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# Translation Services Not Required: The Civil Rights Act of 1964 Does Not Require Special Accommodations for Limited English Proficiency Individuals

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# TRANSLATION SERVICES NOT REQUIRED: THE CIVIL RIGHTS ACT OF 1964 DOES *NOT* REQUIRE SPECIAL ACCOMMODATIONS FOR LIMITED ENGLISH PROFICIENCY INDIVIDUALS*

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## Abstract

Is an employer or health care provider required to provide special accommodations to applicants or patients unable to speak English proficiently? If so, to what extent must they accommodate them? Must they provide free translation services? This scenario sets forth a hotly contested issue: *whether Limited English Proficiency (LEP) individuals are entitled to receive special accommodations*.

The Civil Rights Act ("CRA") prohibits discrimination based on national origin. However, the CRA does not clearly answer whether an LEP individual is entitled to receive special accommodations *because* of his LEP status. Notwithstanding this, President Clinton issued an executive order *requiring* recipients of federal financial assistance "to ensure that the programs and activities they . . . provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of [the CRA] . . . ." In doing so, he muddied the waters with regard to the significant difference between language and national origin.

This Article proposes the appropriate analysis for finding that the CRA does ***not*** require special accommodations for LEP individuals. The CRA's scope is limited to its express provisions, which do not prohibit language discrimination. The Court should refrain from reading additional protections into the CRA and determine that a person's choice of language does not equate to national origin. Accordingly, pursuant to the CRA, the appropriate outcome in the scenario above is that the employer or health care provider is not forced to provide special accommodations to an LEP person.


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## I. INTRODUCTION

Imagine that you are an employer or health care provider, and you receive an influx of applicants or patients unable to speak English proficiently.[2] Are you required to provide special accommodations to these people? If so, to what extent must you accommodate them? If you are required to provide translation services, for example, must you provide them at your own expense, or can you pass the resulting cost onto those receiving the services? This hypothetical scenario sets forth a hotly contested issue: whether Limited English Proficiency (LEP) individuals are entitled to receive special accommodations.[3]

[2] This fictional scenario was created by the author of this Article to illustrate the potential impact of requiring entities to provide special accommodations to people who are unable to speak English proficiently.

[3] *See* Exec. Order No. 13,166, 3 C.F.R. 289 (2000), WL 1152059, *reprinted at* 65 Fed. Reg. 50,121 (requiring federally-conducted and federally-assisted programs to improve access for persons with "Limited English Proficiency" (LEP), and defining such individuals as "persons who, as a result of national origin, are limited in their English proficiency[.]").

It is undisputed that the Civil Rights Act of 1964 ("CRA"), as amended, prohibits discrimination based on national origin.[4] However, the reach of its mandate is disputed.[5] Is an LEP individual entitled to receive special accommodations *because* of his LEP status?[6] The CRA does not answer that specific question.[7] Notwithstanding the lack of an express requirement in the CRA for entities to provide special accommodations to LEP individuals, in 2000, President William J. Clinton issued Executive Order 13,166 *requiring* recipients of federal

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[4] *See, e.g.,* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, §§ 601–02 (2000); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000). Section 601 of Title VI of the Civil Rights Act of 1964 ("CRA") states that "[n]o person in the United States shall, on the grounds of race, color, or *national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2000) (emphasis added). Title VII of the CRA provides that employers, employment agencies, and labor organizations are prohibited from discriminating against an individual because of his race, color, religion, sex, or *national origin*. 42 U.S.C. § 2000e-2 (2000) (emphasis added).

[5] *Compare infra* note 57 and accompanying text (discussing cases in which courts have held that national origin does not include a person's language), *with* notes 62–72 and accompanying text (discussing cases in which courts have equated language with national origin).

[6] *See* Sharon L. Browne, Colwell v. United States Department of Health and Human Services: Feds Order Physicians and Health Care Providers to Provide Free Language Translation Services to Limited English Proficient Patients, ENGAGE (The Journal of the Federalist Soc'y's Practice Groups), Oct. 2005, at 14. Browne described one controversial issue concerning whether an LEP individual is entitled to receive special accommodations because of his LEP status. *Id.*

> Title VI prohibits 'discrimination under any program or activity receiving Federal financial assistance' against any person in the United States 'on the ground of race, color, or national origin.' Although neither language nor LEP status are protected classifications under Title VI, the [Guidance adopted by the United States Department of Health and Human Services ("HHS") on August 30, 2000, titled "Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons" ("Policy Guidance Rule")] requires physicians who receive funding from HHS . . . including Medicare or Medicaid, to provide free oral and written translations [without reimbursement] for any patient who has limited English speaking skills and to ensure the quality and accuracy of the translation—or face possible prosecution for national origin discrimination [under Title VI].

*Id.* (footnotes omitted). As Browne explained, HHS adopted its guidance in order to comply with policy guidance issued by the United States Department of Justice ("DOJ") on August 14, 2000. Nonetheless, Browne argued that HHS exceeded its authority under Title VI in issuing the policy. *Id.* "There is simply no congressional policy under Title VI that equates language with national origin. The ability to speak English and one's national origin are distinct qualities." *Id.* at 16. "HHS's Policy Guidance Rule is poorly conceived and illegal." *Id.* at 17. *See also* Allison Keers-Sanchez, Commentary, *Mandatory Provision of Foreign Language Interpreters in Health Care Services,* 24 J. LEGAL MED. 557, 562 (2003) ("[N]o legislative enactments contain specific protection against language discrimination."). *But see* Barbara Plantiko, Comment, *Not-So-Equal Protection: Securing Individuals of Limited English Proficiency with Meaningful Access to Medical Services*, 32 GOLDEN GATE U. L. REV. 239, 239, 262–63, 269–70 (2002) (arguing that LEP individuals are entitled to special accommodations *because of their LEP status* much like disabled individuals are afforded reasonable accommodation pursuant to the ADA *because they possess a qualifying disability*, and asserting that denying LEP persons accommodations, such as translation services, is unlawful).

[7] *See generally* 42 U.S.C. §§ 2000d, 2000e-2 (2000).

financial assistance "to ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of title VI of the Civil Rights Act of 1964, as amended, and its implementing regulations."[8] In so doing, with the stroke of his pen, he "blur[red]" the significant difference between language and national origin—an important distinction recognized by the courts for decades.[9] In response to this Executive Order and corresponding guidance issued by the United States Department of Justice ("DOJ"), federal agencies implemented policies which stated that recipients of federal financial assistance must provide certain special accommodations to LEP patients.[10] Nevertheless, courts have disagreed regarding whether entities have an affirmative duty to provide special accommodations to LEP individuals.[11] Moreover, the United States

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[8] *See* 3 C.F.R. 289, 65 Fed. Reg. at 50,211 (requiring federally-conducted and federally-assisted programs to improve access for LEP individuals). Executive Order 13,166 was issued on August 11, 2000, less than six months before President Clinton left his position as the President of the United States of America. 3 C.F.R. 289, 65 Fed. Reg. at 50,211; Presidents of the United States, http://www.whitehouse.gov/history/presidents/ (indicating that President George W. Bush was sworn into office on January 20, 2001). This Executive Order, titled, "Improving Access to Services for Persons with Limited English Proficiency[,]" introduced a general guidance document titled "Enforcement of Title VI of the Civil Rights Act of 1964 National Origin Discrimination Against Persons with Limited English Proficiency" ("LEP Guidance") issued by the DOJ to assist federal agencies in carrying out their responsibilities to LEP individuals. 3 C.F.R. 289, 65 Fed. Reg. at 50,211. Executive Order 13,166 requires recipients of federal financial assistance to implement policies to ensure compliance with the LEP Guidance. *Id.*

[9] *See* Sharon L. Browne, *supra* note 6, at 14 (noting that Executive Order 13,166 "almost casually blurs the important distinction between language and national origin[]" and "[i]n doing so, it ignores three decades of judicial rejection of the notion of equating language with national origin under Titles VI and VII of the Civil Rights Act."); *infra* notes 53–54, 57 (presenting cases in which courts have held that a person's national origin is distinct from a person's language).

[10] *See, e.g.*, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47,311 (Dep't of Health and Human Services Aug. 30, 2000) (indicating that HHS implemented a policy requiring all physicians who receive federal funding to provide free oral and written translation services to LEP patients).

[11] *Compare, e.g.,* notes 56–57 and accompanying text (discussing a case in which the court refused to find that national origin includes the language that a person speaks), *with* note 72 and accompanying text (discussing a case in which the court equated language with national origin, and, at least inferentially, suggested that an employer has a duty to provide special accommodations to an LEP individual). *See also Colwell v. Dep't of Health and Human Servs.*, 558 F.3d 1112 (9th Cir. 2009). In *Colwell*, Plaintiffs asserted a pre-enforcement challenge to policy guidance issued by the Department of Health and Human Services. *Id.* The stated purpose of the policy guidance was to clarify the legal obligation of recipients of federal funds to provide meaningful access for individuals with limited English proficiency to programs supported by those funds. *Id.* Plaintiffs raised arguments similar to arguments this Article advances. *Id.* The Ninth Circuit dismissed the case on lack of prudential ripeness, without addressing the

Supreme Court has not yet determined whether entities have any such duty.[12] Thus, uncertainty exists concerning whether entities are required to provide special accommodations to LEP persons.[13]

The purpose of this Article is to propose the appropriate analysis for finding that the CRA does not require special accommodations for LEP individuals.[14] An entity may provide such accommodations, but the Act does not require it to do so.[15] Thus, absent a statute mandating a different result, the appropriate outcome in the hypothetical scenario above is that the employer or health care provider may provide special accommodations to LEP applicants or patients but, alternatively, may refuse to provide such accommodations.[16] Part II of this Article discusses why the CRA was passed, how courts have interpreted its requirements, and apparent disagreement concerning whether entities are required to provide special accommodations to

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merits. *Id*. *Colwell* is indicative of the importance of this issue. *See id.* A similar challenge will surely return to the courts of appeal when the plaintiffs have suffered some direct injury from failure to comply with the directive.

[12] *See, e.g.,* Natalie Prescott, *English Only at Work, Por Favo*r, 9 U. PA. J. LAB. & EMP. L. 445, 451 (2007) (acknowledging that the Court has not determined whether English-only work rules violate Title VII of the CRA); Amy Crowe, Note, *May I Speak? Issues Raised by Employer's* [sic] *English-Only Policies* [sic], 30 J. CORP. L. 593, 594, 601 (2005) (noting that the Court has not decided whether English-only work rules are permissible under Title VII of the CRA or whether the EEOC acted within its authority in promulgating its guideline concerning English-only workplace policies). It is unclear whether the Court would impose upon an entity a duty to provide special accommodations to an LEP person, such as allowing a person to speak his preferred language while at work.

[13] *See infra* Part II.C (setting forth cases which demonstrate that uncertainty exists concerning whether an entity is required to provide special accommodations to LEP individuals).

[14] *See infra* Part III (proposing that the CRA does not require an entity to provide special accommodations to a person because of a person's LEP status).

[15] *See infra* Part III (elaborating on why the CRA does not require an entity to provide special accommodations to an LEP person).

[16] *See infra* Part III (explaining that the CRA allows an entity to choose whether it will provide special accommodations to an LEP individual).

LEP individuals.[17] Part III analyzes why mandating such accommodations is inconsistent with the CRA's requirements.[18]

## II. THE BACKGROUND OF THE CIVIL RIGHTS ACT OF 1964

In his last year of office as President of the United States of America, President John F. Kennedy announced the need for a revision to the 1960 Civil Rights Act and delivered his proposed legislation to Congress on February 28, 1963.[19] However, the legislation faced many obstacles and was not passed during President Kennedy's term in office.[20] Thus, President

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[17] *See infra* Part II (establishing the background of the CRA, discussing how courts have interpreted the CRA's requirements regarding providing special accommodations to LEP individuals, and setting forth the disagreement among the courts concerning the scope of an entity's duty to provide such accommodations).

[18] *See infra* Part III (proposing model judicial reasoning for determining that the CRA does not require special accommodations for LEP persons); Part IV (summarizing this Article's thesis, i.e., that the CRA does not require entities to provide special accommodations to LEP individuals).

[19] Robert D. Loevy, A Brief History of The Civil Rights Act of 1964, http://faculty1.coloradocollege.edu/~bloevy/CivilRightsActOf1964/. President Kennedy stated,

> The Negro baby born in America today . . . has about one-half as much chance of completing high school as a white baby born in the same place on the same day-one-third as much chance of completing college-one third as much chance of becoming a professional man-twice as much chance of becoming unemployed . . . a life expectancy which is seven years less-and the prospects of earning only half as much.

*Id*. *See also* Major Features of the Civil Rights Act of 1964, http://www.congresslink.org/print_basics_histmats_civilrights64text.htm#sources ("Discouraged by the violence accompanying the Birmingham demonstrations, [President] Kennedy urged in eloquent language that Americans take action to guarantee equal treatment of every individual, regardless of color.").

[20] A Brief History of The Civil Rights Act of 1964, *supra* note 19. Loevy elaborated on the challenges that President Kennedy faced in passing the legislation that he proposed,

> The obstacles to passing a civil rights bill were truly formidable in early 1963. . . . Because debate is limited in the House of Representatives, committee bills first go to the House Rules Committee. . . . Many bills that make it through the regular committees, however, often are not reported out of the Rules Committee at all, and usually when this happens the particular bill is dead for the remainder of that session of Congress.
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> In 1963 the chairman of the House Rules Committee was Howard Smith, a conservative southern Democrat from Virginia. Smith was ardently opposed to all civil rights legislation, and it was clear he would use his powers as chairman of the Rules Committee to delay any civil rights bill as long as possible. . . .
>
> Over in the Senate, the situation was even more difficult. The chairman of the Senate Judiciary Committee was James O. Eastland, a Democrat from Mississippi and, as one would expect, a staunch opponent of civil rights. Eastland had used his powers as judiciary Committee chairman to kill more than one hundred proposed civil rights bills throughout the late 1950s and early 1960s. . . .
>
> The big obstacle to a civil rights bill in the Senate, however, was the filibuster. Senate rules provide for unlimited debate, which means that a group of senators can kill a bill by simply talking it to death. Over the years southern Democratic senators had clearly established the idea they would filibuster any strong civil rights proposal. . . .

Kennedy's successor, President Lyndon B. Johnson, elected in 1964, pledged to pass Kennedy's proposed bill and followed through with his promise.[21] In the wake of several decades of racial injustice, the CRA, aimed at preventing discrimination against minorities, was passed by the House of Representatives on February 10, 1964, was passed by the Senate on June 10, 1964, was passed again, quickly, by the House (agreeing to the Senate's amendments), and was signed into law by President Johnson on July 2, 1964.[22]

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> President Kennedy's real problem with civil rights, however, was the crucial role of the South in the Democratic Party. In 1963, the Democratic party was made up of an uneasy coalition of conservative southern Democrats on the one hand and liberal northern and western Democrats on the other. The only way Kennedy could hope to get a major tax-cut bill and other economic programs through the Congress was to keep the Southerners in the Democratic fold. Pushing hard for civil rights, however, would have antagonized the southern Democrats.
>
> In addition, there was the political problem of keeping the support of southern Democratic voters in the upcoming 1964 presidential election. Kennedy had defeated Richard Nixon in 1960 in one of the closest presidential races in American history. The electoral votes of several southern states, particularly Texas, had been essential to Kennedy's victory. Kennedy was going to need that southern Democratic support again in the 1964 presidential race. . . . To antagonize the South with a strong push for civil rights could well be presidential political suicide.
>
> The president also was aware that a civil rights battle could harm his foreign policy proposals and weaken his position in international affairs. Overseas problems such as the Soviet construction of the Berlin Wall and the Cuban missile crisis could be handled more successfully if public opinion in the United States was united behind the chief executive. . . . The president knew that 'to provoke a bitter national controversy (over civil rights) without achieving any gain would divide the American people at a time when the international scene required maximum unity.' . . .
>
> Thus it was that, when dealing with civil rights, President Kennedy faced all the crippling constraints that hamper a president's ability to act on domestic policy. Clearly it would be better to forget about civil rights legislation and only do for black Americans those things which a president can do without congressional approval-appoint large numbers of blacks to important government jobs and order the Justice Department to help black and white integrationists arrested in civil rights demonstrations.

*Id*.

[21] *Id.* *See also* Everett M. Dirksen: The Civil Rights Bill, http://www.congresslink.org/print_basics_histmats_civilrights64_doc8.htm. In his address to President Johnson on June 10, 1964, Everett Dirksen described the "tortuous road" that the CRA traveled before finally reaching the Senate for a vote,

> Sharp opinions have developed. Incredible allegations have been made. Extreme views have been asserted. The mail volume has been heavy. The bill has provoked many long-distance telephone calls, many of them late at night or in the small hours of the morning. There has been unrestrained criticism about motives. Thousands of people have come to the Capitol to urge immediate action on an unchanged House bill.

*Id*.

[22] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000d–2000h (2000)) (stating the CRA's goal of preventing discrimination against minority groups). The Act states its purposes,

> To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in

Part II discusses the CRA's passage, difficulties that have arisen in interpreting the Act, and differing views expressed by courts related to whether entities are required to provide special accommodations to LEP persons.[23] More specifically, Part II.A explains why the CRA was enacted and what protection it provides.[24] Part II.B considers the involvement of the courts in interpreting the Act.[25] Part II.C sets forth varied approaches by courts regarding whether an entity must provide special accommodations to LEP individuals.[26]

*A. The Civil Rights Act of 1964: What it Was Intended to Protect*

The passage of the CRA was a "civil rights milestone."[27] The legislation was aimed at improving the quality of life for minorities, namely African Americans.[28] Specifically, it barred

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> federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

*Id.*; Everett M. Dirksen: The Civil Rights Bill, *supra* note 21 (noting the dates that the legislation was passed in the House and Senate and signed by President Johnson). *See also* JO FREEMAN, HOW "SEX" GOT INTO TITLE VII: PERSISTENT OPPORTUNISM AS A MAKER OF PUBLIC POLICY, http://www.jofreeman.com/lawandpolicy/titlevii.htm. Freeman stated,

> The Civil Rights Act of 1964 was a milestone of federal legislation. Like much major legislation it had "incubated" for decades but was birthed in turmoil. On June 19, 1963, after the civil rights movement of the fifties and early sixties had focused national attention on racial injustice, President Kennedy sent a draft omnibus civil rights bill to the Congress. On Saturday, February 8, 1964, while the bill was being debated on the House floor, Howard W. Smith of Virginia, Chairman of the Rules Committee and staunch opponent of all civil rights legislation, rose up and offered a one word amendment to Title VII, which prohibited employment discrimination. He proposed to add "sex" to that one title of the bill in order "to prevent discrimination against another minority group, the women[.]" This stimulated several hours of humorous debate, later enshrined as "ladies day in the House", [sic] before the amendment was passed by a teller vote of 168 to 133.

*Id*. (citations omitted).

[23] *See infra* Part II (explaining why the CRA was enacted, difficulties in interpreting the Act, and the disagreement surrounding whether the Act requires an entity to provide special accommodations to an LEP person).

[24] *See infra* Part II.A (setting forth why the CRA was passed and what protections it intended to provide).

[25] *See infra* Part II.B (discussing judicial interpretations of the CRA).

[26] *See infra* Part II.C (describing the differing views concerning whether an entity must provide special accommodations to an LEP person).

[27] Everett McKinley Dirksen's Finest Hour: June 10, 1964, http://www.congresslink.org/print_basics_histmats_civilrights64_cloturespeech.htm. This article described the period in history when the CRA was enacted. *Id*.

> The nation teetered on the edge of a racial divide in the mid-1960s. Frustrated by decades of second-class treatment, African-Americans were losing patience with their country's legal and political institutions and turning to direct action to secure their rights. Only 12,000 of

discrimination against minority groups in public accommodations, education, and employment.[29] As a result, it decreased racial restrictions in public facilities, afforded more job opportunities to

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> the 3,000,000 African-American students in the South attended integrated schools. African-American life expectancy was seven years fewer than white, infant mortality twice as great.
>
> Nineteen sixty three and 1964 were the years of civil rights marches in Birmingham, Alabama, the murder of civil rights leader Medgar Evers in Mississippi, the March on Washington and Martin Luther King, Jr.'s, 'I Have a Dream' speech, John F. Kennedy's assassination, and the murder of three civil rights workers in Mississippi. 'To be a Negro in this country and to be relatively conscious,' James Baldwin asserted in 1961, 'is to be in a rage all the time.'
>
> At long last, the White House and Congress awakened to the need to strength [sic] civil rights law.

*Id*.

[28] *See* Major Features of the Civil Rights Act of 1964, *supra* note 19. This article provided,

> On July 2, 1964, President Johnson spoke the following words before signing the bill:
>
> We believe that all men are created equal - yet many are denied equal treatment. We believe that all men have certain inalienable rights. We believe that all men are entitled to the blessings of liberty - yet millions are being deprived of those blessings, not because of their own failures, but because of the color of their skins.
>
> The reasons are deeply embedded in history and tradition and the nature of man. We can understand without rancor or hatred how all this happens. But it cannot continue. Our Constitution, the foundation of our Republic, forbids it. The principles of our freedom forbid it. Morality forbids it. And the law I sign tonight forbids it. . . .

*Id*.

[29] *See* 42 U.S.C. § 2000a–h (2000). Title II of the CRA bars discrimination on the basis of race, color, religion, or national origin in public accommodations, including hotels, restaurants, and theaters engaged in interstate commerce. *Id*. § 2000a(a). Title III authorizes the U.S. Attorney General to sue to address violations of equal protection based on race, color, religion, or national origin and to enforce desegregation of public schools. *Id*. § 2000b. Title VI outlaws discrimination on the basis of race, color, or national origin on the part of programs receiving federal financial assistance. *Id*. § 2000d. Title VII, as amended by the Equal Employment Opportunity Act of 1972, bans discrimination in employment on the basis of race, color, religion, sex, or national origin. *Id*. § 2000e-2. It prohibits such discrimination in businesses with more than fifteen employees and charges the EEOC with responding to complaints. *Id*.

*See also* A Brief History of The Civil Rights Act of 1964, *supra* note 19 (describing the climate in the United States at the time that this important legislation was passed). This article indicated,

> The Supreme Court s [sic] landmark decision [in Brown v. Board of Education of Topeka, Kansas, in which the Supreme Court rejected the separate but equal doctrine and stated that African American children could *not* be coerced to attend separate schools] was one of the single most important features of the climate of opinion that began to encourage federal action to protect civil rights. Yet the Brown ruling did not settle the controversy surrounding the treatment of minorities in the United States. Although the Supreme Court made its commitment to equal rights unmistakably clear, the cause of civil rights still required affirmative action by Congress to become a reality for most African Americans. . . .
>
> The stage was set for a new legislative initiative to deal with the problem of federal protection of civil rights.

*Id*. (emphasis added).

minorities, and reduced federal funding of discriminatory aid programs.[30] In short, the CRA opened the door to significant progress concerning equal treatment of minorities.[31]

*B. Court Decisions: Interpreting the Civil Rights Act of 1964*

Despite the well-intentioned purpose of the CRA—to prohibit discrimination against minority groups—the Act faced strong opposition before becoming law and spawned much debate after its passage.[32] Initially, courts considered whether the Act was a constitutional exercise of Congress's Commerce Clause power and whether the Act applied to certain entities.[33] Once the Act's constitutional validity was established, courts turned their attention to interpreting the Act.[34] Generally, in interpreting the CRA's scope, courts have construed the Act narrowly, refusing to expand its protections beyond what is expressly protected because construing the Act broadly could result in providing protections not contemplated by Congress.[35]

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[30] *Id*. (discussing the initial effects of the CRA).

[31] *Id*. *See also* Honoring the Anniversary of the 1968 Civil Rights Act, http://www.house.gov/apps/list/hearing/ar04_ross/newsletter_040804.htm. In follow-up to the CRA, in April 1968, President Johnson signed the Civil Rights Act of 1968 which expanded on previous protections provided, prohibiting discrimination in the sale, rental, and financing of housing on the basis of race, religion, sex, or national origin, (and as amended) handicap and family status, and providing for the protection of civil rights workers. *Id*. On April 8, 2004, reflecting on the passage of the Civil Rights Act of 1968 in his weekly online newsletter, Congressman Mike Ross stated,

> [The CRA], also known as the Housing Rights Act of 1968, did not become law without a struggle. A conservative legislative branch at the time utilized procedural legislative tactics that delayed the passage of the bill for several years. However, pressure mounted to pass the law after the assassination of civil rights pioneer Martin Luther King. The day after Dr. King's funeral, Congress passed the Act overwhelmingly. President Lyndon B. Johnson signed the Civil Rights Act of 1968 into law the following day.

*Id*.

[32] *See, e.g.*, *Blow v. North Carolina*, 379 U.S. 684 (1965) (concluding that particular restaurant owners who refused to allow African Americans to enter their restaurant violated the CRA because the restaurant qualified as a public accommodation under the Act); *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964) (upholding the public accommodations provisions of the CRA as a valid exercise of Congress's power to regulate interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that the CRA's ban on racial discrimination at restaurants receiving food from out of state was constitutional pursuant to the Commerce Clause).

[33] *See, e.g.*, *supra* note 32 (noting cases in which the CRA was debated).

[34] *E.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989), *superseded in part by* the Civil Rights Act of 1991.

[35] *See, e.g.*, *id.* The Court considered the text of the CRA in trying to ascertain what Congress intended and stated, "We need not leave our common sense at the doorstep when we interpret a statute." *Id*.

*C. Does The Civil Rights Act of 1964 Require Special Accommodations for LEP Individuals?*

In interpreting the CRA, the principal debate boils down to one question: is the Act grounded in ensuring equality, or conversely, in providing special accommodations to minorities?[36] The specific question explored in this Article is whether an entity is required to provide special accommodations to an LEP individual.[37] Courts have varied in approaching related issues, and the Supreme Court has not yet ruled on this exact issue.[38] Some holdings suggest that an entity is not required to provide special accommodations to an LEP person, and others suggest that an entity may be required to provide such accommodations.[39] These differing views are presented one at a time.[40]

1. An Entity Is *Not* Required to Provide Special Accommodations to an LEP Individual

Some courts have decided that entities are not required to provide special accommodations to LEP persons and that language is not the same thing as national origin.[41] Although those courts

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[36] *See infra* Part II.C.

[37] *See infra* Part II.C (showing that judicial disagreement exists); Part III (proposing the appropriate analysis for finding that the CRA does not require special accommodations for LEP persons).

[38] *See infra* Part II.C (discussing case law on this subject).

[39] *See* Part II.C.1 (discussing cases that suggest that an entity is not required to provide special accommodations to LEP persons); Part II.C.2 (discussing cases that suggest that an entity may be required to provide such accommodations).

[40] Courts have not yet been asked to determine whether the CRA requires an entity to provide special accommodations to an LEP individual. Therefore, in an attempt to forecast how courts might approach that particular question, Part II.C reviews cases in which courts have been asked to determine (1) whether an entity is required to provide additional services to an LEP person and (2) whether the language that a person speaks is the same thing as that person's national origin. Cases highlighted in Part II.C do not deal directly with the precise issue regarding whether the CRA requires an entity to provide special accommodations to an LEP person. Nonetheless, the author of this Article turns to these cases out of necessity. Because the cases deal with similar issues, the author draws parallels concerning how courts will likely respond when asked whether the CRA requires an entity to provide special accommodations to an LEP person. *See supra* note 6 (describing the controversy that began when the DOJ promulgated its policy guidance on August 14, 2000). *See also* "Civil Rights" Agencies Ignore Law, Promote Tower of Babel, http://www.openmarket.org/2007/11/19/civil-rights-agencies-ignore-law-promote-tower-of-babel/. The DOJ's policy guidance will inevitably be attacked and debated in courts unless the Court or Congress clarifies whether the CRA imposes a duty on entities with regard to LEP individuals. *Id.*

[41] *See infra* Part II.C.1 (presenting cases in which courts have held that an entity is not required to provide special accommodations to a person *because* he is an LEP individual).

were not asked specifically whether the CRA mandates special accommodations for LEP individuals, their holdings suggest that, if asked, they may answer such an inquiry in the negative.[42]

In the first case, in 1999, in *Nazarova v. INS*, the Seventh Circuit considered whether the INS was required to provide a deportation notice in the preferred language of the potential deportee receiving the notice.[43] The plaintiff, Natalia Nazarova ("Nazarova"), conceded that the notice that she was provided met statutory notification requirements but argued that because it was not written in Russian—her preferred language—it failed to satisfy constitutional requirements of due process.[44] In responding to the plaintiff's contention, the Seventh Circuit found that constitutional due process requirements do not require individualized notification by the INS and that the notice in English provided to Nazarova satisfied the requirements of due process.[45] In other words, the court concluded that the plaintiff was not entitled to receive special accommodations, i.e., special notification, because of her LEP status.[46]

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[42] *Id*. (showing how some courts' holdings suggest that those courts would not read into the CRA protections against language discrimination).

[43] *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999).

[44] *Id*. The author of this Article wishes to emphasize that Nazarova did not allege national origin discrimination in violation of the CRA. *Id*. Nevertheless, *Nazarova* is used for instructional purposes to illustrate how courts have decided cases in which the plaintiff claimed that special accommodations were appropriate considering the plaintiff's LEP status.

[45] *Id*. The *Nazarova* court found that holding the INS responsible for providing notification in the preferred language of a potential deportee would have significant implications and determined that the INS need not provide such individualized notification. The court explained,

> [H]er real argument is that the statutory requirements do not satisfy the dictates of due process. This is a broad and troublesome position: the logical implication is that the INS must maintain a stock of forms translated into literally all the tongues of the human race, and then select the proper one for each potential deportee. No court to our knowledge has ever held that the Constitution requires the INS to undertake such a burden, and we will not be the first.

*Id*. In *Nazarova*, unusual facts existed, and the court ultimately held that while the notice provided to the plaintiff comported with due process requirements for adequate notice, the plaintiff nonetheless did not receive a meaningful opportunity to be heard, and, thus, her due process rights were violated. *Id*. 483–84. The court explained that on the facts in the record, it was evident that the INS took actions that "sent hopelessly confusing signals to Nazarova about the most fundamental aspect of her hearing[.]" *Id*. at 485.

[46] *Id*. (noting that the INS was not required to treat LEP persons differently than other individuals).

In another case involving notification, in 1973, in *Carmona v. Sheffield*, the Ninth Circuit upheld the state of California's practice of providing information regarding unemployment benefits in only one language—English.[47] The class of plaintiffs bringing suit were people able to speak, read, and write proficiently in only one language—Spanish.[48] Therefore, because notices were provided to them only in English, they alleged violations of multiple federal statutes as well as a pendant claim of a violation of a California statute.[49] In deciding the case, the Ninth Circuit found that the notice provided by the state satisfied due process and did not violate equal protection, and the court affirmed the lower court's ruling that no grounds existed for requiring the state of California to provide notice to people regarding their unemployment benefits in a language other than English.[50] In short, the Ninth Circuit determined that the state need not provide special notification to LEP persons.[51]

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[47] *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973) (concluding that the state of California had a rational basis for providing unemployment benefit information, including benefit termination notices, only in English, and upholding the practice). The author of this Article underscores that the plaintiffs in *Carmona* did not allege national origin discrimination in violation of the CRA, but rather *Carmona* is considered in this Article because it shows the approach that courts have taken when considering whether LEP individuals are entitled to receive special treatment. *See id*.

[48] *Id*. at 739. These plaintiffs resided in Santa Clara County, California, but the record does not reveal additional information, such as how long the plaintiffs resided in California, what their work history was, when they filed their complaint, or whether they were U.S. citizens. *Id*.

[49] *Id*. The plaintiffs sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201 and also alleged a violation of The Social Security Act, 42 U.S.C. § 503(a)(1). *Id*. Their pendant claim was that the state's English-only notification to the plaintiffs violated a California statute, but the record does not indicate which state statute was allegedly violated. *Id*.

[50] *Id*. As in the previously mentioned case (*Nazarova*), the plaintiffs in *Carmona* did not assert that the lack of notice in their preferred language amounted to national origin discrimination in violation of the CRA. However, in *Carmona*, like in *Nazarova*, the court's ruling is illustrative of how courts have decided cases in which the plaintiff claimed that special accommodations were appropriate given the plaintiff's LEP status.

[51] *Id*. (citing *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); *Dandridge v. Williams*, 397 U.S. 471 (1970)). The court made the following statements regarding the constitutional claims:

> The due process claim is that even though notices of rights under the unemployment laws are adequate for those who speak English, the notices are no [sic] notice to all plaintiffs. We cannot say, as a constitutional matter, that there is a relatively easy means of providing a more adequate form of notice, and we conclude that California's approach is a reasonable one.

Similarly, several courts have addressed the issue concerning whether the language that a person chooses to speak equates to that person's national origin and most have determined that national origin does not include a person's choice of language.[52] In some cases, this issue has been raised in the context of an alleged violation of Title VI of the CRA.[53] More often, this issue has arisen in the context of Title VII of the CRA.[54] To illustrate, in 2002, in *ProEnglish v. Bush*,

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> Giving notice in English to these appellants is not a denial of equal protection. Even if we assume that this case involves some classification by the state, the choice of California to deal only in English has a reasonable basis.

*Id*. (citations omitted).

[52] *See infra* notes 53–54, 57 (discussing cases in which courts have considered whether a person's language choice equates to their national origin).

[53] *See, e.g.*, *Castaneda v. Pickard*, 648 F.2d 989, 1007 (5th Cir. 1981) ("[W]e do not think it can seriously be asserted that . . . [a] program [of allegedly inadequate bilingual education in a Texas public school] was intended or designed to discriminate against Mexican-American students in . . . [violation of Title VI].").

[54] *See, e.g*. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489–90 (9th Cir. 1993) (rejecting a relevant EEOC guideline and instead relying on Title VII, the court held that a rule mandating that only English be spoken in the workplace during work time is not national origin discrimination), *cert. denied*, 512 U.S. 1228 (1994); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987) (concluding that an employer-radio station's decision to require a radio announcer to conform to an English-only requirement was motivated by market considerations and not national origin discrimination, and thus did not violate Title VII of the CRA); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981) (acknowledging dismissal of the plaintiff's Title VII claim because of failure to satisfy jurisdictional prerequisites, the court determined that an employer's English-only requirement imposed on non-English-speaking truck drivers did not amount to national origin discrimination in violation of 42 U.S.C. § 1981); *Garcia v. Rush-Presbyterian St. Luke's Med. Ctr.*, 660 F.2d 1217 (7th Cir. 1981) (upholding hiring practices that require English proficiency); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (suggesting that national origin represents an immutable characteristic that is beyond an individual's control, and indicating, "The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin."), *cert. denied*, 449 U.S. 1113 (1981); *See also, e.g*., *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (upholding an English-language civil service exam for carpenters, despite the plaintiff's allegations that such exam violated his Fourteenth Amendment rights as well as his civil rights pursuant to 42 U.S.C. §§ 1981, 1983, and 1985); *Velasquez v. Goldwater Mem. Hosp.*, 88 F. Supp.2d 257, 261–62 (S.D.N.Y. 2000) (citing *Gloor*, 618 F.2d 264; *Long*, 894 F. Supp. 933) ("Neither . . . [Title VII] nor common understanding equates national origin with the language that one chooses to speak."); *Gotfryd v. Book Covers, Inc.*, 1999 WL 20925 (N.D. Ill. Jan. 7, 1999) (rejecting plaintiffs' allegation that, pursuant to EEOC guidelines, their employer created a hostile work environment); *Magana v. Tarrant/Dallas Printing, Inc.*, 1998 WL 548686, *5 (N.D. Tex. Aug. 21, 1998) ("English-only policies are not of themselves indicative of national origin discrimination in violation of Title VII."); *Kania v. Archdiocese of Philadelphia*, 14 F. Supp. 2d 730, 733 (E.D. Pa. 1998) (reviewing cases, and noting that, "[a]ll of these courts have agreed that - particularly as applied to multi-lingual employees - an English-only rule does not have a disparate impact on the basis of national origin, and does not violate Title VII[]"); *Tran v. Standard Motor Products, Inc.*, 10 F. Supp. 2d 1199, 1210 (D. Kan. 1998) ("[T]he purported English-only policy does not constitute a hostile work environment."); *Prado v. L. Luria & Son, Inc.*, 975 F. Supp. 1349 (S.D. Fla. 1997) (rejecting a challenge to an employer's English-only policy); *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 941 (E.D. Va. 1995) (unpublished) ("There is nothing in Title VII which . . . provides that an employee has a right to speak his or her native tongue while on the job."), *aff'd*, 86 F.3d 1151 (4th Cir. 1996); *Mejia v. New York Sheraton Hotel*, 459 F. Supp. 375, 377 (S.D.N.Y. 1978) (holding that, where an employer denied a chambermaid a promotion because of her "inability . . . to articulate clearly or coherently and to make herself adequately understood in the English

the United States District Court of the Eastern District of Virginia addressed a somewhat novel claim dealing with the CRA's ban on national origin discrimination.[55] In *ProEnglish*, the plaintiffs asserted that the Department of Justice exceeded its authority when, in 2000, it released policy guidance stating that, in some instances, requiring English was national origin discrimination in violation of Title VI of the CRA.[56] The court examined the text of the CRA and its legislative history and also reviewed the array of court cases that previously established that national origin does not include a person's choice of language.[57] The court determined that the Department of Justice's policy guidance was "a massive and unprecedented expansion of federal civil rights law[]" and granted the defendant's motion to dismiss the claim.[58]

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language[,]" the same employer did not engage in national origin discrimination but instead executed an appropriate business decision).

[55] *ProEnglish v. Bush*, 2002 WL 34362594 (E.D. Va. May 31, 2002), *aff'd*, 70 Fed.Appx. 84, 2003 WL 21101726 (4th Cir. 2003) (unpublished).

[56] *Id*. (citing Department of Justice Guidance, 65 Fed. Reg. 50,123 (Aug. 16, 2000)).

[57] *Id*. (citing *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973) (discussing the legislative history of the CRA, finding that, "[t]he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came[,]" and concluding that national origin does not equate to citizenship); *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999); *Spun Steak Co.*, 998 F.2d at 1489–90; *Jurado*, 813 F.2d 1406; *Vasquez*, 660 F.2d 686; *Rush-Presbyterian St. Luke's Med. Ctr.*, 660 F.2d 1217; *Castaneda*, 648 F.2d at 1007; *Gloor*, 618 F.2d at 270; *Frontera*, 522 F.2d 1215; *Pena v. Lehigh County*, 2001 WL 41137, *4 (E.D. Pa. Jan 17, 2001) (determining that service of process provided in English by mail and by publication in an English newspaper is sufficient and does not demonstrate national origin discrimination); *Velasquez*, 88 F. Supp.2d at 261–62 (citing *Gloor*, 618 F.2d 264; *Long*, 894 F. Supp. 933); *Gotfryd*, 1999 WL 20925, *8; *Magana*, 1998 WL 548686, *5; *Kania*, 14 F. Supp. 2d at 733; *Tran*, 10 F. Supp. 2d at 1210; *Prado*, 975 F. Supp. 1349; *Long*, 894 F. Supp. at 941; *Mejia*, 459 F. Supp. at 377).

[58] *ProEnglish*, 2002 WL 34362594 (describing the Department of Justice's Guidance, released in 2000, which "abruptly announced that, in some circumstances, [requiring people to] speak[] English was national origin discrimination in violation of the Civil Rights Act of 1964," as "a massive and unprecedented expansion of federal civil rights law[]"). *See also* Natalie Prescott, *supra* note 12, at 457. Prescott, an immigrant herself, argued,

> [M]utability of language is the most important evidence that Title VII does not protect language. Title VII was built "on a civil rights model that promotes even-handed treatment of employees[]" . . . [and] was designed to protect immutable individual characteristics – those that are usually obtained at birth and cannot be changed . . . . These characteristics include "race, color, religion, sex, or national origin." Linking language ability to "national origin" under Title VII goes against the intent of the drafters, which was to protect those who could not change their protected statuses and characteristics.

*Id*. at 445 n.a1, 457. *See also* note 19 (indicating that President Kennedy acknowledged early on in the journey of the proposed bill through Congress, that the CRA's purpose was to provide equal treatment to all people regardless of the color of their skin); 28 (noting that President Johnson stated that, prior to 1964, people were treated differently merely because of the color of their skin and that the CRA's goal was to eliminate such discrimination).

*Nazarova* and *Carmona*, the first two cases discussed above, support the position that entities are not required to provide special services to LEP persons.[59] *ProEnglish*, the third case set forth above, supports the position that neither language nor LEP status are protected under the CRA because language is not the same thing as national origin.[60] All three cases suggest that these courts are likely to hold that the CRA does not require an entity to provide special accommodations to an LEP person.[61]

2. An Entity May Be Required to Provide Special Accommodations to An LEP Individual

In sharp contrast to the views of the majority of courts (highlighted in the discussion above), some courts have suggested, inferentially through their holdings, that an entity may be required to provide special accommodations to an LEP individual.[62] In 1999, in *EEOC. v. Synchro-Start Products, Inc.*, a United States District Court of the Northern District of Illinois considered the appropriateness of an Equal Employment Opportunity Commission (EEOC) Guideline (29 C.F.R. § 1606), which specifically states that English-only workplace rules presumptively violate Title VII of the CRA.[63] The court examined the language of Title VII of the CRA, the language

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[59] *See supra* notes 43–46 (discussing *Nazarova*); 47–51 (discussing *Carmona*).

[60] *See supra* notes 55–58 (discussing *ProEnglish*).

[61] *See supra* Part II.C.1 (discussing *Nazarova*, *Carmona*, and *ProEnglish*).

[62] *See infra* Part II.C.2 (showing that some courts have suggested that LEP persons may be deserving of heightened protections *because of* their LEP status).

[63] *EEOC v. Synchro-Start Products*, 29 F. Supp. 2d 911, 915 n.10 (N.D. Ill. 1999) (stating that it was "staking out a legal position that has not been espoused by any appellate court[,]" the court upheld 29 C.F.R. § 1606). *See also* 29 C.F.R § 1606.7(a)–(b) (2007). Regarding English-only work rules, the Guidelines state,

> 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 work environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it. . . . 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.

*Id.*

in 29 C.F.R. § 1606, and cases involving English-only work rules decided by other courts, namely those of the Fifth, Ninth, and Eleventh Circuit Courts of Appeals.[64] Distinguishing the facts at issue from those in cases previously decided, the court determined that an English-only work rule *could* violate Title VII and denied the defendant's motion to dismiss the claim.[65] The court upheld 29 C.F.R. § 1606 as valid, although it failed to adequately explain why the same guideline was a proper exercise of the EEOC's authority or why the guideline fell within the scope of the CRA's ban on national origin discrimination.[66] Nonetheless, the court allowed the

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[64] *Synchro-Start*, 29 F. Supp. 2d at 912–15, 915 n.10 (citing *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1488 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994) (rejecting a claim that a rule requiring English to be spoken in the workplace did not amount to nation origin discrimination); *Gonzalez v. Salvation Army,* 985 F.2d 578 (11th Cir.1993) (unpublished) (rejecting a similar claim); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (rejecting a similar claim), *cert. denied*, 449 U.S. 1113 (1981)). *See also* Mark Colon, Note, *Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees*, 20 YALE L. & POL'Y REV. 227, 243 n.127 (2002) ("Synchro-Start [sic] was decided in the Seventh Circuit, which had no previous precedent with regard to English-only workplace rules.").

[65] *Synchro-Start*, 29 F. Supp. 2d at 912.

> Although each of the three Courts of Appeals that has examined the issue has upheld the validity of an employer's English-only rule, no such court has knocked the plaintiff out of the running at the very outset by finding that English-only rules could never violate Title VII. Each decision examining such a rule in a disparate impact framework has limited its holding to situations where the employee has the ability to speak English. By contrast, FAC ¶ 7(b) alleges that Synchro-Start's English-only rule is applied to employees "who speak no English or whose ability to speak English is limited."

*Id.* (citations omitted) (footnote omitted).

[66] *Id*. at 913. The court followed the EEOC Guideline with little explanation of how the guideline is an appropriate exercise of the EEOC's authority. *See id*. The court merely stated,

> Congress has charged EEOC [sic] with the interpretation, administration and enforcement of Title VII. In the exercise of that authority, EEOC has promulgated a Guideline specifically addressing English-only rules[] . . . This Court is [] bound to give substantial weight to the EEOC's interpretation of the statute that it administers.

*Id*. The court applied the EEOC Guideline to the facts of the instant case,

> Under 29 C.F.R. § 1606.7 ("Reg. § 1606.7") an English-only rule such as Synchro-Start's [rule] violates Title VII unless the employer can establish a business necessity for the rule. That reverses the effect of the absence of evidence (or the theoretically possible, but rare, equipoise of evidence) on the subject of business necessity, a shifting of burdens that occurs under the Guideline whether or not the employees are proficient in English.

*Id*. (footnote omitted). The court clarified under which Guideline *Synchro-Start* was analyzed,

> Reg. § 1606.7 breaks English-only rules into two types: (1) rules applied at all times, which are presumed to violate Title VII and are closely scrutinized, and (2) rules applied only at certain times, which are allowed where the employer demonstrates a business necessity for the rule. Here [the English-only rule] . . . states that employees are required "to speak only English during working hours," an obligation that could arguably fit the "at all times" category. But because EEOC itself has placed Synchro-Start's rule within the less stringently scrutinized category . . ., this opinion will deal with it in that same manner.

plaintiff to continue to challenge the employer's English-only rule as a violation of the CRA's ban against national origin discrimination.[67]

A similar case, *EEOC v. Premier Operator Servs., Inc.*, was then brought in the Northern District of Texas, in 2000, shortly after *Synchro-Start* was decided.[68] *Premier Operator Servs.* had instituted a work rule requiring all employees to speak only in English at all times while at work, including on lunch breaks, and a class of plaintiffs challenged the rule as a violation of Title VII of the CRA.[69] In addition to relying on *Synchro-Start*, the *Premier Operator Servs.* court considered expert testimony stating that complying with an English-only rule is not a matter of preference for bilingual speakers and also considered evidence that showed that the company's president disliked employees of Hispanic origin.[70] The court held that insufficient

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Id. at 913 n.7.

[67] *Id*. *But see, e.g., Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489–90 (9th Cir. 1993) (upholding a work rule which mandated that only English be spoken in the workplace and rejecting the plaintiffs' allegations that such a rule amounts to national origin discrimination), *cert. denied*, 512 U.S. 1228 (1994); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (same), *cert. denied*, 449 U.S. 1113 (1981); *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 941 (E.D. Va. 1995) (unpublished) (same), *aff'd*, 86 F.3d 1151 (4th Cir. 1996); *supra* note 54 (noting additional cases holding the same).

[68] *EEOC v. Premier Operator Servs.*, 113 F. Supp. 2d 1066 (N.D. Tex. 2000) (rejecting the holdings of multiple appellate courts and relying on *Synchro-Start* and a dissent from a denial of a rehearing en banc in *Garcia v. Spun Steak*, the court found disparate treatment of Hispanic employees by the institution of an English-only workplace rule, where the defendant did not offer any defense to the alleged discrimination).

[69] *Id*. at 1068. The plaintiffs were of Hispanic national origin, i.e., "they or their parents were born in Mexico or another country in which Spanish is the primary or predominant language." *Id*. Their primary language was Spanish, but they were bilingual and able to speak both Spanish and English proficiently. *Id*.

[70] *Id*. at 1069–70. The court found,

> Nonobservance of the English-only policy was not simply a matter of individual preference for the class members. On a daily basis, the Hispanic employees of Defendant were faced with the very real risk of being reprimanded or even losing their jobs if they violated the English-only rule, even if such non-compliance was inadvertent. There was no comparable risk posed by the policy for Defendant's non-Hispanic employees, particularly since they would not have the same tendency to lapse into Spanish inadvertently. In fact, there is no evidence that any person other than an employee of Hispanic national origin was disciplined or terminated for objecting to or violating the English-only policy. . . .
>
> The evidence presented . . . shows that . . . the speak-English-only policy as implemented and enforced by the Defendant was a tool by which discrimination based on national origin was effected. Discriminatory intent supporting a claim of disparate treatment is evidenced not only in the implementation and enforcement of the English-only policy, but also by the manner in which a majority of the Hispanic employees were replaced by an increasing majority of non-Hispanic employees. Evidence of intent is also seen in the pretext of reasons by the employer for instituting

evidence existed to show that the employer implemented its English-only policy because of business necessity and held that the policy discriminated against employees based on their national origin, thereby violating Title VII's ban against national origin discrimination.[71] Without using the phrase "special accommodation" in its holding, the court equated language with national origin, and, furthermore, at least inferentially, suggested that an employer should provide special treatment to LEP persons (or, perhaps, to all bilingual individuals)—by allowing them to speak a language other than English while at work—in order to withstand a claim of national origin discrimination pursuant to Title VII.[72]

These cases show that some courts have acknowledged that a close link exists between language and national origin, and correspondingly, may be inclined to hold that, pursuant to the CRA, an entity must provide special accommodations to an LEP individual.[73] Differing views exist related to providing such accommodations, and uncertainty regarding an entity's duty to an LEP person pursuant to the CRA will persist until the Court or Congress settles the debate.[74]

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> the policy, by the company's admitted plan to install a pay phone outside the building to be used by the Hispanics who wished to speak Spanish during their *personal* phone calls. Testimony of ethnic slurs [such as the company's President referring to Hispanic employees as "Wetbacks"] . . . was also presented.

*Id*. 1070–71 (emphasis added). *But see Spun Steak Co.*, 998 F.2d 1480 (finding, on different facts, "This is not a case in which the employees have alleged that the company is enforcing the policy in such a way as to impose penalties for minor slips of the tongue[,]" and holding that evidence was insufficient to show that the employer implemented the policy as a way of discriminating against employees because of their national origin), *cert. denied*, 512 U.S. 1228 (1994).

[71] *Id*. at 1069–71.

[72] *Id*. at 1073–76 (omitting the phrase "special accommodations"). The court concluded,

> Defendant's enactment and implementation of the speak-English-only rule or policy constitutes disparate treatment of Hispanic employees based upon their national origin, in violation of Title VII of the Civil Rights Act of 1964, as amended. A blanket policy or practice prohibiting the speaking of a language other than English on an employer's premises at all times, except when speaking to a non-English speaking customer, violates Title VII's prohibition against discrimination based on national origin.

*Id*.

[73] *See supra* Part II.C.2 (discussing cases that suggest that language is closely linked to national origin).

[74] *See supra* Part II.C (explaining differing views by courts).

## III. ANALYSIS: THE CIVIL RIGHTS ACT OF 1964 DOES *NOT* REQUIRE AN ENTITY TO PROVIDE SPECIAL ACCOMMODATIONS TO AN LEP INDIVIDUAL

Requiring entities to provide special accommodations to LEP individuals is inconsistent with the CRA's requirements.[75] Part III analyzes why requiring such accommodations is unfounded.[76] More particularly, first, Part III.A discusses why a plain reading of the CRA shows that an entity is not required to provide special accommodations to an LEP person.[77] Second, Part III.B explores how the history of the Act supports that view.[78]

### A. *The Text of the Civil Rights Act of 1964: An Entity Is Not Required to Provide Special Accommodations to an LEP Individual*

Though courts have not yet addressed this precise issue, a plain reading of the CRA shows that the Act does not require special accommodations for LEP individuals.[79] First, the CRA's core goal is eliminating discrimination against minorities, but it only protects against discrimination based on race, color, religion, sex, or national origin.[80] It does not protect against language discrimination.[81] Second, the CRA's purpose is to eliminate discrimination against minorities who fall within the enumerated classes, not to give special preference to certain

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[75] *See infra* Part III.A (discussing why a plain reading of the CRA shows that the Act does not require an entity to provide special accommodations to an LEP person).

[76] *See infra* Part III (analyzing why requiring an entity to provide special accommodations, such as free translation services to LEP persons, is unwarranted).

[77] *See infra* Part III.A (showing that requiring entities to provide special accommodations to LEP individuals is inconsistent with the CRA).

[78] *See infra* Part III.B (arguing that the CRA's legislative history shows that Congress did not intend for the CRA to preclude language discrimination).

[79] *See infra* Part III.A (discussing the CRA's requirements).

[80] *See infra* notes 84–93 (examining the CRA's purpose of eliminating discrimination of particular groups enumerated in the Act).

[81] *Id*.

minorities at the expense of those not protected by the Act.[82] Thus, the CRA does not require special accommodations for LEP persons, and this textual view is discussed below.[83]

First, the CRA prohibits discrimination against an individual where that discrimination is based on an individual's race, color, religion, sex, or national origin, but the Act does not prohibit language discrimination.[84] Pursuant to the CRA, when a covered entity makes certain decisions—for example, when an employer refuses to hire an individual "because of such individual's race, color, religion, sex, or national origin[]"—the entity discriminates against that individual.[85] In other words, the CRA serves to ensure that an entity does not avoid serving or

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[82] *See infra* notes 94–96 (demonstrating that the CRA is grounded in ensuring equality, not in providing special preference or accommodations).

[83] *See infra* Part III.A (explaining that the CRA does not require entities to providing special accommodations to LEP persons).

[84] *See, e.g.*, Title II, 42 U.S.C. § 2000a(a) (2000) (emphasis added) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of *race, color, religion, or national origin*."). *See also, e.g.*, Title III, 42 U.S.C. § 2000b(a) (2000).

> Whenever the Attorney General receives a complaint in writing signed by an individual to the effect that he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his *race, color, religion, or national origin*, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof, other than a public school or public college as defined in section 2000c of this title, . . . the Attorney General is authorized to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate[.]. . .

*Id*. (emphasis added). *See also, e.g.*, Title IV, 42 U.S.C. § 2000c-9 (2000) (emphasis added) ("Nothing in this subchapter shall prohibit classification and assignment for reasons other than *race, color, religion, sex or national origin*."). *See also, e.g.*, Title VI, 42 U.S.C. § 2000d (2000) (emphasis added) ("No person in the United States shall, on the ground of *race, color, or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"). *See also, e.g.*, Title VII, 42 U.S.C. § 2000e-2(a) (2000).

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

*Id*. (emphasis added). *See also supra* note 29 (describing, more generally, the protection provided by the CRA).

[85] *See supra* note 84 (quoting Title VII).

hiring a particular person *because of* the person's *race, color, religion, sex, or national origin*.[86] In addition, the Act precludes some practices that "cause[] a disparate impact on the basis of race, color, religion, sex, or national origin."[87]

However, notwithstanding its relatively broad proscription against discrimination, the Act does not prohibit all discriminatory acts but, rather, it prohibits *only* those acts that are based on an individual's race, color, religion, sex, or national origin.[88] For example, pursuant to the CRA, absent a state or local statute which specifically prohibits discrimination based on sexual orientation, an entity is free to discriminate against a person because of that person's sexual

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[86] *See id*.

[87] 42 U.S.C.A. § 2000e-2(k). Concerning disparate impact cases, the Act states,

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of *race, color, religion, sex, or national origin* and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

*Id*.

[88] *See, e.g*., Title IV, 42 U.S.C. § 2000c-9 (2000) (emphasis added) ("Nothing in this subchapter shall prohibit classification and assignment for reasons other than *race, color, religion, sex or national origin*."). *See also* Enforcement of Title VI of the Civil Rights Act of 1964 National Origin Discrimination Against Persons With Limited English Proficiency, Policy Guidance, 65 Fed. Reg. 50,123 (Dep't of Justice Aug. 11, 2000) (providing guidance to agencies receiving federal financial assistance concerning how to assess compliance with Title VI and Executive Order 13,166). Even the Department of Justice acknowledged that "there is not always a direct relationship between an individual's language and national origin[.]" *Id*. at 50,124. *See also* Juan F. Perea, *Killing Me Softly, With His Song: Anglocentrism and Celebrating Nouveaux Latinas/os*, 55 FLA. L. REV. 441, 451–53 (2003), *available at* http://biblioteca.uprrp.edu/LatCritCD/Publications/PublishedSymposium/LCVIRUtgers&%20FLR(2002–03)/18LCVIFLRPerea.pdf (arguing that, despite the rulings by a majority of courts, language discrimination is a form of race discrimination, or in the alternative, national origin discrimination, and, thus should be deemed unlawful pursuant to Title VII of the CRA). *See also* Lisa L. Behm, Comment, *Protecting Linguistic Minorities under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 MARQ. L. REV. 569 (1998). Some scholars, such as Behm, have argued that Congress should amend Title VII of the CRA to include language, and in so doing, protect against language discrimination. *Id*. *See also* Amy Crowe, *supra* note 12, at 602–04. Crowe acknowledged that most courts have not held that language is the same thing as national origin but argued that courts should interpret Title VII's existing ban on national origin discrimination to include language because language should be viewed as a natural extension of national origin. *Id*.

orientation.[89] To illustrate further, even where a plaintiff establishes that her employer harassed her, she must prove that she was harassed because she is a member of one of the enumerated classes protected by the CRA to prevail on a charge brought under the Act.[90] As the Supreme Court has often stated in its opinions, the CRA does not protect against all discrimination that seems inappropriate or immoral by societal standards, but, instead, its scope is limited to its express statutory provisions.[91] Indeed, the Court's recent practice has been to "reject[] attempts

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[89] *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998). The Court explained that discrimination because of an individual's sexual preference does not establish a proper claim under Title VII of the CRA; discrimination because of an individual's biological sex must be established. *Id.*

> Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* ... because of ... sex.'

*Id*. *See also Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) (concluding that the female plaintiff failed to establish a claim under Title VII of the CRA, where the harassing incidents that she alleged related to her sexual orientation, not her biological sex); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) (citing *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1086 (7th Cir. 2000); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000)) ("Title VII does not . . . provide for a private right of action based on sexual orientation discrimination."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001) (holding that a male homosexual employee must establish that he was discriminated against because of his sex in order to prevail on a claim under Title VII of the CRA; it is not enough to establish that he was discriminated against because of his sexual orientation); *Graziano v. Village of Oak Park*, 401 F. Supp. 2d 918, 927 n.12 (N.D. Ill. 2005) (citing *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) (stating that discrimination based on sexual orientation is not prohibited under Title VII of the CRA); Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based On Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 69–70 (2000) (arguing that courts should interpret Title VII of the CRA to ban "anti-gay workplace discrimination" or Congress should pass legislation that specifically protects against sexual orientation discrimination); Tiffany L. King, Comment, *Working Out: Conflicting Title VII Approaches To Sex Discrimination And Sexual Orientation*, 35 U.C. DAVIS L. REV. 1005 (2002) (arguing that Congress should amend Title VII of the CRA to preclude discrimination based on sexual orientation).

[90] *See* Oncale v. Sundowner Offshore Servs., Inc. 523 U.S. 75 (1998).

[91] *See id.* at 81 (1998) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); in turn, citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Id*. Title VII is not a "general civility code" and "does not prohibit all verbal or physical harassment in the workplace[.]" *Id.* at 80. In *Oncale*, the Court considered whether the plaintiff, who "was forcibly subjected to sex-related, humiliating actions against him by [three of his male co-workers] . . . in the

to infer enforceable rights" and to require Congress to "unambiguously confer an enforceable right upon the . . . beneficiaries[]" of an Act.[92] Thus, the CRA makes many types of discriminatory acts unlawful, but its scope is limited to prohibiting only that discrimination which Congress has unmistakably outlawed.[93]

Second, the CRA is aimed at eliminating discrimination against minorities, not providing special accommodations to them.[94] Accordingly, assuming arguendo that the language that a person speaks is a close enough connection to that person's national origin to automatically warrant protection under the CRA's ban against national origin discrimination, which it does not, the CRA still does not require entities to provide special accommodations to people because of their national origin.[95] The CRA emphasizes an employer's duty to make decisions free from

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presence of the rest of the crew" was entitled to relief under Title VII of the CRA. *Id*. at 77. Undeniably, the plaintiff's situation was unfortunate. *See id*. However, the reason that the Court decided in the plaintiff's favor was not because it empathized with him for having been "physically assaulted . . . in a sexual manner[] and . . . threatened . . . with rape[]" in the workplace. *Id*. The Court stated, "[I]t is ultimately the provisions of our laws . . . by which we are governed." *Id*. at 79.

*See also Dandridge v. Williams*, 397 U.S. 471, 485 (1970). The court stated,

> We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. *Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure*, certainly including the one before us. *But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court*.

*Id*. at 487 (emphasis added).

[92] *Gonzaga University v. Doe*, 536 U.S. 273, 281 (2002) (citing *Suter v. Artist M.*, 503 U.S. 347 (1992)). If Congress intends to create rights, it must speak in "clear and unambiguous terms[,]" and if relevant statutory provisions "contain no rights-creating language," then the Court may not infer such rights. *Id*. at 290. *See also, e.g., Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); citing *Pennhurst State Sch. and Hosp. v. Halderm*an, 465 U.S. 89, 99 (1984)) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'").

[93] *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (noting that the omission of the word "language" from the CRA, and, in particular, from Title VII's statutory definition, indicates that Congress did not intend to make language discrimination unlawful), *cert. denied*, 449 U.S. 1113 (1981).

[94] *See supra* notes, 29, 84, 87 (discussing provisions contained within the CRA).

[95] *See* Civil Rights Act, 42 U.S.C. §§ 2000a–2000h (2000). The CRA's prohibition against national origin discrimination does not require entities to provide special accommodations to an individual because of the individual's national origin. *Id*. *See also* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–213 (2000); 47 U.S.C. § 225 (2000); Barbara Plantiko, *supra* note 6, at 262–63. The Americans with Disabilities Act (ADA) specifies that a covered entity must provide "reasonable accommodation" to a person who possesses a qualifying disability unless the entity can demonstrate that doing so presents an "undue hardship." 42 U.S.C. §

discrimination; it does not impose a duty to provide special accommodations.[96] For these reasons, the CRA does not mandate special accommodations for LEP persons.[97] The CRA's history supports this textual analysis and is discussed next in Part III.B.[98]

### *B. The History of the Civil Rights Act of 1964: An Entity Is Not Required to Provide Special Accommodations to an LEP Individual*

The legislative history of the CRA provides a glimpse into congressional intent concerning the CRA's goals and supports the proposition that an entity is not required to provide special accommodations to an LEP person.[99] First, during the period leading up to the passage of the

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12112(b)(5)(A). Therefore, Plantiko argued that people with limited language proficiency should be given special accommodations pursuant to the CRA much like people with disabilities are afforded reasonable accommodation pursuant to the ADA. Barbara Plantiko, *supra* note 6, at 262–63. She stated,

> An analogy may be drawn to the provision of interpreters under the Americans with Disabilities Act where courts have been extremely reluctant to excuse a health care provider's failure to provide sign language interpreters under an 'undue . . . [hardship]' defense. Health care providers . . . rarely succeed [under the ADA] in claiming that providing interpreting assistance for individuals with hearing impairments constitutes an undue . . . [hardship] because alternative accommodations, such as hiring interpreter employees . . ., are feasible.

*Id*. at 262–63. However, Plantiko's argument fails because as stated above, unlike the CRA, the ADA expressly requires covered entities to provide "reasonable accommodation." 42 U.S.C. § 12112(b)(5)(A). The CRA contains no similar provision requiring an entity to provide special or reasonable accommodation to an individual because of that individual's race, color, religion, sex, or national origin. 42 U.S.C. §§ 2000a–2000h (2000). *See also Gonzaga University*, 536 U.S. at 280. "Congress [must] 'speak[] with a clear voice,' and manifest[] an 'unambiguous' intent to confer individual rights[.]" *Id*. If Congress fails to do so, the Court will not infer such rights. *Id*. Thus, where no express provision within the CRA purports to require special accommodations for persons of LEP status, the Court must not interpret the Act to require such accommodations. *Id*. *See also* Carrie L. Flores, Note, *A Disability is Not a Trump Card: The Americans with Disabilities Act Does Not Entitle Disabled Employees to Automatic Reassignment*, 43 VAL. U. L. REV. 195 (Fall 2008) (arguing that even though the ADA requires that employers provide reasonable accommodation to individuals with qualified disabilities, limitations exist concerning the types of accommodation that are considered reasonable pursuant to the ADA).

[96] See *supra* note 95 (discussing that the primary purpose of the CRA is to outlaw certain types of discrimination, not to impose a duty on entities to provide special accommodations to people because they fall within a class enumerated in the Act).

[97] *See supra* Part III.A (explaining that the CRA is limited to prohibiting only that discrimination which is expressly outlawed; the Act does not impose an affirmative duty on entities to provide special accommodations).

[98] *See infra* Part III.B (demonstrating that the CRA's legislative history supports a textual reading of the Act, i.e., the Act does not require entities to provide special accommodations to people based on national origin).

[99] 1964 U.S.C.C.A.N. 2391, H. Rep. No. 914, 88th Cong., 2d Sess., and S. Rep. No. 872, 88th Cong., 2d Sess. (demonstrating that the legislative history of the CRA shows that Congress did not refer to language in the context of national origin).

CRA, very little discussion occurred concerning what was meant by "national origin."[100] However, in conversation that did ensue, one Congressman opined that national origin referred to "the country from which you or your forbears came . . .[,]" and another clarified that a person's national origin is distinct from a person's race or color.[101] Moreover, during the entire sixteen-months of congressional debates, no Congressman referred to the language that a person speaks in the context of national origin.[102]

Another important aspect of history that shows that Congress did not intend for language to be protected by the CRA is derived from a much later point in time—1991.[103] By 1991, many plaintiffs had argued, albeit a majority unsuccessfully, that discrimination based on a person's language should be banned by the CRA.[104] In addition, as early as 1973, in *Espinoza v. Farah Mfg. Co.*, the United States Supreme Court defined national origin (without including language) as follows: "[t]he term 'national origin' on its face refers to the country where a person was

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[100] *Id. See also Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1490 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994) (noting that "nowhere in the legislative history is there a discussion of English-only policies at all[]"); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88–89 (1973) (describing pertinent legislative history as "meager[,]" but noting that such history supports treating the terms "national origin" and "ancestry" as synonyms); Natalie Prescott, *supra* note 12, at 455 (citing 110 Cong. Rec. 2549, 2550 (1964); citing James Leonard, *Bilingualism and Equality: Title VII Claims for Language Discrimination in the Workplace*, 38 U. MICH. J.L. REFORM 57, 69 (2004); quoting, in part, Steven I. Locke, *Language Discrimination and English-Only Rules in the Workplace: The Case for Legislative Amendment of Title VII*, 27 TEX. TECH. L. REV. 33, 50 (1996)). "Congress has offered remarkably little aid in defining [national origin] . . . . The legislative history of the Civil Rights Act suggests that Congress did not intend to restrict employers' [sic] ability to regulate languages in the workplace, and, in fact, did not aim to protect languages at all." Natalie Prescott, *supra* note 12, at 455 (citing 110 Cong. Rec. 2549, 2550 (1964); citing James Leonard, *Bilingualism and Equality: Title VII Claims for Language Discrimination in the Workplace*, 38 U. MICH. J.L. REFORM 57, 69 (2004); quoting, in part, Steven I. Locke, *Language Discrimination and English-Only Rules in the Workplace: The Case for Legislative Amendment of Title VII*, 27 TEX. TECH. L. REV. 33, 50 (1996)).

[101] *Id*. (quoting James Leonard, *supra* note 100, at 101).

[102] *See, e.g.,* 1964 U.S.C.C.A.N. 2391, H. Rep. No. 914, 88th Cong., 2d Sess., and S. Rep. No. 872, 88th Cong., 2d Sess. (indicating that Congress does not mention language or LEP status in the context on national origin discrimination); Raphael Metzger, *Hispanics, Health Care, and Title VI of the Civil Rights Act of 1964*, 3-WTR KAN. J.L. & PUB. POL'Y 31, n.84 (1993/1994) (noting that Congress did not discuss language in the context of national origin discrimination); Natalie Prescott, *supra* note 12, at 455 n.64 (citing 110 Cong. Rec. 2549, 2550 (1964)) (noting that Congress "omit[ed] 'language' from the definition of 'national origin'").

[103] *See infra* notes 104–08 (discussing the legislative history preceding the passage of the Civil Rights Act of 1991).

[104] *See supra* Part II.C (citing numerous judicial decisions in which plaintiffs asserted that a person's preferred language is essentially the same as their national origin).

born, or, more broadly, the country from which his or her ancestors came."[105] If the United States Supreme Court's interpretation of "national origin"—excluding language as an automatic extension of nation origin—was inconsistent with the CRA, Congress had a duty to amend the CRA to clarify its terms.[106] Yet, when Congress amended the CRA by passing the Civil Rights Act of 1991, it made significant changes to the Act and addressed several problematic areas but did not add the term "language" to the list of classes enumerated in the Act and did not in any way incorporate language discrimination into the Act's ban on national origin discrimination.[107] Because Congress did not do so, it is appropriate to conclude that Congress agreed with the view subscribed to by most courts at that time.[108] Accordingly, a review of history shows that Congress did not intend for the CRA to require special accommodations for LEP individuals.[109]

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[105] 414 U.S. at 88. Discussing the legislative history of the CRA, the Court concluded that, "[t]he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came[]" and did not include language in defining national origin. *Id*. Referring to guidelines promulgated by the EEOC, the Court stated,

> [D]eference must have limits where, . . . application of the guideline would be inconsistent with an obvious congressional intent. . . . Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.

*Id*. at 94 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 (1969); *Zuber v. Allen*, 396 U.S. 168, 193 (1969); *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 272 (1968)).

[106] *See* Civil Rights Act of 1991, Pub.L. No. 102-166, § 105(b), 105 Stat. 1071 (demonstrating that Congress amended the CRA in 1991 in response to the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded in part by* the Civil Rights Act of 1991); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); citing *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'").

[107] Civil Rights Act of 1991, Pub.L. No. 102-166, § 105(b), 105 Stat. 1071 (omitting the term "language").

[108] *See* Mona T. Peterson, Note, *The Unauthorized Protection of Language Under Title VI*, 85 MINN. L. REV. 1437, 1466–67 (2001). Peterson explained,

> Congress's and HHS's failure to mandate translation services for LEP individuals is the best indicator of the significance of this issue. Congress failed to overturn cases in which the courts upheld policies that had a disparate impact on LEP individuals. If Congress disagrees with a judicial interpretation of a federal statute, it may overturn the decision by amending the statute. By congressional inaction, one may conclude that Congress does not consider discriminatory language policies to conflict with Title VI. In addition, if Congress believed that language was a significant social concern, it would have enacted a statute requiring federal funding recipients to provide translation services. Unlike the Rehabilitation Act and the ADA, both which require translation services for those in need of auxiliary aid, Title VI fails to include translation services as a means of ensuring meaningful access to recipient's services. This indicates that Congress did not deem this issue to be one of significant social concern.

## IV. CONCLUSION

To conclude, the United States Supreme Court has not yet had occasion to answer the burning question discussed in this Article: does the CRA require entities to provide special accommodations to LEP persons? However, in light of Executive Order 13,166 issued by President Clinton at the eleventh hour of his term in office in 2000, corresponding guidance issued by the DOJ, and policy guidance subsequently issued by other federal agencies, it is only a matter of time before that precise question is debated in courts. Indeed, the matter will likely be hotly contested until the Court settles the controversy.

In keeping with the notion of stare decisis, the Court should refrain from reading additional protections into the CRA. By looking to the terms of the Act and to legislative history indicating Congress's intent, the Court should determine that a person's choice of language does not equate to national origin. Accordingly, pursuant to the CRA, a person must establish more than simply that he or she was discriminated against because of a lack of language proficiency to prevail on a charge of national origin discrimination.

As a result, absent a statute mandating a different result, the employer or health care provider in the hypothetical scenario presented in Part I is not be forced to provide special accommodations to an LEP person. The CRA is grounded in providing equality of opportunity, not in providing special advantages to individuals. Moreover, its scope is limited to its express provisions, which do not purport to preclude discrimination based on an individual's language proficiency or LEP status. Thus, requiring individuals to show that they were discriminated against because of their *national origin* appropriately balances the business needs of employers and other entities and the interests of individuals who may fall victim to discrimination because of their race, color, religion, sex, or national origin.

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*Id*. (footnotes omitted).

[109] *See supra* Part III.B (discussing the CRA's legislative history).