Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish

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DEADWEIGHT COSTS AND INTRINSIC WRONGS OF NATIVISM: ECONOMICS, FREEDOM, AND LEGAL SUPPRESSION OF SPANISH

Drucilla Cornell† & William W. Bratton‡

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‡ Professor of Law and Governor Woodrow Wilson Scholar, Rutgers University. Our thanks to Brad Cornell, Gregory DeFreitas, Ronald Dworkin, George Fletcher, Gary Francione, Richard Ford, Carlos Gonzales, David Kennedy, Mitchel Lasser, Sylvia Law, Joe McCahery, Larry Mitchell, Toni Morrison, Richard Rorty, Jeremy Waldron, and the participants at LatCrit III for their comments on earlier versions of this Article. Pheng Cheah’s and Roger Berkowitz’s critical comments on the essay encouraged revisions that benefitted the argument for a Kantian-inspired defense of language rights. Special thanks to our excellent research assistants, Deborah Milgate, Hope Lloyd, and Mónica de los Ríos. Nosotros dedicamos este artículo a los miembros Latinos de nuestras familias.

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INTRODUCTION

In the traditional story of immigration to America (the “assimilation story”), the most motivated, talented, and intelligent of the world’s dissatisfied people—our ancestors—came here to seek success in the world’s largest, freest, and deepest national marketplace. The American system, we are told, was demanding but fair, holding out equal economic opportunity in exchange for two things. First, the system required hard work on the job. Second, the system required hard work on the identity: to avoid consignment to America’s lower economic caste, immigrants had to root out the linguistic and cultural components of their old-world selves and substitute the less affected, more facilitative incidents of American identity. Eventually, the immigrants’ self-reliant efforts would bring the reward of Americanization.

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1 We refer to the norms implicit in the assimilation story as “assimilation norms.”
This transformation, however, called for patience. Only the most clever and ambitious could reconstruct themselves completely within a few years of arrival. The rest had to be content with life as quasi-Americans of foreign origin. Their children, however, would go on to achieve a full American identity and its accompanying economic opportunity. The third generation would complete the process of Americanization; internal ties to the antecedent language and culture would not burden the immigrants’ grandchildren.

The assimilation story, while always normative, has taken a particularly sharp normative edge in recent tellings. These versions set the assimilation pattern of early twentieth-century European immigrants as a standard against which one should measure the social suc-
cess of more recent arrivals. This usage of the early twentieth-century pattern, not coincidentally, has accompanied a thirty-year decline in the proportion of immigrants coming from Europe and a concomitant increase in immigration from Latin America and Asia. Critics argue that new arrivals of Latin American origin, hereinafter “Latinos and Latinas,” or in abbreviated form, “Latinos/as,” in particular have fallen short of this standard because too many have remained in a handful of large, Spanish-speaking enclave communities and have failed to disperse across the continent. Critics contend that the resulting concentration of non-English speech and other incidents of foreignness pose a threat to the nation’s social, economic, and political cohesion. Among other remedies, proponents advocate regulation to protect and enhance the status of the English language and

6 The watershed events in modern immigration law were the repeal of the Chinese Exclusion Acts by the Act of Dec. 17, 1943, ch. 344, 57 Stat. 600, and the Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911. These ended the ban on Asian immigration, shifted entry requirements to favor members of families of present residents, and imposed annual limits on the number of people admitted from both the Western and Eastern Hemispheres. The limits on entries from the Western Hemisphere were the first in history. See Massey, supra note 4, at 637-38. Entries from Mexico were not previously unregulated, however. See id. at 635-36. Although they were not subject to a numerical cap, entrants had to satisfy substantial visa qualification requirements, see id. There were, as a result, hundreds of thousands of illegal Mexican entrants during the 1950s and 1960s. See Gregory DeFreitas, Inequality at Work: Hispanics in the U.S. Labor Force 17 (1991).

7 Latinos/as are not identifiable by application of a generally accepted bright-line test. For the purposes of this Article, the category will include persons born in or descended from Americans born in Spanish-speaking countries in North and South America, in addition to the descendents of the Mexicans native to the southwestern states. We distinguish “Latinos/as” from “Anglos,” by which we mean native-born, English-speaking United States citizens. Within the category of Anglos we distinguish “white Anglos” when the context demands. In our usage, Latinos/as and Anglos are all American, whatever their citizenship or residence. Ideally, we would have a system of more particular reference to country of origin.

We use “Latinos and Latinas” and the abbreviated form “Latinos/as” to avoid the generic masculine. For use of a similar abbreviated form, see, for example, Elizabeth M. Iglesias, International Law, Human Rights, and LatCrit Theory, 28 U. MIAMI INTER-AM. L. REV. 177 (1996-1997). We note that most of the Latin writers we rely on throughout this Article still use “Latinos.” But anyone who is a feminist must analyze that usage. Luce Irigaray has been one of the most eloquent critics of the designation of human beings (as well as objects) through the differentiation of the masculine and the feminine in Romance languages. See Luce Irigaray, I Love To You 79-95 (Alison Martin trans., 1996). The language, she tells us, differentiates in such a way as to perpetuate fantasies of the masculine and the feminine and thereby has the masculine stand in for the universal human. See id.

We do not, however, take the further step of coining a word “Angla” to correspond to “Latina,” even though this causes one of us to disappear in the description “Anglo.”

8 See infra Part II.B.1.

9 See, e.g., Economic and Demographic Consequences of Immigration: Hearings Before the Subcomm. on Econ. Resources, Competitiveness, and Sec. Econ. of the Joint Econ. Comm., 99th Cong. 359 (1986) (statement of Gov. Richard Lamm) (“English [is] one of the common threads that hold us together. We should be color blind, but we can’t be linguistically deaf.”).

10 One advocated remedy is revision of the immigration laws. See, e.g., Juan F. Perea, Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official Eng-
thereby hasten (or force) the assimilation of Latinos/as and other foreign-born and foreign-language residents.

The American public has heard similar “scare talk” before. Nativists\textsuperscript{11} have been characterizing foreign-language speech as a threat for as long as non-English speakers have been settling in this country in large numbers.\textsuperscript{12} Despite American civilization’s unscathed survival, the nativist impulse powerfully continues to influence law and policy,\textsuperscript{13} even in sophisticated quarters where skepticism usually greets such predictions of social disaster.

Nativism derives part of its power from the negative reactions that some English-speaking Americans (“Anglos”) experience upon encountering foreigners in traditionally Anglo neighborhoods.\textsuperscript{14} Its remaining power derives from the widely held assimilation norm. The assimilation story ties the English language to American national identity, asserts the primacy of both, and implies a concomitant duty of submission for this country’s non-English speakers.

The assimilation story also asserts that two factors—cost and volition—strictly delimit the permissible scope of non-English speakers’ claims for equality of treatment. As to cost, there is a broad zone of economically justified discrimination against non-English speakers. Since communication is costly, an otherwise qualified immigrant who speaks no or little English lacks a legal claim to equal consideration for most jobs in the United States. Similarly, cost considerations dictate that foreign-language taxpayers have no general claim of right to public services in their own languages, even though they receive less


\textsuperscript{11} The use of the term “nativism” implies a normative repudiation of the point of view denoted thereby. See Linda S. Bosniak, “Nativism” the Concept: Some Reflections, in \textit{Immigrants Out!} 179, 290-91 (Juan F. Perea ed., 1997).

\textsuperscript{12} The notion that common language defined the nation and its people, substituting for a common culture and history, gained currency during the Colonial and Early Independence eras. See Dennis Baron, \textit{The English-Only Question} 28-46 (1990). Benjamin Franklin provides an example, expressing concern in 1751 about the number of German immigrants in Pennsylvania and their failure to adopt “our Language or Customs.” 4 \textit{Benjamin Franklin, Observations Concerning the Increase of Mankind, in The Papers of Benjamin Franklin} 234 (Leonard W. Labaree ed., 1961).

\textsuperscript{13} The mid-1990s have seen a resurgence of nativist sentiment. Thomas Muller, \textit{Nativism in the Mid-1990s: Why Now?}, in \textit{Immigrants Out!}, supra note 11, at 105, 106-14, attributes this resurgence to economic and job insecurity among natives, cultural and social disparities, and continued inflows of immigrants. For a well-known text that expresses contemporary nativist sentiment and quite explicitly focuses on race and ethnicity, see Peter Brimelow, \textit{Alien Nation: Common Sense About America’s Immigration Disaster} at xvii, 10, 57, 117, 129 (1995). Daniel Kanstrom, \textit{Dangerous Undertones of the New Nativism: Peter Brimelow and the Decline of the West}, in \textit{Immigrants Out!}, supra note 11, at 300, provides a useful discussion of Brimelow’s work, reviewing the dangerous history of racist discourse.

value for the same tax contribution because the services are inaccessible. As to volition, the assimilation story argues that foreign-language speakers who suffer discrimination have a self-help cure that is unavailable to victims of race and gender discrimination. Like previous generations of immigrants, they can learn English and cannot deny that they were aware of the desirability of doing so upon entry to this country.

Together, these two factors suggest a general bar to all language-related claims of right for non-English or bilingual speakers: the claims’ very existence signals a failure of diligence and threatens to impose an avoidable cost. The full-blown nativist expedient of prohibitive legislation is a short step away. Regulations that create English-only zones (“English Only”) that exclude newcomers encourage non-English speakers to “get with the program.”

In this Article, we challenge the assimilation norm’s economic, cultural, and ethical presuppositions, marshaling a new case for invalidating English Only regulations. We take up two classes of regulation that the assimilation norm supports, one from public law and the other from private law. On the public side lie statutes, widespread in the states and now often proposed at the federal level, that elevate English to “official” status as the language of government (“Official English”). On the private side lie employer regulations, widespread in American workplaces and sustained by federal courts, that mandate English speech at all times on pain of termination (“Workplace Eng-

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16 For antecedent treatments in the legal literature, see, for example, José Roberto Juárez, Jr., The American Tradition of Language Rights: The Forgotten Right to Government in a “Known Tongue,” 13 LAW & INEQ. J. 443 (1995); Perea, supra note 10; Leila Sadat Wexler, Official English, Nationalism and Linguistic Terror: A French Lesson, 71 WASH. L. REV. 285 (1996). These articles question the legitimacy of these statutes.
lish"). We focus throughout this Article on Latinos/as, who comprise the largest foreign-language group among the recent generation of immigrants. As such, they are the most prominent nativist targets.


This simplifying limitation also enables us to cast the starkest possible light on the assimilation norm's invidious nature. We show that the refrain of threat, cost, and volition permits legislators and judges to avoid confronting the fact of persistent economic discrimination against Latinos/as based not on English-language disability but ethnic, and in many cases, racial origin.

We note that the limitation also carries the important cost of omission of the particular experience of Asian immigrants.

Massey shows the trend by comparing the region of origin of immigrants for the period 1983-1993, based on U.S. Immigration and Naturalization Service sources. See Massey, supra note 4, at 634 tbl.1. Of the nearly 9.3 million arriving, 54.0% came from the Americas, 32.7% from Asia, and 10.2% from Europe. See id. A comparison of the percentages for the period 1960-1970 is instructive. At that time, of the roughly 3.3 million arriving, 51.7% came from the Americas, 12.9% from Asia, and 33.8% from Europe. See id. This comparison shows an increase in absolute numbers of Americans and Asians in the latter period as well as a notable increase in the percentage of Asians in the latter period. See id.

There are several prominent issues regarding language and Latino/a citizens and residents that we do not consider in this Article. The language of primary and secondary education is the most prominent. See, e.g., Alberto T. Fernandez & Sarah W.J. Pell, The Right To Receive Bilingual Special Education, 53 Educ. L. Rep. 1067, 1067 (1989) (arguing that students with limited English skills have a right to bilingual education because all students in the United States have a "right to a meaningful and appropriate education"). The conduct of criminal trials involving bilingual witnesses and jurors also has raised prominent questions. See, e.g., Hernandez v. New York, 500 U.S. 352, 370-72 (1991) (opinion of Kennedy, J.) (upholding peremptory strikes of bilingual jurors at a trial at which several witnesses were to testify in Spanish).

Questions also arise respecting the tort law duty to warn. Compare Stanley Indus. v. W.M. Barr & Co., 784 F. Supp. 1570, 1575-76 (S.D. Fla. 1992) (noting that English language warnings might be insufficient when manufacturer uses non-English media to advertise), with Ramirez v. Plough, Inc., 863 P.2d 167, 177 (Cal. 1993) (holding that providing warnings only in English is sufficient as a matter of law). Special protection provisions can be found in consumer protection legislation in a number of states. See, e.g., N.J. STAT. ANN. § 17:16C-61.6(d) (West 1984) (requiring retailers who do business in a language other than English to provide customers speaking that language with a copy of the receipt in that language).

Nor do we take up immigration policy, whether regarding numbers admitted, standards for admission, or the treatment of undocumented entrants. We note only that the prominence of Mexican border-crossers among undocumented entrants tends to be overstated. Sixty percent of illegal entrants come from countries other than Mexico, and one-
Our case against English Only regulations centers on the value of linguistic and cultural identifications to the individual person. It shows that English Only regulations violate the basic right of personality of non-English-speaking and bilingual Americans without yielding any cognizable benefits to American society as a whole. Our case has two phases. The first approaches value from the point of view of the person as modeled in economic theory. It thereby highlights infirmities in all three foundations—threat, cost, and volition—of the nativist policy construct. The second phase approaches value from the point of view of the person as modeled in Kantian moral and political theory. It centers on the right of personality requiring that each of us receive the legally protected freedom to represent and evaluate our basic identifications. This general theory of right leads to a theory of language rights that weighs against state-imposed norms of assimilation.

This Article has three parts. Part I provides a more particular description of the problem—the nativist response to Latino and Latina immigration during the last four decades and its manifestation in Official English and Workplace English.

Part II sets forth our economic analysis. We demonstrate that economic theory both undercuts the cost justification for state English Only mandates and permits legal intervention against Workplace English. First, we draw on the economics of language, which teaches that language difference is costly and that the cost of acquiring the dominant language falls on minority-language speakers. Second, we draw on the economics of discrimination, which teaches that cultural differences of any kind can increase the cost of production and that the costs of difference fall on members of minority groups.

The economics of language and of discrimination imply a complex description of Latino/a immigrants’ incentives. On the one hand, every reason remains to apply the traditional view that market incentives sufficiently assure that immigrants learn English with a view toward participating in the mainstream economy. This application of economic theory rebuts the nativist characterization of a threat to American civilization—spontaneous order appears adequate to do the job here. That being the case, public choice theory invites us to

half of the total undocumented population originally entered under visas and then remained after their expiration. See Kevin R. Johnson, Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class, 42 UCLA L. Rev. 1509, 1517, 1546 (1995).


22 See Perea, supra note 10, at 348 (noting the “overwhelming social and economic incentives to learn English”).

23 See infra Part II.A.3.
account for Official English as Jim Crow legislation in fact if not in name—a self-protective move by rent-seeking Anglos.\(^{24}\) On the other hand, the economics of language and of discrimination provide no basis for predicting that the economic opportunities the market offers to Latinos/as provide incentives to disperse across the continent. Discrimination by white Anglos limits Latino/a returns on human capital investment and thereby lessens their incentive to assimilate.\(^{25}\) Moreover, the economic theory of discrimination fails to support a prediction that free markets necessarily will cause this problem to disappear over time. Instead, it teaches that in a free market, suboptimal employment discrimination against minorities can persist indefinitely.

This flawed economic incentive structure effectively undercuts any rational basis for applying the assimilation norm. If Latinos/as face persistent employment discrimination due to ethnicity or race, then for many of them, returns on investment in assimilation will fall off long before the point implied in the assimilation story. At the same time, the phenomena that support the nativist claims—enclave settlement patterns and refractory Spanish speech—are explainable in rational expectations terms. Given limited returns on investment in English, it makes perfect cost sense to live in a Spanish-speaking enclave. At the same time, volitional fault shifts to white Anglos: absent the Anglos' continued practice of ethnic and racial discrimination, Latinos/as would share previous immigrant generations’ high-powered incentive to disperse.

Finally, Workplace English in this analysis is indistinguishable from other discriminatory conduct that Title VII bars.\(^{26}\) Title VII coverage, however, may be costly. Discriminatory employer practices may be cost reductive, and enforcement increases employer operating costs. This cost evaluation does not end the discussion, however, because in legal contexts the ultimate cost-benefit result can depend on who bears the costs. We project that Latinos/as themselves will bear these modest costs. Thus, the question is: Would Latinos/as willingly bear the costs of a Title VII bar to Workplace English? We presume to answer in the affirmative because we see no reason to distinguish Latinos/as from other Americans with respect to their willingness to bear the costs of life in a free and equal society.

Part III sets forth a theory of right that compels the law to accord suspect status to discrimination based on language. We connect the Kantian ideal of the free person to the contemporary notion that identifications play a constitutive role in each person’s life. Our theory of right follows from an interpretation of what it means to treat

\(^{24}\) See infra Part II.B.

\(^{25}\) See infra Part II.C.

each individual as a free person with equal dignity—an interpretation
grounded in a description and defense of the ideal of the imaginary
domain. This theory of right demands that each individual receive
the moral and psychic space to evaluate, to represent, and ultimately,
to integrate the complex realities of culture, linguistic origin, national
affiliation, ethnic identity, and religious heritage. Two points logically
follow from our theory of right. First, the legal system should treat
language as a fundamental identification encompassed by each
person’s right of personhood. Second, a legal system that treats Latinos/
as as equals recognizes and respects the value they bestow on the
Spanish language. In contrast, an English Only regime designed to
force Latinos/as to speak the majority tongue in public life or in the
workplace treats Latinos/as as something less than free persons,
thereby degrading them and violating their imaginary domains.

While articulating this position, Part III addresses recent, general
debates on cultural rights. This discourse teaches that identifications
are both constitutive of the person and, to some extent, embedded—
human beings cannot just step out of their identifications. This teach-
ing in turn destabilizes assumptions basic to the traditional metaphys-
cal defense of the fully autonomous subject. We accept this result,27
but nevertheless define our project as Kantian because it focuses on
freedom. To understand the subject as symbolically or socially con-
structed is to imply that freedom is fragile. If who we are is pro-
foundly rooted in our identifications, then we cannot know for certain
whether any of our judgments, evaluations, or actions are truly self-
determined. A need to thematize anew what freedom can mean for
us arises from this uncertainty.

The ideal of the imaginary domain renders this thematization
consistent with the Kantian ideal that the individual person, as op-
posed to the state, must be legally designated as the responsible
source of judgments and evaluations. This approach makes no at-
tempt to claim in the strong Kantian sense that we can make our eval-

27 We write of “treatment as an equal” rather than “equal treatment,” borrowing this
distinction from Ronald Dworkin, Taking Rights Seriously 227 (1977). Treatment as an
equal is fundamental, consisting of the right to be treated with respect and concern equal
to anyone else. See id. Equal treatment, in contrast, is the equal right to an opportunity,
resource, or burden. See id.

28 We accept this result without joining the discussants in debating the truth about the
constitution of the modern or postmodern subject. Our argument does not require us to
answer the question of who we really are as subjects. Its central point is that such basic
decisions about the meaning of identification must remain with individuals themselves.
Indeed, in our view, the focus of legal debates about minority rights and multiculturalism
should shift away from the question of the truth of the subject and instead ask how and
why state recognition of the person demands the right of personhood—the right we call
the imaginary domain. This need to change the question is not solely of philosophical
interest. It allows us to rethink the ethical stakes in political debates about identity without
attaching ourselves to a simplistic or, worse yet, naturalized conception of identity.
uations and judgments freely and solely in accordance with the moral law.\textsuperscript{29} It nevertheless insists that our actions and judgments inevitably engage us in the practice of self-responsibility. Even though our own histories profoundly determine our decisions, we still make them and, in so doing, make ourselves who we are. Self-responsibility re-emerges on this interpretation as a practice by which we constitute ourselves as unique beings who over time shape identities indissociable from the evaluative designs we give to our identifications. On this view, our value as free persons is independent of both our particular value and of the uses we make of our judgments and evaluations. This approach thus maintains the distinction, central in Kant, between the worth of our freedom and personhood and the value we make of them in particular cases. It offers, in sum, Kant with an existential twist.\textsuperscript{30}

Our conclusion applies the idea, which George Fletcher developed, that a culture or a nation can have a right to linguistic self-defense, which justifies protective measures to ensure the survival of its majority language, including in extreme circumstances regulation like Official English.\textsuperscript{31} We conclude that the conditions for this right do not exist in the United States at this time. Indeed, if here and now any group could make a case for such a right, it would be Latinos/as in the Southwest.

We note that our treatment couples two approaches that scholars usually deem mutually exclusive—consequentialist economic analysis and the defense of a basic right of personality.\textsuperscript{33} We caution that

\begin{footnotesize}
\begin{enumerate}
\item Some thinkers that psychoanalysis has influenced have redefined autonomy to make it consistent with the recognition that we are constructed through and by a symbolic Other with which we inevitably engage in defining a self. Cornelius Castoriadis, for example, defines autonomy as follows:

\begin{quote}
Autonomy then appears as: my discourse must take the place of the discourse of the Other, of a foreign discourse that is in me, ruling over me: speaking through myself. This clarification immediately indicates the social dimension of the problem (little matter that the Other in question at the start is the 'narrow' parental other; through a series of obvious connections, the parental couple finally refers to society as a whole and to its history).
\end{quote}


\item The convention that separates them follows from the deeply held view that rights, by their nature, transcend cost concerns.

\end{enumerate}
\end{footnotesize}
our treatment does not thereby purport to offer a theoretical formula that locates and resolves all tensions between these two approaches; rather, we identify two intrinsic sources of tension between them. First, we defend a right to personality, which limits the means open to a society in pursuit of general economic welfare or other utilitarian goals. Second, we defend the ideal of the person as the legally authoritative source of her own identifications against any theory that vests such evaluation in some prior analysis (welfarist or otherwise) and that gives the State the power to impose that evaluation.

At the same time, however, this basic right of personality recognizes the legitimacy of consequentialist considerations. This recognition makes it possible to synchronize the approaches and thereby to mediate the tensions. At a minimum, a theory of right must take consequences into account when evaluating the institutional and legal means that protect the right to personality in practice. With language rights, economic consequences must play a still larger role because rights and costs operate as necessary complements in this context. To see the element of complementarity, posit an ideal world in which language acquisition is costless and each person strives to guarantee maximum respect for each other person. In this ideal world, multiple languages present no practical problem because each person’s respect for the other leads each to learn all languages.

The problem develops when we relax these heroic assumptions and look at a more realistic world of interpersonal frictions, communicative breakdowns, and finite resources. In this world, we cannot realize the ideal of complete respect for the means of communication closest to the other’s identity; instead, we see a need to privilege one language to facilitate communication by reducing its cost. A concomitant need to protect minority-language speakers with rights to personhood arises. The question that results is whether society feasibly can bestow these rights in practice. We demonstrate in this Article that it can. Although our imperfect world cannot realize the ideal of complete respect for others’ means of communication, this ideal still can inform the rules of the game.

Our approach, while admitting consequentialist considerations, strives to assure that they remain reasonably faithful to the person we defend. This concern leads us to depart from the traditional methods of law and economics. For others, economic theory, properly applied, automatically yields a single, morally defensible result. For us, eco-

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34 See infra Part III.
onomic theory, properly applied, describes a range of possible consequences, each of which is open to further moral evaluation.\textsuperscript{36} Our coupling of economic analysis with the defense of a basic right of personality serves an additional objective: advancing the proposition that economic analysis can coexist with the lessons of race critical theory.\textsuperscript{37} We anticipate skepticism on this point from the race critical community. The skepticism is justified because economic analysis has the intrinsically offensive property\textsuperscript{38} of treating the fundamental rights of minorities as contingencies open to legitimate negation in a rarefied world of formal welfare analysis.\textsuperscript{39} Despite this possibility, we are confident that economic analysis has practical potential for race critical

\textsuperscript{36} See Amartya Sen, Inequality Reexamined 16-19 (1992), for a broad discussion of ways in which deontology and consequentialist economic theory could serve each other.

\textsuperscript{37} Others have advanced similar propositions. See, e.g., Ian Ayres, Narrow Tailoring, 43 UCLA L. Rev. 1781, 1786-1800 (1996) (showing, assuming a compelling interest to remedy past discrimination, that the narrow tailoring principle should not bar racial classifications that tailor the size of the preference to the remedial need); John J. Donohue III, Is Title VII Efficient?, 134 U. Pa. L. Rev. 1411, 1411-12 (1986) (commenting that the neoclassical economic model, with its stress on the desirability of aggregating market preferences, has long grounded an argument against antidiscrimination legislation).


\textsuperscript{39} In addition, prominent exemplars of law and economics purport to undermine the policy assumptions supporting the body of rights that make up core accomplishments of the civil rights movement. See generally Epstein, supra note 38 (arguing that Title VII needlessly infringes upon the freedom of competitive employment markets).

Delgado makes a series of criticisms of economic methodology that provide a useful basis for demonstrating this unexplored potential. See Delgado, supra note 38. All of the criticisms, detailed below, are justifiable in the context of a discussion of Epstein’s book. We nonetheless think it is worth confronting them as a way of opening an avenue of communication and demonstrating that economic theory holds out a flexible mode of inquiry.

Delgado’s discussants make the following charges, in addition to that mentioned supra note 38:


(2) Economics needs to explain why competitive pressures do not eliminate racism in the market. See Delgado, supra note 38, passim. Not only is this the endeavor of statistical discrimination theory, see infra notes 221-33 and accompanying text, but it also is a topic of increasing prominence in the field. See Symposium, Discrimination in Product, Credit and Labor Markets, 12 J. Econ. Persp. 23-126 (1998).

(3) Economics tends to assume perfect knowledge while the stigmatic picture that whites have of blacks limits their level of knowledge. See Delgado, supra note 38, passim. Information asymmetries and their contribution to racist economic behavior is what statistical discrimination theory is all about. See infra notes 266-68 and accompanying text.
scholars and believe that an analysis grounded in an unequivocal affirmation of the individual’s right to treatment as an equal can usefully demonstrate this potential.

I

LATINO AND LATINA IMMIGRANTS AND ENGLISH LANGUAGE MANDATES

A. Latino and Latina Settlement and Speech

Nativists point to three aspects of the lives of Latino/a immigrants when they claim to identify a pattern of resistance to assimilation. First, Latinos/as have gravitated to a small number of enclave communities rather than dispersing across the continent. Nothing about immigrant enclaves, of course, is new. Like turn-of-the-century arrivals, many Latino/a immigrants have settled in enclaves because they have arrived with a family or network connection that provides a job or a place to stay.\(^4\) Nativists charge that the enclave-settlement tendency is more pronounced among Latinos/as than with earlier immigrant groups. For example, a recent study found that today’s top five receiving states take in 78.2% of arrivals, and today’s top five receiving metropolitan areas take in 47.9% of arrivals.\(^4\) By contrast, 1910’s top five receiving states took in 54.0% of arriving immigrants, and 1910’s top five receiving cities took in 35.6% of arrivals.\(^4\)

Second, inflows of Latinos/as and other new “visible” immigrants, which began in the 1950s and 1960s, promise to continue indefinitely and without abatement. Nativists contrast current immigration patterns with the turn-of-the-century immigration wave, which Congress ended abruptly when it imposed entry quotas in the 1920s.\(^4\) Entry quotas resulted in a substantial reduction in both immigrant visibility and concentration of immigrant populations in enclave communities
as immigrants assimilated over subsequent decades.\textsuperscript{44} Due to continued in-migration, Latinos/as will continue to be visible, and enclave communities will indefinitely persist.\textsuperscript{45} Thus, even if assimilation proceeds at the same rate as it did at the turn of the century, enclaves will not disappear.\textsuperscript{46}

Third, many Latinos/as speak Spanish among themselves. In fact, 48.0\% of Latino/a households predominantly speak Spanish, 33.0\% predominantly speak English, and the remainder alternately speak both languages.\textsuperscript{47} Nativists interpret these statistics to indicate that new arrivals to the enclave communities take advantage of Spanish-language infrastructures to avoid incurring the cost of English-language education.\textsuperscript{48} Moreover, unlike turn-of-the-century immigrants, who crossed an ocean and practically had to cut ties with their home country, today’s Latinos/as enjoy easy access to their home countries and cultures and consequently have a diminished incentive to assimilate.\textsuperscript{49} With the proportion of Latinos/as in the overall population rising and projected to continue—from 9.0\% in 1990 to a projected 22.5\% in 2050—nativists argue that this refractory behavior imposes

\textsuperscript{44} See Massey, supra note 4, at 641-43 (noting the pattern of Europeans’ assimilation as their numbers declined).

\textsuperscript{45} One of the reasons for European immigrants’ assimilation is “a long hiatus when few additional Europeans arrived.” Id. at 642. Therefore, Latin Americans will have difficulty leaving their enclave communities because they “can expect to have their numbers continuously augmented by a steady supply of fresh arrivals from abroad.” Id. at 643.

\textsuperscript{46} See id. at 642-43; Portes & Schauffler, supra note 2, at 645-46.


\textsuperscript{48} See Massey, supra note 4, at 647. However, he offers no additional supporting evidence. Moreover, if his argument is true, it is nothing new because widespread home-language speech within the enclave lowers the immediate cost of assimilation for new arrivals. See Buckley, supra note 5, at 85 (asserting that new immigrants are likely to settle in areas already settled by immigrants to find compatriots and a more tolerant community).

\textsuperscript{49} See Hispanics: More People than Power, ECONOMIST, Sept. 17, 1988, at 32, 33 (citing no data). Latinos/as have repeated this point themselves. See Pollack, supra note 47 (quoting the head of the Telemundo television network); cf. Thomas Sowell, ETHNIC AMERICA 243, 276 (1981) (suggesting that Puerto Ricans’ and Mexicans’ tendency periodically to return home explains their income levels). For a definitive statistical refutation of this suggestion, see DeFreitas, supra note 6, at 71-73.

\textsuperscript{50} “Between 1970 and 1990, the population of the United States increased 22.4\%.” Hing, supra note 15, at 865. During that time the Latino/a population increased by 141\% to reach 9\% of the total U.S. population. See id. at 865-66. According to the Census Bureau, the relative percentage had increased to 10.2\% by 1995. See HISPANIC AMERICANS: A STATISTICAL SOURCEBOOK 11 (Louise L. Horney ed., 1996) (drawing on the United States Census Bureau’s Current Population Reports). The Bureau predicts an increase to 11.3\% by 2000 and to 22.5\% by 2050. See id.
a cost burden\footnote{See Joseph Torres, The Language Crusade: What’s Really Behind the Campaign for “Official English”? HISPANIC, June 1996, at 50, 52 (noting that nativists want English Only “for the sake of cost-effectiveness and unity”).} and threatens national cohesion.\footnote{The findings of the proposed Language of Government Act of 1997, S. 323, 105th Cong. § 2, summarize this perspective. The United States, they state, has a history of rich diversity, but the common thread is a common language. “[T]o preserve unity in diversity and to prevent division along linguistic lines, the United States should maintain a language common to all people.” Id. § 2(4). Furthermore, a single language for federal government operations will promote “efficiency and fairness to all people,” id. § 2(8), and “help immigrants better assimilate,” id. § 2(6); see also Hing, supra note 15, at 874 (describing the belief of many assimilationists that Latino/a and Asian immigration increases bilingualism, creating problems for the educational system and leading to unwelcome changes in our national identity).} We are, say nativists, facing the chaos of the Biblical Tower of Babel.\footnote{See Portes & Schauffler, supra note 2, at 640 (quoting from the policy statement of U.S. English, a political action organization prominent in the so-called “English Only Movement,” the warning that without linguistic unity, “[s]ociety as we know it can fade into noisy babel and then chaos” (italics omitted)). Even prominent liberal Arthur Schlesinger, Jr. reportedly fears that a Tower of Babel may result from multiculturalism. See Muller, supra note 13, at 113.} 

The facts just cited, however, at best suggest a possibility that Latinos/as will assimilate at a slower pace than turn-of-the-century immigrants. They do not support a Tower of Babel projection. Indeed, because Latino/a immigrants do learn English, the facts point to the contrary conclusion. Just like immigrants at the turn of the century, first-generation Latino/a immigrants incur the special cost of acquiring English as a second language. They tend to read fluently within ten years and speak fluently within fifteen years.\footnote{See Hing, supra note 15, at 877. James Crawford reports that during the last half century, there has been a four percent to five percent increase in the anglicization rate among Latino/a immigrants. See James Crawford, Hold Your Tongue: Bilingualism and the Politics of “English Only” 127 (1992). Immigrants from different countries anglicize at different rates—with age, ties to the homeland, educational level, and economic prospects explaining, in large part, the differentials. See id. at 127-28.} Also, as with past groups, the second generation speaks English fluently,\footnote{See id. at 863 app. b (describing Asian immigrants who both live in enclaves and learn English).} and studies show that settlement in enclaves does not inhibit the acquisition of English skills.\footnote{See id. Even within the enclaves, Latino/a parents who want their children to have the cultural and economic advantages of bilingualism report having trouble getting the children to speak Spanish. See Mireya Navarro, Pop Culture Blunts Immigrant Children’s Taste for Spanish, HOUS. CHRON., Aug. 31, 1996, at 16.} The third generation of Latino/a immigrants, remaining consistent with historical patterns, tends to be monolingual.\footnote{High demand has caused a large language-education infrastructure to spring up within Latino/a communities. English-as-a-second-language classes have long waiting lists in both New York and Los Angeles. See Torres, supra note 51, at 54.}
The language question for Latinos/as, then, is not one of English language acquisition; instead, it concerns the degree to which English and associated cultural traits completely replace Latino/a antecedents in the second and third generations. Enclave settlement does have an impact at this level because second-generation English monolingualism increases as immigrants disperse geographically and as the length of their residence in the United States increases. But fundamentally, Latino/a families face the same cultural problems of earlier immigrants—ameliorating the generational loss of the parental language to preserve the resource of bilingualism. The loss can come violently. In her novel, *The House on Mango Street*, Sandra Cisneros described a Latina mother who tries to surround her family, living in the heart of a Spanish enclave, with the beauty of Spanish in their home. Television does not respect her boundary, and to her horror she cannot keep her baby from speaking English:

> And then to break her heart forever, the baby boy who has begun to talk, starts to sing the Pepsi commercial he heard on T.V.

> No speak English, she says to the child who is singing in the language that sounds like tin. No speak English, no speak English, and bubbles into tears. No, no, no as if she can’t believe her ears.

B. Official English

Under the assimilation norm, it is not Latino/a immigrants who need legal protection, but the English language. Assimilationists argue that Latinos/as, instead of complaining about their rights, should take the path to equal status by extinguishing their Latino/a identities

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58 See Portes & Schauffler, *supra* note 2, at 644-45. Portes and Schauffler studied eighth- and ninth-grade students in Miami who were either born here of at least one foreign parent or born abroad and a resident in this country for at least five years. See id. at 646. Nearly 99% spoke English at least “well,” and close to 73% spoke “very well”; more than 80% preferred to speak English. See id. at 649.

59 See id. at 651.


61 If the agenda of the English Only Movement can be taken as a guide, the two provisions with the highest profile are Spanish-language ballots and Spanish-language education. It is not, say movement leaders, that Latino/a immigrants fail to share the aspirations of their European predecessors, but that their political leaders have misguided them. See Linda Chavez, *Hispanics vs. Their Leaders*, COMMENTARY, Oct. 1991, at 47, 48; see also Hiram Puig-Lugo, *Freedom To Speak One Language: Free Speech and the English Language Amendment*, 11 CHICANO-LATINO L. REV. 35, 43 (1991) (noting that proponents of the English Language Amendment advocate termination of bilingual education).
and becoming fully American. Treatment as equals will follow in due course.

This assimilationist analysis, carried to its logical conclusion, implies that everyone in American society, including Latinos/as themselves, would be better off if Spanish speech were suppressed. The First Amendment's free speech guarantee blocks the achievement of this goal through direct legislative prohibition. But indirect means to the end of Spanish-language suppression prominently figure on nativist agendas. Nativists have asked both the national and many state governments to correct what they see as an oversight of the Founding Fathers by privileging the English language with official status. Senator S.I. Hayakawa made the first request when he introduced an English Language Amendment ("ELA") to the Constitution in 1981.

62 See Chavez, supra note 61, at 47 (noting that Hispanics, "like millions of immigrants before them, see their best opportunity for success in assimilating to the common culture of America" (emphasis added)).

63 See U.S. CONST. amend. I.

64 The Constitution does not declare English to be the national government's official language, although an early Congress did reject requests from the German-speaking population to publish laws in German. See Perea, supra note 10, at 303-09. Federal level Official English legislation thereafter was sporadic. The New Mexico statehood legislation, itself delayed until the territory had an Anglo majority, required the state to provide English-language education and make English literacy a required skill for state officials. See id. at 321-23. In Puerto Rico, taken by force in 1898, the provision for English-language instruction in the schools was declared soon thereafter to be feasible and desirable by Major General Guy Henry, the second military governor. See David Rodriguez Encarnacion, Evolucion del Derecho a la Educacion Consagrado en la Constitucion del 1952 y su Desarrollo Jurisprudencial, 32 REVISTA JURIDICA DE LA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO 423, 426 (1998). Imposition of mandatory English-language education was attempted by the colonial government in 1909, see Lisa Napoli, The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico, 18 B.C. THIRD WORLD L.J. 159, 183 (1998), and most classes were conducted in English and until 1948, see Ennio M. Colon Garcia et al., The Linguistic Factor, 32 REVISTA JURIDICA DE LA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO 310, 314 (1998). An Act to provide a civil government for Puerto Rico, and for other purposes, ch. 145, 39 Stat. 951 (1917), anglicized the spelling of the colony's name to "Porto Rico." Congress later reinstated the Spanish spelling. See Act of May 17, 1932, ch. 190, 47 Stat. 158 (codified at 48 U.S.C. § 731a (1994)). For an economic history of Puerto Rican colonization, see DeFreitas, supra note 6, at 26-36. Puerto Rico is now officially bilingual. See P.R. LAWS ANN. tit. 3, § 941 (1992) (added 1992) (requiring all government reports published in English also to be published in Spanish). The issue remains a hot one in Congress. When, in March 1998, a bill authorizing a referendum on statehood among the Puerto Rican voters was presented to and approved by the House of Representatives, an amendment conditioning statehood on English Only in federal offices and public education was only narrowly defeated. See Lizette Alvarez, Senate Is Lukewarm, but Some Seek Vote on Puerto Rico, N.Y. TIMES, Mar. 6, 1998, at A18.

In the states there has been a sporadic history of juridical bilingualism. Pennsylvania, California, and Louisiana each had periods of official bilingualism. See Perea, supra note 10, at 310-26. New Mexico remains officially bilingual, see id. at 323, as does Hawaii, see HAW. REV. STAT. ANN. § 1-13 (Michie 1998) (English and Hawaiian). For Texas's bilingual history, see Juárez, supra note 16.

65 See S.J. Res. 72, 97th Cong. (1981). Others have reintroduced it many times since. See, e.g., H.R.J. Res. 37, 105th Cong. (1997) (adding that English shall be used for all gov-
When Congress balked at adopting the ELA, the movement's political focus shifted to the states. Twenty-one states responded with Official English statutes, in some cases at the legislature's instance and in other cases by popular initiative. Some of these statutes, which essentially are mark-ups of the ELA, ambiguously declare "official status" for English and accord an open-ended enforcement power to the

\[\text{COSTS AND WRONGS OF NATIVISM} \]
legislature. See Ala. Const. amend. 509 (ratified 1990) (declaring English the official language, authorizing the legislature to take all “steps necessary” to “preserve[,] and enhance[,]” English, and prohibiting any law to “diminish[,] or ignore[,] the role of English as the common language”); Cal. Const. art. III, § 6 (added by initiative 1986) (declaring English the official language and authorizing the legislature to take all steps necessary to preserve and enhance it); Colo. Const. art. II, § 30a (added by initiative 1988) (declaring English the official language and authorizing the assembly to implement); Fla. Const. art. II, § 9 (added by initiative 1988) (establishing English as the official language and utilizing substantially the same language as Colorado).


More restrictive versions repeal federal laws that require Spanish-language election ballots and that encourage Spanish-language primary and secondary education. Congress has not, to date, enacted any of the proposals.

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72 See Language of Government Act of 1997, S. 323, 105th Cong. § 2; Bill Emerson English Language Empowerment Act of 1997, H.R. 123, 105th Cong.; English Language Empowerment Act of 1996, H.R. 3850, 104th Cong. § 3 (adding § 163 to 4 U.S.C.); Language of Government Act of 1995, H.R. 123, 104th Cong. § 3 (same); Language of Government Act of 1995, H.R. 345, 104th Cong. § 3 (same); Language of Government Act of 1995, S. 356, 104th Cong. § 3 (same). The Language of Government Act of 1997 provides, inter alia, (1) that “[t]he [g]overnment shall conduct its official business in English,” S. 323, 105th Cong. § 3 (adding § 163(a) to 4 U.S.C.); (2) that the government has an “affirmative obligation to preserve and enhance the role of English as the official language of the . . . government,” id. (adding § 162 to 4 U.S.C.); (3) that “[n]o person shall be denied services, assistance, or facilities, directly or indirectly provided by [g]overnment solely because the person communicates in English,” id. (adding § 163(b) to 4 U.S.C.); and (4) that “[e]very person . . . is entitled to . . . communicate with the [g]overnment in English; . . . [to] receive information from or contribute information to the [g]overnment in English; and . . . [to] be informed of or be subject to official orders in English,” id. (adding § 163(c) to 4 U.S.C.). Savings clauses go on to state that the statute is “not intended . . . to discriminate against or restrict the rights of any individual,” id. § 2(b)(1), and “not intended to discourage or prevent the use of languages other than English in any nonofficial capacity,” id. § 2(b)(2).

For a variant proposal, see the Declaration of Official Language Act of 1997, H.R. 622, 105th Cong., and the Declaration of Official Language Act of 1995, H.R. 739, 104th Cong. These proposed bills (1) declare English to be the official language, see H.R. 622 § 2 (adding § 161 to 4 U.S.C.); (2) state that English is the “preferred language of communication among citizens of the United States,” id. (adding § 162 to 4 U.S.C.); (3) encourage citizens to use English in a section labeled “Duties of citizenship,” id. (adding § 164 to 4 U.S.C.); and (4) command the INS to enforce the English-language proficiency standard, see id. (adding § 165 to 4 U.S.C.).


Guam delegate Robert Underwood has introduced an English Only School Prayer Bill. According to Representative Underwood, “[w]e should not tolerate prayers in dead languages like Latin, nor unfamiliar prayers in Hebrew, Greek, Arabic or Spanish.” English-Only Prayers, Plain Dealer (Cleveland), Aug. 12, 1996, at 10D.

Finally, there is a counterproposal. See H.R. Con. Res. 4, 105th Cong. (1997); H.R. Con. Res. 83, 104th Cong. (1995). These resolutions recognize the importance of English, but resolve to continue the provision of services in languages other than English to facilitate access to essential government functions. See H.R. Con. Res. 4; H.R. Con. Res. 83. The declaration neatly summarizes several policy counters to the English Only Movement:

Whereas there is no threat to the status of English in the United States, a language that is spoken by 94 percent of United States residents, according to the 1990 United States Census, and there is no need to designate any official United States language or to adopt similar restrictionist legislation;

Whereas “English-only” measures, or proposals to designate English as the sole official language of the United States, would violate traditions of cultural pluralism, divide communities along ethnic lines, jeopardize the
Constitutional litigation has followed enactments of these laws in the states. The Ninth Circuit struck down an Arizona provision that mandated English as the exclusive language of public services as facially overbroad and violative of the First Amendment’s free speech guarantee. The Supreme Court took the case only to vacate the lower court judgment as moot. Subsequently, in Ruiz v. Hull, the Supreme Court of Arizona reached the same result as the Ninth Circuit, offering both a more expansive reading of the First Amendment and a parallel equal protection ground for invalidation. Pending a definitive federal court ruling, however, the constitutionality of restrictive Official English statutes remains an open question.

provision of law enforcement, public health, education, and other vital services to those whose English is limited, impair government efficiency, and undercut the national interest by hindering the development of language skills needed to enhance international competitiveness and conduct diplomacy; and

Whereas such “English-only” measures would represent an unwarranted Federal regulation of self-expression, abrogate constitutional rights to freedom of expression and equal protection of the laws, violate international human rights treaties to which the United States is a signatory, and contradict the spirit of the 1923 Supreme Court case Meyer v. Nebraska, wherein the Court declared that “The protection of the Constitution extends to all; to those who speak other languages as well as to those born with English on the tongue”...

H.R. Con. Res. 4.

74 See Yniguez v. Arizonans for Official English, 42 F.3d 1217, 1241-42, aff’d, 69 F.3d 920 (9th Cir. 1995) (en banc), vacated as moot sub nom. Arizonans for Official English v. Arizona, 520 U.S. 43 (1997). The opinion holds, inter alia, (1) that the statute is facially overbroad because it chills the speech of all Arizona public employees and officials and burdens their interest in receiving information of non-English-speaking citizens; and (2) that speech in a foreign language is not unprotected expressive conduct. See id. at 1229-30, 1232.

75 See Arizonans for Official English, 520 U.S. at 43.


77 Ruiz joins Yniquez in focusing on a violation of the right of elected officials and public employees to communicate with constituents and the public. See 957 P.2d at 998. But it also finds a violation of the First Amendment rights of “limited- and non-English-speaking persons [to] access . . . information about the government when multilingual access may be available and may be necessary to ensure fair and effective delivery of governmental services to non-English-speaking persons.” Id. at 997.

78 The court applied strict scrutiny on the ground that the provision impinged on the First Amendment right to petition for redress of grievances. See id. at 1000. Because the State failed to establish a compelling state interest, the court held the provision violative of the Equal Protection Clause “because it impinges upon both the fundamental right to participate equally in the political process and the right to petition the government for redress.” Id. at 1002.

79 We would expect the Supreme Court definitively to hold such restrictive Official English statutes unconstitutional in line with Yniquez rather than Ruiz, advancing a narrow First Amendment ground and avoiding the Equal Protection and Due Process Clauses.

Under the time-honored preference for the narrow ground, avoidance of constitutional challenges certainly would be sound litigation strategy. The First Amendment framework allows only a tentative commitment to juridical equal status for Latinos/as. The invalidating court need only accord Spanish equal status with English so far as it concerns direct, governmental prohibition of the act of speech. Although this matter has important
C. Workplace English

Private institutions may use direct mandate to suppress Spanish when the First Amendment prevents the government from doing so. Employers often impose these language regulations on an absolute basis, requiring English speech at all times and in all circumstances regardless of whether the conversation includes customers, monolingual English supervisors, or fellow employees. Employer justifications cite workplace safety,\(^{80}\) simplicity,\(^{81}\) transparency of administration,\(^{82}\) and professional appearances.\(^{83}\) Yet Workplace English regulations often lead to workplace conflicts, and numerous people have reported disputes in recent years.\(^{84}\)

implications for the Latino/a community's political rights, it need not entail affirmative recognition of equal status. An equal protection theory of invalidation, in contrast, shifts the focus to the prevention of Spanish-language access to political participation and implies an equal right to use political influence in the democratic process to secure Spanish-language services. Government in Spanish would by implication join government in English in the universe of constitutionally sanctioned public goods. Even this limited recognition of Latino/a equality may be difficult to extract in the present American context. Even less likely is substantive due process recognition of a right to a zone of protection for individual choice respecting language acquisition and usage.

This Article's analysis of costs and rights applies regardless of the doctrinal framework, however. In an ideal world, the courts would endorse a right to cultural and linguistic freedom under the Thirteenth Amendment, making reference to David Richards's recent exhaustive interpretation. See David J. Richards, Women, Gays, and the Constitution (1998). Under Richards's moral and legal interpretation, the Thirteenth Amendment includes and forbids all forms of moral slavery. See id. at 5. The concept of suspect classification, as reconstructed by Richards, condemns the "basis for law that reflects the unjust degradation of a cultural tradition (moral slavery) with which a person reasonably identifies as central to their conscientious sense of personal and moral identity." Id. Furthermore, "[s]uch devaluation of identity is . . . what unites on grounds of principle the interlinked grounds for the suspectness of religion, race, gender, and sexual preference." Id. This principle provides a powerful basis for constitutional condemnation of Official English and, more generally, legal instantiations of the assimilation norm. Richards's interpretation is the closest in the literature to our defense of the moral right of the person to be recognized as the self-authenticating source of the evaluation of her origin.

\(^{80}\) See Carol Kleiman, Learning English Opens Doors for Employees, Chi. Trib., July 9, 1995, § 8 (Jobs), at 1; David Poppe, Bachelor Defends English-Only Rule, Miami Herald, Mar. 28, 1997, at 1C.

\(^{81}\) See Kleiman, supra note 80; Diane E. Lewis, 5 Hotel Workers Quit, Cite English-Only Demand, Boston Globe, Mar. 29, 1997, at B3.


\(^{83}\) See Garcia, 618 F.2d at 267 (explaining the employer's claim that English-speaking customers object to hearing conversations they cannot understand); Lewis, supra note 81.

\(^{84}\) At least one ACLU lawyer alleges that increased reports could reflect increased employer usage of Workplace English. See Lewis, supra note 81. In the alternative, it could
Meanwhile, the legal environment has turned markedly in the employers’ favor. Ten years ago, both the Equal Employment Opportunity Commission (“EEOC”) and the federal courts appeared to be in accord on the Title VII status of Workplace English. The EEOC Guidelines on Discrimination\(^\text{85}\) formally declared Workplace English a burdensome term and a condition of employment that disparately impacts a protected group and therefore presumptively violates Title VII’s prohibition of national origin discrimination.\(^\text{86}\) Under this analysis, Workplace English regulations are sustainable only if an employer can make a showing of business necessity.\(^\text{87}\) Although leading federal cases initially adopted this position,\(^\text{88}\) the courts changed their view, rejecting the EEOC Guidelines and holding that broad Workplace English rules do not automatically raise a prima facie case of reflect decreased tolerance on the part of Latinos/as and others whose contacts the regulations constrain (or perhaps an increased interest on the part of the press). The Mexican-American Legal Defense and Educational Fund and the ACLU have set up hot-lines to receive complaints. See Torres, supra note 51, at 56. Protests now are common. See, e.g., Aly Colon, AOL Drops English-Only Policy, SEATTLE TIMES, July 25, 1996, at A5 (reporting a customer protest against English Only computer bulletin board); Ray Delgado & Julian Guthrie, Day Care Language Barrier: Spanish-Speaking Workers Claim They’re Forced To Use English on the Job, or Else, S.F. EXAMINER, Sept. 20, 1996, at A4 (reporting a worker protest); Lewis, supra note 81 (same). On a related front, there have been recent instances of protests by government employees in bilingual service situations who are fed up with doing much more work than similarly situated monolingual Anglos for the same pay. See William Booth, Growth in Bilingual Jobs Brings Demands for More Pay, WASH. POST, Jan. 19, 1996, at A3; Clemence Fanome, Bilingual Job, Higher Pay, CHRISTIAN SCI. MONITOR, Jan. 26, 1996, at 3; Charles Strouse, Big Language Debate Pits English-Only vs. Bilingual, FRESNO BEE, Jan. 21, 1996, at A11.


\(^{86}\) See id § 1606.7(a).


\(^{88}\) See Gutierrez v. Municipal Court, 838 F.2d 1031, 1039-40 (9th Cir. 1988) (holding that employee allegation of harm to identity sufficed to support preliminary injunction and citing EEOC Guidelines with approval), vacated, 490 U.S. 1016 (1989); Sucedo v. Brothers Well Serv., Inc., 464 F. Supp. 919, 922 (S.D. Tex. 1979) (ruling that an English Only rule has disparate impact and therefore raises the issue of business necessity); see also Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1410-11 (9th Cir. 1987) (sustaining radio station order of English-language broadcasting format because the order was business related). But see Garcia, 618 F.2d at 270 (holding that no discrimination is present when employees can speak English but choose not to do so).

Gutierrez makes the important point that bilingualism does not terminate the link between language and cultural identity. See 838 F.2d at 1039. For further discussion, see Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. REV. 303, 361-69, 376-77 (1986); Bill Piatt, Toward Domestic Recognition of a Human Right to Language, 23 Hous. L. REV. 885, 898-900 (1986).
disparate impact. Under this approach, to make a prima facie case, the plaintiff must prove the existence of a discriminatory impact—that the adverse effect is significant and that the general employee population is not affected to the same degree.

This judiciary change signals shifting concerns. Degradation carries decisive weight under the EEOC approach, resulting in findings that language prohibition is national origin discrimination. Today, courts reject this idea that expressions of ethnicity have Title VII significance. Costs matter more in this analysis. Accordingly, courts cite Title VII’s legislative history for the proposition that employer internal affairs should be interfered with as little as possible. Ascriptions of fault also have shifted under the current approach. Courts see complainants in these cases, who by definition are bilingual, as possessing a choice about complying with Workplace English regulations. Once the court concedes the legitimacy of the employer’s forcing this choice, employee volition emerges as the determinant factor in the case. In effect, courts believe that employees who can speak English, who know the rule, and who choose to speak Spanish get what is coming to them.

The cost and volition components of the assimilation norm have found their way into Title VII case law. The third member of the nativist trio—the foreign language threat to American civilization—does

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90 See Spun Steak, 998 F.2d at 1486.

91 See Adams, supra note 17, at 903-04; see also Jorgensen, supra note 17, at 414 (discussing cases that connect English Only and discrimination); Kirtner, supra note 17, at 874-75 (arguing that English Only impacts non–English speakers).

92 Compare Gutierrez, 838 F.2d at 1039-40 (adopting the EEOC’s business necessity test for evaluating Title VII claims), with Spun Steak, 998 F.2d at 1487 (noting that Title VII does not protect workplace expressions of cultural and ethnic identity).

93 See Spun Steak, 998 F.2d at 1489-90; see also Long, 894 F. Supp. at 941 (characterizing and rejecting the notion that the ability to converse in any language is a “privilege of employment” subject to employer control (emphasis added)).

94 See, e.g., Spun Steak, 998 F.2d at 1487 (“The bilingual employee can readily comply with the English-only rule and still enjoy the privilege of speaking on the job.” (emphasis added)).

95 For challenges to the behavioral notion that bilingual speakers always have a choice, see Adams, supra note 17, at 906-07; Mirandé, supra note 17, at 95-98. Others challenge the notion that mutability of the characteristic should determine a Title VII case in the defendant’s favor. See Jorgensen, supra note 17, at 419-20; Kirtner, supra note 17, at 899, 903. On the importance of mutability in Title VII cases, see Peter Brandon Bayer, Mutability Characteristics and the Definition of Discrimination Under Title VII, 20 U.C. Davis L. Rev. 769 (1987); Karen Engle, The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII, 76 Tex. L. Rev. 317, 331-32 (1997).

96 See Spun Steak, 998 F.2d at 1487; Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1410 (9th Cir. 1987); Garcia v. Gloor, 618 F.2d 264, 269-70 (5th Cir. 1980).
not yet explicitly figure into the jurisprudence. But it would be rash to predict its permanent absence.

II

THE ECONOMICS OF ASSIMILATION: LANGUAGE ACQUISITION, DISCRIMINATION, AND SPONTANEOUS ORDER

In this Part, we use economic theory to inspect the soundness of the three concepts—threat, cost, and volition—that support English Only.97

This inspection confirms that multiple languages do result in added costs for a given economy. But it also shows that these costs fall most heavily on minority-language speakers themselves. As a result, individual economic incentives should keep overall costs at a manageable level, even given significant immigration. Moreover, enclave settlement and bilingualism—each of which nativists call a threat—are rational (and unthreatening) when viewed economically. The analysis also shows that Official English does lend itself to a rational expectations description, but not as a first-best means to the end of Latino/a assimilation. From a public choice perspective, Official English resembles Jim Crow legislation designed to advance the collective interests of the Anglo majority either by discouraging Latino/a settlement in the enacting state or by impeding the existing Latino/a community’s access to public services and employment.

The economic analysis, however, does not necessarily imply frictionless repetition of the turn-of-the-century assimilation pattern. Rational members of an ethnic minority will migrate from enclaves only to the extent that the wider economy offers superior economic opportunities.98 It is not at all clear that these opportunities exist for many Latinos/as. Moreover, the economic theory of discrimination provides no credible assurance that market forces will provide a solution to this problem in either the short or long run. In fact, the empirical evidence supports a prediction that Latinos/as will face more virulent and persistent discrimination than that which their turn-of-the-century immigrant predecessors faced.99

97 In doing so, we do not wish to claim that microeconomic theory should provide the exclusive methodological framework for analysis of problems of assimilation and discrimination. For criticisms with which we concur, see Glenn C. Loury, Discrimination in the Post-Civil Rights Era: Beyond Market Interactions, 12 J. Econ. Persp. 117, 118-23 (1998). We draw on microeconomics here because it occupies a privileged role in today’s legal policy discourse and comes to bear on the subject matter with surprising results.

98 Cf. Hing, supra note 15, at 891 (“In my experience, immigrants who reside or work in ethnic enclaves do so less out of ideological reasons than out of comfort or affordability . . . .”).

99 For a review of the empirical literature on Latinos/as, see supra note 3 and accompanying text. We have come across no empirical studies comparing the experiences of the different immigrant generations with discrimination.
The character and intensity of Latino/a economic incentives to assimilate\textsuperscript{100} depend on the character and intensity of discriminatory behavior by Anglos. If public policy problems arise because Latinos/as maintain stronger home country ties than members of previous immigrant generations, Anglos can blame themselves. This analysis reveals a clear message for legal policy: a legal regime seeking to encourage assimilation should open opportunities for immigrants through the subsidy of English-language education or through the scrupulous enforcement of Title VII. English Only sticks are the tools of segregationists.

A. Official English, Cost Economics, and Immigrant Incentives

1. Language Difference, Its Costs, and Their Allocation

Language differences make exchanges more expensive. Consider, for example, a prospective trade between two monolingual parties who speak different languages. Language acquisition or translation costs necessarily will accrue if the parties consummate this trade. Like costs of transportation, the parties typically will pass these costs along to the parties’ ultimate customers.\textsuperscript{101} Compare the aforementioned trade with a situation in which producers in a small country with its own language wish to enter the market in a big country with a different language. Here, the big country’s market will determine the terms of trade, including the language. It follows that traders in the small country bear all the costs (and gain the benefits) of learning the big country’s language.\textsuperscript{102}

If we now take an additional step and consider international trade in a world of multiple languages, we see that a transnational lingua franca—presumably a big country’s language—will reduce costs. The small country’s traders in particular will benefit from the lingua franca’s emergence because it gives them across-the-board access to multiple markets at the cost of learning only one additional language.\textsuperscript{103} The lingua franca is thus a public good. The distribution of the costs associated with the lingua franca, however, is unequal. Those whose first language is not the lingua franca, such as the small country’s traders, bear the cost of learning it to reap the gains of the transactions that a common language facilitates. Residents of the big country (or countries, as is the case with English today) for whom

\textsuperscript{100} See supra Part I.A.
\textsuperscript{102} See id. at 264-65.
\textsuperscript{103} See id. at 262 (noting that investing in a second language can be profitable if the country can realize gain to offset the investment). They save the costs of investing in acquisition of multiple foreign languages.
the lingua franca is their native tongue receive a free ride. Some have referred to this premium that native lingua franca speakers enjoy relative to other language speakers as the "seigniorage of language."\footnote{Id. at 266-67, 270.}

The main points revealed by this pattern of costs and benefits and of seigniorage and peonage also apply to foreign language speakers within a national economy. The general currency of the native language, like the lingua franca of global trade, is a cost-reducing public good because it lowers transaction costs for the population as a whole.\footnote{See id. at 268.} Members of linguistic minorities, like the small country's traders, must bear the cost of learning the native language if they wish to access the benefits of full participation in the national economy.

2. Public Policy Implications of Language Economics

A justification for Official English from a social engineering perspective follows from the above-described economics. If general fluency in the native language is a public good, then the pattern of usage of English in the United States is a legitimate issue of state concern. A large, geographically concentrated, Spanish-speaking minority amounts to an internal trade barrier that increases transaction costs in the wider economy.\footnote{Cf. Frank M. Lowrey, IV, Comment, Through the Looking Glass: Linguistic Separatism and National Unity, 41 Emory L.J. 223, 262-63 (1992) (noting that the linguistic divisions among Canadian provinces have become so intense that after NAFTA, "trade with the United States [might] become[ ] a more viable option than the economic integration of the provinces").} In the long run, the mandatory provision of public services in English reduces both trade frictions and the resulting costs by encouraging Latinos/as (and members of other language minorities) to learn English and by hastening the disappearance of minority languages.\footnote{The argument in the text is a markup of Donohue's time-based defense of Title VII against Becker's free market story of the inevitable disappearance of discrimination. See infra notes 185-90 and accompanying text.}

This social welfare calculation needs unpacking. The calculation begins with the economic assertion that linguistic sameness lowers (and difference increases) costs. Supporters make two further assertions. First, mandated sameness enhances our economic welfare. Second, the polity as a whole therefore prefers mandated sameness. We question and negate the first of these assertions in the subsection that follows.\footnote{See infra Part II.A.3.} We address the second assertion in this subsection, asking two questions. First, we question the positive correlation the calculation draws between cost-reductive homogeneity and real-world political preferences. Second, we question the safety of assuming that sameness always lowers costs, suggesting that at some point one must
concede the possibility that diversity can have positive consequences for social welfare.

a. Homogeneity and Preference Aggregation

The proposition that sameness lowers costs is not unique to the economics of language acquisition. This assumption also provides a basis for the following disturbing proposition, which is fundamental to the economic theory of discrimination: If sameness lowers costs, then all other things being equal, segregation enhances social welfare. Just as a common language lowers the cost of a discrete trade, other common traits such as race, gender, ethnicity, and social class lower costs and facilitate more complex, long-term cooperative economic relationships. Accordingly, one can expect people of similar types and tastes to sort themselves among different producing organizations—the narrower the variance of preferences within the firm, the cheaper the process of firm decision making. This sorting may even appear within complex, hierarchical organizations in which the costs of group decision making do not loom large. Since such organizations segment themselves into teams performing different functions, we can expect to see segregation along lines of race, language, and gender. It follows that mandated integration under Title VII is costly.

The same cost analysis that justifies government suppression of Spanish also justifies the repeal of Title VII. This Title VII analogy

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109 The economics of this proposition stands apart from its questionable ethical posture. This calculation seizes on a point of ethnic and cultural difference, finds it to be mutable and costly, and concludes that a state-sponsored program of eradication advances social welfare. The majority trait automatically becomes the uniform standard in the cost-reductive homogeneous regime.

110 See infra Part II.C.2.

111 See Epstein, supra note 38, at 61-67; Cooter, supra note 39, at 142.


113 This is the famous argument of Richard Epstein. See Epstein, supra note 38, at 61-70, 76-77.

The arguments for the suppression of Spanish and for the repeal of Title VII are distinguishable on the ground that education can change language whereas race, gender, and ethnic origin are immutable characteristics. But the distinction loses much of its cogency on closer inspection. Mutability, by itself, does not disqualify a trait from state-sponsored protection. Religion is mutable too, yet a cost-based state policy encouraging non-Christians to convert arguably would not advance social welfare. At the same time, language is only mutable to some extent. The economic literature of discrimination makes reference to sociolinguistics to expand the definition of linguistic difference. It is not just the words one speaks, but one’s verbal and nonverbal communicative apparatus—posture, gesture, eye contact, and inflection—that counts. See Kevin Lang, A Language Theory of Discrimination, 101 Q.J. Econ. 363, 366-68 (1986). In America there is a majority “code,” the native speakers of which are white, Anglo, middle-class males. Others—women, African Americans, Latinos/as, and other immigrants—all have to learn and use this code to
highlights several factors that complicate and weaken the welfare calculation behind Spanish suppression. Repealing Title VII to reduce transaction costs would have substantial distributive consequences—white men would win, and everyone else would lose. This redistribution of wealth and privilege would not reflect the preferences of society as a whole, even if it were possible to prove that its cost reductive effect would cause the gross national product to rise. This divergence between the economic optimum and the politically preferred result probably would persist even if the proponent of repealing Title VII shows that the benefit of a higher gross national product evenhandedly would trickle down among the losers, so the worst off would be, in the aggregate, at least as economically well off as before. Since losing still hurts, it remains plausible that the class of losers might prefer to be less well off in a more equal society.

The numbers work differently, of course, with Spanish suppression. The losers in this context are Latinos/as and other non–English speakers, for whom public services become less valuable. English speakers are the winners. Yet one still plausibly can posit a preference for sharing within the wider class of Title VII beneficiaries. The rationality for sharing is akin to the labor organizer’s appeal to long-run benefits of solidarity in the face of a short-run urge to give in to the employer. Prisoners’ dilemma literature presents a formal economic showing of this possibility.\textsuperscript{114} New evolutionary models illustrate the rationality of such cooperation by positing, first, a class of prisoners’ dilemma players who over time have managed as a group to overcome the temptation to defect and achieve optimal, collective ends, and second, another class of players who interact with the members of the cooperative group, but who always favor defection.\textsuperscript{115} With infinite repeat plays, these models show that cooperation within the group is possible despite the presence of the class of opponents who are ever ready to divide and conquer.\textsuperscript{116} In accordance with those models, intragroup cooperation may be benefit maximizing on an individual basis across the various classes of Title VII beneficiaries.\textsuperscript{117}

\textsuperscript{114} See, e.g., Brian Skyrms, Evolution of the Social Contract 58-59 (1996). Skyrms offers a prisoners’ dilemma analysis contrasting one cooperator in a universe of defectors to an identifiable group of cooperators in a universe of defectors. The solo cooperator is eliminated by the defectors. The group of cooperators playing with one another will be evolutionarily fit, however. Defectors will not be eliminated completely but will prey on the edge of the group of cooperators.

\textsuperscript{115} See id. at 59.

\textsuperscript{116} See id. (noting that although defectors “will persist as predictors on the periphery,” cooperators will survive).

\textsuperscript{117} Cf. id. (discussing the possible benefits of intragroup cooperation to increase “average fitness” over defectors).
b. Homogeneity and Diversity as Tradeoffs

A second infirmity in the welfare calculation lies in its assumption that homogeneity is absolutely cost-beneficial. This supposition neglects the complex, real-world interrelation between sameness and difference. Within producing organizations, for example, diversity of traits and tastes makes available different perspectives and talents that increase the likelihood of solving complex problems. Any accompanying increases in communication costs accordingly may find justification in the improved quality of results.\textsuperscript{118} More broadly, most people have a taste for difference, albeit to widely varying degrees. Two preferences operate—one for cost-reducing homogeneity and the other for costly but stimulating difference\textsuperscript{119}—with the inevitable tradeoffs between cost and variety depending on subjective tastes and differing from individual to individual.

A second-best world presents no basis for predicting that the tradeoffs emerging in an environment of free individual interaction will be optimal. Barriers including information asymmetries, free-rider problems, and strategic concealment will prevent optimal outcomes.\textsuperscript{120} A number of possibilities result. One is that the assimilation story, despite its currency, describes a suboptimally homogenous social result. In a dynamic environment, the societal whole could emerge better off if Latinos/as were left to make their own decisions about learning English and acquiring Anglo cultural traits. If slow assimilation resulted from their decisions, Anglos would gain the spillover benefit of closer proximity to Latin American culture. Cultural acquaintance in turn would generate valuable opportunities for Anglos in the markets of increasingly robust Latin American economies. In this scenario, Official English perversely channels Anglos toward costly insularity whereas investment in cross-cultural learning opportunities provides the more promising means to an optimal assimilation equilibrium.

c. Nonconvergent Preferences

A more complex outcome emerges if we take this line of reasoning in a different direction and consider the possibility that an economic optimum with a multicultural inclination may not be the politically preferred result. Assume the present equilibrium is eco-

\textsuperscript{118} See Cooter, supra note 39, at 142.

\textsuperscript{119} Education about the incidents of other cultures and languages lowers costs of cross-cultural communication and thus enhances an individual’s ability to enjoy the different traits of others. For a formal model suggesting this conclusion, see William Breit & John B. Horowitz, Discrimination and Diversity: Market and Non-Market Settings, 84 PUB. CHOICE 63, 65-70 (1995).

\textsuperscript{120} See id. at 68.
nomically suboptimal due to homogeneity. Under these circumstances, government intervention to move society toward a more optimal level of interaction can find justification in theory. In practice, however, a policymaker considering this intervention would encounter the enormous problems of ascertaining the location and cause of the suboptimal equilibrium and of articulating a strategy for shifting it to a point of greater preference satisfaction.

Suppose the policymaker undertakes a state-of-the-art study, concluding that Americans have a deficient level of multicultural knowledge. In response, the policymaker proposes an extensive and mandatory program of multicultural education for grades one through twelve. This program, by hypothesis, would make most members of the majority economically better off in the long run. Nevertheless, it is likely that the program would be politically infeasible in many American communities due to a perception (if not a reality) of excessive governmental invasion of the individual’s zone of choice with respect to matters of acculturation.

Suppose we modify the program by employing a carrot-and-stick approach. This approach could, for example, make eligible for federal college loans only those students who have received the approved multicultural education. We suspect that critics would denounce as coercive even this modified program. Without enforceable government action to the contrary, cultural preferences could continue to diverge from the economic optimum.

The carrot-and-stick approach to multicultural education is difficult to distinguish from Official English if one narrowly views it as a

121 A full exploration of multicultural programs in the schools is beyond the scope of this Article. We note that particularly in New York City these programs have gained acceptance as crucial for what it means to treat students from different cultural backgrounds as equal. One current aspect of the debate around these programs in New York concerns the point in time at which schools should teach Spanish to all students. This debate recognizes that Anglo children can be economically disadvantaged in cities with a substantial Latino/a minority if they are not fluent in Spanish. See generally Nathan Glazer, We Are All Multiculturalists Now (1997) (discussing the changing face of America and how it will influence our future).

122 Cf Lisa D. Delpit, The Silenced Dialogue: Power and Pedagogy in Educating Other People’s Children, in Beyond Silenced Voices: Class, Race, and Gender in United States Schools 119, 122-23 (Lois Weiss & Michelle Fine eds., 1993) (asserting that issues of power are enacted in classrooms and that school cultures accordingly are based on the cultures of the middle and upper classes).

123 Breit and Horowitz suggest that this sort of mandatory education could have the projected effect of shifting cultural preferences to their economic optimum in the small-numbers situation of a university curriculum. See Breit & Horowitz, supra note 119, at 68-70. They qualify the suggestion, however, by noting that “there is no certainty that a consensus will arise over the optimal amount of ‘familiarity’ [with other cultures] to impose” and no way to assure that a given policy assures the intended results. Id. at 69-70.
legal manipulation of a zone of choice for cultural freedom.\textsuperscript{124} Like the education program, Official English manipulates tradeoffs between cost incurrence and cultural attachment. By withholding public services from Latinos/\textsc{as}, Official English induces a higher level of English-language cost incurrence than otherwise would occur, making it cheaper for Anglos to deal with Latinos/\textsc{as}. Of course, Official English also could yield economic benefits to affected Latinos/\textsc{as}. But because Latinos/\textsc{as} would not have pursued these benefits voluntarily, they would be indistinguishable from those yielded through mandated multiculturalism.

d. Summary

Thus far, our analysis does not preclude the possibility that Official English could be Kaldor-Hicks efficient.\textsuperscript{125} This possibility follows from the numbers: the majority gets the benefit of lower costs at the minority's expense. But the questioning process we have undertaken does highlight some significant counterfactual possibilities. Rational solidarity across society's many minority groups could lead an overall majority to prefer forbearance of the economic benefit of state-imposed monolingualism. In the alternative, monolingualism entails opportunity costs that could alter the Kaldor-Hicks bottom line.

3. Economic Incentives To Learn English

Let us assume that Anglo resistance to Spanish language and culture is embedded and that the opportunity costs of monolingualism

\textsuperscript{124} This Article's analysis does signal a point of material distinction, however. One can state the point both in the economic terms of this Part II and in terms of the ideal of the free person we describe in Part III.

Economically, the difference lies in asymmetric incentives. When Latinos/\textsc{as} have a powerful economic incentive to acculturate themselves as Americans, Anglos do not perceive immediate gains from multicultural education, even if these gains accrue as a long-run proposition. One can defend from a welfare perspective mandatory multicultural education, but cannot defend Official English.

From the point of view of the ideal of the free person, the difference between a multicultural educational program, fairly designed and applied, and an English Only regime is that the first is inviting while the second is degrading. Part III indicates that groups and individuals only are reasonable to the degree they recognize that they cannot bind others to norms to which they themselves would not agree to be bound. See infra notes 291-94 and accompanying text. This recognition implies a basis for defending multicultural education as a means to the end of equal dignity, even when mandated. Although society must allow to all groups cultural expression, there is always a danger that the majority culture simply can assert its superiority, thus violating the conditions of reasonable cooperation. Multicultural education protects against this danger.

\textsuperscript{125} That is, it results in most people being better off even as it leaves some people worse off, with the aggregate gain outweighing the aggregate loss. \textit{See, e.g.}, Kenneth G. Dau-Schmidt, \textit{Smoking in the Washroom of the Chicago School: A Reply to Crespi, 22 Law & Soc. Inq. 171, 177-78 (1997) ("A policy is said to be Kaldor-Hicks efficient if those who are made better off by the policy would pay more for adoption of the policy than those who are hurt by the policy would pay to avoid adoption of the policy.").
appear to be low so Official English seems to be welfare improving on a Kaldor-Hicks analysis. The economic analysis is still not complete. It remains to be seen whether the likely level of Latino/a acquisition of English is appreciably lower in a world of free choice than it would be in a world in which the government wields a stick. If Latinos/as are not less likely to acquire English skills by free choice, then Official English with its intrinsic capacity for perverse effects may not be worth the trouble.

The analysis that ascribes desirable cost attributes to a lingua franca implies that members of linguistic minorities have a high-powered incentive, which derives from the employment market, to learn the majority language. Since entry of members of the linguistic minority into a given firm or workplace means additional communication costs, all other things being equal, a majority-group employer either will avoid hiring members of the linguistic minority or, if it chooses to integrate, will pay minority employees less to compensate for the resulting increase in costs (and decrease in profits) not incurred by competing segregated firms. The monolingual members of the minority group will "bear the cost of intergroup communication." Employment discrimination will persist while the communication costs of integration persist. Members of the language minority may solve the problem of employment discrimination by incurring the cost of learning the majority language. In effect, for any given skill level the minority must make a greater human capital investment than the majority.

Despite their greater investment, members of the language minority may encounter obstacles on the road to wage parity. Assume, for example, that newly bilingual members of the minority seek the same wage as members of the majority but that monolingual members of the language minority offer the same labor for a lower wage. The bilingual and majority language speakers now could find themselves competing with minority monolinguals. Although the costs of communication dictate that a rational employer will prefer a monolingual workplace, they do not necessarily determine the language chosen. An employer could invest in learning the minority language or in paying a higher wage to a bilingual supervisor or supervisors, enabling itself to employ a workforce monolingual in the minority language at

126 See supra notes 102-04 and accompanying text.
127 This model assumes the absence of regulation successfully mandating equal pay for equal work.
128 Lang, supra note 113, at 373; see also Welch, supra note 112, at 231 (arguing that the minority bears the cost of integration in the workplace).
129 See Breit & Horowitz, supra note 119, at 71-72 (noting that as the transaction costs of interaction, such as communication problems, decrease, interaction will increase).
130 See Lang, supra note 113, at 376.
the lower wage. The higher the number of workers per bilingual supervisor, the more viable this option becomes for the employer.131

Despite this caveat, incentives to learn the majority language should remain powerful.132 The prevailing cost bias in favor of segregated, monolingual workplaces assures the strength of those incentives. The minority can retain its language and its economic independence only by restricting itself to segregated workplaces and to teams that are monolingual in the minority language. Segmentation into certain occupations may result, along with overcrowding in each.133 Stratification also will occur because highly verbal managerial and professional opportunities will be unavailable to members of the language minority.134 Latinos/as understand this reality very well.135 In the words of the Dominican singer Juan Luis Guerra: “pues no hablamos inglés/ni a la Mitsubishi/ . . . ni a la Chevrolet.”136

B. Official English, Sorting, and Rent Seeking

1. Latino and Latina Sorting

The economic factors that create a powerful incentive for English-language acquisition also explain immigrants' tendency to settle in enclave communities. A simple jurisdictional sorting model illustrates this point.137 Assume an English-speaking federation with ten states of equal size, each with an international port of entry. At t=0 a Latino/a minority has immigrated into the federation, has settled evenly across the ten states, and now constitutes ten percent of the federation’s population.138 Assume further that (1) movement within the federation is costless, (2) it has unlimited job opportunities, (3) all the Latinos/as have become citizens, and (4) most Latinos/as are bi-

131 The company will have to compensate the bilingual supervisor for her special skill, of course. See generally Booth, supra note 84 (reporting that bilingual and monolingual supervisors have demanded higher pay to speak Spanish). Because the cost advantage is greatest with a low supervisor-to-worker ratio, one would expect this pattern, and any resulting negative impact for English-acquisition incentives, to show up with respect to jobs at lower skill levels. See Lang, supra note 113, at 573-74.

132 Studies show that there is little labor-market substitution between new arrivals and earlier immigrant generations. See infra note 270 and accompanying text.

133 See Breton & Mieszkowski, supra note 101, at 270; Lang, supra note 113, at 73-74.

134 See Breton & Mieszkowski, supra note 101, at 270.

135 As the above evidence on English-language education indicates. See supra notes 54-57 and accompanying text.

136 JUAN LUIS GUERRA, El Costo de la Vida [The Cost of Living], on AREITO (Polygram Latino 1992) (translating as “Since we don’t speak English, got no Mitsubishi, got no Chevrolet”).


138 Assume further that no state has a special geographic connection to the home country and that each immigrant has made an individual decision and had no network ties to the federation.
lingual but prefer to speak Spanish because doing so facilitates cheaper communication. Given these assumptions, the model predicts that between \( t=0 \) and \( t=1 \) the Latinos/as will resettle, concentrating their population in a smaller number of states.

Geographical concentration of the Latino/a population generates additional opportunities for transacting business in Spanish, creating both employment and trade opportunities for which a relative disability with English presents no barrier. As the Latino/a population concentrates, some Anglos may respond by moving out of the target states.\(^{139}\) Ethnic and cultural bias provides one reason for such a reaction—Anglos apparently prefer to live in areas populated exclusively by other Anglos.\(^{140}\) Economics provides another reason for this behavior. As an Anglo's immediate neighborhood populates with Spanish speakers, the seignorial value of English declines, even though national economic integration and dominant Anglo numbers assure that it never completely disappears in any political subdivision.

This simple sorting model predicts, all other things being equal, that Latino/a concentration eventually will create a voting majority in one state.\(^{141}\) This model depends on heroic assumptions and accordingly is only suggestive. It nonetheless suffices to explain why Latinos/as have not settled evenly across the United States and, so long as there continue to be substantial numbers of first-generation immigrants, why they cannot be expected to disperse from enclave communities. For first-generation Latinos/as speaking limited English, opportunities in enclaves will be superior to those in Anglo communities.\(^{142}\) The model therefore requires us to qualify our description of a high-powered incentive to learn English. But the qualification is minor: an integrated national economy and an overwhelming Anglo majority ensure that English-language and bilingual employment opportunities will outnumber Spanish-language opportunities, even for those who live in enclaves.

Latino/a sorting results from both economic incentives and cultural preferences. Since sorting coexists with an independent incentive to learn English, it implies a long-term barrier to assimilation only to the extent that the Anglo community takes actions that retard the

\(^{139}\) Cf. David P. Kasakove, Note, New York State Association of Realtors, Inc. v. Shaffer: When the Second Circuit Chooses Between Free Speech and Fair Housing, Who Wins?, 61 BROOK. L. REV. 397, 422 (1995) (discussing "tipping," which "is the sociological term used to refer to the critical point at which whites . . . leave a community, because of black entry into the neighborhood").

\(^{140}\) The population-sorting literature provides ample empirical support for this point. See Bratton & McCahery, supra note 137, at 242 & n.169.

\(^{141}\) Concentration in two of the ten states and a slight increase in the population of Latinos/as could mean a voting majority in two states.

\(^{142}\) Cf. Lang, supra note 113, at 370 (noting that minority-language speakers likely will experience "occupational segregation").
ordinary course of population dispersion in pursuit of economic opportunity. The model suggests that English Only legislation conceivably could serve just such a purpose.

2. **English Only as an Entry Barrier**

Return to $t=0$ in the original ten-state model. A state wishing to discourage Latino/a in-migration due to sorting can make itself marginally less desirable by enacting a restrictive Official English statute. If public services in Spanish remain available in the other states, then the Official English state has erected an effective barrier against Latino/a in-migration. Indeed, assuming costless movement, the state can expect out-migration of its present Latino/a population. Of course, because the other states are free to copy the legislation, the long-term efficacy of this strategy remains questionable. A “race to the bottom” could result, with all states adopting Official English statutes. Ironically, in that event, the Latinos/as have a heightened incentive to concentrate in enclave settlements. Once all states adopt Official English, each potential target state offers the same set of costs and benefits to Latino/a citizens. Only a sorting process can differentiate the states again: a solid Latino/a majority in one state supplies the means to remove even a constitutional Official English mandate.

3. **English Only and Domestic Interest Groups**

We can further modify this public choice analysis of Official English to explain domestic politics in a state with a Latino/a minority and a restrictive Official English statute. Hypothesize a single state and assume the following: (1) a ten percent Latino/a minority, many but not all of whom are bilingual, (2) an even distribution across the state of Latinos/as, (3) no bilingual Anglos, (4) residents who all are citizens and taxpayers, (5) no possibility of in-migration of Latinos/as from other states, (6) a monolingual provision of public goods and services, and (7) a government operating in pursuit of the public interest, meaning it distributes the return of the highest possible supply of public goods as equally as possible to all taxpaying citizens.

Keeping the aforementioned assumptions in mind, consider the following scenario. The government concludes that the provision of monolingual services is inconsistent with its notion of the public interest and decides to provide bilingual public goods and services to the

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143 This conclusion rests on the assumption that complete information is available to all sides.

144 This race to the bottom is analogous to the result that follows from applying jurisdictional competition theory to welfare provisions for the poor. In the standard model, wealth redistribution must proceed at the centralized, federal level because the states have an incentive to encourage poor people to move out by lowering the level of the welfare provision. *See* Bratton & McCahery, *supra* note 137, at 217-31.
extent feasible. An anti-Latino/a political entrepreneur responds by putting a restrictive Official English provision on the ballot. The Anglos have a cost incentive to vote in favor of the initiative. To the extent that bilingual government imposes additional costs on all taxpayers solely for the purpose of providing Latinos/as an effective pro rata return for taxes paid, self-interested Anglos have no reason to support bilingual government.

Even if the marginal increase in cost that bilingual government causes is quite low, a discrete class of Anglos will have a high-powered incentive to work to insure the measure’s success. This class will consist of present and prospective Anglo public employees. If the state provides bilingual public services, then bilingual Latinos/as will have a qualification advantage with respect to job openings. The degree of that advantage will depend on the scope of the decision to provide bilingual services, the distribution of the Latino/a population, and the presence or absence of economies of scale in the providing of services. If the population of Latinos/as is evenly distributed and the government provides all public services through small offices spread thickly across the state, bilingual Latinos/as could have a qualification advantage for virtually every public position. If the distribution of Latinos/as is uneven and economies of scale have encouraged the development of a small number of large government offices spread unevenly across the state, then bilingual ability will not be a universal qualification. Even so, the decision to provide bilingual services still could disrupt extremely the expectations of entrenched Anglo civil servants.

4. English Only and Local Politics

The two models presented thus far—the multijurisdictional-migration model¹⁴⁵ and the public-service provision model¹⁴⁶—can combine to thicken this rational expectations description of state politics. For example, consider a state with multiple internal tiers of elected government—counties, cities, and towns. Assume further that the state has a substantial Latino/a minority that remains well short of a state-level voting majority, but through the ordinary process of settlement and sorting has gained voting majorities in several political subdivisions within the state. To the extent that officials in those political subdivisions have discretion regarding the public-service provision, Anglo public employees in those districts will have an incentive to work for Official English at the state level. There, Anglos still constitute a majority, even as the Latinos/as elect their own to the local city hall, sheriff’s office, and school board. A state-level statute, if restric-

¹⁴⁵ See supra Part II.B.1.
¹⁴⁶ See supra Part II.B.2-3.
tively drafted, can hard-wire English language seigniorage at the local level.147

5. Summary: The Multijurisdictional and Single-State Models

Official English emerges from this public choice analysis as the functional equivalent of Jim Crow legislation.148 In the multijurisdictional-migration model, Official English operates as a tariff that discourages in-migration of a minority that the majority deems undesirable. To the extent that Latino/a in-migration implies (or is perceived to imply) increased labor-market competition for certain Anglos,149 we find a textbook example of a privileged group using law to perpetuate its economic dominance and to retard the operation of market forces that impair its position. In the single-state model, Official English affects Latino/a subordination more directly, if only with respect to access to public jobs and services. In this scenario, the majority again uses its legislative power in the Jim Crow tradition to contain a minority’s economic aspirations.

147 The back-and-forth experience of Dade County, Florida with Official English reflects this scenario. See supra note 68. But it is important to note that elected officials are only beginning to feel Latino/a voting power, even within the enclave states. See, e.g., Todd S. Purdum, California G.O.P. Faces a Crisis as Hispanic Voters Turn Away, N.Y. TIMES, Dec. 9, 1997, at A1 (noting that politicians are beginning to recognize the importance of appealing to growing numbers of Latino/a voters). The following chart catalogs the number of Latino/a elected officials at the state and local levels in 1985 and 1994:

<table>
<thead>
<tr>
<th>Public Official</th>
<th>1985</th>
<th>1994</th>
</tr>
</thead>
<tbody>
<tr>
<td>State executives and legislators</td>
<td>119</td>
<td>199</td>
</tr>
<tr>
<td>County and municipal officials</td>
<td>1,316</td>
<td>2,197</td>
</tr>
<tr>
<td>Judicial and law enforcement</td>
<td>517</td>
<td>651</td>
</tr>
<tr>
<td>Education and school boards</td>
<td>1,185</td>
<td>2,412</td>
</tr>
<tr>
<td>Total</td>
<td>3,147</td>
<td>5,459</td>
</tr>
</tbody>
</table>

Source: Hispanic Americans: A Statistical Sourcebook, supra note 50, at 97.

Some have attributed past electoral failures for Latinos/as to low levels of voter registration and turnout. See, e.g., Charles S. Bullock, III & Susan A. MacManus, Structural Features of Municipalities and the Incidence of Hispanic Councilmembers, 71 SOC. SCI. Q. 665, 678 (1990) (showing that given adequate voter participation, Latino/a representation on city councils grows as the percentage of Latinos/as in the population grows under a variety of structural arrangements). In 1992, the national Latino/a registration level was 35.0%, compared with 70.1% for whites; turnout was 28.9%, compared with 63.6% for whites. See Hispanic Americans: A Statistical Sourcebook, supra note 50, at 98. Gerrymandering also has occurred, most famously in Los Angeles. Compare Chavez, supra note 61, at 47 (noting that a court order created a voting district to give Latinos/as a seat on the L.A. County Board of Supervisors), with Hispanics: More People than Power, supra note 49, at 32 (discussing a Justice Department suit alleging that voting districts were deliberately drawn in L.A. County to exclude Latinos/as and other minorities from power).

148 See Solé, supra note 21, at 828-29.

149 This proposition is controversial when advanced in the context of Latino/a immigrants. See generally DeFreitas, supra note 6, at 209-51 (concluding that some jobs are lost, but not nearly as many as advocates of closed borders allege).
Admittedly, these public choice scenarios cannot afford an exclusive account of Official English. Nativist ideology has independent and powerful causal force, particularly in a time when norms have arisen to foreclose direct expression of racist impulses in public discourse. The scenarios show how neatly these impulses dovetail with rent incentives.

C. Employment Discrimination and Latino and Latina Incentives

The assimilation story cannot plausibly be applied as a norm absent a concomitant and credible promise of equal economic opportunity. It is, after all, economic opportunity that gives immigrants incentives to disperse from enclaves and to complete the process of Americanization. Without equal economic opportunity, it is not clear why we should expect dispersion and full assimilation.

But why should discrimination block application of the assimilation norm to today’s Latinos/as when early twentieth-century eastern and southern European arrivals also suffered and overcame significant national origin and religious discrimination? We suggest two answers. First, two wrongs do not make a right. It is one thing to intone that immigrants should “pay their dues” when the dues are the costs of learning English to achieve equal economic opportunity. It is quite another to require them to undergo a vicious hazing process of indefinite duration. Gloria Anzaldúa describes a youth’s experience of Anglo linguistic terrorism:

I remember being caught speaking Spanish at recess—that was good for three licks on the knuckles with a sharp ruler. I remember being sent to the corner of the classroom for “talking back” to the Anglo teacher when all I was trying to do was tell her how to pronounce my name. “If you want to be American, speak ‘American.’ If you don’t like it, go back to Mexico, where you belong.”

Anzaldúa’s experience is not unique.

Second, it is not at all clear that the concept of “national origin” discrimination, closely tied to those early twentieth-century immigrants, adequately describes the discrimination barrier confronting Latinos/as. Mexicans, Puerto Ricans, Cubans, Dominicans, and Central and South Americans descend from Native Americans and Africans as well as from Europeans. In their responses to the 1980 census,

150 See Tatalovich, supra note 67, at 81-82 (making this point with admirable rigor).
152 Rosa Rosales, a spokesperson for the League of United Mexican Citizens, recalls going to school under a regime that “threatened to have our mouths washed out with soap and our knuckles hit with rulers when we spoke Spanish in the hallways.” Stefanie Soott & Nicole Foy, Judge’s English Decision Rapped, SAN ANTONIO EXPRESS-NEWS, Aug. 30, 1995, available in 1995 WL 9501154.
forty percent of Latinos/as classified themselves as neither black nor white but as "other." These responses suggest that for many Latinos/as, their "visibility" stems less from their lack of acculturation than from their skin color.

Discrimination—whether ethnic, racial, or a combination—prevents assimilation. To the extent that Latinos/as face discrimination, the appropriate analogy for the Latino/a enclave is not the turn-of-the-century immigrant community, but the African American community of the contemporary inner city. Of course, an acknowledgment that Latinos/as are targets of discrimination requires further examination of our description of a high-powered Latino/a incentive to acculturate as Americans. Discrimination reduces returns on human-capital investments, and reduced projected returns lower the present value of a proposed investment. A persistent residual income differential due to discrimination means that a rational Latino/a makes a smaller human-capital investment than a similarly situated white Anglo. Accordingly, Latinos/as have a reduced incentive to acculturate. In addition, the Latino/a perception that heightened discrimination barriers exist outside of enclave communities lessens the incentive to disperse in search of economic opportunity. If maximal assimilation is the objective, Official English is the wrong tool. A vigorously enforced antidiscrimination law will be more successful.

1. Evidence of Economic Discrimination

Statistical evidence strongly suggests that markets convert personal skills into economic outcomes differently for Latinos/as than for white Anglos. The studies we describe below detail adverse eco-
onomic treatment of Latinos/as through the use of varied data sets and different methods of investigation.\textsuperscript{158}

Latinos/as consistently earn less than whites, and little progress in closing the historic income differential has occurred during the last thirty years.\textsuperscript{159} The average family income of Latinos/as was 69.2\% of whites’ in 1973, and it fell to 62.9\% in 1987. By 1993, however, it climbed to 70.0\%,\textsuperscript{160} which was roughly the same as the 1973 level. Language barriers and other educational and skill differentials partially explain these figures. The studies yield various quantifications of the impact of these differences. Scholars have found that language abilities account for income differentials ranging from as little as four percent to as much as thirty-three percent.\textsuperscript{161} Differences in the particular samples that the studies compare and in the methodologies that the studies apply explain the variations.

But language barriers, skill differentials, and other productivity factors do not completely explain the differential. Studies that adjust

\begin{footnotesize}
\begin{tabular}{l|c|c}
 & Latino/a & White \\
\hline
 Median &  &  \\
1980 & 22,591 & 30,921 \\
1993 & 22,886 & 32,960 \\
\hline
 Mean &  &  \\
1980 & 27,594 & 36,264 \\
1993 & 30,291 & 43,285 \\
\hline
\end{tabular}
\end{footnotesize}


One can infer that continued arrival of large numbers of non-English-speaking Latino/a immigrants retards the rate of closure of the Latino/a-white Anglo income differential, obscuring economic gains made by existing residents.

\textsuperscript{158} The text paraphrases Glenn Loury’s description of the literature respecting African Americans. \textit{See} Loury, supra note 97, at 118; \textit{see also} William A. Darity Jr. & Patrick I. Mason, \textit{Evidence on Discrimination in Employment: Codes of Color, Codes of Gender}, 12 J. Econ. Perse. 63, 63 (1998) (surveying the literature as a whole and concluding that “[t]he evidence is ubiquitous” that discriminatory treatment in the labor market contributes greatly to the racial and gender disparity in the American economy).

\textsuperscript{159} \textit{See} DeFreitas, supra note 6, at 56-57 & tbl.3.1.

\textsuperscript{160} \textit{See} Hispanic Americans: A Statistical Sourcebook, supra note 50, at 147. The complete raw incomes for 1980 and 1993 are as follows:

for differentials in human capital find a residual gap. DeFreitas’s study, for example, compares the incomes of white, Puerto Rican, and Mexican males.\textsuperscript{162} All of the men he sampled had been born in the United States, were fluent in English, and had lived in the same metropolitan area for at least five years.\textsuperscript{163} The study found that Puerto Ricans’ income was 62.6\% of whites’, and Mexicans’ income was 74.7\% of whites’.\textsuperscript{164} It also found that for college graduates, Puerto Ricans earned 70.0\% of what whites earned, while for Mexicans, the percentage was 74.5\%.\textsuperscript{165} When the study controlled for age as well as education, Mexicans fared better, earning 95.1\% as much, while Puerto Ricans earned 92.6\% as much.\textsuperscript{166} Other studies have concluded that the residual differential, an indirect measure of the impact of discrimination on wages, for Puerto Ricans is 18.0\%.\textsuperscript{167} The literature offers a range from nine to fifteen percent for the residual differential in income between Mexicans and whites.\textsuperscript{168}

Comparative figures on “returns to schooling”—percent figures representing the change in earnings associated with each additional year of schooling—that Schoeni, McCarthy, and Vernez generated point in a similar direction.\textsuperscript{169} In 1970, the figure for United States natives was 7.9\%, and by 1990 it had increased to 10.3\%.\textsuperscript{170} The com-

\begin{footnotesize}
\footnotesize\begin{itemize}
\item\textsuperscript{162} See DeFreitas, supra note 6, at 71-73.
\item\textsuperscript{163} See id. at 71.
\item\textsuperscript{164} See id. at 72 tbl.3.7.
\item\textsuperscript{165} See id.
\item\textsuperscript{166} See id. (showing the results for persons with over 16 years of education who were ages 30-34).
\item\textsuperscript{167} See Reimers, Wage Structure, supra note 161, at 407, 413 (noting also a 12\% differential for other Latinos/as and a six percent differential for Mexicans).
\item\textsuperscript{169} See Schoeni et al., supra note 3, at 55-56 & tbl.4.6.
\item\textsuperscript{170} See id. at 56 tbl.4.6.
\end{itemize}
\end{footnotesize}
parable 1970 figure for Mexican Americans educated in the United States was 6.4%, but by 1990 it had decreased to 5.3%.171

These figures, which are the product of regression analyses of census or personnel data,172 fall short of affirmative proof of employment discrimination because they do not foreclose the possibility that other factors, such as secular changes in the relevant job base173 or information problems concerning immigration status,174 also contribute to the residual income gap.175 Therefore, at best they represent an “upper bound” measure of discrimination’s effects.176 A different and less well-developed line of empirical research, however, approaches the problem from a different angle to produce affirmative showings of discriminatory behavior. Audit studies of matched white and Latino/a job seekers reveal statistically significant differentials in job search results for whites and Latinos/as.177

171 See id. Meanwhile, the 1990 figure for immigrants born in Canada and the United Kingdom, as well as educated in the United States, was 8.3% and for immigrants born in Japan, Korea, and China, as well as educated in the United States, was 13.1%. See id. at 56-57 & tbl.4.6.

172 See id. app. at 69-74 (describing the data and regression analyses for the data we reference).

173 See DeFreitas, supra note 6, at 89.

174 See Schoeni et al., supra note 3, at 58 (“[T]he wage penalty for being undocumented may be as high as 7-10 percent.”). Schoeni, McCarthy, and Vernez also mention a special statistical discrimination factor—the difficulty of distinguishing legal from illegal immigrants. See id. To the extent that illegals present legal risks to the employer, one can expect difficulty in effecting informational separation to depress wages for all Mexicans. See id. at 57-58. Alberto Dávila, Alok K. Bohara, and Rogelio Saenz make the same point. See Alberto Dávila et al., Accent Penalties and the Earnings of Mexican Americans, 74 SOC. SCI. Q. 902, 903-05 (1993). Their study finds that independent of English-speaking proficiency, heavily-accented Mexican Americans earn significantly lower wages than nonaccented Mexican Americans. See id. at 905. In addition, they find that accented Mexican Americans pay more for their accents than do accented Germans and Italians. See id. at 914.

175 For further discussion, see James J. Heckman, Detecting Discrimination, 12 J. Econ. Persp. 101, 103-07 (1998) (warning against reading discrimination into the disparity in hiring of whites over blacks when interpreting the residual wage gap).

176 For a discussion of the strengths and weaknesses of the methodologies employed, see Darity & Mason, supra note 158, at 67-68.

177 See, e.g., Marc Bendick, Jr. et al., Measuring Employment Discrimination Through Controlled Experiments, in AFRICAN AMERICANS AND POST-INDUSTRIAL LABOR MARKETS 77, 88-89 & tbl.3 (James B. Stewart ed., 1997) (finding a rate of discrimination in excess of 20% in Latino/a-Anglo pairings, with Latinos being nearly three times more likely to experience discrimination than Latinas); Michael Fix et al., An Overview of Auditing for Discrimination, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 1, 22 tbl.1.3 (Michael Fix & Raymond J. Struyk eds., 1993) (finding that Latinos are three times as likely as non-Latino whites to experience employment discrimination); see also Genevieve M. Kenney & Douglas A. Wissocker, An Analysis of the Correlates of Discrimination Facing Young Hispanic Job-Seekers, 84 A.S.I. ECON. REV. 674, 676-77 (1994) (finding that the differential in response narrows as the Latinos go from the inquiry and preinterview stage to the postinterview job-offer stage). The Latinos who get through the screening process do better at the latter stage, although there still is a statistically significant differential in job offers. See id. An inference of crude statistical discrimination arises—employers are
An additional body of studies also warrants mention. This body of work investigates whether skin color contributes to the wider pattern of discrimination. One study,\(^\text{178}\) whose findings some have controverted,\(^\text{179}\) looks for differences in earnings among groups of Mexican Americans divided according to their skin color—light, medium, and dark. The study adjusts for human-capital differentials and concludes that the darkest, most Native American-looking group members earn substantially less than their lighter-skinned counterparts.\(^\text{180}\) Another study compared the earnings of New York City Puerto Ricans who identify themselves as “other” in census reports with those who identify themselves as “white.”\(^\text{181}\) With everything else constant, males who identified themselves as nonwhite earned eight percent less than those who identified themselves as white.\(^\text{182}\) Anzaldúa echoed the studies and the controversies they engender: “I am visible—see this Indian face—yet I am invisible. I both blind them with

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more accepting once they see that the Latino applicant does not have expected undesirable qualities.

Some have criticized audit study methodology. See Heckman, supra note 175, at 107-11 (emphasizing that unobserved variables can cause hiring differentials to be due to factors other than discrimination). But see Kenneth J. Arrow, What Has Economics to Say About Racial Discrimination?, 12 J. ECON. PERSP. 91, 95 (1998) (acknowledging the criticism but concluding that “[w]hile one can always invent hypotheses to explain away these results, there is really no reason not to draw the obvious conclusions”); Darit\(^\text{y}\) & Mason, supra note 158, at 79-81 (answering Heckman and describing an audit study designed to meet many of the criticisms of the audit technique).


\(^{179}\) See Alok K. Bohara & Alberto Dávila, A Reassessment of the Phenotypic Discrimination and Income Differences Among Mexican Americans, 73 SOC. SCI. Q. 114 (1992) (subjecting the same data to a different statistical methodology and finding no support for the finding of discrimination). But cf. Edward E. Telles & Edward Murguia, The Continuing Significance of Phenotype Among Mexican Americans, 73 SOC. SCI. Q. 120 (1992) (concluding that a linear regression model is better suited to an analysis of Mexican American earnings and that Boharo and Dávila’s results do not alter the finding that dark phenotype translates into lower earnings for Mexican Americans).

\(^{180}\) See Telles & Murguia, supra note 178, at 693. Telles and Murguia are surprised by the lack of a significant differential between the light group and the medium group. See id. They suggest that the medium group members were heavily concentrated in both the construction industry and in unions, compensating for the greater labor-market endowment of the light-skinned group members. See id. They also suggest that given the prevalence of low skills across all three groups, the light and medium group members did not face further discrimination within their already circumscribed labor markets. See id. at 694; see also Carlos H. Arce et al., Phenotype and Life Chances Among Chicanos, 9 HISPANIC J. BEHAV. SCI. 19, 25-30 (1987) (dividing their sample into two phenotypical dimensions, skin color and physical features, and finding that Chicanos with lighter skin and European features had higher socioeconomic status).

\(^{181}\) See Rodriguez, supra note 153, at 86.

\(^{182}\) For females, the differential was not statistically significant. See id. at 86-88. For another study, see William Darity Jr. et al., Explaining Differences in Economic Performance Among Racial and Ethnic Groups in the USA: The Data Examined, 55 AM. J. ECON. & SOC. 411, 422 (1996) (reporting, on basis of 1980 and 1990 census data, that black Latinos/as suffer proportionately more income loss due to differential treatment than do white Latinos/as).
my beak nose and am their blind spot. But I exist, we exist. They’d like to think I have melted in the pot. But I haven’t, we haven’t.”

2. The Economic Theory of Discrimination

The hypothesis that discrimination negatively impacts Latino/a incentives to assimilate also must endure testing in the framework of the economic theory of discrimination. This theory poses three competing explanations for discriminatory behavior: taste, cost, and asymmetric information. The three explanations in turn provide conflicting long-term projections of the degree to which the market will correct discriminatory behavior and therefore draw conflicting conclusions about both Latino/a assimilation incentives and the need for (and justifiable scope of) antidiscrimination legislation. The following analysis shows that the asymmetric information approach, which projects that discrimination will persist over the long term, most accurately describes the situation of Latinos/as and other immigrant groups.

a. Taste

Gary Becker’s famous theory of discrimination as a product of a “taste for separation” is the foundation of the economics of discrimination. Under Becker’s theory, discrimination results from a taste for segregation that employers and employees hold. If this taste is widespread, the target minority receives a lower wage in the marketplace and finds employment only with the least prejudiced employers. These employers benefit from a cost advantage because society’s widespread taste for segregation depresses wages for minority labor. In Becker’s neoclassical setup, the nondiscriminatory employers employ this cost advantage to drive discriminatory employers from the market, and the wage differential falls over time. The market’s eventual equilibrium always is nondiscriminatory; hence, antidis-

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183 Anzaldua, supra note 151, at 86.
184 As the discussion will show, the cost and asymmetric information explanations are closely related because asymmetric information implicates costs.
186 See id. at 14.
187 See id. at 107.
188 See id. at 43-45; Kenneth J. Arrow, Models of Job Discrimination, in Racial Discrimination in Economic Life 83, 86-87 (Anthony H. Pascal ed., 1972). In a perfect market, a person having a special preference must pay for its satisfaction, and any employee demanding special working conditions is paid less; thus, segregation is a higher cost mode of production. See Cooter, supra note 39, at 139-41. We should note that discrimination disappears in the Becker model “[o]nly if the supply of entrepreneurship is perfectly elastic in the long run at zero price, so” that employers have no discretionary income with which to enjoy their taste for discrimination. Heckman, supra note 175, at 111-12.
criminalization legislation is unnecessary and is merely a transfer mechanism that causes efficiency losses.

b. Cartels, Castes, and Dynamic Models

Subsequent variations on taste theory destabilize these emphatic free market conclusions. Becker’s model left the economic community with two disquieting alternative possibilities. On the one hand, American history thus far has falsified the prediction that market forces will eliminate discrimination. Indeed, under the model, “it is unclear how [a pattern of] discrimination could have arisen in the first place.” In the alternative, an admission of pervasive racism among white Anglos could sustain the theory. If the taste for discrimination is very widespread, its cost implications become trivial, and the market corrective never operates. Unsurprisingly, the academic literature has not much pursued the latter proposition.

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189 See Donohue, supra note 37, at 1421-22. Ironically, taste theory indirectly confirms the above analysis of Official English. See supra Part II.A.1, 2(a)-(b). Just as labor-market incentives assure that Latino/a immigrants will learn English, price competition in product markets causes discrimination barriers to disappear over time. In addition, a strong negative implication arises for applications of Title VII to Workplace English: just as the free economy eventually solves any assimilation problems, it also provides solutions for any problems respecting employer-employee relations. If Workplace English is cost effective, it will survive and redouble the Latino/a educational incentive; if it is not, Workplace English employers will be driven out.

190 See Shelly J. Lundberg & Richard Startz, Private Discrimination and Social Intervention in Competitive Labor Markets, 73 Am. Econ. Rev. 340, 340 (1983) (noting the often-made argument that antidiscrimination laws cause efficiency losses, but concluding that this legislation is desirable under some conditions); see also Cooter, supra note 39, at 156 (arguing that antidiscrimination laws can “benefit a social group by reducing competition from others”). Note, however, that the assertion is not that “discrimination is efficient.” As between an economy without discrimination and an economy with discrimination, utility and income are comparable, but the ultimate question as to whether resources are being put to their most productive uses is indeterminable. Answering that question requires a moral determination about the appropriateness of facilitating the discriminatory taste. See Stewart Schwab, Is Statistical Discrimination Efficient?, 76 Am. Econ. Rev. 228, 228 (1986).

191 Arrow objects to taste theory from a different perspective. For him, it “undermine[s]” rational choice theory by introducing a variable in addition to profits for the employers. Arrow, supra note 177, at 94-95.

192 See Cooter, supra note 39, at 150.

193 Lundberg & Startz, supra note 190, at 340; see also George A. Akerlof, The Economics of Caste and of the Rat Race and Other Woeful Tales, in An Economic Theorist’s Book of Tales 23, 34 (1984) (“[T]here are a fair number of cases where opportunities have arisen for deviants to break the caste code and make economic profits, with consequent rise in their social position and erosion of the caste taboos.”). A negative implication for the robustness of neoclassical microeconomic methodology also resulted. See Lang, supra note 113, at 365.

194 See Lang, supra note 113, at 364-65.

195 The exception is Michael Selmi, Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate, 42 UCLA L. Rev. 1251, 1284-89 (1995), which draws on psychological literature to suggest that unconscious discrimination will be a persistent phenomenon and will resist market correction. Selmi’s analysis leads to a conclusion similar to that of Cornell & Welch, supra note 39, which we discuss supra text accompanying notes 250-68. Race
Some have employed a cartel analogy to bring the model into rough alignment with American history. This analogy explains that racial majorities collaborated to exclude competition from other groups and to shift the cost of discrimination to these groups, just as producers often conspired to form cartels to escape the discipline of price competition. Since cartels are unstable, the majority procured legislation—Jim Crow legislation—to reduce the risk of defection. These discriminatory statutes provided a narrow justification for antidiscrimination legislation. This legislation legitimately can serve the limited purpose of repealing or preempting Jim Crow constraints on free markets. Once the legal support of the discriminatory price conspiracy vanishes, however, price competition will assure due employment for qualified people. According to this logic, Congress should repeal Title VII.

Two additional lines of analysis depart from this narrow view of Title VII while adhering to the neoclassical projection of long-run market elimination of discrimination. The first accepts the Becker model, but recasts it in a stochastic time frame. The analysis asserts that the market corrective requires an intolerably long time period to operate successfully. Title VII is justified as an interim measure because it drives discriminators from the market more quickly than non-intervention by lowering their profits.

The second line of analysis expands on the cartel analogy. It posits normatively sustained group solidarity in the racial majority and attempts to show how, assuming a spontaneous-order scenario, the norm can sustain discrimination in the face of cost pressures. A question arises about showing a spontaneous order: How can collusion among millions of white employees who have no recourse to the legal system enforce a segregationist norm that is contrary to the interest of employers? To answer this question, the leading model posits a critical theory also predicts this result while suggesting that the matter should be pursued. See, e.g., Derrick Bell, After We’re Gone: Prudent Speculation on America in a Post-Racial Epoch, 34 St. Louis U. L.J. 393, 402 (1990) (asserting that “the mass of whites . . . will accept large disparities in economic opportunity in comparison to other whites as long as they [retain] a priority over blacks”).

See Cooter, supra note 39, at 150-57.

See id. at 150.

See id. at 156 ("[S]outhern whites actively used the power of the state and local government to reduce competition from blacks through the ‘Jim Crow’ legislation . . . ").

See id. at 155-57. Antidiscrimination legislation also prohibits physical violence against those who defect from discriminatory norms. See Epstein, supra note 38, at 246-47.

See Epstein, supra note 38, at 76-77.

See Donohue, supra note 37, at 1426.

Arrow enters the neoclassicist’s objection to this move. See Arrow, supra note 177, at 98-99. The description is, he says, contrary to the tradition of economics, which recognizes group interests only in legally sustained form. Group solidarity holds out benefits for
c. **Cost Theory**

Cost theory follows from the observation that workforce homogeneity lowers production costs. Recall that the cost story has provided the basis for our simultaneous descriptions of high-powered Latino/a incentives both to learn English and to settle in enclaves. Since tastes-based discrimination increases costs and is economically irrational, cost-based discrimination reduces costs employees, but not for employers. Thus, the theory has to do the heroic job of making collusion among hundreds of millions of white Americans plausible.

The caste equilibrium model leaves intact the neoclassical account of a free market corrective while altering the description of the normative environment in which it operates. In other words, but for the normative barrier, cost pressures would eliminate discrimination. Two alternative economic approaches—cost and statistical theory—controvert this assertion and predict persistent discrimination regardless of social norms.

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203 See *Akerlof*, supra note 193, at 37-42. Akerlof’s construct seems unsuited to explaining the persistence of discrimination in the post–Title VII economy. Given a shifting normative pattern, nondiscriminatory subsectors seemingly would proliferate with ease. The “noncompeting groups hypothesis,” that Darity and Mason describe, reaches an end point similar to that Akerlof reaches. Darity & Mason, *supra* note 158, at 85.

The caste concept has been revived in the legal literature in an expanded version that draws on social theory. This analysis asserts that the pursuit of social status within discrete communities provides an ongoing incentive for enforcement of the discriminatory norm. See McAdams, *supra* note 39, at 1007, 1019, 1027, 1046-51, 1064. The advantage of this approach is its depiction of society with antidiscrimination laws and a large population containing both those who follow the nondiscrimination norm and those who continue to discriminate despite price pressures. The weaknesses, in our view, are thinness in the description of the majority population’s normative constitution and a reliance on the notion of a robust spontaneous order that has no support in economics. For a presentation of the latter point, see William W. Bratton et al., *Repeated Games, Social Norms and Incomplete Corporate Contracts*, in *Aspects of Fairness in Contract* 161, 168-78 (Chris Willett ed., 1996).

204 See *Akerlof*, supra note 193, at 97, 40-41.

205 See id. at 44.

206 See *supra* Part II.A.3.
and is economically rational. As a result, the same free market assumptions that support a prediction that taste-based discrimination disappears over time support a prediction that cost-based discrimination can persist. Moreover, according to this view, any legal prohibition of discrimination increases the costs of production (even assuming costless enforcement); therefore, Congress should repeal Title VII.

This cost story significantly overlaps with the assimilation story. This overlap becomes apparent when one applies the message of the cost story to African Americans. Recall that according to the literature, the list of human differences having negative production cost implications is long, extending to all aspects of identity and personality. It includes not only language, but also accent and a range of nonverbal codes that manifest themselves in posture and gesture. Thus, cultural and ethnic identification, in addition to factors like the number of years of school completed and other investments in technical skills, determines individual economic opportunity sets. To achieve economic parity with whites, African Americans must minimize their cost implications to employers by shaping their behavior to mimic white patterns to the fullest extent possible. “Assimilation” is an appropriate term for this process of reinventing oneself to surmount the linguistic and cultural divides that separate a minority from the majority group.

Cost theory therefore demands an added capital investment from both African Americans and immigrants: assimilation. Ideally, we would read Title VII to mean that African Americans should not have to make this added investment to reconstitute themselves culturally as whites. In a regime of equal economic opportunity, full qualification

207 See Epstein, supra note 38, at 61.
208 This is Epstein’s argument. See id. at 61-67, 76. It overstates the role of decision-making costs in the broader economy. Epstein depicts all producers as if they were law firms with large numbers of partners, each with an individual vote. See id. at 61-67. In that model, heterogeneity of personnel indeed might lead to decision-making costs approximating those in political life. In the real world, however, hierarchical organization ordinarily solves that problem. One wonders what Epstein is talking about. Something like the treatment in Part II.A.2(b) would be more plausible. There may be a cost advantage to homogeneity in large hierarchical organizations, but it is the lesser benefit stemming from segregated teams. The cost is less impressive in the restated version—the U.S. Army, after all, has become one of the nation’s model integrated organizations.
209 The problem with this approach is the deterministic importance it accords to the identification of costs of all sorts and the impoverished framework it allows for the articulation of countervailing benefits. See, e.g., John J. Donohue III, Advocacy Versus Analysis in Assessing Employment Discrimination Law, 44 Stan. L. Rev. 1583 (1992) (reviewing Epstein, supra note 38, and arguing that the early success of Title VII supports the contention that it generates substantial benefits).
210 See supra Part II.A.2(a).
211 See Lang, supra note 113, at 366-68.
should follow upon successful investment in technical skills. 212 Contrariwise, proposing the repeal of Title VII endorses placing on African Americans rather than on employing firms (and society as a whole) the burden of these assimilation costs. 213

The repeal proposition also raises questions concerning skills-acquisition incentives. On the surface, and particularly with widespread and significant assimilation costs, 214 repealing Title VII diminishes these incentives. Advocates of repeal controvert this prediction, claiming that discrimination barriers create heightened rather than reduced incentives to invest in human capital. 215 Just as minority-language speakers must (and do) invest more to reach skills parity, victims of racial discrimination would have to invest heavily to develop demonstrable skills, including indicia of white acculturation. 216 The incentive to do so derives from the job market payoff. Of course, if integration remains costly, minority job seekers who make this investment will not receive certain jobs until all qualified whites have found employment. 217 Nonetheless, because of a projected exhaustion of the supply of qualified whites, one can predict that minority applicants eventually will find work at the level for which they are qualified. 218

This Horatio Alger-like description of incentives for racial minorities precisely parallels the assimilation story’s description of self-reliant immigrant success. Its application to African Americans, an historically disadvantaged group whose ancestors arrived in America as long ago as those of the most advantaged white Anglos, is ironic. The description also makes problematic assumptions. First, we would argue that it is inaccurate to assume that an inevitable exhaustion of the supply of qualified whites guarantees equal opportunity for African Americans. We would modify this projection by recognizing a cognizable risk of a white surplus and would expect rational, risk-averse African Americans investing in skills to do likewise. This modification implies that the projected returns on African American skills investment will be less than the Horatio Alger story predicts. Second, the story presupposes an absence of racial animus. We think rational African Americans would discount the predicted value of any returns for

212 In Part III we state an ethical case supporting this proposition.
213 This argument assumes that Title VII successfully has shifted costs to firms. It is, of course, not at all clear that the level of Title VII enforcement is thorough-going enough to shift these costs to firms in the first place.
214 See supra Part II.A.1.
215 See Epstein, supra note 38, at 40-41.
216 See supra Part II.A.1.
217 See Epstein, supra note 38, at 35.
218 See id. at 34-40 (assuming that some employers invest in adequate information about the skills of minority applicants).
the contrary possibility. We can restate this argument in cost terms by stating that the costs of integration may include significant residual frictions, stemming from negative white responses to dark skin color—costs that investment in acculturation cannot reduce.219 This residual animus means a rational African American would not predict that an investment in skills would result in an equal opportunity to achieve a return. Ex ante investment incentives accordingly decrease.220 Thus, an examination of the assumptions underlying the Horatio Alger story casts doubt on its motivational power.

Latinos/as, particularly those of color, receive the same message: Persistent discrimination based on the costs of difference means that returns on investment in acculturation start to diminish at an earlier point than the assimilation story predicts. A disturbing proposition thus arises for economic theory: discrimination can persist indefinitely despite constant competitive pressure to produce at the lowest possible cost. A line of formal theory—the statistical theory of discrimination, which draws on the economics of asymmetric information—also suggests this proposition.

d. Asymmetric Information: Statistical and Screening Theories

Statistical theory removes the economics of discrimination from the neoclassical world, in which information is complete and costless, to a second-best world, in which information is costly and incomplete. In the second-best world, employers subject to cost constraints have a choice when they make hiring decisions. They can hire based on a limited number of easily observed but imperfect signals, accepting the attendant chance and cost of mistakes.221 Alternatively, they can reduce the number of mistakes by investing in the development of particularized information about candidates. If the cost of obtaining accurate information exceeds the cost of mistakes that the imperfect signals generate, the rational employer will use the cruder measure. Furthermore, if the employer’s experience makes minority group membership a negative signal, the employer will not give full effect in the hiring process to a minority applicant’s equal or greater skills.222

219 Both cost and taste figure into white discriminatory preferences, and in a world without Title VII, the persistence of the costs in a free market economy would create a space for the exercise of the taste. Because the two varieties of cost are not distinguishable in the real world, shifting the cost of acculturation to African Americans through a Title VII repeal would only serve to make the world safe for exercise of the taste.

220 Loury takes the position that the economic explanation of continuing racial inequality in the labor market should accord a central place to the “skills gap.” Loury, supra note 97, at 118. He points to a cluster of responsible social and cultural factors, each having a racial quality—“geographic separation, deleterious social norms and peer influences, and poor educational quality.” Id.

221 See Akerlof, supra note 193, at 23-24.

222 See Cooter, supra note 39, at 158.
The formal model of statistical discrimination assumes a non-discriminatory but Bayesian employer who responds to greater measurement error respecting the performance of minorities. The employer evaluates workers by calculating a weighted average of the particular worker's directly observed productivity and the mean productivity of the group. Greater measurement error stemming from cultural difference indicates that the employer weights the mean figure more heavily when evaluating minorities. The result is not discriminatory with respect to groups as a whole because both the majority and the minority receive the same average compensation. But heavier mean weighting yields underpayment for highly productive minority group members and overpayment for unproductive minority group members.

Discrimination results when this pattern continues across generations. If employers cannot accurately identify good performance, incentives to make productivity-enhancing investments lessen accordingly. Rational minority group members will reduce their human-capital investments in skills that the employer cannot observe directly. Over time, minority workers' mean productivity will decline, while whites will become relatively better skilled and receive higher average compensation. This result is discriminatory, given equal initial endowments between the two groups. Therefore, legal prohibition of discrimination improves labor-market allocations.

Statistical theory justifies Title VII despite the fact that it assumes unprejudiced white employers. The theory's justification, however, is qualified. Statistical theory, like cost theory, argues that discrimination persists in a free market because it stems from cost calculations, and one may term it cost efficient. Title VII implies costs too: the opportunity cost of barring employers from using the cheapest means

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225 See Phelps, supra note 223, at 659.
226 See id. at 660.
227 See id. at 660-61.
228 See Paul Milgrom & Sharon Oster, Job Discrimination, Market Forces, and the Invisibility Hypothesis, 102 Q.J. ECON. 453, 456-57 (1987). This disincentive occurs because the members of the group enjoy the diffusion of the benefits of the investment. See Cooter, supra note 39, at 158.
229 See Lundberg & Startz, supra note 190, at 341-42, 344-45.
230 See id. at 340 (showing formally that a policy forbidding separate wage schedules between two types of workers forces an increase in allocative efficiency).
231 See Schwab, supra note 190, at 228.
of employee evaluation.\textsuperscript{232} On the other hand, extensions of the statistical model have introduced the possibility that statistical evaluation can lead to structural inefficiencies.\textsuperscript{233} These extensions marginally strengthen the case for Title VII.

The statistical model is not without its critics. One criticism is that the model is too crude. For example, it presumes that employers cannot distinguish entry-level candidates based on the candidate’s number of years of education.\textsuperscript{234} In the real world, critics argue, employers cheaply develop basic information workups, decreasing their

\textsuperscript{232} See \textit{id}. This cost structure in turn suggests that the more cost efficient way of curing the problem is to increase the flow of information to the market so that it no longer has to rely on crude signals. \textit{See Cooter, supra note 39, at 159-60}. The problem with this solution is that an increased information set can magnify a discriminatory tendency. \textit{See infra notes 247-67} and accompanying text.

\textsuperscript{233} Schwab offers a model that draws on the idea of a market for lemons first advanced in George A. Akerlof, \textit{The Market for “Lemons”: Quality Uncertainty and the Market Mechanism}, 84 Q.J. ECON. 488 (1970). \textit{See Schwab, supra note 190, 229}. Schwab shows “that statistical discrimination [may] increase [the] efficiency of labor supply for the favored group but decreases efficiency for the disfavored group.” \textit{Id}. The upshot is “that the net efficiency effect cannot be determined a priori.” \textit{Id}.

More particularly, Schwab’s model posits both a standardized employment market in which employers judge employees on statistics and an individualized economy in which each employee is self-employed and there are no information asymmetries. \textit{See id}. Assuming that all workers look alike in the standardized market and that employers treat them based on the averages, and further assuming that employees are drawn from the individualized market to the standardized market by higher wages, Schwab’s model shows that an unregulated economy may allocate too few workers to the standardized market. \textit{See id}. at 229-30. Schwab then changes the assumptions so that firms in the standardized market get information about employees in the form of one true stereotype, by which employers costlessly can divide workers into two groups: Group 1 workers are, on average, more productive than Group 2 workers, but all workers of ability \(a\) (highly skilled marginal workers) have the same behavior whatever their group. \textit{See id}. at 231. Given the foregoing assumptions, the efficiency of statistical discrimination depends on (1) the relative numbers of type \(a\) workers; (2) the extent of the cross-market shift in wages; and (3) the net change in output as workers go to standardized market and workers in the standardized market go to the individual market. \textit{See id}. A legal ban on statistical discrimination means that wages of Group 2 workers move “closer to a socially optimal incentive to work, but causes the wage of [G]roup 1 workers to diverge further from an efficient level.” \textit{Id}. at 232. “The net efficiency effect depends on shape of ability functions of the two groups.” \textit{Id}. Furthermore, “[s]tatistical discrimination is most likely to be inefficient when the disfavored group has relatively large numbers of unskilled workers,” “pulling down its average skill level,” “while the skilled workers are more evenly distributed between [the two] groups.” \textit{Id}. Statistical discrimination becomes unambiguously inefficient if the labor supply of Group 1 is inelastic, so that all work in the standardized market, while the Group 2 supply is elastic, so that more able members tend to stay in the individual market. \textit{See id}. In this case the result is that employers in the standardized market only see substandard Group 2 workers. \textit{See id}. at 232-33; \textit{see also Milgrom & Oster, supra note 228, at 456-57} (arguing that information asymmetries create employer incentives to underpromote and underpay highly effective minority employees to avoid creating a credible marketplace signal of capability and thereby capture minority’s services for a low price).

\textsuperscript{234} See Lang, \textit{supra} note 115, at 365.
reliance on statistical generalities.\textsuperscript{235} The model also assumes that employers continue to use statistical abstracts in their internal evaluations, but real world firms have an incentive to develop particularized information to improve the quality of internal job assignments.\textsuperscript{236} Finally, critics cite statistics on returns for formal education that date from the early 1980s to show that young African Americans reap a greater income increase than young whites for an additional year of schooling.\textsuperscript{237} Critics argue that these results refute the suggestion that statistical practices have a negative incentive effect on minorities’ skills acquisition.\textsuperscript{238} These critical arguments produce the tendency, particularly in the legal literature, to dismiss as minimal the potential for statistical discrimination.\textsuperscript{239}

This dismissal merits strict scrutiny.\textsuperscript{240} Whatever the statistical model’s methodological shortcomings, it is implausible to proclaim

\begin{footnotesize}
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\item See Epstein, supra note 38, at 34; Darity & Mason, supra note 158, at 83; see also John J. Donohue III & James J. Heckman, Re-Evaluating Federal Civil Rights Policy, 79 Geo. L.J. 1713, 1725 (1991) (noting that if employers can distinguish among African American employees based on the number of years of schooling, then a statistical effect would result only if all high-school graduates were treated equally, and that even in that event it might be possible to develop information respecting performance in school).
\item See Milgrom & Oster, supra note 228, at 455; see also Joseph G. Altonji & Charles R. Pierre, Employer Learning and Statistical Discrimination (National Bureau of Econ. Research Working Paper No. 6279, 1997) (using an information theory to argue that employers discriminate based on easily observable variables, such as years of schooling and race, in the first period of an employment relationship, but that learning stemming from noisy indicators of worker performance causes wages to become more closely tied to productivity in subsequent periods).
\item See James P. Smith & Finis R. Welch, Closing the Gap: Forty Years of Economic Progress for Blacks 40, 113-16 (1986).
\item See Epstein, supra note 38, at 40-41; Donohue & Heckman, supra note 235, at 1725.
\item See Epstein, supra note 38, at 40-41; Donohue & Heckman, supra note 235, at 1725. This dismissal is an essential link in Epstein’s story that qualified minority candidates eventually get picked up in the free market hiring process. See Epstein, supra note 38, at 34-37 (arguing that due to search costs the law only should encourage employers to develop fuller information). But cf. Donohue, supra note 209, at 1609 (arguing that an effort to reduce job search costs for minorities through freedom of contract imposes a dignitary harm on minorities and that the result of Epstein’s approach is higher search costs for minority job-seekers and more employer rejections of minority job-seekers). Darity and Mason comment that this point of view ultimately seeks to absolve market processes from a causal role in the discriminatory results that are manifest in American society. See Darity & Mason, supra note 158, at 83. It follows that any deficiency must be with the victims themselves—whether due to poor schooling or cultural factors, or perhaps as the result of some inherent quality.
\item The dismissal may to some extent reflect dissatisfaction with statistical enforcement techniques. But misuse of statistical evidence in employment discrimination litigation is a separate problem. In the litigation context, the use of averages to show a discriminatory pattern can have the perverse effect of discouraging the development of particularized information. See, e.g., Stephen Coate & Glenn Loury, Antidiscrimination Enforcement and the Problem of Patronization, 83 Am. Econ. Rev. 92, 92-93 (1993) (using a formal model to examine the perverse incentive effects of statistical enforcement); Robert S. Follett et al., Problems in Assessing Employment Discrimination, 83 Am. Econ. Rev. 73, 73 (1993) (analyzing problems when using statistics in the unquantifiable area of employment discrimination);
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that whites and African Americans have equal skills-acquisition incentives. Scholars generally concede that although incidences of racial discrimination markedly declined during the period 1965-1975, the movement toward economic racial equality has stagnated since the mid-1970s. Along the same lines, the education gap between young African Americans and young whites, which in former decades had narrowed steadily, became a constant during the 1980s. This trend occurred while the aggregate wage gap between African Americans and whites widened from the low point it had reached in the 1970s. Moreover, whatever returns African Americans receive on investments in schooling, the corresponding returns for Mexican Americans do not even approach those of whites and actually have deteriorated during the past two decades.

More importantly, statistical theory makes a broader point that becomes obscured when we focus exclusively on formal problematics. The model's basic insight originated with Arrow's touchstone discussion of information asymmetry and discrimination. Arrow argued that once experience has led employers to believe that minority group members perform worse than majority group members, that belief does not necessarily yield to hard information about a candidate's education and experience. As employers scrutinize candidates more carefully, cultural difference begins to influence them. Qualitative evaluations may turn on unverifiable or unobservable factors, such as habits of thought, "steadiness, punctuality, responsiveness, and initiative"—factors employers more easily can access in own-group candidates. What begins as statistical observation becomes a taste prejudice that cognitive dissonance perpetuates. With an ethical code condemning discrimination, cognitive beliefs become necessary socially to justify the discriminatory conduct.

Mark R. Killingsworth, Analyzing Employment Discrimination: From the Seminar Room to the Courtroom, 83 Am. Econ. Rev. 67, 71 (1993) (discussing the problems resulting when statistical studies are used in the courtroom).


The aggregate fall in the education deficit during the 1980s was one half as great as that during the 1970s. See James P. Smith, Affirmative Action and the Racial Wage Gap, 83 Am. Econ. Rev. 79, 81 (1993). "[T]he schooling gap of black workers with 1-10 years of experience has remained constant at about 0.5 years throughout the 1980's." Id.

See id. at 80-81. Wage parity for new college graduates was achieved in 1971-1972, but wage gains at this level steadily eroded thereafter. See id. at 81.

See supra notes 172-77 and accompanying text.

See Arrow, supra note 188, at 95-97. For a recent reaffirmation, see Arrow, supra note 177, at 96-97.

See Arrow, supra note 177, at 97.

See id. at 96.

See id. at 96.

See Arrow, supra note 188, at 97.

See Arrow, supra note 177, at 97.
Arrow’s insights are formalized in a recent model of screening discrimination from Cornell and Welch. The model posits that a prospective employer will be interested in unverifiable, intangible qualities that constitute the candidate’s character. It draws on the economics of language to assert that the employer can better judge a candidate’s character type (high or low) when the employer shares with the candidate a common cultural background, which enables the employer to understand the full range of the candidate’s verbal and nonverbal communications.

More specifically, Cornell and Welch assume that employers hire from a pool of candidates evenly distributed both between two cultural (or racial) types and between good and bad types within each cultural pool. The Cornell-Welch employers are neutral, but do have a cultural type and more readily can identify good and bad types of their own cultural type because of better information. Cornell and Welch’s results parallel those of the statistical model—the more information an employer develops about a group of candidates in a given pool, the greater the pool’s variance. If the employer selects only one candidate, the best candidate is likely to come from the group with the widest distribution. Since employers receive more information about candidates in the pool that share their cultural background, the probability that the chosen candidate will come from that group increases as the number of candidates increases. The chances of same-group hiring are fifty percent with two candidates (one from each group), are seventy-five percent with four candidates (two from each group), and continue to rise as the number of candidates increases. Recast in a generational framework, the model predicts that in a universe of as few as forty candidates and five jobs, it would take more than one million generations before the chances of other-group hiring exceeds fifty percent.

250 See Cornell & Welch, supra note 39, at 543 n.1.
251 See id. at 543.
252 See id. at 543-44.
253 See id. at 549.
254 See id.
255 See id. at 548.
256 See id. at 549.
257 See id. at 552.
258 See id. at 544-45. Assuming both two possible types (good and bad) evenly distributed in the population and an ability to distinguish between them only with own group candidates, neutrality results only when there are two candidates. In this case there is only a 50% chance that the candidate from the same background is bad. As the number of candidates increases, the probability of hiring a same group applicant approaches one. This analysis derives from the “rank-order tournament[ ]” literature. Id. at 545 (internal quotation marks omitted).
259 See id. at 546.
Cornell and Welch recognize the possibility that with a concentration of employers from one group in the high-wage sector, the model’s hiring dynamic implies the evolution of a caste system. If a pool of favored-group candidates remains available, nothing exists to trigger the market corrective of hiring from the growing pool of capable candidates in the excluded group. Employers have less incentive to hire from the disadvantaged pool because by doing so they lose the benefit of the screening device. Segregated workplaces proliferate accordingly, and the excluded group makes up the low-wage sector of the labor market. Rational employers, relying on market information concerning hiring patterns, cease incurring the cost of considering candidates from the excluded group. Eventually, cognitive dissonance causes the advantaged group to develop theories to explain and to justify the segregation in terms of the excluded group’s inferiority. The resulting discriminatory equilibrium, however, is not immobile. Either entry by excluded-group employers into the high-wage sector or exhaustion of the supply of good types in the advantaged group will break the equilibrium.

The Cornell-Welch screening model, like both the cost and the statistical models, assumes that discrimination is cost efficient. But the Cornell-Welch model works from that starting point to destabilize additional cost assumptions that have crept into the legal literature. It demonstrates that information asymmetries can lead to discriminatory results even when the employer invests in researching background information and in interviewing candidates. The model also projects that discriminatory results, once repeated, become discriminatory schema, which can be perpetuated in a market economy.

260 See id. at 558-59.
261 See id.
262 If the supply of good types in the favored pool is exhausted, however, discrimination breaks down. See id. at 555. Thus, there is no direct conflict with Epstein’s market corrective. He presupposes that the pool of favored group candidates is exhausted and that equal information either is available or can be developed. See Epstein, supra note 38, at 34-37. This analysis implies a descriptive question: How quickly, if ever, does the pool of good white types at the high end of the United States employment market become exhausted?
263 This result is a “cascade effect.” See Cornell & Welch, supra note 39, at 547.
264 See id. at 558-59. Note that to the extent that the discrimination has had the effect of depressing the minority’s skills-acquisition incentives, minority group members might not be in a position to take advantage of this opportunity. One can state the incentive point in psychological as well as economic terms. See Bruce Elmslie & Stanley Sede, Discrimination, Social Psychology, and Hysteria in Labor Markets, 17 J. ECON. PSYCHOL. 465 (1996). According to Elmslie and Sede: “One initial bout of unemployment that is not productivity based can lay the foundation for continued future unemployment and persistently lower job status even if no future discrimination occurs.” Id. at 474.
265 See Cornell & Welch, supra note 39, at 554-55.
266 See id. at 547-52.
267 See id. at 554-55.
reaches the same end point as statistical theory, but takes a different route, which completely avoids (and even reverses) the objection that commentators lodge in the legal literature. The model also suggests that one cannot safely assume that market forces will correct an inherited pattern of discrimination, even though it acknowledges the possibility of correction under the right conditions. Finally, the model controverts the notion that the economics of discrimination posits an absolute assumional choice between prejudiced whites (taste theory) and unprejudiced whites (cost theory). “Neutral” cost-based behavior can trigger the development of discriminatory tastes that add to the costs of integration.

The screening model is particularly pertinent to Latinos/ as because its conceptual roots lie in language discrimination theory. It supports two predictions. First, discrimination against Latinos/as may persist for an extended period, even if one excludes phenotypic factors. The screening model asserts that English fluency alone does not ensure equal opportunity—assimilation must be absolute. Latinos/as and other immigrants gain wealth at a correspondingly high cultural cost. Second, since employers within the enclave economy will best appreciate the skills of Latinos/as who are not completely assimilated, these Latinos/as intensively should pursue opportunities within the enclave. As applied to Latinos/as, then, the information asymmetries posited in the screening model imply an economic opportunity barrier that separates the enclave and mainstream economies.

3. Summary

Can we describe the incentives of a rational second-generation Latino/a in light of the above economics? As illustrated above, the literature offers contrasting incentive stories. In the majority view, dis-

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268 See id. These ideal conditions, an exhaustion of the supply of qualified whites or an adequate supply of minority employers, arguably will not arise in the real world.

269 See supra Part I.A-B.

270 The likelihood of phenotypic discrimination complicates long-term projections. It gives rise to the possibility of a separating assimilation equilibrium based on skin color. On this model white Latinos/as face lower barriers and eventually, upon acquisition of completely American cultural identities and appearances, uncover economic opportunities sufficient to prompt dispersion. Meanwhile, by analogy to the experience of African Americans, Latinos/as of color face more substantial barriers and tend to remain in enclave communities. Cf. Martha R. Mahoney, Segregation, Whiteness, and Transformation, 143 U. PA. L. REV. 1659, 1670-71 (1995) (describing the phenomenon of racial tipping by which neighborhoods become segregated due to white distaste for people of color).

271 Previous immigrant generations faced similar barriers, of course. But because particular barriers’ heights will depend on the totality of the economic and cultural circumstances, racial attitudes could mean that those confronting Latinos/as are materially higher.
Crimination has a depressive impact on skills investment, thereby contributing to its own perpetuation. A minority, grounded on the legal side, describes a heightened incentive to take advantage of educational opportunity to overcome the barrier of discrimination. Which incentive story should we incorporate in the description of second-generation Latino/a incentives?

It is not clear to us that we can or should make an absolute choice between the high- and low-incentive alternatives. Certainly, the low-incentive story is technically correct because it inexorably follows from the economics of investment; accordingly, aggregated Latino/a choices should show a depressed level of skills investment. The aggregate result, however, does not capture an all-purpose description of rational choice. Just as different subjective preferences with respect to risk determine the choices of investors, so too will Latino/a choices turn on subjective factors—talents, ambitions, familial and cultural ties, and risk aversion. Thus, in our economic picture, Latinos/as have a wide zone of rational choices for investments in human capital. We would expect some Latinos/as to invest more heavily than others, in the same manner as did yesterday's immigrants and as do today's Anglos.

Although this economic description is capacious, it has a powerful normative implication. It emphatically negates the normative assimilation story. Latinos/as neither have broken past immigrant patterns nor have failed to live up to some vague obligation to acculturate. Instead, they rationally have responded to the problem of assimilation in the unique circumstances they confront. Moreover, while the assimilation story focuses exclusively on immigrant choices, the economics shows that Anglo choices also matter. Since Latino/a cultural choices depend upon economic prospects, these choices depend in part on Anglo choices about Latino/a opportunities. Only one moment of culpability occurs in this story—the moment when Anglos convince themselves that their own Americanness implies superior capability.

D. Workplace English and the Costs of Title VII

Finally, we turn to the economic implications of requiring Workplace English to find justification in a showing of business necessity under Title VII.

One easily may articulate an economic case against application of Title VII to Workplace English. The absolute suppression of Spanish in the workplace is cost-justifiable because communication is costly,

272 See Coate & Loury, supra note 240, at 92-93; Cooter, supra note 39, at 158; Cornell & Welch, supra note 39, at 555-56; Milgrom & Oster, supra note 228, at 454-55.

273 See supra Part II.A.3.
especially when the environment is not monolingual.\textsuperscript{274} The resulting transparency renders supervision cheaper and reduces frictions in intra-employee relations.\textsuperscript{275} The employer, who bears the cost of ineffective workplace rules, has a strong incentive to promulgate the lowest cost set. Over time, employers and employees will sort themselves between monolingual and multilingual environments.\textsuperscript{276} Additionally, Title VII enforcement is itself costly. If the employer has a goal of cost reduction, it should have Workplace English.

However forceful this cost case may be, it is not conclusive. The identification of a set of costs alone does not conclude the determination of social welfare. We must appraise costs in broader contexts before concluding an inquiry about any particular course of action. The costs of applying Title VII to Workplace English fail to impress when we examine them in this broader context.

First, this cost case does not differ in substance from the cost case for a complete repeal of Title VII. Recall that according to the cost theory of discrimination, all other things being equal, rational employers have a high-powered incentive to operate segregated workplaces.\textsuperscript{277} Thus, the same social welfare judgment that activates Title VII as a whole justifies the constraint on employer business judgment which is actualized as a qualified prohibition of Workplace English. It would be anomalous to allow free rein to business judgment in the limited context of Workplace English but not in other contexts governed by Title VII.

Second, the economics provides no credible assurance that Workplace English reflects only cost concerns and bears no taint of ethnic or racial animus. The economics we reviewed above does not describe any financial incentives that assuredly constrain such impulses, at least as long as a robust market correction story is lacking.\textsuperscript{278}

\textsuperscript{274} Cf. supra Part II.A.1 (discussing the general economic costs associated with bilingual interactions).
\textsuperscript{275} See supra notes 82-84.
\textsuperscript{276} See Breton & Mieszkowski, supra note 101, at 262-63.
\textsuperscript{277} See supra Part II.C.2(c).
\textsuperscript{278} Indeed, Workplace English appears to be doubly attractive to many employers for this reason. It could be disruptive of employee relations yet still be cost reductive because it offers a means to terminate employees that is unrelated to the more conventional and work-related matters included in the notion of “good cause.”

Anecdotal evidence does indicate that large firms have been waking up to the fact that Latinos/as constitute 10\% of the population and have been adjusting their business practices to increase Latino/a market share. For such a firm, the goal of good will in the Latino/a community could lead to a decision against Workplace English despite a projection that bilingualism increases management costs. But this story in the end only reinforces our conclusion. In our view, large American firms have been remarkably slow in their “discovery” of the Latino/a market. We suspect that Anglo myopia and prejudice have long retarded pursuit of these ready profits.
Third, although Title VII enforcement intrinsically is costly, the prohibition of Workplace English presents no significant additional cost burden. The Workplace English cases have simple facts—most concern work rules with no arguable relationship to business necessity. The message to employers resembles a per se rule: do not fire employees for speaking Spanish to each other in informal situations. In a dynamic environment, such a message even could have a transformative affect. To the extent that Workplace English stems from animus and fear, its prohibition prompts the rational employer to suppress the taste for segregation without incurring further significant costs.

Thus, the economic case against Title VII for Workplace English fails as an absolute assertion. But, because Title VII coverage and enforcement still will be costly, we must answer one remaining question: Who bears the cost?

To answer this question we consult, by analogy, economics that predicts the effects of taxes on employment. Given static labor demand, a payroll tax can cause a reduction in employment or in wages. Since empirical studies of these taxes do not clearly evi-

It is helpful to consider some examples. First, we note the recent performance of the stock of Univision, the larger of the two Spanish-language television networks. A block of stock purchased for $50 million in 1992 recently was reported to be worth $700 million. See Pollack, supra note 47. Part of the increase in value came at the expense of the network’s competitor in the market. See id. But much of the value comes from perceptions of an arbitrage profit opportunity created by Anglo myopia—a large gap between the network’s audience share and ad share. See id. Apparently, the gap will be closed, and network revenues will increase as marketers discover the existence of the Latino/a market.

For a second example, consider Sears. For about three years, Sears has been managing 148 of its stores, all located in or near Latino/a communities, in a manner that would appeal to Latino/a tastes. In so doing the company has reversed a cost-benefit decision not to micromanage to reach geographical ethnic markets. Sears is happy; sales in the effected stores are way up. See Jennifer Steinhauer, A Minority Market with Major Sales: Stores Redo the Merchandise Mix and the Hispanic Dollars Flow, N.Y. TIMES, July 2, 1997, at D1. What surprises us is not the result of this management decision, but the length of time it took Sears to ascertain the existence of the opportunity—decades in the case of stores in places like East Los Angeles, California and Hudson County, New Jersey, for example. We also note that by definition the new policy entails the extension of managerial responsibility to Latinos/as. See id.

A final example, in which an external shock led to sudden visibility in the business community, involves People magazine. People started a quarterly Spanish-language issue after a special issue on the singer Selena proved extremely successful. The people at People had never heard of Selena before her murder was front page news. See Octavio Emilio Nuiry, Magazine Mania, HISPANIC, Dec. 1996, at 53, 53-58. People En Español now publishes monthly.

279 See Donohue, supra note 209, at 1602-03. He estimates the total cost of Title VII enforcement at $15 billion per year, or $200 per worker. See id. at 1602. Given standard estimates of elasticity of demand for labor, it follows that total employment is reduced by one-fourth of one percent or 188,000 jobs. See id. at 1603.

280 See supra notes 80-83 and accompanying text.

dence a proportionate effect on levels of employment, an inference that the burden falls on wages arises. We can draw a more tailored analogy to models that predict the effect of a tax on a particular group of workers, again given static demand for labor. The impact of this tax depends on the relative supply behavior of the affected workers and on the ability of employers to substitute the taxed workers for others. Without relative supply elasticity between the affected group of workers and other workers, a relative decline in the affected group’s wages again offsets the tax. In that case, any impact on employment levels additionally depends on relative supply within the affected group. To the extent that employers can substitute workers from other groups, a smaller aggregate impact on wages and employment will result. Indeed, given high substitutability, members of the affected group will have an incentive to take steps to realign themselves with an untaxed group.

When reading these parameters together with the results of the empirical literature on labor elasticities, one can draw an inference that bilingual Latinos/as themselves consequently would pay for special Title VII protection in the form of lower wages. The labor elasticity studies reveal only very small “elasticities of complementarity between immigrants and natives, or between new immigrants and older cohorts.”

It is important to note that the predicted trade off between protection and wages assumes imperfect enforcement of Title VII. Such a wage adjustment could be hard to realize in a world of perfect enforcement. Given diverse workplaces, employers would have to pay Latinos/as at the same level as members of other groups. Even if bilingual workplaces without Workplace English cost more than bilingual workplaces with Workplace English, employers could not pass on the cost in the form of a reduced number of jobs for Latinos/as, at least to the extent that perfect enforcement of Title VII requires em-

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282 See id.
283 See id. at 181.
284 See id.
285 See id. at 178-81.
286 See, e.g., id. at 61-136.
287 Id. at 126; see Defreitas, supra note 6, at 232-34. The implication is that immigrant flows have relatively little effect on the wages of domestic workers. The wage studies contradict the neoclassical view, which suggests that the arrival of low-skilled immigrants depresses wages and increases unemployment. See id. at 231. They also support Piore’s description of immigrant employment in a secondary segment of low-wage jobs on the industrial periphery. See id. Defreitas concludes that Latino/a immigration has not affected significantly the wages or employment of American-born Latinos/as, but that undocumented immigrants adversely have affected the employment of African American males and wages of African American females. See id. at 250.
288 See Epstein, supra note 38, at 96 (noting that perfect enforcement prevents workers from discounting their services).
ployers to hire a proportionate number of qualified bilingual Latinos/as. This scenario yields an inference of cost shifting to the employer.\textsuperscript{289}

But Latinos/as still would bear significant costs even in this scenario. An employer who wishes to avoid the cost of bilingualism would avoid locating in a region with a significant non-Anglo population. These employers, if located in regions with mixed Latino/a and Anglo populations, would tend to take up residence elsewhere. As a result, Latinos/as would have reduced job opportunities. The resulting concentration of monolingual firms would harm bilingual firms that did not relocate to a monolingual region and abandon their bilingual status. Those bilingual firms would suffer a long-term cost disadvantage, and monolingual firms would drive them out of business, reducing the stock of job opportunities available to Latinos/as.

The imperfect enforcement scenario is the more plausible of the two, and it holds out no significant hopes of cost sharing. But the case for Title VII constraints on Workplace English remains compelling even if cost sharing is very unlikely. As the next Part demonstrates, choices respecting language implicate an individual’s right to treatment as an equal. It is fundamental to American ideology that we must make sacrifices to secure these freedoms. We have no doubt that Latinos/as stand as ready as other Americans to incur this cost.

III

THE INTRINSIC WRONG OF LEGAL SUPPRESSION OF SPANISH:
LANGUAGE, FREEDOM, AND THE IMAGINARY DOMAIN

Our economic analysis shows that English Only reinforces the seigniorage of the English language by increasing the cost of withdrawal into a Spanish-language enclave and by prodding Latinos/as to increase their investment in English-language acquisition. Our analysis does not deny that linguistic sameness lowers costs under one prominent model of social welfare calculation.\textsuperscript{290} But it does identify three points that undermine that calculation’s soundness as a basis for public policy. First, the analysis questions whether we safely can assume in every case that the imposition of the English language (or any other majority trait) effectively enhances welfare.\textsuperscript{291} In our complex multicultural world—characterized by growing trade, transnational contacts, and emerging communities of nations in Europe, Asia, and South America—we must at least question the assumption that homo-

\textsuperscript{289} Cf. id. (noting that because an antidiscrimination law would prevent free market bargaining, employers would pay more for services).

\textsuperscript{290} See supra notes 100-04, 108-11, 207-12 and accompanying text.

\textsuperscript{291} See supra text accompanying note 271.
geneity is cost beneficial. Second, assuming that language homogeneity enhances social welfare, economic theory suggests that free market incentives suffice to assure language homogeneity's prompt evolution in any society with a large linguistic majority. Third, white Anglos' economic discrimination against Latinos/as presents the only significant barrier on that assimilationist evolutionary path. Our ultimate conclusion is simple. Because legal suppression of language and legal sanction of segregation follow from the same cost economics, both Official and Workplace English impose a form of peonage on Latinos/as that is discriminatory.

In this Part, we step outside the consequentialist framework of economic theory to discuss the characteristics of right and wrong that make it both intrinsically and extrinsically wrong to suppress Spanish. Proof of an intrinsic or extrinsic wrong cannot rest on economic analysis alone. We have shown, for example, that legal suppression of Spanish is the functional equivalent of Jim Crow. Yet if we are to complete our analysis, we must still go on to demonstrate that something is deeply wrong with these laws. Without a reasonable moral, political, or legal conception of the person coupled with an interpretation of freedom and equality, the fact that legal suppression of Spanish is the functional equivalent of Jim Crow is just a fact. What makes it wrong is that legal imposition of peonage controverts the

292 Let me explain why we are arguing that the suppression of Spanish is both an intrinsic and an extrinsic wrong. At least under a strict reading of Kant, the suppression of Spanish simply can be understood as an extrinsic wrong, in the sense that it is a violation of the doctrine of Right. To quote Kant:

Any action is right if it can coexist with everyone's free in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.

If then my action or my condition generally can coexist with the freedom of everyone in accordance with a universal law, whoever hinders me in it does me wrong; for this hindrance (resistance) cannot coexist with freedom in accordance with a universal law.


Outer freedom is outer in the sense that it issues from an external source such as law. But we are also making another point, as we will see shortly. Given our understanding of personality, the development of one's potential to shape an identity can and should be understood as inner virtue. Kant never would have spoken of potential. This reliance on potential clearly has Hegelian overtones. See CHARLES TAYLOR, SOURCES OF THE SELF (1989). But despite this difference, an internal virtue in Kant includes respecting your own person as an end in itself. For us, the development of the potential or capability to shape an identity then can be grasped as internal virtue. Hence, our argument that the suppression of Spanish can be both an intrinsic and an extrinsic wrong. If a Latina makes Spanish-speaking into an end and this confers ethical value on her mother tongue, then it clearly can be part of her respect for her own person that she speak her language. If she fails to be true to the pursuit of her end, even if because of outward pressure that degrades her language, then she can be understood to have degraded herself. Of course, this argument turns on the Latina making Spanish-speaking an end in Kant's sense. Our point is that she cannot be forced to do so. To coerce her to do so, in the sense of legal coercion, violates her external freedom.
equal dignity of persons by legally imposing a form of moral servitude on Latinos/as.\textsuperscript{293}

This Part begins by discussing the moral, ethical, and legal meaning of the free person pursuant to an existentialist interpretation of the Kantian idea of equal worth. We then use the concept of the free person of equal worth to locate the intrinsic wrong inherent in the suppression of Spanish.\textsuperscript{294} In doing so we step outside the conventional liberal framework, which has difficulty accommodating a complex understanding of individual identity, to discuss the formation of identity out of basic identifications, one of which clearly is language. To lay the groundwork for this discussion, we revisit the communitarian-liberal debate as well as the critique of the liberal person that feminist and race critical theory articulate. We ultimately hope to show both that one can reconcile a more complex understanding of identity with a concept of rights and that the ideal of the person need not rely on an individualistic anthropology. The mainstay of this case for a revived ideal of the person is the aesthetic idea of the imaginary domain.

After establishing a right to personality at a general level, this Part argues that the suppression of Spanish controverts the freedom of Latinos/as reasonably to design, by developing their own sense of culture and heritage, unique lives. This argument does not rely on metaphysical or foundational notions of the subject.\textsuperscript{295} Our assertions depend instead on a simple, direct interpretation of the normative organizational ideal of political or ethical liberalism—the State and our basic social institutions should treat everyone as free and equal persons.\textsuperscript{296} At the same time we contend that this interpretation survives the contemporary critique of the autonomous subject. We begin our analysis by reconsidering the ideal of the person.

\textsuperscript{293} See Richards, supra note 79, at 5.

\textsuperscript{294} John Rawls has clarified the relationship between the operation of wrong- and right-making characteristics—the facts "cited in giving reasons why an . . . institution is . . . just or unjust"—in Kantian constructivism. \textit{John Rawls, Political Liberalism} 121-25 (1993). Although it is beyond the scope of this Article fully to explore this issue, we agree with Rawls that some form of Kantian constructivism is the most philosophically justified path to take in the justification of political and, we would add, moral ideals of right. See id.

\textsuperscript{295} For a discussion of the difference between a metaphysical conception of the subject and our political and moral interpretation of the free person, see Dru Gillia Cornell, \textit{At the Heart of Freedom: Feminism, Sex, and Equality} 3-65 (1998) [hereinafter Cornell, \textit{At the Heart}]; Dru Gillia Cornell, \textit{The Imaginary Domain} 3-27 (1995) [hereinafter Cornell, \textit{Domain}].

\textsuperscript{296} According to Hegel, the hallmark of modernity is the historical and normative construction of the legal and moral person through a concept of right, which in turn legitimates the State on the basis of whether or not the State allows for the actualization of this construct. See Hegel's \textit{Philosophy of Right} 15-24, (T.M. Knox trans., 1967) (1821).
A. The Ideal of the Free Person

All forms of liberalism start with a simple premise: the State should treat us all as if we are free persons of equal worth. Critics of liberalism attack this moral, legal, and political ideal of the person, charging that it is out of touch with reality. In real life, they contend, we are not the abstract persons that the liberal model deploys; we are not beings who in any meaningful sense actually can be self-determining. Some of these criticisms, however, fail to recognize the reason why Kantian liberalism stresses the significance of justice of the free person. Our interpretation of the Kantian ideal of the person is not meant to be a full picture of the lives of actual human beings; rather, it is tailored to enshrine our freedom as a practice of self-responsibility for the lives we lead.

1. The Kantian Idea of Equal Worth of Free Persons

If social benefits are not for persons, one may ask, who is the beneficiary of any theory or practice of an ethics of social organization or of any theory of justice? We (and many others) reject the answer that the beneficiary should be society as a whole—or a majority of those within it—as an invitation to tyranny. Much political and

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297 Almost all of the important debates in Western liberal jurisprudence and political philosophy have been over what it means to treat people as free and equal persons. For an excellent discussion of how widely this ideal is held, see Ronald Dworkin, Why We Are All Liberals (Oct. 19 & 27, 1995) (paper presented at the Program for the Study of Law, Philosophy, and Social Theory) (on file with authors).

298 The most searing critique of the liberal ideal of the person remains that of Karl Marx. See KARL MARX, CRITIQUE OF HEGEL'S 'PHILOSOPHY OF RIGHT' (Annette Jolin & Joseph O'Malley trans., Joseph O'Malley ed., 1970) (1964). The last hundred years have generated fierce dispute about what Marx's critique of the legal, moral, and political critique of the person actually means: Was Marx arguing against this category altogether? Was he instead arguing that it was "undialectical," hence one-sided? We cannot explore the voluminous literature, let alone examine the history of the sweat and blood that has been spilt because of the state enforcement of the position that there is no moral nor political validity to the ideal of the person. We stand behind the interpretation that a Marxist should believe in right and thus, the persons who have them.

299 Since the Kantian person is an idea that, by definition, must be in the abstract, it often has been thought to be inconsistent with any recognition of our phenomenological existence. I have tried to show, however, that we can use a philosophical anthropology that can recognize certain aspects of our phenomenological existence, such as our sexual being, but recognize it in such a way that it does not controvert the freedom that is maintained in the abstract definition of the idea of the person. Of course, in this Article, we are trying to make a similar argument about how we should grapple with another crucial aspect of our phenomenological existence, i.e., language. See CORNELL, AT THE HEART, supra note 295, at 37-39; CORNELL, DOMAINS, supra note 295, at 3-27.

300 For a discussion of how the person has to exist at least implicitly in utilitarianism in order for the theory to be coherent, see GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 147-89 (1996).

301 See, for example, Ronald Dworkin's distinction between constitutionalism and majoritarianism in RONALD DWORKIN, THE MORAL READING AND THE MAJORITARIAN PREMISE, IN FREEDOM'S LAW 1-38 (1996).
legal theory conceptualizes the person from this point of view to examine what constitutes a legitimate relationship between the individual and the State.\footnote{For an excellent discussion, however, of why an instrumental or utilitarian account of the person never can be an adequate account of the worth of persons, see John Rawls, A Theory of Justice 22-27 (1971).} In our analysis, one can justify for reasons apart from its value as a shield against tyranny the political and legal ideal of the person. We pursue a second, alternative approach to understanding the person: interpreting the ideal of the free person that Kant initially invoked in the context of cultural and linguistic choices.

Kant defended the simple idea that the State should treat all human beings as "ends in themselves" because as rational beings they are the ultimate source of the value they give to their ends.\footnote{See The Moral Law: Kant’s Groundwork of the Metaphysics of Morals 61-64 (H.J. Paton ed. & trans., 1961) [hereinafter Kant’s Groundwork]. For an excellent discussion of Kant’s Formula of Humanity, see Christine M. Korsgaard, Creating the Kingdom of Ends 106-32 (1996).} This idea is Kant’s Formula of Humanity.\footnote{The Formula of Humanity is Kant’s second formulation of the universal law. The first is the Categorical Imperative. For readers unfamiliar with Kant, he states the Categorical Imperative as follows: “Act only on that maxim which you can at the same time will that it should become a universal law.” Kant’s Groundwork, supra note 303, at 88 (footnote omitted and typeface altered). The Formula of Humanity is stated as follows: “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means but at the same time as an end.” Id. at 86.} For Kant, an end is an object of free choice. Ends are by definition at least partially “set” by practical reason. We want to stress partially because Kant does not mean that an “end” may not also be an object of desire or inclination. But it is reason that is responsible for the unique human characteristics that translate an object of desire into an end. It is a misreading of Kant, however, to argue that the Formula of Humanity demands respect only for our capacity for choosing morally obligatory ends. When we take a rational interest in something, we do so by deeming it valuable or important and, in that sense, good. In this sense, we do not value our ends as objects of desire, but because they are good. It is this capacity that the Formula of Humanity demands that we treat as an end in each person. This is why it is completely illegitimate to force someone to take up an end because to do so denies her dignity as someone with this capacity. As beings who assume responsibility, including self-responsibility in the practice of moral and ethical judgment, each is of equal worth because each bestows value on those decisions.\footnote{One could term Kant’s elaboration of our equal worth as persons as “metaphysical” and thus philosophically outdated because it relies on ontological dualism. See Kant’s Groundwork, supra note 303, at 104-08. To defend free will, which is our capacity to set our end by reason, Kant understood dualism as the division of the “human being” into the “noumenal” world of moral freedom and the “phenomenal” world of causal determination by the laws of nature. See id.; see also Korsgaard, supra note 303, at 159-60 (providing a
Kant’s argument for our equal worth is based on his argument that the good will—or our rational nature (which, to Kant, is synonymous to the good will)—is the only thing that can have unconditional value, meaning it can be recognized as the source of all value.\textsuperscript{306} For Kant, something has unconditional value if it has intrinsic value under all conditions, and the only “thing” that can meet this condition is the good will.\textsuperscript{307} Even something like happiness and the search for it, at least according to Kant, is conditional and not valuable in all conceivable circumstances.\textsuperscript{308} As beings who ultimately confer ethical value around us through setting our ends at least partially by reason, we are the source of what makes things important or deemed good. Objects have value because they have value for individuals who bestow value on objects rationally by making them their ends. It is this value-conferring capacity as rational beings that human beings recognize in one another. This recognition creates the mandate that Kant claims is basic to both morality and, in an impure form, politics.\textsuperscript{309} An individual

\textsuperscript{306} See Kant’s Groundwork, supra note 303, at 61-66.

\textsuperscript{307} See id.

\textsuperscript{308} See Immanuel Kant, On the Relationship of Theory to Practice in Morality in General, in Kant: Political Writings, supra note 23, at 64, 67 (“The maxim of absolute obedience to a categorically binding law of the free will... is good in itself, but [happiness] is not. [It] may, if it conflicts with duty, be thoroughly evil.”).

\textsuperscript{309} See Immanuel Kant, Introduction to the Theory of Right, in Kant: Political Writings, supra note 33, at 132; Kant’s Groundwork, supra note 303, at 96-98.
respects the equal worth and dignity of all others because she shares in the humanity that makes them the source of value they give to their own ends. Hence, it is as free persons that we all have equal worth, and it is this equal worth that law must recognize.

It is beyond the scope of this Article to rehearse all the criticisms of Kantian moral theory or, alternatively, to review the efforts to render his moral theory coherent without ontological dualism.\textsuperscript{310} We note only that we agree with those who argue that a strong Kantianism offering a comprehensive view of the self is indefensible because it relies on an outdated concept of causality.\textsuperscript{311} Yet we still want to defend the Kantian conception of our equal worth as free persons who possess a value-conferring capacity, partially setting our ends by reason. We do so by adding an existentialist twist to Kant’s insight into the assertiveness of our value-conferring capacity whenever we judge an object of desire to be an end.

In his book on Kant, Heidegger argues that the factual dimension of lived experience makes judgment and evaluation inevitable.\textsuperscript{312} Moral freedom is a praxis of self-responsibility that we must assume as part of our moral awakening to the inevitable reality that we do make judgments and evaluations, bringing forth a moral self when making those judgments and evaluations. Self-responsibility is a practice in and through which we constantly are becoming who we are as we individuate ourselves by evaluating and re-evaluating our actions, evaluations, and judgments as we make them our own ends.\textsuperscript{313} In this understanding, we exercise our freedom as a narration that makes the value-conferring moment in our actions and judgments one that we

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\item For an excellent discussion of why Kant’s two standpoints need not rely on ontological dualism, see KORKGAARD, supra note 303, at 159-87.
\item See PEIRCE, supra note 305, at 197-217.
\item See HEIDEGGER, supra note 30, at 89-142.
\item See id. We are well aware that one can read Heidegger to have dropped all lingering aspects of his “humanism” in his later writings. See REINER SCHÜRMANN, HEIDEGGER ON BEING AND ACTING (Christine-Marie Gros trans., 1987). Our intent is not to enter into the debate about the meaning of Heidegger’s “turn” for his understanding of action and more specifically of self-assertion. We only argue that it is possible to maintain something close to Kant’s understanding of our equal worth because we are value-bestowing creatures who turn our actions into ends that we justify through reasons by giving moral or ethical narrations of our lives. The process of narrating a moral or ethical story is how we bring forth the moral self, which then takes responsibility for her actions, valuations, and judgments as if they had been her ends all along. This process we call the practice of self-responsibility. Both Herbert Marcuse and Hannah Arendt took up the Heidegger-Kant dialogue and made it central to their own thinking. See HANNAH ARENDT, ON REVOLUTION 47-50 (1963) (elaborating on the Kantian ideal of freedom and the role it has played in inspiring revolutions). For an important discussion of Marcuse’s appropriation of the ideal of moral freedom as a practice of responsibility, see MARTIN J. BECK MATUŠÍK, SPECTERS OF LIBERATION 25-47 (1998). For an excellent discussion of the Kant-Heidegger dialogue as Heidegger conceived it, see IAN WARD, KANTIANISM, POSTMODERNISM AND CRITICAL LEGAL THOUGHT 36-56 (1997).
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ourselves understand as called upon rationally or reasonably to justify to others. This understanding of our moral freedom as a practice of self-responsibility for our ends as moral beings suffices to defend the idea of our equal worth, even though it temporalizes the way in which the moral self is brought into being.

2. The Kantian Standpoint of Practical Reason

As persons with a life, which is ours alone to lead, we all ask the question, “What should I do?” By posing this question, each one of us takes up the stance of practical reason. From this standpoint, an individual cannot be the object of another because each individual is existentially positioned to ask and answer that question through moral reflection only for herself; her actions still will be hers as she reflectively takes them on as such. Each of us has her own moral and ethical options and reacts to her own set of external demands, although some of us are much more constrained by law and circumstance than others.

Liberal political philosophy, particularly when informed by the tradition of critical idealism, demands that any just societal order begin with the treatment of each individual as an equal in the sense that we must view each as equally worthy to pursue her own answer to that fundamental question, “What should I do?” The State should treat each of us as if we are rational in a specific sense—as if we are capable of assuming responsibility for our own ends. We are reasonable in that we realize that we are capable of recognizing and harmonizing our pursuit of the good with creatures who are like us in that they have equal dignity. Both notions, rationality and reasonableness, must operate in the law. The law should recognize persons as the source of ethical value that they give to their own life’s decisions when they take these up as ends through moral reflection. But it also should accord individuals the capacity to decide that other human creatures are, like themselves, worthy of that same recognition and respect. We therefore are reasonable only when we recognize in others their worthiness to pursue their own lives and recognize that we must try to organize both our own lives and a system of social life

315 John Rawls’s work, which profoundly has shaped the last two generations of liberal political, ethical, and legal thought, develops his entire theory from the initial recognition of equal dignity in the sense that human beings must be politically recognizable as having both of these capacities or capabilities; that is, they are both reasonable and rational. See Rawls, supra note 294, at 48-54. For the purposes of this essay, we will use capacity and capability interchangeably.
and of political organization that is consistent with the equal dignity of all persons.\footnote{316 We endorse John Rawls's definition of the reasonable: If we ask how the reasonable is understood, we say: for our purposes here, the content of the reasonable is specified by the content of a reasonable political conception. The idea of the reasonable itself is given in part, again for our purposes, by the two aspects of persons' being reasonable: their willingness to propose and abide by fair terms of social cooperation among equals and their recognition of and willingness to accept the consequences of the burdens of judgment. \textit{Id.} at 94 (internal cross-reference omitted). We can highlight the moral and political significance of the reasonable by contrasting it to the unreasonable: By contrast, people are unreasonable in the same basic aspect when they plan to engage in cooperative schemes but are unwilling to honor, or even to propose, except as a necessary public pretense, any general principles or standards for specifying fair terms of cooperation. They are ready to violate such terms as suits their interests when circumstances allow. \textit{Id.} at 50. We contrast the notion of rationality operative in our economic discussion. In economics a considerably narrower ideal of rationality operates, focused almost exclusively on wealth maximization as the expression of self-interest. The Kantian-inspired notion of the reasonable altogether disappears. \textit{See generally} I Ken Binmore, \textit{Game Theory And The Social Contract} 7-92 (1994) (proceeding under the title "DeKanting Rawls" to struggle with the proposition that an expanded concept of economic rationality can encompass the reasonable). The assertion instead is that people's free pursuit of rational self-interest leads to a society that realizes the greatest possible wealth. This realization has obvious ethical implications in a world of scarcity and physical suffering. Significantly, the Kantian ideal of rationality permits the existence of the individual as economic actor. Recognizing rationality as a basic human capability in politics and law necessarily concedes legitimacy to economic self-interest; political philosophy must not foreclose it in the name of an overarching good, but it must be allowed to play out as a part of human freedom. At the same time, however, it cannot be accorded essentialist status. In Kant, rationality is always a limit to self-interest because an end or a maxim is only freely chosen if it is chosen in accordance with the universal law. Game theory does not understand rationality as a limit to self-interest but rather as the means to its realization in the world.}

The person as a legal and moral ideal must remain abstract if that ideal is to denote the freedom on which it is based. Because each individual undertakes her own practice of self-responsibility, the State must not impose definitions of how one can or should realize that potential for self-definition. Of course, we are more, much more, than this abstract free being. The political and moral point of abstracting the ideal of the person from the substance of any one individual's concrete life is to protect the freedom—the potential—of forming ourselves into a unique being—a being immersed in a life to be lived in all the relational complexity we associate with any actual living human being.

3. The Ideal of the Imaginary Domain

On this understanding, a person is not just a given, but implicates a practice in and through which the person is constantly engaged, a process of assuming self-responsibility through moral reflection on
the question, "What should I do?" As persons, then, we inevitably are implicated in the working through of personas. Since these are not just given or imposed on us but have to be assumed, it also turns us toward culture. In this sense, culture tends to be a condition of personhood. The personas in and through which we come to ourselves are both culturally expressed and a fundamental expression of culture.

This understanding of the relationship between person and persona is crucial to our defense of the ethical, political, and legal ideal of the person against the legitimate and powerful criticisms of this ideal that both feminists and race critical theorists have made. In crude summation, these critiques argue that the liberal ideal of the person is too "thin" to provide political or legal insight into the embodied concrete concerns of everyday life.\textsuperscript{317} Significantly, the criticisms do not reject the idea that all persons have equal worth. They instead turn on an ethical mandate to provide a "thicker" and thus truer conception of the self as the basis for legal reform.\textsuperscript{318} We address these criticisms and simultaneously maintain as central to our defense of language rights the ideal of the free person.\textsuperscript{319} To do so, we defend the ideal of the imaginary domain.\textsuperscript{320}

The imaginary domain is an aesthetic idea that illuminates what freedom demands of creatures that inevitably are shaped by their own identifications. We understand freedom as a practice of assuming responsibility for our evaluations of our basic identifications as we make them our own in the course of shaping our individual lives.\textsuperscript{321} Kant

\textsuperscript{317} See, e.g., Sara Ruddick, \textit{Maternal Thinking} (1989) (arguing that mothering gives rise to a distinct mode of thinking and exploring the implications of this thought).

\textsuperscript{318} For an example of a "thicker" conception of self, see Robin West, \textit{Narrative, Authority and Law} 251-63 (1993) (comparing her "literary woman" with Richard Posner's "economic man").

\textsuperscript{319} See Cornell, \textit{Domain}, supra note 295, at 3-27 and Cornell, At the Heart, \textit{supra} note 295, at 3-32, for a more elaborate defense of why scholars should maintain the ideal of the person in political philosophy. For an example of a feminist who criticizes the abstract ideal of the person, see Ruddick, \textit{supra} note 317.

\textsuperscript{320} Later we will defend the degradation prohibition as it is a limit on the equal protection of each person's imaginary domain implied by the way we define the ideal.

\textsuperscript{321} Ronald Dworkin uses a similar concept of the relationship between freedom and responsibility to base the legal authorization of ourselves as the only legitimate source of value for the evaluative design of our lives. To quote Dworkin's understanding of his own second principle of ethical individualism:

The second principle is not just a general principle assigning each person major responsibility for what happens to him. It is more specific. It assigns people for the evaluative design of their life; it assigns each person the responsibility to shape his life to a conception of ethical value that is chosen or endorsed by him rather than by any other person or group. We must take considerable care not to misunderstand that assignment. It assumes and demands a kind of freedom but it is not metaphysical freedom—it is not, that is, people's power by an act of free will to alter the chain of events predetermined by physical or mental causation. The second principle is
defines aesthetic ideas as interpretative in that they help us grasp the personal significance of otherwise hopelessly abstract ideals.\textsuperscript{322} The expression of aesthetic ideas facilitates political and moral reflection and gives body to our interpretation of the meaning of the free and equal person.\textsuperscript{323} Aesthetic ideas configure the moral dimension of experience.\textsuperscript{324} The moral dimension is crucial to articulating the construction of the wrong- and right-making characteristics of any particular social fact—in the present case, the legal suppression of Spanish. More particularly, the aesthetic idea of the imaginary domain helps us to imagine and to articulate the cross-references by which our case for language rights follows from the liberal ideal of the free and equal person.

The imaginary domain expresses an essential right of personality by recognizing both our equal dignity and our potential to assume our special responsibility for ourselves.\textsuperscript{325} We cannot assume this responsibility, however, unless the moral and psychic space is protected, allowing us to engage in the practice of self-responsibility through which we come to terms with the ethics of our own identifications. We may either embrace these identifications, keep them fluid, or struggle to discard them altogether. These possibilities are what makes way for our ethical responsibility for our identifications. When we make an identification, such as being a Latina, a conscious end, then we clearly can see why respect for how that identification is articulated is crucial to the respect for the person. But even if we are not so explicit in making an identification an end in Kant’s sense, we cannot entirely escape our responsibility for how we live with these

\footnotesize{not offended or undermined in any way by a commitment to determinism, because it neither demands nor presupposes what we may call relational freedom: it insists that so far as your life is guided by convictions, assumptions, or instincts about ethical value, that they must be your convictions, assumptions, or instincts. You rather than anyone else have the right and responsibility to choose the ethical values that you will try to embody in your life.

\textsuperscript{322} \textit{See Immanuel Kant, Critique of Judgment} 183 (Werner S. Pluhar trans., 1987) (1793).
\textsuperscript{323} In Kant’s words, aesthetic ideas draw out a “concept’s implications and its kinship with other concepts.” \textit{Id}.
\textsuperscript{324} In particular, aesthetic ideas can draw out the moral dimension of experience. Although Kant never directly would have connected aesthetic ideas with his conceptualization of the morally free person, I have argued that we can use such ideas to try to give body to what would otherwise remain abstract. So, for example, when Rawls argues that the veil of ignorance is a representational devise, I would argue that it is more precisely thought of as an aesthetic idea. For Rawls’s most recent discussion of his understanding of the original position or the veil of ignorance as a representational devise, see \textit{Rawls, supra} note 294, at 27-28. For a more elaborate discussion of my own use of the aesthetic idea of the imaginary domain, see \textit{Cornell, At the Heart, supra} note 295.
\textsuperscript{325} \textit{See Cornell, At the Heart, supra} note 295.
identifications because they always are being reshaped by us as we take them on, even if we think we only are doing so by following tradition. As persons who can never entirely escape self-responsibility, we need the moral space in which to exercise it. The imaginary domain mandates that the moral community of persons include each of us and provide us this space.

The imaginary domain operates on two levels within the moral community of persons. At one level, the imaginary domain allows each of us to demarcate a space for self-evaluation through moral reflection. This space must have protection prior to the beginning of a conception of procedurally just justice, such as the one John Rawls defends. In a famous analogy, Rawls uses the representational device of “the original position” and “the veil of ignorance” to engage in a hypothetical experiment in the imagination that guides our moral reflection. The veil of ignorance forecloses knowledge of our gender, our ethnic identity, our linguistic origin, our race, or our class position. Without this knowledge, the perpetuation of social hierarchies is not rational because no one knows where in the world of social hierarchies she would fall.

The veil of ignorance helps us envision a procedure for moral reflection that, by virtue of its very articulation, forces us to question social hierarchies, and at the same time, challenges their hold on our imaginations. But how does one take into account gender, race, nationality, and ethnic and linguistic background in the hypothetical experiment of the imagination? Certainly we should take into account these fundamental aspects of each person’s life. But the solution is not to assert that “facts” concerning the meaning of these realities about ourselves should reside behind the veil of ignorance. Because these so-called facts are intertwined with basic social hierarchies in the real world, placing them behind the veil of ignorance frustrates the purpose of the exercise of imagining ourselves as free, equal, and unbound by our hierarchical place in society. This difficulty, however, does not mean that we should forget these realities; instead, we should imagine ourselves as persons free to morally evaluate these hierarchies. Behind the veil of ignorance, in other words, the idealized situ-

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326 Rawls, supra note 302, at 304-09.
327 Critics of Rawls wrongly have attacked the idealized representations behind the veil of ignorance as if they were supposed to be real human beings. Thus, these critics argue that Rawls gives us a hopelessly abstract ideal of the person that cannot guide our moral reflection in real life. Real life, of course, is infused with the hierarchies that corrupt our thinking about equality. These critics neglect the purpose of a hypothetical experiment in the imagination, which demands that we try to represent the conditions for moral reflection of free and equal persons. Such an experience does not start with reality, particularly a social reality that hierarchies bind together, because the point of the representative device is to imagine a basis for moral reflection on the moral legitimacy of the hierarchies. How would we think about justice if we did not know how those hierarchies would treat us?
ulation of the representative includes the postulation of the self as free in the terms described earlier. The imaginary domain, in which we conceptualize all persons in the moral community as possessed of the right to represent and evaluate what these realities mean to them, provides a space for that prior evaluation of our equal worth.328

At a second level, the imaginary domain extends to each person a right to self-representation—a right to establish herself as her own representative of whom she is because she must take responsibility for her own life.329 To be included in the moral community is to be recognized as having the potential to shape and to reshape one’s identifications out of the symbolic material they present. This right to self-representation subsumes the right to privacy, at least when interpreted as the demand to be left alone. This subsumption is because the right to self-representation insists that each person must have the psychic and moral space to experiment with the personas through which culture is expressed so that she may have the chance to resignify what culture means to her. By demanding this psychic and moral space for each of us, the right to the imaginary domain takes us beyond hierarchical definitions of the self, whether caste, class, race, gender, national origin, or linguistic descent imposes it. Some have thought that these socially and symbolically constructed identifications determine the person.330 But as persons with the right to self-representation, women, African Americans, and Latinos/as cannot be reduced to naturalized classes whose entitlements and duties flow from their status positions. This right demands that the State and our basic social institutions recognize the person as worthy of being who she is as a member of the moral community of persons and, as such, treat her as the legally authoritative source of any moral or ethical meaning she gives to her basic identifications.

B. The Dynamic Nature of Identification and Our Disagreement with the Communitarians

We now turn to a detailed response to the several critiques of the liberal person that communitarians, feminists, and race critical theorists make. Our conceptualization of identifications as central to the shaping of identity answers these divergent critiques of the liberal person. For us, a person’s identity is inseparable from her identifications;

328 For a more extensive discussion of the imaginary domain and Rawls’s hypothetical experiment in the imagination, see CORNELL, AT THE HEART, supra note 295, at 14-19.
329 See id. at 17-18.
330 For an excellent summation of the communitarian critique of the liberal person, particularly as it has been elaborated in the work of John Rawls, see MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (2d ed. 1998). For a rich analysis of the relationship between race critical theory and the liberal ideal of the person, see PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).
as a result, the moral self is inseparable from an ethics of identification through which the person engages the practice of self-responsibility. We have no quarrel with communitarians, feminists, and race critical theorists when they criticize the phenomenology of the individual, often implicit in liberal thought. But we argue that they are wrong to the extent that they denigrate the significance of freedom due to its purported use in a misguided phenomenology or anthropology in liberal theory.

Our basic identifications are fundamental aspects of our lives. We internalize these basic identifications initially as essential to ourselves, often even without recognizing, let alone rationally assessing, the fact that we do so. We cohere into a self only by making sense of these basic identifications, whether we consciously question them as contestable or not. When an individual assumes an identity, this assumption implies that these basic identifications have received a sedimented meaning or meanings. We inevitably engage these inheritances when we acknowledge ourselves, whether as a Jew, a woman, an African American, a Latino, or a Latina.

“No one chooses her parents,” goes the old saying, and indeed, our parents’ identity is only one of an array of life circumstances we do not choose. As soon as we are born, we are stamped with a sex. Our racialized culture racially designates our parents (or parent) and us with them. We are placed in their arms and delivered into their realities—their country, their culture, their class position, their religion (or lack of it), their lived sexualities, and whatever other basic identifications that have shaped them. We are immersed into a world thick with meaning, meaning that is passed on to us in language. We rely on this language to give ourselves form slowly to distinguish ourselves from our surroundings. We inherit a world that at least to some extent comes to us framed by the language of those who engage us in intimacy; they are the ones who first teach us, consciously and unconsciously, what it means for them and in turn for us to be human.

Communitarians continually remind us that our inheritance of language, our country, our culture, and our tradition constitute us.

331 See, e.g., Sandel, supra note 330, at 1 (“This is an essay about liberalism . . . . Against the primacy of justice, I shall argue for the limits of justice and, by implication, for the limits of liberalism as well.”).
332 See Taylor, supra note 292, at 111-14.
333 It is important to remember that long before the “new” communitarians, Hegel made the same point about the constitution of human identity. See Hegel’s Philosophy of Right, supra note 296, at 38-40. But Hegel also understood that people could draw different moral and ethical lessons from the recognition of how human identity is rooted in history, language, and culture. Indeed, Hegel argues that the modern person is distinguishable from other legal and moral forms given to our humanity. See id. at 39-40. The person of modernity is no longer reducible to her social role in established hierarchy. Nor is she identical with any of the final ends of her community or even with the State. Given
We do not, they say, make ourselves up from scratch. This argument is true enough. But it is just as true that we revise ourselves, even if some of us experience ourselves as already imbued with an identity, “man” or “woman”; “white” or “of color”; “Jewish” or “Christian”; “gay” or “straight”; “Anglo,” “Latin American,” or “Asian.” As we stressed before, when we take up these identifications, we become responsible for them and for the ethical meanings they receive. Some of us may experience our identifications as if ancestral tradition, religious conviction, national origin, or the nature of our sexuality carved them out in certain forms. For people who experience themselves in this way, it makes little or no sense to separate themselves from these basic identifications. Who they are is for them identical to their constitution as Jewish, African American, or Asian. But consciously or not, they still exercise moral and ethical responsibility when they take up a life associated with a particular identification.

For example, there are many meanings of what it means to be Jewish. Anyone who simply claims that her Judaism mandates acceptance of a particular institutionalized form of Judaism still must confront responsibility for this associational decision. Clearly, members of the Jewish community constantly exercise this responsibility or freedom, as many different meanings of being Jewish have been both expressed and institutionalized. Still, other people do not experience themselves as identical with their origins, whether national, ethnic, or religious. Indeed, the entire immigrant story, particularly as it emphasizes battles between the generations, stems from what it means for the members of the next generation to revise their sense of themselves by re-evaluating for their own lives the basic identifications of their parents.

Many believe the debate between the liberals and the communitarians to be over whether or not individuals can revise these basic ends and identifications or for that matter rationally assess these at all. As generation after generation of immigrants have shown,
even the deepest identifications are open to both re-evaluation and rerepresentation.\textsuperscript{336} Thus, the communitarians clearly are wrong about what people can do. The real debate is over what people should do and should take responsibility for and, more specifically, what the State should be allowed to do to enforce people’s allegiances to specific ends and identifications. If, as some communitarians have argued, people’s ends and identifications constitute and thus are identical with them,\textsuperscript{337} the State can enforce fidelity to these ends and identifications without trampling on individual freedom and on the practice of self-responsibility. The individual is the ends and identifications; she only can be as free as those specific ends that already constitute her. As we already have suggested, this conception of the self may indeed be a true description of how some people experience their identities, but even then it does not relieve them of responsibility. It also suffers from overinclusion: the State still can trample on other people’s freedom by reinforcing all people’s allegiances or by limiting the space in which people’s basic identifications can be re-evaluated and rerepresented.

What body should we recognize as the source of moral value for these moral allegiances and identifications when they are defined as ends? Can the State bestow value on them in its own name or even in the name of the “true” interests of the individual? For a communitarian, if the individual truly knows who she is, she would understand that the state-imposed allegiances are truly her own ends.\textsuperscript{338} She would exercise her practice of self-responsibility in the only way she truly ethically can: by living a life in allegiance with her community.\textsuperscript{339} We argue, on the contrary, that the person must be recognized as the source of the ethical or moral value she gives to her basic identifications. To make this argument in no way implies that human beings, like persons shedding clothes, simply can detach themselves from the ends and identifications that have shaped who they are as persons. Our argument presupposes only that people can revise and readjust ends and identifications and that even if we accept them as passed down to us, we remain responsible for the form in which we accept them. It emphasizes that the communitarian insight that human beings grow into individuals only in and through webs of relationships also should remind us that freedom is fragile. Indeed, the degree to which persons actually can revise identifications and ends depends in part on whether the State and basic social institutions provide them

\textsuperscript{336} See, e.g., supra notes 54-57 (noting that immigrants use English as their primary language within three generations).

\textsuperscript{337} See Sandel, supra note 330, at 59-65.

\textsuperscript{338} See id.

\textsuperscript{339} See id.
with the moral and psychic space to do so. This responsibility is why the equal protection of the imaginary domain is so important. Protecting the imaginary domain ensures that the person and not the State is the source of the evaluations and representations of her fundamental ends and identifications. It is precisely because we initially do not choose the primordial relationships and identifications through which we pattern a self and become a person that we need morally and legally provided psychic space to incorporate them, to re-evaluate them, or to contest them through the evaluations and meanings we give them. How one does so is inevitably a part of the exercise of self-responsibility.

Once we see that identifications are not just stamped on us, we begin to comprehend the ideal or idealized element of identification. This element often is made explicit as an ethical or political ideal. This is the case with Latinos/as. The identification of Latino/a carries an ethical and political message due in part to the historical basis of its usage in the United States. The identification implies that the person can trace roots to a Latin American country and is ensconced in the Spanish language, but is not trying to pass as Spanish—as a white European. Identification as Latino/a also is relational—an historical interpretation of the Southwest, Puerto Rico, Mexico, and Cuba, as well as the significance of the economic and political domination of South America for Latin culture and for the Spanish language, defines in part the meanings of Latino/a. The definition of what it means to be a Latino/a thus is partially an act of the political imagination. To enhance this identification can be to take it as an end through moral reflection. In like manner, Gloria Anzaldúa describes the political and ethical process by which Chicanos/as came to imagine themselves as bound together as a people:

Chicanos did not know we were a people until 1965 when Ceasar Chavez and the farmworkers united and I Am Joaquin was published and la Raza Unida party was formed in Texas. With that recognition, we became a distinct people. Something momentous happened to the Chicano soul—we became aware of our reality and acquired a name and a language (Chicano Spanish) that reflected that reality. Now that we had a name, some of the fragmented pieces began to fall together—who we were, what we were, how we had evolved. We began to get glimpses of what we might eventually become.

340 For an excellent discussion of the political demarcations that either create or reinforce identities, see Iris Marion Young, Together in Difference: Transforming The Logic of Group Political Conflict, in The Rights of Minority Cultures 155 (Will Kymlicka ed., 1995).
341 ANZALDUA, supra note 151, at 63.
The fact that the boundaries of an identification have political and ethical dimensions does not mean that anyone can take on any identification. Neither of us is Latino/a, and if either of us were to insist that we are, you would be right. Either gently prod us to see a psychiatrist or, once you had heard either of us speak Spanish, make reference to this Article and accuse us of moral hubris. The communitarians are correct that the inheritance of language, culture, and country sets parameters for our lives. But they are just that—parameters. They are not necessarily imposed limits that so rigidly define us that we cannot develop a personal response to the full particularity of our situation. As Ronald Dworkin has argued, ultimately, each of us personally should make the distinction between parameters and limits, even if the historical situation in which we find ourselves indexes it.

At this point, another important difference with the communitarians becomes manifest. It is a limit on our lives that under the above definition of Latino/a, we cannot embrace that identification or gain acceptance as those who identify themselves as Latinos/as, even if we desperately seek to do so. But what if one of us were to marry a Mexican, move to Mexico, become a Mexican citizen, achieve fluency in Spanish, and raise children of the marriage as Mexicans? Assume that the one who took on that overwhelming project of trans-

\[342\] See Dworkin, supra note 335, at 67.
\[343\] We borrow the distinction between parameters and limits from Ronald Dworkin. See id. at 68.
\[344\] As Dworkin explains:
The ideal life is always the same: it is a life creating as much independent value—as powerful a pleasing of God or as much human happiness—as it is conceivable for a human being to create. Circumstances act as limits on the degree to which the ideal can be achieved. Mortality, for example, is a very important limit: most people could create more pleasure if they lived longer. Talent, wealth, personality, language, technology, and culture provide other limits, and their force as limits will be much greater for some people, and in some times and places, than others. If we take an indexed challenge view of ethics, however, and treat living well as responding in the right way to one’s situation, then we must treat some of the circumstances in which a particular person lives differently, as parameters that help define what a good performance of living would be for him.

Ibid. at 66-67.
\[345\] When a commentator argues that bilingualism in Spanish and English is a disability in the United States, he is setting out Spanish as a limit on people’s lives that must be addressed in the name of equality. See Mirandé, supra note 17, at 103. For this commentator, it is only by addressing bilingualism as a disability that we can hope legally to interpret statutes that forbid the speaking of Spanish in workplaces as discrimination. See id. at 102-03. How an ability to speak two languages at home sensibly could be rendered as a disability demands more discussion. See infra note 396.

Clearly, this conception of bilingualism in Spanish and English as a disability is inseparable from the treatment of Latinos/as in the United States.
formation were later to tell the other, “At this point in my life I identify myself more as a Mexican than as an American.” That individual’s life parameters substantially would have changed. Identification as Latino/a would no longer seem like simple craziness or hubris, despite the fact that many if not all Mexicans would continue to identify that person as an Anglo.

Even though we cannot completely escape our Anglo context, we certainly can change its meaning for ourselves—despite the fact that other members of society may not recognize the change. Freedom demands that the individual should be the only entity empowered to set, ethically and politically, the divide between limits and parameters. The imaginary domain gives the person the moral and psychic space to determine which historical circumstances are limits and which are parameters. Concomitantly, the imaginary domain gives the person space within which to embrace the parameters of her life, thereby enabling her practice of self-responsibility.

D. Language, Culture, and Identification Within the Parameters of the Imaginary Domain

1. Language as a Parameter

In response to the question of whether or not he was “influenced” by the Spanish language, the great novelist Jorge Luis Borges exclaimed:

I am inseparable from the Spanish language. My dreams, my aspirations as a writer are formed in Spanish. It’s no exaggeration to say that the man I am would not “be” who he is without Spanish. The writer I have become is unthinkable without the shape it has been given by the great traditions of Latin culture.

For Borges, the Spanish language is a personal, ethical, and aesthetic parameter of his life both as a man and as an artist. In Dworkin’s sense, Borges makes judgments about whether or not he has met his own standards for an effective life as an artist and as a person within the parameters of Spanish language and of Latin American culture.

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346 As Dworkin articulates this point:

Anyone who reflects seriously on the question which of the various lives he might lead is right for him will consciously or unconsciously discriminate among these, treating some as limits and others as parameters. I might treat the fact that I am an American, for example, as just a fact that in some cases might help and in others hinder my leading the life I think best. Or I must treat my nationality as a parameter and assume, whether or not self-consciously, that being an American is part of what makes a particular life the right one for me.

Dworkin, supra note 335, at 67.

Spanish language and culture are, at least for this one writer, what Dworkin calls “hard” parameters. Borges can imagine himself only within these parameters. The person outside those parameters would no longer be the man or writer, Borges.

Toni Morrison makes a similar point when she writes:

The question of what constitutes the art of a black writer, for whom that modifier is more search than fact, has some urgency. In other words, other than melanin and subject matter, what, in fact, may make me a black writer? Other than my own ethnicity—what is going on in my work that makes me believe it is demonstrably inseparable from a cultural specificity that is Afro-American?

Morrison answers her question through a careful analysis of the first sentences of several of her novels, noting that one can find the answer in “the ways in which I activate language and ways in which that language activates me.” The parameter of her writing that gives it the specificity of the work of a black writer is a practice of language, “a search for and deliberate posture of vulnerability to those aspects of Afro-American culture that can inform and position my work.”

Morrison’s writing, in other words, is inseparable from her assumption of the identification of African American in the form of a search—a search conducted in part by her self-responsibility for the articulation of the cultural difference of her people.

For Morrison, it is through language that we try to fathom cultural difference and try to give shape to “Unspeakable Things Unspo-

348 By using the term “Latin American culture,” we isolate the culture of South America from that of Spain.
349 See Dworkin, supra note 335, at 70. Dworkin elaborates:

We must distinguish between what I shall call hard and soft parameters. Parameters, as I said, enter into the description of any challenge or assignment: they describe the conditions of successful performance. Hard parameters state essential conditions: if they are violated the performance is a total failure, no matter how successful in other respects. The formal structure of a sonnet imposes hard parameters: we cannot make a sonnet better by adding an extra line, no matter how beautiful it is. Soft parameters are those aspects of assignment that, when violated, reduce the value of the performance but do not annihilate it: they act as standards of good performance that permit defects to be compensated by high success against other standards. Compulsory figures in competitive ice skating are treated as soft parameters. It is part of the assignment that the performance execute a particular figure, and any deviations, no matter how beautifully executed, count as faults. But deviations are not absolutely fatal to winning any points at all, and a performance that includes a brilliant deviation may win more overall than a lackluster but perfectly faithful one.

Id.
350 Id.
351 Id.
352 Id. at 162.
How does a writer tell the story of a young African American girl’s unbeing? How does one tell this and other horror stories that block the “rememoration”—which is in turn a representation of the previously unrepresented past? Writing, for Morrison, is explicitly an act of self-responsibility before the stories that haunt the historical present of her life—a life that she deliberately has assumed as that of an African American writer. The opening phrase of *The Bluest Eye* is, “Quiet as it’s kept.” This phrase was a familiar one from Morrison’s childhood, one she heard again and again, listening to adult black women talking amongst themselves. The hope in this phrase, from the perspective of the adult women looking back on the young girlfriends who lived through the character Pecola’s undoing, is that the “us” that is keeping the secret can admit to it and therefore confirm that this “us” has the power to confront even the most horrible reality. Telling a story gives a possible new meaning to the “us” that is formed even if the secret that made us can never be fully revealed, not only because it is too horrible, but also because the story comes too late to save Pecola. As Morrison writes,

The words are conspiratorial, “Shh, don’t tell anyone else,” and “No one is allowed to know this.” It is a secret between us and a secret that is being kept from us. The conspiracy is both held and withheld, exposed and sustained. In some sense it was precisely what the act of writing the book was: the public exposure of a private confidence. In order fully to comprehend the duality of that position, one needs to think of the immediate political climate in which the writing took place, 1965-69, during great social upheaval in the life of black people. The publication (as opposed to the writing) involved the exposure; the writing was the disclosure of secrets, secrets “we” shared and those withheld from us by ourselves and by the world outside the community.

The “we” is in quotation marks because this group is not just there, but is formed in part by the secret and the effort to fathom the meaning of the rape of a young black girl who only can be there when she hallucinates a white self with the bluest eyes. How can “we” make sense of that? Of a young black girl who cannot see herself until she becomes mad enough to see herself as the idealized white girl with the bluest eyes? She strives to take on her own version of the idealized identification “white girl.” Then she becomes what everything in the racist world in which she grew up told her she could not be. The young girl’s hallucination of herself is madness because she must distinguish herself to see herself as “worthy” of her existence. Psychosis

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353 *Id.* at 121.
is the only way for her to dream up a self because she lives her “blackness” as an absolute limit on any attempt to fill herself in and become a person. The adult women who tell the story stumble before they make the identification with her that they must to reveal the secret, an identification they did not make when they let her go to the abyss of her madness. Pecola is not alone in the brutal limitations imposed upon what she could make of herself as a black girl in a racist society. The story proceeds through rememoration—re-identification of what it means to be an African American.

How does the writer find the language to tell this story? What is it about this story and the language in which it is told that makes it an expression of identification and re-identification of the difference of Afro-American culture? Morrison explains:

The points I have tried to illustrate are that my choices of language (speakerly, aural, colloquial), my reliance for full comprehension on codes embedded in black culture, my effort to effect immediate coconspiracy and intimacy (without any distancing, explanatory fabric), as well as my (failed) attempt to shape a silence while breaking it are attempts (many unsatisfactory) to transfigure the complexity and wealth of Afro-American culture into a language worthy of the culture.356

It might seem strange to use Morrison and Borges as if they are making the same point. Borges is speaking of the unsunderable connection between himself and the Spanish language and culture. He implicitly draws the connection between Spanish language and Latin culture. But the Spanish language also embodies the culture of Spain, which is not Latin American. Morrison writes in English, but hers is an English that amongst other things expresses the colloquial practices of black folklore and the day-to-day expressions encoded in Afro-American culture. Both writers articulate the insight that who they are is inseparable from the way they are “activated” in language and that their language is inseparable from both the culture that brings it to life and their own identification with that culture. Morrison and Borges describe language as an essential parameter of their lives, but one that the complex relationship language has with culture, ethnicity, nationality, and race shapes. As is the case with all parameters, the very attempt to articulate its significance reworks its meaning.

2. Language and Culture

The exact relationship between the person, language, and thought remains a matter of dispute, as does the precise connection between language and culture. Steven Pinker, for example, has ar-

356 Id. at 150.
gued that we all think in a prelinguistic medium called “Mentalese.”\(^{357}\) As a result, the mode of linguistic expression has no real bearing on our thoughts and on our access to reality. Pinker could imagine a world in which we all speak in the same universal language.\(^{358}\) Perhaps James Joyce in *Finnegans Wake* came closest to realizing such a world, undoing the boundaries of historical human languages. But to do so Joyce also had to imagine the dissolution of the rigid ethnic, national, and sexual identifications.\(^{359}\)

For human beings living today, however, language differentiation is inseparable from the lived experience of ethnicity, national conflict, and racism. This is not to say that Pinker is right or wrong, although other thinkers and linguists strongly disagree with him. For example, Benjamin Lee Whorf, who has devoted his life to studying the unique syntax of the Hopi language, argues that different structures of language can shape our conceptualization of basic parameters such as space and time.\(^{360}\) And yet, if we listen to Morrison,\(^{361}\) to imagine the English language is not to imagine the form of life of African American culture, even though African Americans speak English.\(^{362}\)

Culture is more than language. To parallel (and deepen) an observation central to the screening model of discrimination we described earlier,\(^{363}\) culture is the full range of encoded day-to-day behaviors, which at least in part find expression in the personas through which a culture is assumed. Not all culturally embedded communication is verbal. Many ways of signaling to one another mark our connection or our identification with a group. Signs—a way of pointing a finger, raising the eyebrows, sighing in church, nodding to


\(^{358}\) See id. at 82.

\(^{359}\) See James Joyce, *Finnegans Wake* (Paladin 1992) (1939). Toni Morrison evokes this “paradise” as she ends her new novel by the same name:

> There is nothing to beat this solace which is what Piedade’s song is about, although the words evoke memories neither one has ever had: of reaching age in the company of the other; of speech shared and divided bread smoking from the fire; the unambivalent bliss of going home to be at home—the ease of coming back to love begun.


\(^{360}\) See generally Benjamin Lee Whorf, *Language, Thought, and Reality* (1964) (illustrating the principle of linguistic relativity, which states that the structure of a human being’s language influences her understanding of reality and her behavior).

\(^{361}\) See supra text accompanying note 350.

\(^{362}\) As the anthropologist Gananath Obeyeskere has observed:

> There are people who are thoroughly fluent in an alien language but are quite incapable of understanding the alien culture. This is simply because culture is not coterminous with language. The variety of normative behavior governed by implicit meanings, nonverbal communication, and nonlinguistic symbolic forms shows that language provides at best access to the culture.


\(^{363}\) See supra text accompanying note 250.
each other on the street, and shaking hands—allow others to identify the signaler as a member of a particular group.

These nonverbal personas are crucial to how actual human beings express culture. But personas are lived only as the people who are the members of the culture and who bring it to life assume and re-imagine them. Because human beings are the entities that express themselves and their cultural identifications through these personas, the meanings of those personas always are changing. At the same time, one can both misinterpret and stereotype the cultural personas of others. This misinterpretation and stereotyping is one of the many ways in which people convey racism and ethnic disparagement within a culture. Sometimes it takes the subtle form of mistakenly thinking that only other cultures have personas, while we white Anglos simply represent the moral and decent mode of behavior.

The proposition that language and culture are not coterminous does not imply that language is not a basic parameter of culture. A person who has no access to the language of a culture is severely, if not entirely, limited in her access to that culture. We may dance the salsa; we may love Mexican food; we may be obsessed with the tradition of hyper-realism found in many of the great South American novels; we may be completely convinced that Puerto Rico is economically and politically disadvantaged because of its commonwealth status. More profoundly, we may have thrown in our lot with people who are Latino/a and find in these loves the most important relationships of our lives. But neither our love for Latin music, our appreciation of South American literature, our deep sympathies for the political concerns of the Latin American community, nor even the profound love and respect we feel for Latino/a members of our families will make us part of that culture. Similarly, learning to speak Spanish, while undoubtedly enhancing our access to the culture, alone cannot make us a part of it. Language for most of us is more of a limit than a parameter precisely because attaining fluency in another language is a truly formidable goal.

One cannot easily draw with exactitude the relationship between language and culture. If we are monolingual, to what extent are we enclosed in our culture? George Fletcher, who fully recognizes the complexity of this question, convincingly draws a clear connection between language and culture when he examines the relationship between the English language and the subculture of law. Fletcher, in one of his several examples, argues that the different meanings of reason in English, German, and French make it virtually impossible to

364 See DeFreitas, supra note 6, at 26-36 (describing Puerto Rico’s historic and current status).
365 See Fletcher, supra note 31, at 329.
translate accurately the term "reasonable person" and to convey to participants in other legal systems the place it holds in our legal system.\textsuperscript{366} Fletcher writes:

In contrast to a single rule based on reasonableness, European lawyers start their arguments with broad, sweeping rights. They would say, for example, that you have the right to use all the force necessary to protect your interests regardless of the costs that fall on others. But this is only the first step of a structured argument. If it appears that the defensive force imposed a disproportionate cost on others, European lawyers would apply the doctrine of \textit{abus de droit}—the principle that defeats the exercise of absolute rights in particular situations. Not surprisingly, in view of the doctrine of reasonableness, English-speaking lawyers have no need for the doctrine of "abuse of rights."\textsuperscript{367}

In Fletcher’s view, this variance in the definitions of reason reflects an important difference between the subcultures of Anglo-American and European legal systems.\textsuperscript{368} The use of the word “reasonable” suggests an Anglo-American preference for pluralism in legal thought as opposed to the stronger notion of rights that some European legal systems defend.\textsuperscript{369} The word and the meaning it has acquired over time, including the preference for pluralism that comes to be a part of what reasonableness encodes as a word of art in the subculture of law, pass down through the generations and blend into the traditions of legal scholarship. For Fletcher, thought, language, and culture have a reciprocal relationship.\textsuperscript{370}

We think Fletcher is exactly right. The relationship between thought, language, and culture is both reciprocal and dynamic. But we would make one important addition, addressing the question of whether or not there is a determinative or constitutive relationship between thought and language and between language and culture: this is not the \textit{right} way to think about these relationships because languages and cultures live only through persons and personas. It is not the right language because human beings also fabricate the cultural personas in which they express themselves. Fabrication disrupts the causal chain that we need to show a determinative relationship between language and culture and leaves us with the potential to shape and reshape ourselves.

\textsuperscript{366} See id. at 329-31.
\textsuperscript{367} Id. at 330.
\textsuperscript{368} See id. at 330-32.
\textsuperscript{369} See id. at 331.
\textsuperscript{370} See id. at 331.
3. Turning Limits into Parameters: Language, Culture, and Individual Choice

We have seen that it is hard to learn a new language well enough to make another culture accessible, and it is harder still to revise oneself to identify with that culture, whether psychically or in one’s outward relations with others. Yet we also have seen that this learning and revision is just what generation after generation of immigrants, including those from the Caribbean, Mexico, and Central and South America, have achieved. Although the high degree of difficulty diminishes the potential occurrence of cross-cultural movement, it by no means erases that potential. It follows that freedom is deeply implicated in the potential’s realization. We repeat our central argument: Each of us—those experiencing that difficult process of linguistic and cultural access, as well as natives—should receive the legal freedom to re-evaluate and rerepresent our basic identifications, including the significance we give to our mother tongue. Different people will value this freedom differently.

For us, this distinction between the freedom and the value of the freedom is crucial in the case of language rights. Consequently, we disagree with the terms that define one current of the multicultural debate: the current that poses a choice between a liberal nationalist—rooted in and contained by linguistic and cultural context—and a cosmopolitan conception of the subject—surmounting context to construct an independent, personalized identity. In our view, the choice between those two conceptions is false when posed either to defend or to undermine the importance of cultural or language rights.

Jeremy Waldron views cosmopolitanism as an ethical and political ideal that best expresses the value of the freedom to make sense of our basic identifications.\(^\text{371}\) Waldron describes the cosmopolitan as follows:

[One] may live all his life in one city and maintain the same citizenship throughout. But he refuses to think of himself as defined by his location or his ancestry or his citizenship or his language. Though he may live in San Francisco and be of Irish ancestry, he does not take his identity to be compromised when he learns Spanish, eats Chinese, wears clothes made in Korea, listens to arias by Verdi sung by a Maori princess on Japanese equipment, follows Ukrainian politics, and practices Buddhist meditation techniques. He is a creature of modernity, conscious of living in a mixed-up world and having a mixed-up self.\(^\text{372}\)


\(^{372}\) *Id.*
Waldron bolsters his appeal to the ideal of cosmopolitanism by arguing that liberal nationalists are wrong to emphasize the importance of defining oneself through a specific culture and language.\textsuperscript{373} Will Kymlicka counters, correctly in our view, that the sort of cultural mélange that Waldron describes does not actually involve moving between cultures.\textsuperscript{374} For those who do attempt such a move, language fluency will be a first, necessary step. Waldron exaggerates how easy it is for us, particularly as adults, truly to escape our “mother” tongue.\textsuperscript{375}

Yet Waldron certainly has a right to his imaginary domain and deserves the psychic and moral space to define himself as a cosmopolitan.\textsuperscript{376} Indeed, one can understand Waldron as describing an immigrant identity—one that has fluid parameters because many different social and historical forces constitute it.\textsuperscript{377} Gloria Anzaldúa makes a similar point when she describes what she calls the consciousness of the new mestiza:

The new mestiza copes by developing a tolerance for contradictions, a tolerance for ambiguity. She learns to be an Indian in Mexican culture, to be Mexican from an Anglo point of view. She learns to juggle cultures. She has a plural personality, she operates in a pluralistic mode—nothing is thrust out, the good the bad and the ugly, nothing rejected, nothing abandoned. Not only does she sustain contradictions, she turns the ambivalence into something else.\textsuperscript{378}

Both Waldron and Anzaldúa are describing processes by which an individual comes to terms with a complex historical web of relationships. The new mestiza consciousness is in part a political act that

\textsuperscript{373} See id. at 105-08.
\textsuperscript{374} See Will Kymlicka, From Enlightenment Cosmopolitanism to Liberal Nationalism 10-11 (Sept. 11, 1997) (paper presented at the Program for the Study of Law, Philosophy, and Social Theory) (on file with authors).
\textsuperscript{375} See id. at 101.
\textsuperscript{376} Cosmopolitanism as a special, overarching, constructed identification has faced criticism as a mask for the more particular white, male, middle-class identification of a handful of academics. See Bruce Robbins, \textit{Comparative Cosmopolitanisms, in Cosmopolitics} 246 (1998) (discussing some of the pitfalls of cosmopolitanism either as a reality achieved by globalization of an elite or as an ethical or political identification that recognizes the value of freedom and the equality of all human beings); see also Pheng Cheah, \textit{Given Culture: Rethinking Cosmopolitical Freedom in Transnationalism, in Cosmopolitics, supra,} at 290 (criticizing northern academics who critique nationalism as a weapon for southern nations resisting re-colonization and control by multinational corporations).
\textsuperscript{377} We must note here, as we saw in \textit{supra} Part II.C.1, that economic discrimination remains central to the lives of large numbers of Latinos/as in this country. This discrimination against immigrants, particularly immigrants who are racialized, is not limited to Latinos/as. But because of the discrimination, there is a sense in which cosmopolitanism may not be a rational alternative for many Latinos/as. We must distinguish the decision to stay within a barrio to reduce the risk of exposure to a brutally discriminatory “outside” culture from the affirmance of loyalty to a group identification made by a person whose means give rise to alternative choices.
\textsuperscript{378} \textit{Anzaldúa, supra} note 151, at 79.
turns limits into parameters and thereby challenges the meaning of being Indian in Mexico. Yet in Anzaldúa’s description, cultures continue to operate as both limits and parameters in part through the personas they make available to the individual seeking to make sense of her complex identifications. No Anglo could access the Mexican persona from the Indian point of view in the same way that Anzaldúa does. Both Anzaldúa and Waldron not only are describing piecing together identities (and in the case of Anzaldúa, playing with cultural personas to expand their meaning), but also are telling us how they morally and ethically value their identifications. This process of evaluation is that which *freedom demands* be left to the individual.

For these reasons, we need not choose between liberal nationalism and cosmopolitanism in the context of defending language rights. Each principle accurately describes how some individuals come to value their freedom to make sense of their identifications. Consider as an example individuals who identify themselves as both Québécois and liberal nationalists. For these individuals a commitment to the French language is essential to their self-definition, and they should be free to identify with their inherited language in this strong manner. Waldron’s real rebellion is not against these people, at least not on our reading of him. Rather, Waldron argues against the idea that our heritage rigidly predetermines our identity so as effectively to undercut the moral or ethical dimensions of whom one might become.379 On this point, we agree with him. People must be morally free to make sense of their identifications in their own way. Sometimes this means a brutal uprooting of oneself from one’s culture and linguistic background. Again to quote Anzaldúa:

To this day I’m not sure where I found the strength to leave the source, the mother, disengage from my family, *mi tierra*, *mi gente*, and all that picture stood for. I had to leave home so I could find myself, find my own intrinsic nature buried under the personality that had been imposed on me.380

It is precisely because the relationship among languages, cultures, ethnicities, class, and race is complex that it is difficult to draw the kinds of causal claims that tell us what determines what. But this difficulty actually is a good thing. The intractability of grasping exactly how these relationships affect one another leaves open a space for our freedom to practice self-responsibility. To put the argument more strongly, one even can understand the intractability as a result of our freedom to re-imagine ourselves and to re-evaluate our fundamental identifications and what they mean to us.

Chandran Kukathas has defended the position that cultural rights (including group-differentiated rights) to such things as language, territory, and culture are necessary for the meaningful exercise of autonomy.381 “Put simply,” Kymlicka argues, “freedom involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us.”382 For example,

[w]ether or not a course of action has any significance for us depends on whether, and how, our language renders vivid to us the point of that activity. And the way in which language renders vivid these activities is shaped by our history, our “traditions and conventions”. Understanding these cultural narratives is a precondition of making intelligent judgements [sic] about how to lead our lives. In this sense, our culture not only provides options, it also “provides the spectacles through which we identify experiences as valuable.”383

We agree with Kymlicka on this point. He shows again that the way in which language “activates” someone who in turn activates her language is basic to the process of forming a unique person. But we need to address two tensions in his formulation. The first is a technical point: Kymlicka writes of autonomy while defending the proposition that our autonomy is dependent upon the phenomenal world. In other words, he is not using autonomy in the strict Kantian sense.384 In contrast, we address this problem with an existential re-interpretation of Kant’s notion of moral freedom, the only kind of freedom open to us, according to Kant. Second, a tension remains between us and Kymlicka that also lies at the heart of Waldron’s disagreement with him on the question of how culture, and more specifically homogenous culture, frames our choices. If our culture effectively bounds our choices, then the very culture that purportedly serves our freedom limits it, regardless of the culture’s contents (including, for example, its protection of individual rights). By postulating a kaleidoscope of cultures, Waldron in part tries to keep us from being limited and predetermined.385 Waldron does not want his national origin or

382 Id.
383 Id. (quoting RONALD DWORKIN, A MATTER OF PRINCIPE 228 (1985)).
384 Strictly from the standpoint of practical reason, autonomy demands that our phenomenal relationships or ties do not define us. If we were to treat ourselves as constituted by these ties then we would be treating ourselves as objects of study, controlled or constructed by forces that theoretical reason could grasp. For an excellent explanation of why Kant need not defend dualisms in order to defend the self because it is a practical standpoint and a theoretically demonstrable conception, see KORSGAARD, supra note 303, at 159-87.
385 See Waldron, infra note 371, at 110-12.
linguistic descent to capture his imagination.\textsuperscript{386} This predetermination is inconsistent with most strong conceptions of freedom.

Kymlicka recognizes that cultures are open-ended phenomena, yet at times he lapses into the language of determinism: “familiarity with a culture determines the boundaries of the imaginable.”\textsuperscript{387} In other words, because persons construct culture through their identification with (or against) it, a “culture” always changes. Toni Morrison describes a dynamic relationship: language activates the person, but the person also activates language by stretching the limits of the meaning of her identifications.\textsuperscript{388} True, language is a basic parameter of our lives, but even if one remains monolingual, it is a cultural parameter whose meaning changes for her as she struggles to articulate its unspoken possibilities.

Yet, like Kymlicka, we defend the connection among culture, language rights, and individual freedom. Dworkin’s distinction between parameters and limits aids this defense. As Dworkin reminds us, our lives are indexed; the true particularity of anyone’s situation will include a whole host of limits and parameters.\textsuperscript{389} We argue that this indexing occurs because given sets of identifications form all of us. Because there should be no precise way to determine which are limits and which are parameters, and because that “determination” is part of a person’s freedom, some people will seek to break out of their language and national background by assimilating into another language and culture. To make this break, some may interpret their language as a “soft parameter.”\textsuperscript{390} Others, like Borges, define their language as a “hard parameter,”\textsuperscript{391} which gives them a fundamental sense of themselves. Borges’s definition of language as a hard parameter provides him the most basic sense of himself as a man and as a writer. We experience our freedom in large part through our endeavor to determine which are limits and which are parameters in our lives. Furthermore, we try to determine how we understand exactly how the parameters bind us to a tradition and to the cultural narratives contained therein and how they enable us to tell new stories, including stories about ourselves.

\textsuperscript{386} See id.
\textsuperscript{387} Kymlicka, supra note 381, at 89 (quoting Avishai Margalit & Joseph Raz, National Self-Determination, 87 J. Phil. 439, 449 (1990)).
\textsuperscript{388} See Morrison, supra note 350, at 146.
\textsuperscript{389} See Dworkin, supra note 335, at 69-70.
\textsuperscript{390} Id. at 70 (“Soft parameters are those aspects of assignment that, when violated, reduce the value of the performance but do not annihilate it: they act as standards of good performance that permit defects to be compensated by high success against other standards.”).
\textsuperscript{391} Id. (“Hard parameters state essential conditions: if they are violated the performance is a total failure, no matter how successful in other respects.”).
To confront this substantial challenge, we must have our imaginary domain protected. Part of Anzaldúa’s struggle to become a person involved her effort to free herself from the stereotypical personas in and through which the majority Anglo culture defined the meaning of her Chicana identification. But her struggle did not just involve inversion, affirming the features of the stereotypical personas imposed by Anglo culture. Instead, her struggle involved a complex re-working of the metaphor of the borderlands in which the mestiza can recreate the complex being that is herself. This process involved not only the celebration of the Spanish language but also the affirmance of Spanish as a living tongue, which the Mexican American Spanish with which she grew up changed and enriched. “But Chicano Spanish is a border tongue which developed naturally. Change, evolución, enriquecimiento de palabras nuevas por invención o adopción have created variants of Chicano Spanish, un nuevo lenguaje. Un lenguaje que corresponde a un modo de vivir. Chicano Spanish is not incorrect, it is a living language.”

E. Equality, Language, and Rights

Chandran Kukathas suggests that the right to “exit” appropriately resolves tensions among language, culture, and individual freedom. We disagree because this negative option does not provide the measure of freedom demanded here. First, the right to exit implies that cultures have sharper boundaries than those existing in the real world. Second, it implies that “exit” is possible. It is almost impossible to exit a first language, like it or not. One may learn new languages, but her “mother” tongue stays with her forever. Third, and more importantly, many people do not want to exit. Instead, they want to push against or re-interpret the meanings of their culture.

In place of the right to exit, we propose the right to the imaginary domain. This right furnishes the person with the moral and psychic space to come to terms with the full particularity of her situation, with language, with culture, with gender, and with sexuality. It does so in part by insisting that how we live with and define the parameters of our life is basic to our freedom. People differ, and profoundly so when it comes to their desire to be rooted in their native language and culture. But they certainly should have the right to affirm their language because it inevitably is, at a minimum, a basic parameter,

392 Anzaldúa, supra note 151, at 55. Similarly, a day care worker protests a supervisor’s Workplace English: “Our language is . . . our culture; no one can take that away from us.” Delgado & Guthrie, supra note 84, at A4.

393 Therefore, we disagree with Chandran Kukathas’s argument that we do not need to have cultural rights because the right to exit is sufficient. See Chandran Kukathas, Are There Any Cultural Rights?, in The Rights of Minority Cultures, supra note 340, at 228, 251-52.
which is crucial to how they shape an identity of their life. At the same time, we should never undermine the freedom to re-imagine ourselves.

Only the “degradation prohibition” limits the right to the imaginary domain. The degradation prohibition forbids the characterization of someone as unworthy because of how she has constituted herself from her basic identifications. One degrades a person in our sense if one does not allow her to bestow value on her language. Again we quote Anzaldúa:

So, if you want to really hurt me, talk badly about my language. Ethnic identity is twin skin to linguistic identity—I am my language. Until I can take pride in my language, I cannot take pride in myself. Until I can accept as legitimate Chicano Texas Spanish, Tex-Mex and all the other languages I speak, I cannot accept the legitimacy of myself. Until I am free to write bilingually and to switch codes without having always to translate, while I still have to speak English or Spanish when I would rather speak Spanglish, and as long as I have to accommodate the English speakers rather than having them accommodate me, my tongue will be illegitimate.

This freedom to use one’s own tongue is crucial to equal dignity. By denying someone the freedom to affirm her linguistic origin as she ethically interprets it, one robs from her the basic freedom to practice self-responsibility for her identifications. If the State instead imposes its evaluation of her language on her, it denies her equal worth as a free person.

People still will ask who, as between natives and immigrants, should have to accommodate whom? We should resolve this question by reference to the concept of reasonableness, which helps us determine what we should expect in social relations with others, viewed as free and equal persons. We repeat the definition of reasonableness we offered earlier in this Article—we are reasonable when we realize that we are capable of recognizing and harmonizing our pursuit of the good with creatures having equal dignity. Applying that definition, it is unreasonable for Anglos to treat Latinos/as as anything other than free persons who bestow value on their language. It follows that both Official English and Workplace English are unreasona-

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394 Cornell, At the Heart, supra note 295, at 60.
395 This means, for example, that no one can treat someone as less than worthy of her personhood because of her lived sexuality. See id. at 3-32 (discussing sexual freedom). To treat someone in such a manner is first and foremost to deny them their freedom by making their sex or sexuality an imposed limit on how they can live their lives. See id. at 33-65.
396 See supra text accompanying notes 151-52 (describing the brutal punishment of school children in parts of the United States for speaking their native languages).
397 Anzaldúa, supra note 151, at 59.
398 See supra note 315 and accompanying text.
ble. We can make a similar argument by reference to Kant’s own understanding of external right. The suppression of Spanish is a maxim that cannot be made a universal law without suppressing the form of rightfulness.\textsuperscript{399}

Of course, some still might say that Latinos/as remain free persons no matter how Anglos view their language and despite any measures Anglos take to denigrate or more directly to suppress it. A strong Kantian answer would be that such particularistic suppression of a creature of reason always falls afoul of the moral law, with its universalizability requirement. That would be the end of the story. But even if we do not stop there, we can see how these measures impose a cost on the exercise of that freedom. The imposition of that cost cannot be reasonable in Rawls’s sense of the word, because Anglos impose it pursuant to the view that the linguistic valuation that Latinos/as make is less worthy than that which Anglos make. The State’s imposing the assimilation norm controverts the legal freedom the State must authorize as the source of the evaluative design of one’s life. It is unreasonable to expect people to give up their freedom to affirm their lives as they see fit to “Americanize” themselves.

Furthermore, Official English clearly degrades people because of their linguistic descent.\textsuperscript{400} By degradation we mean a grading down—because of ethnicity—of one’s ethnic background or linguistic origin. In a world of Official English, Spanish speakers are “picked out” because of their language and marked as not belonging to the majority group.\textsuperscript{401} To belong, they have to become “American” and assume an

\textsuperscript{399} See supra note 292.

\textsuperscript{400} One commentator has attempted to subvert the courts’ volition reading in Workplace English cases, see supra notes 92–95 and accompanying text, by arguing that bilingualism is a “disability,” making it an immutable characteristic. See Mirandé, supra note 17, at 103. Mirandé relies on studies showing that “code switching” takes place automatically for many bilingual speakers. Id. at 94. Code switching means at least two things. First, bilingual speakers semiconsciously incorporate words from both languages when they speak. Second, they unconsciously respond in the language in which they are addressed. That is, if a worker addresses a coworker in Spanish on the job, she will answer in Spanish before she has a chance to catch herself. Under this analysis, those bilingual in Spanish and English cannot help themselves from code switching; therefore the argument goes, bilingualism is both something like an immutable characteristic and a disability. See id. at 94–98.

We sympathize with Mirandé’s goal of reforming the law to protect bilingual Spanish speakers from losing their jobs for their “aberrant” speech. But we would find it sad indeed if we had to interpret bilingualism in Spanish in this way in order to make Workplace English legally redressable. We offer a more direct approach to the same end.

\textsuperscript{401} See Margalit & Raz, supra note 387, at 449. They write:

It may be no more than a brute fact that people’s sense of their own identity is bound up with their sense of belonging to encompassing groups and that their self-respect is affected by the esteem in which these groups are held. But these facts, too, have important consequences. They mean that individual dignity and self-respect require that the groups, membership of which contributes to one’s sense of identity, be generally respected and not be made a subject of ridicule, hatred, discrimination, or persecution.
identity that others imagine to be bound up with the imposition of the English language. Workforce English similarly degrades Spanish-speaking workers and accordingly is invalidated.

Discrimination against Spanish speakers affects the way they view their own language. Speaking Spanish becomes an imposed limit. This imposed limit not only violates a person’s freedom, but also subjects her to a serious inequality by turning her language into a mark that determines how to meet her life prospects. Accordingly, courts should legally mark this discrimination with the status of a “suspect classification.” In the analysis of David Richards:

In each case its irrationalist object is not some brute fact that cannot be changed, but central features of moral personality—identifications that make one a self-respecting member of a community that one reasonably values. The suspectness of the underlying prejudice in each case is its irrationalist interpretation of central aspects of human personality and the unjust degradation of the culture (moral slavery) with which a person reasonably identifies. Spoken language obviously is central to the identity of many Latinos/as. We should consider steps taken to force a person to forsake that identity altogether or significantly to repress it as “moral slavery” in Richards’s sense.

**Conclusion: English Only and the Right to Linguistic Self-Defense**

This conclusion turns first to our substantive case against English Only. It then addresses methodology, suggesting a series of lessons emerging from this Article’s joint deployment of economic analysis and rights theory.

Could there be a situation compelling enough to accord a group the right to impose its language or to ask for significant state reinforcement of it? The Quebecois, arguing that French can survive only if it insures that the next generation will learn it, have sought to keep English from being taught in the schools that have a majority French population. Can English Only statutes that demand the suppression of other languages have similar defenses?

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402 One, of course, can judge this imposition as a form of denial because one just as easily can perceive the Spanish language, particularly in the Southwest, as crucial to what it means to be an “American” who lives in that part of the country.

403 Richards, supra note 79, at 355.

404 Id.

405 Not all claims of polyethnic right are this strong. The demand, for example, for bilingual education for Spanish-speaking children in New York City does not include forbidding a language minority to have its language in the schools. The opposite is the case. The demand is instead that the Spanish language be allowed to have a presence in the
George Fletcher, analogizing to the criminal law doctrine of justification, argues that a people has a right to linguistic self-defense in some cases. Recall that, for Fletcher, language and culture have a close causal connection.\textsuperscript{406} Fletcher further argues that given a conflict between two languages over which language should govern, there can be no “neutral” perspective from which to judge which language is better for any culture. He explains: “It is better to think of the struggle to retain a language as an expression of a localized imperative to survive against an external threat. Thus it seems that the principle of self-defense provides a better framework for justifying measures of defense than does the neutral standard of necessity.”\textsuperscript{407}

Fletcher emphasizes historical priority as a key factor in the determination of who should receive this right of self-defense when two peoples and two languages fight for preeminence. Using Kant’s famous example that who got on the plank first can determine who has the right to push the other off,\textsuperscript{408} Fletcher argues that priority in time should be determinate.\textsuperscript{409} In addition, says Fletcher, only a serious and demonstrable challenge to the survival of the language can trigger the right to self-defense.\textsuperscript{410} Finally, Fletcher stipulates three ancillary requirements: first, the defensive measures should be effective; second, they must be reasonably necessary, for that is the cheapest means available for linguistic survival; and third, there must be a sense of proportionality.\textsuperscript{411}

We take seriously the proposition of a right of linguistic self-defense.\textsuperscript{412} But, using Fletcher’s standards, it is crystal clear that such a right cannot justify English Only. No serious threat to the survival of the English language exists because there are and will continue to be high-powered economic incentives for immigrants to learn English. The assimilation process of today’s immigrants, like that of every previous immigrant group, indeed has triggered a Kulturkampf, but not one that threatens the survival of our language. Under the economic theory of language and in light of the emerging role of English as a global lingua franca, the very suggestion of a threat is absurd.

\begin{itemize}
\item \textsuperscript{406} See supra text accompanying note 365.
\item \textsuperscript{407} Fletcher, supra note 31, at 337.
\item \textsuperscript{408} See KANT, supra note 292, at 60-61.
\item \textsuperscript{409} See Fletcher, supra note 31, at 337.
\item \textsuperscript{410} See id.
\item \textsuperscript{411} See id. at 337-38. We note that although Fletcher takes linguistic patriotism very seriously, he still questions whether it ever would be necessary to impose the majority language in all public offices and services. See id. at 337.
\item \textsuperscript{412} We see this right as a group-differentiated right in Kymlicka’s sense, but one that still adheres to individuals.
\end{itemize}
Furthermore, even if a threat caused the issue to be joined, it would not be at all clear that English should have a priority entitlement nationwide. In the Southwest, where most of the Title VII cases have arisen, Spanish was first in time. That Anglos conquered these Spanish-speaking areas and that the Spanish speakers gradually lost their language rights presumably would create an issue under Fletcher’s standard. We would take seriously the proposition that Spanish-speaking people in the Southwest (and Puerto Rico) have this right to linguistic self-defense, although the articulation of that case is beyond this Article’s scope.

Absent a plausible case for a right to linguistic self-defense, no plausible case for English Only mandates arises because they contort the equal dignity of free persons. Indeed, if the meaning of “American” turns on identification with a political culture based on legal recognition of the equal dignity of free persons, then to repudiate English Only is to do something quintessentially American.

Three lessons emerge from this Article’s joint application of economic analysis and rights theory to the field of language rights. First, economic analysis may be ill-equipped to identify morally defensible policy results when one conducts it on a stand-alone basis. This is not because it lacks moral implications, however. To pursue an efficient outcome is to pursue the utilitarian goal of providing the greatest good to the greatest number on the assumption that “greatest wealth” can serve as a valid proxy for “greatest good.” This assumption is defensible in a world of scarcity and suffering. But problems arise if the efficiency calculation comes to contain a broader policy inquiry. For one thing, confronting scarcity and suffering means addressing distributional as well as productivity questions. Problems remain even if we follow the law and economics tradition and put distributional questions to one side. The normative weight of economic analysis varies directly with the certainty of the results it yields; consequently, the results tend to become less and less certain as the economic analysis increases in sophistication. Economic analysis, while calculative, is not a calculus that yields uncontestable states of nature. It yields a multiplicity of possible consequences—complex, contingent results that vary with the factors one includes in the cost assessment.

Consider by way of example some of the economic propositions and results this Article considers. Diversity entails costs, and an efficiency analysis implying a world of complete segregation follows. Yet we also have seen that this result cannot be absolutely right even as a matter of cost analysis, for at some point diversity provides benefits.

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We are left to speculate about the location of a tradeoff point and to make a correspondingly ambiguous message for policy. We also have seen in this Article that the costliness of Title VII enforcement provides only a starting point for discussion of the legitimacy of Title VII. Further analysis may show that the costs fall on a protected class that is manifestly willing to bear them. Similarly, even though costs are a crucial policy concern, the mere focus on the economic costs of linguistic diversity can achieve no more than very little progress toward the articulation of the best policy regarding linguistic diversity. Meanwhile, the contingent nature of economic inquiry makes it possible to smuggle in normative presuppositions that tilt an analysis purveyed as “pure” cost assessment. Our point is not to bar these normative presuppositions. They may be determinative in a world where projections of wealth effects are necessarily contingent. But they need to acquire transparency. Expanding the context in which economic analysis proceeds helps us to see more clearly how fact and value interrelate.

Second, this Article’s joint deployment of economics and ethics teaches a lesson about the bearing of economics on cultural debates. It has both heuristic strengths and limitations. The strength lies in the ability of economics to freshen the hothouse atmosphere of English Only discourse. The universalized, rational economic actor enters a stage on which nativists darkly depict immigrants as “others” and characterize Spanish speech as threatening. By showing Anglos that Latinos/as are doing precisely what Anglos would do if they found themselves in the immigrant situation, the rational actor defuses the threat. Furthermore, by directing Anglo attention away from cultural insecurity and toward cost, economic analysis shows Anglos just how one-sided our Kulturkampf is: English wins in the long run, period. The weakness of economic analysis in this context lies in the fact that the rational economic actor operates free of cultural attachments. Accordingly, it has little to tell us about cultural rights. More generally, utilitarianism does not and cannot provide us with an adequate account of the individuation and multiplicity of persons. To put the rational economic actor in the position of an ideal spectator and legislator is to assess empirical costs without assessing individual, subjective valuations of cultural attachments. Different individuals will value English and Spanish differently. Respect for them in their multiplicity and their individuation means we must recognize and allow for those different valuations. Therefore, ethical evaluation must take individual consequences as well as social consequences into account.

The third lesson directly follows. Economic analysis cannot take the place of moral and political philosophy because reference to their value to others cannot quantify and determine the *worth* of persons. We all have incalculable worth as persons, and therefore we all have *equal* value in a significant sense. A powerful message for legal policy follows: freedom is the key because our worth as persons flows from our capacity to shape an identity through the practice of ethical and moral self-responsibility. The problem, of course, is that no real-world legal system can realize complete freedom for every individual. Cooperation among free persons in societies requires constant freedom-limiting compromises. But we strongly argue that these compromises must be *reasonable*. Economic analysis comes in to assist at this point, describing (and in some cases quantifying) the costs of protecting freedom, which helps to inform our judgment as to what is reasonable. In doing so, economic analysis cannot replace the need for normative standards for treating each individual as a free and equal person.