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Abstract
This article deals the workers who are bilingual and their accompanying compensation on the job. The article covers compensation, classification, Bilingual Hispanic employees required to speak both Spanish and English on the job may, in certain circumstances, be entitled to greater compensation under Title VII of the Civil Rights Act of 1964 than employees who do the same job exclusively in English. It is unlikely, however, that a court will conclude that bilingual Hispanic employees required to speak both Spanish and English are for that reason alone entitled to increased compensation. Yet bilingual Hispanic employees required to use both languages may be able to show that the way they have been assigned or classified by employer violates Title VII.

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Title VII Compensation Issues Affecting Bilingual Hispanic Employees

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Bilingual Hispanic employees required to speak both Spanish and English on the job may, in certain circumstances, be entitled to greater compensation under Title VII of the Civil Rights Act of 1964[1] than employees who do the same job exclusively in English.[2] It is unlikely, however, that a court will conclude that bilingual Hispanic employees required to speak both Spanish and English are for that reason alone entitled to increased compensation. Yet bilingual Hispanic employees required to use both languages may be able to show that the way they have been assigned or classified by their employer violates § 703(a)(2) of Title VII.[3]

COMPENSATION

An employee is not automatically entitled to additional compensation simply because he or she does not perform duties identical to those performed by other employees.[4] The skills required to perform certain

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There is a difference of opinion concerning whether "Latino" or "Hispanic" is the appropriate descriptive term for national origin. The author chose Hispanic after consulting with the Mexican American Legal Defense and Educational Fund ("MALDEF"), the League of United Latin American Citizens ("LULAC"), and numerous individuals involved with national origin issues.

1. 42 U.S.C. §§ 2000e to 2000e-17 (1989) (making it an unlawful employment practice for an employer to either discriminate with respect to hiring, firing, compensation, conditions or privileges of employment or to limit or classify individuals in a way that tends to or does adversely affect employment opportunities on the basis of race, color, religion, gender, or national origin).

2. This discussion will focus on Hispanic employees who are capable of speaking both Spanish and English. It is not intended to suggest that bilingual issues are solely the concern of Hispanics. These issues also affect persons with other national origins.

3. 42 U.S.C. § 2000e-2(a)(2).

4. *See* Spaulding v. University of Wash., 740 F.2d 686, 706-08 (9th Cir. 1983), *cert. denied*, 469 U.S. 1036 (1984).

duties may be so widely available throughout the population that it is not necessary to pay any additional compensation to attract employees willing to perform those duties. The ability to speak Spanish commands increased compensation when an employer needs this skill and the skill is relatively uncommon. If an employer can attract a sufficient number of employees willing and able to speak both Spanish and English without paying any additional compensation, it is doubtful that a court will find a Title VII violation.

Courts have consistently refused to hold employers liable in cases alleging gender-based wage discrimination when disparities could be attributed to market forces. The court in *Christensen v. Iowa*[5] explained that "nothing in the text and history of Title VII suggests that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work."[6] In *AFSCME v. Washington*,[7] the court stated that the value of a particular job to an employer is only one factor influencing rates of compensation.[8] The availability of workers willing to do the job is another consideration. The court in *Briggs v. City of Madison*[9] concluded: "That there may be an abundance of applicants qualified for some jobs and a dearth of skilled applicants for other jobs is not a condition for which a particular employer bears responsibility."[10] The language and analysis from these cases will probably be used to deny a Hispanic employee's compensation claim.

Bilingualism is a distinct skill, and in some circumstances bilingual employees may be required to use this skill when other employees are not subject to the same requirement. In certain locations, however, the ability to speak both Spanish and English is so common that employers will not have to pay additional compensation to attract bilingual employees.[11]

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5. 563 F.2d 353 (8th Cir. 1977).
6. *Id.* at 356.
7. 770 F.2d 1401 (9th Cir. 1985).
8. *Id.* at 1407.
9. 536 F. Supp. 435 (W.D. Wis. 1982).
10. *Id.* at 447.
11. Although bilingual employees may provide an employer increased "flexibility" for purposes of servicing either English or Spanish speaking customers, if an employer does not have to offer higher wages to acquire this flexibility it does not appear that there will be a Title VII violation. This Title VII hypothetical can be distinguished from Equal Pay Act ("EP Act") cases discussing the idea of "flexibility." Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970) was an EP Act case where the court rejected an employer's assertion that male employees' availability to perform additional services justified a higher wage than that paid females in part because the "extent and economic value [of the flexibility] is neither measured

A court will apply a similar analysis to any claim that a bilingual Hispanic employee must be paid more because he or she is exerting greater "effort." Although the Equal Pay Act is not implicated, its regulations develop the concept of job comparability and equality. The term "effort" refers to the physical or mental exertion necessary to perform a job.[12] A bilingual Hispanic employee may claim that he or she should be paid more because switching between English and Spanish requires greater "effort" than merely speaking one language, which is all that other employees are required to speak.[13] If a sufficient number of workers are willing and able to exert this effort and the employer does not have to offer additional compensation to attract these workers, however, there does not appear to be any compensation discrimination.

Bilingual Hispanic employees faced with these hypothetical circumstances can make an argument based upon the "comparable worth" theories asserted unsuccessfully in gender cases.[14] Comparable worth theories assert that a society politically and culturally dominated by men has steered women into certain jobs and set the wages at a depressed level that does not represent the true value of those jobs. Furthermore, supporters of comparable worth analysis argue that an-

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nor determined." *Id.* at 264. Although this language suggests that "flexibility" can justify wage differentials, *Schultz* should not be read to support an argument that certain employees are entitled to have their salary increased to a level higher than that paid to other employees. *Schultz* was an EP Act case addressing the question of whether certain female employees must be paid a salary equal to the salary received by male employees. *Id.* at 261. *Schultz* confirms the principle that if one class of employees offers flexibility to an employer, and this flexibility is in such demand that it commands a premium, an employer is permitted to pay those employees a higher wage than it pays other employees. The employer is not required, however, to pay the employees providing flexibility a higher wage. If an employer can acquire this flexibility at no additional cost, a failure to pay higher compensation would not necessarily violate Title VII. *See id.* at 264.

12. 29 C.F.R. § 1620.16 (1990).

13. The regulations examining "English-Only" rules suggest that some switching between languages occurs quite effortlessly: "It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language." 29 C.F.R. § 1606.7(c) (1990). This does not, however, indicate how difficult it might be to change from the primary language back to the secondary language. The term "bilingual" is somewhat vague and does not reveal degrees of fluency. If English is not a bilingual employee's primary language, and that employee is asked to frequently switch from Spanish to English, even if that employee appears "fluent" in English, substantial effort may be required. *Cf.* SECOND LANGUAGE ACQUISITION RESEARCH: ISSUES AND IMPLICATIONS (William C. Ritchie ed., 1978). Although it may be difficult to quantify the amount of energy and effort required to switch back and forth between languages, if it can be shown that only Hispanic employees are being required to exert substantial additional effort this will support an unlawful classification claim. The next section in the text discusses unlawful classification in greater detail.

14. See AFSCME v. Washington, 770 F.2d 1401, 1406 (9th Cir. 1985); *see also* Lemons v. City and County of Denver, 620 F.2d 228, 229 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977).

alytical techniques exist which permit the determination of the relative value of jobs that involve different levels of skill, effort, or responsibility. Accordingly, the wages in jobs traditionally held by women can and must be raised relative to the wages paid for jobs traditionally held by men.[15]

Bilingual employees can argue that their ability to speak both Spanish and English provides a greater value to an employer than simply the ability to speak English. The only reason an employer does not have to pay higher compensation for this greater value is that, because of unlawful national origin discrimination, the monetary value of this language skill has been artificially depressed. Consequently, a court should order employers to pay a higher wage that recognizes the true value of bilingualism.

One form of comparable worth theory articulated in certain gender cases offers a slightly different argument. In several cases women have argued that long-standing discriminatory practices in job markets have channeled women into a small number of jobs, resulting in an oversupply of workers and correspondingly depressed wages.[16] Thus an employer's apparently neutral reliance upon prevailing wage rates in determining salaries actually transfers the effects of sex discrimination in the marketplace into the employer's own wage policies. A bilingual Hispanic employee could argue that the failure to pay additional compensation for Spanish language ability occurs because Hispanics have been channeled into a limited number of jobs, and that the market for bilingual skills has deteriorated because of oversupply.[17] This argument, however, has not been successful in the gender cases.[18]

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15. American Nurses' Ass'n v. Illinois, 783 F.2d 716, 719 (7th Cir. 1986).

16. *See, e.g., Christensen*, 563 F.2d at 355.

17. If a particular employer assigns all bilingual Hispanic employees to only those positions that require Spanish and English language skills and does not permit any of these employees to assume any other position, one can argue that this employer has created his or her "own" oversupply of Spanish speakers and thus artificially depressed the market value of Spanish language skills. Unlike gender cases such as *Christensen*, these Hispanic employees might not argue that the entire labor market was distorted. Rather, they could focus on the labor supply for this particular employer. If one accepts assumptions underlying the neoclassical labor market model, however, this situation will never occur because bilingual Hispanic employees preferring English-speaking positions will refuse these assignments and seek other employment. Although labor market assumptions that employees have full knowledge of other employment opportunities and complete mobility can be challenged (*see infra* notes 24-26 and accompanying text), these assumptions are more difficult to attack when only one employer in a given market is involved.

18. *See AFSCME*, 770 F.2d at 1406; Briggs v. City of Madison, 536 F. Supp. 435, 447 (W.D. Wis. 1982); *Lemons*, 620 F.2d at 229; *Christensen*, 563 F.2d at 356. *But cf. American Nurses'*, 783 F.2d at 719. *American Nurses'* was a Title VII case involving allegations of gender-based wage discrimination. *Id.* at 718. The court stated that although it could not impose

Yet in one case involving bilingual Hispanic employees, *Perez v. FBI*,[19] the court did refer to comparable worth principles.[20] To justify Spanish-speaking assignments for Hispanic agents, the Federal Bureau of Investigation ("FBI") explained that there was a "critical and unmet need at the Bureau."[21] The court relied on this assertion to conclude that, where Hispanic special agents engaged in supposedly critical Spanish-speaking assignments actually received lower compensation, the "[n]eeds of the Bureau do not justify the disparate monetary valuation of the various skills."[22]

Thus, if an employer justifies an assignment by stating that bilingual skills fulfill a critical and otherwise unmet need, a bilingual employee who is not paid as much as other monolingual employees could cite *Perez*. The discussion of this issue in *Perez*, however, was limited to whether the employer could justify lower compensation for bilingual Hispanic agents.[23] A court may not be as willing to invoke comparable worth principles in support of a claim for compensation greater than that paid other employees. The general rejection of comparable worth principles suggests that arguments modeled on *Perez* will be limited to unusual circumstances.

The best response to an employer's market defense may be that neoclassical labor market assumptions are not valid. The neoclassical model makes several assumptions regarding labor. One assumption is that labor (the supply side) is so mobile that any worker victimized by wage discrimination will resolve the problem by resigning and taking a job with an employer who recognizes the worker's true value. Accordingly, victims of discrimination are at fault because they hold the power to resolve their own problems. They can either resign or recognize their preference for the existing circumstances. The neoclassical model also assumes the existence of numerous employers driven by profit-maxi-

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comparable worth relief even as a remedy for blatant discrimination, this merely meant that it would have to substitute some other less effective remedy. *Id.* at 730. The court explained that it would be premature to conclude that there was no worthwhile remedy for the type of intentional discrimination that consists of overpaying workers in predominantly male jobs simply because those workers are male. *Id.* Proof of this causality is essential, however, and cannot be inferred merely from the results of a comparative worth study. *Id.* The court concluded that plaintiffs had a "tough row to hoe" and could lose on summary judgment if discovery revealed no more than unsupported assertions or stale and isolated incidents. *Id.*

19. 47 Fair Empl. Prac. Cas. (BNA) 1782 (W.D. Tex. 1988).

20. *Id.* at 1802.

21. *Id.*

22. *Id.* At least one Hispanic attorney wanting to use his legal skills was told that his Spanish language skills fulfilled a greater need for the Bureau. *Id.* n.45.

23. *Id.* at 1797.

mization (the demand side). Furthermore, the model assumes employers and employees have approximately equal bargaining power.[24]

These assumptions may not withstand close scrutiny. Rarely do employees have bargaining power equal to that possessed by the employer, full information, and unencumbered mobility. Additionally, if there are few employers in a market, those employers will not be controlled by competitive labor markets but may instead have the power to lower labor costs by decreasing wages.

If the assumptions underlying the neoclassical model are discredited, then a court may not be as willing to forgive an employer's failure to pay bilingual employees a premium wage. Because many jobs have historically been closed to Hispanics, and because actual discrimination still exists, Hispanics are not completely mobile. There may be a very real reluctance to leave one job and risk the future in an unknown environment that may be equally, if not more, discriminatory. In addition, Hispanics face limitations on mobility common to all workers, such as family ties or home ownership. Although demographic information reveals that certain localities have large Hispanic populations,[25] making it easier to identify markets requiring bilingual skills, information and mobility restrictions do still exist. If there is an excess supply of bilingual employees in one location who do not possess both full knowledge about other jobs and complete mobility, the neoclassical model cannot properly value the ability to speak both Spanish and English. Courts have not, however, adopted this analysis.[26] Instead, when bilingual skills are so common that an employer does not have to pay a premium to hire bilingual employees, courts will hold that the employer acted lawfully.

CLASSIFICATION

Section 703(a)(2) of Title VII will protect bilingual employees under certain circumstances. The section states that:

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24. *See* M. Neil Browne & Andrea M. Giampetro-Meyer, *The Overriding Importance of Market Characteristics for the Selection of Pay Equity Strategies: The Relative Efficacy of Collective Bargaining and Litigation in the Nursing Industry*, 11 INDUS. REL. L.J. 414, 421-23 (1989).

25. "As of March 1989, 89 percent of Hispanics lived in nine states [tables omitted]. Three States alone — California, Texas, and New York — were home to 65 percent of the Hispanic population." BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Series P-20, No. 444 (March 1989) at 2.

26. Additionally, even if a court agrees that employees are not mobile and do not have full information, it may conclude that these limitations are inherent in the normal operation of the market and that employers should not be held responsible. *See* International Union, UAW v. Michigan, 886 F.2d 766, 769 (6th Cir. 1989); *see also* American Nurses' Ass'n v. Illinois, 783 F.2d 716, 719-20 (7th Cir. 1986). Courts may also maintain that they are not equipped or authorized to compute the value of work. *American Nurses'*, 783 F.2d at 720.

> [i]t shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[27]

Our hypothetical could involve either disparate treatment or disparate impact discrimination. If an employer only requires bilingual Hispanic employees to speak Spanish and does not inquire as to or ignores the Spanish language ability of employees having other national origins, the workplace will be unlawfully segregated as a result of disparate treatment. Even if compensation and promotion opportunities are comparable throughout the work force, there cannot be any justification for such action. This classification necessarily results in a work place tainted by national origin discrimination.[28] If, on the other hand, the employer requires all Spanish-speaking employees to speak Spanish regardless of national origin, there may still be an unlawful disparate impact.

First, consider the disparate treatment analysis. In *Perez v. FBI*,[29] the FBI assumed that Hispanics were bilingual and only tested Hispanics for Spanish language proficiency.[30] The tests, however, were often cursory and there was no genuine attempt to determine fluency.[31] This practice was held to violate Title VII.[32]

The court in *Perez* reached several conclusions. It stated that Title VII may not prevent the FBI from assigning Hispanic special agents to

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27. 42 U.S.C. § 2000e-2(a)(2).

28. *See* James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977) (stating that broad injunctive relief is appropriate to eliminate an employer's system of total segregation, which included the entrances to the plant, employee identification numbers, the cafeteria, drinking fountains and locker rooms), *cert. denied*, 434 U.S. 1034 (1978). If customers are segregated and assigned to employees based upon national origin or race instead of language ability, employees may have a Title VII cause of action. In Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1972), the court examined a charge stating that the employer was "segregating the patients." *Id.* at 236. The court did not interpret this charge as alleging that the plaintiff was required or permitted to attend only to patients of a certain ethnic origin, but rather that the employer treated patients differently depending upon national origin. *Id.* at 237. The court stated that patient segregation could be so demeaning that it would constitute an invidious condition of employment. *Id.* at 240. The court concluded that an employee's psychological, as well as economic, environment is statutorily entitled to protection from employer abuse, and the phrase "terms, conditions, or privileges of employment" in § 703 is an expansive concept that prohibits practices resulting in an ethnically or racially discriminatory working environment. *Id.* at 238.

29. 47 Fair Empl Prac. Cas. (BNA) 1782 (W.D. Tex. 1988).

30. *Id.* at 1792-93.

31. *Id.* at 1793.

32. *Id.* at 1796, 1811.

undercover work in disproportionate numbers.[33] The court explained that it would not challenge the professional investigatory assessment made by Bureau officers that a particular person's appearance will make him or her more effective in an undercover assignment.[34] Additionally, the court added that "[t]he informal or formal expectation of the Bureau that Hispanic Spanish-speaking agents will assist a fellow agent in any manner, itself, does not violate Title VII."[35]

However, the *Perez* court also declared that an employer can only make such transfers and require such bilingual assistance if Spanish-speaking employees do not suffer uncompensated burdens concerning conditions of employment or promotional opportunities.[36] Because the FBI did not credit the Hispanic undercover agents' contribution to the FBI's mission, Title VII was violated.[37] There may be situations where only bilingual Hispanic workers, but not Spanish-speaking workers having other national origins, are asked to provide assistance to employees who do not speak Spanish. If the employees providing assistance do not receive credit for the time lost assisting other employees, or lose promotional opportunities, this would appear to be a clear Title VII disparate treatment violation.

Even if an employer requires all Spanish and English speaking employees to use their language skills, this requirement may have an unlawful disparate impact. If an employer assigns all Spanish-speaking employees to a specific position and then prevents those employees from taking any other assignment, a disproportionate number of Hispanic employees will be kept out of positions they prefer.

Although *Perez* is a disparate treatment case, the court discussed business necessity,[38] a concept that ordinarily arises only after a plaintiff has established a prima facie disparate impact case.[39] The FBI presumed that all Hispanic agents were bilingual, selected only Spanish surnamed agents for Spanish language tests, and did not allow Hispanics to "opt-out" of Spanish language duty (while relieving Anglos of this duty when it would enhance promotional opportunities).[40] If the requirement to use the Spanish language had been applied in the same manner to

33. *Id.* at 1798.

34. *Id.*

35. *Id.* at 1797 n.33.

36. *Id.* at 1797-98.

37. For instance, when a bilingual Hispanic employee assisted another employee who did not speak Spanish, the employee being assisted received credit for the case. There was not any mechanism for recognizing or rewarding the time and effort contributed by the Hispanic agent. *Id.* at 1797.

38. *Id.* at 1795-96.

39. *See* Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 658-60 (1989); Griggs v. Duke Power, 401 U.S. 424, 430-31 (1971).

40. Perez v FBI, 47 Fair Empl. Prac. Cas. (BNA) 1782, 1793 (W.D. Tex. 1988).

all bilingual employees and this requirement had a disparate impact, these facts would fit the disparate impact model, and a defendant could argue business necessity. The FBI in *Perez* apparently articulated its "business necessity" as the legitimate, nondiscriminatory reason for its actions in order to satisfy its burden under the disparate treatment model.[41] The Bureau asserted that requiring agents to utilize Spanish language skills was necessary to the mission of the FBI because the national drug problem caught the Bureau with a severe shortage of agents with Spanish language skills.[42]

Given these unique facts, the court stated that business necessity justified a disproportionately high transfer rate of bilingual Hispanic Special Agents to wherever they are needed.[43] This was only permissible, however, if the transfer did not adversely affect promotional opportunities or result in uncompensated additional responsibility.[44]

This conclusion must be placed in context. The court described the FBI as a paramilitary organization responsible for enforcing the laws of the land and protecting United States from foreign enemies.[45] It also is a place where orders must be given and obeyed.[46] A court may not be as willing to accept an employer's claim of business necessity under other circumstances. Most employers do not have the "paramilitary" characteristics of the FBI, nor do they have a business necessity comparable to the FBI's urgent need to halt the rapidly increasing influx of illegal drugs from Central and South America.

If a court determines that an employer's need, that being its "business necessity," for Spanish language skills rebuts a prima facie disparate impact case,[47] then Hispanic employees disproportionately affected will have an opportunity to show a less discriminatory alternative.[48] Simply requiring an employer to permit transfers within the workforce would be a reasonable alternative. If there are a sufficient number of Spanish-speaking persons in the labor market to assume the jobs that are vacated because of transfers, this should not involve any additional cost.[49] If there are an insufficient number of Spanish-speaking persons

41. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

42. *Perez*, 47 Fair Empl. Prac. Cas. (BNA) at 1795.

43. *Id.* at 1798.

44. *Id.*

45. *Id.* at 1810.

46. *Id.*

47. Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989), describes the employer's burden of proof on the issue of business necessity as merely one of production rather than persuasion. *Id.* at 659-60.

48. *Id.* at 660.

49. *Wards Cove* states that any alternative must be equally effective and that cost is a relevant consideration. *Id.* at 661.

in the market, the employer may be required to pay a premium to acquire this skill. Although the employer's cost may increase, this solution would allow supply and demand market forces to operate more freely. A plaintiff can make a laissez-faire argument similar to the argument used against plaintiffs in gender-based compensation discrimination cases. If a court has such great respect for the neoclassical labor market model that it is not willing to interfere when asked to raise the wages of bilingual employees,[50] that same court should not allow an employer to distort the model by forcing certain employees into only those positions that require Spanish.

Again, it will be the unusual case where an employer's business needs are so urgent and the organization is so structured that a business necessity argument will rebut the Hispanic employees' prima facie disparate impact case. Thus the issue of what may be a less discriminatory alternative may not be reached. Because the United States Supreme Court in *Wards Cove Packing Co. v. Atonio*[51] reduced the defendant's burden of proof from one of persuasion to one of production, however, the less discriminatory alternative stage of the disparate impact model cannot be ignored.

CONCLUSION

Bilingual Hispanic employees may be required to use both Spanish and English language skills to complete assignments otherwise identical to assignments given to employees who cannot speak Spanish. If this is the only difference between the assignments, it is unlikely that a court will find a Title VII violation. If an employer requires only bilingual Hispanic employees and not other bilingual employees to use both languages, however, the employer has classified employees in a manner that is unlawful. Furthermore, if an employer requires all Spanish-speaking employees to serve in certain positions and prevents those employees from taking any other job, this policy may have an unlawful disparate impact.

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50. *See supra* notes 5-13, 26 and accompanying text.
51. 490 U.S. 642 (1989).