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The Zero Sum Game of Language Accommodations in the Workplace

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INTRODUCTION
No matter how well-intentioned, law creates conflict when it regulates cultural affairs. Frictions become acute in a society experiencing high levels of immigration. The United States is such a place: for 2007, the Census Bureau reports that 38.1 million, or nearly one in eight residents was foreign born.1 The most obvious cultural difference between the immigrants and the native born is language. The Census reports that 20% of the population speaks a language other than English in the home.2 Of this group, approximately half speaks English “very well” while the other half speaks English with varying degrees of facility.3

While immigrants are expected to learn enough English to function in the workplace and public institutions such as schools,4 the EEOC has issued Guidelines that effectively protect the right of immigrants to speak their native tongues in the non-operational places and times of the workplace.5 Such rights are essentially cultural and clash with the cultural views of employers and co-workers who desire a monolingual workplace or society generally. This article takes a skeptical view of such regulations. There are no generally accepted norms or analytical schemes that allow us to rank or rate cultural preferences. I shall argue that the better approach – at least within the private sphere – is to allow individuals and private entities to make their own decisions within the constraints of common property and contract rules.

Let us illustrate this cultural clash with three vignettes. Imagine a factory in Brownsville, Texas, on U.S. Highway 281 right across the border from Matamoros. Two women, both born in Mexico, both excellent workers, are chatting in Spanish in the break room. Let’s call them Blanca and Consuelo. Their exchange is the stuff of every day conversation. They talk about the weather this weekend, the mysterious fluctuations in gasoline prices and retirement account balances. Blanca says that her daughter has won a


3See id. at 3.


prize at school for achievement in mathematics. Consuelo speaks warmly about her son’s game-winning overtime basket for the junior varsity team. Things are swell until their supervisor approaches and reminds them politely but firmly of the company’s English-only policy. Smarting from the reprimand, the workers swallow their pride and apologize in dutiful English for their lapse. They become sullen and don’t care to continue the conversation.

No one of the slightest sensibility lacks some sympathy for these hypothetical workers. The greatest challenge for many immigrants, especially those arriving as adults, is to learn enough English to get and keep a job. Nearly everyone needs to work, so the typical immigrant becomes bilingual to some degree; rarely, however, does English displace his or her native tongue. It is natural that workers from the same country or region of the world, such as Blanca and Consuelo, would want the comfort of conversing in their native tongue. Why should it matter, many will ask, that two employees speak Spanish to themselves if they are not actually working? Why not let them ease the burden of transition to a new society with a few consoling moments in their native tongue?

At this point the Equal Employment Opportunity Commission gets involved. EEOC Guidelines construing Title VII’s prohibition against national origin discrimination cast a skeptical glance at workplace language rules. Blanket restrictions on languages other than English are effectively banned while employers bear the burden of demonstrating a business necessity for rules of lesser scope. Halting a lunchtime conversation in Spanish will usually violate the EEOC’s interpretation of Title VII since the break room is a place of limited business necessity. (The federal courts have been reluctant to apply the Guidelines with vigor, but more about this later.) You can make a safe bet that Blanca and Consuelo will find sympathetic ears should they complain to the

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8Guidelines on Discrimination Because of National Origin, 29 C.F.R. ’ 1606.7(a).

9Id. ’ 1606.7(b).

10See infra Part II.A.4 (discussing reluctance of federal courts of appeal to apply Guidelines vigorously).
EEOC about their employer=s English-only policy.  

But there are more characters and other interests in this story. Imagine a third woman in the Brownsville factory breakroom. Mary has lived in Brownsville her entire life and speaks only English. She is troubled by the changing character of the workplace and the community. She has no objection to immigration but feels that immigrants should adopt American ways, especially the use of English in gathering places such as the workplace. Her grandfather came over from Denmark as a young man and Mary never heard him speak a word of Danish. In a nutshell, she is an old fashioned assimilationist who feels that use of English in public settings is a fair price to pay for the privilege of a better life in America.

And finally Raul. In 1963 he escaped from Cuba on a raft with his family rather than face a revolutionary tribunal. He had been a labor attorney in Havana but at first had to settle for lawn work and other odd jobs in the United States. He saved what money he could, learned English and eventually founded the company at which Consuelo, Blanca and Mary now work. He is a naturalized American citizen. He feels strongly that English serves a vital role as the unifying national force and that language accommodations only serve to hold immigrants back. He also feels that the factory is his property and that, unlike Cuba, the owner should be able to set work rules without interference from the government.

Who in these vignettes has the high moral ground? Should we side with Blanca=s preference to speak to Consuelo in Spanish, Mary=s need to preserve the Brownsville of her childhood, or Raul=s insistence on using his property as he sees fit? Again, there is no generally accepted method of ranking these competing demands. Proponents of minority language rights might offer justifications of prioritizing culturally related expression, accommodating the immigrant=s burden of integrating into a new society, or promoting associational rights generally.12 Contemporary western liberalism will tend to view cultural accommodations at best as secondary to economic security.13 Libertarians simply oppose government intervention in the private realm to promote cultural objectives.14 Assimilationists favor it to promote a national identity.15

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12 See infra Part III.
13 See infra Part II.A.1.
14 See infra note 87 and accompanying text.
15 See, e.g., John J. Miller, The Unmaking of Americans (1998) (favoring assimilationist policies); id. at 217-33 (arguing that social assimilation including speaking English at work leads to economic assimilation).
Whatever the fate of the *EEOC Guidelines* – and cultural accommodations generally – significant constituencies of American society will be displeased and regard the outcome as arbitrary or wrong.

Disappointments notwithstanding, we must still determine how this clash of norms should be resolved. In this Article, I take the position that the better approach is to maximize employer control over decisions regarding language use in the private workplace. My principal concern is that mandatory language accommodation schemes interfere with the core liberal value assigning choices regarding cultural identity to the individual or to voluntary associations. The *EEOC Guidelines* create a uniform national mandate regarding the use of minority languages in every workplace covered by Title VII. They create orthodoxy by imposing a multicultural ethic while giving no shrift to the cultural preferences of employers or dissenting workers. Nor do these policies create offsetting economic benefits that might provide a culturally neutral justification for encroachment into the private sphere.

To be candid, an unregulated workplace operating on common law rules of contract and property is hardly a perfect promoter of individual cultural decisions. Employers often have the economic power to impose their cultural views on workers who would prefer to speak in a disfavored language. Nonetheless some mechanism must exist to resolve the cultural collisions of a contemporary workplace. Allowing each shop to set its own policy avoids the rigidity of a nationwide cultural decision while permitting employers to consider the effect of proposed language policies on workforce preferences, morale and effectiveness. Likewise an unregulated approach leaves open the possibility that an employee may influence an employer’s decisions on culturally significant matters. The one-size-fits-all alternative offered by the *EEOC Guidelines* is far worse.

I elaborate my argument as follows. Part I attempts to capture the ground rules for any attempt to regulate language use in the workplace. Part I.A sets up the discussion by analyzing both the communicative and cultural functions of language and their implications for language policy. Part I.B then discusses the *EEOC Guidelines* and concludes that, although an employer’s need for effective communication or safety usually prevails, the regulations create significant cultural protections for immigrants. Part I.C provides the key insight for the remainder of the Article by concluding that language accommodations are a “zero sum game,” i.e., accommodating one cultural preference imposes burdens on other cultural views.

How should the law treat this impasse? Part II sets out my case against culturally based language accommodations. The argument is twofold. First, I contend in Part II.A that cultural decisions are ideally left to the individual and that the laissez-faire approach better attains this goal. Part II.B makes a second and related argument that a laissez-faire
scheme would tend to confine Title VII to what it can do reasonably well – redressing the economic effects of bias through an anti-discrimination mandate that applies equally to all workers – while avoiding the undesirable trade-offs of cultural accommodation.

In Part III, I give proponents of language accommodations in the workplace what I trust is a fair hearing. Academic commentary favoring accommodations tends to stress three concerns: expressive interests in language (Part III.A); fairness, both in the sense of compassion for the difficult transition experienced by immigrants (Part III.B.1) and cultural burden sharing (Part III.B.2); and, associational interests in choice of language (Part III.C). While these competing views are often based upon factually accurate observations about the importance of native languages to immigrants, they fail to offer a persuasive justification for the shift of cultural authority away from individuals or private entities exercising their common law contract and property rights.

Let me also offer at the outset a few clarifying statements about the intentions of this Article. First, I am not pursuing an official assimilationist agenda. To the contrary, the arguments developed below would justify a freely chosen employer work rule requiring the use of Spanish or Chinese in a private workplace. Second, my analysis extends only to private employment decisions. A decision requiring the use of a single language in a government workplace would be subject to review under constitutional principles of equal protection and federalism. I leave that analysis for another occasion. Third, I reserve judgment on the utilitarian aspects of conducting official business in English versus other languages. Finally, I have no stake in the outcome. If the cumulative effect of private decisions is to create a bilingual society, that’s fine. ¡Está bien, que sigamos juntos! As Ariel Dorfman says reassuringly about his dream of a bilingual America: “Don’t worry. Your children won’t be losing Shakespeare. They’ll be just be gaining Cervantes.”16

Part I: Cultural and Practical Aspects of Language in the Workplace.

A. The Practical and Cultural Functions of Language.

1. Introduction.

Language serves multiple purposes in human society. Its obvious function is to convey information, sometimes factual and other times expressive of opinions or beliefs. Such speech facilitates a broad range of human transactions and responses. A traffic

sign lets the driver know that the maximum permissible speed on this stretch of interstate is 70 m.p.h. and implies that violations may earn a conversation with a highway patrolman. Cave drawings at Lascaux depict a man being attacked by a bison, providing a pictographic warning that hunting this particular beast is dangerous. King Henry informs us of the fact of his fear on the eve of Agincourt when he says: “I think the King is but a man as I am.”

Collaboration in the workplace obviously depends upon the effective exchange of information among workers and supervisors. American employers thus have a legitimate interest in requiring that job applicants demonstrate a proficiency in English that is appropriate to a particular workplace. Employees who cannot speak adequate English may diminish a firm=s productivity or pose a safety threat. Workers on a Chicago factory floor must be able to understand and carry out an instruction to load an extra sofa bed onto the truck arriving at 3:30 p.m. for delivery to an Omaha retail outlet. For the same reason, a monolingual Francophone will simply not do as a sales clerk at Saks in Manhattan (New York or Kansas) nor as a first responder to a toxic spill in Wyoming.

But language serves functions independent of efficient communication of information. Political theorists have observed that language plays two particular roles in cultural formation, each with implications for public policy: 1) as an ingredient of a cultural milieu that individuals require to sustain their cultural preferences, and 2) as marker of individual identity. To illustrate, let us return to our hypothetical worker Blanca. She arrives in the United States knowing little or no English and faces the immediate need to adapt to life in a new language at school, play or in the market. If she comes as an adult, the transition will focus on the workplace. Education, training, the formation of professional relationships, difficult enough in themselves, are complicated by the need to learn English on the fly. And no matter how well she learns English, the chances are that it will never supplant her native language. (Immigrant families typically use their native languages in the home to some degree for two generations. She will

17Henry V, Act 4, Scene 1.
continue to think in her primary language and constantly devise ways to translate subtle insights into English. It is not surprising that she will seek the relief of companionship of other Mexican immigrants, for example by attending a parish where mass is said in Spanish, and by viewing herself primarily as a Spanish speaker.

A thorough discussion of the relationship between language and culture falls well beyond the scope of this Article. In order to facilitate the discussion in the next subpart of the EEOC Guidelines, however, let us review certain theoretical and practical aspects of language as culture on which there is consensus in scholarly quarters. First, what exactly is culture? How does it affect collective and individual identity? And, how do we distinguish it from neutral practices such as efficiency and safety which may influence the nature of government regulation in the workplace?

2. Language, Culture and Identity.

Culture is a ubiquitous presence that is notoriously difficult to pin down. Kwame Anthony Appiah laments that nowadays anything from anorexia to zydeco can be attributed to some group’s culture. Standard definitions are remarkably broad. Webster’s Dictionary renders culture as: the ideas, customs, skills, arts, etc. of a people or group, that are transferred, communicated, or passed along, as in or to succeeding generations. Sir Edward Burnett Tylor’s often-quoted Nineteenth Century definition is just as wide-open: Culture or civilization, taken in its wide ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities acquired by man as a member of society. Such broad formulations of culture are inevitable since we ask this concept to explain anything from the constitutional faith of a nation to the use of Velcro on sneakers. Perhaps the best we can do is to say that culture consists of the distinctive shared conventions of a particular group. It is, simply, what a group predictably and distinctively practices.

Language, along with ethnicity and religion, is a key cultural marker. Many

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21Kwame Anthony Appiah, The Ethics of Identity 114 (2005) [Hereinafter Appiah, Ethics of Identity].
23Sir Edward Burnett Tylor, Primitive Culture 1 (1871).
24See Steven Pinker, The Blank Slate: The Modern Denial of Human Nature 65 (2002). See also Walter Benn Michaels, Our America: Nativism, Modernism, and Pluralism at 125-29 (1996) (without a racial component, culture consists of what we do); Appiah, Ethics of Identity, supra note 21, at 137 (same); Julie Ringelheim, Diversité Culturelle et Droits de l=Homme: L=Émergence de la Problématique de Minorités dans le Droit de la Convention Européene de Droits de l=Homme (2006) at 6 (reviewing principal definitions of culture and concluding that shared language, norms, values, beliefs and practices characterize a culture).
25Ringelheim, supra note 24, at 4, 6.
cultural groups, such as the Basques or the Québécois are defined by language as well as geographical concentration. Language may indeed be the primary cultural symbol. Every moment of the day is spent in the company of words: conversation, silent thoughts, reading, writing, dreams. Practically everything we do is reduced to voiced expressions or silent gestures. The sociolinguist Joshua Fishman argues that language is more likely to constitute cultural identity than any other symbol. He refers to language variously as the recorder of paternity, the expressor of patrimony, adding other, similarly exalting phrases.\textsuperscript{26}

Language=s role as a cultural ingredient plays out on two levels. At the collective level, language is a critical symbol that distinguishes one corporate entity from another. In France, for example, it is widely accepted that speaking French is an essential part of being French.\textsuperscript{27} Québec is even more insistent on importance of linguistic identity.\textsuperscript{28} After the fall of the Soviet Union, many former client states in Eastern Europe rushed to deprive Russian of official language status.\textsuperscript{29} Closer to home, we can see a weaker preference for national linguistic identity in the requirement that applicants for naturalization in the U.S. must pass an English competency test\textsuperscript{30} and the decision of thirty states to adopt Official English provisions.\textsuperscript{31}


Collective identities, however, are embodied individually and often dictate the sort of person one is. Will Kymlicka argues that culture provides the spectacles through which we identify experiences as valuable. Similar arguments are posed by Margalit & Raz and Tamir. The multiculturalist view that language influences identity is, I think, correct as a factual matter. One scholar takes the position that one’s native language should be considered an immutable trait for purposes of constructing equality interests. While I have previously disagreed with his conclusion that language use should be protected as an aspect of Title VII’s national origin provision, I concur that a person’s mother tongue nearly always remains her primary language hence a critical aspect of the individual’s identity.

Examples of this phenomenon abound. Professor Mirande, for example, has written about his need to pray, write poetry and express deep emotions in Spanish rather than English. The essayist Richard Rodriguez has commented movingly about the silence in his childhood home caused by the language gap between his primarily Spanish-speaking parents and their Anglophone children. In a similar vein, the bilingual playwright Ariel Dorfman has commented on the long struggle for primacy between his two languages: Spanish and English.

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32 See, e.g., Ringelheim, supra note 24, at 7.
34 Avishai Margalit & Joseph Raz, National Self-Determination, 87 J. Phil. 439, 449 (1990) (A Familiarity with a culture determines the boundaries of the imaginable®); see also Joseph Raz, Multiculturalism: A Liberal Perspective, in Ethics in the Public Domain: Essays in the Morality of Law and Politics 170, 178 (rev. ed. 1995) (A Membership in their cultural group is a major determinant of [individuals=] sense of who they are; it provides a strong focus of identification; it contributes to what we have come to call their sense of their own identity.®).
35 Yael Tamir, Liberal Nationalism 72 (1993) (cultural affiliations endow institutions with meaning).
36 Perea, English-Only Rules, supra note 18, at 280.
37 See Leonard, Bilingualism, supra 6 note, at 118- 121.
40 Ariel Dorfman, Rumbo al Sur, Deseando el Norte at 360 (1998) (“[M]is dos lenguas han de declarar una tregua después de cuarenta años de pelear emperradamente por la posesiönde mi garganta.”) By way of personal example, I once attended an Anglican Mass at the American Cathedral in Paris that was said in French. I could follow the words well enough, but after a while the novelty faded into strangeness. French renderings of Sixteenth Century Cranmerian phrases were to me unnatural.
In a monolingual society the importance of language to identity goes unnoticed. Speaking English in England and many parts of the United States or Canada won’t raise an eyebrow. Persons who were born in the monolingual U.S. before the Sixties B the author is one B tend to regard English as the wallpaper of American society. Will Kymlicka rightly points out that most Americans still participate in a social culture based on the English language. Recent waves of immigration, however, have brought the importance of language to the fore. The vigor and success with which the English Only movement has pursued its agenda of imposing English in official fora can be explained in part as a reaction to the strong attachment that immigrants have to their native tongues by old line citizens with an equally intense attachment to English. Even opponents of the English Only movement understand the argument=s popular appeal. Before the 2006 pro-immigration Gran Marcha in Los Angeles, Cardinal Mahoney astutely advised marchers to switch from Mexican flags and Spanish placards to their respective American and English equivalents.

Effects of a native language on individual identity are compounded by the persistent tendency of immigrants from the same area or country of origin to congregate residentially. Nineteenth Century immigrants, the historian Arthur Schlesinger, Jr., explained, tended to remain together, using their native tongue in churches, schools and newspapers. American cities are graced with neighborhoods called Little Italy, Germantown or Little Havana of varying vintages. Modern immigration, largely from Latin America and Asia, appears to follow the same pattern. Immigrants generally occupy metropolitan areas and reside in neighborhoods that are affordable and located near places of employment. In such places an adult immigrant can no doubt find relief

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41Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights 77 (1995) [Hereinafter Kymlicka, Multicultural Citizenship].
42Use of a Spanish version of the Pledge of Allegiance was similarly controversial. See, e.g., Fredrick Kunkle, Furor Over Spanish Version Reopens Pledge Debate, Washington Post Sunday (March 20, 2005) at C5.
within the home and neighborhood from the daily pressures assimilation. This de facto segregation also insures that personal identification with a prior culture will persist for first generation immigrants.

3. Policy Implications.

An immigrant’s “identity stake” in her native language raises two policy concerns. The first concerns the interest in expressing one’s identity. For Blanca and Consuelo in our vignettes, speaking in a language other than English is a way of confirming to each other and informing all listeners that Spanish is an essential trait of their Mexican-American identity. Language policies designed to protect expressive and associational interests will therefore confirm the right to speak in a minority language and simultaneously impose upon an employer or service provider a corresponding duty to tolerate such speech. In Québec, for example, all persons including employees have a right to communicate with commercial enterprises in French, even in shop run by Anglophone management.47

Immigrants have an equally important interest in access to social environments that nurture their cultural identities. Will Kymlicka correctly views culture as the context in which identities are formed.48 Development of individual identity cannot be meaningfully separated from personal experience as molded by the ambient culture. Thus what the political philosopher Charles Taylor calls the “authentic self,” i.e., the kind of person each of us truly is,49 will be shaped in dialogue with other participants in one’s culture.50 Even for individuals who wish to alter their cultural affiliations, one’s inherited culture becomes the starting point from which individuals begin the construction of new identities.51 But the converse is also true: immigrants wishing to conserve their prior identities (as well as adapting to the culture of the receiving country) will want the comfort and conformation of enclaves where the old ways hold.

Maintenance of culturally supportive social structures is a difficult proposition for policy makers in an immigration-driven society such as the United States. Political,

47 See Charter of the French Language, R.S.Q. Ch. C-11 § 2. See also id. Preamble (policy of making French the “normal and everyday language of work.”).
50 Id. at 32 (the “crucial feature of human life is its fundamentally dialogic character”).
economic and governmental institutions form a social structure that is based on the English language. For the most part, immigrants must turn to the private realm of family and friends for cultural connections. There is very little that public policymakers can do to satisfy the need for cultural affirmation. Unlike subnational groups such as the Catalonians in Spain or the Québécois in Canada, most immigrant groups in this country are not territorially concentrated and lack pre-existing social structures. Assimilative pressures normally convert the grandchildren of immigrants into monolingual English speakers. The government couldn’t replicate foreign social structures no matter how hard it tried. The best the government can do is to subsidize cultural activities (e.g., a Mayan cultural center), permit bilingual education in schools (now out of fashion), enact and vigorously enforce anti-discrimination measures, offer public services in the more common immigrant languages, protect the use of languages other than English in designated parts of the public sphere (e.g., at a public hearing on a rezoning permit) and, more to the point of this Article, create language accommodations in the workplace.

B. Title VII: Practical and Cultural Elements in the EEOC Guidelines.

How do Title VII’s language regulations give effect to the competing practical and cultural aspects of language? Essentially they strike a compromise that favors the employer’s interest in efficient business operations but grants cultural rights to employees in limited circumstances. “Business necessity” serves as the dividing line between these often conflicting goals. The mechanics are as follows. The EEOC Guidelines recognize two classes of English only rules. First, they all but condemn work rules that require employees to speak only English at all times, referring them as a burdensome term and condition of employment.\(^5\) The EEOC asserts that prohibiting workers from speaking their primary language at all times creates an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.\(^6\) Restrictions applying only at certain times are treated more generously. Such rules are acceptable so long as the employer can demonstrate business necessity.\(^7\)

I have argued elsewhere that the practical effect of the Guidelines is to divide the workplace into two zones: public and private.\(^8\) In the former, consisting of the operational areas of the workplace such as an assembly line or the order counter at a fast

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52 See Kymlicka, Multicultural Citizenship, supra note 41, at 76-77.

53 29 C.F.R. ' 1606.7(a).

54 Id.

55 Id. ' 1606.7(b).

56 See Leonard, Protection of Minority Rights, supra note 5, at 750-51.
food joint, employers should be able to justify most English-only rules by reference to the need for efficient communications among workers, ease of supervision, safety, and so forth. Here cultural desires bend to managerial and business imperatives. In the private zones, however, the Guidelines provide considerable choice of language. Regulation of conversation in the breakroom or cell phone conversations with a family member are hard to explain as necessary to the conduct of a business. The difficulty of justifying such rules is heightened by the assignment of the burden of proof of business necessity to the employer in Title VII cases. In essence, the solution to language differences embodied by the EEOC Guidelines subordinates cultural concerns to business needs but provides significant protections in the putatively non-productive realms of the workplace.

By world standards the Guidelines’ protection of workers’ cultural interests are modest. American sensitivity to economic efficiency is not universally accepted. A quick comparison to Quebec’s culturally protective language policy helps emphasize the limited reach of the EEOC Guidelines as a cultural implement. Under Quebec’s 1977 Charter of the French Language, workers have a right to carry on their activities in French; employers, in turn, are required to issue written messages to workers in French and may not dismiss an employee solely because he or she speaks French exclusively or has insufficient knowledge of another language. There is no general right to communicate in a minority language. Non-compliant entities may expect a visit from L’office québécois de la langue française, i.e., the language police. Absent from this scheme are significant exceptions for those employers who might find it more efficient to operate in English even where it makes economic sense, such as Anglophone enclaves in Montreal. The Charter thus makes a deliberate decision to subordinate such economic choices to the overarching goal of protecting the Frenchness of Quebec. It spares the Québécois of a difficult choice between assimilating into the English culture of greater Canada and maximizing one’s earning potential.

An American advocate of extensive language accommodations, inspired by the

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58 I have argued elsewhere that the Guidelines underestimate the practical importance of break areas to production related supervision. See Leonard, Bilingualism, supra note 6, at 130-35.
60 Id. ' 41.
61 Id. ' 45. Employers may, however, require knowledge of another language consistent with job responsibilities. See id. ' 46.
62 Id. § 159.
Québec Charter and other language protection laws, might be tempted to reduce the EEOC Guidelines into a wholly cultural exercise. Efficiency, so the argument might run, is just a convention that governs the behaviors of a group, a choice to consume the fewest resources necessary to achieve a result. In other words, efficiency is a just one more cultural attitude with no claim to preference over competing views. I concede that this argument makes some sense at the highest level of abstraction. We often hear references to the "culture of business" with its emphasis on cost, safety, profitability and all the other aspects of efficiency that fit neatly into elastic definitions of culture such as Tylor=s. The argument, however, misses the extremely practical nature of the Guidelines and as well as the tendency of efficiency to transcend cultures.

Concepts of efficiency and business necessity are common to so many cultural views that it is difficult to say that, standing alone, they merit the label of culture. Efficiency is a value shared by most cultural groups or subgroups in the United States. An underfunded legal aid office and the struggling businesses they commonly sue are equally interested in maximizing the effect of each dollar spent on operations. The near universal reach of these economic forces deprives them of any power to distinguish one cultural grouping from the other. The most we can say is that one group or operation does a better job of achieving its goals than another. Rarely do we hear of groups that reject efficiency as a mode of operation. Efficiency is rather like drinking water: every one depends on it but no one thinks about it until there=s a drought.

Besides lacking the power to distinguish cultural groups, the concept of efficiency does not predispose individuals toward particular cultural affiliations. Rawls speaks of Aprimary goods,@ that is, those that afford individuals the resources and freedom of action to devise and pursue their individual life plans.63 He mentions as examples both a schedule of civil rights including freedom of expression or conscience and sufficient income and wealth.64 Financial resources provide the developmental infrastructure that facilitates individually determined life plans. But there is no fixed relationship between resources and particular outcomes. An efficient economy will generate greater wealth that might be used for generous college scholarships; ultimately, however, the recipient=s choices determine whether she will become an environmental advocate or a libertarian opponent of the Green Movement.

The EEOC Guidelines implicitly recognize that workplaces will have culturally neutral motives for controlling language use.65 An employer might have several non-
cultural reasons for insisting that her workers communicate with management and each other in a single language. Operations are usually simpler and more efficient when carried out in a single language. Safety concerns may favor the use of one language. Supervisors often find it easier to manage the workplace when they can understand what the workers are saying. Workplace harmony may even be strained when workers suspect that colleagues are speaking in another language to insult or exclude them. Thus in many cases the unfettered employer could logically insist on the use of English in the workplace though she may also hire bilinguals to deal with customers who prefer other languages. The logic that creates a preference for English generally, however, might favor other languages in places where their speakers are concentrated.

Respect for economic dynamics and the limited goal of protecting the interests of individuals in speaking a minority language when efficiency permits does not, I emphasize, mean that the EEOC Guidelines are indifferent to employees’ cultural concerns. It simply means that the EEOC=s cultural agenda is narrowly focused on times and places in the workplace where business necessity is diminished, e.g., the breakroom, telephone calls to home, idle chatter when production pauses, or lunchtime. Here is where the conflict of cultures begins under Title VII=s language rules. As I argue in the next subsection, such changes can succeed only by rewarding one set of cultural

consequences. Will Kymlicka points out correctly that cultural practices, especially a language, that are not embodied in social institutions tend to die out. Kymlicka, Multicultural Citizenship, supra note 41, at 76. Eliminating a particular language from the workplace narrows the social context that sustains it. Workers who don=t speak English as their primary or preferred language will then have an obvious economic incentive to assimilate into an English language mindset. (The ever practical Willie Sutton robbed banks because that=s where the money is. ) For purposes of this Article, however, marking off the culturally neutral realm of Title VII=s business necessity defense allows us to focus on the actual functions of the EEOC=s language regulations.

66Leonard, Bilingualism, supra note 6, at 134 (noting slight advantage in promoting safety).
67Id.
69See Julie Suk, Economic Opportunities and the Protection of Minority Languages, 1 L. & Ethics Hum. Rts. 134, 160 (2007) (noting that monolingual workplaces in multilingual societies may be more efficient).
70See, e.g., Garcia v. Gloor, 618 F.2d 264, 266 (5th Cir. 1980) (Policy allowing bilingual employees to communicate with customers in Spanish).
interests at the expense of others.

C. Winners and Losers under Language Accommodation Rules.

Cultural accommodations are a zero-sum game. Attempts by sovereign authorities to recognize, validate and facilitate cultural practices by one group inevitably clash with the competing interests of others. The most astute commentary on this phenomenon comes from Sir Isaiah Berlin and his theory of value pluralism. He observed that a free society is characterized by a welter of cultural and other views that are contradictory and irreconcilable. The solution, he suggests, is to create a private realm of negative freedom, i.e., the ability to choose as you wish to choose. . . uncoerced. I would add, regarding language accommodations, that those negative freedoms have traditionally been given shape by property and contract principles, i.e., we exercise our choices via our power to control our property and to form contracts with others.

Language accommodations in the workplace are a perfect example of the concern behind Berlin=s value pluralism. The effects are most obvious at the individual level. Return to the vignettes from the Introduction. Is there any way to reconcile Blanca=s and Consuelo=s demands for Spanish language conversations at work with those of Mary and Raul for an English-only environment? In a word, no. Any concession to Blanca and Consuelo requires that we devalue Raul and Mary=s pro-English views and diminish Raul=s property rights and his freedom to contract. Note also that the risk of conflict is mutual. Should the authorities side with Raul and Mary, for example by enacting strict English-only laws, then Blanca and Consuelo=s views are given no shrift.

It is legitimate to ask whether we can resolve the clash of values by measuring the benefits and burdens at a society-wide level. I am nonetheless doubtful that a utilitarian analysis would be useful. Doing the Benthamite arithmetic would be a difficult undertaking. Presumably the benefits of accommodations are enjoyed mostly by immigrants and members of their families since nearly 20% of the population over age 5 speaks a language other than English in the home. Studies indicate that the first two generations in an immigrant family are bilingual to varying degrees while the grandchildren are monolingual English speakers. But as Cristina Rodríguez correctly

72See infra Part II.A.1.
73See supra note 20 and accompanying text.
observes, bilingualism does not mean equal fluency in two languages.74 One would expect enthusiastic demands for accommodations on part of the nearly 9% of the total population that identified itself as speaking English less than “very well.”75 Roughly speaking, up to a fifth of the population places some value on the privilege of not speaking in English in the workplace.

Desire for affirmative language rights, however, may not be uniform among this group. The 55.9% who speak English very well may feel less urgency for language rights than those who speak English not well (16.3%) or “not at all” (8.1%).76 For some, language becomes a matter of practicality as much as pride. Once we leave the confines of home or neighborhood, America is an English language shop. Anyone who lacks competence (if not fluency) in English cannot take full advantage of educational opportunities, enter the general workforce or manage most businesses. Participation in political and social dialogue may also be hampered.77 There appears to be agreement among families from non-Anglophone origins that speaking English is critical to success and therefore desirable. A survey by the Pew Hispanic Center, for example, indicated that 57% of Latinos felt that immigrants must speak English to become a part of American society while 92% thought that teaching English to the children of immigrants was very important.78

In contrast, millions of Americans sincerely feel that English is the only appropriate language for the workplace (and the public realm generally). A recent Rasmussen poll indicated that 84% of Americans favored the designation of English as the official national language while 81% said that a U.S. employer should be able to require that employees speak English.79 While such polling data should be taken with several grains of salt as they do not distinguish cultural motives from a desire for the efficiency of a single language, depth of feeling or plain xenophobia, these results appear to reflect a strong attachment to English by the population generally. It is plausible to conclude that far more persons are burdened culturally by a regime of language

74Cristina M. Rodríguez, Language Diversity in the Workplace, 100 Northwestern Univ. L. Rev. 1689, 1707-08 (2006) [hereinafter Rodríguez, Language Diversity].
75See Language Use in the United States, supra note 2.
76Id.
77But see Cristina M. Rodríguez, Language and Participation, 94 Cal. L. Rev. 687 (2006) (arguing that participation in democratic process is enhanced by policies promoting bilingualism).
accommodations in the workplace than benefit from them. It is certain that the preference of one part of the population for accommodations cannot be reconciled with the desire of another part for a monolingual workplace.

Part II: The Case Against Language Accommodations.

How then shall we weigh the interests of those who desire language accommodations and those who oppose them? Language controversies are not susceptible to clever solutions or easy compromises. Conceptually there is no middle ground between a bi- or multi-lingual workplace and an exclusively English language environment. Arguments in favor of either position, moreover, are intellectually respectable. Millions of persons will be disappointed no matter how the question is resolved.

I shall argue in this part that, though the equities may be difficult to sort out, the better course is to treat the prohibition against national origin discrimination as a guarantee that no one will be denied the economic benefits of the labor market because of the status of speaking a particular language as one’s mother tongue. Leaving decisions on language use within the workplace to the employer advances two important goals. First, the laissez-faire approach tends to assign cultural decisions to the individual or to private entities as well as bringing Title VII into alignment with the First Amendment value of individual control over expression of identity. Second, a culturally unregulated workplace confines Title VII to something that it can do well – achieving equality of economic opportunity.

A. Enhancement Of Individual Control Over Cultural Decisions.

1. The Case for Individual Autonomy.

A society operating on principles of traditional western liberalism values personal choices in cultural matters – as well as other decisions regarding identity and self-definition – because it assigns greater importance to individual prerogative than do more collectively oriented visions such as multiculturalism or communitarianism. Since in-depth treatment of liberalism would be impossible in this Article, let us facilitate the discussion by focusing on John Rawls, perhaps the most prominent and influential exponent of liberalism of our era.80 Rawls identifies the challenge to modern western societies as promoting toleration and setting the terms of fair social cooperation among

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80 See, e.g., Samuel Freeman, Justice and the Social Contract: Essays on Rawlsian Political Philosophy 3 (2007) (Rawls is recognized as the most significant and influential political philosopher of the Twentieth Century).
free and equal citizens.81 He makes the uncontroversial observation that modern western societies are inevitably pluralistic and characterized by irreconcilable belief systems.82 His solution generally is to operate a society according to a set of morally neutral principles.83

At the structural or constitutional level, Rawls aims to found basic institutions within the “overlapping consensus” of society’s competing belief systems.84 At the individual level, egalitarian interests are served by leaving significant life decisions to individuals, with assistance from the state when necessary. Such support will typically take the form of basic civil liberties, choice of occupation, adequate economic support, in short whatever is necessary to allow an individual to develop her inherent moral powers85 that in turn allow her to determine what is good.86 (The libertarian branch of liberalism would take personal autonomy even further, granting individuals near absolute control over cultural decisions while rejecting welfare liberalism’s willingness to redistribute economic resources.87)

How do language accommodations fit into this scheme? Since I have written elsewhere at length about the relationship of liberalism to language accommodation rules,88 I shall present a simplified version of the argument here. To a limited degree, the general anti-discrimination mandate of Title VII advances liberalism’s plan of maximizing personal autonomy while enabling each individual with an adequate schedule of civil rights and economic resources. Pursuing an occupation can be a critical ingredient in an individual’s chosen life plan. While offering no job guarantees and hardly amounting to a full schedule of civil rights, Title VII’s basic rule of non-discrimination makes it easier to follow a chosen career free from the unjust influence of occupationally irrelevant factors. By imposing a requirement of non-discriminatory, merit-based personnel criteria on employers, Title VII likewise clears the personnel

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81 John Rawls, Political Liberalism at 1-2 (expanded ed. 2005) [hereinafter Rawls, Political Liberalism].
82 Id.
84 Rawls, Political Liberalism, supra note 81, at 15.
85 Id. at 181.
86 Id. at 27.
87 See, e.g., John Stuart Mill, On Liberty, in The Basic Writings of John Stuart Mill at 11 (Modern Library ed. 2002) “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”); Friedrich Hayek, The Road to Serfdom (Milton Friedman ed. 1994) (arguing that an unregulated market was necessary to preserve political liberties).
88 See Leonard, Protection of Minority Languages, supra note 5 (discussing in detail the difficulties of fitting language rights into the framework of liberalism).
process of unjustified impediments to gaining the economic security that each individual requires to fashion a meaningful life.

Language accommodations, in contrast, do not advance liberalism’s core agenda in an obvious way. Few liberal theorists have addressed the issue of language rights directly. Rawls avoids the issue by assuming a closed society, i.e., one where citizens are “born into a society where they will lead a complete life”89 and by implication where there is no immigration or diversity of languages. Ronald Dworkin and Bruce Ackerman likewise fail to address this issue directly.90 Nonetheless it is difficult to perceive how language accommodations facilitate the pursuit of individual concepts of what is good on a society-wide basis. Regarding the need for economic security, accommodations add nothing to the prohibition of wage differentials based on national origin discrimination. That is, an employee receives the same compensation and benefits regardless of language spoken at work. Nor, for those whose identity is based on occupational achievements, are they likely to increase the prestige or importance of a line of work.

Cultural practices such as use of language are vitally important to most persons.91 But in the case of language use, the inevitable clash of cultural demands seems to render the accommodation of individual preferences difficult if not impossible. Individuals whose concept of self involves speaking a language other than English – and associating with others like them – obviously benefit from the EEOC Guidelines while persons favoring a monolingual society lose their advantage. A decision to create a civil right favoring one culturally defined group of workers does not comport with the ground rules of a liberal society. In the liberal state, interventions into the workplace and elsewhere are designed to facilitate individual choices and should be culture-neutral. Language accommodations thus cross the line between assistance and state prescribed norms. When the EEOC Guidelines exempt certain times and places in the work day from an employer’s discretionary power to manage language use, they no longer facilitate individual choices, or at best do so selectively. Instead, they establish a cultural norm on language use to which all must now conform. Otherwise stated, they choose among the irreconcilable belief systems that liberalism takes as a background social condition92 and attempts to manage with the even hand of individual choice and private association. They do not lie within an “overlapping consensus.”

89Rawls, Political Liberalism, supra note 81, at 12.
90 See generally Leonard, Protection of Minority Languages, supra note 5, at 772-76 (discussing failure of Dworkin and Ackerman to address language issue).
91 See supra Part I.A.2.
92 Rawls, Political Liberalism, supra note 81, at 14.
Personal autonomy was the rule of the day before the enactment of Title VII and the promulgation of the *EEOC Guidelines*. An employer’s right to control the language used by her employees was straightforward and based on two common law principles. First, the owner of property may control the language used on her property. As the hornbooks tell us, ownership of property entails the power to exclude others as well as the right to condition use of the property by others.93 Hence property owners—including employers—are within their common law rights to deny entrance to, or to expel, anyone who refuses to speak a particular language on her property.94 Contract law provided the other source of an employer’s power to control language. Generally speaking, principles of freedom of contract leave the formation of agreements to the individuals involved.95 Hence employers are free to bargain for control over working conditions such as language use. Deeming employment “at will” eliminates any doubt of such power. Title VII of course displaced contrary common law property and contractual rules, though without retroactive effect.96

Common law rules had the virtuous tendency of creating safe havens within which cultural decisions were left to individuals or voluntary associations. Under the traditional regime, an immigrant family could choose to replicate the culture of its country of origin within the family home or voluntary associations such as churches, clubs, and the neighborhood. Or they could opt for an assimilationist path. In either event, the fit between individual preferences and the cultural results were good. The freedoms created by common law property and contract rules had the parallel benefit of limiting the effect of individual cultural decisions. A person made cultural decisions within her own realm. Language rights in the workplace, in contrast, are effectuated by the imposition of duties of tolerance that interfere with managerial discretion and burden third parties.

Maximizing individual prerogatives in cultural matters such as language is a

93 See, e.g., Herbert Hovenkamp & Sheldon F. Kurtz, The Law of Property: An Introductory Survey at § 4.1 (2001) (“The possession of real property consists of dominion and control over the property with the intent to exclude others.”)

94 Property rights are not absolute. Common law principles recognize a narrow range of privileges for non-permissive entry onto private property. Examples of privileged entry include former tenants who wish to retrieve property or process servers. See generally William B. Stoebuck & Dale A. Whitman, The Law of Property § 7.1 (3d. ed. 2000). Some courts have also granted government sponsored or charitable organizations a limited privilege of entry to provide assistive services. See, e.g., State v. Shack, 277 A.2d 369 (N.J. 1971) (government funded assistance programs may enter private farm to communicate with resident migrant workers). See also infra Part II.A.2 (discussing constitutional free speech limitations on control of private property). No common law principle, to my knowledge, restricts a property owner’s control of cultural expression on her land.

95 See, e.g., E. Allan Farnsworth, Contracts § 5.1 (4th ed. 2004).

superior alternative to the zero-sum game of language accommodations in a society experiencing high levels of immigration and cultural ferment. Once an employer’s decision about language use in the workplace cannot be justified under the Title VII’s business necessity test, we enter the realm of cultural phenomena which lack objective or generally agreed standards for evaluation. As previously stressed, culture is simply what a group of people characteristically does.97 There is no inherent reason to favor the minority language preferences of some workers rather than the cultural desire of others for an monolingual Anglophone society. Consequently there is no compelling reason to have disturbed the common law rules that allocate cultural decisions according to ownership of property or contractual rights.

A predictable objection to the re-privatization of language decisions is that an unregulated workplace creates cultural opportunities that depend upon an employee’s economic power. Immigrants as a group lack the high-demand skills that permit them to shop around for a culturally sympathetic workplace. Hence the differential cultural treatment under the Guidelines is no worse and perhaps better than what would exist under a laissez-faire system that entrenches a preexisting inequality in an important aspect of self definition. A second objection is that requiring immigrants to bear the entire burden of assimilation is unfair in light of the benefit their presence confers on society. Language accommodations, so argument goes, are show compassion and fairly spread the burden of adjustment. I address these concerns below.98

2. Individual Autonomy as the Constitutional Norm.

Conceptualizing the EEOC Guidelines as a cultural directive permits us to appreciate the normative gulf between the regulations and many constitutional decisions that touch on cultural dynamics. In the main, the Court’s pronouncements regarding culture or its component acts reject state intrusions into the realm of individual choice. The framers of the First Amendment of course didn’t mention the term A cultural identity but culture is necessarily linked to speech, expression of ideas and voluntary association which the First Amendment protects vigorously in most instances. Although the Court’s decisions are not a tidy lot, they usually treat culture as a privately determined matter. Particularly illuminating are the Court=s decisions on forced association, compelled speech, and the opening of private property to public speech.

a. Associational Rights.

97 See supra Part II.A.
98 See infra Part II.A.4 (discussing employee influence over work rules) and Part III.B (discussing fairness as justification for language accommodations).
Protection of individual cultural interests is implicit in the decisions protecting associational rights. The stakes are high, since the American landscape is dotted with culturally defined entities ranging from La Raza to Garrison Keillor’s fictitious Sons of Knute. The Court tends to protect the membership prerogatives of such groups from government regulation so long as they are small, intimate associations or exist for the purpose of promoting ideas: the “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends” is implicit in the right to engage in activities protected by the First Amendment.99 The Court is particularly hostile to regulations that compel voluntary associations to receive unwanted members. Hence Veterans= Day parade organizers100 and the Boy Scouts101 have been permitted to exclude gays from participation and membership, respectively, since the latter’s forced inclusion might affect these groups= ability to convey their cultural messages. In essence, the Court takes a laissez-faire approach to the composition of such groups. Voluntary associations are the masters of their creeds and membership rosters.

How should the Court’s principles regarding expressive organizations inform our view of a seemingly different context? At first glance, workplaces are distinct from expressive organizations. Employees are hired to advance an employer’s interests and, under present law, can be required to speak English when business necessity so demands. Still, there are certain similarities between the workplace and voluntary associations that invite a comparison. Remember that rules creating minority language rights come into play in the non-operational times and places of the workday. Interactions during these moments have an attenuated relationship to an employer’s business or commercial interests.102 In simpler terms, this is down time when workers and sometimes management interact, when the conversation often turns from shop talk to more general concerns like music, religion, or current events. Once the number of employees reaches a certain level, we can expect smaller groups to form based on common interests or a common traits such as religious affiliation or ethnicity.

Culturally based interaction is an inevitable part of the breakroom dynamic. Yet I am not suggesting that such expressive activities require protection by the EEOC.103 To do so would create an “equality interest” that is, as this Part argues, usually impossible to obtain because of the zero-sum nature of cultural accommodations. My point, rather, is

102 See supra notes 56 and accompanying text.
103 See infra Part III.A (rejecting expressive interest in language as a basis for minority language rights).
that the voluntary associations cases tend to leave cultural decisions in the hands of those who control an organization or have influence over it. Mandatory minority language rights are a departure from the Court’s laissez-faire attitude toward private expressive entities and the recognition that cultural expression implicitly requires a right to exclude.104

b. **Compelled Speech.**

Cultural beliefs likewise require protection from forced expression of unwanted ideas. The Court has shown a distinct hostility toward directly compelled expression. In *Barnette*, the Court rejected attempts to make school children, Jehovah’s Witnesses, violate their creed by reciting the Pledge of Allegiance. In a frequently quoted phrase, the Court stated: *If there is any fixed start in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.* 105 In a case of non-religious speech, *Wooley v. Maynard* struck down the power of the state to force automobile owners to display a license tag with a state motto that violated individual morality.106

Sometimes compelled speech takes on a more subtle form than a command to speak. Academic regulations present a particularly difficult issue of compelled speech: how to balance an institution’s need to define its mission and activities with the fact that students may be forced to associate themselves with unwanted ideas. Here the potential for compelled speech arises both from the risk that silent association with a message implies endorsement and the notion that forced funding is the rough equivalent to forced words. Mandatory fees, for example, may be spent on activities whose message involuntary contributors reject. Zionist students are likely to object to the use of their fees to fund a Palestinian Authority speaker. While such “compelled speech” lacks the personal association seen in *Barnette* or *Wooley*, a person who must pay fees to support

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104 *Cf. Christian Legal Society v. Martinez* 561 U.S. ___ (2010) (permitting state law school to condition official recognition of student organizations on adoption of an all-comers membership policy). *Martinez* permitted the UC-Hastings Law School to condition official recognition of the local CLS chapter on an open membership policy that would have violated the national organization’s ban on persons who engage in “unrepentant homosexual conduct.” *Id.* at ___. *Martinez* is distinct from decisions such as *Dale* that involve compulsory inclusion of unwanted members within expressive organizations. *See id.* at ___. The issue in *Martinez*, rather, was the proper balance between the School’s proper interest in promoting the exchange of ideas and the student organization’s expressive rights in a limited public forum within an academic context. Hence *Martinez* is better grouped with the limited public forum cases. *See infra* Part II.A.2.b.


an organization’s speakers programs may feel little comfort in being an enabler rather than a mouthpiece.

Employing limited public forum analysis, the Court has permitted state universities to use mandatory fees for expressive purposes with the key proviso that expressive activities must governed by viewpoint neutral rules. In Regents v. Southworth, for example, a state university’s use of mandatory activity fees for student advocacy and debate programs was permissible so long as funds were allocated under viewpoint neutral criteria.107 The Southworth decision smacks of compromise, but the end result is a system under which academic entities may fulfill their mission of encouraging debate of controversial issues while minimizing (though not eliminating) the risk that individuals will be personally identified with objectionable ideas. In the labor context, by comparison, the Court has been even more protective of dissenters, holding that nonunion employees are not required to pay the portion of representation fees devoted to political speech that is not germane to representation in bargaining.108

Martinez takes the analysis beyond the realm of mandatory fees by deeming a state law school’s “accept all comers” membership requirement for recognized student organizations to be a reasonable, viewpoint neutral approach to furthering various institutional goals including a desire to create leadership, educational, and social opportunities for all students, to ensure that no student’s mandatory fees support an organization that would exclude her, and to promote tolerance among students of different backgrounds.109 While the policy’s potential effects on group integrity were undeniable, the Court sought to diminish the effect by noting that the CLS chapter had “substantial alternative channels”110 for communication.

Duties of cultural tolerance such as the EEOC Guidelines are not the precise equivalent of forced expression seen in Barnette or Wooley. Workers are not required to sign pledge cards stating “I support everyone’s right to speak in his native language whenever possible.” The danger is the more subtle prospect of endorsement inferred from silence and proximity to a program of bilingualism. The Guidelines deprive an

109 Martinez, 561 U.S. at ___. The Law School’s desire to protect students from contributing fee money to organizations that would deny them membership is a paradigmatic zero-sum game. Protecting this group of students can only be achieved by diminishing the associational and expressive rights of the excluding student organizations.
110 Id. at ___. See also Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) (assessments for generic product advertising leave are economic regulation leaving grower free to communicate its own message).
employer of her prerogative to set the cultural agenda of a workplace. To avoid liability, an employers must now redeploy her resources to accommodate cultural practices to which she may object. Cautious employers will seek to avoid hostile environment liability by refraining from any counter-speech and by establishing strict work rules protecting choice of language. This possibility of liability is more than theoretical. In Maldonado, the Tenth Circuit stated adoption of an English-only policy may be evidence of intent to create hostile work environment.111 Speaking in favor of such rules should a fortiori be stronger evidence of intent. Language rights may also have the derivative effect of cancelling the influence workers who oppose language accommodations but see no point, and perhaps now a disadvantage, in militating for a contrary rule.

Employers and workers favoring a single language workplace occupy positions similar to the that of the frustrated students in Southworth, Rosenburger or Martinez. Compliance with the Guidelines requires that employers devote their resources to implementing a cultural viewpoint which they may not support (compare mandatory fees) and entails the risk that compliance may be perceived as support. Addressing the analogous issue commandeering, the Court has stated that actions taken by state governments under federal directives are likely to be perceived as independent choices of the state.112 I concede that compliance with any law entails some risk that others may perceive endorsement of the results. The risk of false perception is heightened in the case of mandatory language accommodations, in part because of the possibility of hostile environment claims discourages counter-expression, and in part because one doesn’t expect state regulation of cultural matters.

Private employers, however, are not state actors. A private workplace has no need of a limited public forum doctrine that provides a compromise between a state actor’s obligation to respect the free expression of ideas and its equally important need to operate its institutions on reasonable and effective terms. A decision by a private employer in an unregulated environment to impose language restrictions can be properly perceived as the employer’s own decision. The employer is free to explain her motivations. Workers and the general public may credit the explanation or not. In any event, the speech will be rightly attributed to the employer and anyone else who is inclined to speak to the matter.

c. Control of Property and Contractual Relationships.

111 Maldonado v. City of Altus, 433 F.3d 1294, 1308 (10th Cir. 2006)
Finally, the Court’s decisions suggest an understanding that control over one’s own property and the freedom to structure contractual relationships are necessary components of expression and therefore of maintaining one’s cultural identity. Initially these pronouncements arose in the “substantive due process” era of the late Nineteenth and early Twentieth Centuries when the Court construed liberty interests to protect freedom of contract from economic regulations. One decision dealt squarely with state attempts to control language use in a private setting. In *Meyer v. Nebraska*, the Court struck down a state statute severely restricting instruction in modern foreign languages in foreign school. (The statute reflected anti-German sentiment after World War I).

Although Justice McReynolds’ opinion in *Meyer* was based on the now out-of-favor notion that teachers and parents had a liberty interest in forming a contract to teach the students, the decision illustrates the importance of retaining sufficient control of property and contract to make meaningful the notion that cultural affiliations are within the province of the individual.

More recent decisions have recast the link between property, contract and expression as a First Amendment issue, taking a skeptical view of attempts to open private property or processes in favor of third party speech. For example in *Miami Herald Publishing Company*, the Court struck down a state statute requiring newspapers to offer rebuttal space to political candidates who had been criticized in print. Likewise in *Pacific Gas* the Court nixed a state utility commission regulation requiring that a private utility distribute public interest materials in its billings. In each instance


116 See *Meyer* at 399. Justice Kennedy has stated that *Meyer* would now likely be decided on First Amendment grounds of freedom of speech or religion. See *Troxel v. Granville*, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting).


118 Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. 1 (1986). The Court’s record in this line of decisions is not entirely consistent. In *PruneYard*, the Court sustained a state constitutional provision granting speech rights in privately owned shopping centers. *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980). One can distinguish *Pruneyard* from *Miami Herald* since the latter decision involved the direct exercise of the property owners’ free press rights. The departure from the purely commercial activity of billing in *Pacific Gas* is more difficult to justify. The *PruneYard* court emphasized that the situation there was different from *Wooley* since a mall is a public place while a license tag logo is affixed to a personal place (an automobile) and conveys a
the regulated party stood to lose its liberty interest in choosing not to facilitate third party expression or to dictate the terms. Although rationale has evolved over the years and the Court will sometimes override property and contractual rights to promote competing in interests, the within constitutional jurisprudence among property rights, freedom of contract and expressive interests persists.

d. A Summing Up.

Just to be clear, I am not making a doctrinal argument that the EEOC Guidelines are constitutionally void. Perhaps they are, but such a conclusion would require a series of complex analyses regarding state action, the reach of the Commerce Clause and Section 5 powers which would be unlikely to produce consensus and which I therefore leave to others. My point here is that the underlying constitutional norms of free expression should inform our choices when fashioning language policy at the legislative and regulatory levels. The constitutional decisions just discussed represent a cumulative judgment by the Court that cultural decisions are better left to individuals or voluntary associations exercising their property and contractual rights. To interpret Title VII to impose duties of cultural tolerance, as the EEOC has done in its Guidelines, rejects the Court’s wisdom about the costs of depriving individuals of the power to fashion cultural identities. One can of course argue that individual autonomy interests should yield to other concerns. I discuss such arguments in Part III.

3. Employer Autonomy as the Statutory Norm.

Lower federal courts have reacted skeptically toward attempts to lace Title VII with cultural accommodations and duties of tolerance. The key factor is the notion that cultural behaviors are distinct from immutable characteristics. Accordingly, Title VII creates fairness in the employment relationship by protecting individuals from discrimination based on statuses such as race or gender that cannot be altered but not specific message that cannot be disavowed. Mall owners are also less likely to be associated with a message and have opportunities for counter-speech. Perhaps then the principal issue raised by PruneYard for language accommodations is whether the private places and moments in the workplace are public. See infra Part III.B.2 (discussing argument that workplaces should be regarded as public places).


from behaviors which are subject to individual choice.121 Perhaps the best known
decision in this line is Rogers v. American Airlines, Inc.,122 in which a district court
rejected plaintiff=s argument that cornrows were an ethnic trait protected by Title VII.
The courts have likewise been reluctant to restrict an employer=s authority to set separate
dress and grooming standards for men and women.123 Title VII, in short, is not
generally viewed as a reaching the sort of optional behaviors that constitute culture.124

Title VII does require that employers accommodate the religious practices of
employees.125 It is better to view this requirement, though, as sui generis rather than an
exception to the philosophy of confining the Act=s protections to immutable
characteristics. Many—perhaps most—religious practitioners would say that their
beliefs are based upon inalterable divine revelations that are different in kind from
ephemeral matters such as dress or hairstyle. At any rate, in Hardison the Supreme Court
defanged the accommodation requirement by holding that employers need incur no more
than “de minimis” costs.126 The Court expressed concern that accommodating a
Sabbatarian’s need for scheduling change in spite of a seniority system would in effect
penalize other workers for their lack of particular religious beliefs. The Court was
obviously avoiding an Establishment Clause problem by construing Title VII
narrowly.127 For present purposes, Hardison represents an instance where the Court
deprecated to inject a zero-sum game into Title VII. Religious accommodations, like
language rules, inevitably create winners and losers in the workplace.

Turning to the specific issue of language, the Courts of Appeal have relied upon
the traditional civil rights model=s focus on immutable traits to limit Title VII’s

121 See Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980) (Ruben, J.) (Title VII does not protect choices regarding
ethnic and sociological traits).

122 527 F. Supp. 229 (S.D. N.Y. 1981) (rejecting Title VII claim involving grooming code on grounds that corn-
rows are not an immutable, racially identifiable characteristic).

123 See, e.g., Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (en banc) (different
hair rules for men acceptable since length is a mutable characteristic); Jespersen v. Harrah’s Operating Company,
Inc., 444 F.3d 1104 (9th Cir. 2006) (upholding separate grooming standards for men and women that did not
significantly burden one sex or impose gender stereotypes).

124 The Academy, in contrast, has been critical of grooming standards. See, e.g., Michael Selmi, The Many Faces
of Darlene Jesperson, 14 Duke J. Gender L. & Policy 13 (2007); Dianne Avery & Marion Crain, Branded:
Corporate Image, Sexual Stereotyping and the New Face of Capitalism, 14 Duke J. Gender L. & Policy 13 (2007);
Kimberly A. Yuracko, Trait Discrimination as Race Discrimination: An Argument about Assimilation, 74 Geo.
concerns over essentializing racial characteristics).


127 Id. at 89 (Marshall, J., dissenting) (noting that Court’s narrow reading of statute avoids constitutional issues).
protection of language preferences. In the seminal decisions of Garcia v. Gloor and Spun Steak, the Fifth and Ninth Circuits respectively concluded that bilinguals’ ability to choose between languages took them outside of Title VII’s ambit. Each case concedes the critical role of language to cultural affiliation but nonetheless denies relief to the bilingual plaintiffs who complained about English-only policies. In Garcia, Judge Ruben concluded that Title VII’s prohibition against national origin discrimination does not reach mutable “ethnic and sociocultural traits” such as language. Judge O’Scannlain took a similar tack in Spun Steak when he observed that requiring a bilingual to speak English did not entail the materially adverse effects necessary to sustain a disparate impact claim since a bilinguals are capable of speaking either language.

Indeed, most federal courts have turned away accommodation claims based on the logic of Spun Steak. While the assumption that one can switch languages as easily as Mickey Mantle could switch-hit is questionable, the conclusion that a bilingual worker can comply in most instances with a workplace language rule is sound. The vast majority of employees know sufficient English to function in the workplace. Setting aside the infrequent cases of workers who speak no English at all, the question becomes: why should language be treated any different than hairstyles? Once one accepts the proposition that Title VII protects only immutable traits, there is little reason to do so. The Guidelines’ insistence on affirmative protection of selected cultural behaviors creates a gap between the regulatory requirements and the willingness of the

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128Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980); Garcia v. Spun Steak, 998 F.2d 1480, 1487 (9th Cir. 1993).
129Garcia, 618 F.2d at 270 (Ruben, J.) (noting the “importance of a person’s language of preference or other aspects of his national, ethnic, or racial self-identification”); Spun Steak, 998 F.2d at 1487 (O’Scannlain, J.) (“[I]t cannot be gainsaid that an individual’s primary language can be an important link to his ethnic culture and identity”). Cf. Hernandez v. New York, 500 U.S. 352 (1991) (plurality) (Kennedy, J.) (“Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond.”).
130Garcia at 270.
131Spun Steak at 1486.
133See Leonard, Bilingualism, supra note 6, at 121-23 (questioning degree to which bilinguals can freely switch languages).
134See generally id. at 114-17 (discussing unresolved issues of Title VII’s application to monolingual, non-English speaking workers).
federal courts to effect those rules in litigation. The fact that the EEOC has used its investigative and other powers to enforce the Guidelines heightens the disjunction between the judicially perceived statutory norm and the administrative reality.

4. A Practical Concern Regarding the Imbalance of Wealth.

One might object that reliance on property and contract rules creates “rights” that are dependent on wealth and bargaining power, i.e., they are hardly rights at all. There is merit to this position as a factual matter. Using the common law as the ground rules of language policy favors for now Anglophones simply because the native born as a group are more likely to have greater wealth than immigrants. There are, however, two problems with this reasoning. First, the objection begs the question of minority language rights. Failing to achieve the power to insist on a preferred language in an employment contract is problematic only if an employee has a supervening right to demand such a provision. In my view, the external costs of cultural accommodations make such rules inappropriate. Decoupling cultural opportunities from wealth, moreover, requires a radical alteration of the view that control of property is essential to individual liberty.

Second, a workplace spared of the EEOC Guidelines would not leave a determined language minority without some influence over working conditions. Most employers are sensitive, to some degree, to their workers’ desires. In a unorganized shop, employees are free to press for either a monolingual environment or language privileges. In a union shop, worker preferences are filtered through a syndicate. In either event, the competing views of employees on language rights or conditions becomes part of the labor dynamic.

It is also a mistake to assume that employers are uniformly and naturally hostile to languages other than English on the job. There are many reasons why an employer would want to require that her workers speak English that pass any test of rationality: effective supervision, transparency in communication, safety during emergencies and so


forth. In *Spun Steak*, for example, the employer adopted an English-only policy because of fears that the Hispanic employees were using Spanish to disparage the Chinese workers. Employers who think in such terms should have no problem with entertaining requests from workers or union representatives for language privileges. I also have doubts about the extent to which employers act arbitrarily in matters of language. It is significant that the vast majority of Title VII claims are litigated on a disparate impact theory where intent is irrelevant. Granted, disparate impact may be the only realistic strategy when facing well counseled employers who conceal their motives. Still, the virtual absence of disparate treatment claims at a time when immigration is a hot topic is telling. We also to my knowledge lack comprehensive statistics about the extent of language controls in the American workplace.

5. A Summing Up.

In the end, returning authority to set language policy to the private employer is the better way to promote cultural self-definition while respecting property rights and freedom of contract. The *EEOC Guidelines*’ requirement that minority languages be tolerated whenever and wherever business necessity cannot be found makes an arbitrary choice between competing cultural views about the role of language in the workplace and, for that matter, society in general. The *Guidelines* are, moreover, difficult to square with the laissez-faire view of culture found in the Supreme Court’s First Amendment decisions and the lower federal courts’ skeptical views about using Title VII to reach volitional practices. Leaving language decisions to the private employer will undoubtedly lead some employers to deny immigrant workers the much desired privilege of speaking in their native tongues. It is difficult, though, to predict how often this would happen in an unregulated environment. Even though the conceptual gap between the desire for a monolingual English and multilingual environments is vast, good employers will be attentive to workplace dynamics and attempt to bridge the differences though negotiation and compromise when possible. The *Guidelines* insure that this bridge will never be built.

B. Confinement of Title VII to Protection of Economic Interests.

Expanding employment opportunities for minority workers, particularly African-Americans and women, was the principal concern of the Civil Rights Act’s framers in

137 *See generally* Leonard, Bilingualism, *supra* note 6, at 130-35.
138 *Spun Steak*, 998 F.2d at 1483.
1964. Title VII’s antidiscrimination provisions were inspired by the dismal economic status of black citizens in American society. Proponents of the Act repeatedly emphasized during the legislative process and floor debates the economic disparities that discrimination had imposed on African-Americans. Senator Clark, for example, stated that “economics is at the heart of racial bias. The Negro has been condemned to poverty because of lack of equal job opportunities. This poverty has kept the Negro out of the mainstream of American life.” Senator Humphrey sounded a similar note: “At the present time Negroes and members of other minority groups do not have an equal chance to be hired, to be promoted, and to be given the most desirable assignments. The Court has taken a similar view, opining in Weber that Congress’s primary concern in enacting Title VII was to improve employment opportunities for black citizens.

Title VII was intended at the outset by Congress, and subsequently elaborated by the courts, to identify and remedy the economic effects of discrimination. Nearly all Title VII claims require that a plaintiff offer evidence of a economic injury. Proof of discriminatory intent alone is not sufficient to sustain a disparate treatment claim. Whether the plaintiff proceeds by direct evidence of discriminatory intent or via an inference of discrimination under the McDonald-Douglas prima facie case, there must be proof that she has been materially affected. Establishing material effects, in turn, amounts to an allegation that the actual or potential terms of employment have been altered by economically significant events such as a failure to hire, the denial of a promotion, or termination.

In systemic disparate treatment or disparate treatment claims, the plaintiff’s analysis begins with the observation that, even taking into account representation in the appropriated labor market, too few members of a particular group have been hired or promoted. Remedies in the run of the cases consequently focus on monetary relief: back pay, front pay and reinstatement make up for wrongfully denied pay checks. Hostile work environment claims are a partial exception to which I shall

140 United Steelworkers of American v. Weber, 443 U.S. 193, 202 (1979) (Congress’s primary concern in enacting Title VII was to improve employment opportunities for black citizens).

141 See, e.g., 110 Cong. Rec. 7204 (1964).

142 Id. at 6547.


144 See, e.g., Minor v. Centocor, Inc., 457 F.3d 632 (7th Cir. 2006) (extra work to earn equivalent salary is materially adverse); Williams v. Bristol-Myers Squibb Co., 85 F.3d 270 (7th Cir. 1996) (lateral transfer without reduction in pay not materially adverse). The requirement of an economically significant effect has been criticized as misconstruing Congress’s concern with all job-related actions. See Rebecca Hanner White, De Minimis Discrimination, 47 Emory L.J. 1121, 1151 (1998).


146 See, e.g. 42 U.S.C. § 2000e-5(g) (equitable remedies available under Title VII); id. § 1981(a)(1) authorizing compensatory and punitive damages for unlawful intentional discrimination.
return presently.

Suits to enforce language rights lack the underlying economic character of other Title VII claims. *Spun Steak* provides a good example of the different dynamic. Bilingual employees and their union sued under a disparate impact theory to prevent enforcement of an employer’s English-only policy. The defendant’s response to a violation of the policy was limited to sending warning letters to two non-complying employees and prohibiting them from working together for two months.147 None of the plaintiffs alleged a significant economic injury such as discharge or a pay cut. *Spun Steak* thus represented a situation where the plaintiffs were excluded from none of the financial benefits of the labor market, i.e., a paycheck and perhaps a retirement plan and health insurance for the family. In effect, workplace language policies are not terms of exclusion; rather, they set conditions of inclusion that in turn yield economic benefits available to all without regard to immutable characteristics such as national origin. Some scholars view the workplace as a social as well as an economic institution; I address their arguments below.148

Granting a remedy against the enforcement of English-only rules, has distinct and undesirable effects that are absent when litigation focuses on economic impacts. When a court remedies discrimination based on consideration of, say, race rather than ability, it effectively imposes on a workplace a requirement that employers make personnel decisions based on neutral occupational principles. Employees and applicants will then compete for job offers, retention and promotions according to economically rational and uniform criteria that transcend cultural groupings. Remedies for monetary harms, in short, effectively promote an equality interest in occupational opportunity.

The same cannot be said for an order nullifying a work rule pertaining to language use. Such relief introduces a rigid inequality into the workplace by favoring one group of workers over another. Granted, the overturned English-only work rule may have had the same effect. A judicial order, however, does nothing to promote equality. Instead, it has the effect of promoting one group of workers from disfavored to favored status at the expense of a previously privileged group. Furthermore, if my reasoning in Part II.A.4 is correct, the *EEOC Guidelines* interfere with the normal labor-management dynamic by which management deals with differences among its workers. There is no reason to presume that employers as a group would not consider the various cultural views of its workforce and attempt conciliation or compromise. The *Guidelines* short circuit this process by declaring a winner off the mark.

147 *Spun steak*, 998 F.2d at 1483.
148 See infra notes 198-202,
Hostile environment claims are the primary exception to Title VII’s focus on economic harms. In Meritor Savings Bank v. Vinson, which endorsed such claims, then-Justice Rehnquist rejected the proposition that Title VII claims are limited to “economic or tangible discrimination”; rather, the Act was intended “to strike at the entire spectrum of disparate treatment of men and women.” The essence of a hostile environment claim is harassment so severe and pervasive that the conditions of employment have been altered. Strictly speaking, harassment claims need not involve the “tangible,” i.e., economic aspects of work; the plaintiff often suffers demeaning treatment while remaining on the job and drawing a paycheck. The key Title VII remedies in such claims are compensatory damages for the non-pecuniary losses of pain and suffering and mental anguish, subject to statutory caps, and punitive damages.

What’s the difference between the dignitary interests in avoiding harassment and the non-economic injury of being denied the use of a preferred language? Ultimately hostile environment claims are about achieving equality of economic opportunity. Sexual harassment alters the terms and conditions of employment by raising an impediment to free and fair competition for the economic benefits of the workplace. An employee subject to such demeaning treatment can hardly compete on her own merits for a higher salary, a promotion, or a desirable transfer. Vigorous enforcement of rules against harassment will remove that impediment and, in the end, create a workplace in which employees compete for advantage on an equal footing. Protecting language preferences has the opposite effect. When the smoke clears, the workforce is divided into two camps: those whose cultural preferences are favor and those whose are not.

III. Competing Normative Views of Workplace Language Rights.

Most academic commentary favors some form of legally enforceable protections

149 477 U.S. 57, 64 (1986).
150 Id. (citations omitted).
151 Id. at 67.
153 See Rebecca Hanner White, There’s Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment, 7 William & Mary Bill Rts. J. 725, 739 (1999) (Congress added compensatory and punitive damages to Title VII in the Civil Rights Act of 1991 to address fact that typical hostile environment claimants has no out-of-pocket losses addressable by then existing equitable remedies).
154 See 42 U.S.C. § 1981a(1) and (b)(1,3).
for minority languages in the workplace. Since language tends to be so important to the individual, it is fair to ask whether ideas at odds with my own either can either resolve the “zero sum game” problem of cultural rights or provide a superior normative framework. Thus in this Part of the Article, I propose to discuss three potential normative justifications for the accommodations: 1) the employee=s expressive interests; 2) fairness and the concept of cultural burden sharing; and, 3) associational interests. My conclusion is that none of these concepts overcome the arbitrary assignment of cultural rights that are inherent in language protection schemes.

A. Expressive Interests in Language.

Identity, Professor Appiah reminds us, is the kind of person we truly are. Formation of identity, however, does not occur in a vacuum; it is greatly influenced by immutable traits such as race, gender or sexual orientation and also by voluntary decisions to conform to the behavioral norms of a particular group. Part one of the equation has little to do with expression and has been addressed as a legal matter by the existing civil rights laws as a strong presumption that immutable traits are irrelevant to personnel decisions. Disadvantaging workers because they are, say, Latinos or Asians is regarded as fundamentally unfair since they cannot switch to another race or ethnicity. The analysis changes once we shift the focus to identity-influenced behaviors. Affiliation with a particular group may become the most important part of a person=s identity. It is understandable that a person who views herself as, say, Guatemalan or gay or Vietnamese or Roman Catholic would want the freedom to express the essence of her identity in the workplace or other public fora. Such expressions might take the form of dress, hair styles, or, more to the point of this Article, use of a native language. The courts, however, have been generally unmoved by attempts to stretch Title VII to cover traits or behaviors that are associated with immutable characteristics since individuals have to the power to comply with work rules.

155 See, e.g., Rodríguez, Language Diversity, supra note 74, at 1712 (cultural burden sharing requires Anglophones to tolerate other languages); Juan F. Perea, English-Only Rules and the Right to Speak One's Primary Language in the Workplace, 23 U. Mich. J.L. Reform 265 (1990) (arguing that use of primary language should constitute a protected aspect of national origin under Title VII); Kymlicka, Multicultural Citizenship, supra note 41, at 96-97 (arguing for language accommodations).

156 See Appiah, Ethics of Identity, supra note 21, at 65 (discussing collective dimension of individual identity).

157 See id. at 20-23, 65-71 (identity is articulated through concepts provided by religion, society, school, and state as mediated by family and friends). Cf. Taylor, Politics of Recognition, supra note 49, at 32 (the authentic self is shaped in dialogue with others).

158 Leonard, Bilingualism, supra note 6, at 71-82.

159 See supra notes 121-124 and accompanying text.
Arguments for expanding the anti-discrimination canon to include expressive interests are essentially a rejection of assimilation to prevailing social norms. Recently Kenji Yoshino has argued for heightened protections for expressions of identity in the workplace and elsewhere. His analysis is explicitly based on his experience as both as a gay man and a Japanese-American attempting to navigate the mainstream of American social expectations. Yoshino observes that civil rights law has progressed through three stages or paradigms. The first is a conversion model where the offending trait is suppressed;160 next comes a passing, where gays, ethnic minorities and others are to conceal or tone down their identities in the spirit of A don’t ask, don’t tell. The last stage is A covering, i.e., a diluted demand for assimilation that requires that one tone down the salient aspects of identity.162 Gay men, for example, should A act straight by discussing the Super Bowl, the Major League Baseball’s doping scandals or the implications for star athletes of deferred compensations schemes under ERISA, all while attending the Talladega.500

Yoshino wants a post-covering paradigm in which assimilative pressures are strongly discouraged. He is willing to tolerate employer conformity requirements that are supported by a A good reason rather than mere bias.163 He gives the rather easy example of a requirement that Muslim women lower their hijab for a driver’s license photo but leaves the reader to work out the line between need and bias. Yoshino’s justification for banishing covering is that assimilative pressures interfere with the development of the true or authentic self, i.e., the sort of person that each knows himself to be. He views authentic identity as self-elaborated and bases his new paradigm based on the A universal right of persons to elaborate their own identity.165

Yoshino’s new agenda reflects a desire to protect individual, liberty-based interests. As to English-only requirements in the workplace, Yoshino acknowledges that the liberty interest in speaking a language other than English may clash with legitimate employer interests in customer relations and workplace harmony. Here he contemplates balancing the interests in individual cases.166 He is critical, however, of the courts’ practice of ending the inquiry once a trait is deemed mutable. He also appears to regard

161 Id. at 50-73.
162 Id. at 74-107.
163 Id. at 178.
164 Id. at 184.
165 Id. at 189.
166 Id. at 138.
English-only policies as a foolish waste of talent in an increasingly multi-lingual population.\textsuperscript{167}

Though he hardly falls within the ranks of traditional liberalism, Yoshino=s concern for protecting individual self-development bears some relation to liberalism=s concern that society facilitate individual self-development. So what=s the problem with Yoshino=s sincere concern for expressions of individual identity? My colleague Paul Horwitz has properly criticized Yoshino for underestimating the social nature of the formation of identity and self as well as the class elements self-formation.\textsuperscript{168} But those criticisms relate to the viability of Yoshino=s measure of individual identity.

My critique is different. Yoshino fails to justify, much less acknowledge, the costs placed on others by the various rights of expression implicit in a post-covering regime. Schemes that protect the identity (and therefore cultural) interests of a subset of workers, including regulations that forbid English-only rules in the workplace, are inherently arbitrary. They favor the preferences of those who wish to speak a language other than English. Simultaneously they frustrate the desires of the workers whose identities can only be fulfilled in an English-only shop as well as employers’ preferences to control the cultural atmosphere of a worksite via traditional contract and property rights. In short, Yoshino’s program of expressive rights would distribute rights of cultural expression unevenly among our hypothetical characters: Blanca and Consuelo win; Mary and Raul lose. This inevitable outcome fails to achieve the universality that we expect of fundamental rights.

One might argue that accommodation rules simply require tolerance of difference in matters of language and impose minimal costs: everyone is placed under the same obligation but also gains the same benefit of cultural self definition regardless of native tongue. Creating generally applicable rights of cultural expression, so the argument might go, involves no genuine clash of interests. Bilingual plaintiffs in \textit{Spun Steak} offered a variant of this approach when they argued, unsuccessfully, that they had been denied the privilege enjoyed by Anglophones of speaking in the most comfortable language.\textsuperscript{169} Equality in cultural expression, however, is not a universally agreed value. It is rejected vigorously both by advocates within the English Only movement and by libertarians who would protect an employer=s property and contract rights beyond the scope offered by Title VII=s business necessity defense. Traditional liberals also get

\textsuperscript{167}Id.


nervous when cultural rights and duties are imposed by sovereign authorities. Positing a
general right of cultural expression does nothing to diffuse the clash of norms created by
language accommodations schemes.

A more serious challenge to my skepticism of expressive rights lies in the fact that
Title VII and other employment laws have already made inroads into the workplace with
measures that control expression. Title VII permits harassment claims that are forthright
attempts to control words and expressive conduct motivated by a worker’s race, gender,
national origin and so forth. The essence of such claims is that the employer has
tolerated abuse by one employee of another because of a protected trait. They are
based on the theory that outrageous behaviors directed against an employee because of
race, gender, etc. can become so severe that they essentially deprive the victim of her job.
The abusive is sometimes physical (unwanted touching), often verbal (slurs) and
sometimes graphic (posted centerfolds). The legal standard is whether a reasonable and
not overly sensitive person would feel deprived of the benefits of her job.

Since Title VII has already breached the boundary of expression to protect
workers, why not extend the practice to protections of cultural expressions? A
progression, however, from prohibiting abusive verbal behaviors by some workers to
guaranteeing individual cultural expression for all is inadvisable. Harassment claims are
an anomaly since they appear to impose an duty upon employers to protect some workers
from the insulting expressions of other workers. Such restrictions would fail Free Speech
analysis if imposed generally on citizens by a state actor. Indeed they have been
criticized as attempts by state actors to do an end run around the First Amendment since
they coerce employers into becoming de facto agents by threat of Title VII liability.170
While I share such concerns generally, I also agree that the employment contexts adds
factors that are not present when, say, government attempts to rig the rules of expression
in a newspaper or Speakers Corner at a local park.

The gravamen of a typical harassment claim is that outrageous expressions have
deprived an employee of the benefits of her job. Harassment claims protect a worker’s
equality interest in open access to the labor market on neutral economic terms. Once
those barriers have been eliminated, either by the judgment of a court or proactive
compliance efforts of the employer, the employee’s material interests have been
vindicated. State control of expression has occurred, but it is ancillary to the protection
of economic interests. We could and many have do so171 attempt to explain

170 See, e.g., Volokh, supra note 120, at 1816-18 (1992); Kingsley R. Browne, Title VII as Censorship: Hostile-
171 See Rodríguez, Language Diversity, supra note 74, at 1725-26 & n. 135 (discussing tendency of Title VII
claimants and scholars to characterize English-only rules as invasions of dignitary interests). See also id. at 1726 n.
harassment claims as protecting cultural interests (or for that matter as effecting a larger anti-subordination program). But such an analysis is unnecessary since there is already an economic rationale for the result. Similarly, the National Labor Relations Act accords protections to employees who wish to engage in union organizing activities. These intrusions into employer discretion, however, have the culturally neutral goal of opening the employment market to all persons rather than authorizing certain forms of self-expression.

Unlike harassment claims and union organization laws, where restrictions on expression are ancillary to economically related interests, the point of language accommodation rules is purely cultural. Restricting an employer’s control over language is an attempt to impose a cultural vision shorn of any countervailing justification of creating economic equality. Cultural rights are conferred on workers who already receive the full economic benefit of their contracts. Such rules are no different in concept from requiring a private employer to take down anti-war posters from the break room wall because they offend veterans. In short, the fact that harassment claims restrict worker expressions to protect an economic interest in access to the labor market does not justify the use of such restrictions to achieve the personal expression of a preferred cultural vision. At best, accommodation schemes are one of many cultural visions that lack an a priori claim to preference.

B. Fairness

1. Fairness as Compassion.

Fairness is the second possible justification for language accommodations. It is also one of those check your wallet words since its meaning becomes clear only when its advocates specify what they are really after. (Readers who have teenage children will understand this point immediately). In language accommodations, fairness appears to have two applications. First, advocates might argue that language accommodations are justified as a collective expression of sympathy toward the difficulties faced by immigrants. Kindness toward strangers as a moral precept has an ancient lineage. In Exodus we find this injunction: Also thou shalt not oppress a stranger: for ye know the heart of a stranger, seeing ye were strangers in the land of Egypt.

What person of normal sensibility lacks sympathy for the position of an immigrant

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136 (doubting that persons who speak English suffer significant dignitary harms).
173 Exodus 23:9
who bears the burden of adjustment to a new society? While immigrants from the British Commonwealth usually arrive as English speakers, the typical immigrant from Latin American or Asia will have to learn a new language. Overcoming language barriers will prove difficult even for the most motivated. Chances are that immigrants who arrive as adults or late adolescents will learn enough English to function at work and in society but never become fluent. English, moreover, will likely not displace their native tongue. \(^{174}\)

It is natural and understandable that workers from the same country or region of the world, such as our Blanca and Consuelo, would want the comfort of conversing in their native tongue when possible. Why should it matter, many will ask, that two employees speak Spanish to themselves if they are not actually working? Why not let them ease the burden of transition to a new society with a few moments in their native tongue? Why not give them an enclave from the pressures of adaptation?

There is a difference, nevertheless, between encouraging employers to act on their own kind impulses and requiring that they serve as involuntary agents of a third party’s desires to favor newcomers on particular terms. Mandatory language accommodations strip an act of accommodation of its charitable element and turn it into a requirement of positive law. Even if rules such as the EEOC Guidelines as taken as a collective act of kindness, we must still ask why kindness for a selected set of workers constitutes a superior norm to promoting the competing cultural views of others. I suggest that nothing about one viewpoint is inherently superior to others. Barring the revelation of a natural law of cultural interests, there is no reason to say language accommodations should trump other social or cultural interests. In fact, there are reasons to question the creation of a charitably inspired schedule of accommodations for immigrants.

Will Kymlicka discusses the position of immigrants in liberal societies. Kymlicka’s work tends to focus on the need to protect sub-national minorities such as the Catalans, the Basques and Quebecers. He labors hard to stay within the traditions of Western liberalism by assigning cultural choices to the individual but at the same time making the choice meaningful by giving the individual a range of options. In the case of sub-national minorities, this means protecting their institutions by making, for example, Catalan or French co-official languages. He recognizes immigration, however, as a different and a hard case.\(^{175}\) He reasons that it is not inherently unfair to require that voluntary immigrants adapt to their new land and assumes that the transition is inevitable.\(^{175}\)

Kymlicka argues instead for a series of accommodations designed to

\(^{174}\) See supra notes 37-40 and accompanying text.

\(^{175}\) Kymlicka, Multicultural Citizenship, supra note 41, at 95.
“renegotiat[e] the terms of integration”176 of immigrants including: affirmative action programs, reservation of seats in legislative bodies, revised dress codes, cultural diversity training, and so forth.177 He does not mention workplace language rules specifically, but such accommodations seems modest compared with his endorsement of bilingual education and suggestion that public services be provided in languages other than English.178 Given his view that immigrants arrive with reduced cultural expectations, Kymlicka=s program logically reflects a utilitarian concern over promoting integration, but also a compassionate desire to ease the pains of transition.179 As appealing as the idea may seem, it is important to remember that kindness, like any other quality, comes at a cost. The admittedly substantial benefits conferred on immigrants are paid for by the imposition of a cultural duty – directly upon employers and indirectly on other workers – who oppose the cultural shifts but may have no objection to immigration per se. Fairness imposed from above, moreover, deprives employers of the flexibility in managing or compromising conflicting employee demands regarding language.

Adoption of a compassion-based norm would also sit uneasily with the legal system=s unwillingness to create a duty to render assistance to persons in need barring an independent legal relationship. While most persons incorporate some level of compassion into their individual philosophies, for example by volunteer activities and charitable contributions, American law has been reluctant to permit the use of compassion as a standard of behavior. English and American common law rarely place individuals under a duty to come to the rescue of a stranger in distress.180 They thus protect individual autonomy at the expense of compassion. Other legal systems strike a different balance. European regimes commonly impose a duty to assist when the rescue is easy.181 But there is no a priori reason that we prefer the European way to our own.

177Id. at 163-72.
178Id. at 163.
179 Kymlicka describes many of this proposed accommodations as ways to make immigrants “feel more comfortable within . . . institutions once they are there.” Id. at 164.
181 See Daniel B. Yeager, A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties To Help Strangers, 71 WASH. U. L.Q. 1, 6 n. 28 (1993). The French enactment, ironically enough, dates back to a Vichy-era rule requiring French citizens to rescue German soldiers in peril. The statute was not repealed after the
Reasonable persons can conclude that imposing such a duty is an unacceptable intrusion into personal autonomy. More important, the duty to render assistance has never required cultural tolerance; rather, it requires at most that one come to the aid of another in physical danger.182

2. Fairness as Cultural Burden Sharing.

There is a second aspect of fairness in the literature that involves recognizing an equality interest in the distribution of the burdens of assimilation.183 The question of fairness arises from the perception that incorporation of immigrants into the prevailing culture is inevitable, i.e., not a matter of choice either for the individual or society; someone, therefore, must bear the burden of transition. The sense of inevitability is perhaps greatest in the case of language, since languages other than English are unlikely to survive more than two generations if not used in public or private institutions.184

Fairness becomes a question of how this integration into the new society takes place. Kymlicka perceives that multicultural accommodations are justified by two equality-driven considerations. First, acculturation is a difficult and often intergenerational process that should not be borne by immigrants alone.185 The failure to provide public services in a recent immigrant’s language, for example, may deprive her of these services.186 Second, a failure to accommodate creates inequality by showing less respect to the identities of immigrants than to those of the descendants of the society=s founders.187 The goal, according to Kymlicka, is a pluralizing or hybridic approach that breaks down social barriers by encouraging immigrants to lower their guard and assimilate while leaving the traditional society open to the cultural contributions of newcomers.188

Fairness in the distribution of burdens has also been taken up more recently by Cristina Rodríguez who argues for a cultural burden sharing. (Her scholarship is also
marked by a desire to protect the associational rights of workers which I shall address below). The essence of her argument is that immigration has wide-scale social effects the burden of which should be shared fairly. Addressing workplace language accommodations, she describes a fair allocation of the burdens as follows: persons who have another native language must communicate with English-only speakers in a mutually intelligible manner, i.e. in English. English-only speakers have a reciprocal obligation to tolerate non-English in their presence. Why this balance is fair rests on a number of assumptions, including: 1) the burden of adjustment for immigrants is heavy; 2) members of the receiving society are voluntary participants in the immigration society and therefore must take on cultural responsibilities; 3) the workplace is part of the public sphere; and 4) that the basic premise that we must associate with people, in public, as we find them also requires the acceptance of certain disharmonies.

Cultural burden sharing appeals to an instinctive human desire to share burdens. And it is hardly a radical or separatist agenda. Both Rodriguez and Kymlicka assume that immigration imposes both practical and theoretical obligations upon immigrants to conform to the Anglophone environment, including the workplace. In turn, toleration of a Spanish conversation in the lunch room is a far lighter burden than, say, making Spanish a co-official language. In spite of its intuitive appeal, however, the cultural burden sharing norm has weak theoretical support. Lightness of burden is a factual observation but not a normative justification. We must continue to ask what lifts the particular value of cultural burden sharing above the autonomy interests of the individual in freely fashioning or influencing the cultural atmosphere of those places within her control.

Start with the notion that the receiving society voluntarily participates in a system that significantly burdens immigrants. While no one seriously denies that the burdens of immigration are heavy and borne largely by immigrants themselves, the concept of voluntary participation in the process does little to justify cultural burden sharing. It

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189 See infra Part III.C.

190 Rodríguez, Language Diversity, supra note 74, at 1712.

191 Id.

192 Id. at 1714.


194 See Kymlicka, Multicultural Citizenship, supra note 41, at 78, 96; Kymlicka, Politics in the Vernacular, supra note 176, at 24-25.
lacks the sweep needed to justify a society-wide norm. If volition triggers the obligation to share burdens, then the millions of Americans who oppose immigration, both legal and otherwise, are logically excused from this responsibility. Perhaps participation in immigration is voluntary in the sense that we all benefit from the contribution of immigrants to our economy or our culture. If so, the rationale for granting language accommodations begins to resemble a remedy for unjust enrichment, where consent is irrelevant, rather than redress for breach of a social bargain.

Assertions that we are obliged to acknowledge and deal[] . . . on respectful terms with those we encounter in the public sphere should provoke similar skepticism. In support of this proposition, Professor Rodriguez cites to Charles Black’s seminal commentary on Brown v. Board of Education. While this statement is good advice for dealing with others in a society marked by difference, it is also important to remember that Brown dealt with race, the sort of difference based on immutable characteristics rather than optional cultural characteristics. Even more important is that Professor Rodriguez cites to no legal authority for this proposition. How could she? A federal court would quickly set aside on overbreadth grounds or as a facial violation of free speech rights any law that generally mandated respectful treatment of others.

Free speech jurisprudence tolerates boorish and even hateful expressions in order to keep the doors to the market place of ideas ajar. If you are old enough, you likely remember the provocative Nazi march in Skokie, Illinois where quite a few residents were not coincidentally Holocaust survivors. Attempts by the municipal government to ban the march were eventually thwarted by a federal appellate court. Hate-speech codes adopted by state universities have been similarly rejected. Nor does statutory law provide support for a norm of respectful treatment. Title VII hostile environment claims are triggered by behaviors and expressions that severe and abusive and not merely disrespectful or insensitive. This is not to say that the older norms protecting freedom of expression, voluntary cultural affiliation and self-definition are encased in amber. It is to say, however, that a new norm of respectful treatment is at odds with existing law and comes onto the legal scene without any presumption of correctness.

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195 Rodríguez, Language Diversity, supra note 74, at 1712 n 95 (citing Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 429 (1960)).
196 Collin v. Smith, 587 F.2d 1197 (7th Cir. 1978).
Even if we accept the proposition that the public sphere imposes an obligation of respectful treatment, language accommodation schemes become acceptable only to the extent that the workplace is truly a public place. But what is it that makes the workplace “public?” Extensive regulation has certainly made the workplace far less private than ever before. Civil rights initiatives such as Title VII, accommodation requirements under Title I of the Americans with Disabilities Act, safety regimes such as OSHA regulations, minimum wages under the Fair Labor Standards Act, union certification under the NLRA and so forth have substantially reduced employer prerogatives that were once protected under the common law of contracts and property.

But the ceding of certain employer prerogatives to the sovereign hardly makes the workplace a public place for all purposes. The primary authorization for regulating the private workplace, at least at the federal level, lies with the Commerce Clause. The commerce power, however, authorizes cultural mandates only if one accepts it as granting Congress a carte blanche to govern the workplace. That sentiment was challenged if not extinguished by two Rehnquist-era decisions that concluded that neither the need to protect school children from firearms (Lopez) nor to desire to protect women from violence (Morrison) were sufficiently commercial in character to trigger Congress’s power of interstate commerce.199

Perhaps one could construct an argument that language accommodations are necessary to achieve the commercial end of bringing peace to a labor force that is in demographic transition. Even so, the argument has the feel of a conclusion in search of reasoning. A typical regulatory scheme features obvious commercially related goals. Minimum wage rules, for example, create a floor of compensation while the antidiscrimination mandate of Title VII protects every covered individual against differentials in employment or wages because of specific traits. Thus when the law intrudes on the private interests of employers, it typically does so to achieve results that are commercial or economic in character and confer a right on every individual in the workplace. Cultural regulations do neither since the accommodations themselves are hardly commercial and, as frequently noted above, confer benefits on one class of workers at the expense of others. Nor does it help to argue that everyone eventually benefits from a scheme of cultural protections. The purported benefit is nothing more than a hopeful assertion that the majority of citizens will eventually change their minds and agree with a new cultural concept.

Scholars who favor the “public” view of the workplace emphasize its importance to social dynamics. Vicki Schultz describes the workplace as more than a place where

one earns a paycheck. It is, she argues, the primary milieu of social interaction where friendships and communities are formed, self-understanding is enhanced and one contributes to the larger society. Cynthia Estlund makes a similar point. Cristina Rodríguez comments on the importance of the workplace in the social life of the surrounding community. There seems to be wide-scale agreement, with which I concur, that the workplace is the one place in American society where adults from diverse backgrounds are likely to come together.

There is no question that the workplace offers a promising venue for the promotion of social or cultural rights. But the observation that employers are not just profit seekers but managers of social interaction cannot of itself justify placing employers under a public duty to promote the cultural welfare of their workers. Treating the workplace as an incubator for selected social interests begs the question of what legal norm should prevail. Title VII and similar civil rights statutes in the main subordinate an employer’s private interests to an anti-discrimination mandate that forbids commercially irrational reliance on immutable traits or harassing conduct that interferes with the enjoyment of work’s bounty in an even handed way. Cultural accommodations such as the EEOC Guidelines do none of these things. Thus the factual observation that the workplace is socially significant may be the first step in a new concept of the workplace but hardly the last. Proponents must still grapple with the inherent inequality of cultural protections. And they must counter the argument that workplaces free of the Guidelines may do a better job of maximizing individual self-definition in the aggregate.

C. Associational Interests.

Language accommodations have been justified as protecting associational interests. In this context, such interests do not refer to the fundamental freedom of association developed by the Supreme Court as an implicit, ancillary right to freedom of speech. Rather, we are concerned with the proposition that the workplace should be protected as a place of social bonding. The primary exponent of this argument is Professor Rodriguez who, as discussed above, notes that the contemporary workplace provides the most important forum for the formation of personal relationships that

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202Rodríguez, Language Diversity, supra note 74, at 1704-05.
203Id.; Estlund, supra note 201, at 10
204Rodríguez, Language Diversity, supra note 74, at 1704.
complement pre-existing social networks such as the family.206 She similarly points to the effect of the workplace dynamic on larger community dynamics.207

Addressing the language dynamic specifically, Rodriguez argues that English-only work rules have a particularly harmful effect on bilingual workers. She observes that bilinguals are different in that: 1) bilingualism affects the development of individual personality; 2) bilinguals are Aborderers@ who live on the edge of two speech communities; and, 3) bilinguals often experience tension when the process of socialization takes place under social and cultural conditions hostile to bilingualism and biculturalism . . . @208 Hence English-only shop rules are harmful since they interfere with the bilingual’s interest in associating with others who share their language and building solidarity among groups of workers.209

Rodriguez has a second insight that derives from the general proposition that the workplace is a social institution. Linguistic interactions in a diverse society, she argues, are “layered:"210 persons may use one language in one setting, e.g., shopping, but another in a distinct setting, e.g., conversing with neighbors. This pattern of linguistic attraction seems to be part of larger human tendency to affiliate socially with others who share commonalities of race and culture.211 English only rules therefore interfere with the solidarity that would otherwise arise among workers who speak languages other than English. Rodriguez further observes the dampening of non-English has a spillover effect on social relations in the wider community from which the workplace is often inseparable.212 In sum, eliminating English-only rules facilitates social bonding by allowing workers to communicate in the language most comfortable for them.213

Rodriguez’s observations are, to my mind, factually correct. Of course it’s easier to form social relationships in one’s native language unburdened by a policy of speaking English in the workplace. I quarrel with the easy transition from the uncontestable statement that workplaces are socially significant to assumption of a legal norm that they should be regulated to protect socialization. Since my objections to a socialization norm

206 Rodríguez, Language Diversity, supra note 74, at 1703.
207 Id. at 1703-04.
208 Id. at 1710.
209 Id. at 1707, 1711.
210 Id. at 1721.
211 Id. at 1724.
212 Id.
213 Id. at 1721.
parallel those already raised against justifications based on expressive interests and fairness in the previous subparts, I see no need to repeat that analysis in depth.

Briefly put, language accommodations function to protect the desire of a segment of the workforce to form social relationships based on a key cultural trait. It is not plausible to say that conferring a right to speak in a language other than English removes a communication impediment to a relationship that would otherwise form. Speaking to each other in, say, Spanish or Cantonese is the very point of the social relationship. So here again we have the problem of the “zero-sum game.” By conferring a right to speak in a preferred language, an accommodation scheme clashes with the cultural views of other workers that English is the appropriate language for all communications in the workplace. The system picks winners and losers without offering a convincing justification for shifting cultural authority from employers to the EEOC.

In the realm of associational interests, the “zero-sum game” of cultural accommodations goes a step further by frustrating the desire of monolingual English speakers to form relationships with bilingual colleagues who may now form an island within the workplace. Professor Rodriguez rightly notes that relationships may still form across linguistic boundaries and that race or ethnicity apart from language may also be a determinative factor in social interactions.214 Language rules, nonetheless, at the very least alter the ground rules under which relationships are formed. Why is it that we should favor the desires of one group of workers for enhanced social experiences at the expense of the monolinguals’ desires for greater intergroup interaction that necessarily must occur in English? So far as I can see, there is no reason to do so. The unregulated workplace is better suited – overall – to balance the competing interests in play.

CONCLUSION

How newcomers should be incorporated into the fabric of American society is a critical question. An enlightened nation will adopt measures to insure that those who are invited create a new home here are protected from unjust discrimination against traits they cannot control such as race, ethnicity, country of origin or native tongue. Title VII’s antidiscrimination mandate provides the legal muscle against such unfair treatment, creating equality among old-line citizens and newcomers in the competition for economic success. The same act goes a step too far, however, when its implementing regulations impose duties of cultural accommodation and tolerance on employers and workplaces. I have attempted to demonstrate in this paper that minority language rights as conceived by the EEOC Guidelines do not pertain to business necessity and, more important, favor the

214 Id. at 1723-24.
cultural views of some workers at the expense of employers and other workers. Such tradeoffs are impossible to reconcile with our prevailing norms of individual control over culture free from coercion by sovereign authorities. It would be wise, therefore, to abandon the scheme created by the *EEOC Guidelines.*