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RECOGNIZING A HUMAN RIGHT TO LANGUAGE IN THE UNITED STATES

KATHRYN J. ZOGLIN*

I. INTRODUCTION	15
II. LANGUAGE RIGHTS IN THE UNITED STATES: CURRENT APPROACHES TO "ENGLISH ONLY" LEGISLATION	16
A. <i>California's English Only Amendment</i>	16
B. <i>Traditional Constitutional Analysis</i>	18
III. INTERNATIONAL HUMAN RIGHTS LAW AND LANGUAGE RIGHTS	24
A. <i>Language as a Fundamental Right</i>	25
B. <i>What Is a Linguistic Minority?</i>	26
1. Definition of a Minority	27
2. Existence of Linguistic and Other Minorities	28
a. <i>Non-Dominant Position</i>	29
b. <i>Legal Status</i>	30
c. <i>Group Identity</i>	31
d. <i>Indigenous Populations</i>	31
e. <i>Individual versus Collective Rights</i>	33
C. <i>Application of Language Rights</i>	33
1. Language and Education	34
2. Language and Culture	35
IV. CONCLUSION	36

I. INTRODUCTION

With the current trend of enacting "English Only" legislation in the United States, the rights accorded linguistic minorities are receiving increasing attention. This essay will briefly explore the bases for, and the implication of, language rights under international human rights law. International human rights law represents a reasonably comprehensive body of jurisprudence that is unfamiliar to the vast majority of lawyers in the United States. American law offers an impressive range of protections for the individual but has its limitations with respect to the rights of linguistic minorities. International human rights law, however, offers a more enlightened and flexible approach to adjudicating language rights that is generally not discussed under traditional American constitutional doctrine.

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II. LANGUAGE RIGHTS IN THE UNITED STATES: CURRENT APPROACHES TO "ENGLISH ONLY" LEGISLATION

A. *California's English Only Amendment*

The United States is experiencing a growing concern, occasionally bordering on hysteria, over what many view as the erosion of the use of the English language.¹ This concern has prompted a number of states to enact legislation affirming the primacy of English (English Only legislation).² California is a prominent example. This state has long been a destination for refugees, agrarian workers, and immigrants from areas including Mexico, Central America, and Asia. Many non-English speakers consequently live within the state's borders. Principal linguistic minorities in California include Hispanics, Chinese, and Vietnamese. As these examples demonstrate, language and ethnic minority groups frequently coincide. California voters recently passed an initiative which amended the state constitution to declare English the state's official language.³ Its stated purpose is to "preserve, protect and strengthen" the English language.⁴

California's English Only amendment requires that the legislature "take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced."⁵ No law which "diminishes or ignores the role of English as the common language" may be passed.⁶ The amendment is "not to supercede any of the rights guaranteed" by the state constitution.⁷ Private individuals are specifically permitted to bring suit against

¹ It should be noted that languages other than English (including German and Spanish) historically have been granted official status in various regions of the United States. The non-English languages were often those of older, more established immigrants, as opposed to more recent settlers. For an historical overview of status of various languages in the United States, see Note, *Language and Education Rights in the United States and Canada*, 36 INT'L & COMP. L.Q. 903 (1987); Note, *Language Minority Voting Rights and the English Language Amendment*, 14 HASTINGS CONST. L.Q. 657 (1987).

² Arkansas, California, Illinois, Indiana, Kentucky, Nebraska, Tennessee, and Virginia have adopted such legislation.

³ Proposition 63, commonly known as the "English Only" amendment, was passed in November 1986, codified at CAL. CONST. art. III, section 6.

⁴ CAL. CONST. art. III, section 6.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

the state to enforce the amendment.⁸ At this writing, no implementing legislation has been enacted under California's English Only amendment. Most vulnerable to attack under this amendment are bilingual public education, multilingual ballots, multilingual emergency services and information concerning public benefits.

Courts have not considered whether California's English Only amendment violates the equal protection clause of the U.S. Constitution's fourteenth amendment (equal protection clause). In *Gutierrez v. Municipal Court of the South-East Judicial District*, a Los Angeles Municipal Court promulgated a rule requiring court employees to speak only English in court offices, unless the employees were translating for the public or on a lunch break.⁹ Gutierrez, a bilingual Hispanic-American employed as deputy court clerk, challenged this rule. One of her duties as a clerk was to translate for the Spanish-speaking public.

While the Ninth Circuit Court of Appeals in *Gutierrez* discussed the California English Only amendment, the court did not reach the amendment's validity under the equal protection clause. The Ninth Circuit rejected the appellant's argument that the Los Angeles Court's rule was required by California's English Only amendment. First, the court reasoned, the California Constitution simply asserts that English is the state's official language and does not require that English be the only language spoken.¹⁰ The court rejected the contention that all government communications be in English since the official use of Spanish was permitted (and sometimes mandated) for official business.¹¹ In addition, the Ninth Circuit held that even though an individual may be bilingual, "his primary language remains an important link to his ethnic culture and identity."¹² While *Gutierrez* contains helpful reasoning concerning the importance of language to group identity, the decision sheds no light on equal protection issues arising out of English Only legislation.

⁸ *Id.*

⁹ *Gutierrez v. Municipal Court of the South-East Judicial District*, 838 F.2d 1031 (9th Cir. 1988).

¹⁰ *Id.* at 1043-44.

¹¹ *Id.* at 1044.

¹² *Id.* at 1039. It should be noted that the court's discussion of the significance of language and national unity exemplifies a relatively enlightened perspective which recognizes that language and national origin are interrelated. The court remarks that, "The multicultural character of American society has a long and venerable history and is widely recognized as one of the United States' greatest strengths." *Id.* at 1038-39 (citation omitted).

B. *Traditional Constitutional Analysis*

Several courts have considered the constitutionality of language policies in contexts outside of California's amendment. For example, courts have considered the validity of bilingual education programs and the availability on the basis of language of a variety of government services.¹³ Challenges to those programs have relied either on federal statutes or on the equal protection clause.

The outcome of equal protection challenges depends largely on the determination of which tier of constitutional analysis is most appropriate to the group in question. The three possible tiers are strict scrutiny, intermediate scrutiny, and the rational basis test. To apply strict scrutiny, the inequality must either involve a "suspect classification" or a "fundamental right." The Supreme Court has defined suspect classifications very narrowly and allowed only two types of classes under this category: racial minorities and certain classes based on alienage. To merit strict scrutiny, the group must have a history of unequal treatment and disenfranchisement.¹⁴

A fundamental right is one "implicitly" or "explicitly" found in the Constitution.¹⁵ Fundamental rights specifically mentioned in the Constitution include the right to free speech and to petition the government. "Implicit" fundamental rights include the right to vote, the right to privacy and the right to travel.¹⁶ When strict scrutiny is applied, the statute in question is rarely upheld: the law must be precisely tailored to serve a compelling government interest.¹⁷ The Supreme Court generally is reluctant to expand the category of fundamental rights.

If the discrimination alleged in an equal protection claim does not involve a fundamental right or a suspect classification, courts will apply a lower level of scrutiny. An intermediate standard of scrutiny is applied when a group is a "quasi-suspect" class or an interest is important, but not fundamental. Under this middle tier,

¹³ See B. Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885 (1986); Note, *Official English': Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345 (1987); *Language Minority Voting Rights and the English Language Amendment*, *Supra* note 1; see also Comment, *Cultural Pluralism*, 13 HARV. C.R.-C.L. L. REV. 133 (1978); Note, *The Proposed English Language Amendment: Shield or Sword?* 3 YALE L. & POL'Y REV. 519 (1985).

¹⁴ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28, 93 S. Ct. 1278, 36 L.Ed.2d 16 (1973).

¹⁵ *Id.* at 33.

¹⁶ See *id.* at 35-36; see also *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969).

¹⁷ *Plyler v. Doe*, 457 U.S. 202, 217 (1982); see also *Shapiro*, 394 U.S. at 638.

the state must demonstrate that the statute is substantially related to a significant government interest.¹⁸ Finally, the broadest standard of analysis is the rational basis test. The rational basis test will find state action producing discriminatory results to be constitutionally permissible if the action bears a rational relationship to a legitimate or reasonable state purpose.¹⁹ In order to strike down a law on the basis of racial discrimination, discriminatory intent or purpose must be established. This requirement of intent, however, is often difficult to satisfy.²⁰

To date, linguistic minorities have been accorded neither suspect class status nor quasi-suspect class status for the purpose of affirmative entitlements.²¹ The discriminatory intent requirement compounds the difficulty of confronting discrimination against linguistic minorities under the equal protection clause. Although equal protection holdings concerning linguistic minorities seem to apply a rational basis test, there is room to argue that the courts should apply heightened scrutiny to cases involving linguistic minority rights.²²

Courts have reviewed a variety of English Only policies. In the private employment context, courts almost uniformly refuse to grant suspect classification status to linguistic minority challenges and have held that English Only rules do not result in discrimination. *Garcia v. Gloor*, for example, involved a bilingual Mexican-American employee, born in Mexico, who challenged his employer's rule that employees in sales positions were to speak only English on the job.²³ The rule did not apply to those who did not speak English or to conversations during breaks. The United States Court of Appeals for the Fifth Circuit held that the policy was implemented

¹⁸ *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

¹⁹ See *Rodriguez*, 411 U.S. at 40; see also *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

²⁰ *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). See generally *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973).

²¹ See e.g., *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) (rejected challenge by Hispanics to Social Security notices which were in English only), *cert. denied*, 466 U.S. 929 (1984); *Guadalupe Organization v. Tempe Elementary School District No 3*, 587 F.2d 1022, 1927 (9th Cir. 1978) (rejected claim of Mexican-American and Native American (Yaqui) school children to a constitutional right to bicultural, bilingual education); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975) (rejected challenge to civil service exams offered in English only); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (denied plaintiff's right to interviewers and notices concerning unemployment insurance in Spanish).

²² See Piatt, *supra* note 13; *Official English: Federal Limits on Efforts to Curtail Bilingual Services in the States*, *supra* note 13.

²³ *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

for non-discriminatory business reasons. The employer's rule was not discriminatory as applied to Garcia because he could readily comply with the policy; non-compliance was a matter of choice for him.²⁴ Contrasting Garcia's situation with that of someone who spoke only Spanish, the Fifth Circuit suggested: "To a person who speaks only one tongue, or a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic, like skin color, sex, or place of birth."²⁵

Public employment cases seem to produce similar results. In *Frontera v. Sindell*, Frontera, a Spanish-speaking carpenter applying for a permanent job with a municipal government, claimed that he failed the civil service examination because it was administered in English.²⁶ He had been working for the municipality on a part-time basis. The parties stipulated that he was skilled as a carpenter and that his language abilities did not interfere with his ability to perform his job. Frontera requested in advance that the exam be administered to him in Spanish. Although a commission agreed to translate it for him if possible, the test was given in English. The United States Court of Appeals for the Sixth Circuit held that the fourteenth amendment does not require civil service exams to be conducted in Spanish for Spanish-speaking individuals.²⁷

The Sixth Circuit held in *Frontera* that the lower court should have applied the rational basis test rather than strict scrutiny, since no suspect nationality or race was involved.²⁸ Holding that the administration of the test in English did not discriminate against the plaintiff on the basis of his nationality, the Sixth Circuit noted: "Frontera did not have a constitutional right to public employment."²⁹ The court justified its decision by reasoning that it would be too burdensome on the municipality's limited financial resources to require it to provide translations for all nationalities.³⁰ The court

²⁴ *Garcia*, 618 F.2d at 270. In *Jurado v. Eleven-Fifty Corporation*, 813 F.2d 1406 (9th Cir. 1987), a bilingual disc jockey alleged that his civil rights were violated on the basis of race and national origin when he was fired for refusing to speak English only on his radio program. The radio station had adopted a bilingual format for Jurado's show to improve the program's ratings, but instead the ratings dropped. The station subsequently reverted to the original format. The Court held that in this instance the rule was not racially motivated; rather, it represented a valid business decision which was enforced against an employee who was able to comply, as was the case in *Garcia*.

²⁵ *Garcia*, 618 F.2d at 270.

²⁶ *Frontera*, 522 F.2d 1215.

²⁷ *Id.* at 1218.

²⁸ *Id.* at 1219.

²⁹ *Id.* at 1220.

³⁰ *Id.* at 1219.

also added that English is the national language of the United States and stated that there is a national interest in having English as a common language.³¹

Other cases hold that the relationship between public benefits and language rights generally does not warrant heightened scrutiny. In *Soberal-Perez v. Heckler*, for example, the plaintiffs were Hispanics who spoke only limited English.³² They contended that letters denying them their claims for supplementary social security and disability benefits written only in English violated their fourteenth amendment rights. These letters included notices of the plaintiffs' rights to appeal and to obtain a hearing. The United States Court of Appeals for the Second Circuit rejected the plaintiffs' contentions, remarking that social security benefits are not fundamental entitlements.³³ The court reasoned that although Hispanics may be a suspect class for equal protection analysis, the *Soberal-Perez* plaintiffs failed to allege improper classification as an ethnic group.³⁴ The Second Circuit stated: "A classification is implicitly made, but it is on the basis of language, i.e., English-speaking versus non-English-speaking individuals, and not on the basis of race, religion, or national origin. Language, by itself, does not identify members of a suspect class."³⁵ The court further explained that while facially neutral statutes or conduct may violate the fourteenth amendment, there must be a showing of discriminatory intent against a suspect class. The court found that the *Soberal-Perez* plaintiffs made no such showing.³⁶

In *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, public elementary school children of Mexican-American and Native American (Yaqui) descent brought suit to compel their school district to provide bilingual and bicultural education for the non-English-speaking students.³⁷ The United States Court of Appeals for the Ninth Circuit applied the rational basis test to the claim.³⁸ Citing *San Antonio Independent School District v. Rodriguez*,³⁹ the Ninth Circuit reasoned that while education is an important interest, it is

³¹ *Id.* at 1220.

³² *Soberal-Perez*, 717 F.2d 36.

³³ *Id.* at 41.

³⁴ *Id.*

³⁵ *Id.* (citation omitted).

³⁶ *Id.* at 42.

³⁷ 587 F.2d 1022 (9th Cir. 1978).

³⁸ *Guadalupe*, 587 F.2d at 1026.

³⁹ 411 U.S. 1, 35 (1973).

not a fundamental right guaranteed by the Constitution.⁴⁰ The *Guadalupe* court concluded that the equal protection clause does not require the state to provide bicultural or bilingual education.⁴¹ The court further held that the school district met its constitutional obligations by adopting measures “to cure existing language deficiencies of non-English-speaking students.”⁴² According to the *Guadalupe* court, the school’s program did not “fail ‘to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of rights of speech and of full participation in the political process.’”⁴³ The court asserted that linguistic and cultural diversity, despite their occasional advantages, are actually detrimental to a nation.⁴⁴ It nonetheless concluded that bilingual and bicultural education are issues to be decided on a local level and are neither mandated nor prohibited by the Constitution.⁴⁵

Some support for heightened scrutiny of linguistic minority rights issues is nonetheless found in a recent Ninth Circuit case involving voting procedures. In *Olagues v. Russoniello*, the United States Attorney’s office conducted an investigation of possible voter fraud regarding foreign-born voters who requested bilingual ballots.⁴⁶ The voters wished to have such ballots provided in counties where other voting materials were already available in Spanish and Chinese pursuant to federal law.⁴⁷ The Ninth Circuit ruled that the U.S. Attorney’s investigation specifically targeted Chinese and Hispanic immigrants and held that the district court should have accorded the plaintiffs suspect classification.⁴⁸ The Court of Appeals reasoned that in passing legislation mandating bilingual ballots, Congress recognized that discrimination against linguistic minorities

⁴⁰ *Guadalupe*, 587 F.2d at 1026.

⁴¹ *Id.* at 1027.

⁴² *Id.* at 1026–27.

⁴³ *Id.* at 1027.

⁴⁴ *Id.* The court stated:

Linguistic and cultural diversity within the nation-state, whatever may be its advantages from time to time, can restrict the scope of the fundamental compact. Diversity limits unity. Effective action by the nation-state rises to its peak of strength only when it is in response to aspirations unreservedly shared by each constituent cultural and language group. As affection which a culture or group bears toward a particular aspiration abates, and as the scope of sharing diminishes, the strength of the nation-state’s government wanes.

Id.

⁴⁵ *Id.*

⁴⁶ *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986).

⁴⁷ *Id.*

⁴⁸ *Id.* at 1521.

exists.⁴⁹ The court added that, "an individual's primary language skill generally flows from his or her national origin."⁵⁰ The court noted, however, that while immutability may indicate suspect classification, it is not determinative.⁵¹

The Ninth Circuit distinguished *Olagues* from cases denying suspect classification to linguistic minorities by stating that the plaintiffs in those cases sought only to establish classifications on the basis of an individual's ability to speak English, which is a constitutionally neutral attribute.⁵² The court reasoned that the *Olagues* plaintiffs, by contrast, alleged a more specific, non-neutral classification of Chinese-speaking and Spanish-speaking immigrants.⁵³ The Court of Appeals stated: "while a non-English-speaking classification is facially neutral with respect to ethnic group classification, the classification challenged here is not, because for all practical purposes, it is a classification based on race and national origin."⁵⁴ The court concluded: "Therefore, we hold that the three characteristics, i.e., foreign-born voter, recently-registered voter, and bilingual ballot voter, taken together in the instant case form a class that has the traditional indicia of a suspect classification based on race and national origin."⁵⁵

The bases of courts' reasoning in cases addressing the rights of linguistic minorities are not always evident. It appears, however, that courts examine the extent to which these cases also involve fundamental constitutional rights in order to determine what level of scrutiny to apply. Courts seem least concerned with English Only rules in the private business context, as illustrated in *Garcia*. Courts similarly recognize no fundamental constitutional right to public employment and benefits, leading the *Frontera* and *Soberal-Perez* courts to deny heightened scrutiny to linguistic minority rights. While bilingual education appears to receive a closer examination in *Guadalupe*, education is not a fundamental right and it consequently does not receive strict scrutiny. Courts seem to accord heightened protection to minority language groups only when a fundamental right, such as the right to vote in *Olagues*, is also at stake. If a fundamental right is at stake, however, strict scrutiny is

⁴⁹ *Id.* at 1520.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See id.* at 1521.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

independently triggered. In sum, current U.S. constitutional analysis does not accord strict scrutiny to state action affecting linguistic minorities.

While traditional fourteenth amendment analysis has often been used to combat inequalities and to protect minority interests in the United States, its application in the context of linguistic minorities is limited. This limitation is caused in part by the relatively inflexible nature of the labels and concepts upon which equal protection analysis relies. Courts have applied these inflexible standards because traditional doctrine dictates that fourteenth amendment issues be examined under the rubric of tiers of scrutiny. Reliance solely on such a mechanically applied legal doctrine, however, obscures and diminishes important underlying concerns.

Language issues are of great importance to intra-societal communication and to the identity of each individual within a society. Recent English Only developments jeopardize the ability of non-English-speaking citizens and residents of the United States to gain access to basic governmental services such as education, welfare, emergency medical services, and voting procedures. Given the low economic status of many members of linguistic minority groups and their consequent reliance upon government services, official language policies will inevitably cause some individuals to suffer great hardship. Recognition of increased protections for linguistic minorities can significantly enhance the ability of these minorities to maintain their various cultural heritages. A group's cultural and linguistic identity may be seen as important not only to the individuals directly concerned, but also to the cultural heritage of the entire population.⁵⁶

III. INTERNATIONAL HUMAN RIGHTS LAW AND LANGUAGE RIGHTS

International human rights instruments including the Universal Declaration of Human Rights (Universal Declaration),⁵⁷ the International Covenant on Economic, Social and Cultural Rights (Covenant on Economic, Social and Cultural Rights),⁵⁸ and the International Covenant on Civil and Political Rights (Covenant on

⁵⁶ Piatt, *supra* note 13; McDougall, Lasswell & Chen, *Freedom from Discrimination in Choice of Language and International Human Rights*, SO. ILL. U. L.J. (1976); *Cultural Pluralism*, *supra* note 13.

⁵⁷ Adopted and proclaimed by G.A. Res. 217 A (III) of 10 Dec. 1948.

⁵⁸ Adopted and opened for signature, ratification and accession by G.A. Res. 2200 A (XXI) of 16 Dec. 1966. Article 2(2) contains its non-discrimination clause.

Civil and Political Rights)⁵⁹ emphasize a range of fundamental values against which the validity of measures such as California's English Only amendment can be assessed. While in some respects the international instruments reflect traditional American conceptions of rights, they also introduce conceptual elements that are absent from the comparatively limited frame of reference of constitutional discourse in the United States.

Many human rights instruments were written in the aftermath of the two world wars. During this time, national borders were dramatically re-drawn and the world sought to prevent a recurrence of the wholesale slaughter of the European Jewish population during World War II. Protecting existing cultures and minorities was consequently of great general concern. Other treaties recognizing human rights were written in the 1960's, during the period of decolonization, when cultural imperialism (including the colonizing powers' imposition of their language on indigenous populations) was widely condemned. Given these contexts, it is not surprising that international human rights instruments reflect broader concerns, especially with respect to cultural pluralism, than those enshrined in the United States Constitution. While the United States is proud of its history of pluralism, American legal discourse nevertheless stresses the concept of a homogenous, non-discriminatory society of individuals, while minimizing the rights enjoyed by sub-societal groups such as linguistic minorities.

A. *Language as a Fundamental Right*

Unlike the U.S. Constitution the principal human rights instruments include language as a classification equally as fundamental as race, religion, and gender in their "non-discrimination clauses." These clauses are the functional equivalents of the fourteenth amendment to the United States Constitution. The Universal Declaration, for example, states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁶⁰ Since it is a basic rule of construction that different clauses of an instrument are read together, no right provided for in these human rights agreements consequently may be denied on the basis

⁵⁹ Universal Declaration of Human Rights, *supra* note 57, Article 2.

⁶⁰ *Id.*

of language. Other provisions similarly recognize language as a fundamental right, such as Article 26 of the Covenant on Civil and Political Rights:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or other birth status.⁶¹

By considering language rights as fundamental, these human rights instruments could be understood, in United States constitutional terms, to define linguistic minorities as a suspect class.⁶²

Language rights nonetheless raise a range of complicated issues in this context. The principle of non-discrimination is basic to American constitutional law and to international human rights law. In a pluralistic society, however, the notion that individuals are entitled to equal treatment is complicated by the fact that certain minority groups may legitimately claim that they are entitled to differential treatment in order to preserve their collective identity. While differential treatment, such as education in a minority language, may satisfy significant needs of the group, it may violate the principle of non-discrimination.⁶³ The tension between these potentially conflicting concerns may be difficult to resolve, depending on factors unique to each situation.⁶⁴

B. *What Is a Linguistic Minority?*

Article 27 of the Covenant on Civil and Political Rights (Article 27) specifically addresses the rights of linguistic minorities. Article 27 provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their

⁶¹ Covenant on Civil and Political Rights, *supra* note 58, Article 26.

⁶² In addition to these provisions, the United Nations Commission on Human Rights has established an open-ended working group to consider the drafting of a Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities. See U.N. Doc. E/CN.4/1987/32 (1987) and E/CN.4/1986/43 (1986). Since this Declaration is currently incomplete and in draft form, the discussion will focus on the Covenants.

⁶³ See V. VAN DYKE, HUMAN RIGHTS, ETHNICITY AND DISCRIMINATION (1985); *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (which prohibits separate but equal facilities).

⁶⁴ VAN DYKE, *supra* note 63, at 50. See generally *Cultural Pluralism*, *supra* note 13.

group to enjoy their own culture, to profess and practice their own religion, or to use their own language.”⁶⁵ While this provision affirms the existence and rights of linguistic minorities, which are not acknowledged under United States domestic law, it leaves open the definition of linguistic minorities.

1. Definition of a Minority

The United Nations has long wrestled with the meaning of the term “minority” and has yet to settle on a specific definition. In fact, the Commission on Human Rights did not define the term before it established the Sub-Commission on the Protection of Minorities and Prevention of Discrimination (Sub-Commission).⁶⁶ In the 1950’s, the Sub-Commission made several unsuccessful attempts to define a minority, but the Commission on Human Rights never accepted any of the proposed definitions.⁶⁷

In 1971, the Sub-Commission appointed Francesco Capotorti as Special Rapporteur to examine Article 27 in detail.⁶⁸ In his study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities (Capotorti study), Capotorti provided the following definition of a minority:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.⁶⁹

The Capotorti study is comprehensive and detailed, but no action was taken to endorse this proposed definition.

In 1984, the Commission on Human Rights requested that the Sub-Commission define a minority.⁷⁰ Special Rapporteur Jules Deschenes consequently examined the question again and responded with a report to the Sub-Commission entitled “Proposal

⁶⁵ Covenant on Civil and Political Rights, *supra* note 58, Article 27.

⁶⁶ Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, by Special Rapporteur Francesco Capotorti [hereinafter Capotorti], U.N. Doc. E/CN.4/Sub.2/384/Rev. 1, para. 561.

⁶⁷ *United Nations Action in the Field of Human Rights* at 211, U.N. Doc. ST/HR/2/Rev. 2, U.N. Sales No. E.83.XIV.2 (1983) [hereinafter *UN Action*].

⁶⁸ *UN Action*, *supra* note 66, at 211.

⁶⁹ Capotorti, *supra* note 65, para. 568.

⁷⁰ U.N. Doc. E/CN.4/1984/77 (1984), Com’n on Human Rights Res. 1984/62 (1984).

concerning a definition of the term 'minority.'"⁷¹ Deschenes suggested that a minority be defined as follows:

A group of citizens of a State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.⁷²

While the Deschenes proposal was discussed by the Sub-Commission, no final conclusion was drawn. Thus, after several decades of debate, the United Nations has yet to accept any single definition of a minority. Although a single definition would facilitate interpretation and implementation of the Covenant on Civil and Political Rights, the absence of precise agreement is by no means fatal to the application of Article 27 and other relevant provisions.

2. Existence of Linguistic and Other Minorities

Article 27 applies only to "States in which ethnic religious or linguistic minorities exist." This wording suggests that if no minority groups are recognized, no rights attach.⁷³ According to this interpretation, the state has the final say in determining which groups constitute a minority for purposes of Article 27. In some situations a state may deny the existence of a minority group, while certain individuals within that state believe that they constitute a minority that merits protection. According to the Capotorti study, a state has the duty to comply with Article 27 whenever there is "objective" proof of the existence of a minority group.⁷⁴ In any event, it is clear that the state does not have unfettered discretion in determining whether or not a group constitutes a protected minority. As in all matters arising out of the interpretation of the Covenant on Civil and Political Rights, it is the international community, specifically in the form of the Human Rights Committee, which must determine whether or not a state is complying with its obligations.

⁷¹ U.N. Doc. E/CN.4/1985/31 (1985), by Special Rapporteur Jules Deschenes [hereinafter Deschenes].

⁷² Deschenes, *supra* note 70, para. 181.

⁷³ France, for example, has stated that "Article 27 is not applicable so far as the Republic is concerned." *Human Rights, International Instruments, Signatures, Ratifications, Accession, etc.* at 50 (1 July 1982), U.N. Doc. ST/HR/4/Rev. 4 (1982). See *Minorities and Human Rights Law*, Report No. 73, by Minority Rights Group at 7.

⁷⁴ Capotorti, *supra* note 65, para. 570.

Article 27 protects only ethnic, religious, and linguistic minority groups. Other minorities subject to discrimination, such as political groups or social classes, are not protected under Article 27. To the extent that ethnic, religious and linguistic classifications are fairly stable and identifiable, membership in these groups may be readily distinguishable from the remainder of the population. In regions such as the Middle East, however, ethnic, religious and linguistic classifications may be inextricably intertwined with non-protected political and national groups, thus obscuring these Article 27 distinctions.

Countries have adopted a variety of policies recognizing the existence of linguistic minorities with respect to the operation of the government and legal system, schools, the media and other matters.⁷⁵ Some states elevate several or all languages to the status of “official languages” at the national level. Other countries use a decentralized approach which allows for one official language, but grants official or elevated status to other languages on a regional or local level. Finally, some nations, like the United States, recognize only one language regardless of the size of linguistic minority groups within their borders.

a. *Non-Dominant Position*

There are two aspects to the non-dominant status of a minority group: a threshold number of group members and the relative position of power that the group enjoys. Both the Capotorti and the Deschenes studies require that the members of a group must total less than half of a state’s population in order to be a minority. Article 27 may also apply when there are a number of ethnic, religious, and linguistic groups of approximately the same size in a country.⁷⁶ A numerical threshold provides an ostensibly objective means to identify the existence of a linguistic minority. Given a limited availability of public resources, however, most governments would probably require a minimum group size as a prerequisite to granting protections to members of a linguistic minority.⁷⁷

⁷⁵ *Id.* para. 429–521; VAN DYKE, *supra* note 62, chapter 2; Minorities and Human Rights Law, *supra* note 72, at 9–11.

⁷⁶ Capotorti, *supra* note 65, para. 566.

⁷⁷ This requirement of a minimal number of individuals in order to receive certain benefits also is reflected in United States constitutional law, for example in *Lau v. Nichols*, 414 U.S. 563 (1974). *Lau* concerned the failure of the San Francisco school system to teach English to about 1800 (out of 2800) Chinese-speaking students. Justice Douglas, writing for the Court, held that the school was required to take affirmative steps to provide some

The question remains as to how to determine the minimum group threshold number in any given context. That number may be, at least in part, a function of the nature of the protections at stake or a function of the expense of providing such protections. The geographic distribution of group members may also play a role in calculating a numerical threshold for linguistic minority protections.⁷⁸ As a practical matter, it is more likely that a linguistic minority will be recognized and accorded protection if group members are concentrated geographically rather than dispersed throughout the population. It is not entirely satisfactory, however, that the protection of fundamental rights should be dependent upon the group's success in concentrating its members in specific regions.

The requirement of a numerical minimum alone suggests that in South Africa (to cite an obvious example), the black population, which constitutes a numerical majority, would not enjoy safeguards under Article 27. Most definitions of a minority, however, also provide that the minority group be in a "non-dominant position." This wording suggests that the group must not be in a position of power economically, politically, or otherwise. Thus, a small ruling class controlling an oppressed majority apparently would not qualify for Article 27 protections.⁷⁹ Once again, in some situations it may be difficult to determine if a group is sufficiently oppressed to meet this requirement.

b. *Legal Status*

While Article 27 refers only to "persons," both the Capotorti and the Deschenes studies restrict their definitions to individuals who are "nationals" or "citizens." Aliens, refugees, and other non-nationals therefore are completely precluded from consideration. The Deschenes study, for example, explains that non-citizens should not be considered as minorities since a state's primary duty is to its

assistance to the students. It should be noted that Douglas based his ruling on federal statutes such as the Civil Rights Act of 1964 and HEW regulations rather than on the equal protection clause of the Constitution. In his concurring opinion, Justice Blackmun commented that unless the situation concerned a "substantial" number of students, the *Lau* holding should not be regarded as "conclusive:" "For me, numbers are at the heart of this case . . ." 414 U.S. at 572 (Blackmun, J., concurring).

⁷⁸ See discussion by VAN DYKE, *supra* note 62, at 24-30 concerning Belgium, including Case Relating to certain aspects of the laws on the use of language in education in Belgium (Merits), 1968 Y.B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Human Rights) 832.

⁷⁹ Capotorti, *supra* note 65, para. 566. *But see* Deschenes, *supra* note 70, at para. 78-88, in which he concludes that a strict definition of a minority must be used.

citizens.⁸⁰ Under this approach, it appears that a group of aliens would have to wait until its members attain citizenship before it is granted any rights, even if such a group shares linguistic, ethnic, and religious background with others who are nationals protected as a minority.

c. *Group Identity*

A minority must also possess common ethnic, linguistic or religious traits and must manifest some degree of group "solidarity," either explicitly or implicitly. Maintenance of one's language represents an easily identifiable, objective indication of a group's subjective desire to preserve its cultural heritage.⁸¹ The Deschenes study notes that a group seeking minority status must demonstrate a "collective will to survive,"⁸² adding that the group must wish to achieve *de jure* and *de facto* equality with the rest of the population.⁸³ A linguistic minority with no interest in preserving its heritage most likely will be assimilated into the dominant culture, and thus will not need protection under Article 27. The requirement that a group should desire to maintain its characteristics, however, assumes that a minority will be able to survive as a group if it wishes to do so. What may be perceived as a group's "indifference" to its language or heritage may actually reflect other conditions in the country such as forced assimilation, a dispersed minority population or a lack of political influence.⁸⁴

d. *Indigenous Populations*

The unique historical situation of indigenous populations also raises the question of whether these populations should be granted protections comparable to or even greater than protections enjoyed by non-indigenous minority groups. While the issues confronting "traditional" minorities and indigenous populations are often similar, a growing body of domestic and international law addresses

⁸⁰ Deschenes, *supra* note 70, at para. 44; *but see id.* at para. 46.

⁸¹ See generally Capotorti, *supra* note 65, at para. 244-271.

⁸² Deschenes, *supra* note 70, at para. 75.

⁸³ *Id.* at para. 171.

⁸⁴ See Sohn, *The Rights of Minorities*, in THE INTERNATIONAL BILL OF RIGHTS 279-80 (L. Henkin ed. 1981); Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 104 (1976).

issues specific to indigenous peoples.⁸⁵ Indigenous populations have been defined by Special Rapporteur Martinez-Cobo in his report to the Sub-Commission on Indigenous Populations:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁸⁶

Despite the parallels between the definitions of minorities and indigenous populations, the Deschenes study points out that certain characteristics of the two groups are not identical and concludes that indigenous populations should not be considered as minority groups.⁸⁷ Thus, according to the Deschenes study, neither indigenous peoples that pre-date the "dominant" societal power nor the most recent non-citizen arrivals in a state are to be considered as minorities.

Moreover, a number of indigenous peoples themselves have indicated that they do not wish to be categorized as minorities.⁸⁸ Indigenous groups do not deny that they need protection, but rather assert that they are different and face distinct problems. These groups consequently argue that they merit separate treatment and should not be lumped in the same category as minorities. While the wishes of indigenous populations should be respected, the implications of this approach are unclear. One possible consequence of this view espoused by indigenous groups could be a new international instrument dealing exclusively with the rights of in-

⁸⁵ The International Labour Organization's Indigenous and Tribal Populations Convention of 1957, ILO Convention 107, which is currently under revision, illustrates that indigenous populations have often been treated as distinct from other minority groups.

⁸⁶ U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8. para. 379 (1983). Martinez-Cobo further explains that: "On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group)." U.N. Doc. E/CN/Sub.2/1983/21/Add.8, para. 381 (1983).

⁸⁷ Deschenes, *supra* note 70, para. 24-38.

⁸⁸ See U.N. Doc. E/CN.4/ Sub.2/1984/20, at para. 104 (1984); Deschenes, *supra* note 70, para. 32-34.

indigenous populations.⁸⁹ Indeed, for several years the Sub-Commission's Working Group on Indigenous Populations has been drafting a Declaration of Principles concerning the rights of indigenous populations.⁹⁰ While this alternative may represent a politically palatable solution, it does little for other minority groups.

e. Individual versus Collective Rights

Historically, international human rights law has focused on the protection of individual rights. Examples of individual rights include the right to privacy, freedom of thought, and security of the person. Collective rights were subsequently recognized in the context of the rights of minorities.⁹¹ Collective rights include the right to self-determination, the right to utilize natural resources, and "new" rights such as the right to development.⁹² The distinction between individual and collective or group rights is frequently made.⁹³ Deschenes concludes that the emphasis should be placed on the individual, not the group.⁹⁴ The two categories, however, may actually merge or overlap, as in the case of the right of association which is ostensibly an individual right but only has real significance when exercised by a group. The concept of a minority in international human rights law reveals the interplay between linguistic minority groups and their individual members. While specific protections appear to be enjoyed by individuals, without the context of an identifiable minority group the rights do not exist.

C. Application of Language Rights

The extent to which a state chooses to acknowledge rights of linguistic minorities affects the ability of members of these minority groups to fully participate in societal opportunities, such as education, and to preserve their cultural heritage. To date, neither access to education nor cultural preservation for linguistic minorities have received more than rational basis scrutiny under United States con-

⁸⁹ But see J. Nordenfelt, *Conventions in Crisis*, 11 HUM. RTS. INTERNET REPORTER 60 (Winter/Spring 1987).

⁹⁰ U.N. Doc. E/CN.4/Sub.2/1987/22 (1987).

⁹¹ The rights of select minorities in fact have long been recognized by international law pursuant to certain treaties. See Dinstein, *supra* note 83, at 113-15.

⁹² *Id.* at 106-11; VAN DYKE, *supra* note 62, at 14-16.

⁹³ See generally Dinstein, *supra* note 83.

⁹⁴ According to Deschenes: "Every minority undoubtedly constitutes a group, but where it is a question of determining its rights, it is on the individual as a member of the minority that the emphasis should be placed." Deschenes, *supra* note 70, para. 56.

stitutional doctrine. Yet international human rights law, developed against the background of an international recognition of the need for cultural pluralism, provides protections for linguistic minorities in these areas. Ratification by the United States of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights would provide the basis for legal protections for language rights in the context of education and cultural preservation. If ratification is not feasible (for political or other reasons), these instruments should be cited in U.S. courts as sources of customary international law.⁹⁵ Finally, one may look to the Covenants and United Nations studies as instructive of world trends and international norms. In any case, American lawyers should consider employing the approaches used in international law.

1. Language and Education

While the United States Supreme Court has conceded that the equal protection clause does apply to language in the context of education, it has yet to go as far as international instruments. In countries in which a number of languages are spoken, if linguistic minorities are to survive, it is vital that the various languages be used in the school system, especially at the primary level, since language is inextricably connected with education.⁹⁶ In addition to Article 27's provisions, Article 13 of the Covenant on Economic, Social, and Cultural Rights, which affirms the "right of everyone to education," also is relevant to linguistic minorities.⁹⁷ The Covenant on Economic, Social, and Cultural Rights explicitly recognizes the goals and underlying purposes of education: "[States] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms."⁹⁸ This word-

⁹⁵ For discussions concerning the methods, merits, and status of incorporating international human rights law in domestic courts, see, e.g., Burke, et. al., *The Status of International Human Rights Law: An Overview*, 18 TEXAN INT'L LAW J. 291 (1983); Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367 (1985); Oliver, *The Treaty Power and National Foreign Policy as Vehicles for the Enforcement of Human Rights in the United States*, 9 HOFSTRA L. REV. 411 (1981); Schneebaum, *International Law as Guarantor of Judicially-Enforceable Rights: A Reply to Professor Oliver*, 4 HOUS. L. REV. 65 (1981); *Symposium on International Human Rights Law in State Courts*, 18 INT'L LAWYER 59, 59-88 (1984).

⁹⁶ McDougall, Lasswell & Chen, *supra* note 55, at 153-57; Piatt, *supra* note 13; *Cultural Pluralism*, *supra* note 13; Capotorti, *supra* note 65, para. 493.

⁹⁷ Covenant on Economic, Social and Cultural Rights, *supra* note 58, at Article 13.

⁹⁸ *Id.*

ing permits discourse that is too rarely acknowledged by courts in the United States.⁹⁹ Although equal opportunity and equal access are familiar concepts in domestic law, international human rights instruments extend them further.

While it is easy to make the connection between language and education, economic and other logistical constraints may prevent states from providing education in each minority group's language. In addition, some argue that emphasis on a minority language may permanently handicap or isolate members of a minority group and consequently create a permanent underclass in society. Other forms of multilingual education, however, concurrently teach minority group language(s) and the language of the majority group. In sum, the complex debate concerning the relative merits of the different approaches to bilingual education remains unresolved.

2. Language and Culture

International human rights instruments, by contrast to United States constitutional law, recognize that language is a reflection and vital component of one's culture.¹⁰⁰ These instruments consequently affirm the rights of linguistic minorities, and prohibit governments from interfering with this aspect of an individual's identity. Article 27, for example, states that members of linguistic and other minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."¹⁰¹ UNESCO's Declaration of the Principles of International Cultural Cooperation similarly states: "every people has the right and duty to develop its culture."¹⁰² This provision acknowledges that state interference with the development of a culture is prohibited and further indicates that cultural groups themselves bear an affirmative responsibility to develop their respective identities. These interna-

⁹⁹ See *supra* note 95 and accompanying text.

¹⁰⁰ *Id.* (general discussion concerning importance of language and identity of individual and group); Piatt, *supra* note 13, 895-99 (discussion concerning the relation between language and culture); *Cultural Pluralism*, *supra* note 13.

¹⁰¹ Covenant on Civil and Political Rights, *supra* note 57, Article 27.

¹⁰² Proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its 14th session on 4 Nov. 1966, Article 1(2). Article 1(1) provides: "Each culture has a dignity and value which must be respected and preserved." Article 1(3) adds: "In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind."

tional human rights provisions not only recognize the existence of diverse groups within a population, but also confirm their importance.

In addition to prohibiting discrimination on the basis of language, international instruments place an affirmative duty on states to maintain and promote cultural diversity. Article 15 of the Covenant on Economic, Social and Cultural Rights provides:

The States Parties to the present Covenant recognize the right of everyone to take part in cultural life The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.¹⁰³

This provision thus extends the protection of linguistic minorities further than that allowed under U.S. law: each linguistic group has a right to maintain its language. Each group is also encouraged to share its contributions to cultural diversity with the rest of society.

IV. CONCLUSION

While American constitutional law affords the individual a broad spectrum of protections and rights, current doctrine falls short with respect to the rights of linguistic minorities. Constitutional discourse regarding minority rights traditionally relies on an analysis focused on certain categories of fundamental rights and tiers of scrutiny. Although these categories are not inherently narrow, they have been applied restrictively and mechanically to claims by linguistic minorities. Courts often look to see if the right at stake is included on the "list" and, if not, to deny protection. In the United States, a number of jurisdictions have enacted legislation restricting language rights of minority groups, making this issue increasingly important.

International human rights law, by contrast, offers a more enlightened and flexible approach to adjudicating these issues. Unlike United States constitutional law, international human rights instruments recognize language as a fundamental right. The international standards acknowledge the extent to which language allows linguistic minorities to preserve their heritage, to maintain their identity, to educate themselves and ultimately to contribute to society. Adequate doctrines, although far from perfect, have been developed

¹⁰³ Covenant on Economic, Social and Cultural Rights, *supra* note 58, Article 15.

by the international community to address linguistic minority issues. Through ratification of international instruments, through incorporation of these instruments by U.S. courts as customary law and through application of the principles embraced in the instruments, the United States has an opportunity to employ these doctrines for the greater protection of linguistic minorities.