

RACE INEQUITY FIFTY YEARS LATER: LANGUAGE RIGHTS UNDER THE CIVIL RIGHTS ACT OF 1964

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INTRODUCTION

The occasion of the fiftieth anniversary of the Civil Rights Act of 1964 gives pause to consider whether the Act has been effective in eradicating discrimination against people of color. Much has changed over the past fifty years. In 1964, it would have been difficult to imagine an African American president and the end of *de jure* racial restrictions in employment, education, voting, jury service, and places of public accommodation. However, as the old French expression goes: *plus ça change, plus c'est la même chose*—the more things change, the more they stay the same.¹

Racial discrimination still exists in 2014, but it manifests itself differently. In view of this, it is imperative that the civil rights laws of yesterday are equipped to address the race problems of today. Over the past half-century, both racial demographics and the manner in which racism is expressed in the United States have changed. Expressions of racism have become more subtle and sophisticated.² Rather than explicitly barring someone from employment, education, public accommodations, and civic participation on the basis of his or her race, racially discriminatory exclusion is often couched in seemingly race-neutral terms.³ Such racially discriminatory practices often go unremedied because current colorblind legal jurisprudence is increasingly formalistic and frequently refuses to look beyond the surface of inequitable acts to reveal the underlying discriminatory impetus.⁴

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¹ JEAN-BAPTISTE ALPHONSE KARR, LES GUÊPES (Jan. 1849).

² Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 216 (2004); see, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 331, 340–41 (1987).

³ Johnson, *supra* note 2, at 235.

⁴ Adherents of “colorblindness” define racial discrimination as either on-its-face

Another change is that, while in 1964 African Americans were the largest racial minority,⁵ today Latinos constitute the largest racial minority population in the United States.⁶ It is often assumed that antidiscrimination laws protect all racial groups equally. This Article questions that assumption and explores the competence of the Civil Rights Act of 1964, which was enacted to address racism against African Americans, in addressing racial discrimination against Latinos by examining the Act's treatment of language discrimination. Racial discrimination is often expressed differently against Latinos than it is against African Americans. Most notably, language discrimination, which includes discrimination on the basis of actual or *perceived* English-language ability, bilingualism, and accent, is a common method of subordinating Latinos.⁷ For Latinos, language discrimination is not simply a linguistic issue; it is frequently a form of discrimination on the basis of race and national origin. Language discrimination is challenging to address in the courts because English-language requirements are often viewed as race-neutral, even when they serve to exclude or subordinate Latinos and other racial minorities.⁸

This Article focuses on language discrimination in the areas that the Civil Rights Act of 1964 was primarily concerned with: employment, education, public accommodations, and civic participation—concentrating, in the latter respect, on jury participation. The Civil Rights Act, particularly

racial exclusion or racial classification or recognition of any kind, whether it be for the purposes of race-based exclusion or affirmative action. Colorblind jurisprudence imposes a literal “anti-differentiation principle” whereby “discrimination is defined so narrowly that it is virtually impossible to advance a constitutionally [or statutorily] cognizable claim of racial discrimination” Cedric Merlin Powell, *Schools, Rhetorical Neutrality, and the Failure of the Colorblind Equal Protection Clause*, 10 RUTGERS RACE & L. REV. 362, 378 (2008).

⁵ Carlo A. Pedrioli, *Respecting Language as Part of Ethnicity: Title VII and Language Discrimination at Work*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 97, 102 n.42 (2011).

⁶ Jorge M. Chavez et al., *Sufren Los Niños: Exploring the Impact of Unauthorized Immigration Status on Children's Well-Being*, 50 FAM. CT. REV. 638, 638 (2012).

⁷ See, e.g., Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1432–34 (2004) [hereinafter *Buscando América*].

⁸ See Laura M. Goodall, Comment, *The “Otherized” Latino: Edward Said's Orientalism Theory and Reforming Suspect Class Analysis*, 16 U. PA. J. CONST. L. 835, 847 (2014) (quoting Andrew P. Averbach, *Language Classifications and the Equal Protection Clause: When Is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. REV. 481, 499 (1994)).

Titles VI and VII, has been the primary federal law used to challenge language discrimination in the United States. Regulations promulgated and cases decided under Title VI and VII have been ahead of constitutional jurisprudence in recognizing that language discrimination is a form of national origin and, at times, race discrimination.⁹ However, the Act has ultimately proved ineffectual in redressing language inequity for several reasons.

This Article examines the Civil Rights Act of 1964's treatment of language discrimination and suggests ways that the Act can better protect against such discrimination. Part I explores the differences and similarities between race discrimination in 1964 and today and looks at language discrimination as an example of contemporary race discrimination against Latinos. Part II examines language discrimination in the areas of employment; education; public accommodations; and the courts, particularly jury service; as well as the availability of protection against such discrimination under the Civil Rights Act of 1964. It evaluates both the Act's deficiencies and its untapped potential in combating language discrimination. Part III examines structural problems with the Act that have limited its effectiveness in eradicating language discrimination.

I. RACE & LANGUAGE DISCRIMINATION: YESTERDAY & TODAY

In evaluating race inequity fifty years after the enactment of the Civil Rights Act of 1964, it is important to consider the changing face of racial discrimination and racial demographics in the United States. In 1964, the largest racial minority group was African Americans.¹⁰ Jim Crow laws overtly discriminated against African Americans, relegating them to separate public schools and public facilities and denying opportunities to participate in democratic self-government activities, such as voting and jury service.¹¹ In 2014, Latinos are the largest racial minority.¹² Racial discrimination persists today but is less conspicuous. Rather than hanging signs that say "No Negros" or "No Mexicans," racial exclusions are doled out in "race-neutral"

⁹ See, e.g., Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 190 (2001).

¹⁰ Pedrioli, *supra* note 5, at 102 n.42.

¹¹ See Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Prize Award Speech)*, 47 HOW. L.J. 473, 483 (2004); Barbara Y. Welke, *Beyond Plessy: Space, Status, and Race in the Era of Jim Crow*, 2000 UTAH L. REV. 267, 273 (2000).

¹² Pedrioli, *supra* note 5, at 102 n.42.

code. One example of these racially discriminatory but purportedly race-neutral exclusions is English-language requirements. Under current “colorblind” jurisprudence, a sign outside a restaurant stating “No Mexicans or Dogs Allowed” (as was prevalent in the Southwest in the 1950s and 1960s)¹³ would be unlawful and condemned by the majority of Americans. However, a sign stating “English only,” even when the common understanding is that in practice it means “No Spanish” and hence “No Latinos,” may survive legal scrutiny and even be celebrated by many Americans as patriotic.¹⁴ Similarly, prospective jurors could not overtly be excluded from service on the basis of their race,¹⁵ but language ability (either limited English proficiency or full bilingual ability) can serve as a basis whereby Latino citizens and other minorities can be excluded.¹⁶

Language-based restrictions have long been a tool used to subordinate Latinos.¹⁷ In the Jim Crow era, African Americans were segregated in schools throughout the South and other regions of the United States on the basis of their race.¹⁸ Latinos were also subjected to race-based educational segregation, but this segregation was veiled under the pretext of language. For instance, in the Southwest, Mexican American children were segregated in separate “Mexican” schools or “Mexican” classrooms within white schools on the purported basis of their deficient English-language skills.¹⁹ However, these students’ English-language abilities and consequent assignment to a

¹³ See REYNALDO ANAYA VALENCIA ET AL., *MEXICAN AMERICANS AND THE LAW* 8 (Adela de la Torre ed., 2004); Antonia Castañeda, *Language and Other Lethal Weapons: Cultural Politics and the Rites of Children as Translators of Culture*, 19 CHICANO-LATINO L. REV. 229, 234 (1998); see generally CYNTHIA E. OROZCO, *NO MEXICANS, WOMEN OR DOGS ALLOWED: THE RISE OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT* (2009).

¹⁴ See Pedrioli, *supra* note 5, at 102 n.42; Rodríguez, *supra* note 9, at 220–21.

¹⁵ *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975).

¹⁶ *Hernandez v. New York*, 500 U.S. 352 (1991).

¹⁷ *Buscando América*, *supra* note 7, at 1432–34.

¹⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁹ See *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544 (S.D. Cal. 1946), *aff’d*, 161 F.2d 774 (9th Cir. 1947); *Indep. Sch. Dist. v. Salvatierra*, 33 S.W. 2d 790 (Tex. Civ. App. 1930); Robert R. Álvarez, Jr., *The Lemon Grove Incident: The Nation’s First Successful Desegregation Court Case*, 32 J. SAN DIEGO HIST. 116, 116 (1986), *available at*

<http://sandiegohistory.org/journal/86spring/lemongrove.htm> (citing Petition for Writ of Mandate, *Álvarez v. Lemon Grove Sch. Dist.* (No. 66625) (1931)); see also Lupe S. Salinas, *Linguaphobia, Language Rights, and the Right of Privacy*, 3 STAN. J. C.R. & C.L. 53, 63–65 (2007) [hereinafter *Linguaphobia*].

Mexican school or classroom were frequently determined not on the basis of linguistic skill, but rather simply on their Mexican appearance or Spanish surname.²⁰ The segregated Mexican schools or Mexican classrooms offered substandard facilities and instruction,²¹ and sometimes lacked any teachers at all.²²

Today, English-language requirements, although race-neutral on their face, are often prompted by racial animus against Latinos. English-only laws are habitually brought about in response to popular movements driven by a “mission[] of ‘race betterment,’” “questions about the intelligence and values of Latin American immigrants,” and a “fear of a Hispanic takeover.”²³ However, despite racist, nativist, and xenophobic beginnings, legislative history and statutory language do not mention Latinos or the Spanish language. This is not surprising; overtly acknowledging the primary targets of the bill would be legally and politically objectionable. Nonetheless, there is frequently a common understanding that, in both original intent and application, “English-only” rules and statutes are often intended to be “No-Spanish” restrictions.²⁴ These rules are generally less about a genuine preference for English than a means to limit Spanish usage, exclude Spanish

²⁰ Mendez, 64 F. Supp. at 550.

²¹ Meaghan Field, *Voting Equality and Educational Equality: Is The Former Possible Without the Latter and Are Bilingual Ballots a Sensible Response to Education Discrimination?*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 385, 389 n.21 (2011).

²² My grandfather, Rafael L. Gonzales, reports that in Southern Colorado, in some instances, white students were placed in Mexican classrooms, but only as a serious form of punishment. Interview with Rafael L. Gonzales, La Junta, Co. (July 14, 2014).

²³ Philip C. Aka & Lucinda M. Deason, *Culturally Competent Public Services and English-Only Laws*, 53 HOW. L.J. 53, 85 n.207 (2009) (citing Thomas Ricento’s research “based on examination of the internal documents, funding sources and written statements of leaders of the English-Only movement”); see generally Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 356–57 (1992) [hereinafter *Demography and Distrust*]; Lupe S. Salinas, *Immigration and Language Rights: The Evolution of Private Racist Attitudes into American Public Law and Policy*, 7 NEV. L.J. 895 (2007) [hereinafter *Immigration and Language Rights*].

²⁴ Braden Beard, Note, *No Mere “Matter of Choice”*: *The Harm of Accent Preferences and English-Only Rules*, 91 TEX. L. REV. 1495, 1506–07 (2013) (citing Alfredo Mirandé, “En la Tierra del Ciego, El Tuerto es Rey” (“*In the Land of the Blind, the One Eyed Person is King*”): *Bilingualism as a Disability*, 26 N.M. L. REV. 75, 103 (1996)).

speakers, and make Latinos of all linguistic backgrounds feel unwelcome.²⁵

Language discrimination affects Latinos of diverse socioeconomic, citizenship, immigration, and language backgrounds. Latinos may be discriminated against on the basis of being Limited English Proficient (LEP), fully Spanish-English bilingual, or having a Spanish/Hispanic accent. Further, due to the problem of perceived foreignness (viewing Latinos as foreign irrespective of the duration of their American ancestry or nationality),²⁶ Latinos are often discriminated against when they are mistakenly perceived as LEP or bilingual or as having an accent even when they do not. For example, I come from a Chicano New Mexican family that never crossed any border. Rather, the border crossed my family when New Mexico became part of the United States pursuant to the Treaty of Guadalupe Hidalgo in 1848. I am a native English speaker who grew up in Oregon in an English-speaking household and learned Spanish primarily through classes and work abroad. However, throughout my life people have frequently assumed I am LEP or speak English with a Spanish accent. For instance, in third grade I was placed in special education classes for a nonexistent “accent.” As an adult, in several professional settings, colleagues have described me as a person with a “heavy Spanish accent,” though I speak English with an Oregon/Pacific Northwest accent that is a rather standard American accent unassociated with Hispanic background. This phenomenon of misperceiving an accent or English-language limitation based solely upon a Latina’s physical appearance, surname, or ancestry indicates the close relationship between race and language for Latinos. Not only is language often central to one’s internal Latino identity,²⁷ it is also a key external racial

²⁵ Aka & Deason, *supra* note 23, at 85–86.

²⁶ See Delgado & Stefancic, *supra* note 11, at 490; Richard Delgado, *Derrick Bell’s Toolkit—Fit to Dismantle That Famous House?*, 75 N.Y.U. L. REV. 283, 302 (2000).

²⁷ Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1364 (1997); Rodríguez, *supra* note 9, at 141 (noting that language “defines the essence of cultural identity”); see *Hernandez v. New York*, 500 U.S. 352, 364, 370 (1991) (Even Justices of the United States Supreme Court have acknowledged that, for many Latinos, Spanish language is used to “define the self,” and “[l]anguage permits an individual to express both a personal identity and membership in a community”); J.A. Fishman, *Language and Ethnicity*, in LANGUAGE, ETHNICITY AND INTERGROUP RELATIONS 15, 25 (Howard Giles ed., 1977).

identifier used by others to classify a person as Latino.²⁸

As the argument that language discrimination can be a form of race discrimination is an unfamiliar concept to many, it might be helpful to pause and consider the meaning of race and racism, and the intersection of race, racism, and the Spanish language for Latinos. In our society, racial groups are defined by certain physical or cultural characteristics.²⁹ This differs from national origin (the country of one's or one's ancestor's origination) because diverse populations are lumped together in broad classifications such as white, black, Asian, or Latino instead of recognizing the diversity of national origin and other backgrounds of the individuals and their ancestors.³⁰ Racial prejudice is the attribution of negative qualities to these identifying characteristics.³¹ Racism is racial prejudice plus power.³² We often see this with skin color, hair texture, and phenotype.³³ For instance, people with dark skin, kinky or curly hair, and certain facial characteristics may be racially classified as "black" without regard to their unique ancestry. Racism materializes when negative qualities are associated with physical (or cultural) traits. An example of this distinction would be when someone sees a person with the aforementioned physical characteristics and classifies them as "black" and then, without any basis, perceives them to be dangerous, intimidating, dishonest, or criminally inclined. The first assumption is one about race; the second is racism.

For Latinos, in addition to physical characteristics, Spanish language or accent are attributes used to designate the individuals as a racialized collective group of Latinos, Hispanics, or "Mexicans" despite their multiplicity of ancestry and other background traits.³⁴ Racism steps into play when the use of Spanish is perceived to hold innately negative qualities, such as being "dirty," un-American, abusive, foul, threatening, uneducated, or offensive. These racist perceptions about the negative qualities of Spanish are then used as a justification for imposing English-only rules. Racism is also present when Spanish language or accent is used as a racial proxy to exclude

²⁸ See Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503, 548 (1998).

²⁹ Jasmine B. Gonzales Rose, *Language Disenfranchisement in Juries: A Call for Constitutional Remediation*, 65 HASTINGS L.J. 811, 835 (2014).

³⁰ *Id.* at 828.

³¹ *Id.* at 835–40.

³² Beverly Daniels Tatum, *Defining Racism: "Can We Talk?," RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY* 127 (Paula S. Rothenberg ed., 6th ed. 2001).

³³ Gonzales Rose, *supra* note 29, at 835–40.

³⁴ *Id.* at 826.

or subject the speaker to less favorable treatment. Throughout this Article, we will see examples of how Spanish language is used as a proxy for race and how Spanish is perceived to possess inherently negative qualities that are, in turn, employed to justify English-only policies.

Language discrimination affects many Americans. LEP³⁵ persons are the group most frequently and severely affected by language discrimination. LEP individuals comprise a significant percentage of the population and are predominately people of color, particularly Latinos.³⁶ Nearly ten percent of the population in the United States is LEP.³⁷ That is approximately 29.5 million people.³⁸ There is a tremendous correlation between race and English-speaking ability in the United States. The vast majority, 87 percent, of LEP individuals are people of color.³⁹ That is about 25.67 million people of color, of which an estimated 21 million are Latino.⁴⁰ Despite popular perceptions to the contrary, many LEP individuals are United States citizens. A conservative estimate is that 13 million United States citizens are LEP.⁴¹

English-language requirements and preferences exclude and subordinate LEP people, particularly Spanish-speaking Latinos, in a variety of contexts, including employment, education, domestic relations, access to healthcare and public services, and participation in democracy. For example, private employers have increasingly imposed “English-only” rules in workplaces, which have been applied to humiliate, discipline, and fire workers, as well as exclude LEP customers, especially Latinos.⁴² In public

³⁵ In this essay, a LEP individual is defined as one who “[does] not speak English as their primary language and [has] a limited ability to read, speak, write, or understand English” *Limited English Proficiency (LEP)*, LEP.GOV, <http://www.lep.gov/faqs/faqs.html> (last visited June 9, 2015).

³⁶ MIGRATION POLICY INST., DATA BRIEF: LIMITED ENGLISH PROFICIENT INDIVIDUALS IN THE UNITED STATES: NUMBER, SHARE, GROWTH, AND LINGUISTIC DIVERSITY 6 (Dec. 6, 2011), *available at* <http://migrationpolicy.org/sites/default/files/publications/LEPatabrief.pdf> (“Most LEP individuals speak Spanish. Spanish-speaking LEP individuals accounted for 66 percent of the total US LEP population in 2010.”).

³⁷ *Id.* at 1.

³⁸ *Id.*

³⁹ PEW HISPANIC CTR., TABLE 20: LANGUAGE SPOKEN AT HOME & ENGLISH-SPEAKING ABILITY, BY AGE, RACE AND ETHNICITY: 2009 (2011), *available at* <http://www.pewhispanic.org/2011/02/17/statistical-portrait-of-hispanics-in-the-united-states-2009/2009-statistical-portrait-23/>.

⁴⁰ Gonzales Rose, *supra* note 29, at 814.

⁴¹ *Id.*

⁴² *See Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980). Garcia, a bilingual

schools, students' violations of English-only rules have resulted in Latino students being sent to "Spanish detention" or suspended simply for speaking Spanish on school grounds.⁴³ Some courts have even found speaking Spanish at home to be a form of child abuse and have threatened to remove custody from Latino parents unless they speak English to their children.⁴⁴ Furthermore, LEP individuals face significant barriers when it comes to accessing healthcare and public services.⁴⁵ Even the ability to exercise the fundamental right to vote can be inhibited when accommodations are not provided to LEP citizens.⁴⁶ Further, LEP citizens are routinely excluded from jury service in most jurisdictions.⁴⁷

LEP individuals are not the only people subject to language discrimination. Bilingual persons, particularly bilingual Latinos, are also affected. A recent study revealed that 38 percent of Latinos in the United States are "Spanish dominant, 38 percent are bilingual and 24 percent are English dominant."⁴⁸ This is not merely an immigrant issue. Nearly half of United States-born Latinos are not English dominant.⁴⁹ Widespread LEP language-based exclusions, coupled with accent and bilingualism discrimination, affect a large number of Latinos and other people of color in the United States but are often left out of discussions about race discrimination. In pondering whether the Civil Rights Act of 1964 has been effective in curtailing race discrimination, it is important that the topic of

employee, was fired for speaking Spanish in an English-only workplace. The Fifth Circuit upheld the "English-only" rule, finding it did not impose hardship upon Garcia because he was bilingual and capable of speaking English. *Id.* See also Pedrioli, *supra* note 5, at 97; Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 826–27 (1994) [hereinafter *Ethnicity and Prejudice*] (discussing how courts of appeal fail to recognize language restrictions in the workplace as a form of national origin discrimination).

⁴³ *Buscando América*, *supra* note 7, at 1443; Mirandé, *supra* note 24, at 103.

⁴⁴ *Buscando América*, *supra* note 7, at 1445.

⁴⁵ Siddharth Khanijou, Note, *Rebalancing Healthcare Inequities: Language Service Reimbursement May Ensure Meaningful Access to Care for LEP Patients*, 9 DEPAUL J. HEALTH CARE L. 855, 857 (2005).

⁴⁶ Jocelyn Friedrichs Benson, *¡Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. REV. 251 (2007).

⁴⁷ Gonzales Rose, *supra* note 29, at 815.

⁴⁸ PEW HISPANIC CENTER, WHEN LABELS DON'T FIT: HISPANICS AND THEIR VIEWS OF IDENTITY 4 (2012) available at

<http://www.pewhispanic.org/files/2012/04/PHC-Hispanic-Identity.pdf>.

⁴⁹ *Id.*

language discrimination finds a place in the discussion.

II. THE CIVIL RIGHTS ACT OF 1964 & LANGUAGE DISCRIMINATION

The Civil Rights Act of 1964, most notably Titles VI and VII, is the primary source of law utilized to challenge English-only policies and other forms of language discrimination.⁵⁰ Another section of the Act, Title II,⁵¹ which addresses discrimination in places of public accommodation, has not been used to tackle language discrimination, but it could be.⁵² The Act was primarily concerned with addressing racial restrictions in employment, education, places of public accommodation, and full participation in democracy; thus, in evaluating the Act's efficacy in combating language discrimination, it is appropriate to focus on these areas.⁵³ In recent years, there appears to have been an upsurge in language discrimination in workplaces, public schools, and restaurants.⁵⁴ This section discusses the current state of language discrimination jurisprudence under the Act and how the Act can be better utilized to promote language equality.

A. LANGUAGE DISCRIMINATION IN EMPLOYMENT

The majority of language discrimination litigation has arisen in the employment context. Language discrimination in the workplace can occur in a variety of ways, such as denying employment or promotion based upon English-language ability, non-English usage, or accent.⁵⁵ Policies that are frequently challenged are English-only workplace rules.⁵⁶ These rules prohibit workers from speaking languages other than English on the job and have become increasingly common in the past few decades.⁵⁷ Challenges to employee-firings as a result of a violation of English-only workplace rules

⁵⁰ See James Leonard, *Bilingualism and Equality: Title VII Claims for Language Discrimination in the Workplace*, 38 MICH. J.L. REFORM 57, 70 (2004); see generally Rodríguez, *supra* note 9.

⁵¹ 42 U.S.C. § 2000a(a) (2012).

⁵² *Id.*

⁵³ Civil Rights Act, Pub. L. No. 88-352 (1964).

⁵⁴ See, e.g., Beard, *supra* note 24, at 1501, 1503–05; Michael DiChiara, Note, *A Modern Day Myth: The Necessity of English as the Official Language*, 17 B.C. THIRD WORLD L.J. 101, 129–30 (1997).

⁵⁵ Beard, *supra* note 24, at 1496, 1503–05.

⁵⁶ Mirandé, *supra* note 24, at 76.

⁵⁷ Cristina M. Rodríguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689, 1689 (2006).

are most often evaluated under Title VII of the Civil Rights Act of 1964.⁵⁸ Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin.⁵⁹ Prohibiting employees from speaking non-English languages at work has been found to constitute national origin discrimination in violation of Title VII.⁶⁰

The term “national origin” is not defined in the Act.⁶¹ However, national origin has been defined by the United States Supreme Court as “refer[ing] to the country where a person was born or, more broadly, the country from which his or her ancestors came.”⁶² For Title VII purposes, the Equal Employment Opportunity Commission (EEOC) has delineated national origin discrimination as including “the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.”⁶³ The EEOC has also declared that an “essential national origin characteristic” is the “primary language of an individual.”⁶⁴ These guidelines are forward-thinking and recognize the reality that one’s native language is a part of his or her national origin and that discrimination on the basis of language or background can amount to national origin discrimination under the Act.

The EEOC presumes that rules requiring employees to speak English at all times in the workplace, including breaks, violate Title VII because such rules amount to burdensome terms and conditions of employment and can foster a hostile work environment.⁶⁵

The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language

⁵⁸ Deborah F. Buckman, *Requirement That Employees Speak English in Workplace as Violative of Federal Constitutional and Statutory Law*, 24 A.L.R. Fed. 2d 587.

⁵⁹ 42 U.S.C. § 2000e (2012).

⁶⁰ *See, e.g.*, EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066 (N.D. Tex. 2000); Saucedo v. Bros. Well Serv., Inc., 464 F. Supp. 919 (S.D. Tex. 1979). However, while it is well-settled that English-only workplace rules may potentially violate Title VII, in the majority of Title VII cases challenging such rules the courts have found that the rules were justified by business necessity and do not violate Title VII. *See* Buckman, *supra* note 58.

⁶¹ *See* 42 U.S.C. § 2000e (noting the lack of a definition for “national origin”).

⁶² *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973).

⁶³ 29 C.F.R. § 1606.1 (1980).

⁶⁴ *Id.* § 1606.7.

⁶⁵ *Id.* § 1606.7(a).

or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation[,] and intimidation based on national origin which could result in a discriminatory working environment.⁶⁶

When English-only rules are only applied at certain times, the rules must be justified by business necessity.⁶⁷ Recognized business necessities include safety, where all communications in a common language of English enable employees to understand the dangerous task at hand,⁶⁸ and serving monolingual English-speaking customers.⁶⁹ The EEOC acknowledges that "[i]t is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language."⁷⁰ As such, employers who believe they have a business necessity justifying an English-only rule must provide notice to the employees outlining the "general circumstances when speaking only in English is required and of the consequences of violating the rule."⁷¹ Failure to provide such notice is considered evidence of discrimination on the basis of national origin.⁷² However, it should be noted that the courts have not uniformly followed the EEOC guidelines.⁷³

A distinction has been made in the courts between employees who are fully bilingual and those who are LEP. The courts' treatment of bilingual employees is troubling. Many courts have found that employees who are fully bilingual in English and another language should be able to comply with the employer's language policy and thus are less able to attack it because they can choose to speak only English.⁷⁴ This emphasis on language "choice" is problematic for at least two key reasons. First, bilingual people often involuntarily speak their native language, so it is not always an actual choice.

⁶⁶ *Id.*

⁶⁷ *Id.* § 1606.7(b).

⁶⁸ *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160 (10th Cir. 2007).

⁶⁹ *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

⁷⁰ 29 C.F.R. § 1606.7(c) (1980).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See, e.g., Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (rejecting the notion that an across-the-board English-only workplace rule presumptively establishes a *prima facie* case of disparate impact based on national origin discrimination).

⁷⁴ *Gonzalez v. Salvation Army*, 985 F.2d 578 (11th Cir. 1993); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987); *Gloor*, 618 F.2d 264.

Second, emphasis on the bilingual employee's choice of language obfuscates the employer's discrimination.

As noted above in the EEOC regulations, bilingual people often inadvertently speak in their native language. "[A]dhering to an English-only requirement is not simply a matter of preference for Hispanics, or other persons who are bilingual speakers, but . . . such restraints can be virtually impossible in many cases[,]” particularly when speaking with members of their own cultural group.⁷⁵ Many Title VII language discrimination cases arise after Latino employees were fired for briefly speaking to a fellow Latino Spanish-speaking coworker.⁷⁶ For instance, in the case of *Garcia v. Gloor*, Gloor Lumber Supply had an English-only rule prohibiting employees from speaking Spanish at work unless they were communicating with Spanish-speaking customers or on break.⁷⁷ Gloor Lumber Supply is located in Brownsville, Texas, and a majority of both their employees and customers are Spanish-speaking Latinos. Hector Garcia, a bilingual Mexican American salesperson, was fired when another Mexican American employee asked him a question concerning a product requested by a customer and Garcia responded in Spanish that the item was not available.⁷⁸

The United States Court of Appeals for the Fifth Circuit held that this enforcement of the employer's "speak-only-English" rule did not amount to national origin discrimination or otherwise violate Title VII because Mr. Garcia was bilingual and thus chose to speak Spanish on that occasion.⁷⁹ Like many bilingual employees, Mr. Garcia did not actively *choose* to violate a workplace rule. His Spanish response to a fellow Latino coworker's question was not an act of insubordination or even conscious choice at that moment; it was simply an involuntary slip of the tongue. The fact that bilingual speakers often inadvertently revert back to their native language when speaking with persons from their cultural group demonstrates how English-language requirements can be an unfair burden in employment, and also how deeply-rooted native language is in a person's communication and identity.

Focusing on bilingual speakers' "choice" of language obscures the

⁷⁵ EEOC v. Premier Operator Servs., Inc., 113 F. Supp. 2d 1066, 1070 (N.D. Tex. 2000) (discussing the testimony of expert witness, Dr. Susan Berk-Selingson).

⁷⁶ See, e.g., Saucedo v. Bros. Well Servs., Inc. 464 F. Supp. 919, 922 (S.D. Tex. 1979) (Mexican American discharged for saying two words in Spanish about where to place an item to his coworker); *Gloor*, 618 F.2d at 266 (Mexican American discharged for responding to a coworker's question in Spanish about whether an item requested by a customer was available).

⁷⁷ 618 F.2d 264 (5th Cir. 1980).

⁷⁸ *Id.* at 266.

⁷⁹ *Id.* at 271.

racism and xenophobia behind English-only rules. In the *Gloor* case, Mr. Garcia's Spanish reply to a Latino coworker did not harm the employer's business in any way. However, the employer's English-only policy and termination for violation of this policy was a significant harm to Mr. Garcia. As the EEOC has explained, one's native language is core to one's national origin.⁸⁰ Penalizing an employee for—or preventing an employee from—expressing this essential element of his or her national origin when there is no genuine business necessity is inherently discriminatory. It is a direct attack on the employee's national origin as well as race.

The discriminatory nature of English-only rules is striking when compared with discrimination on the basis of religion, which is also a protected characteristic under Title VII. Absent undue hardship on the employer, it would be unlawful for an employer to discharge a Sikh man who refused to remove his turban or a Catholic woman who refused to remove her crucifix necklace at work.⁸¹ Technically, a Sikh could choose to remove his turban and a Catholic could choose to remove her crucifix. However, the law recognizes that conditioning employment and its terms and conditions on such activity is discriminatory in itself.⁸² Although the employee theoretically could choose to forgo key aspects of expressing his or her religion, the employer's unnecessary requests would result in dignitary harm, and acquiescence would carry a heavy cost for the employee. Arbitrary English-language requirements are similar. Even if bilingual employees could abstain from speaking their native language, requiring them to do so absent business necessity amounts to a tremendous dignitary harm, as well as an attack on their national origin and possibly their racial background. However, the courts have too often treated English-language requirements as akin to general grooming and dress-code requirements without recognizing the connection between native language and national origin, ethnicity, and race.⁸³

⁸⁰ 29 C.F.R. § 1606.7 (1980).

⁸¹ See EEOC, *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, EEOC.GOV, http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm (last visited June 9, 2015); but see Dawinder S. Sidhu, *Out of Sight, Out of Legal Recourse: Interpreting and Revising Title VII to Prohibit Workplace Segregation Based on Religion*, 36 N.Y.U. REV. L. & SOC. CHANGE 103 (2012) (discussing how discriminatory employers have devised ways to get around Title VII's provisions).

⁸² 42 U.S.C. § 2000e-2 (2012).

⁸³ Mirandé, *supra* note 24, at 76; Roman Amaguin, *Garcia v. Spun Steak Company: Has the Judicial Door Been Shut on English-Only Plaintiffs?*, 16 U. HAW. L. REV. 351, 363 n.104 (1994) (noting how the *Garcia* court compared the

Prohibiting a bilingual employee from speaking her native language is demanding her to give up a key attribute of her protected national origin, and often racial, identity.⁸⁴ Firing an employee for speaking his native or cultural language, absent actual business necessity, is discrimination against that employee's national origin (and frequently race) even if the employee technically could choose to speak English. Like religion, language is, at least to some extent, a mutable characteristic. However, the fact that a protected trait can be changed should not determine whether legal protection is warranted. Rather, legal scrutiny should focus on the necessity of the employer's requirement that an employee change a protected characteristic, not on whether the protected characteristic could be changed.

Scholars have frequently written about English-only workplace rules and their impact on employees. An important yet largely overlooked point is the impact of English-only workplace policies on consumers. In addition to employees' interests, the effect of workplace rules on customers and the broader public should be considered. English-only workplace rules vary.⁸⁵ Some allow (and even encourage) Spanish-speaking employees to serve customers in Spanish,⁸⁶ while others prohibit bilingual employees from speaking Spanish to consumers even if it is the customers' primary or preferred language.⁸⁷ In fact, customer service jobs are the types of jobs most likely to have English-only workplace policies.⁸⁸ Thus, many consumers are affected by English-only rules.

The impact of English-only workplace rules on consumers is important for many reasons. First, English-only workplace rules can restrict the availability of goods and services to minorities. Second, examining the effect of such rules on customers reveals the discriminatory animus behind such rules. English-only rules are frequently instituted in restaurants and hotels.⁸⁹ When English-only rules are introduced and enforced in these and

employer's "English-only policy to grooming codes or length of hair").

⁸⁴ See Ruiz Cameron, *supra* note 27, at 1366 ("To suppress the speaking of Spanish is to suppress an essential, if not the essential, component of Latino identity.").

⁸⁵ See Kelley Holland, *When English Is the Rule at Work*, N.Y. TIMES, Jan. 27, 2008, available at http://www.nytimes.com/2008/01/27/jobs/27mgmt.html?_r=0.

⁸⁶ See, e.g., Long v. First Union Corp. of Va., 894 F. Supp. 933, 933 (E.D. Va. 1995) (upholding a policy that forbade employees from speaking Spanish except where a Spanish speaking customer required assistance); *Garcia*, 618 F.2d at 266.

⁸⁷ See, e.g., Holland, *supra* note 85.

⁸⁸ Rodríguez, *supra* note 57, at 1690.

⁸⁹ See, e.g., *id.* at 1736–37 (discussing the EEOC settlement with Melrose Hotel); Complaint, EEOC v. Melrose Hotel Co., No. 04 CV 7514 (S.D.N.Y. Sept. 23,

other places of public accommodation, Title II may also be implicated. Accordingly, in evaluating the impact of English-only workplace policies on consumers, it is appropriate to examine Title II's potential to protect consumers who are subject to language discrimination. Like English-only requirements in schools (discussed below), English-only demands in restaurants have seen a revival in recent decades.⁹⁰

B. LANGUAGE DISCRIMINATION IN PUBLIC ACCOMMODATIONS

Title II of the Civil Rights Act of 1964 provides, "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."⁹¹ Establishments that qualify as places of public accommodation within the meaning of Title II include hotels, restaurants, lunch counters, gas stations, and places of public entertainment such as theatres, concert halls, and sports stadiums.⁹²

Title II was prompted by the refusal of private business owners to serve African Americans in the South and the protests against this discrimination. Pushing for equal access to public accommodations and responding to demonstrations at lunch counters in the South, President John F. Kennedy gave a speech to Congress in support of the Civil Rights Act,

2004); *EEOC v. Melrose Hotel Co.*, No. 04 CV 7514 (S.D.N.Y. Sept. 23, 2004) (consent decree prohibiting the defendant from enforcing its English-only policy); *EEOC v. Brown Derby Rest.*, No. 92-2940, at 3-4 (C.D. Cal. Dec. 23, 1992) (consent decree prohibiting the defendant from enforcing its English-only policy).

⁹⁰ See Steven W. Bender, *Silencing Cultures and Culturing Silence: A Comparative Experience of Centrifugal Forces in the Ethnic Studies Curriculum*, 33 U. MICH. J. L. REFORM 329, 330 n.25 (2000) (citing Steven W. Bender, *Direct Democracy and Distrust: The Relationship between Language Law Rhetoric and the Language Vigilantism Experience*, 2 HARV. LATINO L. REV. 145, 170-72 (1997) (discussing civil rights litigation seeking redress from enforcement of English-only policies by restaurants and taverns against Spanish-speaking patrons)); DiChiara, *supra* note 54, at 130 ("[W]hen Florida's English-only bill was enacted, shopkeepers and restaurant owners denied services to non-English-speaking patrons simply because of their language.") (citing Robert Robison, *English-Only Policy Would Hinder, Not Help, Assimilation*, COLUMBUS DISPATCH, Nov. 16, 1995, at 15A)).

⁹¹ 42 U.S.C. § 2000a(a) (2012).

⁹² *Id.* § 2000a(b).

stating, “Surely, in 1963, [one hundred] years after Emancipation, it should not be necessary for any American citizen to demonstrate in the streets for the opportunity to stop at a hotel, or to eat at a lunch counter in the very department store in which he is shopping, or to enter a motion picture house, on the same terms as any other customer.”⁹³ The legislative history of Title II reveals that the fundamental object of Title II was to vindicate “the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.”⁹⁴

During the age of Jim Crow, in the Southwest, racial discrimination in and exclusion from places of public accommodation were common for Mexican Americans. Restaurant owners hung signs outside their establishments proclaiming “[N]o Mexicans or dogs allowed.”⁹⁵ Mexican Americans were excluded from restaurants, could only sit in racially segregated balcony seats in movie theaters, and were only allowed to swim in public pools on “Mexican Day”—the day before the pool was drained and cleaned and made suitable for white patrons.⁹⁶ In recent years, there seems to be a resurgence of excluding racial minorities, particularly Latinos, from places of public accommodation.⁹⁷ However, in these colorblind times, signs proclaim “English only” instead of “No Mexicans.” The term “English only” has become racialized code. Despite the different wording, the result and underlying aim is basically the same: Latinos are refused entry on the basis of their race and national origin or, at a minimum, are made to feel unwelcome. Even if Latino patrons can speak English and will be served, they are being asked to abandon or distance themselves from a core attribute of their cultural, national origin, and racial groups. Even when this does not amount to an actual inconvenience, it can still be an indignity.

Examining English-only requirements in places of public accommodation demonstrates how such rules are not race-neutral. English-only rules do not merely have a disparate impact on Latinos and other racial

⁹³ S. REP. NO. 88-872, at 8–9 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2362.

⁹⁴ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).

⁹⁵ Castañeda, *supra* note 13, at 234.

⁹⁶ STEVEN W. BENDER, *GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION* 144–45 (2003); Ariela J. Gross, “*The Caucasian Cloak*”: *Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 *GEO. L.J.* 337, 382 (2007).

⁹⁷ Keith Aoki et al., *(In)visible Cities: Three Local Government Models and Immigration Regulation*, 10 *OR. REV. INT’L L.* 453, 521 (2008) (“Recently, activists sought prohibitions on the use of non-English languages for restaurant patrons and urged private employers to impose English-only rules on their employees.”).

and national origin minorities; rather, there is also often discriminatory intent behind these rules. Modern racism has abandoned the racial epithets of old and now uses racial and racist code words.⁹⁸ One example is the English-only ordering policy at Philadelphia's famous cheesesteak restaurant, Geno's Steaks. In 2006, the owner placed a sign stating, "This is America: When Ordering Speak English."⁹⁹ The owner of the establishment stated that he posted the sign in response to the debate on immigration reform and the number of people in the area who are unable to order in English.¹⁰⁰ This statement is revealing because, when he made it, the historically Italian community where this restaurant is located had seen an increase of immigrants from Latin America.¹⁰¹ Additionally, "immigration" and "immigrant" are racially coded words synonymous with Latinos.¹⁰² The owner also placed a sign stating, "I am Mad as Hell! I want My Country Back!"¹⁰³ The idea that white Americans want "their country back" is commonly a response to the presence of Latinos, both native born and immigrant.¹⁰⁴

However, current colorblind formalistic jurisprudence ignores these indicators of racial animus. Despite the racist and xenophobic motivation behind Geno's Steaks' English-only sign, the Philadelphia Commission on Human Relations found the sign was not discriminatory because it "did not convey a message that service would be refused to non-English speakers."¹⁰⁵

⁹⁸ See generally IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS* (2014).

⁹⁹ Michelle García, *Wit Cheese, Not Con Queso*, WASH. POST, June 18, 2006, at A2.

¹⁰⁰ *Philadelphia's Geno's Steaks Adopts English-Only Ordering Policy*, FOX NEWS (June 8, 2006), available at <http://www.foxnews.com/story/2006/06/08/philadelphia-geno-steaks-adopts-english-only-ordering-policy/>.

¹⁰¹ *Id.*

¹⁰² Leila Higgins, *Immigration and the Vulnerable Worker: We Built this Country on Cheap Labor*, 3 AM. U. LAB. & EMP. L.F. 522, 526 (2013); Mary Romero, *Are Your Papers in Order?: Racial Profiling, Vigilantes, and "America's Toughest Sheriff"*, 14 HARV. LATINO L. REV. 337, 350 (2011); see generally LÓPEZ, *supra* note 98.

¹⁰³ *Geno's Joey Vento Dead at 71*, PHILLYMAG.COM (Aug. 24, 2011, 1:18 A.M.) <http://www.phillymag.com/foobooz/2011/08/24/genos-joey-vento-dead-at-71/>.

¹⁰⁴ DeWayne Wickham, *In Ethnic Pandering, Obama Can't Top Reagan*, USA TODAY, June 19, 2012, at 7A.

¹⁰⁵ Andrew Maykuth, *Ruling: "Speak English" Sign at Cheesesteak Shop Not Discriminatory*, PHILLY.COM (Mar. 20, 2008), <http://articles.philly.com/2008-03->

In response, the restaurant owner thanked the Commissioner for “making him a hero.”¹⁰⁶ Although the owner has since died, the sign remains posted to honor his “dying wish” that it be preserved.¹⁰⁷

Similarly, in 2011, the Reedy Creek Family Diner in Greensboro, North Carolina displayed a sign stating: “No Speak English. No Service.”¹⁰⁸ Another line of the sign read, “We only speak and understand American.”¹⁰⁹ The owner says he placed the sign in response to “several Latino customers that came in and weren’t able to speak or read English.”¹¹⁰ He reported it was frustrating for him and the customers, and although he did not know enough Spanish to assist them with their order, he did know enough to understand he was being cursed at and put down.¹¹¹ After placing the sign outside his business, he reported that he received an outpouring of positive feedback.¹¹² He stated that he received supportive telephone calls from people in every state and eight foreign countries, was interviewed by politically conservative talk show hosts Rush Limbaugh and Glenn Beck, and, perhaps most importantly, tripled his business.¹¹³ The signs were so popular that he claims he printed 1,700 copies and gave away all but one.¹¹⁴

Pro English, a group who advocates for “Official English” and English-only reform, contacted the owner of Reedy Creek Family Diner offering to represent him in any legal proceedings that might result from the English-only policy.¹¹⁵ Although legal action challenging such language requirements has not been brought, Title II could be an effective tool to address this type of language discrimination. Title II allows private actions

20/news/24989499_1_english-sign-geno-s-steaks-philadelphia-commission.

¹⁰⁶ *Id.*

¹⁰⁷ Victor Fiorillo, *Joey Vento’s Dying Wish: Keep “Speak English” Sign at Geno’s*, PHILLYMAG.COM (Aug. 30, 2013, 12:07 PM), <http://www.phillymag.com/foobooz/2013/08/30/joey-ventos-dying-wish-keep-the-speak-english-sign-at-genos/>.

¹⁰⁸ David Bodenheimer, *‘English Only’ Sign Back Up to Stay at Diner, Owner Says*, THE DISPATCH, <http://www.the-dispatch.com/article/20110519/NEWS/305199978> (last modified, May 19, 2011, 2:30 P.M.); *see also* Fox News Insider, *“English Only” Sign Triples Diner’s Business*, YOUTUBE (May 23, 2011) <https://www.youtube.com/watch?v=OPB-7XesVrg>.

¹⁰⁹ Bodenheimer, *supra* note 108, at 1.

¹¹⁰ Fox News Insider, *supra* note 108.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

for injunctive relief,¹¹⁶ and prevailing parties are generally entitled attorney fees.¹¹⁷

1. The Negative Impact of English-Only Rules on Consumers

Whether the English-only requirements directly target patrons or indirectly affect customers when employees are prohibited from speaking non-English languages to customers, they negatively impact consumers and reveal the discriminatory animus behind such requirements. English-only requirements serve to exclude national origin and racial minorities, especially Latinos. This discriminatory exclusion produces both tangible and intangible injuries. Tangibly, these minorities are deprived of goods and services available to others. They also suffer intangible injuries, such as the dignitary harm that results when a business chooses to prohibit—or at least strongly discourage—people from their cultural, national origin, and racial group from being served by the establishment. These types of deprivations are matters about which the Civil Rights Act of 1964 is centrally concerned.

The effects of English-only workplace rules—restricting the availability of goods and services and denying dignity to employees and customers who speak other languages—reveal the discriminatory animus underlying them. English-only rules “appear most often in the consumer services sector[.]”¹¹⁸ Most EEOC complaints deal with the prohibition of Spanish language, and many of the workplaces at issue in these cases are located in areas with a significant Spanish-speaking Latino community.¹¹⁹ Rules prohibiting employees from speaking Spanish in consumer services result in decreased services for Spanish-speaking Latino customers.¹²⁰ Although Latino employees are directly constrained by English-only rules, in many circumstances it may be the customers who are also indirectly targeted. As mentioned above, in some instances, Latino employees are prohibited from speaking Spanish with Spanish-speaking customers, even when those

¹¹⁶ Civil Rights Act of 1964, §§ 204(a), 206, 42 U.S.C. §§ 2000a-3(a), 2000a-5 (2012).

¹¹⁷ Reasonable attorney’s fees are available to prevailing Title II plaintiffs under § 204(b) of the Civil Rights Act of 1964, within the discretion of the court. 42 U.S.C. § 2000a-3(b) (2012).

¹¹⁸ Rodríguez, *supra* note 57, at 1690.

¹¹⁹ *Id.* at 1700.

¹²⁰ See DiChiara, *supra* note 54, at 125 (explaining how “English-only” rules lead to miscommunication by preventing non-native English speakers from communicating with the United States government).

customers are monolingual.¹²¹ Moreover, as discussed above, some businesses may limit their customer pool even further by requiring that customers speak only English in order to receive service.

There seem to be two primary reasons a business would choose to limit its customer pool by excluding national origin and racial minorities, and both indicate discriminatory impetus. The business either wants to profit from discrimination by appealing to intolerant customers, or it prefers discrimination over making a profit. The first is a reason business owners frequently expressed after the enactment of the Civil Rights Act of 1964, when establishments that excluded African Americans claimed that serving black people was economically detrimental to their businesses.¹²² This “while I don’t mind black people, my customers do” attitude is itself discriminatory because the business owner is supporting and propagating societal prejudice. Conformity to discriminatory customer preference is not a legally permissible basis upon which to discriminate against employees or customers.¹²³

If excluding minorities is not lucrative, then discriminatory intent may be indicated by the business’s failure to act rationally. Ambitious businesses would likely seek Spanish-speaking employees to cater to a Spanish-speaking clientele to be locally competitive, or utilize bilingual signs, or at a minimum simply refrain from taking steps to actively discourage speakers of languages other than English from spending money at their establishment. A rational business person would be eager to have employees who speak Spanish or try to otherwise accommodate LEP customers to maximize profits, especially if it came at no additional investment. Conversely, discriminatory businesses intentionally seek to limit their service to this group of customers. Discriminatory intent should be inferred from the failure to act like a rational economic actor.

¹²¹ See, e.g., Holland, *supra* note 85.

¹²² See, e.g., Katzenbach v. McClung, 379 U.S. 294 (1964) (rejecting a restaurant’s argument that it would lose a substantial amount of business if it were required to serve African Americans); Williams v. Connell, 9 Race Rel. L. Rep. 1427 (D.C. Fla. 1964) (arguing that African Americans could not be served in the restaurant because that would be detrimental to its business).

¹²³ See, e.g., Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276–77 (9th Cir. 1981) (holding that an employer cannot refuse to hire women solely on customer preference to conduct business with men); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971); Wilson v. Sw. Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981).

C. TITLE VI: PUBLIC PROGRAMS RECEIVING FEDERAL FUNDING

Title VI of the Civil Rights Act of 1964 and its corresponding regulations provide protection against language discrimination and require in many instances that LEP individuals be provided language interpretation in order to meaningfully participate in public programs and activities. Title VI provides that, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹²⁴ Despite the lack of specific textual reference or mention of language in its legislative history, similar to the interpretation of Title VII, language discrimination has been recognized as a form of national origin and race discrimination under Title VI.¹²⁵ The most famous instance is the United States Supreme Court case *Lau v. Nichols*.¹²⁶ In *Lau*, LEP children of Chinese ancestry claimed that San Francisco public schools failed to provide them with English as a Second Language (ESL) instruction in violation of Title VI and the Equal Protection Clause of the Fourteenth Amendment.¹²⁷ The Court found that the failure to provide ESL instruction to these students prevented their access to a meaningful education.¹²⁸ The Court concluded that the Chinese-speaking LEP students had been denied a federally funded educational benefit on the basis of their national origin or race in violation of Title VI.¹²⁹ Having decided the case on statutory grounds, the Court declined to reach the Equal Protection claim.¹³⁰

On August 11, 2000, President William J. Clinton issued Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency.”¹³¹ Executive Order 13166 requires federal agencies to examine the services they provide, identify the need for these services to LEP persons, and develop an approach so that LEP persons have meaningful access to these services.¹³² The Order also requires that federal agencies make efforts to ensure that recipients of federal financial assistance also provide meaningful access to their services.¹³³ Specifically, federal agencies are required to: (1) develop a plan that provides LEP individuals meaningful access to the agency’s programs and/or services; (2) issue agency-specific

¹²⁴ 42 U.S.C. § 2000d (2012).

¹²⁵ *Lau v. Nichols*, 414 U.S. 563 (1974).

¹²⁶ *See id.*

¹²⁷ *See id.* at 564.

¹²⁸ *Id.* at 566.

¹²⁹ *Id.* at 566–69.

¹³⁰ *Id.* at 566.

¹³¹ Exec. Order No. 13166, 65 Fed. Reg. 50121 (Aug. 11, 2000).

¹³² *Id.*

¹³³ *Id.*

guidance to bring the agency's programs/recipients of federal funds into compliance with Title VI, if the agency has not already done so; and (3) ensure that LEP individuals have input throughout the process.¹³⁴ Both Title VI protection against language discrimination and the requirement that language interpretation be provided to LEP individuals have been applied to ensure access to the courts.

1. Language Discrimination in the Courts: Access & Jury Service

In response to Executive Order 13166, the Department of Justice (DOJ) issued its own LEP Guidance regulations.¹³⁵ The DOJ's LEP regulations were designed to direct funding recipients "to ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of Title VI of the Civil Rights Act of 1964."¹³⁶ Executive Order 13166 and the DOJ's LEP Guidance have been applied in the court context and confirm that most courts are required to provide language services to LEP persons who participate in the courts.¹³⁷

Relying in part on *Lau v. Nichols*,¹³⁸ the DOJ's LEP Guidance reiterates that "failure to ensure that LEP persons can effectively participate in or benefit from Federally assisted programs and activities may violate the [national origin] prohibition under Title VI of the Civil Rights Act of 1964 . . . and the Title VI regulations against national origin discrimination."¹³⁹ Recipients of federal funding must consider four factors when determining what language assistance is necessary to provide meaningful access to its programs:

- (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee;
- (2) the frequency with which LEP individuals come in contact

¹³⁴ *Id.*

¹³⁵ 67 Fed. Reg. 41455, 41459 (June 18, 2002).

¹³⁶ Exec. Order No. 13166, 65 Fed. Reg. 50121 (Aug. 11, 2000).

¹³⁷ 67 Fed. Reg. 41455, 41459 (specifying that courts are covered entities); LAURA K. ABEL, BRENNAN CTR. FOR JUSTICE, LANGUAGE ACCESS IN STATE COURTS (2009) [hereinafter BRENNAN CTR. REPORT], available at <http://www.brennancenter.org/publication/language-access-state-courts>.

¹³⁸ 414 U.S. 563 (1974).

¹³⁹ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, 41457 (June 18, 2002).

with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs.¹⁴⁰

After weighing these factors, recipients of federal funding must determine the extent of language assistance they should provide. However, the LEP Guidance specifies that this flexibility "does not diminish, and should not be used to minimize" the agency's obligations under Title VI.¹⁴¹ Thus, if certain programs are "more important . . . and/or have greater impact on or contact with LEP persons," more language assistance will be required.¹⁴²

Applied to the courts, this four-factor test requires, among other things, that recipient courts ensure that LEP litigants and witnesses receive language assistance.¹⁴³

At a minimum, every effort should be taken to ensure competent interpretation for LEP individuals during all hearings, trials, and motions during which the LEP individual must and/or may be present. When a recipient court appoints an attorney to represent an LEP defendant, the court should ensure that either the attorney is proficient in the LEP person's language or that a competent interpreter is provided during consultations between the attorney and the LEP person.¹⁴⁴

The DOJ LEP regulations mention how some courts have adopted certification procedures for court interpreters and instruct courts to consider carefully the qualifications of court interpreters who are not certified.¹⁴⁵ These regulations also specify that informal interpreters, such as family members, are inappropriate.¹⁴⁶

The issue of providing language accommodation to enhance court participation among LEP beneficiaries and participants has focused primarily on litigants.¹⁴⁷ But the exclusion of LEP citizens from jury service, and the

¹⁴⁰ *Id.* at 41459.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 41471.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Gonzales Rose, *supra* note 29, at 862.

attendant denial of juror language accommodation (interpretation for jurors), is also an underexplored language-rights issue with significant racial and national origin implications. Elsewhere, I have argued that English-language juror requirements and the failure to provide juror language accommodation violates the Fair Cross-Section requirement of the Sixth Amendment and raises serious Equal Protection concerns.¹⁴⁸ Here, I explore how the failure to allow LEP jurors to serve with juror language accommodation may violate Title VI.

Many people simply assume that LEP individuals are not competent to serve on a jury because of their lack of English-language skills. However, this ignores the possibility of allowing a juror to serve with the assistance of language interpreters. Juror language accommodation is not a new idea. It has an extensive, centuries-old history in the United States and Anglo-American legal systems.¹⁴⁹ Further, juror language accommodation has long been employed in the state courts of New Mexico¹⁵⁰ and is currently provided in most courts for hard of hearing, deaf, and blind jurors.¹⁵¹

All federal courts¹⁵² and most state courts¹⁵³ require English-language

¹⁴⁸ *Id.* at 831, 848; Jasmine B. Gonzales Rose, *The Exclusion of Non-English-Speaking Jurors: Remediating a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico*, 46 HARV. C.R.-C.L. L. REV. 497 (2011).

¹⁴⁹ Hiroshi Fukari & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury De Medietate Linguae*, 4 VA. J. SOC. POL'Y & L. 645, 654–56 (1997) (“At various times between 1674 and 1911, a number of states—including Kentucky, Maryland, Massachusetts, Pennsylvania, New York, Virginia, and South Carolina—each provided for juries *de medietate linguae*.”); see Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 790 (1994).

¹⁵⁰ N.M. CONST. art. VII, § 3 (providing, “The right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write the English or Spanish languages”); *State v. Samora*, 307 P.3d 328, 330–31 (N.M. 2013) (holding that the district court’s excusal of a LEP Spanish-speaking prospective juror violated the juror’s state constitutional rights to serve on a jury).

¹⁵¹ Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2012).

¹⁵² Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861, 1865(b)(2) (2012) (providing that a person is not qualified for jury service if she does not speak English or “is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form”).

¹⁵³ See Gonzales Rose, *supra* note 29, 817–822 (providing an overview of state court English-language juror requirements.).

proficiency as a prerequisite to serve on juries. Although the focus of Title VI analysis has been on litigants, jurors are also participants within the meaning of Title VI of the Civil Rights Act of 1964. As such, the exclusion of LEP jurors on the basis of their English-language ability could run afoul of Title VI. If otherwise eligible, LEP citizens could be made competent to serve on juries with language accommodation. Thus, in communities with significant numbers of LEP citizens, denying LEP citizens juror language accommodation could amount to unlawful discrimination on the basis of national origin or race under Title VI.

While no notable Title VI litigation has occurred on the issue, it seems clear that jurors should be considered participants in court programs pursuant to Title VI. Under similarly worded statutes like the Rehabilitation Act of 1973 (RHA) and Americans with Disabilities Act of 1990 (ADA), jurors have been deemed “participants” in court proceedings.¹⁵⁴ When initially looking to draft a piece of civil rights legislation for persons with disabilities, Congress turned to Title VI of the Civil Rights Act to craft § 504 of the RHA, the precursor to the ADA.¹⁵⁵ While Title VI provides that no person shall on the basis “of race, color or national origin, *be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance,*”¹⁵⁶ the RHA with the same wording provides that no qualified individual with a disability shall “*be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*”¹⁵⁷

In cases interpreting this RHA provision, once it is decided that jury service is a federally funded program, it is then accepted that persons with disabilities serving as jurors must not be denied that participation. For example, in *Galloway v. Superior Court*, the United States District Court for the District of Columbia interpreted the RHA’s language to conclude that it was “readily apparent” that the jury system fell within the purview of the statute such that Mr. Galloway, a blind man who previously had been dismissed categorically due to his blindness, must be allowed participation so long as he was “otherwise qualified.”¹⁵⁸ Similarly, although not as explicitly, in *People v. Caldwell*, the Criminal Court in the City of New York

¹⁵⁴ *Galloway v. Superior Court*, 816 F. Supp. 12 (D.D.C. 1993).

¹⁵⁵ RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF AMERICANS WITH DISABILITIES ACT* (2005).

¹⁵⁶ 42 U.S.C. § 2000d (2012) (emphasis added).

¹⁵⁷ 29 U.S.C. § 794(a) (2012) (emphasis added).

¹⁵⁸ *Galloway*, 816 F. Supp. at 15.

concluded that because summarily dismissing persons with disabilities from the jury selection process violated the ADA, jury service must be a “program” contemplated under the statute in which persons with disabilities were entitled to participate.¹⁵⁹ This presupposes that jurors are participants in the court program.

When a program participant is excluded from a federally funded program on the basis of being LEP, the DOJ has set forth four factors that should be considered to determine whether language assistance is required. The first two factors are the “number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee” and “the frequency with which LEP individuals come in contact with the program[.]”¹⁶⁰ In many areas of the country, there are significant numbers of LEP persons, especially Spanish-speaking Latinos. Nationally, English-language requirements result in the juror disenfranchisement of almost 13 million United States citizens.¹⁶¹ Some communities, particularly those in urban areas or located near the southern border, have notably high populations of LEP residents.¹⁶² These populations tend to be geographically concentrated. Half of LEP persons reside in three states: New York, Texas, and California.¹⁶³ In California and Texas there are several cities where LEP persons comprise over a quarter of the population. For instance, in Texas, 56 percent of Laredo’s residents are LEP, in El Paso it is 33 percent, and in McAllen it is 32 percent.¹⁶⁴ In California, 31 percent of the residents of Salinas are LEP, 29 percent in El Centro, and 25 percent in greater Los Angeles.¹⁶⁵ There are many other jurisdictions throughout the United States, including Puerto Rico, where LEP citizens make up a significant portion of the community.¹⁶⁶ As different regions have varying concentrations of LEP persons, the need for juror language accommodation must be evaluated

¹⁵⁹ 603 N.Y.S. 2d 713, 715 (N.Y. Crim. Ct.1993), *aff’d*, 661 N.Y.S. 2d 436 (N.Y. App. Term 1997).

¹⁶⁰ 67 Fed. Reg. 41455, 41459 (June 18, 2002).

¹⁶¹ *See* Gonzales Rose, *supra* note 29, at 814 (showing that the number of LEP persons, irrespective of citizenship, is about twice as much).

¹⁶² Jean Batalova & Monica Whatley, *Limited English Proficient Population of the United States*, MIGRATION POLICY INSTITUTE (July 25, 2013), <http://www.migrationpolicy.org/article/limited-english-proficient-population-united-states#6>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ In Puerto Rico, approximately 90 percent of the age-eligible population is excluded from federal jury service due to the federal English-language juror requirement. Gonzales Rose, *supra* note 148, at 528–29.

specifically in each court's jurisdiction. Since the majority of LEP persons are Spanish-speaking,¹⁶⁷ Spanish-language interpretation services are particularly needed.

The third factor presented by the DOJ to determine whether language interpretation should be provided is "the nature and importance of the program, activity, or service provided by the program" to people's lives.¹⁶⁸ Serving on a jury is an important responsibility of citizenship. When a person is excluded from this central function of democracy on the basis of their English-language ability, they are lumped together with the other groups of persons ineligible to serve: former felons, "infants,"¹⁶⁹ non-citizens, and those deemed to have poor moral character.¹⁷⁰ This results in tremendous dignitary harm as well as second-class status for LEP citizens.

English-language juror requirements also negatively impact criminal defendants. An estimated 11.3 million of the United States citizens precluded from jury service on the basis of English-language ability are people of color.¹⁷¹ In certain communities, English-language requirements can result in jury pools that are not racially representative of the community.¹⁷² Juries that are not representative of the community can have serious consequences for criminal defendants, who are often disproportionately people of color.¹⁷³ These criminal defendants may be denied a "jury of their peers" or their fundamental Sixth Amendment right to a jury selected from a "fair cross-section of the community."¹⁷⁴ The purposes of having juries selected from a fair cross-section of the community are to:

- (1) "guard against the exercise of arbitrary power" ensuring that the "commonsense judgment of the community" will act as "a hedge against the overzealous or mistaken prosecutor,"

¹⁶⁷ Jeanne Batalova et al., *Limited English Proficient Individuals in the United States: Number, Share, Growth, and Linguistic Diversity*, MIGRATION POLICY INSTITUTE, LEP DATA BRIEF, Dec. 2011, 6.

¹⁶⁸ 67 Fed. Reg. 41455, 41459 (June 18, 2002).

¹⁶⁹ Defined here as persons who have not reached the age of majority. See BLACK'S LAW DICTIONARY 793 (8th ed. 2004).

¹⁷⁰ See 28 U.S.C. § 1865 (2012).

¹⁷¹ Gonzales Rose, *supra* note 29, at 814.

¹⁷² *Id.* at 816.

¹⁷³ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 16 (2010).

¹⁷⁴ Gonzales Rose, *supra* note 29, at 848–56 (discussing how the exclusion of LEP jurors denies Latino criminal defendants the right to a "jury of their peers" or, more specifically, a jury selected from a "fair cross section of the community").

(2) preserving “public confidence in the fairness of the criminal justice system,” and (3) implementing our belief that “sharing in the administration of justice is a phase of civic responsibility.”¹⁷⁵

Looking to this last purpose of having a representative jury pool, it is important to emphasize that when juries are not representative of the community, this can undercut the actual and perceived legitimacy and fairness of the courts and legal system.¹⁷⁶ The majority of Americans believe that jury decisions reached by racially diverse juries are fairer than decisions reached by non-diverse juries.¹⁷⁷ This belief is well-founded, as studies have revealed that racially homogenous white juries generally do not spend as much time deliberating, are less likely to consider diverse perspectives, and are more likely to commit errors or exhibit racism than racially diverse juries.¹⁷⁸ By contrast, racially diverse juries lessen racist manifestations, consider more varied perspectives, deliberate more thoroughly, and ultimately commit fewer errors.¹⁷⁹

The fourth and final factor in determining whether language assistance is warranted is the resources available to the federal funding recipient (here the courts) and costs.¹⁸⁰ The main resistance to providing interpretation to litigants and jurors are concerns about cost and accuracy.¹⁸¹ These two concerns are closely related. Accuracy of interpretation can only be guaranteed if the interpreters are highly trained and certified. However, certified interpreters are in limited supply and require considerable financial

¹⁷⁵ See *Lockhart v. McCree*, 476 U.S. 162, 174 (1986) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530–31 (1970)).

¹⁷⁶ Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 77 (1993).

¹⁷⁷ HIROSHI FUKURAI & RICHARD KOOTH, RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION 128 (2003).

¹⁷⁸ See BRUCE EVAN BLAINE, UNDERSTANDING THE PSYCHOLOGY OF DIVERSITY 101–04 (2d ed. 2013) (summarizing racial bias in jury deliberations and verdicts when juries are not sufficiently diverse); EDITH GREENE ET AL., WRIGHTSMAN’S PSYCHOLOGY AND THE LEGAL SYSTEM, *Jury Trials I: Jury Representativeness and Selection* 305 (6th ed. 2007); Neil Vidmar, *The North Carolina Racial Justice Act: An Essay on Substantive and Procedural Fairness in Death Penalty Litigation*, 97 IOWA L. REV. 1969, 1980 (2012).

¹⁷⁹ See GREENE, *supra* note 178, at 305.

¹⁸⁰ 67 Fed. Reg. 41455, 41459 (June 18, 2002).

¹⁸¹ Gonzales Rose, *supra* note 29, at 859.

investment.¹⁸² It is significant, however, that the limited supply of certified interpreters is itself a result of language discrimination. The majority of LEP persons are Spanish speakers.¹⁸³ Thus, Spanish-language interpreters are in the greatest demand. If bilingual education was embraced rather than “No-Spanish” and English-only policies in schools, there would be a larger pool of educated bilingual English-Spanish Americans, as well as speakers of other languages, who could train to become certified court interpreters. Any challenges to securing certified court interpreters should be scrutinized with the understanding that the shortage or cost obstacles (since presumably costs would be lower if there were a larger supply) have actually been brought about by discriminatory language policies.

Concerns about the accuracy and possible intrusive effect of juror language accommodation are valid but not insurmountable. There is a need to have qualified and certified interpreters such as the ones employed in the New Mexico state courts,¹⁸⁴ and there is much that can be learned from the New Mexico interpretation system. Studies of LEP jurors in New Mexico state courts conducted by Lysette Chavez and Markus Kemmelmeier of the University of Nevada-Reno Department of Social Psychology have shown that not only is juror language accommodation possible, it is actually preferable.¹⁸⁵ Archival research and mock jury studies demonstrate that LEP jurors and interpreters do not compromise deliberation outcomes.¹⁸⁶ Further, additional studies have shown that jurors who served alongside LEP jurors receiving juror accommodation actually viewed future jury service more positively than those jurors who had not served with a LEP juror.¹⁸⁷

The Civil Rights Act of 1964 was centrally concerned about race and national origin discrimination in key functions of democratic involvement.¹⁸⁸ The Act took a bold stance against discrimination that excluded people on the basis of their race and relegated them to second-class citizenship. Judicial and administrative agency interpretation of Title VI has taken a realist approach to recognizing that language discrimination can be a form of national origin or race discrimination. In the last quarter century, efforts have been made to

¹⁸² *Id.* at 862.

¹⁸³ Jeanne Batalova et al., *Limited English Proficient Individuals in the United States: Number, Share, Growth, and Linguistic Diversity*, MIGRATION POLICY INSTITUTE, LEP DATA BRIEF, Dec. 2011, 6.

¹⁸⁴ See generally Edward L. Chávez, *New Mexico's Success with Non-English Speaking Jurors*, 1 J. CT. INNOVATION 303 (2008).

¹⁸⁵ Gonzales Rose, *supra* note 29, at 863.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ ALEXANDER, *supra* note 173, at 38.

increase interpretation services for LEP litigants in the courts, and it has been recognized that the failure to do so could amount to a Title VI violation.¹⁸⁹ However, Title VI has not been sufficiently utilized to challenge juror language exclusion. English-language juror requirements are generally viewed as race and national origin neutral. But these requirements are not race and national origin neutral because they do not take into account how juror language accommodation can make Latino and other minority LEP citizens eligible to serve.

This is not the only manner in which these language requirements are viewed in isolation. Too often policy makers and jurists do not look at the systemic nature of juror language discrimination. Excluding citizens from jury service on the basis of LEP removes people of color from the jury pool and can result in unrepresentative juries. The perceived shortage of court interpreters is a result, at least in part, of English-only school policies and a lack of bilingual education. Further, the notion that a LEP person could fully participate on a jury if they learned English is a fallacy since bilingual jurors can be struck from jury service merely on the basis of their bilingual ability.¹⁹⁰

Too quickly the courts and society discount LEP citizens' ability to serve with the assistance of interpreters. Centuries of historical practice of juror language accommodation as well as the experience of New Mexico state courts are ignored.¹⁹¹ Refusal to provide language accommodation to LEP jurors may violate Title VI in jurisdictions with significant numbers of LEP persons. Title VI should be employed to remedy this inequality and to reveal the discriminatory nature behind seemingly race-neutral English-language requirements.

2. Language Discrimination in Education

As the United States Supreme Court decision in *Lau v. Nichols* demonstrated, language discrimination in public schools can violate the national origin and race provisions of Title VI.¹⁹² Any school, public or private, that receives federal funds falls under the purview of Title VI.¹⁹³

¹⁸⁹ See Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, 41459 (June 18, 2002).

¹⁹⁰ *Hernandez v. New York*, 500 U.S. 352, 371 (1991) (plurality opinion).

¹⁹¹ See generally *Chávez*, *supra* note 184.

¹⁹² *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

¹⁹³ See 42 U.S.C. § 2000d (2012).

There is a long history of language discrimination in schools in the United States.¹⁹⁴ Some states banned the teaching of foreign languages, and teachers who taught in foreign languages faced possible prosecution.¹⁹⁵ However, these linguistic hostilities against German and Japanese were short lived.¹⁹⁶ The targeting of both the Spanish language and Latino Spanish-speakers has persisted over the years and experienced a revival in the past several decades as hostility against Latino immigrants has heightened.¹⁹⁷

There is a long history of public schools in the Southwest imposing “No-Spanish” rules on Latino students.¹⁹⁸ Such rules were particularly prevalent in the 1950s and 1960s, increasing when Mexican American children were allowed to integrate into previously racially segregated schools.¹⁹⁹ Punishment for violating English-only school rules has varied in severity from humiliation, “Spanish detention,” or corporal punishment, to suspension or expulsion.²⁰⁰ Punishment for speaking Spanish was often designed to humiliate and imply that the Spanish language and those who speak it lack intelligence.²⁰¹ Labor leader César Chávez long remembered and recounted instances where, in elementary school, he was placed with a dunce cap and a sign that said, “I am a clown, I speak Spanish.”²⁰² Children were sometimes asked to write, “I will not speak Spanish on school grounds” hundreds of times on the blackboard,²⁰³ or were simply beaten for speaking a “dirty language.”²⁰⁴ The embarrassment of this punishment was undoubtedly amplified when a student had to explain to her parents that she

¹⁹⁴ VALENCIA ET AL., *supra* note 13, at 81–82.

¹⁹⁵ *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Farrington v. Tokushige, 273 U.S. 284 (1927).

¹⁹⁶ VALENCIA ET AL., *supra* note 13, at 82.

¹⁹⁷ *Id.* at 85–86.

¹⁹⁸ DENNIS BARON, THE ENGLISH-ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS 166 (1990).

¹⁹⁹ *Buscando América*, *supra* note 7, at 1443–45.

²⁰⁰ *Id.* at 1443; Mirandé, *supra* note 24, at 102–3; BARON, *supra* note 198, at 166.

²⁰¹ *See Buscando América*, *supra* note 7, at 1444–45.

²⁰² RICHARD GRISWOLD DEL CASTILLO & RICHARD A. GARCIA, CESAR CHAVEZ: A TRIUMPH OF SPIRIT 13 (1997).

²⁰³ *See* Lupe Salinas, *Arizona’s Desire to Eliminate Ethnic Studies Programs: A Time to Take the “Pill” and to Engage Latino Students in Critical Education About Their History*, 14 HARV. LATINO L. REV. 301, 315, n.105 (2011) (citing THOMAS P. CARTER, MEXICAN AMERICANS IN SCHOOL: A HISTORY OF EDUCATIONAL NEGLECT 97–98 (1970)) [hereinafter *Arizona’s Desire to Eliminate Ethnic Studies Programs*].

²⁰⁴ *Immigration and Language Rights*, *supra* note 23, at 910.

had been disciplined for speaking their home language.²⁰⁵

No-Spanish rules are highly damaging to Latino children and their ability to learn. In the late 1960s, the United States Commission on Civil Rights conducted the “Mexican American Education Study” to research the crisis of deficient Latino educational attainment.²⁰⁶ The Commission found that many school districts enforced No-Spanish rules and these policies were detrimental to the students’ personal and academic development.²⁰⁷ No-Spanish rules inflict psychological harm and diminish Latino children’s self-esteem, which in turn lessens learning outcomes.²⁰⁸ In response to No-Spanish school rules, many Latino families felt pressured to make sure their children only spoke English.²⁰⁹ This resulted in a loss of Spanish as a heritage language for many families, leading to a loss of identity, self-esteem, and ability to communicate with one’s familial elders.²¹⁰ Due to the harmful impact of these policies, No-Spanish rules have been highly criticized and deemed an unfortunate racist relic of the past.²¹¹

However, despite widespread renouncement of the practice, No-Spanish public school rules have reemerged in the past two decades.²¹² Even when the rules are termed “English-only” rather than specifying Spanish, these language rules have focused on Spanish-speaking Latinos and are for all practical purposes No-Spanish rules.²¹³

The following three examples illustrate how English-only rules in schools are not race-neutral but are actually racially discriminatory and should be found to violate Title VI. These examples also demonstrate the need for Department of Education regulations addressing English-only school policies.

In 2005, Zach Rubio, a bilingual Latino 16-year-old in Kansas City, Kansas, was on a break at school when a schoolmate passing in the hall asked

²⁰⁵ Salinas, *supra* note 203, at 315 n.105.

²⁰⁶ *Id.* at 314 (citing UNITED STATES COMM’N ON CIVIL RIGHTS, THE EXCLUDED STUDENT 5 (1972)).

²⁰⁷ *Id.* at 315.

²⁰⁸ See *Linguaphobia*, *supra* note 19, at 66; Bethany Li, *From Bilingual Education to OELALEALEPS: How the No Child Left Behind Act Has Undermined English Language Learners’ Access to a Meaningful Education*, 14 GEO. J. ON POVERTY L. & POL’Y 539, 549–50 (2007).

²⁰⁹ See *Immigration and Language Rights*, *supra* note 23, at 917.

²¹⁰ *Linguaphobia*, *supra* note 19, at 66–67.

²¹¹ See *id.* at 65, 95–96; *Immigration and Language Rights*, *supra* note 23, at 292.

²¹² *Buscando América*, *supra* note 7, at 1444.

²¹³ See *Linguaphobia*, *supra* note 19, at 65.

to borrow a dollar in Spanish.²¹⁴ Zach responded simply, “*No problema.*”²¹⁵ A teacher overheard the conversation and sent Zach to the principal’s office, where the principal ordered him to call his father and leave the school.²¹⁶ The principal told Zach, “If you want to speak Spanish, go back to Mexico.”²¹⁷ Zach was suspended from school for speaking Spanish.²¹⁸

More recently, in November 2013,²¹⁹ Amy Lacey, the principal at Hempstead Middle School in Hempstead, Texas, made an announcement over the intercom forbidding the entire school from speaking Spanish.²²⁰ Subsequently, teachers began to threaten students with punishment for speaking Spanish.²²¹ The effect on the Latino children was considerable. Some students felt that the principal’s directive gave teachers and other students permission to discriminate against and harass them.²²² Children became afraid to speak their native tongue and risk getting disciplined.²²³ One eighth grade student, Yedhany Gallegos, tried to explain to the principal that Spanish was her first language, and the principal responded by encouraging her to leave the school.²²⁴

More than half of the students in the Hempstead district are Latino and many speak Spanish.²²⁵ As a result of these attacks on students’ language, the principal was suspended.²²⁶ Her suspension may have triggered a campaign to intimidate Latinos in the community.²²⁷ After taking disciplinary

²¹⁴ *Rubio v. Turner Unified Sch. Dist.* No. 202, 453 F. Supp. 2d 1295, 1298 (D. Kan. 2006); T.R. Reid, *Spanish At School Translates to Suspension*, WASH. POST (Dec. 9, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/08/AR2005120802122.html>.

²¹⁵ Reid, *supra* note 214.

²¹⁶ *Id.*

²¹⁷ Amended Complaint at 1–2, *Rubio*, 453 F. Supp. 2d 1295 (No. 05-2522-KHV).

²¹⁸ *Id.*

²¹⁹ David Edwards, *Texas Principal Bans Hispanic Students from Speaking Spanish to ‘Prevent Disruptions,’* RAWSTORY (Dec. 4, 2013), <http://www.rawstory.com/rs/2013/12/04/texas-principal-bans-hispanic-students-from-speaking-spanish-to-prevent-disruptions/>.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Lisa Gray, *Principal Who Told Kids Not to Speak Spanish Will Lose Job*, HOUSTON CHRON. (Mar. 19, 2014), <http://www.chron.com/news/education/article/Principal-who-told-kids-not-to-speak-Spanish-will-5327528.php>.

²²⁶ *Id.*

²²⁷ *Id.*

action against Ms. Lacey, the district's superintendent, who is Latina, reported that strangers have watched and taken photos of her house; her yard was vandalized; and her garbage was searched.²²⁸ Vandals also damaged the brakes of three Hempstead school busses.²²⁹ These actions are a sign of the racial tensions related to the use of Spanish in this community.

No-Spanish rules have also been extended by public schools to regulate communication off school grounds. In 2007, the Esmeralda County School District in Nevada made a rule prohibiting students from speaking Spanish on a school bus that transported Latino students who lived in the small farming and ranching community of Esmeralda to Tonopah High School in neighboring Nye County.²³⁰ The bus ride took approximately an hour and a half each way.²³¹ There were other buses that transported students between Esmeralda County and Nye County, but students were free to speak any language of their choice on those routes.²³²

These stories show how English-only school rules are often not race-neutral and, instead, discriminate on both the basis of national origin and race. In the *Rubio* case, Zach was suspended for uttering “*no problema*” instead of “no problem.” He was suspended on the basis of the Spanish vowel “a.” Interestingly, the phrase “no problema” is not actually Spanish. Rather it is slang combining the English “no problem” and the Spanish “*no hay problema*.”²³³ This “Spanglish” phrase, as well as its even less grammatically correct, “no problemo,” are commonly used by white Americans, often with anti-Hispanic sentiment.²³⁴ However, it is unheard of, and difficult to imagine, that a non-Latino would be suspended or otherwise disciplined for saying “No problema.” The racial and national origin animus against Latinos is obvious since Spanish was the only language targeted at that school. Further, the principal told Zach, “If you want to speak Spanish, go back to Mexico.” This is a racist statement, one that is common toward Latinos. Zach

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Press Release, American Civil Liberties Union, *Nevada School District Agrees to Allow Students to Speak Spanish on Bus*, ACLU.ORG (Feb. 15, 2008), available at <https://www.aclu.org/immigrants-rights/nevada-school-district-agrees-allow-students-speak-spanish-bus>.

²³¹ *Id.*

²³² *Id.*

²³³ DAGNY TAGGART & CHARISSE SUTTON, *SPANISH PHRASEBOOK* 97, 114 (2015).

²³⁴ Zentella, Ana Celia, ‘*José can you see*’: *Latina Responses to Racist Discourse*, in *BILINGUAL GAMES* 52, 62 (Doris Sommer et al. eds., 2003) (discussing racialized use of “mock Spanish” by Anglo-Americans, including the phrase “no problemo”).

is an American citizen by birth; he cannot go “back” to Mexico. He is not from Mexico. He is from the United States. This statement was a racial attack. In Hempstead Middle School, the principal focused only on the Spanish language, going so far as to yell over the intercom that Spanish is not permitted on school grounds. On the school buses in Esmeralda County, only the bus traveling to a farming community with a significant population of Latinos was subject to the language ban. These three different English-only school rules were clearly No-Spanish rules aimed at targeting Latino children.

These instances indicate that No-Spanish rules in public schools are not merely a historic relic. Along with constitutional First Amendment claims,²³⁵ Title VI could be a vehicle to address such rules. Two types of Title VI violations are presented by English-only school rules: different treatment and hostile educational environment.²³⁶ Different treatment claims arise when a student is subject to an adverse educational action or otherwise deprived of the ability to participate in or benefit from the educational program or activity provided by the school.²³⁷ This can occur, for example, when a Latino student is suspended from school for speaking Spanish. In such a case, to establish a *prima facie* case of discrimination under Title VI, the plaintiff must show that she is a member of a protected class; suffered an adverse action or deprivation; and that this adverse action or deprivation was taken because of race or national origin.²³⁸

The second type of potential Title VI action concerns hostile learning environment.²³⁹ This applies when the actions taken by the school individually might not constitute a sufficient deprivation of participation or benefit but collectively the language-based national origin or racial harassment interferes with the student’s ability to participate in or benefit from the educational program or activities provided by the school.²⁴⁰ To prove a *prima facie* suit of hostile educational environment under Title VI, the plaintiff must show that she is part of a protected class; the harassment was implemented because of her race or national origin; the school actually

²³⁵ See Scott J. Bent, “If you want to Speak Spanish, Go Back to Mexico”?: A First Amendment Analysis of English-Only Rules in Public Schools, 73 OHIO ST. L. J. 343 (2012).

²³⁶ See *Silva v. St. Anne Catholic School*, 595 F. Supp. 2d 1171, 1182 (2009); *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cnty., Ok.*, 334 F.3d 928, 934 (10th Cir. 2003).

²³⁷ See *Silva*, 595 F. Supp. 2d at 1182.

²³⁸ *Id.*

²³⁹ See, e.g., *Bryant*, 334 F.3d at 934.

²⁴⁰ *Id.*

knew or was deliberately indifferent to the harassment; and the harassment was so severe, pervasive, and offensive that the harassment denied plaintiff access to the educational benefits or opportunities provided by the school.²⁴¹

The detrimental effect of No-Spanish rules on Latino students has long been recognized.²⁴² Not only are Latino students directly deprived of educational opportunities by having their education interrupted with discipline for speaking Spanish, English-only rules denigrate the culture and identity of Latino youth, instilling a sense of inferiority and fear.²⁴³ Self-esteem, including cultural pride, and feelings of safety are vital for a child's academic success.²⁴⁴ English-only school rules also encourage other expressions of race and national origin discrimination by administrators, teachers, and peers.²⁴⁵ The ban on Spanish is not only a direct attack on a central trait of the student's identity, but it also becomes a proxy and pretext for expressing racial prejudice against Latinos. Hurtful comments, such as "Go back to Mexico"²⁴⁶ or telling a child she cannot touch a United States flag because they are not in Mexico,²⁴⁷ are thrust upon American students of Latino descent in English-only schools. As in the 1950s and 1960s, Spanish today is still considered a "dirty" and lowly language by some school administrations. This is suggested by how some schools have equated any Spanish use with bullying.²⁴⁸ A primary reason school administrators give for banning Spanish is a worry that foul, disrespectful, disruptive words will be used, even when there has been no factual basis for this concern.²⁴⁹

²⁴¹ *Id.*; Howard v. Feliciano 583 F. Supp. 2d 252 (D.P.R. 2008); Rubio v. Turner Unified Sch. Dist. No. 202, 523 F. Supp. 2d 1242, 1251 (D. Kan. 2007).

²⁴² See *supra* text accompanying note 208.

²⁴³ See *Linguaphobia*, *supra* note 19, at 66–67.

²⁴⁴ Michael John Weber, Note, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099, 1104 n.33 (1993) (noting that, for racial minority students, the "connection between self-esteem, cultural pride, and academic achievement is widely accepted").

²⁴⁵ See, e.g., *supra* text accompanying notes 210–25.

²⁴⁶ Amended Complaint at 7–8, *Rubio*, 453 F. Supp. 2d 1242 (D. Kan. 2007) (No. 05-2522-KHV).

²⁴⁷ *Silva v. St. Anne Catholic Sch.*, 595 F. Supp. 2d 1171, 1177 (D. Kan. 2009).

²⁴⁸ *Id.* at 1175 (school claimed its English-only rule was enacted to combat bullying); L. Darnell Weeden, *English only Rules in Public Schools Should be Presumed Illegal*, 34 T. MARSHALL L. REV. 379, 381 (2009) (discussing how, "[i]n 2006, public school officials in Illinois required Latino students to put their signature on a contract stating that comments spoken in Spanish are presumed to involve bullying and subject a student to the penalty of suspension").

²⁴⁹ Weeden, *supra* note 248, at 379–80, 382–83.

Currently, there are no federal regulations or guidelines directing schools' usage of English-only rules. The best practice would be to encourage a multicultural, multilingual environment that values diversity and prepares students for the realities of a multicultural and multilingual world where bilingualism and cross-cultural competence are valuable and profitable skills. However, as pedagogical determinations are usually made at the state and local level,²⁵⁰ at a minimum, the United States Department of Education should offer guidelines advising schools how to avoid Title VI violations. As a starting place, the guidelines could be modeled after the EEOC's Title VII "Speak-English-only rules."²⁵¹

As patterned after the EEOC's Title VII national origin compliance "Speak-English-only rules," English-only policies could only be established for a non-discriminatory purpose. Across the board bans on languages other than English (such as those that require only English to be spoken at all times on school premises) should be presumptively considered to violate Title VI. English-only rules should only be permissible if justified by educational necessity. Thus, it would be permissible to require that written or oral assignments be communicated in English, but a casual conversation between students during break time could not be subject to English-language restrictions. In evaluating whether to adopt an English-only rule, a school district should weigh the educational justifications for the rule against possible discriminatory effects. Given the extensive racial history of language discrimination in schools, English-only policies in schools should be scrutinized closely to ensure that they do not advance discrimination or otherwise decrease the educational success of Latinos and other minority children.

III. STRUCTURAL PROBLEMS WITH THE CIVIL RIGHTS ACT: LIMITED SUCCESS IN REDRESSING LANGUAGE DISCRIMINATION

The Civil Rights Act of 1964 was drafted primarily to address blatant racism against African Americans, but it has been interpreted more liberally to tackle race and national origin discrimination against diverse groups.²⁵² One of the Act's significant steps toward racial equity has been its recognition that language discrimination can be a form of national origin or race discrimination. These language discrimination protections have outpaced legal protections under the United States Constitution, which has been slow

²⁵⁰ See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985).

²⁵¹ 29 C.F.R. § 1606.7 (2012).

²⁵² See Pedrioli, *supra* note 5, at 99.

to recognize the reality that language discrimination is often a method of or pretext for race, ethnic, or national origin discrimination. However, the Act has been ineffectual in redressing language inequity for at least three reasons.

First, the federal government has established regulations concerning language discrimination, but some states have been reluctant to follow these regulations.²⁵³ Second, language protection under the Act has been inconsistent and incomplete²⁵⁴ due to a variety of factors, including resistance to recognizing the relationship between race and language.²⁵⁵ Finally, pursuant to the doctrine of constitutional avoidance, the Act has been utilized as an excuse not to reach constitutional rulings that could establish broader language-based protection for minorities.²⁵⁶

A. STATE RESISTANCE TO FEDERAL REGULATIONS

States have been reluctant to follow federal law and mandates with respect to language equality, as exemplified by their resistance to ensuring meaningful access to the courts for LEP persons. Title VI applies to state courts that receive federal financial assistance and, therefore, as discussed above, such courts are required to abide by Executive Order 13166 and the DOJ's LEP Guidance by ensuring that their programs are available to LEP individuals.²⁵⁷ Specifically, these state courts must provide interpretive services during all hearings, trials, and motions in which LEP individuals are present.²⁵⁸ Courts cannot charge LEP individuals for interpretive services and must ensure that the provided interpreters are competent.²⁵⁹

Despite Title VI, Executive Order 13166, and the DOJ LEP regulations, LEP individuals continue to have limited access to and participation in the court system.²⁶⁰ Without an interpreter, LEP litigants are too often unable to fully understand court proceedings, making it impossible for them to "obtain restraining orders to protect them from domestic violence, argue for custody of their children, successfully fight against their family's

²⁵³ See *infra* Part III A.

²⁵⁴ See *infra* Part III B.

²⁵⁵ *Id.*

²⁵⁶ See *infra* Part III C.

²⁵⁷ See Exec. Order No. 13166, 65 Fed. Reg. 50121 (Aug. 11, 2000); Guidance to Federal Financial Assistance Recipients Regarding the Title VI Prohibition Against National Origin Discrimination Against LEP Persons 67 Fed. Reg. 41455 (June 18, 2002).

²⁵⁸ 67 Fed. Reg. 41455, 41471 (June 18, 2002).

²⁵⁹ *Id.* at 41462, 41471.

²⁶⁰ See generally BRENNAN CTR. REPORT, *supra* note 137.

eviction, or compel employers to pay wages owed to them.”²⁶¹ Further, LEP criminal defendants may not understand their own trials without an adequate interpreter.²⁶² Despite the serious consequences for LEP litigants who are forced to proceed without sufficient language interpretation, LEP litigants continue to face significant barriers when it comes to accessing the courtroom.²⁶³ According to a recent study, approximately 46 percent of the states surveyed did not require that interpreters be provided in all civil cases; 80 percent fail to guarantee that the court will pay for interpreters; and 37 percent of the states that do provide interpreters fail to require the use of certified court interpreters.²⁶⁴ Executive Order 13166 and the DOJ LEP regulations have made it clear that beneficiaries and participants of federally funded court programs and activities are entitled to interpretive services and that failure to provide such interpretation may constitute a violation of Title VI.²⁶⁵ However, this statute and its regulations have not been sufficiently enforced.²⁶⁶ Title VI-compliant interpretation programs should be more actively enforced to ensure equal access to court facilities for all persons, irrespective of English-language ability.

State resistance to Title VI mandates which require that LEP people be provided interpretation and adequate access to the courts is striking because the Act was drafted as a direct response to state refusal to follow federal antidiscrimination law. In the 1950s and 1960s, despite the landmark decision in *Brown v. Board of Education*,²⁶⁷ the hope of desegregation was “dulled by resistance [from Southern states] to any but minimal steps toward compliance.”²⁶⁸ The failure of states to desegregate their schools and public accommodations led to various sit-ins and protests throughout the South.²⁶⁹

²⁶¹ *Id.* at 3.

²⁶² *See id.*; *see also, e.g.*, *Garcia v. State*, 149 S.W.3d 135, 140 (Tex. Crim. App. 2004) (finding that the failure to provide an interpreter for a Spanish-speaking criminal defendant violated the Confrontation Clause of the Sixth Amendment because, “One of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom during his trial,” and “[t]he right to be present includes the right to understand the testimony of the witnesses”) (internal citations omitted)).

²⁶³ BRENNAN CTR. REPORT, *supra* note 137, at 1.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 8.

²⁶⁶ *Id.*

²⁶⁷ 347 U.S. 483 (1954).

²⁶⁸ DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 4 (2004).

²⁶⁹ JUAN PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE*

Unfortunately, several whites did not heed the message of nonviolence. As images of “white violence inflicted upon nonviolent black protestors” permeated every media outlet, Congress was pressured to respond by passing the Civil Rights Act of 1964 and the Voting Rights Act of 1965.²⁷⁰ Congress’s intention is manifest in the legislative history of the Civil Rights Act of 1964. Records of floor debates in the Senate reflect that “the overriding purpose of the legislation was to alleviate the manifest problems of society-wide discrimination against African Americans” that occurred despite federal law and orders to the contrary.²⁷¹

The failure of state courts to follow federal antidiscrimination law and regulations concerning LEP language access is an indicator that there has been less progress in the past fifty years in the realm of civil rights than many might believe or hope. Recent events targeting Latinos in the Southwest are eerily reminiscent of race discrimination in the South in the 1960s.²⁷² The Civil Rights Act of 1964 and its regulations can only be effective if they are enforced.

B. INCONSISTENT & INCOMPLETE LANGUAGE PROTECTION UNDER THE ACT

As outlined above, the Civil Rights Act of 1964 has been used to address language discrimination. However the treatment of such discrimination under the Act is inconsistent and incomplete. On one hand, the Act has been more forward thinking than other segments of law, such as constitutional jurisprudence, in recognizing the reality that native language is often a central constituent of national origin, and that discrimination on the basis of language can amount to national origin discrimination and possibly race discrimination.

AMERICA 161–64 (2000).

²⁷⁰ *Id.* at 164.

²⁷¹ *Ethnicity and Prejudice*, *supra* note 42, at 821.

²⁷² Lisa Gray, *Principal Who Told Kids Not to Speak Spanish Will Lose Job*, HOUSTON CHRONICLE (Mar. 19, 2014), <http://www.chron.com/news/education/article/Principal-who-told-kids-not-to-speak-Spanish-will-5327528.php> (discussing how, at a majority-Latino middle school in Hempstead, Texas, Principal Amy Lacey ordered students to not speak Spanish; Lacey was suspended for her discriminatory behavior and it is suspected that her “suspension may have set off a campaign to intimidate Hispanics,” including harassment of the district’s Latina superintendent and the severing of brake lines of school buses). “A lot of this sounds like Mississippi in the 1950s and ‘60s,” commented Augustin Pinedo, director of the League of United Latin American Citizens Region 18. *Id.*

The United States Supreme Court has not directly determined whether discrimination on the basis of language can constitute discrimination on the basis of national origin, race, or ethnicity under Equal Protection.²⁷³ In *Hernandez v. New York*, a plurality opinion and the Court's most recent language discrimination case, the justices indicated a variety of views about the possible connection between language and race.²⁷⁴ In a concurring opinion by Justice O'Connor joined by Justice Scalia, Justice O'Connor stated that "[n]o matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race."²⁷⁵ Justice Kennedy indicated the opposite view that "[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."²⁷⁶ Currently, language restrictions and requirements are commonly subject to rational basis review, rather than the heightened scrutiny afforded restrictions based on race, ethnicity, and national origin.²⁷⁷ Further, unlike causes of action under Title VI and Title VII,²⁷⁸ disparate impact claims are not recognized under the Equal Protection Clause of the Fourteenth Amendment.²⁷⁹ As such, language discrimination claims are generally more difficult to assert under the Constitution than under the Civil Rights Act of 1964. Therefore, the Act can be celebrated as a progressive advancement for language equity and, ultimately, racial justice.

On the other hand, the lack of explicit mention of language in the text of the statute or its legislative history has made language protections under the Act uncertain and subject to attack, criticism, and inconsistent

²⁷³ See Josh Hill et al., *Watch Your Language! The Kansas Law Review Survey of Official-English and English-Only Laws and Policies*, 57 U. KAN. L. REV. 669, 708 (2009).

²⁷⁴ *Hernandez v. New York*, 500 U.S. 352, 353 (1991) (plurality opinion).

²⁷⁵ *Id.* at 375 (O'Connor, J., concurring).

²⁷⁶ *Id.* at 371 (Kennedy, J., plurality opinion).

²⁷⁷ See Hill, *supra* note 273, at 209 (citing *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993) (holding that the constitutionality of the Jury Selection and Service Act's English-language requirement of § 1865(b) is subject to rational basis review)).

²⁷⁸ *But see* *Alexander v. Sandoval*, 532 U.S. 275 (2001) (noting that although disparate impact claims are available under Title VI and Title VII, no private disparate impact right of action is recognized under Title VI).

²⁷⁹ *Washington v. Davis*, 426 U.S. 229, 235, 237-39 (1976); *McCleskey v. Kemp*, 481 U.S. 279, 292-93 (1987).

treatment.²⁸⁰ Language, as it relates to national origin, was only mentioned briefly in the Title VII *bona fide* occupation qualification exception context.²⁸¹ It does not appear that Congress gave much consideration to either the substance or scope of the term “national origin,” much less to language, as the majority of legislative discussion of the Act focused on racial discrimination against African Americans.²⁸² It is not surprising that discussions of the meaning of national origin under the Civil Rights Act were “quite meager” since African Americans were overwhelmingly born in the United States, were native English speakers, and thus did not experience discrimination on the basis of national origin or language.²⁸³

With this backdrop, it is no surprise that antidiscrimination law is ill-equipped to deal with racial discrimination against Latinos. This is not to imply in any way that existing law sufficiently addresses racial discrimination against African Americans. Rather, it is an observation that the static development and interpretation of civil rights law under a black-white binary paradigm of race often leaves Latinos without sufficient legal recourse to address discrimination. Under the black-white paradigm, non-black minority groups can only seek legal redress to the extent to which they can successfully analogize their experience to that of African Americans.²⁸⁴

Manifestations of racism against Latinos share some similarities with racism against African Americans, but there are two primary differences: language discrimination and perceived foreignness. Like African Americans, Latinos often experience racism based on skin color or phenotype, and they are the subject of derogatory racialized slurs. But unlike most discrimination against African Americans, discrimination against Latinos is expressed frequently in terms of language. Another principal expression of racism against Latinos is perceived foreignness; the assumption that, based on their race, minority persons are not “American” irrespective of how many generations of their families have lived in the United States or even whether

²⁸⁰ Language discrimination is treated inconsistently under the CRA. For instance, although some courts have made the connection between language discrimination and national origin discrimination (see, for example, *Lau v. Nichols*, 414 U.S. 563 (1974), and *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *rev'd sub nom Alexander v. Sandoval*, 532 U.S. 275 (2001)), other courts have not made the connection. See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

²⁸¹ 110 Cong. Rec. 2550 (1964).

²⁸² *Id.* at 2549–50; see also *Ethnicity and Prejudice*, *supra* note 42, at 821.

²⁸³ *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88–89 (1973).

²⁸⁴ See Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

they are indigenous to the land that is now part of the United States.²⁸⁵ In the case of Latinos, the majority are native-born United States citizens.²⁸⁶ In fact, many Chicanos never crossed the border, but rather the border crossed them as the result of the Mexican-American war in which the United States gained a third of its current land mass.²⁸⁷

By recognizing language discrimination primarily under the national origin provisions of the Act rather than its race provisions, the Act perpetuates this perceived-foreignness problem. It ignores the fact that many targets of language discrimination are native born, multigenerational, and even indigenous Americans. In doing so, the Act seems to signal that language discrimination is an immigrant problem or a problem that relates to one's foreign ancestry. It ignores the reality that, for many Latinos, language discrimination is race discrimination,²⁸⁸ thereby overlooking one of the principal ways in which Latinos experience racism.

C. CONSTITUTIONAL AVOIDANCE

Under the doctrine of constitutional avoidance, courts have used the Civil Rights Act of 1964 as a reason not to reach rulings that would establish constitutional protection for language minorities.²⁸⁹ Although this is not a fault of the Civil Rights Act itself, it is a way the statute interacts with constitutional judicial decision-making that reduces the effectiveness of the Act's protection against language discrimination. The doctrine of constitutional avoidance is a judicially created principle that a court should not reach a constitutional ruling if the matter could be decided on statutory

²⁸⁵ See Richard Delgado et al., *Creating and Documenting a New Field of Legal Study*, 12 HARV. LATINO L. REV. 103, 107 (2009); Angela M. Banks, *The Curious Relationship Between "Self-Deportation" Policies and Naturalization Rates*, 16 LEWIS & CLARK L. REV. 1149, 1186 (2012).

²⁸⁶ Amicus Briefs in *Grutter v. Bollinger*, *Brief of Puerto Rican Legal Defense and Education Fund et al. as Amici Curiae*, 14 BERKELEY LA RAZA L.J. 25, 32 (2003).

²⁸⁷ RICHARD DELGADO ET AL., *LATINOS AND THE LAW: CASES AND MATERIALS* 8 (2008); JOHN M. LIPSKI, *VARIETIES OF SPANISH IN THE UNITED STATES* 2 (2008).

²⁸⁸ *Buscando América*, *supra* note 7, at 1431 (arguing that in many instances for Latinos, "language is inseparable from what we call 'race'").

²⁸⁹ See generally LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW* (2001) (see specifically the chapter entitled, "*The Court Avoids Scrutinizing 'Official English' Mandate*").

grounds.²⁹⁰ This approach was applied in *Lau v. Nichols*.²⁹¹ The United States Supreme Court's finding that the failure to provide LEP students of Chinese descent ESL instruction amounted to a violation of Title VI on the basis of national origin or race provided grounds for not reaching the plaintiffs' Fourteenth Amendment Equal Protection claims. Although a finding of a constitutional violation would not have necessarily directly benefited the *Lau* plaintiffs more than the Title VI ruling, it likely would have significantly advanced the rights of language minorities because Title VI and the other provisions of the Act are limited in their breadth of application and could be repealed by the legislature.

CONCLUSION

Fifty years after the enactment of the Civil Rights Act of 1964, this groundbreaking statute still remains significant in the struggle for racial justice. Despite some shortcomings and limitations, the Act has the potential to effectuate improved language equity and, in turn, greater racial equality. However, for this to be achieved we need to examine the racialized nature of English-language requirements with close scrutiny. Language is too often left out of the discussion of race and civil rights because it is deemed to be a legitimate, race-neutral basis upon which to discriminate. As this Article has argued, however, language is not race-neutral. It is race laden.

The Civil Rights Act of 1964 is often celebrated in retrospect. The Act's present glory might be how, in a colorblind era, its interpretation has taken a relatively realistic analysis of language discrimination by recognizing that English-language requirements can amount to national origin discrimination. This clear-sighted view of the reality of language discrimination should be expanded upon within the Civil Rights Act and adopted in other statutory and constitutional contexts to address modern day racism. "Like a virus that has mutated, racism has evolved into different forms that are more difficult not only to recognize but also to combat."²⁹²

²⁹⁰ See, e.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

²⁹¹ *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

²⁹² John F. Dovidio & Sam L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, in *CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE* 2, 25 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

Language restrictions in workplaces, schools, places of public accommodation, and courtrooms are contemporary symptoms of racism that work subtly to exclude and oppress Latinos and other persons of color. Civil rights laws need to be sufficiently adaptable to contend with ever-changing manifestations and expressions of racial subordination. The Civil Rights Act of 1964 has taken some small steps toward this end; perhaps if its gait were to invigorate, society would have something to truly celebrate in another fifty years.