

March 1994

Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII

Juan F. Perea

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Civil Rights and Discrimination Commons](#)

Repository Citation

Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 Wm. & Mary L. Rev. 805 (1994), <https://scholarship.law.wm.edu/wmlr/vol35/iss3/2>

Copyright c 1994 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

William and Mary Law Review

VOLUME 35

SPRING 1994

NUMBER 3

ETHNICITY AND PREJUDICE: REEVALUATING "NATIONAL ORIGIN" DISCRIMINATION UNDER TITLE VII

JUAN F PEREA*

This concept of equality which is so vital a part of the American heritage knows no kinship with notions of human uniformity or regimentation. We abhor the totalitarian arrogance which makes one man say that he will respect another man as his equal only if he has "my race, my religion, my political views, my social position." In our land men are equal, but they are free to be different.¹

And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt.²

* Copyright © Juan F Perea (1994). Associate Professor of Law, University of Florida College of Law. The author would like to thank Professors Mark Brodin, Gil Carrasco, Nancy Dowd, Leslie Espinoza, Lisa Chiyemi Ikemoto, Deborah Malamud, Tomi Massaro, Kenneth Nunn, Walter Weyrauch, Dr. Joe R. Feagin, and Dr. Hernan Vera for insightful and constructive criticism of earlier drafts of this Article. Thanks to Dr. Alan Freed for his extensive knowledge of the development of civil rights policy during the Roosevelt and Truman Administrations. I would also like to thank Ms. Marla Eastwood, Ms. Alise Johnson, and Ms. Sherryl Swindler for expert research assistance on this project.

1. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 4 (1947) [hereinafter TO SECURE THESE RIGHTS].

2. *Leviticus* 19:33-34 (King James).

I. INTRODUCTION

We have, perhaps, not grasped the biblical axiom. In the United States, often we have not treated strangers as we have treated our native born.³ And, ironically, we have treated many of our native born as though they were strangers.⁴ This Article discusses ways in which Americans of manifest ethnicity are treated under Title VII of the Civil Rights Act of 1964 and discusses problems they encounter when they seek redress for discrimination because of their ethnic characteristics.

Congress' principal purpose in enacting Title VII of the Civil Rights Act of 1964⁵ was to prohibit employment discrimination because of race or color.⁶ This is clear both from the events leading to President Kennedy's introduction of legislation to alleviate race discrimination⁷ and from the extensive documentation and discussion of race discrimination during congressional debates on the Civil Rights Act of 1964.⁸ As enacted, however, Title VII of the statute also prohibits employment discrimination because of national origin, religion, and sex, in addition to race and color.⁹ In the years since its passage, the greatest amount of legal

3. See, e.g., Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58-59 (suspending, for 10 years, the immigration of Chinese laborers); Immigration Act of 1924, ch. 190, 43 Stat. 153, 155, 159-60 (creating national origin quotas for immigration); see also *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (holding that alienage is not encompassed within the protection of "national origin" in Title VII). See generally THOMAS A. ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 1-61 (2d ed. 1991).

4. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (allowing the exclusion of approximately 70,000 citizens of Japanese ancestry as well as 30,000 aliens during World War II).

5. Pub. L. No. 88-352, 78 Stat. 241.

6. See 110 CONG. REC. 2556 (1964) (remarks of Congressman Cellar) ("You must remember that the basic purpose of Title VII is to prohibit discrimination in employment on the basis of race or color."). As stated by Senator Humphrey during Senate debate on the entire Civil Rights Act of 1964, "[t]he goals of this bill are simple ones: To extend to Negro citizens the same rights and the same opportunities that white Americans take for granted." *Id.* at 6552.

7. See President Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities, PUB. PAPERS 483 (June 19, 1963) (warning of "a rising tide of discontent that threatens the public safety" and describing only the need to remedy the problems of black Americans).

8. See, e.g., *supra* note 6.

9. Title VII prohibits discrimination in the workplace because of sex, race, color,

development under Title VII has been in the areas of race and sex discrimination.¹⁰

Despite its parallel status and equal longevity in Title VII, the prohibition against "national origin" discrimination remains, as it began, largely undeveloped and ineffective. For example, what is usually referred to as the legislative history of the "national origin" term consists of a few unilluminating paragraphs of the House debate that discuss what national origin meant.¹¹ The national origin term ended up in Title VII because it was part of the "boilerplate" statutory language of fair employment in executive orders and legislation preceding the Civil Rights Act of 1964.¹² At the time, Congress gave no serious thought to the content of the national origin term nor to its proper scope. Since that time, as well, there has been a remarkable scarcity of analysis regarding the "national origin" term and whether it remains adequate for the forms of discrimination common today

Courts have been largely unsympathetic to claims of discrimination as experienced by persons whose ethnicity¹³ differs from

religion, and national origin. 42 U.S.C. § 2000e-2 (1988).

10. For example, there have been many Supreme Court decisions dealing with race and gender discrimination, but only one decision interpreting directly the "national origin" provision of Title VII in the approximately 30 years since the statute was enacted. *Compare* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (gender case) and Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (establishing action under Title VII for sexual harassment) and Dothard v. Rawlinson, 433 U.S. 321 (1977) (gender discrimination case) and International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (race case) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (race case stating elements of plaintiff's prima facie case in disparate treatment action) and Griggs v. Duke Power Co., 401 U.S. 424 (1971) (race discrimination case establishing disparate impact theory) with *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (the single Supreme Court decision construing the "national origin" term of Title VII). For a more detailed discussion of the *Espinoza* case, see *infra* notes 94-108 and accompanying text.

11. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3179-81 (1968) [hereinafter LEGISLATIVE HISTORY] (providing the full amount of debate, according to EEOC, on national origin discrimination).

12. See, e.g., Exec. Order No. 10,590, 20 Fed. Reg. 409 (1955); Exec. Order No. 9,980, 13 Fed. Reg. 4311 (1948); see also *infra* part II.

13. Ethnicity refers to physical and cultural characteristics that make a social group distinctive, either in group members' eyes or in the view of outsiders. JOE R. FEAGIN, RACIAL AND ETHNIC RELATIONS 8-9 (3d ed. 1989). Ethnicity consists of a set of ethnic traits including race, national origin, ancestry, language, religion, shared

that of the majority. Thus Mexican American employees must endure insults such as "wetback" and demeaning labor which "Americans [do] not have to do."¹⁴ Employees may be fired or disciplined for speaking languages other than English in the workplace, even if employees are doing their jobs at the time or if their conversations do not interfere with job performance.¹⁵ Persons who speak with "foreign" accents may be denied employment, despite excellent qualifications and verbal skills, because of the discomfort and displeasure they cause interviewers.¹⁶ African American women may be denied the ability to express their ethnic identity by wearing their hair in cornrows.¹⁷

All of these situations occur, and recur, despite Title VII's prohibitions against national origin and race discrimination. It is apparent that, with respect to many expressions of ethnicity,

history, traditions, values, and symbols. See HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS vi (Stephen Thernstrom ed., 1980). As used in this Article, "ethnicity" and "ethnic traits" are essentially synonymous. For a more extensive definition and discussion of ethnicity and ethnic traits, see *infra* part IV.A-B.

14. One egregious example of insulting treatment because of national origin occurred recently. Artemio Ugalde, of Mexican descent, alleged that his supervisor called him "wetback," "Mexican," and told "two other employees to let Ugalde use their shovels because they were Americans and did not have to do that kind of labor." *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239 (5th Cir. 1993). The court, finding that no "reasonable person" would have quit his job in response to such treatment, upheld summary judgment for the employer. *Id.* at 243. I question the capacity and propriety of courts construing the behavior of hypothetical generic "reasonable persons," as opposed to "reasonable persons" of similar ethnicity insulted and demeaned because of their ethnicity.

15. See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (employees received warning letters for speaking Spanish during working hours); *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980) (employee fired for responding in Spanish to a fellow employee's work-related question, in violation of employer's English-only rule), *cert. denied*, 449 U.S. 1113 (1981); *Dimaranan v. Pomona Valley Hosp. Medical Ctr.*, 775 F. Supp. 338 (C.D. Cal. 1991) (employee was disciplined and received poor performance reviews for speaking Tagalog to other Filipino nurses, in violation of employer's "no Tagalog" policy).

16. See, e.g., *Fragante v. City of Honolulu*, 888 F.2d 591 (9th Cir. 1989) (highest-scoring applicant for clerk position denied employment because interviewers thought he would be difficult to understand); see also Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (describing *Fragante's* case and noting that during the trial of the case, no one in the courtroom expressed difficulty in understanding him).

17. See, e.g., *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981) (employee fired from her job as a receptionist because she wore her hair in cornrows, in violation of employer's grooming code).

courts interpret Title VII in a manner that, rather than encouraging equality and tolerance of difference, instead encourages uniformity and the rejection of ethnic differences. An important reason for this outcome is the current wording of the statute.

The state of the law under Title VII is dramatically at odds with our demographic present and future, a future in which the American workforce will be more diverse ethnically and linguistically. By the year 2000, non-whites, women and immigrants together will make up more than five-sixths (eighty-three percent) of net additions to the workforce, compared to fifty percent in 1987.¹⁸ Non-whites will make up almost twenty-nine percent of new entrants into the labor force, twice their current share, between now and 2000.¹⁹ White males will comprise only fifteen percent of new additions during the same time period.²⁰ Latinos will be America's largest minority group,²¹ constituting approximately ten percent of the nation's labor force.²²

The increasingly visible Latino, African American, and Asian populations of this country invite reexamination of Title VII of the Civil Rights Act of 1964²³ and its adequacy as a legal tool for redressing the present and future forms of discrimination likely to be experienced in a more diverse workforce. To date, the term "national origin" has developed as the primary legal protection against discrimination because of ethnic traits. Yet what is usually labelled "national origin" discrimination is actually discrimination because of a person's ethnic traits. The question is whether, nearly thirty years after its enactment, the term "national origin" provides a sound and comprehensive basis for protecting employees from discrimination because of their ethnic traits.

18. HUDSON INSTITUTE, *WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY* xiii, xx-xxi (William B. Johnston & Arnold E. Packer eds., 1987).

19. *Id.*

20. *Id.*

21. Diego Ribadeneira, *Boom Bypassing Mass. Hispanics*, BOSTON GLOBE, June 5, 1988, at 40.

22. Peter Cattan, *The Growing Presence of Hispanics in the U.S. Work Force*, MONTHLY LAB. REV., Aug. 1988, at 9.

23. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

This Article argues that the "national origin" term does not, and cannot, correctly encompass the protection of ethnic traits or ethnicity. Indeed, the concept of "national origin" discrimination is not helpful in describing accurately or recognizing the kind of discrimination that should be prohibited under Title VII. The continuing and exclusive reliance on "national origin" as the statutory source of protection in Title VII against discrimination because of ethnic traits is increasingly incompatible with more ethnic diversity in the workplace and the predictably increasing demand for equal treatment. The Article proposes that Congress amend Title VII to include more effective and relevant statutory language to combat discrimination because of ethnic traits.

Part II of the Article describes the evolution of the "national origin" term in Title VII, an evolution which is little known and more extensive than the usual accounts of the statute's legislative history would lead one to believe. Part III discusses the consequences of this evolution with respect to court and Equal Employment Opportunity Commission interpretations of "national origin." Part IV defines the terms "national origin," "ancestry," and "ethnicity" and discusses the nature of prejudice.

Part V describes several serious problems that arise under Title VII as it is currently worded. These problems include the current vulnerability of protection for ethnic traits because of the Rehnquist Court's narrow interpretation of civil rights statutes, the judicial creation and enforcement of an underinclusive normative American identity, and what I identify as the "correlation problem" posed for plaintiffs. Furthermore, the term "national origin" reinforces the outsider status of persons who claim its protection. Part VI presents a proposal for legislative reform of Title VII to protect more directly against discrimination because of ethnic traits. Part VII discusses the consequences of my proposal for plaintiffs, employers, and courts.

II. THE EVOLUTION OF THE "NATIONAL ORIGIN" TERM IN TITLE VII

A. *Beginnings: The Origin of "National Origin"*

Prior to the enactment of the Civil Rights Act of 1964, the phrase "national origin" long had been the subject of federal

executive and legislative action. In the immigration laws, national origin had been the explicit basis for discrimination because of country of origin by the federal government for approximately four decades, until 1965.²⁴ With respect to fair employment practices, the phrase appears to have become part of the standard "boilerplate" language of executive orders prohibiting discrimination in employment.²⁵ This context gave the term its basic meaning, country of birth, at the time of the passage of the Civil Rights Act of 1964.

In 1924, for the first time in our history, Congress passed, over a presidential veto, legislation creating national origin quotas for immigration.²⁶ These quotas, defined by the countries of origin of prospective immigrants, attempted to limit immigration so that the demographic composition of immigrants matched the predominantly white, northern European composition of the extant American population.²⁷ As a result of these quotas, the federal government discriminated explicitly against prospective immigrants based on their countries of birth. The late nineteenth and early twentieth centuries were characterized by great hostility towards immigrants and others perceived as foreigners.²⁸ To some extent, the quotas, government-sanctioned discrimination because of national origin, must have fueled and sanctioned discrimination because of national origin by private

24. On July 23, 1963, President Kennedy proposed, again, the elimination of discrimination in the immigration laws because of national origins in the 1924 quota system. President Kennedy, Letter to the President of the Senate and to the Speaker of the House on Revision of the Immigration Laws, PUB. PAPERS 594 (July 23, 1963). Ultimately the national origins quota system was replaced by the October 3, 1965 amendments to the Immigration and Nationality Act, which redefined the bases for admission to this country. Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended at 8 U.S.C. 1151 (1988 & Supp. 1992)); see also E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 366-79 (1981).

25. See *supra* note 10.

26. See Immigration Act of 1924, ch. 190, 43 Stat. 153, 155, 159. The effective date for the national origin system for determining immigration quotas was delayed until 1929. HUTCHINSON, *supra* note 24, at 470.

27. See generally HUTCHINSON, *supra* note 24, at 470-74 (explaining quota system).

28. See JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925, at 195 (Atheneum Press 19th prtg. 1977) (1955) ("The struggle with Germany called forth the most strenuous nationalism and the most pervasive nativism that the United States had ever known.").

actors.²⁹ The national origin quotas remained in effect until 1965.³⁰

Preliminary efforts to eliminate racial and national origin discrimination in employment began during World War II.³¹ Under pressure from A. Philip Randolph and the March on Washington Movement,³² President Franklin D. Roosevelt established a Fair Employment Practice Committee on June 25, 1941,³³ to attempt to eliminate discrimination in both government and private employment related to the war effort. Subsequently, because "the successful prosecution of the war demands the maximum employment of all available workers," Roosevelt, by executive order, prohibited discrimination in war industries and in the federal government because of "race, creed, color, or national origin."³⁴ This same executive order established a new

29. Cf. JOE R. FEAGIN & CLAIRECE B. FEAGIN, *RACIAL AND ETHNIC RELATIONS* 43 (4th ed. 1993) ("Racial and ethnic relations are substantially defined by the actions of governments, ranging from the passing of legislation, such as restrictive immigration laws, to the imprisonment of groups defined as a threat (for example, Japanese Americans in World War II).").

30. For an expression of the view that the 1965 repeal of the national origins quota system, together with enactment of the 1964 Civil Rights Act, led to an increased focus on ethnicity, see Philip Gleason, *American Identity and Americanization*, in *CONCEPTS OF ETHNICITY* 57, 126 (William Peterson et al. eds., 1980) ("Two pieces of legislation passed in 1965—the civil rights act of that year and the immigration law that eliminated national origins as a principle of selectivity—stand as climactic achievements of the approach that had emphasized universalist principles to improve intergroup relations and create a better social order.")

31. For a more detailed discussion of early Presidential efforts to end discrimination chiefly because of race, see HUGH D. GRAHAM, *THE CIVIL RIGHTS ERA* 5-24 (1990).

32. Randolph and the March on Washington Movement threatened a march of 100,000 African Americans to protest discrimination against them in the military and defense-related industries. See WILLIAM C. BERMAN, *THE POLITICS OF CIVIL RIGHTS IN THE TRUMAN ADMINISTRATION* 6 (1970); HERBERT GARFINKEL, *WHEN NEGROES MARCH* 27, 63-64 (1969).

33. Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943).

34. Exec. Order No. 9346, 3 C.F.R. 1280 (1938-1943). The fact that antidiscrimination efforts were begun partly because of the pressing urgency of supporting the war effort illustrates well Derrick Bell's thesis that blacks and other minorities only make progress in this society when it is in the interest of the predominantly white majority. See DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 39, 435-38 (1980) (stating that "it does not require an unreasonable reading of history to conclude that the degree of progress blacks have made away from slavery and toward equality has depended on whether allowing blacks more or less opportunity best served the interests and aims of white society").

Committee on Fair Employment Practice. This committee, like its predecessor, had no enforcement powers and had no access to courts.³⁵ Its work ended in June 1946, when Congress failed to appropriate funds for the committee's work.³⁶

After the war's end, President Truman was shocked to learn of the appalling treatment of African American servicemen upon their return home.³⁷ In one incident, policemen in Aiken, South Carolina gouged out the eyes of a black sergeant, just three hours after he received his discharge from the Army.³⁸ Moved by such incidents, on December 5, 1946 Truman established the President's Committee on Civil Rights (the "Committee").³⁹ The Committee was to study ways in which the civil rights of Americans could be enforced more effectively and to issue a report detailing its findings and recommendations.⁴⁰ In its final report, the Committee found that African Americans were victims of extensive lynching, and that they and other minorities were frequent victims of police brutality and unequal administration of justice.⁴¹ The Committee report detailed extensive discrimination against persons because of their race or national origin in the exercise of voting rights, in employment, in education, in housing, and in public services and accommodations.⁴² Solving these problems required federal legislation and federal intervention, according to the Committee, which recommended a broad-ranging legislative antidiscrimination program.⁴³

Following most of the Committee's recommendations, Truman sought, without success, legislation to prohibit discrimination in voting, public accommodations, and employment.⁴⁴ In his State

35. See TO SECURE THESE RIGHTS, *supra* note 1, at 61.

36. *Id.*

37. William E. Leuchtenburg, *The Conversion of Harry Truman*, AMERICAN HERITAGE, Nov. 1991, at 55, 58, 60 (describing Truman's ambivalence toward blacks and his embrace of civil rights for political reasons as well as his sense of outrage at the mistreatment of blacks); see also BERMAN, *supra* note 32, at 50-51, 57.

38. Leuchtenburg, *supra* note 37, at 58.

39. Exec. Order No. 9808, 3 C.F.R. 590 (1943-48).

40. See TO SECURE THESE RIGHTS, *supra* note 1, at viii-ix.

41. See *id.* at 21-29.

42. See *id.* at 35-79.

43. *Id.* at 151-73.

44. 12 CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT, 1945-1968, at v (Michael R. Belknap ed., 1991).

of the Union message on January 7, 1948, Truman expressed his vision that human rights in America required equal employment opportunity⁴⁵ Truman stated that "[w]hether discrimination is based on race, or creed, or color, or land of origin, it is utterly contrary to American ideals of democracy"⁴⁶

In his Special Message to the Congress on Civil Rights, on February 2, 1948, Truman recommended that Congress pass legislation securing American human rights.⁴⁷ His proposals included strengthening existing civil rights laws, creating federal protection against lynching, protecting voting rights, enacting fair employment practice legislation, prohibiting discrimination in interstate transportation facilities, and promoting greater equality in naturalization.⁴⁸ Truman proposed that the fair employment legislation prohibit "discrimination in employment based on race, color, religion, or national origin."⁴⁹ He proposed creation of a Fair Employment Practice Commission with authority to prevent employment discrimination.⁵⁰ He also urged Congress "to remove the remaining racial or nationality barriers which stand in the way of citizenship for some residents of our country"⁵¹ Truman was motivated both by a sense of fairness and by a concern that discrimination against blacks undermined the United States' moral position in its competition with Communism.⁵² Truman's recommendations for reform contain most of the ideas ultimately enacted twenty years later in the Civil Rights Act of 1964. His proposals were rejected at the time,

45. President's State of the Union Address, PUB. PAPERS 1, 3 (Jan. 7, 1948).

46. *Id.* With respect to immigration, in this speech Truman urged Congress to permit more refugees displaced by World War II to enter the United States. *Id.* at 8.

47. President's Special Message to Congress on Civil Rights, PUB. PAPERS 121 (Feb. 2, 1948).

48. *Id.* at 121-26.

49. *Id.* at 124.

50. *Id.* at 122, 124.

51. *Id.* at 125. President Truman's Committee on Civil Rights had found statutory discrimination because of national origin in granting citizenship to persons of Japanese, Korean, and other Asian and Pacific Island origin. The Committee recommended abolition of such practices. See TO SECURE THESE RIGHTS, *supra* note 1, at 32-34, 160-63.

52. See BERMAN, *supra* note 32, at 83-85; Leuchtenburg, *supra* note 37, at 60.

however, and it was not until the Civil Rights Act of 1957 that Congress enacted only diluted protection for voting rights.⁵³

Notwithstanding congressional refusal to address issues of race and national origin discrimination, Truman accomplished some progress towards the elimination of discrimination in federal employment by executive order. On July 26, 1948, Truman established a Fair Employment Board within the Civil Service Commission to prohibit and provide redress for discrimination on the basis of "race, color, religion, or national origin" in federal employment.⁵⁴ On the same day Truman also began to desegregate the military. He declared it "the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin."⁵⁵

Truman also attempted to gain repeal of the national origins quotas in the immigration laws. In his message vetoing the McCarran-Walter Immigration Act on June 25, 1952, Truman stated, regarding the 1924 national origins quotas:

[t]he idea behind this discriminatory policy was, to put it baldly, that Americans with English or Irish names were better people and better citizens than Americans with Italian or Greek or Polish names. It was thought that people of West European origin made better citizens than Rumanians or Yugoslavs or Ukrainians or Hungarians or Balts or Austrians. Such a concept is utterly unworthy of our traditions and our ideals. It violates the great political doctrine of the Declaration of Independence that "all men are created equal."⁵⁶

In Truman's view, American ideals of equality were violated by national origin discrimination both in the immigration laws and in employment.

The term "national origin" also appeared in the Civil Rights Act of 1957 (the "1957 Act").⁵⁷ Section 101 of the 1957 Act es-

53. See Pub. L. No. 83-315, 71 Stat. 634 (1957).

54. See Exec. Order No. 9980, 3 C.F.R. 720 (1943-1948).

55. Exec. Order No. 9981, 3 C.F.R. 722 (1943-1948).

56. President Truman, Veto of Bill To Revise the Laws Relating to Immigration, Naturalization, and Nationality, PUB. PAPERS 441, 443 (June 25, 1952). The legislation passed over Truman's veto. *Id.* at 447.

57. Pub. L. No. 83-315, 71 Stat. 634 (1957). According to Professor Schwartz, the

established the Commission on Civil Rights.⁵⁸ One of the Commission's duties was to "investigate allegations that certain citizens of the United States [were] being deprived of their right to vote by reason of their color, race, religion or national origin."⁵⁹

In early 1960, President Eisenhower proposed legislation to strengthen slightly the provisions against voting discrimination in the 1957 Act.⁶⁰ In his message to Congress of February 5, 1960, Eisenhower stated that "every individual regardless of his race, religion, or national origin is entitled to the equal protection of the laws."⁶¹ The House of Representatives report on the legislation referred to "the elimination of discrimination because of race, creed, color or national origin," problems which were "far from being solved."⁶² Despite these references to national origin, however, the Civil Rights Act of 1960 (the "1960 Act")⁶³ referred to persons deprived of [their] right to vote "on account of [their] race or color,"⁶⁴ but omitted any reference to national origin.

The focus of the debate on the 1960 Act was on voting discrimination because of race or color, not national origin.⁶⁵ Representative Celler, however, offered an amendment during the debate which would create a "Commission on equal job opportunity under Government contracts."⁶⁶ The proposed Commission would implement federal policy "to eliminate discrimination

Civil Rights Act of 1957 "scarcely deserves the title of Civil Rights Act," so watered down was the statute as finally enacted. STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, PART II 839 (Bernard Schwartz ed., 1970) [hereinafter STATUTORY HISTORY].

58. Pub. L. No. 83-315, § 101, 71 Stat. 634 (1957).

59. *Id.* § 104, 71 Stat. at 636.

60. See STATUTORY HISTORY, *supra* note 57, at 935-38.

61. *Id.* at 947 (quoting President Eisenhower's Special Message to Congress, Feb. 5, 1960).

62. See *id.* at 950 (quoting H.R. REP. NO. 956, 86th Cong., 2d Sess. 3 (1960), reprinted in 1960 U.S.C.C.A.N. 1939, 1941).

63. Pub. L. No. 86-449, 74 Stat. 86 (1960).

64. *Id.* § 601(a).

65. See 106 CONG. REC. 5197-98 (1960) (remarks of Rep. Colmer); *id.* at 5199-201 (remarks of Rep. Celler); *id.* at 5645-46 (remarks of Rep. Kastenmeier); *id.* at 7768-69 (remarks of Sen. Clark).

66. *Id.* at 5477.

because of race, creed, color, or national origin in the employment of persons" performing government contracts.⁶⁷ Celler's amendment was ruled out of order and was not considered on its merits nor did it become part of the enacted legislation.⁶⁸

The next major proposal for civil rights legislation came from President Kennedy. Attempting to stem the increasing violence, actual and threatened, precipitated by the civil rights movement in the South, President Kennedy introduced new civil rights legislation in Congress in June of 1963.⁶⁹ The initial legislation lacked a national fair employment program.⁷⁰ The House Labor and Education Committee, however, reported out of committee H.R. 405, a bill declaring it an unlawful employment practice to discriminate against any person "because of such individual's race, religion, color, national origin, or ancestry"⁷¹ This language, with "ancestry" deleted and "sex" added, became Title VII of the Civil Rights Act of 1964.⁷²

B. Legislative History of Title VII's "National Origin" Term

The legislative history of the term "national origin" in Title VII shows that references to the term were sporadic and relatively insignificant, certainly so in relation to the extensive consideration given to the problems of discrimination against African Americans.⁷³ The debate in the House of Representatives

67. *Id.* Senator Clark commented, during the Senate debate on the legislation, that meaningful civil rights legislation would address the problem of employment discrimination. *Id.* at 7768-69. Clark only referred, however, to employment discrimination because of race or color directed at African Americans.

68. *Id.* at 5478-79.

69. See GRAHAM, *supra* note 31, at 79.

70. *Id.* at 83-84, 95.

71. H.R. 405, § 5(a), in *Hearings, General House Subcomm. on Labor*, 88th Cong. 1st Sess. 3-11 (1963); see also GRAHAM, *supra* note 31, at 97.

72. See H.R. REP. NO. 914, 88th Cong., 1st Sess. 87 (1963) (suggesting that no material change was intended by the omission of the words "or ancestry"); see also GRAHAM, *supra* note 31, at 134-39, 150-52.

73. See LEGISLATIVE HISTORY, *supra* note 11, at 3179-81 (reproducing the debate over "national origin" and citing congressional debate found in 110 CONG. REC. 2548-49 (1964)). I do not claim that the legislative history I present here is entirely comprehensive in collecting references to national origin and ethnicity during the House and Senate debates. Rather, I have reviewed portions of the legislative history and other compilations looking for such references. These other compilations include:

yielded no definition or explanation of what national origin discrimination meant.⁷⁴ The congressmen only stated their understanding of what "national origin" meant and their understanding that national origin could, in a proper case, be a bona fide occupational qualification (BFOQ). Congressman Roosevelt explained: "May I just make very clear that 'national origin' means national. It means the country from which you or your forebears came from [sic]. You may come from Poland, Czechoslovakia, England, France, or any other country"⁷⁵ Congressman Dent stated his understanding that "[n]ational origin, of course, has nothing to do with color, religion, or the race of an individual. A man may have migrated here from Great Britain and still be a colored person."⁷⁶

With respect to national origin as a BFOQ, Congressman Rodino stated that "[t]here may be some instances where a person of a certain national origin may be specifically required to

STATUTORY HISTORY, *supra* note 57; LEGISLATIVE HISTORY, *supra* note 11 (the "EEOC compilation"); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966); and the briefs of the parties in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973). An examination of these sources reveals that while there were a few more references to ethnic or other minority groups than supplied in the EEOC compilation, these additional references were not substantive nor particularly illuminating. Apparently, the Congress was not particularly concerned about the problems of discrimination because of national origin.

74. See Stephen M. Cutler, Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1169 & n.25 (1985).

75. LEGISLATIVE HISTORY, *supra* note 11, at 3179-80.

76. *Id.* at 3180. It is striking that Congressman Dent separates, in his comment, that which often cannot be separated. Dent states that national origin has nothing to do with color, religion or race. Although Dent may have understood national origin as a trait distinct from the others he mentions, in fact these traits are often, perhaps usually, related. As one example, a person from China, or of Chinese ancestry, is likely to exhibit racial, religious, and color characteristics shared by others of Chinese ancestry. The traits of an individual cannot be arbitrarily separated out and protected as though they were independent of each other. This is one major problem with Title VII: the separation of traits that are intertwined, interdependent, and inseparable. For example, courts cannot appreciate adequately the significance of an African American woman's choice of hairstyle without reference to the cultural meaning of her hair within African American culture. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 379. Separating and treating as independent some traits of individual identity "illustrates the quality of legal reasoning that separates that which is inextricably connected." Martha Minow, *Equalities*, 88 J. PHIL. 633, 635 (1991).

meet the qualifications of a particular job.”⁷⁷ Congressmen Dent and Rodino then discussed such instances, in particular restaurants serving the food of a particular nation. Rodino explained:

I think we all know about “pizza pie,” it generally carries an Italian connotation and we would assume that a baker, chef, or cook of Italian origin is especially qualified to make pizza pies [and] the employer or the operator of that pizza pie restaurant would probably seek as a chef a person of Italian origin. He would do this because pizza pie is something he believes the Italians or people of Italian national origin are able to make better than others—and is reasonably necessary to the operation of his particular business. Therefore, national origin in the operation of a specialty restaurant such as a French restaurant or Italian restaurant could properly be an occupational qualification that is reasonably necessary to the operation of the restaurant business.⁷⁸

Labor unions might require the possibility of a national origin BFOQ, according to Representative Roosevelt, because

there was evidence brought out before the committee of certain instances where labor unions that deal with a particular language group had to have and had to be able to hire to work with people who were able to speak the particular language used by the people of a certain national origin. Therefore, it was felt in order not to restrict their activity that quite properly they should be allowed to do that.⁷⁹

Interestingly, Roosevelt’s comment links language and national origin and suggests that at least he thought the “national origin” language of the statute encompassed language requirements for employment.⁸⁰

77. 110 CONG. REC. 2549 (1964).

78. *Id.*, see also *id.* at 2561 (remarks of Rep. Kluczynski) (discussing the variety of ethnic dishes prepared by a Polish sausagemaker and three African Americans in his Polish restaurant).

79. *Id.* at 2550.

80. Although Roosevelt’s comment links language and national origin, I am very reluctant to attribute too much significance to the remarks of a single legislator, particularly when the overall context of the debate shows that the problems of racial discrimination were foremost in enacting Title VII.

Once the legislation passed the House, debate on it began in the Senate. As stated by Senator Humphrey during Senate debate on the entire Civil Rights Act of 1964, "[t]he goals of this bill are simple ones: To extend to Negro citizens the same rights and the same opportunities that white Americans take for granted."⁸¹ Humphrey, in his lengthy discussion of the proposed Act and its necessity for black Americans, occasionally refers to "members of other minority groups," without describing who those persons might be or any discrimination suffered by them.⁸² Humphrey twice uses the term "ethnic origin": once while asserting that Americans were denied access to public facilities because of "their ethnic origin, their national origin,"⁸³ and once asserting that people are denied work opportunities because of their ethnic origin.⁸⁴ Humphrey apparently never explained, however, what he meant by "ethnic origin" nor whether "ethnic origin" differed from national origin.

In addition to Humphrey's few references to national origin, only a handful of other comments discuss the term or amplify upon its meaning. Describing the problem of employment discrimination, Senator Kuchel commented briefly on the problems faced by "a Negro or a Puerto Rican or an Indian or a Japanese American or an American of Mexican descent."⁸⁵ Senator Kennedy asserted that Massachusetts had "absorbed every racial nationality group, from the Puritans to the Poles to the Puerto Ricans."⁸⁶ Senator Dirksen expressed concern that the statutory protection against discrimination because of national origin would pose problems for defense contractors who required security clearances as a condition of employment.⁸⁷

81. 110 CONG. REC. 6552 (1964) (remarks of Sen. Humphrey). President Kennedy, in his Special Message to Congress of June 19, 1963, addressed only the problems of racial discrimination against African Americans as the problems in need of redress. See President Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities (June 19, 1963), PUB. PAPERS 483 (1964).

82. See, e.g., 110 CONG. REC. 6547-48, 6551 (1964) (remarks of Sen. Humphrey).

83. *Id.* at 12,580.

84. *Id.* at 13,083.

85. *Id.* at 6562 (remarks of Sen. Kuchel).

86. *Id.* at 7375 (remarks of Sen. Kennedy):

87. *Id.* at 6450 (remarks of Sen. Dirksen). This concern was addressed in § 703(g) of Title VII, which allows employers to refuse to hire any individual who does not

National origin, as understood by the legislators that enacted Title VII, meant only the nation of one's birth or the nations of birth of one's ancestors.⁸⁸ This understanding of national origin merges one's national origin, or country of birth, with the national origin characteristics of one's ancestry. This meaning is the full meaning that the legislative history of the term's inclusion in Title VII can supply. In addition, Congress envisioned that at least ethnic specialty restaurants could make such national origin a BFOQ.⁸⁹

In the context of what has been characterized as the "longest debate" in Senate history,⁹⁰ the few references to national origin or ethnic groups are trivial in number and in content. The overriding purpose of the legislation was to alleviate the manifest problems of society-wide discrimination against African Americans. Congress gave little or no consideration to the nature of what we now call "national origin" discrimination, nor to the actual problems faced by ethnic minorities other than African Americans in this country. The Supreme Court, considering the comments made during the House debate, correctly characterized this legislative history as "quite meager."⁹¹

fulfill the requirements of any security clearance. Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-2(g) (1988)).

88. See, e.g., BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 305 (2d ed. 1983) (expressing the authors' view that "Congress intended to include within the category 'national origin' members of all national groups of persons of common ancestry, heritage, or background").

89. Congress enacted a "national origin" BFOQ in 42 U.S.C. § 2000e-2(e)(1) (1988), which states that

it shall not be an unlawful employment practice for an employer to hire and employ employees on the basis of [] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Id.

90. The length of the debate even inspired the title of another book on the legislative history of the Civil Rights Act of 1964. See CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

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

III. THE CONSEQUENCES OF INATTENTION: NATIONAL ORIGIN AS A PROTECTED CHARACTERISTIC

A. *The Courts and Interpretations of "National Origin"*

Taking the plain meaning of the statutory language together with its meager legislative history, "national origin" discrimination means only discrimination because of the nation of one's birth or because of the nations of birth of one's forefathers and mothers. Many courts have adhered to this plain meaning of "national origin." Some courts and the Equal Employment Opportunity Commission (EEOC), however, have interpreted the statute more broadly.⁹² Remarkably, in the nearly thirty years since the enactment of Title VII, only one Supreme Court decision has interpreted directly the "national origin" term.⁹³ The Court, in contrast to some lower courts, interpreted the statute even more narrowly than the legislative history and statutory language suggest.

The single Supreme Court decision interpreting "national origin" under Title VII, *Espinoza v. Farah Manufacturing Co.*,⁹⁴ strangled even the plain meaning of the statutory language.⁹⁵

92. For a comprehensive survey and analysis of current national origin and alienage discrimination law, see 2 MERRICK T. ROSSEIN, *EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION* ch. 29 (1990) (chapter authored by the Hon. Manuel del Valle).

93. In a few other cases brought under Title VII's "national origin" provision, the Court has made, without significant explanation or analysis, cursory references to "ethnic discrimination." See, e.g., *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 328-29, 338 n.19 (1977) (referring to "racial and ethnic discrimination" in a lawsuit brought on behalf of blacks and Spanish-surnamed individuals); *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 398-99, 405 (1977) (referring to an allegation of "ethnic discrimination" in a suit by three Mexican Americans alleging race or national origin discrimination). The Court has denied certiorari repeatedly in "national origin" cases. See, e.g., *Gonzalez v. Salvation Army*, 983 F.2d 578 (11th Cir.), cert. denied, 113 S. Ct. 2342 (1993) (denying certiorari in a case upholding an employer's English-only rule); *Fragante v. City of Honolulu*, 888 F.2d 591 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990) (denying certiorari in a case upholding an employer's decision not to hire the plaintiff because of a "foreign" accent); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981) (denying certiorari in a case denying protection to bilingual Mexican Americans under Title VII).

94. 414 U.S. 86 (1973).

95. See *Espinoza v. Farah Mfg. Co.*, 462 F.2d 1331, 1333 (5th Cir. 1972) (citing

In *Espinoza*, the Court decided that the prohibition against discrimination because of "national origin" was not intended to protect against discrimination because of citizenship status.⁹⁶ The Court reasoned that the plain meaning of "national origin" did not include citizenship requirements.⁹⁷ Furthermore, the Court reasoned, Congress had repeatedly required citizenship for the purpose of federal employment.⁹⁸ Had Congress intended to prohibit discrimination because of alien status under the national origin provision, its policy declaration in Title VII prohibiting discrimination in federal employment because of national origin would have made no sense in light of other citizenship requirements enacted by Congress.⁹⁹ The Court also found it inconceivable that Congress could maintain citizenship requirements for federal employment while simultaneously prohibiting private employers from having similar requirements.¹⁰⁰

The Court was correct in deciding that the plain meaning of "national origin," country of birth, was not the same as citizenship or alienage. The Court, however, was confronted with legislative history which it characterized as "meager,"¹⁰¹ and which did not address alienage. The district court had concluded that the legislative history was inconclusive and "equally consistent with [the] view that alienage is included in 'national origin.'"¹⁰² Reversing the district court, the United States Court of Appeals relied on the plain meaning of national origin and found the legislative history "completely consistent" with an opposite interpretation of "national origin."¹⁰³ Faced with inconclusive legislative history which was silent on the question of alienage, the Supreme Court could have ruled either way¹⁰⁴

Lynch v. Overholser, 369 U.S. 705 (1962), *aff'd*, 414 U.S. 86 (1973).

96. Cecilia Espinoza, the plaintiff, was a Mexican-born permanent resident alien with lawful status in this country. *Espinoza*, 414 U.S. at 87.

97. *Id.* at 88-89 & n.2.

98. *Id.* at 89.

99. *Id.* at 90-91.

100. *Id.*

101. *Id.* at 88-89.

102. *Espinoza v. Farah Mfg. Co.*, 343 F. Supp. 1205, 1206 (W.D. Tex. 1971), *rev'd*, 462 F.2d 1331 (5th Cir. 1972), *aff'd*, 414 U.S. 86 (1973).

103. *Espinoza*, 462 F.2d at 1333.

104. *Espinoza*, 414 U.S. at 88-91.

The plain meaning of the statutory language ("national origin") and its meager legislative history ("it means the country from which you came")¹⁰⁵ easily could have been interpreted to prevent discrimination against a legal alien. An alien becomes an alien as a direct result of birth in a country other than the United States. Different national origin practically defines the alien. Discrimination because of alienage, therefore, arguably presents one of the few clear cases of discrimination because of national origin. As Justice Douglas wrote in dissent and the EEOC argued in its amicus brief, "[r]efusing to hire an individual because he is an alien 'is discrimination based on birth outside the United States and is thus discrimination based on national origin in violation of Title VII.'"¹⁰⁶

The Supreme Court, therefore, probably interpreted "national origin" overly narrowly in *Espinoza*. In deciding that Title VII did not prohibit discrimination against a legal alien, the Court adopted a pro-assimilation reading of Title VII, preferring the more assimilated—citizens—over the less assimilated—permanent resident aliens.¹⁰⁷ Just as Congress failed to consider in depth the nature of national origin discrimination, so the Court, by rendering only one decision in nearly thirty years, has failed to give authoritative guidance on the meaning of Title VII for plaintiffs claiming to be victims of national origin discrimination. Further contributing to the lack of development in the area of Title VII law, remarkably few commentaries devoted

105. 110 CONG. REC. 2549 (1964) (remarks of Rep. Roosevelt).

106. *Espinoza*, 414 U.S. at 97-98 (Douglas, J., dissenting) (quoting Brief for the Equal Employment Opportunity Commission as Amicus Curiae). Further support for this position comes from the statute itself, which at the time stated that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State," 42 U.S.C. § 2000e-1 (1988), suggesting that the statute was meant to protect aliens employed within any state. Both the dissent and the majority opinions agree on this proposition, but differ on whether "national origin" encompasses alienage.

107. Daniel J. Hoffheimer, Comment, 15 VA. J. INT'L L. 223, 225-26 (1974). Citizens, whether by birth or after naturalization, are likely to be more assimilated than foreign-born aliens because of their exposure to American culture and our educational system and, in the case of naturalized citizens, because of naturalization requirements that include knowledge of American government and the English language. See Gary H. Greenberg, Comment, *Espinoza v. Farah Manuf. Co.*, 6 INT'L L. & POL. 297 (1973).

to the *Espinoza* case appeared either before or after the Supreme Court decision.¹⁰⁸

Some courts, in contrast, have interpreted the "national origin" term more broadly to encompass the full meaning of ancestry independent of nation of origin. Courts have thus held that gypsies,¹⁰⁹ Acadians,¹¹⁰ Serbians,¹¹¹ and Ukrainians¹¹² all can claim protection under the "national origin" language of

108. My research assistant found only four brief student or other comments focusing on either the appellate court or Supreme Court decision in *Espinoza*: Greenberg, *supra* note 107 (concluding that the appellate court decision was too narrow a reading of Title VII); Hoffheimer, *supra* note 107 (questioning the correctness of the Court's decision); Charles M. Kinsey, *Citizenship: A Permissible Classification for Discrimination*, 11 HOUS. L. REV. 1011 (1974) (concluding that the Supreme Court's decision was correct); Comment, 51 TEX. L. REV. 128 (1972) (arguing that the appellate court's interpretation of "national origin" to exclude alien status was supportable). Perhaps not surprisingly, these four commentaries split evenly regarding the correctness of the courts' decisions.

In addition to the foregoing comments, the only additional discussions of *Espinoza* are brief and in the context of other topics. See Mack A. Player, *Citizenship, Alienage, and Ethnic Origin Discrimination in Employment Under the Law of the United States*, 20 GA. J. INT'L & COMP. L. 29, 40-42 (1990) (describing *Espinoza* in the broader context of statutory and constitutional citizenship law); Cary B. Samowitz, *Title VII, United States Citizenship, and American National Origin*, 60 N.Y.U. L. REV. 245, 246-49 (1985) (describing *Espinoza* and arguing that discrimination against U.S. citizens should be recognized as "reverse *Espinoza*" discrimination in violation of Title VII). Several articles comment on *Espinoza* as apparently inconsistent with *Connecticut v. Teal*, 457 U.S. 440 (1982). See, e.g., James R. Reehl, *Connecticut v. Teal: Extending Griggs Beyond the Bottom Line*, 44 U. PITT. L. REV. 751, 756 n.35 (1985) (distinguishing *Espinoza* from *Teal* because of the Court's interpretation of "national origin" in *Espinoza*); Jane Rigler, *Connecticut v. Teal: The Supreme Court's Latest Exposition of Disparate Impact Analysis*, 59 N.D. L. REV. 313, 318 (1984) (discussing *Espinoza* as a failure to deal with the "bottom line" issue discussed in *Teal*); James P. Scanlan, *The Bottom Line Limitation to the Rule of Griggs v. Duke Power Co.*, 18 U. MICH. J.L. REF. 705, 717-18 n.64 (1985) (commenting that *Espinoza's* reliance on the percentage of Mexican American employees in Farah's workforce may be inconsistent with *Teal*); see also Alfred W. Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law*, 12 N.C. CENT. L.J. 1, 8 (1980) (describing *Espinoza* as a case in which the Court approved of the employer's high bottom-line percentage of Mexican American employees); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 374-75 (1988) (containing a brief discussion of *Espinoza*).

109. *Janko v. Illinois State Toll Highway Auth.*, 704 F Supp. 1531 (N.D. Ill. 1989).

110. *Roach v. Dresser Indus. Valve & Instrument Div.*, 494 F Supp. 215 (W.D. La. 1980).

111. *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667 (9th Cir. 1988).

112. *Kovalevsky v. West Publishing Co.*, 674 F Supp. 1379 (D. Minn. 1987).

Title VII. Although members of all of these ethnic groups could argue that they are protected from discrimination because of ancestry,¹¹³ meaning family descent or lineage, they might not be protected under the plain meaning of "national origin." Gypsies define themselves by their ethnic affiliations and traditions, not by any national affiliation or origin.¹¹⁴ Although Acadians, or Cajuns, have a long history in this country,¹¹⁵ there has never been a nation of Acadia, so they do not have a "national origin" within the meaning of the statute.

Although the courts extended protection to the Serbian and Ukrainian plaintiffs under the "national origin" provision, these results are not compelled by the statute. Serbia and Ukraine, prior to the breakup of Yugoslavia and the Soviet Union, respectively, were nations that no longer existed at the time the cited lawsuits were filed. These courts' interpretation of "national origin" as applying to nations that existed in the past has interesting implications. How far back in history could one appropriately reach and claim the statutory protection? Predictably, in several of these cited cases, the defense argued that the term "national origin" was never intended to apply to simple ethnic groups, or to groups whose nation no longer existed.¹¹⁶

Although courts easily have encompassed ancestry within the meaning of national origin, they generally have been more reluc-

113. Ancestry may be defined as "family descent or lineage," characteristics which may be independent of national origin. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 50 (2d coll. ed. 1982). See *infra* notes 124-27 and accompanying text.

114. See *Janko*, 704 F Supp. at 1531-32 (indicating that recent definitions of "gypsy" refer to ethnic groups who differ by their ties to "earlier Nomadic minority tribal peoples in the Caucasias [sic]"). "Gypsies" is actually an inaccurate label for various groups who call themselves "Roma" or "Rom." See Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323, 335 (1993) ("Despite the generic label 'Gypsy,' the Roman people actually comprise many different groups bound together by notions of purity and pollution, and by Gypsy law.")

115. See *Roach*, 494 F Supp. at 217-18 (recognizing the movements of Acadian exiles to Louisiana beginning in 1764). See generally James H. Domengeaux, Comment, *Native-Born Acadians and the Equality Ideal*, 46 LA. L. REV. 1151 (1986) (arguing that protection should be extended to Acadians under the "national origin" provision).

116. See *Pejic*, 840 F.2d at 673; *Janko*, 704 F Supp. at 1531; *Roach*, 494 F Supp. at 216.

tant to interpret Title VII to provide protection against discrimination because of other ethnic traits. With respect to the trait of language difference, the courts of appeals now uniformly deny protection under Title VII. Only one court, the United States Court of Appeals for the Ninth Circuit, in *Gutierrez v. Municipal Court*,¹¹⁷ concluded that restrictions prohibiting employees from speaking Spanish, their primary language, violated the prohibition against "national origin" discrimination when the employer could not prove any business necessity for its language restrictions.¹¹⁸

Subsequent cases evaluating language restrictions in the Ninth Circuit, however, have avoided the reasoning and outcome in *Gutierrez*. In one such case, the court avoided the reasoning in the *Gutierrez* case by deciding that a language restriction was not really a language restriction.¹¹⁹ Despite this court's recognition that "certain members of management announced a rule prohibiting the use of Tagalog,"¹²⁰ the native language of Filipino nurses on staff at Pomona Valley Hospital, the court concluded that because the rule restricted only use of Tagalog, it was not an "English-only" rule and therefore not a redressable language restriction.¹²¹ In the recently decided case, *Garcia v.*

117. 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

118. *See id.* (deciding that the employer had proved no business necessity for its language restrictions; indeed, the employer had hired bilingual employees precisely because the job demanded their language skills). The Supreme Court subsequently vacated the holding as moot because the parties settled prior to the Supreme Court's consideration of the case. *See Gutierrez*, 490 U.S. at 1016; *see also Gutierrez v. Municipal Court*, 861 F.2d 1187, 1188 (9th Cir. 1988) (denying rehearing en banc) (Kozinski, J., dissenting) (pointing out the split among the circuits created by *Gutierrez*); *see also* Juan F Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REF. 265, 272-73 (1990) (discussing *Gutierrez* decision); *see generally* BILL PIATT, LANGUAGE ON THE JOB 63-77 (1993) (discussing both early and contemporary challenges to the validity of English-only rules in the workplace). *But see* Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987) (upholding the discharge of a disc jockey who insisted on speaking Spanish on the air contrary to management's instructions).

119. *Dimaranan v. Pomona Valley Hosp. Medical Ctr.*, 775 F Supp. 338 (C.D. Cal. 1991).

120. *Id.* at 340.

121. *Id.* at 342-43. As to the Tagalog-speaking nurses, the rule certainly was an English-only requirement. The court denied the plaintiffs' disparate impact action by reasoning that the restriction on Tagalog alone was not facially neutral, i.e., it was

Spun Steak Co.,¹²² the court ignored *Gutierrez* entirely in the body of the opinion. In a footnote at the end of the opinion, the court stated that it was in "no way bound by" the reasoning in *Gutierrez*.¹²³

Most courts that have considered the question have concluded that Title VII does not protect bilingual employees from discrimination because of their non-English primary languages. As the court wrote in *Garcia v. Gloor*,¹²⁴ "neither the statute nor common understanding equates national origin with the language that one chooses to speak."¹²⁵ According to this court, Title VII "does not support an interpretation that equates the language an employee prefers to use with his national origin."¹²⁶ A straightforward reading of the statutory language and its legislative history facilitates the result reached by the Fifth Circuit. Very recently, the Eleventh¹²⁷ and Ninth¹²⁸ Circuits have followed the approach in *Garcia v. Gloor*.

With respect to the accent trait, several courts have stated that employers cannot discriminate against an employee with a foreign-sounding accent when the accent does not interfere materially with the employee's ability to perform his job.¹²⁹ These

facially discriminatory. See *id.* at 344-45. Remarkably, the court also denied the availability of a disparate treatment action, which would follow from a facially discriminatory rule, by restating management's allegedly benign motives, to promote racial harmony on the nursing floor. *Id.* at 343-44.

122. 998 F.2d 1480 (9th Cir. 1993).

123. *Id.* at 1487 n.1. The court ignored *Gutierrez* because the Supreme Court vacated the case as moot. Although the court is correct that the Supreme Court's action renders the Ninth Circuit's decision in *Gutierrez* a nullity, it is striking that a different panel from the same circuit felt entitled to ignore completely the reasoning and result of a prior decision that decided exactly the same issues. See MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 306 n.7 (2d ed. 1991).

124. 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

125. *Id.* at 268.

126. *Id.* at 270.

127. See *Supreme Court Refuses to Review Propriety of English-Only Rule for Hispanic Employees*, Daily Lab. Rep. (BNA), May 18, 1993 (describing the 11th Circuit's unpublished decision in *Gonzalez v. Salvation Army*, Feb. 1993). The Supreme Court denied certiorari in the case. *Gonzalez v. Salvation Army*, 113 S. Ct. 2342 (1993).

128. *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993).

129. See *Fragante v. City of Honolulu*, 888 F.2d 591, 594-95 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990). The appeals court wrote that "[a]n adverse employment decision may be predicated upon an individual's accent when—but only when—it interferes materially with job performance." *Id.* at 596; see also *Carino v.*

courts find theoretical protection for employees with "foreign-sounding" accents in the prohibition against "national origin" discrimination.¹³⁰ In *Carino v. University of Oklahoma Board of Regents*,¹³¹ for example, the court concluded that the employer had committed national origin discrimination by demoting Mr. Carino, a naturalized citizen born in the Philippines, "because of his national origin and related accent."¹³² The trial court had found that Carino's accent would not interfere with his former supervisory duties.¹³³ Similarly, the Supreme Court of Washington found recently that an employer violated a state law prohibition against national origin discrimination by failing to promote an employee because of his "foreign" accent, when the accent did not interfere materially with the plaintiff's job performance.¹³⁴

Despite judicial recognition that accent should be a trait protected under the "national origin" language of the statute, plaintiffs claiming that they have suffered discrimination because of their accents often lose their cases.¹³⁵ In *Fragante v. City of Honolulu*,¹³⁶ for example, Manuel Fragante was denied employment as a civil service clerk because of his pronounced Filipino accent, which made him "difficult to understand," according to the interviewers who denied him employment.¹³⁷ Fragante, however, had the highest score among 721 civil service exam takers,¹³⁸ and he had no difficulty making himself understood during the trial of his case.¹³⁹

University of Okla. Bd. of Regents, 750 F.2d 815, 819 (10th Cir. 1984); *Bell v. Home Life Ins. Co.*, 596 F. Supp. 1549, 1554-55 (M.D.N.C. 1984); *Berke v. Ohio Dep't of Pub. Welfare*, 30 Fair Empl. Prac. Cas. (BNA) 387, 391-92, 394 (S.D. Ohio 1978), *aff'd per curiam*, 628 F.2d 980 (6th Cir. 1980).

130. Matsuda, *supra* note 16, at 1332, 1348-49.

131. 750 F.2d 815 (10th Cir. 1984).

132. *Id.* at 819.

133. *Id.*

134. *Xieng v. Peoples Nat'l Bank*, 844 P.2d 389, 391-92 (Wash. 1993) (en banc).

135. Matsuda, *supra* note 16, at 1332, 1348-49.

136. 888 F.2d 591 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990).

137. *Id.* at 593-94.

138. *Id.* at 593.

139. Matsuda, *supra* note 16, at 1338-39. Professor Matsuda also describes the case of James Kahakua, who was disqualified from a position as a weather forecaster because of his Hawaiian Creole accent. *Id.* at 1344-46.

Court protection for ethnic traits under the current scheme, therefore, is inconsistent and of limited benefit for plaintiffs. Most courts do not protect against discrimination because of language differences. Most courts accept that discrimination because of accent should be protected under Title VII, but courts often defer to the employer's decision to deny employment because an applicant's accent is "too foreign" or excessive. Courts have also protected other traits correlated with particular national origins, such as short height.¹⁴⁰ In every case in which courts protect an ethnic trait such as accent or language, however, the protection depends on a broad construction of "national origin" that finds no support in the statute's language and legislative history. Some courts have found support for their decisions protecting ethnic traits in the guidelines of the EEOC.

B. Ethnicity and the EEOC

Based on the statutory phrase "national origin," the EEOC has developed an expansive conception of national origin discrimination in its *Guidelines on Discrimination Because of National Origin*.¹⁴¹ Going beyond the plain meaning available from the statute and its legislative history, the EEOC writes that the statute protects against discrimination "because an individual has the physical, cultural or linguistic characteristics of a national origin group."¹⁴² Not only does the EEOC protect individuals with these characteristics, the agency also protects individuals associated with individuals with these characteristics. Thus the agency protects spouses or associates of members of "national origin groups," members of organizations identified with national origin groups, persons who attend schools or churches used by national origin groups, and persons who have,

140. *Davis v. County of Los Angeles*, 566 F.2d 1334, 1341-42 (9th Cir. 1977), *vacated as moot on other grounds*, 440 U.S. 625 (1979); *see also* *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 941-42 (10th Cir. 1979) (remanding for more fact finding regarding the question of whether minimum height requirements were applied by the defendant so as to impact Hispanic applicants disparately).

141. 29 C.F.R. § 1606 (1993).

142. *Id.* § 1606.1.

or are associated with those who have, foreign-sounding surnames.¹⁴³

Because height or weight requirements may have a disparate impact upon certain ethnic groups, the EEOC identifies these as potentially protected national origin characteristics.¹⁴⁴ Furthermore, the agency recognizes that “[t]he primary language of an individual is often an essential national origin characteristic.”¹⁴⁵ The agency also recognizes that employment requirements based upon English fluency or the absence of a “foreign accent” may be discriminatory because of national origin.¹⁴⁶

What the agency is actually protecting, however, is not national origin but rather the traits of ethnicity. Its broad conception of “national origin” discrimination reads much like the broad understanding of ethnicity: “the physical, cultural or linguistic characteristics of a national origin group.”¹⁴⁷ The problem with the EEOC’s interpretation is the same as the problem with broad judicial interpretations of the statute: the statutory language and legislative history simply do not support it. Given the current Supreme Court’s penchant for strict construction of civil rights statutes, these judicial and agency attempts to broaden the scope of Title VII will likely prove futile when the Court decides to review them. The only safe course, therefore, is to amend the statute in a manner that would support the efforts of the EEOC and some courts to expand Title VII to bar discrimination on the basis of ethnic traits.

143. *Id.*

144. *Id.* § 1606.6(a)(2).

145. *Id.* § 1606.7(a).

146. *Id.* § 1606.6(b)(1).

147. *Id.* § 1606.1. The EEOC’s definition is almost identical to the broad understanding of ethnicity: the “physical and cultural characteristics that make a social group distinctive, either in group members’ eyes or in the view of outsiders.” FEAGIN, *supra* note 13, at 8-9; see *infra* notes 154-56 and accompanying text.

IV DEFINITIONS OF TERMS AND THE NATURE OF PREJUDICE

A. *Definitions of Terms: National Origin, Ancestry, and Ethnicity*

Before discussing the problems posed for "national origin" plaintiffs under Title VII and my proposal to address these problems, it is important to define three terms: national origin, ancestry, and ethnicity

National origin is the most simply defined and the most easily understood. National origin means the nation of one's birth. In the meager legislative history of the term "national origin" in Title VII, legislators extended this meaning slightly to include the nations of birth of one's ancestors.¹⁴⁸ "National origin" under Title VII means both one's national origin and the national origin characteristic of one's ancestry

Ancestry may be defined as "family descent or lineage."¹⁴⁹ Ancestry, therefore, is a somewhat broader concept than national origin, since it may encompass more than one ancestor and more than one national origin. Although ancestry overlaps with national origin, one's ancestors may not have a single or a strict national origin. Acadians, for example, have a specific ancestry, but no national origin, since Acadia has never been a nation.¹⁵⁰ Gypsies, too, have specific ancestry, but claim no particular national origin.¹⁵¹

148. See H.R. REP NO. 914, 88th Cong., 1st Sess. 87 (1963); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 89 (1973) (noting that deletion of the word "ancestry" from early versions of Title VII was not intended as a material change and suggesting that the terms "national origin" and "ancestry" were considered synonymous). The House Report described the Civil Rights Act of 1963, the predecessor to Title VII, which had included both the terms "national origin" and "ancestry" in the subcommittee proposal, but which ultimately deleted "ancestry." In the paragraph describing the deletion, the authors of the report wrote that "[t]here [was] no material change in the substantive provisions." H.R. REP NO. 914, 88th Cong., 1st Sess. 87 (1963).

149. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 50 (2d coll. ed. 1982).

150. *Roach v. Dresser Indus. Valve & Instrument Div.*, 494 F Supp. 215 (W.D. La. 1980) (holding that a person of Acadian descent is protected under the "national origin" term, despite the historical absence of a nation of Acadia).

151. See *Janko v. Illinois State Toll Highway Auth.*, 704 F Supp. 1531, 1531-32 (N.D. Ill. 1989) (concluding that a gypsy was covered under "national origin" term of Title VII despite the absence of particular national affiliation).

Ancestry may also be distinct from national origin. Consider the situation of a Cuban-born member of the Chinese community in Cuba who emigrates to the United States. Suppose this person becomes a victim of discrimination because he looks Chinese, speaks Chinese, and speaks English with an obvious Chinese accent. While this example may involve discrimination because of ancestry (his Chinese parents and other ancestors) and because of race and ethnic traits (Chinese physical features, color, language, accent), there is no discrimination because of national origin (Cuban birthplace).¹⁵²

Of the three concepts, ethnicity is the most complex and the most difficult to define because it is a varying mix of different traits. Under a broad definition, ethnicity refers to physical and cultural characteristics that make a social group distinctive, either in group members' eyes or in the view of outsiders.¹⁵³ Thus ethnicity consists of a set of ethnic traits that may include, but are not limited to: race, national origin, ancestry, language, religion, shared history, traditions, values, and symbols, all of which contribute to a sense of distinctiveness among members of the group.¹⁵⁴ These traits also may engender a perception of group distinctiveness in persons who are not members of that

152. For a further description of this example, see *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1060 n.7 (8th Cir. 1988).

153. FEAGIN, *supra* note 13, at 8-9.

154. The *Harvard Encyclopedia of American Ethnic Groups* describes ethnicity in the following manner:

Ethnicity is an immensely complex phenomenon. [Ethnic groups] are characterized by some of the following features, although in combinations that vary considerably: common geographic origin; migratory status; race; language or dialect; religious faith or faiths; ties that transcend kinship, neighborhood, and community boundaries; shared traditions, values, and symbols; literature, folklore, and music; food preferences; settlement and employment patterns; special interests in regard to politics in the homeland and in the United States; institutions that specifically serve and maintain the group; *an internal sense of distinctiveness; an external perception of distinctiveness.*

HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS, *supra* note 13, at vi (emphasis added).

group.¹⁵⁵ It is the perception of difference, often based on ethnic traits, that results in discrimination.

B. *The Nature of Prejudice*

Ethnic prejudice, in the negative sense in which it is usually applied to ethnic groups, has been defined by Professor Gordon Allport as follows:

Ethnic prejudice is an antipathy based upon a faulty and inflexible generalization. It may be felt or expressed. It may be directed toward a group as a whole, or toward an individual because he [or she] is a member of that group.

The net effect of prejudice, thus defined, is to place the object of prejudice at some disadvantage not merited by his own misconduct.¹⁵⁶

Discrimination may be understood as directed detrimental action, motivated by prejudice and not deserved by the victim.¹⁵⁷ Furthermore, "since the distinctive physical characteristics of subordinate racial groups are assumed to be linked to intellectual or cultural characteristics, dominant groups regularly mix their racial definitions with notions about intelligence and cultural distinctiveness."¹⁵⁸

Ethnic group membership is dependent upon a constellation of traits, some of which are more perceptible and immediately

155. *Id.* See ANDREW M. GREELEY, *ETHNICITY IN THE UNITED STATES* 291-315 (1974). Greeley has used the term "ethnogenesis" to describe the dynamic development and adaptation of immigrant ethnic groups to the dominant host cultures of their new countries of residence. *Id.* at 297. Over time, "the ethnic group has a cultural system that is a combination of traits shared with other groups and traits that are distinctive to its own group." *Id.* at 308-09. Despite this gradual overlap, some distinctive traits, such as racial features, language, accent, and name may remain perceptibly different from the dominant culture and continue to elicit discrimination. See also FEAGIN & FEAGIN, *supra* note 29, at 30-31 (discussing Greeley's theory of "ethnogenesis").

156. GORDON ALLPORT, *THE NATURE OF PREJUDICE* 9 (25th Anniversary ed. 1979); see also FEAGIN, *supra* note 13, at 10-12 (discussing prejudice).

157. Professor Joe Feagin defines discrimination as "actions carried out by members of dominant groups, or their representatives, that have a differential and harmful impact on members of subordinate groups. The dominant and subordinate groups here are racial and ethnic groups." FEAGIN, *supra* note 13, at 14.

158. *Id.* at 8.

obvious than others. Discrimination, therefore, is more likely to occur against persons because of the perceptible manifestations of ethnic distinction, ethnic traits, than because of the often imperceptible fact of national origin.¹⁵⁹ As Professor Allport wrote, "perceptible differences are of basic importance in distinguishing between out-group and in-group members."¹⁶⁰ The perceptible differences that mark out-groups include skin color, cast of features, gestures, prevalent facial expression, speech or accent, dress, mannerisms, religious practices, food habits, names, place of residence, and insignia.¹⁶¹ Thus an African American applicant for employment may become a victim of discrimination because of a white interviewer's perceptions and assumptions about the applicant's skin color, dress, or speech—all perceptible racial and ethnic traits.¹⁶² Similarly, a Latino employment applicant may face discrimination because of

159. See ALLPORT, *supra* note 156, at 89, 108-09, 113. Professor Allport notes that even a fragment of visibility, however, focuses people's minds on the possibility that everything may be related to this fragment. A person's character is thought to tie in with his slant eyes, or a menacing aggressiveness is thought to be linked to dark color. Here is an instance of our common tendency to sharpen and exaggerate a feature that captures attention and to assimilate as much as possible to the visual category thus created. Most human characteristics ascribed to race are undoubtedly due to cultural diversity and should, therefore, be regarded as ethnic, not racial.

Id. at 108-09, 113; see also Cutler, *supra* note 74, at 1165 ("Differences in dress, language, accent, and custom associated with a non-American origin are more likely to elicit prejudicial attitudes than the fact of the origin itself."). While I agree with Cutler's basic argument that a focus on national origin is myopic and underprotective, I do not agree that differences in dress, language, accent and customs stem from "non-American origin." Rather, these traits are as consistent with and part of American origin as the unspoken norm of traits from which the "differences" are measured. Many of us who are born in this country, and who therefore can properly claim American national origin also possess "different" traits. We are not less American, nor non-American, as a result. Furthermore, everyone in this country has an ancestry which, traced back far enough in time, would reveal non-American origins. The only exceptions might be Native American peoples, who precede all other groups by a significant amount of time. While some traits are more or less prevalent than others, in a nation populated by immigrants, probably every ethnic trait is an American trait or will be an American trait in subsequent generations.

160. ALLPORT, *supra* note 156, at 131.

161. *Id.* at 129-30.

162. *Id.*

an interviewer's associations and prejudice toward the applicant's skin color, name, accent, language, or bilingualism.

The prejudiced assumptions of the majority culture towards persons of differing ethnic traits are well documented. Persons who speak English with a "foreign-sounding" accent regularly are assumed to be "less intelligent" than persons who speak English with a more socially accepted accent.¹⁶³ Similarly, the perceived intelligibility of different languages is influenced by bias against particular ethnic groups.¹⁶⁴ The primary languages of subordinate groups, those perceived as lacking in prestige and power, are deemed more difficult to understand by the majority culture than the English language, which is deemed easy to understand.¹⁶⁵ Language difference results regularly in discrimination.¹⁶⁶ As found by the Congress in the related context of voting rights, "discrimination against citizens of language minorities is pervasive and national in scope."¹⁶⁷ According to the Senate Report accompanying the 1975 amendments to the Voting Rights Act of 1965, this discrimination most affected citizens of Hispanic and Asian ethnicity¹⁶⁸

163. Matsuda, *supra* note 16, at 1348, 1351. Cf. *State v. Gonzalez*, 538 A.2d 210, 215-16 (Conn. 1988) (upholding the prosecution's exclusion of a Latino juror with a highly perceptible accent on the grounds that he might have difficulty understanding questions, despite the juror's demonstration that he understood all questions posed).

164. See Juan F Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 351-52 (1992).

165. See *id.* Spanish is often deemed a low-status language in this country. Roseann Gonzalez has described this low status, and attributes it to "the enduring sentiment variously held by a number [of] Americans that Spanish speakers are 'illiterate, impoverished, dirty, [and] backward.'" Roseann D. Gonzalez et al., *Language Rights and Mexican Americans: Much Ado About Nothing* (presented at Minority Language Rights and Minority Education: European and North American Perspectives, Cornell University, May 6-9, 1988), reprinted in *Hearings on H.J. Res. 13, H.J. Res. 33, H.J. Res. 60 & H.J. Res. 83, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 181, 185 (May 11, 1988).

166. See Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 351-52 (1986) ("A distinctive language sets a cultural group off from others, with one consistent unhappy consequence throughout American history: discrimination against members of the cultural minority. Language differences provide both a way to rationalize subordination and a ready means for accomplishing it.") (footnotes omitted).

167. 42 U.S.C. § 1973b(f)(1) (1988).

168. See S. REP. NO. 295, 94th Cong., 1st Sess. 30-31 (1975), reprinted in 1975

Identifying traits need not, however, be physical.¹⁶⁹ In our culture, foreign-sounding names, like corresponding accents or languages, often elicit prejudice. Names are often markers of a person's ethnicity. Many persons, particularly in the entertainment industry, change their names in order to enhance their success and to escape discrimination because of their ethnicity.¹⁷⁰ Thus Ramon Estevez, a talented Hispanic actor, changed his name to the more Anglo-acceptable Martin Sheen.¹⁷¹ Sheen explained, "I know what it means to have an Hispanic name. It was taken away from me by a gringo society. This is part of my

U.S.C.C.A.N. 774, 797.

169. In *Romeo and Juliet*, for example, Juliet utters these words:

'Tis but thy name that is my enemy;
 Thou art thyself, though not a Montague.
 What's Montague? It is nor hand nor foot,
 Nor arm nor face, [nor any other part]
 Belonging to a man. O, be some other name!
 What's in a name? That which we call a rose
 By any other word would smell as sweet;
 So Romeo would, were he not Romeo call'd,
 Retain that dear perfection which he owes
 Without that title. Romeo, doff thy name,
 And for thy name, which is no part of thee,
 Take all myself.

WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2, ll. 38-49 (The Riverside Shakespeare 1974). Romeo's flaw, in Juliet's eyes, lies not in his person or his character, which she labels "dear perfection," but rather in his name, a name that instantly evokes ancient hatreds and a chasm of discontinuity between the name and its object, Romeo.

Romeo's name, and its social and cultural meanings within the play, render him something quite different from simple perfection. Similarly, a rose, if named "weed" or "poison ivy," would carry different and less attractive connotations. We might be less inclined to stop and smell a bed of weeds or poison ivy than a bed of roses based simply on the connotations carried by their respective names.

170. For example, author Eric Lax, in his book on actor Woody Allen, notes that in the theatrical world, names traditionally are changed either to erase telltale signs of immigration or simply for euphony. The notion that an audience might be more kindly disposed to someone named Woody Allen than they would to Allan Konigsberg is common among performers and producers, who think audiences are more likely to accept someone with a "normal" name.

ERIC LAX, *WOODY ALLEN* 9 (1991).

171. See Charles Champlin, *A Name by Any Other Name Would Sell as Sweet*, *SMITHSONIAN*, Apr. 1985, at 216. One of Martin Sheen's sons, Charlie Sheen, has retained his father's changed name, but at least one son, Emilio Estevez, decided to retain his father's original Mexican American name.

effort to get it back, my identity”¹⁷² Muzyad Yakhoob renamed himself Danny Thomas, a name more acceptable to the American public, in *Make Room for Daddy*¹⁷³ Alphonso D’Abruzzo renamed himself Alan Alda, of less pronounced Italian ethnicity¹⁷⁴ Issur Danielovich Demsky became Kirk Douglas, quintessentially anglicized and acceptable.¹⁷⁵ Many Jewish actors, responding to anti-Semitism in the American public, have changed their names.¹⁷⁶ Thus Emmanuel Goldenberg became Edward G. Robinson¹⁷⁷ and Jacob Cohen became Rodney Dangerfield.¹⁷⁸ The search for a “normal” and “light” name of a funny person led Allan Stewart Konigsberg to change his name to Woody Allen.¹⁷⁹

Although people also change their names for reasons of convenience or simple preference, many people have changed their names to avoid identification of their ethnicity and the frequently resultant discrimination. A name seems a particularly telling vehicle for prejudice. When an actor (or any other person) changes his or her name, nothing else changes—neither physical features, acting ability, nor other relevant characteristics of the actor. A change of name is only a change of label used to identify a particular person. Yet, as those who have changed their names well know, a name may carry enough ethnic meaning to make or break a career or to burden one’s daily existence with stereotypes imposed by others. The negative connotations, and consequent burdens, associated with names of certain identifiable ethnicities exist throughout our culture and our workplaces.¹⁸⁰

172. See *People*, DALLAS MORNING NEWS, May 17, 1993, at 2A; see also Reese Erlich, *A Star’s Activism, On Screen and Off*, CHRISTIAN SCI. MONITOR, Dec. 28, 1990, at 14 (describing how Sheen had to change his name in order to get acting work).

173. See John M. Glionna, *What’s in a Name?; For Robin Hood and Others Who Change Theirs, It Was Years of Bad Jokes and Mangled Spellings*, L.A. TIMES, Oct. 15, 1992, at E2.

174. *Id.*

175. Lynn Steinberg, *Name Not a Game; Why People Go to Court to Change It*, HOUSTON CHRON., Dec. 13, 1992, at C17.

176. See Champlin, *supra* note 171, at 216.

177. *Id.*

178. Glionna, *supra* note 173, at E12.

179. LAX, *supra* note 170, at 9-10.

180. See, e.g., 29 C.F.R. § 1606.1 (1993) (EEOC regulation recognizing that a “for-

The proposition that perceptible ethnic traits are more likely to elicit discrimination than imperceptible traits, such as national origin, is amply borne out by the historical example of Nazi Germany. Because Jews are identical to non-Jews in virtually every physical aspect,¹⁸¹ the Nazis had no easy way to identify those they would discriminate against and destroy. Accordingly, the Nazis had to develop now-discredited eugenic theories of racial traits and superiority in order to attempt to identify Jews.¹⁸² Furthermore, the Nazis had to mark Jews with yellow stars of David to make their Jewish identity visible,¹⁸³ so that marked Jews could be discriminated against. Without signifying markers—perceptible traits—discriminators cannot distinguish between those to favor and those to punish.¹⁸⁴

Most of the discrimination faced by ethnic minorities is based on their perceptible traits, and not on place of birth. Title VII's focus on "national origin," therefore, is not adequate to address the problem of discrimination because of ethnic traits. The inadequacy of this statutory language and its sparse legislative history becomes apparent in light of the Rehnquist Court's ex-

eign" surname may become the basis of "national origin" discrimination).

181. ASHLEY MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* 328-30 (4th ed. 1964) ("On physical grounds it is quite impossible to distinguish Jews from most of the native populations among whom they live in the Middle East, in the Orient, and in many other regions.").

182. *See id.* at 59-60, 288-89; DOROTHY NELKIN & LAURENCE TANCREDI, *DANGEROUS DIAGNOSTICS* 11 (1989).

183. PIERRE L. VAN DEN BERGHE, *RACE AND RACISM: A COMPARATIVE PERSPECTIVE* 24 (1967) ("[R]acial castes sometimes exist even though physical differences are not sufficient to distinguish reliably between members of various groups [T]he visibility of Jews was so low that the Nazis imposed the wearing of stars of David.").

184. Persons who cannot be identified as different, and who do not choose to identify themselves as different, may "pass" and live as the powerful. One example, also drawn from Nazi Germany, comes from the movie *Europa, Europa*, based on a true story. *EUROPA, EUROPA* (Orion 1991). In the film, a young, handsome, virile German Jew blends in so well with the Nazis that he becomes an outstanding member of Hitler's elite youth corps. He lives in constant fear, however, that the one physical marker of his Jewish identity, his circumcised penis, will be observed. So he goes to great lengths to avoid physical exams, observation, and sexual contact. He "passes" successfully, but very unhappily, and survives the war. *Id.*

tremely restrictive approach to the interpretation of civil rights statutes.

V THE PROBLEMS WITH THE CURRENT SCHEME

A. *The Rehnquist Court's Narrow Construction of Civil Rights Statutes*

The current Supreme Court has demonstrated a clear tendency to interpret civil rights statutes extremely narrowly¹⁸⁵ According to two leading commentators, "the Supreme Court of the 1980s was almost never willing to interpret statutes to effectuate the rights of African Americans and other racial minorities to be free of workplace discrimination when their interests were opposed by employer and union groups."¹⁸⁶ The Rehnquist Court recently has interpreted Title VII and 42 U.S.C. § 1981 in a constricted manner.¹⁸⁷ In a series of 1989 decisions demonstrating "outright hostility" toward protecting racial minorities,¹⁸⁸ the Court sharply curtailed the ability of civil rights plaintiffs to bring, and prevail in, lawsuits under Title VII and section 1981.¹⁸⁹ The outcry prompted by these decisions led to

185. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597, 612-14 (1992). "However uneven the Court was in protecting individual liberties through statutory interpretation in the 1970s, it was significantly less protective in the 1980s." *Id.* at 612.

186. *Id.* at 613.

187. *Id.*

188. *Id.*

189. *Id.* at 613 n.92. See, e.g., *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) (limiting Title VII attorney's fees to frivolous, unreasonable intervenors); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (interpreting § 1981 literally and narrowly to apply only to discrimination in the formation of employment contracts, and not to any subsequent race discrimination in the workplace); *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989) (supporting early triggering of Title VII statute of limitations period); *Martin v. Wilks*, 490 U.S. 755 (1989) (permitting challenges to Title VII consent decrees); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (changing the burdens of proof in disparate impact actions, making it easier for employers to defend discriminatory employment practices); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (creating and explaining a new defense available in mixed-motive employment discrimination action). See generally Mark S. Brodin, *Reflections on the Supreme Court's 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*, 21 B.C. L. REV. 1 (1990).

the ultimate enactment of the Civil Rights Act of 1991,¹⁹⁰ which overruled most of these decisions and added additional remedies available in cases of intentional discrimination.¹⁹¹ Indeed, Congress made an explicit finding that one of the Court's 1989 decisions, *Wards Cove Packing Co. v. Atonio*,¹⁹² "weakened the scope and effectiveness of Federal civil rights protections."¹⁹³

Two recent decisions illustrate well the Rehnquist Court's interpretive approach. In *Patterson v. McLean Credit Union*,¹⁹⁴ the Court reinterpreted the scope of 42 U.S.C. § 1981 and held that the statute provided no remedy for racial discrimination subsequent to the formation of an employment contract.¹⁹⁵ Relying solely on the statutory language, the Court decided that the right to "make and enforce contracts" applied only to the initial formation of a contract between employee and employer, and not to any discriminatory conduct or harassment that might occur in the workplace after contract formation.¹⁹⁶ The Court confined itself, and the statute, to a literal reading of what Congress said.¹⁹⁷ The Court wrote that its "role is limited to interpreting what Congress may do and has done."¹⁹⁸ Congress reversed the effect of this decision in the Civil Rights Act of 1991.¹⁹⁹

Remarkably, in light of Congress' virtually complete repudiation of the Court's narrow interpretations of Title VII and 42 U.S.C. § 1981 in 1989, the Court's most recent decision interpreting Title VII again demonstrates persistent hostility toward

190. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

191. Eskridge & Frickey, *supra* note 185, at 613.

192. 490 U.S. 642 (1989).

193. Pub. L. No. 102-166, § 2(2), 105 Stat. 1071, 1071 (1991).

194. 491 U.S. 164 (1989).

195. *Id.* at 179-80.

196. *Id.* at 176-77.

197. *Id.* at 183. The Court wrote, "[a]lthough we must do so when Congress plainly directs, as a rule we should be and are 'reluctant to federalize' matters [such as private contracts] traditionally covered by state common law." *Id.* (emphasis added).

198. *Id.* at 188.

199. Pub. L. No. 102-166, § 101(2)(b), 105 Stat. 1071, 1072 (1991) (adding a subsection which defined the "make and enforce contracts" language broadly to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship").

civil rights plaintiffs. In *St. Mary's Honor Center v. Hicks*,²⁰⁰ by a vote of five to four, the Court altered the traditional *McDonnell Douglas Corp. v. Green*²⁰¹ and *Texas Department of Community Affairs v. Burdine*²⁰² formulations of the burdens of proof and production for plaintiffs and defendants in a disparate treatment case under Title VII. Under both *McDonnell Douglas* and *Burdine*, the Court ruled that a plaintiff should prevail in a lawsuit if she demonstrates that an employer's stated reason for an adverse employment decision was a pretext.²⁰³

In *St. Mary's Honor Center*, however, Justice Scalia, writing for the majority, concluded that it was insufficient for a plaintiff to demonstrate that an employer's proffered reasons were pretexts.²⁰⁴ Rather, the Court held that a plaintiff must also prove that illegal discrimination was the employer's reason. As the Court wrote, "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason."²⁰⁵ By adding an additional element of proof, "that discrimination was the real reason," to the well-settled standards, the Court has made it much more difficult for Title VII plaintiffs to prevail.²⁰⁶ As Justice Souter wrote in dissent, the majority opinion "destroys a framework carefully crafted in precedents as old as 20 years."²⁰⁷ The Rehnquist Court has demonstrated repeatedly

200. 113 S. Ct. 2742 (1993).

201. 411 U.S. 792 (1973).

202. 450 U.S. 248 (1981).

203. See *McDonnell Douglas*, 414 U.S. at 807 (holding that once a plaintiff demonstrates that employer's reason was a pretext, he is entitled to "a prompt and appropriate remedy"); *Burdine*, 450 U.S. at 256 (allowing the plaintiff to meet his burden of persuasion "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence") (emphasis added); see also *St. Mary's Honor Ctr.*, 113 S. Ct. at 2759 (Souter, J., dissenting) (referring to *Burdine* and *McDonnell Douglas*).

204. *St. Mary's Honor Ctr.*, 113 S. Ct. at 2756.

205. *Id.* at 2752 (quoting *Burdine*, 450 U.S. at 258).

206. *Id.* at 2761 (Souter, J., dissenting) ("The majority's scheme greatly disfavors Title VII plaintiffs without the good luck to have direct evidence of discriminatory intent.").

207. *Id.* at 2764 (Souter, J., dissenting).

that the longevity of settled case law presents no obstacle to creating more difficult hurdles for civil rights plaintiffs.

Significantly, however, even the Rehnquist Court has found in favor of civil rights plaintiffs when the statutory language at issue is unmistakably clear. In *International Union, UAW v. Johnson Controls, Inc.*,²⁰⁸ the Court held unanimously that the employer's fetal protection policy, which excluded fertile women from certain hazardous jobs, constituted sex discrimination in violation of Title VII. Since the decision came at a time when the validity of *Roe v. Wade*²⁰⁹ was in question,²¹⁰ the Court's unanimity in *Johnson Controls* was surprising. Yet in light of the Pregnancy Discrimination Act (PDA),²¹¹ which explicitly defines discrimination because of pregnancy as sex discrimination,²¹² the Court had no choice but to give effect to the clear statutory language. As Justice Blackmun wrote for the majority, "[o]ur holding today is neither remarkable nor unprecedented. Congress in the PDA prohibited discrimination on the basis of a woman's ability to become pregnant. We do no more than hold that the PDA means what it says."²¹³

Johnson Controls illustrates the importance of a clear legislative statement of what is protected under Title VII. It is easy to foresee what will happen when the Court decides a case of alleged "national origin" discrimination. Applying its method of statutory interpretation, the Court will look to the plain mean-

208. 499 U.S. 187 (1991).

209. 410 U.S. 113 (1973).

210. What the Court characterized as the core holding of *Roe v. Wade*, the availability of pre-viability abortions, was upheld recently in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

211. 42 U.S.C. § 2000e-2(k) (1988).

212. *Id.*

213. *Johnson Controls*, 499 U.S. at 211. The en banc appellate court decision in *Johnson Controls* illustrates, however, that even seemingly clear statutory language can be interpreted in a way that departs from the statute. The appellate panel adopted a complex business necessity framework to accommodate an employer's interest in protecting an unborn child. *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 883-87 (7th Cir. 1989) (en banc), *rev'd*, 499 U.S. 187 (1991). Only Judges Cudahy, Posner, Easterbrook, and Flaum, in dissent, rejected this departure from Title VII's well-established framework that disparate treatment because of sex requires an employer to prove a BFOQ defense. *See id.* at 901-21 (Cudahy, Posner, Easterbrook, JJ., dissenting).

ing of "national origin" and its clear, but extremely limited, legislative history and conclude that Congress meant what little it said. Such an interpretation will nullify all of the judicial and expert agency amplification of what "national origin" ought to mean. Using its canons of statutory interpretation, the Court will conclude correctly that "national origin" means only an individual's or an individual's ancestors' nations of origin, and not the many ethnic traits protected by using this statutory language. The need to revisit "national origin" and to define accurately what it should mean, and what Title VII should say, is clear.

Given that some courts have interpreted "national origin" broadly in a manner that protects the traits of ethnicity, and that the EEOC has even more broadly interpreted this term to virtually always protect such traits, one could argue that the present situation should be left alone. After all, one of the Supreme Court's interpretive canons calls for a court, when a statute is silent or ambiguous on a question, to defer to an agency's interpretation of a statute enforced by the agency when that interpretation is "based on a permissible construction of the statute."²¹⁴ Courts have stated and upheld this principle in the Title VII context.²¹⁵

The Supreme Court, however, does not always accept the EEOC's expert interpretation of Title VII and related statutes. In *Espinoza*, for example, the Court rejected the agency's position that discrimination against aliens was "based on birth outside the United States" and should be deemed a violation of Title VII.²¹⁶ As described previously, lower courts have also re-

214. See *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 185 (1989) (Marshall, J., dissenting) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)); see also WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 803-17 (1988).

215. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) ("The administrative interpretation of the Act by the enforcing agency is entitled to great deference.").

216. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 97-98 (Douglas, J., dissenting) (citing Brief of the EEOC as Amicus Curiae); Amicus Curiae Brief for the EEOC at 5, *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (No. 72-671); see also *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (rejecting the EEOC's guidelines and ex-

jected the EEOC's guidelines on national origin discrimination.²¹⁷

More recently, in *Public Employees Retirement System v. Betts*,²¹⁸ the Court rejected the EEOC's position that a retirement system that denied disability retirement benefits to employees over the age of sixty violated the Age Discrimination in Employment Act.²¹⁹ In upholding the legality of the plan, the Court explicitly struck down an EEOC guideline to the contrary.²²⁰ The Court reasoned, in part, that the regulatory "requirement that employers show a cost-based justification for age-related reductions in benefits appears nowhere in the statute itself."²²¹ Responding to the EEOC's argument that its regulation was entitled to "special deference," the Court wrote, "[b]ut of course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."²²² Confirming the Court's current disinterest in the EEOC's interpretations of the statutes it administers, the Court's most recent decision interpreting Title VII, *St. Mary's Honor Center v. Hicks*,²²³ also rejected the EEOC's position and imposed a higher and more difficult burden of proof on Title VII plaintiffs.²²⁴

Given that the substantive contents of the EEOC's guidelines on national origin discrimination "appear[] nowhere in the statute itself,"²²⁵ the Court could take an approach similar to the approach taken in *Betts* if presented with a case challenging the validity of the guidelines. Accordingly, one cannot take too much comfort in the protection given to ethnic traits merely because of

planning "that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law".
217. See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993) (citing *Espinoza*, 414 U.S. at 94).

218. 492 U.S. 158 (1989).

219. *Id.* at 170-75.

220. *Id.* at 171.

221. *Id.* at 170.

222. *Id.* at 171.

223. 113 S. Ct. 2742 (1993).

224. See *id.* at 2761-62 (Souter, J., dissenting).

225. *Betts*, 492 U.S. at 170.

the existence of EEOC guidelines on the subject. Nor can one take too much comfort in the court decisions protecting ethnic traits, since many of these decisions rely on the vulnerable EEOC guidelines discussed earlier.²²⁶ If the Court takes a strict, literal interpretive approach to Title VII, like the approach in *Betts*, then virtually all of the protection that exists against discrimination because of ethnic traits will, quite suddenly, disappear.

B. The Judicial Creation of a Normative American Identity

In addition to the Supreme Court's likely hostility to broad interpretations of the "national origin" provision, another problem results from the absence of explicit statutory protection against discrimination because of ethnic traits. As long as traits such as language and accent are protected solely as proxies for protected "national origin," the protection of ethnic traits becomes solely a matter of the interpretive preferences of judges. These preferences manifest themselves in the threshold judicial decisions regarding whether a trait may function at all as a proxy for "national origin," and, if so, whether a trait is a close enough proxy to merit protection. Judges are free to impose their own value preferences, consciously or unconsciously,²²⁷ according to their views of the consistency of particular traits with their notions of American identity. These judicial value preferences are situated within, and informed by, our culture and our history.

1. The Cultural and Historical Context: The Example of Language Difference

Our culture and history form the social framework within which judges render their decisions. With respect to the language trait, our society devalues languages other than English and discriminates on the basis of English proficiency.²²⁸ Ameri-

226. See *supra* part III.B.

227. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 & nn.20-26 (explaining that much bias is unconscious and results from "deeply imbedded" cultural experiences).

228. Perea, *supra* note 164, at 351-52 & nn.452-55; see also FRANCOIS GROSJEAN,

ca has a long history of discrimination against persons whose language differs from the English language of the majority.²²⁹

Before and during World War I, for example, America experienced a period of intense nativism, much of which was expressed in the form of legal restrictions against German Americans and their German language.²³⁰ By 1919, this nativism led fifteen states to ban the teaching of foreign languages.²³¹ Similarly, in Louisiana, teachers prohibited the use of French in the classroom and severely punished students who spoke French in school.²³²

More recently, the Spanish language has been banned from the classroom in Texas and other parts of the Southwest. Mexican American and other Latino students who spoke Spanish words in school were severely punished.²³³ These punishments included corporal punishment, detention, and segregation into separate schools.²³⁴ Similar hostility toward non-English languages exists in large measure in the workplace, where employ-

LIFE WITH TWO LANGUAGES 62-67 (1982) (“[B]ilingualism is treated as a stigma and a liability in the United States, whereas in many European and African countries it is considered a great asset.”).

229. See generally Perea, *supra* note 164, at 328-71 (examining the use of law to restrict languages other than English in the United States and analyzing the official English movement); see also Karst, *supra* note 166, at 351 (“A distinctive language sets a cultural group off from others, with one consistent unhappy consequence throughout American History: discrimination against members of the cultural minority.”).

230. See HIGHAM, *supra* note 28, at 195-204.

231. *Id.* at 260; see also Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that Nebraska’s law banning the teaching of foreign languages to primary school students violated the Due Process Clause of the Fourteenth Amendment).

232. See Domengeaux, *supra* note 115, at 1154-55.

233. See, e.g., United States v. Texas, 506 F. Supp. 405, 412 (E.D. Tex. 1981) (“Mexican-American children were prohibited from speaking their native language anywhere on school grounds. Those who violated the ‘No Spanish’ rule were severely punished.”), *rev’d on other grounds*, 680 F.2d 356 (5th Cir. 1982).

234. See, e.g., THOMAS WEYR, HISPANIC U.S.A. BREAKING THE MELTING POT 52 (1988) (“[A]s late as the 1950’s children who spoke Spanish in school were made to kneel on upturned bottle caps, forced to hold bricks in outstretched hands in the schoolyard, or told to put their nose in a chalk circle drawn on a blackboard. And this would happen in Texas towns that were 98 percent Spanish-speaking.”) Detention was also part of the punishment for speaking Spanish. I possess a “Spanish detention slip,” kindly provided to me by Professor Gloria Valencia-Weber, that was issued as punishment to Latino students who spoke Spanish during the school day.

ees are still fired merely for speaking languages other than English.²³⁵

The virulence of popular hostility toward language difference can hardly be overstated. The continued vitality of the "Official English" movement, which has sought and obtained "Official English" laws and constitutional amendments in approximately seventeen states, depends upon this hostility.²³⁶ The outraged reaction of many to the Spanish-language naturalization ceremony held recently in Arizona provides another example.²³⁷ U.S. English and English First, two prominent sponsors of the "Official English" movement, were so angry about the Spanish-language ceremony that they petitioned the Immigration and Naturalization Service and the Justice Department to order that the Arizona ceremony be held in English.²³⁸ These organizations, which oppose the official use of any languages other than English in this country,²³⁹ neglect the fact that California and New Mexico were officially bilingual in Spanish and English under their state constitutions for long periods.²⁴⁰

2. *Judicial Enforcement of "American" Identity*

Judges do not operate outside the context of such cultural discrimination against non-English languages. We might expect, therefore, that many judicial decisions will favor an employer's choice to restrict non-English languages or "foreign-sounding" accents over an employee's assertion of discrimination because of these traits. In so doing, courts reinforce the common view of English as the only appropriate language for the workplace.²⁴¹

235. See *supra* notes 15-16 and accompanying text.

236. Perea, *supra* note 164, at 340-50. See generally BILL PIATT, ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES (1990) (reviewing language rights and policies in several contexts); Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293 (1989) (arguing that English-only rules are driven by xenophobia).

237. See Mark Shaffer, *Controversial Ceremony in Spanish Brings Tears to Eyes of 76 New Citizens*, ARIZ. REPUBLIC, July 3, 1993, at B1.

238. *Id.* (reporting that U.S. English sent a letter to Attorney General Janet Reno complaining about the ceremony).

239. See *id.*

240. Perea, *supra* note 164, at 309-28.

241. See, e.g., *Garcia v. Gloor*, 609 F.2d 156, 161 (5th Cir. 1980); *Frontera v.*

For example, the original opinion in *Garcia v. Gloor* contained language suggesting that the judges were, in part, reinforcing their view of the proper dominance of English:

*An employer does not accord his employees a privilege of conversing in English. English, spoken well or badly, is the language of our Constitution, statutes, Congress, courts and the vast majority of our nation's people. Likewise, an employer's failure to forbid employees to speak English does not grant them a privilege. If the employer engages a bilingual person, that person is granted neither right nor privilege by the statute to use the language of his personal preference.*²⁴²

The court later withdrew the opinion and replaced it with a similar opinion except that the italicized language quoted above had been deleted.²⁴³ Similarly, in *Frontera v. Sindell*,²⁴⁴ the court denied the plaintiff's claim that an English-only civil service exam violated the Equal Protection Clause and 42 U.S.C. § 1981. The court wrote that

[i]t cannot be gainsaid that the common, national language of the United States is English. Our laws are printed in English and our legislatures conduct their business in English. Some states even designate English as the official language of the state. Our national interest in English as the common language is exemplified by 8 U.S.C. § 1423, which requires, in general, English language literacy as a condition to naturalization as a United States citizen.²⁴⁵

Sindell, 522 F.2d 1215, 1220 (6th Cir. 1975).

242. *Garcia*, 609 F.2d at 161 (emphasis added).

243. See *Garcia*, 618 F.2d at 270 (disclaiming any intent to deny the importance of a person's language).

244. 522 F.2d 1215 (6th Cir. 1975).

245. *Id.* at 1220 (citation omitted). It is of interest to note that the statutory requirement of English literacy as a condition of citizenship was enacted, virtually without debate, as part of the Subversive Activities Control Act of 1950, at the height of our national hysteria over the communist threat to our institutions. It can be argued, therefore, that the statute was more the result of nativism than a reasoned expression of national interest. See Perea, *supra* note 164, at 337-40.

Many courts, because of their own biases, will favor results that support the English language and will ignore the claims of plaintiffs alleging discrimination because of language.

The lack of specific protection of ethnic traits in Title VII encourages courts to reinforce a longstanding and underinclusive normative conception of American identity and traits.²⁴⁶ A court's decision that employers may discriminate against Americans possessing certain ethnic traits—traits that do not interfere with job performance—is tantamount to deciding that the traits are outside the "normal" range of American traits and therefore the employer's behavior is reasonable and understandable. The courts' preferences for English and for "normal-sounding" English are good examples.²⁴⁷

Even if a norm exists, in the limited sense that a particular set of traits is more prevalent than others, the enforcement of trait norms which are not job related is entirely inconsistent with both the ideal and the statutory command of equal treatment in the workplace. Title VII's very purpose was to eliminate the enforcement of white racial and other majoritarian norms that impair severely the employment and life opportunities of persons who differ from these norms.²⁴⁸

246. The unstated normative American identity of the workforce might be described as follows: the norm corresponds to the dominant culture of the United States, which is "Caucasian, English-speaking, Protestant, and of comparatively distant Anglo-Saxon or European background," as described by President Truman's Committee on Civil Rights. See TO SECURE THESE RIGHTS, *supra* note 1, at 14; see also MILTON M. GORDON, ASSIMILATION IN AMERICAN LIFE 72 (1964) (identifying the culture of white, Protestant, English-speaking, Anglo-Saxon Americans to be dominant in the United States).

247. See *Garcia*, 609 F.2d at 161 (expressing a preference for English); *Frontera*, 522 F.2d at 1220 (same).

248. See *supra* notes 5-7 and accompanying text.

C. The "Correlation Problem" Under Title VII

In a concurring opinion in the recently decided case of *Hernandez v. New York*,²⁴⁹ Justices Scalia and O'Connor took a narrow view of race, which apparently would not permit extension of the concept to encompass any ethnic traits. The concurring justices rejected the significance of the correlation between traits and race:

No 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. That is the distinction between disproportionate effect, which is not sufficient to constitute an equal protection violation, and intentional discrimination, which is.²⁵⁰

The approach taken by the concurrence sheds light on a serious problem in litigating cases of alleged "national origin" discrimination. Although *Hernandez* was an equal protection decision, if an analogous approach is applied to Title VII, ethnic traits such as language, accent, and surname will no longer be protected under the language of "national origin." Under current law, scholars and advocates must always argue that traits such as accent and language are highly correlated with different national origins and therefore merit protection under Title VII.²⁵¹ I call the problem of showing the correlation of one trait with a recognized protected category the "correlation problem." Under the approach of the *Hernandez* concurrence, no degree of correlation with national origin would be sufficient for statutory protection of many ethnic traits.

Even a more inclusive approach recognizing that certain ethnic traits can function as proxies for national origin or race does

249. 111 S. Ct. 1859, 1873-75 (1991) (O'Connor and Scalia, JJ., concurring). For a detailed critique of the *Hernandez* opinion, see Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors and the Fear of Spanish*, 21 HOFSTRA L. REV. 1 (1992); Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761.

250. *Hernandez*, 111 S. Ct. at 1874.

251. See, e.g., Perea, *supra* note 118, at 276-79; Ramirez, *supra* note 249, at 802-05; see also Gutierrez v. Municipal Court, 838 F.2d 1031, 1039 (9th Cir. 1988) (recognizing that language is derived from and maintains an important relationship to national origin), *vacated as moot*, 490 U.S. 1016 (1989).

not alleviate the correlation problem for several reasons. First, courts retain discretion to decide which ethnic traits can, as a threshold matter, properly function as proxies for the "real" protected categories of race and national origin. Courts have differed widely on whether identical traits can function as proxies for a protected category. For example, in the related context of determining the "race-neutrality" under the Equal Protection Clause of reasons for peremptory challenges, different courts have found challenges of jurors sometimes race-neutral and sometimes not race-neutral when they involved Hispanic surname, accent, and language ability.²⁵²

A second correlation problem, one that exists even under an inclusive approach to the protection of ethnic traits, is the degree of correlation. How much correlation is enough to establish that an ethnic trait is actually a proxy for prohibited race or national origin discrimination? If fifty percent of the members of an ethnic group share a trait, is this sufficient for the trait to function as a proxy for the ethnic group? If two-thirds of American Latinos are bilingual,²⁵³ is this enough to establish Spanish/English bilingualism as a proxy for Latino ethnicity? Is ninety percent required? Since there are no mathematical guidelines to establish the sufficiency of a correlation for legal purposes, courts will make arbitrary and inconsistent choices of degrees of correlation that are "sufficient" or "insufficient" for purposes of establishing discrimination.²⁵⁴ The correlation problem puts advocates on weak legal moorings by forcing them to argue that some degree of correlation is sufficient for an ethnic trait to be considered a proxy for race or national origin.

The correlation problem also clarifies the major flaw with using national origin as the basis for statutory protection of ethnic traits: "national origin" is usually the wrong characteris-

252. See Perea, *supra* note 249, at 15-21 (citing and describing cases).

253. See Leobardo F Estrada, *The Extent of Spanish/English Bilingualism in the United States*, 15 AZTLAN 379, 389-90 (1984) (estimating that two-thirds of American Hispanics are bilingual).

254. Compare, e.g., *Garcia v. Gloor*, 618 F.2d, 264, 268 (5th Cir. 1980) (finding no correlation between language and national origin for bilingual employees) with *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1039 (9th Cir. 1988) (finding an important relationship between language and national origin).

tic to protect. Most discrimination occurs because of ethnic traits, many of which are perceptible, and not because of mere national origin, which is usually not immediately perceptible.²⁵⁵ If our focus were to be on discrimination because of ethnic traits, rather than the correlation of ethnic traits with national origin, then the correlation problem would disappear.

D. "National Origin" and the Creation of Outsider Status

Legal rhetoric and the language of statutes are important. They are important because they set the contours for litigation and for debate. They also provide a source of important social meanings and definitions. The continuing use of the term "national origin" in Title VII has interesting and revealing meanings.

A plaintiff discriminated against because of some aspect of her ethnicity (other than race or color) must claim protection under the "national origin" provision of the statute. She must claim to be of some distinguishable national origin (meaning the country of birth of one or one's ancestors) as a preliminary matter, to meet the requirements of the prima facie case.²⁵⁶ Implicit in this claim of a distinguishable national origin is the assertion that she and/or her ancestors are of a different,²⁵⁷ non-American national origin or country of birth. However, persons born in the United States have American²⁵⁸ or United States national origin because this is their country of birth.²⁵⁹ Accordingly, citi-

255. See Cutler, *supra* note 74, at 1169-76 (arguing for a trait-based approach to identifying national origin discrimination under Title VII).

256. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

257. The notion of "difference," or "different" national origin in the present context, only has meaning in relation to an unstated norm of "normal" or "non-different" national origin. See Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 13-14 (1987); see generally MARTHA MINOW, MAKING ALL THE DIFFERENCE 22-23, 49-78 (1990). Although our ancestries may differ, United States-born citizens all share the same national origin or country of birth, the United States. Thus for most of us, the concept of "different" national origin is fictional and has no meaning.

258. I use "American" as a synonym for United States national origin to reflect common usage, despite the fact that America refers to the entire continent containing the United States, and not just the United States. America is defined, first as "North America and South America considered together," and, fourth, as "the United States of America." WEBSTER'S NEW WORLD DICTIONARY 44 (2d coll. ed. 1982).

259. It is interesting, in connection with this discussion, to consider the real pover-

zens, other than naturalized citizens, who are plaintiffs in a "national origin" discrimination suit must invoke the ancestry of their parents or some earlier ancestor to find a country of birth, a national origin, different from the United States.

The "national origin" language of the statute thus forces many, probably most, plaintiffs to plead either a fiction about themselves or a truth about their ancestors that is also true for virtually everyone in the country. Assuming that most plaintiffs in "national origin" discrimination cases are United States citizens by birth, the fiction is that their national origin is someplace other than the United States. With respect to ancestry, and with the exception of Native Americans, the truth is that every American has an ancestry, traced far enough back in time, that began in another place or nation. When brought by citizens, then, most national origin discrimination claims require emphasizing one's ancestry. One problem with this is that it serves, again, to obscure the nature of discrimination, which is based on the perceptible ethnic traits of ethnically different Americans.

ty in the concept of American or United States national origin. One commentator has remarked:

The first is simply that an American nationality does in fact exist. That it seems necessary to make such a statement indicates the degree to which the rhetorical imbalance of the recent discussion of ethnicity has created a situation in which very basic matters related to American identity appear questionable.

Gleason, *supra* note 30, at 140. Gleason goes on to describe American nationality and its consistency with the recognition of ethnicity. *Id.* at 141. In addition, one law review commentator, responding to inconsistency in court decisions on the subject, felt compelled to establish what should be obvious, that American national origin exists. *See* Samowitz, *supra* note 108, at 249-55.

At least one court has reached the astonishing conclusion that there is no American national origin for Title VII purposes. *See, e.g.,* Vicedomini v. Alitalia Airlines, 37 Fair Empl. Prac. Cas. (BNA) 1381, 1384 (S.D.N.Y. 1983) (reasoning that national origin meant only ancestry, and not place of birth and acknowledging that under this reasoning perhaps only Native Americans have American national origin).

Other courts have reached the more reasonable conclusion that American national origin (American place of birth) exists for Title VII purposes. *See, e.g.,* Thomas v. Rohner-Gehrig & Co., 582 F. Supp. 669, 674 (N.D. Ill. 1984) (finding that American national origin, based on birth in the United States, exists for purposes of a Title VII action); Bilka v. Pepe's Inc., 601 F. Supp. 1254, 1257-58 (N.D. Ill. 1985); *see also* Chaiffetz v. Robertson Research Holding, Ltd., 798 F.2d 731, 732-33 (5th Cir. 1986) (reaching the same conclusion, relying on *Thomas* and *Bilka*).

Because of its focus on either a fictional difference in national origin or on ancestry, the "national origin" language of the statute forces plaintiffs to define themselves as outsiders, belonging to some other country or place of birth and, correspondingly, outside the scope of American identity. By reinforcing the notion of "foreign national origin" even among American born citizens, at least two negative consequences result. First, United States citizens who *constitute* part of the American polity *and* part of American identity must define themselves as having a foreign national origin and as outsiders not belonging to the American community. This is a false, statutorily-created outsider status, since Americans born here all have equal claim to American national origin and to equal citizenship as a birth right.²⁶⁰

Second, the operation of the national origin language of the statute reinforces unstated norms of "true" American identity.²⁶¹ The term "national origin" operates to reinforce an underinclusive conception of American identity. By making ancestry the significant concept in claiming statutory protection, the statute excludes many ethnic traits of United States citizens, including different languages, accents, and names, from the legal and cultural conception of United States identity. A statutory focus on the varied traits of citizens, in contrast, corresponds much better to the ethnic heterogeneity that has always been characteristic of the United States and erases the connotations that suggest that certain traits correspond to a "different," non-American national origin.

In addition to raising questions about the extent to which ethnically different Americans "belong" to this nation, this forced identification with different national origins has powerful connotations regarding loyalty to this country. The American identification of foreign origins with disloyalty to the United States and its form of government has been a prominent theme throughout American legal history. During the controversy over the Alien and Sedition Acts of 1798, the Federalists attempted to link Republican opposition to their policies with allegiance to the French, and thus to label the Republicans as traitors.²⁶² Dur-

260. U.S. CONST., amend. XIV, § 1.

261. See *supra* notes 227-48 and accompanying text.

262. JAMES M. SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND

ing World War II, over 100,000 persons of Japanese ancestry, including 70,000 *American citizens*, were forcibly evacuated and incarcerated merely because of their ancestry and regardless of the unquestioned loyalty of most of them to the United States.²⁶³ And during the Communist scare of the 1950's, people of foreign origins, particularly those of eastern European origins, had their loyalty questioned.²⁶⁴ The potential disloyalty attributed throughout our history to those Americans identified as "foreign" or ethnically different may have profound psychological consequences for them.²⁶⁵ Ironically, such incidents illustrate that historically the problem has been the lack of loyalty of the American public and its government to its citizens who are ethnically different from the mainstream.

The "national origin" language of Title VII thus perpetuates certain false beliefs about what is and what is not American. The falsity lies in the concept that Americans who differ ethnically from unstated norms of American identity are from a different place than the United States.²⁶⁶ Ethnically different

AMERICAN CIVIL LIBERTIES 12, 20-21 (1956); *see also* Perea, *supra* note 164, at 292-95.

263. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the evacuation and detention of Fred Korematsu, an American citizen of unquestioned loyalty); *see* ALLAN R. BOSWORTH, *AMERICA'S CONCENTRATION CAMPS* 18 (1967); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 390-97 (1989).

264. *See* Perea, *supra* note 164, at 338-40. The persistent identification of aliens with radicalism and disloyalty was also a prominent feature of the "Red Scare" following World War I. *See* ROBERT K. MURRAY, *RED SCARE: A STUDY OF NATIONAL HYSTERIA 1919-1920*, at 266-67 (1955) (describing the anti-alien feeling that culminated in the trial and subsequent executions of Sacco and Vanzetti); WILLIAM PRESTON, JR., *ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS* 1-34, 191-200 (1963).

265. As one example, consider the Nisei, second generation, American-born persons of Japanese ancestry. Thirty-three thousand Nisei served in the Armed Forces during World War II. Niseis served with great bravery and distinction in the 100th Battalion and the 442nd Regimental Combat Team, both units much celebrated for their heroism. There was a double war: the war to defeat America's wartime enemies and the war to convince the United States of their loyalty to the United States, not Japan. *See* TAKAKI, *supra* note 263, at 399-402. The burden of demonstrating one's loyalty and allegiance to the United States often results from being ethnically different from the norm. *See* ALLPORT, *supra* note 156, at 152-54 (describing, among several traits due to victimization, enhanced striving and symbolic status striving).

266. There is a frequent dissociation of Americans of perceptibly different ethnicity from American identity, which I can illustrate as follows. Often, when I make a new

Americans are marginalized because of their ethnic differences, which are made attributable to foreign origins, which further removes these Americans and their traits to a periphery outside American national identity. Thus statutory language meant to protect Americans from discrimination because of "national origin" in fact operates to exclude ethnically different Americans, at times overtly in court decisions, at times surreptitiously in the meaning and use of the term "national origin."

VI. A PROPOSED AMENDMENT TO TITLE VII

A. *The Starting Premises for Reform*

This proposal for statutory reform begins with several premises. First, many courts and the EEOC have been correct in protecting against discrimination because of ethnic traits. In most cases, ethnic traits, like racial or gender differences, are neither relevant nor detrimental in the performance of a job and therefore they should not be a lawful reason for discrimination by employers. The problem, as described above, lies in the choice of "national origin" as the protected characteristic, and in its extension and contraction. If courts generally and consistently inter-

acquaintance and introduce myself, I am asked, "Where are you from?" I respond, truthfully, "Washington, D.C." Then I am often met with "No, I mean where are you from?" I repeat, "Washington, D.C." My questioner, now frustrated, may give up or may shift the focus and ask "Where are your parents from?" The questioner seeks my ancestry, not my national or geographic origin, since I have already supplied this information. But in the course of such an interchange, I have been dissociated from my American birthplace. In a recent conversation with Professor Lisa Chiyemi Ikemoto, she reported that she has had similar experiences, although such conversations with her last longer because her family has lived in this country for three generations. When she is asked where she is from, she responds, truthfully, "Los Angeles." Inevitably, she is asked, "No, where are you *really* from?" Again, she responds, "Los Angeles." Now frustrated, the questioner may ask, "Well, where are your parents from?" Professor Ikemoto responds, truthfully, "Los Angeles." At this point many questioners give up, but more persistent ones may inquire about her grandparents, who are originally from Japan.

The persistence and frequency of such questions is remarkable and intriguing. One explanation for such questions, apart from whatever interest questioners may have in our ancestry, is that some people have difficulty accepting that persons with names and/or appearance like ours can be from Washington, D.C. or Los Angeles, that we can be from and of America. My thanks to Professor Ikemoto for sharing this story with me.

preted Title VII in a manner that protected ethnic differences, as the EEOC has generally done, then there would be less need for statutory reform.²⁶⁷ However, in light of the Supreme Court's likely approach to interpretation of Title VII, at the moment there seems to be little real protection afforded employees whose ethnicity differs from that of the majority

A second premise is that the primary, and perhaps sole, concern of employers should be with job performance and merit, and not with ethnic characteristics that do not interfere in an objective sense with job performance. This premise reflects the underlying meaning and purpose of all of Title VII. Employers, however, often are able to enforce their own visions of proper American identity and traits by denying employment opportunities to persons who do not conform to that vision. Unless provable and legitimate business interests, not themselves the result of prejudice, are affected, employers should not be permitted to enforce their preferences regarding degrees and kinds of assimilation.²⁶⁸

Although much employment is deemed "private," in fact the workplace, and employment in general, fills an important role in each individual's ability to participate in an important public role: to be visible, audible, and participating in the economy and in society. Employment discrimination keeps persons with certain ethnic traits invisible, silent, and unobtrusive, either through the outright denial of employment or by offering such persons relatively invisible work: work out of public view and hearing. For example, in *Garcia v. Gloor*, only Mexican American employees who labored in the lumber yard, out of public view and hearing, were free to speak Spanish when they wanted.²⁶⁹ Only those bilingual employees working as salespersons, and thus more visible and audible to the public, were subject to

267. Indeed, I hope that courts and attorneys will be able to use the understanding of ethnic traits and discrimination presented in this Article to extend protection to ethnic traits even under the existing "national origin" language.

268. See, e.g., Matsuda, *supra* note 16, at 1367-87 (discussing the need to reformulate traditional doctrine to incorporate standards based on unprejudiced listeners and more objective measures of competent communication, rather than basing court or managerial decisions on the extent to which someone sounds "foreign").

269. *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980).

a restriction on their use of Spanish. Similarly, in other cases, bilingual employees' use of their primary language has been restricted when fellow employees or customers resent its use in the workplace during the performance of a job.²⁷⁰ Employers have allowed the use of languages other than English when employees are at lunch or when their work (or their language) is less likely to be noticed.²⁷¹ Thus one employer made an exception to its English-only rule, allowing the clean-up crew to speak Spanish.²⁷² With respect to accent, in *Fragante v. City of Honolulu*, despite Manuel Fragante's outstanding exam performance, the best performance of all applicants for the job, and despite his trial testimony and his record of military service, which demonstrated the adequacy of his communications skills, he was denied a job because his accent was deemed intolerable to the public.²⁷³

This kind of discrimination operates as a double-edged sword, both edges aimed directly at persons of perceptibly different ethnicity. First, persons with perceptible ethnic traits often are denied employment opportunities and advancement when compared with persons whose ethnic traits conform more closely to those of the majority. They get less because of who they are, what they sound like, and what they look like. Second, when employers enforce their mainstream vision of American identity by restricting the visibility and public identity of ethnically different persons, they reinforce a homogeneous, and increasingly inaccurate, conception of American identity. This circular and self-reinforcing vision of American identity, and the American workforce, becomes a more difficult barrier to break for persons who vary from the norm.

270. See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1483 (9th Cir. 1993); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1042 (9th Cir. 1988); *Dimarinnan v. Pomona Valley Hosp.*, 775 F. Supp. 338, 341 (C.D. Cal. 1991).

271. *Garcia*, 998 F.2d at 1483; *Gutierrez*, 838 F.2d at 1036; *Dimarinnan*, 775 F. Supp. at 342.

272. *Garcia*, 998 F.2d at 1483.

273. *Fragante v. City of Honolulu*, 699 F. Supp. 1429, 1432 (D. Haw. 1987). For an excellent account of Manuel Fragante's story, see Matsuda, *supra* note 16, at 1333-40.

B. A Proposal for Legislative Reform

The current statutory language of "national origin" is not adequate for our present nor for our future. Although the term had meaning in the age of widespread governmental and private discrimination because of national origin, Title VII has been effective in eliminating the most overt forms of this discrimination. As Professor Lawrence has aptly described, overt racism and discrimination are not socially acceptable at the moment.²⁷⁴ Signs or advertisements saying "No Japs Wanted,"²⁷⁵ or similarly discriminatory signs, are clearly prohibited under Title VII.²⁷⁶ Statements by employers such as "You know we never hire Mexicans"²⁷⁷ are direct evidence of illegal discrimination. Most employers know better than to discriminate overtly

The most overt discrimination, therefore, is prohibited and quite easily avoided. On the other hand, the protection for discrimination against ethnic traits rests only on broad, and therefore vulnerable, EEOC and lower court interpretations of Title VII's "national origin" term. Congress must amend the statute so that protection against discrimination because of ethnic traits is explicit and clear.

In addition to the "national origin" term, Congress should add terms protecting against discrimination because of "ancestry" and "ethnic traits." The modified section 2000e-2(a)(1), for example, would read:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual because of such individual's race, color, religion, sex, *national origin, ancestry, or ethnic traits.*

274. Lawrence, *supra* note 227, at 322-23 & nn.20-26 (explaining the cultural basis for unconscious racism and bias).

275. See TO SECURE THESE RIGHTS, *supra* note 1, at 78 (describing such signs in store windows).

276. See 42 U.S.C. § 2000e-2 (1988) (declaring unlawful the employment practice of refusing to hire any individual because of national origin, among other reasons); *id.* § 2000e-3(b) (prohibiting advertisements that discriminate because of national origin, except where national origin is a bona fide occupational qualification).

277. TO SECURE THESE RIGHTS, *supra* note 1, at 55.

Corresponding amendments should be made whenever "national origin" appears in the statute. In addition, a new section 2000e(o) should be added to the definitions section, defining "ethnic traits." The definition of "ethnic traits" should read as follows: "(o) The term 'ethnic traits' includes, but is not limited to, language, accent, surname, and ethnic appearance."²⁷⁸

"Ancestry" should be added to the statute, despite the legislative history suggesting that it was thought to mean the same as "national origin,"²⁷⁹ in order to cover those situations in which ancestry and national origin are not the same.²⁸⁰ This addition would provide protection for groups such as gypsies and Acadians who may not claim or have an identifiable national origin. This addition would merely codify what some courts have already done using the "national origin" provision of Title VII.²⁸¹

"Ethnic traits" should be added to the statute to provide specific protection for all of those traits that should be, and in some cases have been, protected under Title VII.²⁸² The EEOC's Guidelines specify most of the traits that should receive specific

278. I recognize the possible vagueness in terms such as "ethnic traits" and "ethnic appearance." I think some vagueness is reduced by the illustrations described throughout this Article. Though these terms may require further, later elaboration, they come much closer to protecting expressions of ethnicity than the current "national origin" language in Title VII.

279. See *supra* notes 73-91 and accompanying text.

280. See *supra* notes 109-16 and accompanying text.

281. See, e.g., *Janko v. Illinois State Toll Highway Auth.*, 704 F Supp. 1531 (N.D. Ill. 1989) (protecting gypsies under Title VII); *Roach v. Dresser Indus. Valve & Instrument Div.*, 494 F Supp. 215 (W.D. La. 1980) (protecting Acadians under Title VII); see also *supra* notes 108-15 and accompanying text.

282. The additions to Title VII that I suggest are similar to language used by the Supreme Court in interpreting § 1981. In *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), the Court interpreted § 1981 to prohibit intentional discrimination because of "ancestry or ethnic characteristics." *Id.* at 613. It remains to be seen whether the Court's use of this language will be as expansive as the approach I advocate under Title VII. The Court's interpretation was based on its reconstruction of the meaning of "race," which appears to have meant ancestry and ethnic characteristics, at the time of the enactment of the Civil Rights Act of 1866, the ancestor of § 1981. See *id.* at 610-13. While I would not confine the meaning of "ancestry or ethnic characteristics" to the meanings these terms had in the mid-nineteenth century, my proposal finds some support in the Court's recent interpretation of § 1981.

statutory protection.²⁸³ These traits include language, accent, surname, membership in ethnic associations,²⁸⁴ and other ethnic traits such as height differences among ethnic groups.²⁸⁵ I include accent as an ethnic trait because a "foreign-sounding" accent is usually entirely derivative from a primary language other than American English and because a "foreign" accent identifies its bearer as a member of an ethnically distinctive group. I add the term "ethnic appearance" to protect employees who are discriminated against for appropriate expressions of ethnic identity. For example, Renee Rogers, an African American female, was fired from her job as a receptionist because she wanted to wear her hair in neat cornrows, a hairstyle with ethnic significance for African Americans.²⁸⁶ Under one court's interpretation of Title VII, however, Rogers had no redress.²⁸⁷

VII. THE CONSEQUENCES OF REFORM

What consequences would follow from adopting my suggested approach? First, many claims of discrimination because of "eth-

283. See 29 C.F.R. § 1606.1 (1993).

284. *Id.*

285. See *id.* § 1606.6(a)(2).

286. See *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981); see also Caldwell, *supra* note 76, at 379 (discussing the ethnic significance of braided hair for African American women). Another example, this time regarding ethnic dress, occurred recently. An African American male attorney wore a ceremonial kente cloth over his suit in court. The attorney was required by his church, Faith United Church of Christ, to wear the cloth publicly and privately, as an expression of religious faith and ethnic solidarity. *Judge Bars African Cloth in Court*, CHICAGO DAILY L. BULL., May 26, 1992, at 1. According to the attorney, "the kente cloth is representative of our ancestry and our kinship with all our brothers." *Ceremonial Garment Creates Issue for Court, Lawyer*, LEGAL TIMES, Apr. 27, 1992, at 6. Judge Robert Scott, of the District of Columbia Superior Court, asked the attorney to remove his cloth because it might unduly influence the jury. Judge Scott then ordered him to stop wearing the cloth and removed him from the case. Another judge subsequently had problems with the cloth, threatening to reduce the attorney's pay due to time taken (by the judge) discussing the kente cloth. *Colorful Cloth Has Judges Seeing Red*, LEGAL TIMES, July 6, 1992, at 6. Retired Chief Justice Burger approved of the judge's decision, writing that "judges should be allowed wide discretion in regulating apparel of those who appear in court." *Court Dress Codes OK. Burger*, CHICAGO DAILY L. BULL., Aug. 6, 1992, at 1.

287. *Rogers*, 527 F. Supp. at 232 (finding that an all-braided hairstyle is cosmetic and that the employer may permissibly ban it from the workplace).

nic traits" that are recognized occasionally as "national origin" discrimination would have an explicit statutory basis. This will change the causes of action alleged by certain plaintiffs and the defenses available to employers. Second, plaintiffs' attorneys no longer would have to make weak "correlation" arguments alleging the sufficiency of the degree of correlation of this or that trait with national origin. Lastly, the proposal would eliminate certain rationales currently used by courts to deny protection for ethnic traits. The proposal would also restrict the currently unconstrained discretion of courts to protect or not to protect certain traits under Title VII.

A. New Possibilities for Plaintiffs

Explicit statutory language prohibiting discrimination because of ethnic traits would allow many plaintiffs to allege disparate treatment actions instead of weaker disparate impact actions. Many forms of discrimination that have been analyzed under disparate impact theory, because of the alleged facial neutrality of challenged job requirements, would now be analyzed as forms of disparate treatment. For example, English-only rules in the workplace, which restrict the use of languages other than English in the workplace, when recognized as discriminatory at all, have been analyzed under the disparate impact model.²⁸⁸ I have argued elsewhere that such rules can have no claim to the facial neutrality required under disparate impact theory, since their exclusive effect will fall upon ethnic groups whose primary language is not English.²⁸⁹ Under the proposed scheme, English-only rules would constitute disparate treatment because of language. Accordingly, such claims would be easier to bring, and perhaps easier to win. As under current law, employers could have language-ability requirements for employment,²⁹⁰ provid-

288. See, e.g., *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1040 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

289. See Perea, *supra* note 119, at 289-95.

290. See, e.g., *Garcia v. Rush-Presbyterian-St. Luke's Medical Ctr.*, 660 F.2d 1217, 1222 (7th Cir. 1981) (holding that the ability to speak and read some English is a relevant requirement for most jobs in a highly sophisticated hospital); *Chung v. Morehouse College*, 11 Fair Empl. Prac. Cas. (BNA) 1084, 1088-89 (N.D. Ga. 1975) (holding that mastery of English could be required for a college faculty position).

ed that they could prove that English-language ability is a bona fide occupational qualification.

B. *The Effects upon Employers*

1. *The BFOQ Defense*

Claims of discrimination based on ethnic traits might be easier to win because employers, under the proposed scheme, could only defend against such claims subject to the higher standards of proof required by the bona fide occupational qualification (BFOQ) defense.²⁹¹ The BFOQ defense places on employers the burden of proving that otherwise illegal discrimination is "reasonably necessary to the normal operation of that particular business or enterprise."²⁹² The Supreme Court has interpreted this defense as "an extremely narrow exception to the general prohibition of discrimination."²⁹³ The narrowness of the exception was reconfirmed recently in *Johnson Controls*.²⁹⁴

2. *The "Minority Percentage Points" Defense*

Furthermore, statutory prohibition of discrimination because of ethnic traits would lessen the effectiveness of the "minority percentage points" defense. Employers are regularly able to defend successfully against claims that must now be characterized as "national origin" discrimination, but that actually arise from discrimination based on ethnic traits, by pointing to the

Courts and litigants should distinguish between jobs in which some level of English-language ability is required (and the measurement of that level of ability), and the often discriminatory characterization of persons with pronounced accents as "difficult to understand" or "less intelligent" than persons who speak English with a more common accent. See Matsuda, *supra* note 16, at 1351-52.

291. See 42 U.S.C. § 2000e-2(e) (1988).

292. *Id.*

293. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

294. *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991). The concurring opinion of Justice White, joined by Chief Justice Rehnquist and Justice Kennedy, expresses reservations about an overly narrow BFOQ defense and allows for the possibility of a cost-based BFOQ defense. See *id.* at 211-12 (White, J., concurring). But see Mark S. Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318 (1987) (arguing against recognition of a cost-justification defense under Title VII).

"minority percentage points" in their workforces. *Garcia v. Gloor*²⁹⁵ provides a good example.

Hector Garcia, a Mexican American citizen whose primary language was Spanish, was fired for speaking Spanish on the job in violation of his employer's English-only rule.²⁹⁶ He was performing his job by answering in Spanish a fellow employee's work-related question at the time he was fired.²⁹⁷ The employer and the court boasted that thirty-one of the thirty-nine Gloor Lumber Company employees—79.5% minority percentage points—were Hispanic, a fact that was persuasive in the court's conclusion that Garcia had not asserted a claim of "national origin" discrimination.²⁹⁸ The percentage points defense also served the employer well in *Espinoza v. Farah Manufacturing Co.*²⁹⁹ The Court relied on the fact that ninety-six percent of Farah's employees in San Antonio (very high minority percentage points) were of Mexican ancestry to prove that the employer did not discriminate because of national origin.³⁰⁰

In *Garcia*, the employee had alleged a claim of discrimination because of an ethnic trait, his primary language of Spanish, which he had to phrase in "national origin" terms. An employer's substantial proportion of Mexican American employees has nothing to do with whether a particular employee has been the victim of unfair discrimination because of an ethnic trait. This is further evidence that the "national origin" language of Title VII misses the mark in protecting against discrimination because of ethnicity

C. *The Effects on Courts*

Statutory prohibition of discrimination because of ethnic traits would limit the ability of courts to deny Title VII protection for

295. 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

296. The district court found that Garcia was fired for violating the English-only rule repeatedly, in addition to several other reasons. *Id.* at 266-67. The court of appeals assumed that Garcia's use of Spanish was a significant factor leading to his dismissal for purposes of its decision. *Id.* at 268.

297. *Id.* at 266.

298. *Id.* at 267.

299. 414 U.S. 86 (1973).

300. *Id.* at 93.

these traits. In *Garcia*, the court reasoned that the plaintiff's primary language was not protected under Title VII both because "national origin" was not the same as language and because, according to the court, language was not an immutable trait for a bilingual person.³⁰¹ The statutory reform I propose would end the "this-trait-is-not-the-same-as-national-origin" line of reasoning. Courts that now deny protection in claims regarding ethnic traits would be required to hear these claims of discrimination.

Courts hearing claims of discrimination because of ethnic traits would also have to assess whether employers have met their burden of proof under the BFOQ defense.³⁰² One possibility is that courts that formerly denied protection altogether would perhaps be apt to find that employers have made out a BFOQ defense. Statutory recognition and prohibition of discrimination because of ethnic traits, however, would express clearly congressional recognition of the significance of this kind of discrimination. If Congress expresses its will in this manner, many judges will be able to recognize, with deeper understanding, perhaps, the nature of this discrimination and will make good faith efforts at redress, now mandated by the statute. Of course, statutory language alone remains pliable and subject to interpretation, so varying outcomes are possible under my proposed scheme.³⁰³

The proposal would also limit significantly the use of the "immutability" rationale for curtailing the expressions of ethnicity. This would be a favorable result for two reasons. First, courts have assumed arbitrarily that some ethnic traits, such as primary language, are easily mutable, when in fact they are not for many persons.³⁰⁴ More importantly, presence or absence of mu-

301. *Garcia*, 618 F.2d at 268-69.

302. Juries, too, may have to consider these claims in cases in which plaintiffs seek compensatory damages under the reforms of the Civil Rights Act of 1991. See Pub. L. No. 102-166, §§ 102(b), 102(c), 105 Stat. 1073 (1991).

303. See, for example, the creative solution of the lower court in manipulating the standard Title VII framework to accommodate an employer's asserted interest in fetal protection policies that excluded women in *Johnson Controls*. See *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 883-87 (7th Cir. 1989) (en banc), *rev'd*, 499 U.S. 187 (1991).

304. See Perea, *supra* note 118, at 279-87.

tability should not be relevant in fundamental matters of individual identity, such as ethnicity³⁰⁵ We do not deem mutability relevant in protecting against discrimination because of religion, an aspect of ethnicity which is easily and sometimes actually changed. The possibility or actuality of religious transformation does not dampen the sincerity of religious belief nor dilute its fundamentality to a person's identity The aspects of our identities with which we are born, or that develop as a result of our families, do not become less important because we choose to, or must, maintain them. Nor are aspects of our identities less important because we have chosen them, if we have ability to choose.

The interpretation of Title VII that extends its protection only to those traits deemed "immutable" in effect cedes to employers and courts the power to define many aspects of individual identity, such as personal appearance, language, and accent.³⁰⁶ Virtually the entire sphere of so-called mutable traits is left to employer- or court-imposed norms. If a trait is mutable, goes the argument, then an employee ought to change it. Employers use this power to enforce majoritarian norms and to exclude persons whose traits do not conform to these norms. History shows this to be true. Before Title VII commanded differently, employers enforced white supremacy by excluding African Americans, Asian Americans, Latinos, and other persons of color from their workforces, or by keeping members of these groups in subservient positions.³⁰⁷

305. Cf. Matsuda, *supra* note 16, 1391-92, 1400-01 (arguing that the protection of personal identity, whether mutable or not, is a core value of our Constitution and one value inherent in Title VII and rejecting immutability rationale); see also Peter B. Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U. CAL. DAVIS L. REV. 769, 837-82 (1987) (arguing that the courts' use of the immutability rationale to deny protection for aspects of individual identity conflicts with Congress' desire for broad protection against discrimination).

306. Cf. Matsuda, *supra* note 16, at 1400 ("A true antisubordination agenda would apply reasonable accommodation to all differences, whether chosen or immutable, that are historically subject to exploitation or oppression by dominant groups.")

307. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 426-27 (1971) (noting that prior to enactment of Title VII, African American employees were consigned exclusively to the labor department, the lowest paying and most menial department on the employer's premises).

The same thing happens now with respect to ethnic traits, in the absence of explicit statutory protection. Employees are regularly fired or disciplined for speaking languages other than English in the workplace. Most courts acquiesce in the employer's action, enforcing the unstated norm that English is the only acceptable language of public discourse in this country

The absence of protection for mutable ethnic traits permits important aspects of personal appearance to be dictated by majoritarian norms as enforced by employers.³⁰⁸ The case of Renee Rogers furnishes a good example.³⁰⁹ Ms. Rogers was employed by American Airlines as an airport operations agent, a position in which she had "extensive passenger contact, including greeting passengers, issuing boarding passes, and checking luggage."³¹⁰ She decided to wear her hair in braids, a style popular among African American women in the United States for over four centuries.³¹¹ American Airlines had a grooming policy that prohibited employees like Rogers from wearing their hair in braids. Rogers sued to enjoin enforcement of the policy, arguing that it discriminated against women, and more particularly against black women. And so it did, as Professor Caldwell describes incisively and eloquently³¹²

308. See Bayer, *supra* note 301, at 839, 873-80; Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992). Professor Klare argues that

[t]he primary social function of appearance law is to empower employers, school officials, judges, and other authority figures to enforce the dominant expectations about appearance and to discipline deviance from the approved social norms. Generally speaking, these official appearance standards denigrate cultural and religious diversity and enforce conformity to white, heterosexual, Christian images of beauty and proper grooming.

Id. at 1398.

309. *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981).

310. *Id.* at 231.

311. See Caldwell, *supra* note 69, at 379 ("Wherever they exist in the world, black women braid their hair. They have done so in the United States for more than four centuries. African in origin, the practice of braiding is as American—black American—as sweet potato pie."). The ethnic significance of hairstyle to African American women is the subject of two films, *Hairpiece: A Film for Nappy-Headed People* (1982), directed by Ayoka Chenzira, and *A Question of Color* (1992), by Kathe Sandler. My thanks to Dr. Patricia Hilliard Nunn for introducing me to these films.

312. Caldwell, *supra* note 69, at 379-80.

The court, however, reasoned that the policy did not discriminate against women, because both women and men were subject to a grooming policy.³¹³ According to the court, the policy also did not discriminate against blacks because it applied to all races and because braided hair is not an immutable trait,³¹⁴ just as language was not immutable for Hector Garcia.³¹⁵ By applying a notion of neutrality that deprives employees of their ethnic identity, and applying a notion of immutability that allows employers to dictate mostly majoritarian norms of appropriateness, the court ignored the ethnic significance of Renee Rogers' braids.

If Title VII protected "ethnic traits," among them ethnic appearance, Renee Rogers would have recourse. So would Hector Garcia. So would countless individuals whose identity is twisted into the shape that employers prefer, and perhaps twisted beyond recognition.

VIII. CONCLUSION

In a nation built and populated by natives, immigrants, and the descendants of Africans, the range of traits belonging to the American population is much broader than the conception of American identity imposed by courts and employers. Without statutory protection for ethnic traits, employers and courts will tend to exclude from the workforce persons whose ethnicity is more perceptible than that of others. Explicit protection of ethnic traits, however, has the potential to minimize incorrect and inconsistent court decisions evaluating discrimination because of these traits.

More accurate protection of those traits which are actually the focus of discrimination will lead to more analytical clarity than the current statutory scheme, which demands that all ethnic traits be protected as proxies, of uncertain magnitude, for "national origin." Specific protection against discrimination because of ethnicity and the features of ethnic identity is an approach more consistent with ideals of individual equality and dignity

313. *Rogers*, 527 F Supp. at 231.

314. *Id.* at 232.

315. See *supra* notes 295-300 and accompanying text.

than the current ad hoc approach, which often coerces conformity with majoritarian norms of American identity. An approach which protects the varying ethnicities of our pluralistic society squares better with the ideal of workplace equality that lies at the foundation of Title VII.

The statutory language of national origin and country of birth began, in 1924, as the means to exclude undesired immigrants. Today's irony is that statutory language now meant to protect so often operates to exclude.