,060,040 spoke a language other than English at home. Id.

24. Based on Census Bureau statistics, 11% of U.S. adults speak a language other than English at home. Id. Less that one percent, .57%, of the total population cannot speak English at all. Id. Of those speaking a language other than English at home, more than 11 million speak Spanish and more than 1.4 million speak Asian languages (Chinese, Japanese, Korean, Vietnamese). Id. Of course, there are also some bilingual native speakers of English who will be affected by an English-only rule, but the percentage is very small. See infra note 228.

25. These include two constitutional bases for protecting language minorities, one definitional basis, and several statutory bases. For a discussion of equal protection analysis, see infra note 28. For a discussion of fundamental rights analysis, see infra note 29.

One commentator advocates broadening the definition of national origin to extend protection to cultural characteristics that manifest cultural identity because such characteristics may be used to discriminate against non-assimilated individuals within a given national origin. Note, A Trait-Based Approach
tional theories have failed even though courts have taken judicial
notice of past discrimination against national origin groups,
particularly Hispanics and Chinese, and despite scholarship
demonstrating the propensity of language restrictions to sup-
press these groups. Courts have never recognized linguistic
minorities as a suspect class under equal protection analysis,

26. See Olagues v. Russoniello, 797 F.2d 1511, 1521 (9th Cir. 1986) (stating
"courts have long recognized the discriminatory treatment inflicted on Chi-
inese and Hispanic people"), vacated for mootness, 484 U.S. 806 (1987); see also
Gomez v. City of Watsonville, 852 F.2d 1186, withdrawn, re-reported at 863
F.2d 1407, 1419 (9th Cir. 1988) (stating that if necessary to decide case, court
"would consider the propriety of taking judicial notice of the pervasive dis-
crimination against Hispanics in California"), cert. denied, 109 S. Ct. 1534
(1989).

27. Historically, language restrictions have been used to dominate minor-
ity language groups. See, e.g., McDougal, Lasswell & Chen, Freedom from Dis-
crimination in Choice of Language and International Human Rights, 1976 S.
ILL. U.L.J. 151, 153 [hereinafter McDougal] (quoting Dr. J. J. Lador-Lederer:
"[s]uffocation of language has always been part of [the] policies of domination
and the struggle for its maintenance was always a precondition for any polit-
ical movement of liberation").

In addition, because of language's unique ability to unify as well as divide
and suppress people, its use should be protected from abuses by careful
scrutiny:

Language is a uniquely powerful instrument in unifying a diverse
population and in involving individuals and subgroups in the national
system...[but] some of the very features of language that give it this
power under some circumstances may, under other circumstances be-
come major sources of disintegration and internal conflict within a na-
tional system.

Id. at 160 (quoting Kelman, Language as Aid and Barrier to Involvement in
the National System, in CAN LANGUAGE BE PLANNED? 21 (1971), reprinted in
2 ADVANCES IN THE SOCIOLOGY OF LANGUAGE 185 (J. Fishman ed. 1972)); see
also Shield or Sword, supra note 21, at 533-39 (discussing language as an offen-
sive weapon).

28. See Official English, supra note 18, at 1354 n.64 (citing cases rejecting
nor have they recognized a constitutional right to speak a language other than English.\footnote{29}

A. TITLE VII OF THE CIVIL RIGHTS ACT

Although linguistic minorities lack constitutional protection, Title VII of the 1964 Civil Rights Act\footnote{30} provides a measure

quasi-suspect status for language minorities). \textit{But see} Asian Am. Business Group v. City of Pomona, 716 F. Supp. 1328, 1331 (C.D. Cal. 1989) (upholding use of strict scrutiny test in equal protection claim that language regulations on business signs discriminated based on national origin). Some scholars have proposed constitutional protection for language rights by treating language minorities as a quasi-suspect class for equal protection analysis. \textit{See, e.g.,} Official English, \textit{supra} note 18, at 1353-55 (arguing that language minorities, non-native English speakers, meet requirements of “discrete and insular minorities” because they are easily identified, have suffered a history of discrimination, and are politically powerless). Because language goes to the essence of one’s identity, language classifications can only be invidious and arbitrary. McDougal, \textit{supra} note 27, at 158.

\footnote{29} No court has confronted this issue and rejected such a constitutional claim. \textit{See} Official English, \textit{supra} note 18, at 1347-52 (tracing the history of language policies and judicial attempts to recognize language minority rights).

Although it is beyond the scope of this Note, there does appear to be a constitutional basis upon which a court could establish individual language rights. \textit{See, e.g.,} Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (protecting right to teach language other than English and right of parents to have children taught language other than English). The Court stated:

\begin{quote}
[The individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.]
\end{quote}


Some scholars argue that the “emergence of the principle of equal citizenship” in the twentieth century is based on constitutional values of dignity and respect. Karst, \textit{supra} note 16, at 337-38. The “principle of equal citizenship protects against stigma, the imposition of badges of inferiority based on a person’s race or membership in an ethnic or religious group.” \textit{Id.} at 338. These are the same values involved in language rights. A Constitution that protects individualism and egalitarianism should also protect the right to express oneself in the language one chooses.

of statutory protection.\textsuperscript{31} Congress enacted Title VII, and amended it in 1972,\textsuperscript{32} to outlaw employment discrimination based on race, color, religion, sex, or national origin.\textsuperscript{33} Congress also enacted Title VII to achieve equality in employment opportunity and employment conditions, to promote hiring on the basis of proper qualifications, and to remove barriers that in the past favored white male employees.\textsuperscript{34}

Title VII does not explicitly define the term "national origin" or the scope of protection it provides for national origin groups. In the context of the statute, however, national origin generally is understood to mean the country from which a per-

\begin{footnotesize}
\text{STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 (1986) [hereinafter LEGISLATIVE HISTORY OF TITLES VII AND XI].}

31. Title VII provides a statutory basis that has successfully protected language minorities and the right to speak languages other than English in the workplace. For examples of cases in which Title VII protected the right to speak a language other than English, see infra notes 98-99, 119, 123 and accompanying text.


33. 42 U.S.C. § 2000e-2 prohibits discrimination on the basis of race, color, religion, sex, or national origin, and states in part:

\begin{itemize}
  \item[(a)] It shall be an unlawful employment practice for an employer—
    \begin{itemize}
      \item[(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
      \item[(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.
    \end{itemize}
\end{itemize}


Congress intended to assure equality by prohibiting employers from making decisions on the basis of race, national origin, color, religion, or sex that may adversely affect employees. See Carino v. University of Okla. Bd. of Regents, 750 F.2d 815, 818 (10th Cir. 1984).

34. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (discussing Title VII's purpose). During the Senate debate on the House-approved bill, Senator Clark, the Senate Floor Manager, responded to a question about the interference with an employer's right to hire based on qualifications, stating "[t]o discriminate is to make distinctions or differences in the treatment of employees, and [such distinctions] are prohibited only if they are based on any one of the five forbidden criteria (race, color, religion, sex, or national origin); any other criteria or qualification is untouched by this bill." 110 CONG. REC. 7218 (1964) (statement of Sen. Clark).
\end{footnotesize}
son or a person's ancestors came.\textsuperscript{35} Congress deleted the word ancestry from the final version of the Act because it considered the term synonymous with national origin.\textsuperscript{36} The Supreme Court confirmed this interpretation in 1973.\textsuperscript{37} There is no evidence that Congress intended to define the term narrowly.\textsuperscript{38} There also is no evidence that Congress intended a narrow scope of protection. Title VII explicitly outlaws certain employment practices that discharge, limit, or otherwise discriminate against employees on the basis of national origin.\textsuperscript{39}

As part of Title VII, Congress created the Equal Employment Opportunity Commission (EEOC) to administer the Act.\textsuperscript{40} The EEOC has published several different guidelines interpret-

\textsuperscript{35} During the discussion of the House version, Rep. Roosevelt stated that "national origin" means "the country from which you or your forebears came from[sic]. You may come from Poland, Czechoslovakia, England, France, or any other country." 110 CONG. REC. 2549 (1964) (statement of Rep. Roosevelt). Rep. Dent reiterated that national origin has nothing to do with color, religion, or the race of the individual. 110 CONG. REC. 2549 (1964) (statement of Rep. Dent).


\textsuperscript{38} See Gutierrez v. Municipal Ct., 838 F.2d 1031, 1040 n.12 (9th Cir. 1988) (stating that "Title VII is a broad remedial statute that was intended to strike at many forms of discrimination that may not be actionable under the fourteenth amendment"), \textit{vacated as moot}, 109 S. Ct. 1736 (1989).


A 1972 amendment to Title VII expanded the EEOC's enforcement powers, giving the EEOC authority to bring civil suits to eliminate unlawful employment practices. Congress granted the authority by amending 42 U.S.C. § 2000e-4(g)\textsuperscript{6} to allow the EEOC "to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent ... ." 42 U.S.C. § 2000e-4(g)(6) (1982). The purpose of the EEO Act was to establish a quasi-judicial agency with enforcement power to implement the national policy of Title VII.

Title VII also gave the EEOC authority to issue procedural guidelines. "The Commission shall have authority from time to time to issue, amend, or rescind suitable \textit{procedural} regulations ... ." 42 U.S.C. 2000e-12(a) (1982) (emphasis added). See LEGISLATIVE HISTORY OF TITLES VII AND XI, supra note 30, at 1020. The word "procedural" was intentionally included. See \textit{id.} at 1021.
ing various aspects of the Act. In 1970, the EEOC published the first Guidelines on Discrimination Because of National Origin. Although Title VII does not explicitly authorize the EEOC to issue such "interpretive" guidelines, the Supreme Court has nevertheless confirmed the EEOC's authority to do so. The Supreme Court has held that guidelines consistent with the Act and legislative history deserve deference.

41. See infra notes 44-45 (Guidelines on Employment Testing Procedures) and infra note 44 (Guidelines on Employment Selection Procedures).

42. Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.1 (1971). The EEOC issued these Guidelines to clarify what constitutes national origin discrimination. "The Commission is aware of the widespread practices of discrimination on the basis of national origin, and intends to apply the full force of law to eliminate such discrimination." Id. § 1606.1(a). "Title VII is intended to eliminate covert as well as overt practices of discrimination . . . where persons . . . have been denied equal employment opportunity for reasons which are grounded in national origin considerations." Id. § 1606.1(b). These practices included using tests in English when English is not the test taker's first language and denying opportunities because a person's name reflects a certain national origin. Id.

43. Although the EEOC is given authority to issue only procedural guidelines, it may be inferred that the EEOC has some power to interpret Title VII because § 713(b) provides a "good faith defense" for employers who relied on the EEOC's interpretation. LEGISLATIVE HISTORY OF TITLES VII AND XI, supra note 30, at 1020. The Supreme Court has stated that "[t]he EEOC Guidelines are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute '[t]he administrative interpretation of the Act by the enforcing agency,' and consequently they are 'entitled to great deference.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971)). See also M. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.02, at 200 (stud. ed. 1988) (stating that "[t]he third major function of the EEOC is interpretive").

44. The Court has ruled twice that certain guidelines are consistent with congressional intent and that courts must defer to them. In 1971, the Supreme Court upheld the EEOC Guidelines on Employment Testing Procedures. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). In 1975, the Supreme Court adopted the EEOC Guidelines on Employment Selection Procedures in Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-31 (1975). The Court held that employers must determine through validation studies that employment tests are job related. Id.

45. Griggs, 401 U.S. at 433-34. The Supreme Court found that the 1966 EEOC Guidelines on Employment Testing Procedures in the racial context were consistent with the Act and therefore accorded them great deference. Id. at 433-36.

Because of the "consistency" requirement, the EEOC guidelines may be subject to court interpretation and subsequent agency revision. For example, in 1973 the Supreme Court ruled that even though EEOC guidelines were generally entitled to deference, the guidelines equating citizenship with national origin were inconsistent with congressional intent and should not be followed. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973). The Court noted that Congress could not have intended to equate citizenship with national origin be-
Seventh Circuit also has stated that courts should follow EEOC guidelines unless a "cogent reason exists for non-compliance."46 In 1980 and 1987, the EEOC published Guidelines on Discrimination Because of National Origin (EEOC Guidelines) that directly addressed English-only rules and their relation to national origin discrimination.47 The EEOC Guidelines define national origin broadly to include linguistic characteristics of national origin groups48 and state that an individual's primary language is an essential characteristic of national origin.49 Although promulgated in 1980, the Ninth Circuit in 1988 was the first court to consider and apply50 the EEOC Guidelines to cause there was no intent to reverse the long-standing practice of requiring federal employees to be citizens. Id. at 92-94. The EEOC subsequently revised the Guidelines to reflect the Court's holding. 29 C.F.R. § 1606.1(d) (1974) (stating that discrimination on basis of citizenship is not per se national origin discrimination).

46. United States v. City of Chicago, 573 F.2d 416, 427 (7th Cir. 1978) (citing United States v. City of Chicago, 549 F.2d 415, 430 (7th Cir. 1977)).


48. The Commission defines national origin discrimination broadly to include denial of 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 (1987).

49. 29 C.F.R. § 1606.7 (1987).

50. The Ninth Circuit adopted the EEOC Guidelines on Discrimination Because of National Origin in Gutierrez v. Municipal Ct., 838 F.2d 1031, 1039-40 (9th Cir. 1988), vacated as moot, 109 S. Ct. 1736 (1989). Although this Note argues that the EEOC Guidelines are consistent with congressional intent and therefore deserve deference, infra notes 211-15 and accompanying text, the Ninth Circuit failed to analyze whether the Guidelines actually met the consistency requirement. Gutierrez, 838 F.2d at 1039-40 & n.7 (noting consistency requirement in footnote only).

The Garcia court did not follow earlier EEOC rulings concerning the validity of English-only rules, because the EEOC had not issued any regulations or general policy on English-only rules. Garcia v. Gloor, 618 F.2d 264, 268 n.1 (5th Cir. 1980) (upholding English-only rule confined to the workplace and workhours), cert. denied, 449 U.S. 1113 (1981). Garcia was decided only on the basis of case law and Title VII. Garcia, 618 F.2d at 268. The court implied, however, that it would have deferred to guidelines stating a general policy or a
English-only rules.  

B. **Theories of Liability to Prove Discrimination**

Under both Title VII and the EEOC Guidelines, two theories exist by which employees may show national origin discrimination: disparate treatment theory and disparate impact theory. The Supreme Court established the disparate standard by which to test the language prohibitions had any existed. See id. at 268 n.1.


The EEOC Guidelines create a presumption that rules requiring employees to speak English at all times in the workplace violate Title VII as national origin discrimination. 29 C.F.R. § 1606.7(a) (1987).

§ 1606.7 Speak-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.

Id. (footnote omitted).

Nonetheless, the EEOC Guidelines allow an employer to impose limited language restrictions if business necessity justifies them:

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(b) (1987).

52. "The Title VII principles of disparate treatment and adverse impact equally apply to national origin discrimination. These Guidelines apply to all entities covered by Title VII . . . ." 29 C.F.R. § 1606.2 (1987). See also B. Schlei & P. Grossman, Employment Discrimination Law 304 n.2 (2d ed. 1983) (citing cases in which courts have considered claims under both theories).

53. See B. Schlei & P. Grossman, supra note 52, at 304 n.1. Disparate treatment occurs when an employer intentionally treats people less favorably because of characteristics such as race or national origin. Proof of motive is critical. See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (stating that proof of discriminatory motive is critical).

54. See, e.g., International Bhd., 431 U.S. at 336 n.15 (stating that disparate impact results from "employment practices that are facially neutral in their
treatment standard in *McDonnell Douglas Corp. v. Green*, which requires employees alleging disparate treatment to show that the employer intentionally discriminated against a protected class. The Supreme Court first established the disparate impact standard in *Griggs v. Duke Power Co.* Under the *Griggs* standard, employees alleging disparate impact must show that a facially neutral employment practice has a disproportionate impact on a group protected by Title VII. Because of the difficulty courts encounter when applying disparate impact theory to an employer who “innocently” adopts an employment practice that has a disparate impact, this Note focuses on disparate impact theory.

1. Historical Perspective of Disparate Impact Theory

Since the Supreme Court first enunciated the disparate impact theory of liability in 1971, lower courts have applied the theory inconsistently. Although recent Supreme Court opin-

---

56. To establish a prima facie case of intentional discrimination, a claimant must show that: (1) she belongs to a racial minority; (2) she applied and was qualified for the position; (3) despite qualifications, she was rejected; (4) after rejection, the position remained open and the employer sought similarly qualified applicants. The employer then must show a legitimate non-discriminatory reason for the rejection. Claimant then has an opportunity to show that the stated reason was just a pretext. *Id.* at 802-06. See also Carino v. University of Okla. Bd. of Regents, 750 F.2d 815, 818-20 (10th Cir. 1984) (applying *McDonnell* standard to national origin discrimination); *Native-Born Acadians*, supra note 36, at 1162-64 (discussing *McDonnell* standard). Under Title VII, the employer must show that disparate treatment is justified by a bona fide occupational qualification (BFOQ). 42 U.S.C. 2000e-2 (1982). See also Comment, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. MARSHALL L. REV. 667, 672 (1982) [hereinafter *Silent Right*] (discussing BFOQ defense).
58. See *id.* at 431 (stating that Title VII proscribes practices that are fair in form, but discriminatory in operation).
59. The Supreme Court's recent reformulation of the disparate impact standard in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), is just one example of the difficulty courts have in distinguishing the disparate impact theory from the disparate treatment theory. See infra notes 159-94 and accompanying text. The Supreme Court's inconsistency has fostered the confusion found in lower courts. See infra notes 93-95 and accompanying text.
61. See *infra* notes 83-73 and accompanying text. See generally B. SCHLEI & P. GROSSMAN, supra note 52, at 1328-29 (discussing business necessity standard requirements in various courts). Various commentators have noted the differing interpretations of business necessity found in the lower courts. *E.g.*,...
ions finally may resolve many of these inconsistencies, it is helpful in understanding past English-only decisions to examine the lower courts’ varying approaches to disparate impact theory. The Courts of Appeals for the Fourth, Seventh, and Tenth Circuits have applied a two-step standard to evaluate the validity of an employment practice challenged as having a disparate impact. The first step requires the plaintiff to establish a prima facie case of disparate impact. The second step is an affirmative defense that shifts the burden to the employer to prove a business necessity for the practice. The Fourth Circuit concluded that once an employee proves disparate impact, the employer must show that a sufficiently compelling business purpose exists to override the discriminatory impact of the alleged discriminatory rule, that the rule effectively carries out the stated purpose, and that there are no acceptable, less discriminatory alternatives. The Seventh Circuit has held that when an employer fails to comply with the EEOC guidelines, the employer bears a heavier burden of proving the business necessity of the rule than when in compliance. The


62. See infra notes 155-82 and accompanying text (discussing recent Supreme Court decisions).
63. See infra note 68.
64. See infra note 69.
65. See infra notes 70-71.
66. “A prima facie case consists of sufficient evidence . . . to get plaintiff past a motion for directed verdict in a jury case or motion to dismiss in a non-jury case . . .)” BLACK’S LAW DICTIONARY 1071 (5th ed. 1979).
67. The majority of cases dealing with employment practices involve employee selection and promotion devices. See B. SCHLEI & P. GROSSMAN, supra note 52, at 304 n.2.
68. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971). The court held that the seniority system violated Title VII under disparate impact theory. 444 F.2d at 795-96. The court believed that maintaining the status quo, conforming to precedent, and avoiding union pressure were not legitimate business purposes that would override the adverse racial impact. Id. at 798-800. Although efficiency is a legitimate business interest, the court found that the seniority system was an inefficient means to assure sufficient prior job experience for advancements. Id. at 799.
69. United States v. City of Chicago, 573 F.2d 416, 427 (7th Cir. 1978). On remand, the court required the employers to make a strong showing that the
Tenth Circuit has held that the employer must prove business necessity for an employment practice and that the practice is "essential, the purpose compelling." A rational or legitimate nondiscriminatory reason for the employment practice is not sufficient.

Other circuits have rejected this two-step standard and found that the employee bears the burden of persuasion at all times, or that the employer does not have to prove that the employment practice is "absolutely necessary" or "essential."

The Supreme Court has promoted this lower court confusion by announcing inconsistent standards. The Griggs Court simply stated that once the plaintiff establishes the disparate effect of the employment practice, the employer has the burden of showing that the practice has a "manifest relationship" to a "genuine business need." Later, in Albemarle Paper Co. v. Moody, the Supreme Court altered the Griggs "manifest relationship" standard by adding a third step. After the employer demonstrates a manifest relationship to a genuine business need, the employee may demonstrate that less

---


71. Williams, 641 F.2d at 842. The court noted that for disparate treatment cases, unlike disparate impact cases, all that is needed is proof of a legitimate nondiscriminatory reason to rebut an inference of intent. Id. The court remanded the case "[i]n light of the district court's misapplication of 'disparate treatment' standards to this 'disparate impact' claim." Id.


74. See generally Judicial Dualism, supra note 61, at 400-19 (discussing Supreme Court's interpretation of Griggs business necessity component).


76. Id. at 432. This case involved employee selection devices having a disparate impact on the basis of race. The test for discrimination required proof that the practice had an adverse impact on a protected class and the absence of proof that the practice resulted from business necessity. Id. at 431. The employer failed to prove that the high school completion requirement and the general intelligence test bore a demonstrable relationship to the successful performance of the jobs. Evidence showed that employees who had not completed high school or who had not taken the general intelligence test performed their jobs satisfactorily. Id.

77. 422 U.S. 405, 425 (1975). The Court also stated that the issue of job relatedness must be viewed within the context of the business. Id. at 427. In this case, the employer did not meet the burden of proving the job relatedness of its testing program. Id. at 435-36.
discriminatory alternatives exist to serve the employer's legitimate interests.\textsuperscript{78} The Supreme Court reaffirmed this tripartite standard\textsuperscript{79} in 1977,\textsuperscript{80} but stated that the employer bears the burden of proving that the practice is "essential" to its business.\textsuperscript{81} In 1979, the Supreme Court affirmed the \textit{Griggs} "manifest relationship" standard, but weakened it by stating that a rule would be valid if it "significantly served" the "legitimate employment goals of safety and efficiency."\textsuperscript{82}

The Court's recent decisions in \textit{Watson v. Fort Worth Bank & Trust}\textsuperscript{83} and \textit{Wards Cove Packing Co. v. Atonio}\textsuperscript{84} appear to resolve some of these inconsistencies. Before discussing the Court's newest enunciation of the disparate impact standard and its implications for the proper analysis of English-only rules, it is useful to discuss challenges to English-only rules under prior case law.

2. Judicial Application of Disparate Impact Theory to English-Only Rules

When an employer uses an English-only rule to discriminate intentionally against members of a national origin group, the employer violates Title VII under disparate treatment analysis.\textsuperscript{85} Disparate impact theory, however, recognizes that some

\begin{itemize}
  \item \textsuperscript{78} \textit{Id.} at 425. Even validated tests may be a pretext for discrimination if less discriminatory alternatives exist. \textit{Id.} at 436.
  \item \textsuperscript{79} The \textit{Albemarle} standard involved three steps. First, the employee must show that the employment practice selects "applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." \textit{Albemarle}, 422 U.S. at 425. Second, the employer must prove that the employment practice has a "manifest relationship to the employment in question" or that the employment practice is "job related." \textit{Id.} Finally, the employee may show that less discriminatory alternatives exist. \textit{Id.}
  \item \textsuperscript{80} \textit{Dothard v. Rawlinson}, 433 U.S. 321, 329 (1977). In this case, height and weight requirements had a disparate impact on gender. \textit{Id.} at 331. The employer was unable to show job relatedness, and even if related, less discriminatory alternatives existed, such as a test that directly measured an individual's strength. \textit{Id.} at 331-32. The Court suggested that a strength requirement would satisfy Title VII standards only if strength is essential to a correction counselor's effective job performance. \textit{Id.} The Second Circuit adopted this standard in 1981. \textit{Grant v. Bethlehem Steel Corp.}, 635 F.2d 1007, 1014-15 (2d Cir. 1980), \textit{cert. denied}, 452 U.S. 940 (1981).
  \item \textsuperscript{81} \textit{Dothard}, 433 U.S. at 331.
  \item \textsuperscript{82} \textit{New York Transit Auth. v. Beazer}, 440 U.S. 568, 587 n.31 (1979) (holding valid rule that denied methadone users employment as drivers).
  \item \textsuperscript{83} 108 S. Ct. 2777 (1988). See \textit{infra} notes 155-58 and accompanying text.
  \item \textsuperscript{84} 109 S. Ct. 2115 (1989). \textit{Atonio} is discussed \textit{infra} notes 159-82, 187-91 and accompanying text.
  \item \textsuperscript{85} Disparate treatment theory recognizes that employers who adopt employment practices with the intent of discriminating against "protected
employment practices, adopted without a discriminatory motive, may be functionally equivalent to intentional discrimination.86 Before Atonio,87 plaintiffs established a prima facie case of national origin discrimination under disparate impact theory by showing that an English-only rule affected employees of a certain national origin in a manner significantly different from other employees.88 Plaintiffs have used statistical comparisons to show the disproportionate effect.89 Courts have focused on the consequences or effects of the practice, rather than on the employer’s motive.90 If an employee established a disparate impact, the employer then had to rebut the claim by showing a business necessity for the English-only rule.91 Finally, depending on the circuit, either the employer or the employee had to show that less discriminatory alternatives were or were not equally effective.92

The Supreme Court’s failure to clearly define disparate impact theory has resulted in lower courts applying business necessity standards in English-only cases that range from “understandable and not irrational”93 to “compelling and essen-

---

88. See B. Schlei & P. Grossman, supra note 52, at 1325 (stating that court must determine whether the “practice or selection device has a substantial adverse impact upon a protected group”); cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (applying disparate impact theory to racial discrimination).
89. See B. Schlei & P. Grossman, supra note 52, at 1326-28 (discussing statistical proof).
90. E.g., id. at 1324 (stating that focus is on consequence, not motive).
91. The employer has the burden of showing that the particular employment practice has a “manifest relationship” to the employment. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971). “The touchstone is business necessity.” Id. at 431. See also Silent Right, supra note 56, at 673 n.27, 687 (stating that proof of business necessity depends on job-relatedness and whether the job related practice is necessary to the safe and efficient operation of business). Necessity implies least restrictive alternative. Id. at 673-74 & n.30 (noting that pretext for unlawful discrimination may be shown if less restrictive alternative available).
92. Compare Albemarle, 422 U.S. at 425 (finding burden on plaintiff) with Kirby v. Colony Furniture Co., 613 F.2d 696, 705 n.6 (8th Cir. 1980) (finding burden on defendant).
93. The “understandable and not irrational” standard appears even weaker than a rational basis standard. Under this standard, courts apparently always find the proffered justifications valid. See, e.g., Flores v. Hartford Police Dep’t, 25 Fair Empl. Prac. Cas. (BNA) 180, 186 (D. Conn. 1981) (holding that absolute no-Spanish rule at Police Academy did not violate Title VII:
Some courts apply an intermediate balancing test, examining the proffered justifications without articulating a standard, and reaching unpredictable results.\(^9\)

EEOC decisions have recognized that an employer may not institute a rule prohibiting non-English languages “at all times” in the workplace or institute any language restrictions absent a business necessity.\(^9\) Under disparate impact theory, the EEOC has held that an employer who denies employees the privilege of conversing in their native language discriminates between

"Even if the rule could not be shown to be job related, it is an understandable and not irrational response. . . ."; Garcia v. Gloor, 618 F.2d 264, 271 (5th Cir. 1980) (noting that judges should defer to employer’s business judgment), cert. denied, 449 U.S. 1113 (1981).


95. The courts sometimes find that the proffered justifications are valid. See, e.g., Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1410 (9th Cir. 1987) (holding English-only rule justified by marketing and rating concerns of radio program); Saucedo v. Brothers Well Serv., Inc., 464 F. Supp. 919, 921 (S.D. Tex. 1979) (implying that court would uphold English-only rule during actual drilling of wells); Commission Decision No. 83-7, 31 Fair Empl. Prac. Cas. (BNA) 1861, 1862 (EEOC 1983) (holding that English-only rule justified by necessity of safe and efficient operation of petroleum refinery laboratory).

Courts in other cases have rejected the proffered justifications. See, e.g., Saucedo, 464 F. Supp. at 922 (holding that Spanish rule had disparate impact on Mexican-American employees of oilfield drilling operation because safety justification not relevant at time employee violated rule); Commission Decision No. 81-25, 27 Fair Empl. Prac. Cas. (BNA) 1820, 1822 (EEOC 1981) (finding that English-only rule for tailor shop employees not justified by fellow employee and customer preference); Commission Decision No. 71446, 2 Fair Empl. Prac. Cas. (BNA) 1127, 1128 (EEOC 1970) (rejecting business necessity justification for absolute no-Spanish rule).

96. See, e.g., Commission Decision No. 81-25, 27 Fair Empl. Prac. Cas. (BNA) 1820, 1822 (EEOC 1980) (holding English-only rule at all times in tailor shop not justified by business necessity); see also Commission Decision No. 71446, 2 Fair Empl. Prac. Cas. (BNA) 1127, 1128 (EEOC 1970) (finding employer offered no evidence of business necessity for absolute English-only rule). The Commission held that a rule prohibiting Spanish on the work premises had an obvious effect on Spanish surnamed American employees and discriminated on the basis of national origin. Id. The Commission has found such a rule unlawful particularly when the employer does not offer any business necessity for the rule. Id. Another decision held that it is unlawful for a labor union and an employer of a food processing company to prohibit employees from speaking their native language during work hours and at union meetings. Commission Decision No. 73-0479, 19 Fair Empl. Prac. Cas. (BNA) 1788, 1804, 1807 (EEOC 1973). The Commission held that the prohibition discriminated against Spanish surnamed Americans on the basis of national origin, noting that 19% of the employees had Spanish surnames. Id.
groups on the basis of national origin. Before 1980, the only court to address the issue of English-only rules held that an oilfield drilling operation unlawfully discharged a Mexican-American employee who violated an informal rule by speaking two words of Spanish. The court found that the employer's absolute prohibition on Spanish had a disparate impact on Mexican-American employees and that no business necessity existed at the time the employee violated the rule. In 1980, the court reached the opposite conclusion in Garcia v. Gloor.

a. Garcia and its Progeny

The Fifth Circuit held in Garcia v. Gloor that a limited English-only rule neither imposed a discriminatory condition of employment nor constituted national origin discrimination under Title VII. The rule at issue in Garcia prohibited employees from speaking Spanish on the job except during breaks or when communicating with Spanish-speaking

---

97. Commission Decision No. 73-0479, 19 Fair Empl. Prac. Cas. (BNA) 1788, 1804 (EEOC 1973) (stating that "to prohibit ... Spanish surnamed American employees and members from speaking their native tongue ... operates to deny them a privilege of employment ... enjoyed by Anglos... "); Commission Decision No. 71446, 2 Fair Empl. Prac. Cas. (BNA) 1127, 1128 (EEOC 1970) (noting that rule denies "Spanish surnamed American employees ... a... privilege of employment enjoyed by other employees: to converse in a familiar language with which they are most comfortable").


99. Id. at 922. There was no evidence of intentional discrimination. Fifty percent of the employees were Mexican-Americans in a community population that was comprised of 30% Mexican-Americans. Id. at 920. The court found that the rule forbidding Spanish obviously had a disparate impact on this group. Id. at 922. The court's ruling, however, is very narrow. It found that the rule had not been clearly promulgated or uniformly enforced. Id. at 921. In addition, the employee was not engaged in drilling at the time he violated the rule. For this reason, the court found there was no business necessity for the rule as applied to the employee. Id. at 922.

In dicta, however, the court found that a rule prohibiting the use of Spanish during the drilling of a well "would be a reasonable rule for which a business necessity could be demonstrated." Id. at 921. The court found that operating an oil drilling rig was a highly skilled, dangerous activity that required close coordination of the members of the crew. Id.


101. Id.

102. Id. at 268-71. The employee challenged the workplace rule under Title VII and 42 U.S.C. §§ 1981, 1985(c). This Note examines only the Title VII claim.

103. Garcia, 618 F.2d at 266. The rule did not apply to non-English-speaking employees who worked outside in the lumberyard. Id.
The court held that the workplace rule did not violate Title VII. Based on the plain language of Title VII and the absence of an EEOC administrative interpretation, the court found that Congress did not intend to equate language preference with national origin. The court also noted that Title VII does not prohibit all arbitrary employment practices, only those based on immutable characteristics or those that impose burdens on a prohibited basis, such as race or national origin. The court held that although national origin is immutable, language preference, like hair length preference, is mutable, and thus should not be given the same protection as immutable characteristics.

The court found no disparate impact on the basis of national origin because the plaintiff, who was bilingual, could have complied easily with the rule by speaking English. For the plaintiff, noncompliance with the rule was a matter of personal preference, rather than an inability to speak English. The court also found no evidence that the rule created a burdensome condition of employment or that it produced an atmosphere of racial and ethnic oppression.

The court also held that even if the rule did have a disparate impact on Hispanics, valid business reasons justified the rule. These included customer preference, and supervisor preference.

104. *Id.* at 266. Garcia, a bilingual salesperson, violated the rule by responding in Spanish to a question from a fellow Mexican-American employee about the availability of a product. An officer of Gloor overheard Garcia's Spanish response and discharged him. *Id.*

105. *Id.* at 268 & nn.1-2. The court based its ruling in part on the fact that even though the EEOC had considered the lawfulness of these rules in specific instances, the EEOC had not adopted a regulation or a general policy specifically prohibiting them. *Id.* at 268 n.1. The EEOC published the 1980 Guidelines on English-only rules after the Garcia decision and the Guideline's commentary makes reference to Garcia. 45 Fed. Reg. 85,632, 85,635 (1980). The court did not support the proposition that a person has a right to speak whatever language one wants at work. *Garcia*, 618 F.2d. at 268. The court also noted that national origin was not to be confused with ethnic or sociocultural traits. *Id.* at 269.

106. *Garcia*, 618 F.2d at 269.

107. *Id.* at 269-70.

108. *Id.*

109. *Id.* at 270.

110. *Id.*

111. *Id.*

112. The rule was necessary to calm English-speaking customers who objected to overhearing conversations they could not understand. *Id.* at 267.
and improving employees' English fluency. These justifications met the Fifth Circuit's lenient business necessity test and the court failed to examine them in detail.

Post-Garcia cases generally have upheld limited English-only rules either by finding no disparate impact because the bilingual employee could comply easily, or by finding that business necessity justified the rule. Courts usually find that the proffered justifications satisfy the business necessity standard. For example, courts have found it lawful to require English to improve trainees' English proficiency even during class breaks in a police training academy; to require English to promote safety in a laboratory where employees work with potentially dangerous chemicals; and to require a radio disc jockey to speak only English on the air because of demographic and marketing concerns.

113. By requiring employees to speak English at all times, the supervisors would be better able to oversee their subordinates' work. Id.

114. By requiring employees to speak English at all times, not just in dealing with customers, the Spanish-speakers' English would improve faster and they would be better able to understand the trade literature available only in English. Id.

115. "Fifth Circuit cases decided after Beazer and Contreras have imposed a less strict standard than business necessity upon defendants seeking to show that their selection devices are job related." Bernard v. Gulf Oil Co., 841 F.2d 547, 563 (5th Cir. 1988). The Bernard opinion further states that the standard is the less strict Albemarle "significantly correlated" standard. Id. at 563-64. See also Levin v. Delta Air Lines, 730 F.2d 994, 1002 (5th Cir. 1984) (holding that policy removing pregnant attendants from flight duty does not violate Title VII under disparate impact theory because the policy was justified by safety concerns, and less discriminatory alternatives were available but too burdensome).


117. Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1412 (9th Cir. 1987) (holding that a radio disc jockey who could easily comply with radio station's English-only order had no basis for disparate impact claim).

118. See infra notes 119-22 and accompanying text.

119. Although the majority of the cases from 1981 to 1987 find the proffered justification sufficient to meet business necessity, the Commission has found that fellow employee and customer preference for hearing English did not justify a rule that forbids English during work hours in a tailor shop. Commission Decision No. 81-25, 27 Fair Empl. Prac. Cas. (BNA) 1520, 1822 (EEOC 1981). Following the EEOC guidelines, the court closely scrutinized the rule and found it discriminated on the basis of national origin. Id.


b. The Gutierrez Standard

In 1988 the Ninth Circuit rejected the Garcia analysis in Gutierrez v. Municipal Court, holding that the English-only rule at issue had a disparate impact on a national origin group and that business necessity did not justify the rule’s use. In 1989, the Supreme Court vacated this decision as moot, without explanation. By providing no explanation, the Supreme Court thus gives lower courts no guidance concerning the proper disposition of challenges to English-only rules.

The English-only rule in Gutierrez prohibited court employees from speaking any language other than English except when acting as court translators or during breaks and lunches. The plaintiff challenged the rule as national origin discrimination with respect to a term or condition of employment under Title VII. The Gutierrez court upheld a preliminary injunction preventing the employer from imposing and enforcing this rule. The court applied a two-step disparate impact standard. It first determined that the rule had a disparate impact and then examined and rejected the proffered business necessity justifications in light of Title VII.

In determining whether the rule had a disparate impact,

---

126. Gutierrez, 838 F.2d at 1037. In 1984, the Municipal Court promulgated a rule that prohibited employees from speaking any language other than English except when translating in court. Id. at 1036. The court subsequently amended this rule to exclude conversations during lunches and breaks. Id. The rule as amended read: “The 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. This rule does not apply to employees while on their lunch hour or work breaks.” Id. at 1037.
127. Gutierrez was an Hispanic-American court translator. Unlike earlier cases, Gutierrez was not discharged for violation of the rule, but filed a complaint with the EEOC and later filed an action challenging the rule’s validity. Id. at 1036. Gutierrez brought the action against the municipal judges who instituted the rule. Id.
128. Id. at 1036. Gutierrez relied on both disparate impact and disparate treatment theories. Id. at 1037. In addition, Gutierrez claimed the rule violated 42 U.S.C. §§ 1981, 1983, 1985(c), as well as the first and fourteenth amendments. Id. at 1036.
129. Id. at 1036.
130. Id. at 1038-44.
the court found that "English-only rules generally have an adverse impact on protected groups and . . . should be closely scrutinized."\textsuperscript{131} The court equated national origin with language, based on the 1987 EEOC Guidelines, which state that language is an "essential national origin characteristic."\textsuperscript{132} The court also found that language restrictions must be monitored carefully because language is an identifying characteristic of national origin and may be a pretext for intentional national origin discrimination.\textsuperscript{133} The court found this particular rule a burdensome condition of employment because it regulated both work and non-work related communications between employees.\textsuperscript{134}

The court adopted the EEOC Guidelines' business necessity standard\textsuperscript{135} and the Fourth and Tenth Circuit's interpretation of business necessity\textsuperscript{136} to determine whether the discriminatory effect of the limited English-only rule was justified. The court examined in detail the business purpose and the effectiveness of the rule in carrying out that purpose, rejecting each justification that the employer proffered.\textsuperscript{137} Although the court acknowledged a substantial state interest in having an English-speaking country, the court found that the rule at issue did not effectively achieve that result.\textsuperscript{138} Similarly, the court rejected the argument that the rule was not necessary for

\begin{itemize}
\item \textsuperscript{131} Id. at 1040. The court rejected the defendant's argument that because Gutierrez was bilingual and could easily comply with the rule there was no burden and no disparate impact. \textit{Id.} at 1041. "The mere fact that an employee is bilingual does not eliminate the relationship between his primary language and the culture that is derived from his national origin." \textit{Id.} at 1039.
\item \textsuperscript{132} \textit{Id.} at 1039 (quoting 29 C.F.R. § 1606.7(a) (1987)).
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.} at 1040. The court agreed with the EEOC's conclusion that English-only rules have a direct effect on the workplace by creating an atmosphere of "inferiority, isolation, and intimidation." \textit{Id.} at 1040 (quoting 29 C.F.R. § 1606.7(a) (1987)).
\item \textsuperscript{135} \textit{Gutierrez,} 838 F.2d at 1040 & nn.8-9.
\item \textsuperscript{136} \textit{Id.} at 1041-42. \textit{See supra} notes 68-70 and accompanying text.
\item \textsuperscript{137} \textit{Gutierrez,} 838 F.2d at 1041-44.
\item \textsuperscript{138} Gutierrez's official duties as an employee of the court included using Spanish in translating for the non-English-speaking public. \textit{Id.} at 1043. The prohibition of intra-employee Spanish communications, therefore, did not effectively promote a single language system. \textit{Id.} at 1042.
\item \textsuperscript{139} \textit{Id.}
\item \textsuperscript{140} \textit{Id.}
\end{itemize}
supervisors to determine whether information was being correctly disseminated to the public.\textsuperscript{141} The nature of the work (translating in court) required employees to communicate with the public in Spanish.\textsuperscript{142} The court thus suggested that employing Spanish-speaking supervisors would be the most effective means to supervise employees.\textsuperscript{143} The court also found that the rule was not necessary to promote racial harmony,\textsuperscript{144} and in fact, only increased the racial hostility among employees because the Hispanic employees felt the rule degraded them.\textsuperscript{145} Similarly, the rule was not necessary to allay the fears and suspicions of the non-Spanish-speaking employees who believed they were the subject of discussion in Spanish.\textsuperscript{146} The court found no probative evidence that employees were using Spanish to talk about other employees.\textsuperscript{147} The court finally rejected the argument that the California Constitution, amended in 1986 to make English the official language of the state,\textsuperscript{148} created a

\begin{itemize}
  \item \textsuperscript{141} Id. at 1043 (describing argument that rule is necessary to monitor employees’ work as “illogical” and “unpersuasive”).
  \item \textsuperscript{142} Id. The office served a multilingual public and the employer required the employees to use Spanish as part of their official duties as court translators. Id.
  \item \textsuperscript{143} Id.
  \item \textsuperscript{144} The employers contended that Spanish had previously been used to belittle non-Spanish-speaking employees. Id. at 1042. There was, however, no evidence of any inappropriate use of Spanish. Id.
  \item \textsuperscript{145} Id. There was some evidence that the Hispanics felt belittled by the regulation and that non-Spanish-speaking employees directed derogatory remarks at the Hispanics. Id.
  \item \textsuperscript{146} Id. at 1042-43.
  \item \textsuperscript{147} Id.
  \item \textsuperscript{148} California voters added the official-English amendment to the California Constitution as a ballot initiative. Id. at 1043. Section 6 provides:
    \begin{itemize}
      \item \textsuperscript{(a)} \textbf{Purpose}
        English is the common language of the people of the United States of America and the State of California. This section is intended to preserve, protect and strengthen the English language, and not to supersede any of the rights guaranteed to the people by this Constitution.
      \item \textsuperscript{(b)} . . . English is the official language of the State of California.
      \item \textsuperscript{(c)} \textbf{Enforcement}
        The Legislature shall enforce this section by appropriate legislation. The Legislature and officials of the State of California shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced. The Legislature shall make no law which diminishes or ignores the role of English as the common language of the State of California.
      \item \textsuperscript{(d)} . . . Any person who is a resident of or doing business in the State of California shall have standing to sue the State of California to enforce this section . . . .
    \end{itemize}
\end{itemize}

\textsuperscript{CAL. CONST. art. III, § 6.}
business necessity.\textsuperscript{149}

The Supreme Court's recent decision to vacate Gutierrez as moot gives no guidance to lower courts on the validity of the Ninth Circuit's reasoning or on the proper analysis to be used in determining whether English-only rules have a disparate impact on members of national origin groups.\textsuperscript{150} A district court decision of July, 1989, however, suggests that the Ninth Circuit's reasoning remains valid.\textsuperscript{151} The court enjoined Pomona, California, from enforcing an ordinance that required businesses with signs using foreign alphabetical characters to devote 50% of the sign space to English.\textsuperscript{152} As in Gutierrez, the court found that language is an expression of national origin and that the ordinance "overtly discriminates on the basis of national origin."\textsuperscript{153}

3. Recent Developments in Disparate Impact Theory

Until 1988, all of the Supreme Court's decisions using disparate impact theory involved objective, standardized employment tests or hiring criteria.\textsuperscript{154} In 1988, the Supreme Court expanded the scope of the theory's application in Watson v. Fort Worth Bank & Trust, holding that disparate impact theory also applies to subjective employment practices.\textsuperscript{155} Although the Court affirmed the earlier Albemarle Paper Co. v. Moody tripartite standard,\textsuperscript{156} a plurality of the Court heightened the evidentiary standards for the plaintiff.\textsuperscript{157} The plurality's shift,

\textsuperscript{149} The court found that the California constitutional amendment was largely symbolic and made a distinction between official and private communications. Gutierrez, 838 F.2d at 1044. The adoption of the amendment did not ipso facto create a business necessity. \textit{Id.} The rule still must meet the business necessity standard. \textit{Id.}

\textsuperscript{150} The court simply stated that U.S. English Foundation, Inc. filed an amicus brief and that the case was remanded to be dismissed as moot. Gutierrez, 109 S. Ct. at 1736.

\textsuperscript{151} Asian Am. Business Group v. City of Pomona, 716 F. Supp. 1328 (C.D. Cal. 1989). In discussing the first amendment claim, the court favorably cited Gutierrez for the proposition that discrimination based on language constitutes discrimination based on national origin. \textit{Id.} at 1330.

\textsuperscript{152} \textit{Id.} at 1332. The court used strict scrutiny for the equal protection claim under the fourteenth amendment.

\textsuperscript{153} \textit{Id.}


\textsuperscript{155} \textit{Id.} at 2786.

\textsuperscript{156} \textit{Id.} at 2790.

\textsuperscript{157} The Court stated that the plaintiff's burden in establishing a prima facie case goes beyond showing statistical disparities. \textit{Id.} at 2788. The plaintiff must first identify the specific employment practice responsible for the disparity and then prove causation. \textit{Id.} Sufficiently substantial statistical disparities
in what appears to be dicta, foreshadowed the Court's recent reformulation of disparate impact theory.\(^{158}\)

Attempting to clarify the disparate impact theory of liability, the Supreme Court in 1989 reformulated the standard in *Wards Cove Packing Co. v. Atonio*.\(^{159}\) Although the Court did not have to reach the issues of burden of proof and business necessity,\(^{160}\) it nevertheless addressed them.

The Court first recharacterized the burden of proof and distinguished the burden of production and burden of persuasion.\(^{161}\) The Court clearly stated that the plaintiff bears the burden of persuasion even after establishing a prima facie case of disparate impact.\(^{162}\) The burden of persuasion does not shift

---

\(^{158}\) **See** *Watson*, 108 S. Ct. at 2788 & n.2, 2791. This change in the evidentiary standards appears to be dicta. The Court stated that heightened standards of proof must accompany the extension of disparate impact theory to subjective practices. *Id.* at 2788 & n.2. The Court feared that without these safeguards, employers would adopt quotas or engage in preferential treatment, a danger that the Supreme Court and Congress recognized and sought to avoid. *Id.* at 2789 & n.2, 2791. The Court appeared to confuse burden of proof, burden of persuasion, and the business necessity defense. A three justice concurring opinion pointed out that the plurality's position is the standard for disparate treatment cases, not disparate impact cases. *Id.* at 2792 (Blackmun, J., concurring). The concurring opinion stated that in disparate impact cases, it is "up to the employer to prove that the discriminatory effect is justified." *Id.* at 2794. Furthermore, the concurring opinion pointed out that the plurality was not correct in implying that the defendant need simply show that the employment practice is based on "legitimate" business reasons. Rather, the practice must be essential and the least discriminatory alternative available. *Id.* at 2794-95.

\(^{159}\) *109 S. Ct. 2115* (1989). The Court applied the tripartite *Albemarle* standard as modified in *Watson*, with further modifications. *Id.* at 2126.

\(^{160}\) The Court remanded the case to determine whether the plaintiff could make out a prima facie case using other statistics. *Id.* at 2125. The Court found the plaintiff had used the wrong set of statistics to prove the disparate impact of the employment practices on race. *Id.* at 2121-24. The issues of burden of proof and business necessity were not properly before the Court and the Court should not have addressed them. A court may properly consider such issues only after a plaintiff makes out a prima facie case.

\(^{161}\) *Id.* at 2126. The Court first distinguished and reallocated the burden of proof. The Court found that the employer's burden of proof is only the burden of production and the employee's burden of proof is the burden of persuasion, which remains with the plaintiff at all times.

\(^{162}\) *Id.* To establish a prima facie case under the *Atonio* disparate impact
to the defendant to prove business necessity.\textsuperscript{163} Instead, the employer bears only the burden of producing evidence of a business justification for the challenged business practice.\textsuperscript{164} Once the employer produces such evidence, the plaintiff must show that no such justification exists.\textsuperscript{165} The Court stated that placing the burden of persuasion on the plaintiff in disparate impact cases conforms to the allocation of burdens in disparate treatment cases.\textsuperscript{166} The Court further stated that, to the extent the lower court's decision in the case suggested that the burden of persuasion shifts to the employer, the decision was "clearly erroneous."\textsuperscript{167} The Court acknowledged, however, that the new standard contradicted some of its own earlier decisions.\textsuperscript{168}

As Justice Stevens pointed out in dissent, the majority blurred the distinction between disparate treatment and disparate impact.\textsuperscript{169} Courts recognize that the employer bears a light burden in disparate treatment cases,\textsuperscript{170} but in past disparate impact cases, once the plaintiff established a prima facie case,\textsuperscript{171}
employers escaped liability only by proving that the discriminatory effect nevertheless was justified.\textsuperscript{172} Justice Stevens noted that the Supreme Court and other federal courts have repeatedly recognized business necessity as an affirmative defense to an otherwise illegal course of conduct.\textsuperscript{173} Justice Stevens argued that the employer's burden, which before \textit{Atonio} included both the burden of production and persuasion, is always "weighty."\textsuperscript{174} The Court's decision in \textit{Atonio}, however, eliminates any doubt whether business necessity is an affirmative defense that requires the employer to satisfy the burden of persuasion.\textsuperscript{175}

The majority held that to satisfy the business necessity requirement, the employer need only show that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer."\textsuperscript{176} This burden is considerably more lenient than proving an "essential and compelling" business purpose.\textsuperscript{177} The Court stated that there is no requirement that the practice be "essential" to the employer's business.\textsuperscript{178} The Court also stated that "a mere insubstantial justification" will not suffice.\textsuperscript{179} Although pointing out that this standard requires a "reasoned review"\textsuperscript{180} and is not a "low standard,"\textsuperscript{181} the Court suggested that courts may be less competent than employers themselves to evaluate business practices.\textsuperscript{182}

\begin{itemize}
  \item \textsuperscript{172} \textit{Id.} at 2131.
  \item \textsuperscript{173} \textit{Id.} at 2130 & n.14.
  \item \textsuperscript{174} \textit{Id.} at 2132.
  \item \textsuperscript{175} \textit{See id.} at 2128-33 (Stevens, J., dissenting) (tracing the development of business justification as affirmative defense and noting majority's rejection of development of past statutory construction following \textit{Griggs}).
  \item \textsuperscript{176} \textit{Atonio}, 109 S. Ct. at 2125-26. The Court stated that "it is generally well-established that at the justification stage of such a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." \textit{Id.}
  \item \textsuperscript{177} \textit{See supra} notes 69-84 and accompanying text (discussing "essentialness" requirement for business justification).
  \item \textsuperscript{178} \textit{Atonio}, 109 S. Ct. at 2126. \textit{See also id.} at 2132 (Stevens, J., dissenting) (observing that majority eliminates "essentialness" requirement).
  \item \textsuperscript{179} \textit{Id.} at 2128. "A mere insubstantial justification in this regard will not suffice because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices." \textit{Id.}
  \item \textsuperscript{180} \textit{Id.}
  \item \textsuperscript{181} \textit{Id.}
  \item \textsuperscript{182} \textit{Id.} at 2127.
\end{itemize}
II. PROPOSED APPLICATION OF THE NEW DISPARATE IMPACT THEORY

The Supreme Court's recent decisions necessarily will affect the way lower courts evaluate the validity of English-only workplace rules. Unfortunately, the decisions further cloud the proper application of the disparate impact theory of liability. The following proposal recognizes the analytical problems inherent in the new formulation of the disparate impact theory and illustrates how courts should apply the new formulation to English-only rules.

A. ANALYTICAL PROBLEMS RAISED BY RECENT DECISIONS

It is not clear what the Supreme Court intended when it vacated on grounds of mootness the Ninth Circuit's decision in Gutierrez v. Municipal Court. The Court's decision has the effect of precluding courts from using Gutierrez as legal precedent. The Court's silence, however, leaves uncertain the validity of the Ninth Circuit's reasoning. Consequently, lower courts in future "English-only cases" may rely on the legal arguments used in equating language with national origin and rejecting certain business justifications. The 5 to 4 decision in Atonio, on the other hand, marks a shift in the Supreme

183. Gutierrez v. Municipal Ct., 838 F.2d 1031 (9th Cir. 1988), vacated as moot, 109 S. Ct. 1738 (1989). The case could have been held moot for several reasons, among them the fact that the plaintiff was no longer an employee of the court or that a settlement had been reached. See B. Piatt, supra note 4, at 71.


185. The Court, however, indicated that the Ninth Circuit erroneously allocated the burden of persuasion in Atonio. Atonio, 109 S. Ct. at 2126.

186. See Gutierrez, 838 F.2d at 1042-44. See also Asian Am. Business Group v. City of Pomona, 716 F. Supp. 1328, 1330 (C.D. Cal. 1989) (noting that "[a] person's primary language is an important part of and flows from his/her national origin"). This case was decided after Atonio and held that a city ordinance requiring business signs in foreign languages to include English translations violated the equal protection clause. Id. at 1332-33. The court reasoned that the "use of foreign languages is clearly an expression of national origin. As such, the ordinance overtly discriminated on the basis of national origin." Id. at 1332. The court also stated that although it was not relying on Gutierrez as precedent, it agreed with the case's rationale and analysis. Id. at 1330. See also B. Piatt, supra note 4, at 72 (stating that Gutierrez "is still persuasive for other language rights cases which will undoubtedly follow").
Court's view of the disparate impact standard.\textsuperscript{187} It remains unclear, however, whether the \textit{Atonio} opinion reflects the Court's confusion over the distinctions between disparate treatment theory and disparate impact theory or whether it reflects the Court's deliberate retreat from established doctrines.

The convergence of the two theories in \textit{Atonio}, nevertheless, raises analytical problems. Even though the Court reallocated the burden of persuasion and diluted the employer's business necessity burden, it still requires the employer to show more than a legitimate business purpose.\textsuperscript{188} The employer must prove that the practice furthers business goals in a "significant way."\textsuperscript{189} Even though the Court places a heavy burden on plaintiffs and "tip[s] the scales in favor of employers,"\textsuperscript{190} the Court requires lower courts to conduct a "reasoned review" of the employer's justifications and not simply defer to them.\textsuperscript{191} How courts should interpret the phrases "legitimate,"\textsuperscript{192} "in a significant way,"\textsuperscript{193} and "reasoned review"\textsuperscript{194} is certainly unclear. The measure of protection the Court intends to afford national origin groups in the context of English-only rules under the disparate impact theory is equally unclear. The following analysis proposes a method for applying the new standard to English-only rules.

\subsection*{B. Establishing a Prima Facie Case of National Origin Discrimination}

Under the Supreme Court's new formulation of disparate impact theory, a plaintiff challenging an employer's practice must identify the specific employment practice and prove that it has a disparate impact on members of a national origin group.\textsuperscript{195} It is relatively easy for the plaintiff to identify the oral or written English-only rule or policy.\textsuperscript{196} Proving the caus-
sation element, that English-only rules disproportionately affect members of national origin groups, however, is more difficult. This Note argues that courts should recognize a rebuttable presumption that English-only rules burden members of national origin groups. In the alternative, even if courts fail to recognize this rebuttable presumption, individual plaintiffs still can prove the disparate impact of English-only rules in their particular work environment.

1. Presumption of Impact

To establish a prima facie disparate impact case, a plaintiff must show that the English-only rule disproportionately affects members of national origin groups. Because English-only rules by nature have an impact on members of national origin groups in the general population, courts should not require each plaintiff to prove such impact. Courts instead should recognize and adopt a rebuttable presumption that English-only rules have an inherent and significant adverse impact on employees belonging to certain national origin groups. The presumption is rebuttable because an employer may show that in its particular workplace the rule has an equal effect on "protected" national origin employees and "non-protected" employees. A rebuttable presumption that English-only rules have a disparate impact on national origin is proper because language may be equated with national origin.

197. Cf. Atonio, 109 S. Ct. at 2124 (stating that plaintiff must show causal link between challenged practice and disparate impact).

198. Gutierrez v. Municipal Ct., 838 F.2d 1031, 1040 (9th Cir. 1988) (adopting proposition that English-only rules have adverse impact and should be closely scrutinized), vacated as moot, 109 S. Ct. 1736 (1989). One commentator advocates abandoning the concept that "forces protection of language rights into the 'national origin' pigeon hole." See B. PIATT, supra note 4, at 901. That author states that using a "'national origin' fiction" is analytically unsound. Id. In light of the fact that courts have been reluctant to recognize a constitutional basis for protecting language rights, supra notes 28-29, this Note argues that courts should adopt the EEOC Guidelines' broad rule equating language with national origin and a rebuttable presumption that English-only rules have an adverse impact on national origin. See infra notes 199-240.

199. Title VII's "protected" groups include race, color, national origin, sex, and religion. M. PLAYER, supra note 43, § 5.01, at 199. Under national origin discrimination, Title VII protects "hyphenated-Americans," such as Italian-Americans and Hispanic-Americans. Id., § 5.24, at 232. This Note uses the term "non-protected" employees to refer to Anglos. In certain situations Anglos may be protected, however, as when an Hispanic employer discriminates against the Anglo employees. Id.

200. See infra notes 201-15; see also Gutierrez, 838 F.2d at 1039 (noting that language is an important aspect of national origin); Olagues v. Russoniello, 797
Courts should recognize a theory equating language with national origin because courts have interpreted Title VII to prohibit discrimination based on certain characteristics that identify national origin, including surname, accent, or heritage of spouse. Courts, for example, have held that because foreign accent flows from national origin, discrimination based on foreign accent constitutes national origin discrimination in violation of Title VII. By analogy, courts should accept the premise that Title VII also prohibits discrimination because of a person's language. Language, like accent, flows from national origin and is a characteristic that may indicate national origin. Discrimination on the basis of language, therefore, should constitute discrimination on the basis of national origin in violation of Title VII.

A theory equating language with national origin also is desirable because there is an obvious statistical correlation between a language and its corresponding national origin group. There is a close connection, for example, between most linguistic minorities, such as Chinese or Spanish, and the corresponding national origin. Language often is a function of the country.
from which a person or his ancestors came, and therefore is an essential characteristic of national origin.206

Employers may argue that courts should not equate language with national origin because a theory equating language with national origin to prove discrimination is both overinclusive and underinclusive. Such a theory is acceptable, however, with English-only rules. At most, it is overinclusive to an extremely limited degree because, for example, it may include some speakers of Chinese who are not Chinese. Because, however, 89% of all adults in the United States speak only English,207 the vast majority of those who do speak Chinese will be Chinese. A theory equating language with national origin to prove discrimination is underinclusive because it will not include members of national origin groups who speak only English. This is not a problem, however, because English-speaking minorities can use other means to prove national origin discrimination.208

A theory equating language with national origin also is desirable because the use of a "foreign language" may identify a person's national origin group.209 An employer's restrictions on language use thus may be "a covert basis for national origin discrimination."210 Courts should recognize that if they fail to equate language with national origin, employers could easily circumvent the protections of Title VII by rewording English-only rules in a facially neutral manner. For example, an employer who institutes a rule requiring Hispanic employees to speak only English violates Title VII under disparate treatment analysis. The rule constitutes intentional discrimination because it explicitly names a national origin group. The same employer, however, can reword the rule so that it is facially neutral by requiring all employees to speak only English. This version is not facially discriminatory, yet only affects Hispanic

206. Gutierrez, 838 F.2d at 1039. See also Piatt, supra note 17, at 885 (arguing for recognition of human right to language); Silent Right, supra note 56, at 667 (discussing lawsuits based on language discrimination).

207. See supra notes 23-24 and accompanying text.

208. See B. Schleil & P. Grossman, supra note 52, at 304-05 & nn.1-2, 313-16 (discussing proof of national origin discrimination resulting from other discriminatory employment practices, including derogatory remarks and minimum height standards).

209. See Gutierrez, 838 F.2d at 1039 (finding that use of foreign language may identify individual as having specific national origin).

employees. The fact that both rules have the same impact illustrates the need to equate language with national origin.

Finally, courts should recognize a theory equating language with national origin because the EEOC Guidelines on Discrimination Because of National Origin support such an interpretation. The EEOC Guidelines broadly define national origin to include linguistic characteristics of a national origin group and mandate a careful scrutiny of English-only rules. Courts should adopt these EEOC Guidelines because they further the goals of Title VII and do not contravene congressional intent. Because Title VII defines neither national origin nor the scope of protection for national origin groups, courts may infer that Congress did not intend to restrict its meaning. Furthermore, Congress gave the EEOC authority to enforce Title VII and the Supreme Court validated the EEOC's authority to promulgate interpretive guidelines. Courts should find that the EEOC Guidelines protect employees from workplace rules that may subject employees to discharge on the basis of national origin, thus furthering the goals of Title VII. Despite the Supreme Court's recent narrow interpretation of Title VII, English-only rules fall within the letter of Title VII because they subject members of national origin groups to possible discharge.

In addition, no legal precedent prohibits courts from adopting the EEOC Guidelines in the context of English-only rules. The Garcia decision antedates the 1980 EEOC Guidelines on Discrimination Because of National Origin. In upholding the English-only rule, the Garcia court based its decision on the

211. 29 C.F.R. § 1606.7(a)-(b) (1987). For text, see supra note 51.
212. 29 C.F.R. § 1606.1 (1987) (defining national origin discrimination broadly to include denial of equal employment opportunity because of place of origin or because individual has physical, cultural, or linguistic characteristics of national origin group).
213. Cf. 42 U.S.C. § 2000e-4 (1982) (setting forth powers of EEOC). Although the Supreme Court has adopted other EEOC interpretive guidelines in the past, EEOC guidelines may be subject to court interpretation and subsequent administrative revision. See supra notes 40-46 and accompanying text. To avoid agency revision, the guidelines must be consistent with Title VII and congressional intent. Id.
plain language of the statute. The court noted that no EEOC regulation or general policy equating national origin with language existed. In 1988, the Ninth Circuit became the first court to adopt the EEOC Guidelines for evaluating the lawfulness of an English-only rule. Although the Supreme Court vacated Gutierrez, it was silent on whether lower courts should adopt the EEOC Guidelines. Therefore, because no "cogent reason exists for non-compliance," courts should defer to the EEOC Guidelines and adopt them as the standard for evaluating the validity of English-only rules.

For the above reasons, courts should recognize and adopt a theory that equates language with national origin and adopt a rebuttable presumption that English-only rules have an adverse impact on national origin groups.

2. Proof of Impact

Even if courts are reluctant to adopt a rebuttable presumption that English-only rules discriminate based on national origin, a plaintiff still can prove that the employer's English-only rule has a disproportionate impact on members of national origin groups. English-only rules violate Title VII because they create burdens for the majority of employees belonging to national origin groups, burdens not created for the majority of "non-protected" employees. Employees whose native lan-

218. Garcia, 618 F.2d at 268 & n.1.
220. Gutierrez, 109 S. Ct. 1736 (1989). The Supreme Court could have held that the EEOC Guidelines were inconsistent with congressional intent, as it did in Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973), and instructed the EEOC to revise the Guidelines, narrowing the definition of national origin to exclude linguistic characteristics.
221. See supra note 46 and accompanying text.
222. Title VII prohibits employers from discriminating against or discharging an individual with respect to conditions of employment because of national origin. 42 U.S.C. § 2000e-2(a)(1) (1982).
223. See Commission Decision No. 71446, 2 Fair Empl. Prac. Cas. (BNA) 1127, 1127 (EEOC 1970). The court found that the English-only rule had an obvious and clear effect on Spanish surnamed employees and denied them a "term, condition, or privilege of employment enjoyed by other employees." Id. Prohibiting employees from speaking their native language is similar to requiring a bilingual employee to use her native language on the job, even when such use is not part of the job description. Both place burdens on bilingual employees. The EEOC recently filed suit against a Los Angeles corporation claiming that the added, uncompensated responsibilities of translating Spanish
language is not English bear the burden of possible reprimand or termination for violating the rule.\textsuperscript{224} Employees who speak only English bear no burden because employers can never terminate them for violating the rule.\textsuperscript{225} When a group protected under Title VII has a higher risk of incurring penalties under a rule, the rule has an adverse impact on that group.\textsuperscript{226}

Employees can use statistics to show that English-only rules are conditions of employment that burden a significantly higher percentage of "protected employees" than "non-protected" employees.\textsuperscript{227} An English-only rule would burden a national origin group when statistics demonstrate that the rule burdens a high percentage of employees belonging to a certain national origin group and a low percentage of "non-protected" employees. This would be the result even though an employer may have a few monolingual English-speaking "protected" employees or a few bilingual "non-protected" employees.\textsuperscript{228} An
English-only rule would not violate Title VII when statistics show that it burdens an equal percentage of “protected” employees and “non-protected” employees. This would be the result both when an employer has many monolingual English-speaking “protected” employees and when many bilingual “non-protected” employees.

English-only rules impose a further burden on national origin groups because employees who are not native English speakers must consciously and continuously monitor their speech. These rules also allow some employees to speak their native language, while prohibiting others from doing the same. When employers deny some, but not all, employees the right to speak their native language, those employees may feel isolated and inferior in the work environment.229 These additional burdens illustrate an adverse impact even on those protected employees who are bilingual.

Although using statistics or other means to prove disparate impact is more difficult than proving impact under a rebuttable presumption, plaintiffs still can prove impact without the benefit of the presumption.

3. Mutability

Employers may argue that English-only rules are not burdensome conditions of employment because language is a mutable characteristic (one that changes over time), and thus not protected under Title VII.230 Indeed, the Garcia court found

\[\text{vacated for mootness, 484 U.S. 806 (1987), an employee may prove disparate impact negatively. To do so, the employee compares the class of employees who could never violate the rule (employees who are monolingual speakers of English) with the class of employees who could potentially violate the rule (employees whose native language is not English). Although some members of a "protected" national origin group may not speak the corresponding language, or some native speakers of English may be bilingual, the greatest adverse impact of the rule falls on those employees whose native language is not English.}\]

229. Cf. Gutierrez, 838 F.2d at 1042, 1045 (noting that plaintiff produced evidence that imposition of English-only rule contributed to work atmosphere that derogated Hispanics).

230. See Silent Right, supra note 56, at 691 (noting no undue burden on bilingual employees). One critic feels that an employer can regulate the use of non-English languages by any bilingual employee, regardless of the employer's motive or intent. Id. The reason is that language is similar to other mutable characteristics that neither the Constitution nor Title VII protects. See, e.g., Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (observing that grooming codes are mutable characteristic within employer's control); Kelly v. Johnson, 425 U.S. 238, 249 (1976) (noting that employers may
that restrictions on language did not violate Title VII, reasoning that language is mutable and therefore undeserving of protection. Following precedent, the Garcia court recognized that mutable characteristics that are easily changed, such as hair length, fall outside the protection of Title VII even if an employment practice based on such characteristics has a disparate impact on a protected group. The court's consideration of "mutability" was improper for two reasons. First, mutability is irrelevant in this context. Disparate treatment cases have rejected the mutability argument and found that Title VII protects characteristics of national origin, such as foreign accent or surname, despite mutability. If the Supreme Court intends to converge the theories of disparate treatment and disparate impact, then the analysis courts have applied in accent cases must be applied in English-only cases. In other words, Title VII should protect language, despite its mutability, in disparate impact cases.

Second, it is inappropriate to compare language with mutable characteristics such as hairstyle. Language is more closely analogous to religion. Both are "mutable," yet both go to the core of the person and are not as easily changed as hairstyle. Learning a language is humankind's most complex intellectual achievement. Although people can speak and comprehend
their native language with little thought of the mental and physical processes involved.\(^{237}\) Language greatly influences the way one views the world and the way one describes events.\(^{238}\) Although a person may learn another language, and thereby learn to view the world differently, the connection between the mental process and native language still exists.\(^{239}\) Although reaching opposite ultimate conclusions, both Garcia and Gutierrez recognized that language preference is an important factor of national self-identification.\(^{240}\) Religion, despite its mutability, receives statutory and constitutional protection.\(^{241}\) Language knowledge about sounds, meanings and syntax that resides in the mind." Id. at 12. Fournier pointed out 100 years ago that "speech is the only window through which the physiologist can observe the workings of the cerebral life." V. Fromkin & R. Rodman, An Introduction to Language 28 (1978) (quoting Fournier). Language allows the accumulation of knowledge and transmission of culture. B. Pearson, Introduction to Linguistic Concepts 3 (1977).

237. J. Falk, supra note 236, at 1. The system of one's native language and the knowledge of one's native language is far below one's consciousness. Id. "Language is so rooted in the whole of human behavior that it may be suspected that there is little in the functional side of our conscious behavior in which language does not play its part." Id. at 159. "Language is a rudiment of consciousness and close to the core of personality; deprivations in relation to language deeply affect identity." McDougal, supra note 27, at 151.

238. See Language, Culture & Personality 92 (L. Spier, A. Hallowell & S. Newman eds. 1941). Language shapes the perception of such concepts as "time," "space," and "matter." Id. By shaping the way people arrange data and analyze phenomena, language influences people culturally and personally. Id. at 75. Benjamin Lee Whorf's thesis, influenced by Edward Sapir, claims that languages with different structural categories compel their respective speakers to view the world in totally different ways. B. Pearson, supra note 236, at 150. See also Piatt, supra note 17, at 895-97 & n.65 (discussing Whorf's thesis and relationship between language and one's view of the world). Languages contain vocabularies that differ vastly in nature. One language may ignore distinctions made in another language. 9 Encyclopedia of the Social Sciences 155, 166 (1935).

239. See Piatt, supra note 17, at 895; see also Karst, supra note 16, at 307-10 (observing that language goes to core of personhood as well); cf. Gutierrez v. Municipal Ct., 838 F.2d 1031, 1039 (9th Cir. 1988) (stating that one's primary language remains an important link to ethnic culture and identity), vacated as moot, 109 S. Ct. 1736 (1989).

240. See Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980) (stating that "we do not denigrate the importance of a person's language of preference or other aspects of his national, ethnic or racial self-identification"), cert. denied, 449 U.S. 1113 (1981); Gutierrez, 838 F.2d at 1039 (observing that language is an important aspect of national origin). "Language 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." Native-Born Acadians, supra note 36, at 1167.

241. B. Schlei & P. Grossman, supra note 52, at 206-45 (discussing protections afforded religion). Even though characteristics of sex and religion are
guage, as a proxy for national origin, deserves at least statutory protection.

In summary, a plaintiff may establish a prima facie case of national origin discrimination by claiming a rebuttable presumption of impact or by proving that an English-only rule has a discriminatory impact. In this analysis, courts should find that mutability is irrelevant either because Title VII protects characteristics of national origin despite mutability or because language is more closely analogous to religion, which receives statutory and constitutional protection.

C. PROVING BUSINESS NECESSITY AND LESS DISCRIMINATORY ALTERNATIVES

Under the Supreme Court's new formulation of the disparate impact standard, after the plaintiff establishes a prima facie case of disparate impact, the employer must produce evidence of a business justification sufficient to justify that effect.242 Under the Atonio standard, the employer must not only produce evidence of "legitimate" business reasons for the English-only rule, but also must show that the rule serves those goals in a "significant way."243 "Insubstantial justifications" do not suffice.244 Courts must conduct a "reasoned review" of the legitimacy of the employer's justification as well as examine the relationship between the justification and the English-only rule.245 Atonio indicates that the Court still believes the standard must be high enough to invalidate those rules that result from both "innocent" discrimination and intentional but masked discrimination.246

Once the employer meets the burden of production, the

---

1989 | ENGLISH-ONLY WORKPLACE RULES | 429

243. See id. at 2125.
244. Id. at 2126.
245. Id.
246. Cf. id. (arguing that insubstantial justification will not suffice; stating that Court will not permit "spurious, seemingly neutral employment practices"). The standard must be strict enough to prohibit employers from perpetuating historical societal discrimination by barring protected groups from employment opportunities. Cox, Substance and Process in Employment Discrimination Law: One View of the Swamp, 18 VAL. U.L. REV. 21, 46 (1984). The business necessity test also requires a standard of proof that eliminates neutral practices that may mask an intent to discriminate on a prohibited basis. See id. This standard assumes an individual right to be free of considerations of group membership and a group right to employment opportunities free from societal discrimination. Id. at 46-47.
plaintiff must either disprove the business justification or demonstrate less discriminatory alternatives.\textsuperscript{247} Showing that the business goal is not "legitimate" or that the English-only rule does not "significantly" serve that goal disproves the business justification. Alternatively, plaintiffs must persuade the trier of fact that an alternative practice is "equally effective" in achieving a "legitimate" business goal.\textsuperscript{248}

The following analysis applies the "business necessity" prong of the disparate impact standard to non-safety and safety justifications that employers often offer.

1. Non-Safety Justifications

To determine whether an English-only rule significantly furthers a legitimate employment goal, courts must examine the rule's scope\textsuperscript{249} and the type of work environment in question.\textsuperscript{250} For example, under this standard, an English-only rule regulating non-work related conversations between employees rarely will "significantly serve" an employer's "legitimate" business purposes.\textsuperscript{251} It is difficult to imagine a situation that would permit an employer to regulate the language the employees speak during their lunch hour, because at such times the employer has a greatly reduced interest in employees' behavior.\textsuperscript{252}

In conducting a "reasoned review," courts must do a case-

\textsuperscript{247} Atonio, 109 S. Ct. at 2126-27.
\textsuperscript{248} Id. at 2127.
\textsuperscript{249} The rule may be limited, applying only to work related conversations and official duties, or be absolute, applying even to casual office conversations and breaks. E.g. Gutierrez v. Municipal Ct., 838 F.2d 1031, 1036-41 (9th Cir. 1988) (noting that employer amended absolute English-only rule to exclude breaks and lunches; finding rule sweeping in nature), vacated as moot, 109 S. Ct. 1736 (1989).
\textsuperscript{251} After Garcia, one court surmised that Puerto Ricans in a police academy could be required to speak English at all times because proficiency in English was a necessary goal. Flores v. Hartford Police Dep't., 25 Fair Empl. Prac. Cas. (BNA) 180, 186 (D. Conn. 1981).
\textsuperscript{252} The commentary to the 1980 EEOC Guidelines on Discrimination Because of National Origin states that if a rule applies "at all times," the Com-
by-case analysis of English-only rules that regulate only work related conversations. Employers commonly cite personnel problems to justify English-only rules. An English-only rule, however, is too drastic a measure to deal with ordinary personnel problems, such as camaraderie and morale. Employers claim, for example, that English-only rules are necessary to assuage employees' fears and suspicions. Some employees suspect that other employees use another language to talk about them and to conceal the substance of their conversations. Although an employer should be sensitive to employees' concerns, including fear or discomfort from hearing languages they do not understand, such concerns are not sufficiently legitimate to justify benefiting one group of employees while imposing burdens on protected national origin groups. Employers should handle such personnel problems on an individual basis with the employees involved. Even assuming, arguendo, that these reasons are legitimate, an English-only rule does not "significantly serve" the goal of easing employee discomfort because it merely shifts the "discomfort" from workers who speak only English to those who speak other languages. An English-only rule also does not significantly serve the goal of improving employee morale or of promoting camaraderie because such a rule "belittles" and further divides employees. If the goal is to prevent employees from gossiping about other

mission presumes that it violates Title VII. 45 Fed. Reg. 85,635 (1980) (codified at 29 C.F.R. § 1606.7(a) (1981)).

253. Gutierrez v. Municipal Ct., 861 F.2d 1187, 1191-92 (9th Cir. 1988) (en banc) (Kozinski, J., dissenting from order denying rehearing en banc) (noting employer's claim that rule instituted because of hurt feelings and tensions between employees).

254. See, e.g., Commission Decision No. 81-25, 27 Fair Empl. Prac. Cas. (BNA) 1820, 1821-22 (EEOC 1981) (observing that rarely will there be need for absolute English-only rule). In situations such as these, "specific problems ... have specific solutions which do not require an absolute prohibition against speaking any language other than English in the workplace." Id.

255. See, e.g., Gutierrez, 838 F.2d at 1042-43 (noting employer's claim that allowing employees to speak Spanish intimidates non-Spanish-speaking employees).

256. See, e.g., id. at 1042 (noting that employer argued that non-Spanish-speaking employees contended that Hispanics used Spanish to convey discriminatory or insubordinate remarks); see also Gutierrez v. Municipal Ct., 861 F.2d 1187, 1191 (9th Cir. 1988) (en banc) (Kozinski, J., dissenting from order denying rehearing en banc) (noting that English-only rule adopted after complaint by black employee that Spanish increasingly used to conceal substance of conversations).

257. See, e.g., Gutierrez, 838 F.2d at 1043 (stating that fears or prejudices do not constitute business necessity for rule that burdens protected class).

258. Id. at 1042.
employees, such a rule is ineffective because employees still may whisper in English to conceal the substance of their conversations.

The "Tower of Babel" justification fares no better. The mere fact that some employees find conversations in other languages distracting does not justify an English-only rule. Casual conversations in English may equally distract fellow employees. If the goal is to eliminate distractions, a rule limiting casual conversations in general serves that goal in a significant way and is a less discriminatory alternative because its burden falls equally on all employees.

A related justification, promoting racial harmony among coworkers, presents the same issues. English-only rules rarely will effectively promote that end. These rules usually increase distrust and animosity among groups by creating an atmosphere of inferiority and intimidation. The employer must produce sufficient evidence that the English-only rule in fact "significantly serves" the goal of fostering racial harmony.

In both hazardous and nonhazardous work environments, improving employees' English fluency may not necessarily be a legitimate business interest. Courts should recognize that if an employer hires certain employees on the premise that they are able to perform their jobs satisfactorily given their existing level of English, there can be no business necessity that requires a higher level of fluency. Employers must demonstrate that improving employees' English fluency is a "legitimate employment goal" for the business. In the absence of a business justification, it should not be sufficient that an employer merely "wants" employees to improve their language.

259. See, e.g., id. (arguing that additional Spanish not likely to create greater disruption because Spanish already spoken in workplace).

260. See id. (noting that employer produced no evidence to support argument that rule fostered racial harmony).

261. See, e.g., id. (noting that evidence indicated that Hispanics felt belittled by regulation and indicated rule increased racial hostility); 29 C.F.R. § 1606.7 (1987) (stating that English-only rules may create an "atmosphere of inferiority, isolation and intimidation").

262. Gutierrez, 838 F.2d at 1042 (noting that employer failed to produce evidence to support argument that English-only rule fosters racial harmony).

263. Cf. M. Player, supra note 43, § 5.24, at 235 (arguing against finding business necessity if English test measures ability beyond that needed for communication). By the same token, if an employer's business necessity requires employees to be bilingual, it is unreasonable to conclude that business necessity also requires an English-only rule. Cf. Gutierrez, 838 F.2d at 1043.
abilities. "The touchstone is business necessity." Moreover, other less discriminatory methods exist to improve employees' English fluency. Classes or tutoring in English would more effectively promote employee fluency with a less discriminatory effect.

Employers also claim that English-only rules ensure that supervisors can monitor the employees' work. Even if monitoring employees' work is a legitimate business interest, an English-only rule may not "significantly serve" that goal. To prove that requiring employees to speak English "significantly serves" that goal, employers must produce sufficient evidence that listening to employees' conversations while performing official duties is the method used to monitor employees' work. Employers commonly use other methods, such as visual observation, quality control checks, or hiring supervisors who speak the same language, to monitor employees' work. An employer does not need an English-only rule to ensure that an employee uses English to communicate with the supervisor. Common sense dictates that the employee will speak to the supervisor in a language common to both.

Under the recently announced Atonio standard, many justifications for English-only rules are not "legitimate" or do not "significantly serve" employment goals. Courts, therefore, must carefully scrutinize English-only rules to preclude the use of unjustified rules.

2. Safety Justifications

It may appear that English-only rules designed to promote and insure the safety of employees, such as requiring employees to use only English while drilling a well or working with dangerous chemicals, always are valid. The commentary to

---

265. This analysis invalidates the police training academy rule in Flores that prohibited Spanish even during after-class breaks. The rule does not "significantly serve" a "legitimate" business goal. The Flores court commented that "[e]ven if the rule could not be shown to be job related, it is an understandable and not irrational response" to the problem. Flores v. Hartford Police Dep't, 25 Fair Empl. Prac. Cas. (BNA) 180, 186 (D. Conn. 1981) (emphasis added).
266. E.g., Gutierrez, 838 F.2d at 1043 (noting that employer contended that supervisors could not monitor employees unless English was spoken).
267. Cf. id. (rejecting this argument because rule did not enable supervisors to evaluate employees' work more effectively).
268. See id. (suggesting employing Spanish-speaking supervisors).
269. See supra notes 98-99 and 121. See also Note, Business Necessity
the EEOC Guidelines states that English-only rules may be justified when safety requires all communications in English.\textsuperscript{270} \textit{Atonio}'s disparate impact standard requires courts to examine whether the English-only rule “significantly” serves the legitimate employment goal of safety in the particular business context.\textsuperscript{271} Courts must apply the test carefully to eliminate “safety” rules that are a pretext for discrimination.

In hazardous or potentially hazardous work environments or in emergency situations, safety is always a legitimate business interest.\textsuperscript{272} Even in these situations, however, courts should not regard English-only rules as valid per se. In some situations a rule allowing employees to speak their native language actually may promote safety and efficiency. Employees who are permitted to use their native language may feel more comfortable and work more efficiently. When a given work task requires coordination of effort and clear communication, a narrowly-tailored rule requiring employees to speak the language common to all employees involved in the task may promote safety most effectively.\textsuperscript{273}

In fact, an English-only rule actually may increase the danger in a true emergency because some employees may react faster in a language that is not English.\textsuperscript{274} Courts, however, may uphold an English-only rule during work hours in those work environments that involve explosives or other dangerous substances or that require continuous verbal coordination between employees.\textsuperscript{275} If employees are accustomed to using Eng-

\begin{itemize}
\item \textit{Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach}, 84 YALE L.J. 98, 107, 108 & n.48 (1974) (stating that "safety and efficiency are the essence of a valid business purpose").
\item \textsuperscript{270} 45 Fed. Reg. 85,635 (1980) (supplementary information) (codified at 29 C.F.R. § 1606.7 (1981)).
\item \textsuperscript{271}  Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2125-26 (1989).
\item \textsuperscript{272} 45 Fed. Reg. 85,635 (1980) (supplementary information) (codified at 29 C.F.R. § 1606.7 (1981)). The EEOC Guidelines recognize safety as a legitimate business interest when “safety requires that all communications be in English so that everyone can closely follow a particular task, such as surgery or drilling of oil wells.” \textit{Id.}
\item \textsuperscript{273} Again, if an employee uses a language not common to the group when a task demands clear communication, the employer should handle this "personnel" problem on an individual basis, rather than instituting an English-only rule.
\item \textsuperscript{274} It is assumed that all employees possess a functional level of English. It also is unfair to reprimand or terminate an employee who blurts out something in her native language, a natural reaction to an emergency.
\item \textsuperscript{275} \textit{See supra} note 272.
\end{itemize}
lish on the job, the likelihood of using English in an emergency increases, thus promoting a safer work environment.

In nonhazardous work environments, however, "safety" rules more often are a pretext. In these environments, English-only rules may not be necessary to promote and ensure employee safety. An employer must produce sufficient evidence that an English-only rule "significantly serves" the employment goal of safety in a nonhazardous work environment. The employer must show more than a rational relationship between the rule and "safety." Again, assuming the employer meets this burden of production, a plaintiff may show that allowing employees to speak their native language actually promotes safety in the workplace because employees communicate more accurately and efficiently in their native language.

Courts must carefully apply the Supreme Court's new business necessity standard to carry out effectively the purpose and intent of Title VII. This Note demonstrates that courts must examine the legitimacy of each proffered justification and the relationship between it and the English-only rule, even when the proffered justification is "safety."

CONCLUSION

An increasing number of employers have instituted English-only rules prohibiting languages other than English in the workplace. In addition, an increasing number of states have declared English the official state language. Members of national origin groups whose native language is not English view these actions as evidence of discrimination.

Recently, the Supreme Court has issued several decisions that call into question the measure of protection that Title VII affords employees in the workplace. By vacating as moot the Ninth Circuit's decision in Gutierrez v. Municipal Court, the Supreme Court leaves undefined the proper analysis for determining whether English-only rules violate Title VII on the basis of national origin discrimination. The Supreme Court's decision in Wards Cove Packing Co. v. Atonio reformulates the disparate impact standard for judging the validity of employment practices. This decision also demonstrates the persistent analytical problems that courts encounter when applying a theory of liability that does not require proof of discriminatory intent or motive.

276. See supra notes 176-79 and accompanying text.
This Note argues that even in light of these recent decisions, Title VII protects national origin groups from “innocent” employers who institute English-only rules. Courts should follow the EEOC Guidelines on Discrimination Because of National Origin that equate language with national origin and recognize a rebuttable presumption that English-only rules have a disparate impact on national origin.

Courts also should find that English-only rules create a burden on members of national origin groups, even those who are bilingual, because they still bear a higher risk of incurring penalties than do employees who speak English as their primary language. Finally, this Note illustrates how courts should apply the new disparate impact standard to English-only rules. Under the new standard, employers must produce sufficient evidence of a “legitimate” business necessity and sufficient evidence that the English-only rule “significantly serves” that goal.

By adopting the EEOC Guidelines, as well as a presumption that English-only rules have a disparate impact on national origin, and by conducting a “reasoned review” of the proffered business necessity, courts will preclude the unjustified use of facially neutral language restrictions that impose burdensome conditions of employment on national origin groups. In the process, courts will further the important values underlying Title VII.

Linda M. Mealey