

OFFICIAL, NATIONAL, COMMON OR UNIFYING: DO WORDS GIVING
LEGAL STATUS TO LANGUAGE DIMINISH LINGUISTIC HUMAN RIGHTS?

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*“Ĉian ofendadon . . . de homo pro tio, ke li apartenas al alia gento, alia lingvo, alia religio au alia socia klaso ol mi, mi rigardas kiel barbarecon.”*¹

— Ludoviko Zamenhof

I. INTRODUCTION

In simple sociolinguistic terms, “[l]anguage is used for transmitting information from one person to another.”² However, successful communication of any information depends not only on the capabilities of the speaker, but also the comprehension of his or her audience. A Danish minister, Ms. Helle Degn, was newly appointed to her position when she chose to forego a translator and speak English at an international meeting. Confident in her linguistic ability because of over 10,000 hours of education in the language, she apologized for her unfamiliarity with a subject with an explanatory declaration: “‘I’m at the beginning of my period.’”³

Sociolinguist Ralph Fasold explains that beyond communicating information, “a speaker is using language to make statements about who she is, what her group loyalties are, how she perceives her relationship to her hearers, and what sort of speech event she considers herself to be engaged in.”⁴ In the context of an international speech event, Ms. Degn chose to accommodate her listeners by using an international language rather than her native Danish.⁵ Though she was speaking on behalf of her country, she abandoned group and national loyalty when she forsook her mother tongue for a global *lingua franca*.⁶ Attempting to join the larger community of

¹ From Esperanto: “Any offending . . . of a man because he belongs to another people, another language, another religion or another social class than I, I regard as barbaric.” L.L. ZAMENHOF: ORIGINALA VERKARO: ANTĀUPAROĴOJ-GAZETARTIKOLOJ-TRAKTAĴOJ-LETEROJ-POEMOJ ¶ II (Johannes Dietterle ed., 1929), available at <http://erewhon.ticonuno.it/primavera2005/img/homaranismo.pdf> (last visited Oct. 23, 2007).

² RALPH FASOLD, THE SOCIOLOGISTICS OF SOCIETY, at ix (1984).

³ Claude Piron, Language Constraints and Human Rights, Address at the Anniversary Symposium on Language and Human Rights (Apr. 28, 2004), available at http://www.geocities.com/c_piron/2.html.

⁴ FASOLD, *supra* note 2, at ix.

⁵ See Denmark, in CIA WORLD FACTBOOK 2007, <https://www.cia.gov/library/publications/the-world-factbook/geos/da.html>.

⁶ See Rhona K.M. Smith, *Moving Towards Articulating Linguistic Rights—New Developments in Europe*, 8 MICH. ST. U. J. INT’L L. 437, 438 (defining *lingua franca* as “[a] language habitually used by peoples whose mother tongues are different in order to facilitate

globalization, she acquiesced to international perceptions of what it means to be fluent in contemporary discourse on globalization.⁷ The choice was to her detriment.

De facto dominance of a foreign language can require a person to relegate her first language to secondary status. When she does so, she relinquishes a portion of her individuality and feelings of inferiority, isolation, and intimidation are often inevitable. Ms. Degn was a well-educated foreign dignitary whose non-native speaker status provided a moment of embarrassment. For millions of others, in a world with six billion people and 6,912 languages,⁸ the status of non-native speaker of a dominant language provides a means of discrimination that infringes fundamental individual human rights.⁹

Americans¹⁰ and Europeans alike know that the language a person speaks and how it is spoken exposes much more personal information than a person's appearance.¹¹ Nevertheless, language laws receive far less attention than race and ethnicity anti-discrimination laws.¹² It is inattention to and ignorance of linguistic human rights that necessitates an exploration of where the law is headed in the United States and the European Union.¹³ This Note will show

communication between them"); Jackie Walters, *Why is English the International Lingua Franca?*, EUROLOGOS, Apr. 2002, <http://www.eurologos.com/en-3p-inen-apr2002-April+2002.html>.

⁷ Local perceptions in Denmark also fuel the suspicion that native languages lack the sophistication and power attributed to the English language for international matters. Studieskolen, English, <http://www.studieskolen.dk/corporateandprivate/english.aspx> (last visited Oct. 23, 2007) ("English is the language of globalization.").

⁸ ETHNOLOGUE: LANGUAGES OF THE WORLD (Raymond G. Gordon, Jr. ed., 15th ed. 2005), available at http://www.ethnologue.com/ethno_docs/distribution.asp?by=area.

⁹ See Smith, *supra* note 6, at 439; Lauri Mälksoo, *Language Rights in International Law: Why the Phoenix is Still in the Ashes*, 12 FLA. J. INT'L L. 431, 432 (2000).

¹⁰ Here, all Americans, but unless further noted this Note refers only to residents and citizens of the United States of America.

¹¹ While appearance may expose race and gender, language often betrays personal characteristics from national and geographic origin (sometimes down to a specific borough) to educational attainment and social class.

¹² See Mälksoo, *supra* note 9, at 432 (describing language rights as being in an "embryonic stage"). Lauri Mälksoo is an advisor in international and European Community law to the Legal Chancellor of Estonia. Juridica, http://www.juridica.ee/cv_en.php (follow "Mälksoo Lauri" hyperlink) (last visited Oct. 23, 2007).

¹³ For the purposes of this Note, the author adopts Mr. Mälksoo's definition of linguistic human rights as the "human rights norms and standards that are related to one's use of his or her mother tongue and that are universally applicable, regardless of whether one belongs to the linguistic majority or minority within a certain country." Mälksoo, *supra* note 9, at 432.

that in the United States and the European Union, current language laws are diminishing linguistic human rights.¹⁴

The Universal Declaration of Human Rights (UDHR) lists language among race, sex, national origin and other rights as a personal characteristic protected against discrimination.¹⁵ Beyond mere normative declaration, however, this right is enshrined in the International Covenant on Civil and Political Rights (ICCPR), a fundamental document of the United Nations signed and ratified by the United States and by most Member States of the European Union.¹⁶ It should be noted that the corresponding International Covenant on Economic, Social and Cultural Rights (ICESCR) was ratified by all Member States of the European Union, but has never been ratified by the United States.¹⁷ While this divergence between the United States and the European Union helps to explain different legal views in areas such as labor and employment law,¹⁸ the separation also illuminates differences in the treatment of linguistic human rights.

While international law provides a broad background to normative linguistic human rights, national and supranational laws in the international context create more legally interesting areas of analysis and comparison of applied linguistic human rights. One context for exploring linguistic human rights and attendant legal issues is found in the problem of immigration in the United States and the European Union. Immigration of Latin Americans to the United States and of Africans to the European Union from southern borders bear striking similarities ripe for comparison.¹⁹ At the federal level of the

¹⁴ See discussion *infra* Part III.

¹⁵ Universal Declaration of Human Rights art. 25, G.A. Res. 217A(III), U.N. GAOR, Supp. No. 16, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR], available at <http://www.un.org/Overview/rights.html>.

¹⁶ International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR], available at <http://www.ohchr.org/english/law/ccpr.htm> (for ratification status, follow "Status of Ratification" hyperlink).

¹⁷ International Covenant on Economic, Social and Cultural Rights art. 11, G.A. Res. 2200A(XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR], available at <http://www.ohchr.org/english/law/cescr.htm> (for ratification status follow "Status of Ratification" hyperlink).

¹⁸ See generally Philip Harvey, *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, 33 COLUM. HUM. RTS. L. REV. 363, 383 (2002) (discussing American history regarding reluctance to recognize socioeconomic rights such as the right to work).

¹⁹ Pierre Vermeren, *Morocco: Europe's migrant Mexico*, LE MONDE DIPLOMATIQUE (Fr.), June 2002, available at <http://mondediplo.com/2002/06/10morocco>.

United States and the supranational level of the European Union, the legal approaches to linguistic human rights are considerably different. Concerning language status laws, it is notable that the European Union currently has twenty-three "official" languages while the United States has none.²⁰ However, while the U.S. federal government has been laissez-faire toward linguistic legislation, thirty U.S. states have not hesitated to pass laws via statute or constitutional amendment recognizing an official status of the English language.²¹ While, superficially, the U.S. federal government seems inattentive and apathetic toward linguistic human rights, the vigilance and zeal of individual U.S. states and EU Member States in codifying and adopting official languages increasingly diminish linguistic human rights.

The United States should not blindly follow European progress in the field of linguistic human rights. The EU model is based on a linguistic ecology approach that often overlooks the individual in the name of collective identity. While the United States should aspire to catch up to the EU in certain areas related to language (such as promoting a policy of learning two languages outside of one's native tongue),²² the United States should also acknowledge its history as a country of immigrants and recognize its present opportunity for greater linguistic rights. Most importantly, the United States should refuse to recognize official languages as the EU does. Official languages merely symbolize the political hegemony of the dominant language of any given country in a given period of time.

Part II of the Note will detail the historical background of linguistic rights in international law and articulate present-day shortcomings. Part III of the Note will discuss and compare the historical and legal content of pertinent laws of the United States and of the European Union relating to linguistic human rights and official language status. Part IV of the Note will deepen the comparison of current linguistic human rights issues through the international context of immigration. First, a comparison will be made between immigration

²⁰ RICHARD L. CREECH, LAW AND LANGUAGE IN THE EUROPEAN UNION: THE PARADOX OF A BABEL "UNITED IN DIVERSITY" 3 (2005); U.S. English, Inc., Making English the Official Language, <http://www.us-english.org/inc/> (last visited Oct. 23, 2007) (supporting adoption of English as official language of the United States).

²¹ James Crawford, Issues in U.S. Language Policy: Language Legislation in the U.S.A., <http://ourworld.compuserve.com/homepages/JWCRAWFORD/langleg.htm> (last visited Oct. 23, 2007).

²² EUROPEAN COMMUNITIES, EUROPE ON THE MOVE, MANY TONGUES, ONE FAMILY—LANGUAGES IN THE EUROPEAN UNION 1 (2004), available at <http://ec.europa.eu/publications/booklets/move/45/en.pdf>.

from Mexico to the United States and from the Maghreb to the European Union. Then, more specific language laws, state and national, will provide a closer analysis of linguistic human rights in language border territories with immigration rates among the highest in the world—the U.S. Southwest and the Iberian Peninsula. A return to case law at the U.S. federal level and the EU supranational level will conclude the comparison. Part V will synthesize the discussion and offer legal conclusions and recommendations for federal, supranational, national and state law.

II. LINGUISTIC HUMAN RIGHTS AND INTERNATIONAL LAW

In 1948, at the end of two world wars, members of the United Nations drafted the Universal Declaration of Human Rights (UDHR).²³ This “universal” approach to human rights attempted to correct failures of the League of Nations.²⁴ One of those failures was the lack of protection of collective minority rights.²⁵ However, in drafting the documents of the UN Charter system, “the States took the ‘ostrich’ approach to minority problems and tacitly accepted that the situation of the minorities [was] not for the international law to regulate.”²⁶ When minority rights are articulated at the international level, they are found in terms of religion, culture and language.²⁷ From a linguistic standpoint, culture and language are inseparable.²⁸ From a linguistic rights standpoint, such a shackling has impeded the progress of linguistic rights from their inception and continues to do so within international law.

The UDHR, the ICCPR and the ICESCR are collectively known as “the International Bill of Human Rights.”²⁹ Human rights are “[t]he freedoms, immunities, and benefits that, according to modern values ([especially] at an

²³ UDHR, *supra* note 15.

²⁴ Mälksoo, *supra* note 9, at 438.

²⁵ *Id.* at 437 (attributing causes of World War II to “a climate of rivalry between the majorities and the minorities” fostered by “the minority protection system”).

²⁶ *Id.* at 438.

²⁷ ICCPR, *supra* note 16, art. 27.

²⁸ Bill Leap & Paul Boyer, *Culture with Literacy: Language and Culture are Inseparable Says Bill Leap*, 4 TRIBAL C. J. AM. INDIAN HIGHER EDUC. 15 (1993); cf. KAREN RISAGER, LANGUAGE AND CULTURE: GLOBAL FLOWS AND LOCAL COMPLEXITY (2006) (drawing an analytical distinction between the two concepts).

²⁹ NANCY FLOWERS, THE HUMAN RIGHTS EDUCATION HANDBOOK: EFFECTIVE PRACTICES FOR LEARNING, ACTION, AND CHANGE: TOPIC BOOK FOUR 3 (U. of Minn. 2000), available at <http://www1.umn.edu/humanrts/edumat/pdf/hreh.pdf>.

international level), all human beings should be able to claim as a matter of right in the society in which they live.”³⁰ Under the UDHR, “[e]veryone is entitled to all the rights and freedoms set forth . . . 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.”³¹ Similar general language appears in the ICCPR:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.³²

This is also echoed in the ICESCR: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, *language*, religion, political or other opinion, national or social origin, property, birth or other status.”³³

There is a marked difference in implementation language between Article 2 of the ICESCR and that of the ICCPR.³⁴ More specifically, the language of the first paragraph of Article 2 of the ICESCR states that each party “undertakes to take steps”³⁵ toward implementation while the ICCPR states that each party “undertakes to respect and to ensure” implementation.³⁶ The general comment to Article 2 of the ICESCR, drafted by the Human Rights Committee, seeks to negate the disparate impact these words might have on State interpretations.³⁷

³⁰ BLACK’S LAW DICTIONARY 758 (8th ed. 2004).

³¹ UDHR, *supra* note 15, art. 2 (emphasis added).

³² ICCPR, *supra* note 16, art. 2, ¶ 1 (emphasis added).

³³ ICESCR, *supra* note 17, art. 2, ¶ 2 (emphasis added).

³⁴ OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, THE NATURE OF STATES PARTIES OBLIGATIONS (ART. 2, PARA. 1) CESCGR GENERAL COMMENT 3 (1990), [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+Comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+3.En?OpenDocument) (noting that “great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights . . .”).

³⁵ ICESCR, *supra* note 17, art. 2, ¶ 1.

³⁶ ICCPR, *supra* note 16, art. 2, ¶ 1.

³⁷ OFFICE OF THE HIGH UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, *supra* note 34, ¶ 1 (saying “it is not always recognized that there are also significant similarities”).

The comment asserts that the Covenant contains "various obligations . . . of immediate effect."³⁸ One of these is the obligation " 'to take steps' " toward implementing the directives of the Covenant.³⁹ However, what " 'immediate effect' " the phrase " 'to take steps' " has is highly uncertain. The Human Rights Committee admits that the implementation language of the ICESCR "is not qualified or limited by other considerations."⁴⁰ Despite the Committee's attempt to explain the "full meaning" of the phrase by exploring other translations,⁴¹ it cannot avoid the Covenant's plain language.⁴² Thus, despite the marriage between culture and language, the world's covenant securing cultural rights is virtually ineffective regarding linguistic rights. This is particularly alarming for proponents of linguistic human rights who view a chief goal of securing linguistic rights in international law as "preservation of linguistic diversity" from "language death."⁴³ In more dire terms, "the extinction of languages — the repository of human experience reflecting the myriad ways in which human beings understand the world — constitutes a diminishment of the cognitive resources of humanity."⁴⁴ While language death and extinction certainly impoverish world culture, such concentrated concern with dying languages ignores the more important aims and wider social goals of preserving peace and security and of promoting individual justice.⁴⁵ Further, cultural emphasis on linguistic rights often demotes what should be a human right for everyone to a minority right for the few.

In terms of minority rights and protection against discrimination, the ICESCR only mentions language once, at the outset, while the ICCPR prohibits distinction or discrimination on the basis of language throughout the

³⁸ *Id.* (emphasis added).

³⁹ *Id.* ¶ 2.

⁴⁰ *Id.*

⁴¹ *Id.* ("[I]n French [the undertaking] is 'to act' ('s'engage à agir') and in Spanish it is 'to adopt measures' (a 'adoptar medidas.').").

⁴² *Id.* ("Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant." (emphasis added)).

⁴³ Mälksoo, *supra* note 9, at 444 ("The recognition of the need to protect endangered languages inevitably must lead to the recognition of language rights as collective rights belonging to the linguistic group."). *Id.* at 445.

⁴⁴ James Fife, *The Legal Framework for Indigenous Language Rights in the United States*, 41 WILLAMETTE L. REV. 325, 328 (2005).

⁴⁵ See *infra* Part III, showing how this view hampers progress in EU law while the United States may be able to avoid the issue entirely.

document.⁴⁶ For linguistic human rights, the most important of these articles is Article 27: "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 group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."⁴⁷ Notably, the right to language use only extends to minorities. Even more limiting, the right is expressed "in community" and not individually.⁴⁸ A persistent problem in addressing language rights for the individual is "that language controversies always involve collectivity."⁴⁹ However, what is laudable in the text of the Article is that linguistic rights are at least nominally distinguished from cultural and religious rights. Further, the guarantees under the ICCPR relate to civil and political rights and not mere cultural protection. Nevertheless, the legal text is viewed as deficient in that it demands only "negative obligations ('not to do anything against') towards [minority groups]."⁵⁰ This prevailing tone of toleration or accommodation is a good start in a field of law that is "at a relatively primitive stage of development,"⁵¹ but is also underdeveloped and outmoded given the inevitable trend of globalization, the ever-increasing free movement of people, and the decreasing importance of political boundaries and borders.

Unfortunately, modern international law development in the area of linguistic rights protection is still at a minimal level and therefore largely ineffective. On December 18, 1992, the U.N. General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992 U.N. Declaration).⁵² The 1992 U.N.

⁴⁶ ICCPR, *supra* note 16, art. 14, ¶ 3, cl. (a) (criminal charges), art. 14, ¶ 3, cl. (f) (tribunals), art. 24 (children's rights), art. 26 (equal protection), and art. 27 (minority rights).

⁴⁷ *Id.* art. 27.

⁴⁸ *Id.* Further, minorities are strictly defined according to the circumstances of the entire nation state. When English-speaking citizens of Quebec asserted a violation of their rights as a minority language group, the U.N. Human Rights Committee decided in *Ballantyne v. Canada*, U.N. Hum. Rts. Comm., Comm's Nos. 359/1989 & 385/1989, U.N. Doc. CCPR/c/47/D/359/1989 & 385/1989/ Rev. 1 (1993), 14 HUM. RTS. L.J. 5-6, 171 (1993) that Article 27 of the ICCPR only protects minorities as defined by an entire state and not a sub-region, such as Quebec. CREECH, *supra* note 20, at 145 & n.89.

⁴⁹ Mälksoo, *supra* note 9, at 443.

⁵⁰ *Id.* at 438.

⁵¹ *Id.* at 465.

⁵² Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, Supp. No. 49, U.N. Doc. A/RES/47/135 (Dec. 18, 1992) [hereinafter 1992 UN Declaration], available at <http://www.un.org/documents/ga/res/47/a47r135.htm>.

Declaration is considered supplementary to Article 27 of the ICCPR.⁵³ On its face, the language of the 1992 U.N. Declaration, beginning in Article 1, is an improvement over the language of the ICCPR. Article 1 of the document provides that the States imperatively "shall" be engaged in not only the "protect[ion]" but also "promotion" of the "linguistic identity of minorities."⁵⁴ The shift from negative obligations, to tolerate or not do anything against linguistic minority rights, to positive obligations, to promote linguistic minorities, signals progress for the concept of linguistic rights protection in international law. However, this progress may not mean very much. First, the declaration, like the UDHR, is merely normative and not legally binding.⁵⁵ Further, Article 2 of the 1992 UN Declaration provides rights for "persons" but only those "belonging to minorities."⁵⁶ The group qualification repeats the same general defect of the ICCPR in narrowing the scope of linguistic rights to minorities instead of applying a broad right for all individuals regardless of cultural affiliation. While individual rights are addressed in Article 3, participation and membership within a linguistic minority are still requirements.⁵⁷ Again, collective rights remain a restriction on the development of linguistic rights for the individual apart from the collective. Finally, and most problematic, implementation of protection and promotion of linguistic rights in the 1992 U.N. Declaration is entirely at the discretion of the state.⁵⁸ Article 4 of the declaration removes implementation force from any potential obligation of an adhering state through conditional language.⁵⁹ According to the language of the Declaration, to address the rights of linguistic minorities, states "should consider"⁶⁰ taking measures "where required,"⁶¹ "wherever possible,"⁶² or "where appropriate."⁶³ The discretion allowed implementing states is very wide. The 1992 U.N. Declaration may be inspired

⁵³ *Id.* ¶ 4; Mälksoo, *supra* note 9, at 459.

⁵⁴ 1992 UN Declaration, *supra* note 52, art. 1, cl. (1).

⁵⁵ ANNA K. MELKNECHT, TOWARDS INTERNATIONAL PERSONALITY: THE POSITION OF MINORITIES AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW 137 (2001).

⁵⁶ 1992 UN Declaration, *supra* note 52, art. 2, cl.(2).

⁵⁷ *Id.* art. 3 ("Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.").

⁵⁸ See Mälksoo, *supra* note 9, at 459.

⁵⁹ *Id.* (describing Article 4 clauses as "escape clauses").

⁶⁰ 1992 UN Declaration, *supra* note 52, art. 4, cl. 5.

⁶¹ *Id.* art. 4, cl. 1.

⁶² *Id.* art. 4, cl. 3.

⁶³ *Id.* art. 4, cl. 4.

by Article 27 of the ICCPR, but concerning individual linguistic human rights, the document does not progress very far beyond it.

International law is underdeveloped and misdirected in the field of linguistic human rights. The view of language in international law is as a dependent right rather than as an independent one. The right to speak one's own language is miscast as a cultural, collective, and/or minority right, whereas linguistic rights should be viewed independently, individually and globally. Worse than a narrow or partial view of linguistic human rights is a view of such rights that remains merely idealistic. While "[f]or lawyers, human rights should . . . remain a legal concept, not merely a moral imperative or wishful thinking,"⁶⁴ the same should hold true for international legal bodies. At the present, international law contains some idea of linguistic human rights within its broad covenants and non-binding declarations.

Generally, enforcement of linguistic rights is only within the field of collective minority rights.⁶⁵ For individuals, the most specific legal application of linguistic rights is within the field of international criminal law.⁶⁶ While a person on trial for a criminal offense is generally entitled to both speak and understand the proceedings,⁶⁷ linguistic rights should be accessible to persons well before they are in chains.

The proper aims of language rights as tools for preserving peace and security and for promoting the fair treatment of individuals have yet to be met in international law. However, "[t]he proscriptions of international law can only reach so far as States are willing to accept."⁶⁸ While international law still seeks a definition of linguistic human rights, the field continues to find more substantive articulation within the legislation and legal practice of the supranational organization of the European Union and the federal government of the United States.

⁶⁴ Mälksoo, *supra* note 9, at 463.

⁶⁵ See generally Robert Dunbar, *Minority Language Rights in International Law*, 50 INT'L & COMP. L.Q. 90 (2001); ICCPR, *supra* note 16, art. 27.

⁶⁶ ICCPR, *supra* note 16, art. 14.

⁶⁷ *Id.* However, even this fundamental access to justice has been denied. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 3 (Penguin Books 1994) (1963) (describing German translation at Eichmann's trial as "sheer comedy, frequently incomprehensible," despite German being "the only language the accused and his counsel could understand").

⁶⁸ Mälksoo, *supra* note 9, at 464.

III. THE UNITED STATES, THE EUROPEAN UNION, AND LANGUAGE LAWS

A. Linguistic Rights and the United States

On May 25, 2006, the U.S. Senate passed S. 2611, the Comprehensive Immigration Reform Act of 2004.⁶⁹ Two separate and opposing amendments, partisan in nature, regarding the legal status of the English language, were proposed and adopted.⁷⁰ Republican Senator James Inhofe submitted Senate Amendment 4064 (S.A. 4064) "to declare English as the national language of the United States and to promote the patriotic integration of prospective US citizens."⁷¹ The amendment passed sixty-two to thirty-five with thirty-three of the "Nay" votes belonging to Democrats.⁷² Democratic Senator Salazar's Senate Amendment 4073 (S.A. 4073), "[t]o declare that English is the common and unifying language of the United States, and to preserve and enhance the role of the English language," also passed.⁷³ Without a Democrat voting against it, the vote was fifty-three to thirty-nine,⁷⁴ again illustrating the partisan nature of the issue. Republican-sponsored S.A. 4064 states:

The Government of the United States shall preserve and enhance the role of English as the national language of the United States of America. Unless otherwise authorized or provided by law, no person has a right, entitlement, or claim to have the Government of the United States or any of its officials or representatives act, communicate, perform or provide services, or provide materials in any language other than English. If exceptions are made, that does not create a legal entitlement to additional services in that language or any language other than English. If any forms are issued by the Federal Government in a language other than

⁶⁹ Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

⁷⁰ Amendment to Comprehensive Immigration Reform Act of 2006, S. Amend. 4064, 109th Cong. (2006) [hereinafter S.A.4064]; Amendment to Comprehensive Immigration Reform Act of 2006, S. Amend. 4073, 109th Cong. (2006) [hereinafter S.A.4073].

⁷¹ S.A.4064.

⁷² Vote Summary, Question: On the Amendment (Inhofe Amdt. No. 4064), http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_109_2.htm (follow "00131" hyperlink).

⁷³ S.A.4073.

⁷⁴ Vote Summary, Question: On the Amendment (Salazar Amdt. No. 4073 As Modified), http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_109_2.htm (follow "00132" hyperlink).

English (or such forms are completed in a language other than English), the English language version of the form is the sole authority for all legal purposes.⁷⁵

On the other hand, the Democrat sponsored S.A. 4073 states:

The Government of the United States shall preserve and enhance the role of English as the common and unifying language of America. Nothing herein shall diminish or expand any existing rights under the law of the United States relative to services or materials provided by the Government of the United States in any language other than English. For the purposes of this section, law is defined as including provisions of the United States Code and the United States Constitution, controlling judicial decisions, regulations, and controlling Presidential Executive Orders.⁷⁶

The effect of S.A. 4064 is that the federal government, barring other laws, has no obligation to provide services in languages other than English for non-English speaking persons. In the event that services are provided in languages other than English, there is no obligation to continue service. Also, if a document is not in English, an English language version would preempt the legal effect of the non-English version. This means that Inhofe's amendment is largely symbolic given the exception for existing federal laws in effect. As to Salazar's amendment, S.A. 4073 seeks to effectively freeze whatever obligations the federal government has under any federal law, in terms of government services for non-English speakers, in the state they exist when the legislation passes. That is, it would ensure that existing non-English provision of government services would remain.

According to the 2000 Census, in a population of 262,375,152 Americans, 46,951,595 do not speak English at home.⁷⁷ Eleven million of these non-native speakers either do not speak English well or not at all.⁷⁸ The number of non-English speakers is increasing. In 1980, twenty-three million people in the U.S. spoke a language other than English at home and in 1990, the number was

⁷⁵ S.A. 4064.

⁷⁶ S.A. 4073.

⁷⁷ U.S. CENSUS BUREAU, HYON B. SHIN & ROSALIND BRUNO, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000, at 4 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>.

⁷⁸ *Id.*

thirty-two million.⁷⁹ When 18% of the U.S. population does not speak the “national” or “common and identifying” language, the subject of linguistic human rights cannot be ignored.

However, federal legislators can feel relatively comfortable ignoring language rights. In 2005, Zogby International released a poll showing that 79% of Americans supported making English the official language of the United States.⁸⁰ Moreover, the same percentage was reflected in the opinions of first and second generation Americans.⁸¹ Further, in 2006, Rasmussen Reports found that 85% of Americans felt that English should be the official language of the United States.⁸² Unsurprisingly, when majority opinion overshadows that of the minority, the Constitution is the first and last bastion of protection in the United States.

Linguistic rights are not expressly found in the United States Constitution. However, the early foundations of substantive due process began with the subject of linguistic rights. In *Meyer v. Nebraska* the Supreme Court declared “[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.”⁸³ However, the decision in *Meyer v. Nebraska* did not depend on a substantive right to speak a particular language, but rather a parent’s right to educate his or her child in the language of his or her choice.⁸⁴ Three years later, in *Yu Cong Eng v. Trinidad*, the Supreme Court upheld the right of Chinese merchants to keep records in their own language.⁸⁵

In the following year, the Court struck down laws restricting the operation of foreign language schools in Hawaii.⁸⁶ In *Farrington v. Tokushige*, the Court recognized that Hawaii was home to “grave problems incident to [a] large alien population” but found the Constitution a barrier to governmental regulations preventing foreign language education.⁸⁷ These three cases depend on the

⁷⁹ *Id.* at 2.

⁸⁰ Susan Jones, *Senate Approves English as ‘National’ Language*, CYBERCAST NEWS SERVICE, May 19, 2006, <http://www.cnsnews.com/Culture/Archive/200605/CUL20060519a.html>.

⁸¹ *Id.*

⁸² *85% Support English as Official Language of U.S.*, RASMUSSEN REPORTS, June 9, 2006, <http://www.rasmussenreports.com/2006/June%20Dailies/EnglishAsNationalLanguage.htm> [hereinafter RASMUSSEN].

⁸³ 262 U.S. 390, 401 (1923).

⁸⁴ *Id.* at 400.

⁸⁵ 271 U.S. 500 (1926).

⁸⁶ *Farrington v. Tokushige*, 273 U.S. 284 (1927).

⁸⁷ *Id.* at 299.

substantive interpretation of the Due Process Clause of the Fourteenth Amendment. Within this interpretation may be found a fundamental right to preserve one's language.⁸⁸

Language rights may also be enforced through the Equal Protection Clause of the Fourteenth Amendment. Linguistic rights protection under the Equal Protection Clause begins with the fact that "language is an incident of ethnicity, ancestry, or national origin."⁸⁹ Including language as a discrimination class for judicial equal protection scrutiny is uncertain. In *Hernandez v. Texas*,⁹⁰ "the suspect group was one defined and self-defined largely on linguistic distinctions."⁹¹ However, in *Hernandez v. New York*, the Court upheld peremptory strikes during jury selection on the basis of a juror's ability to speak Spanish.⁹²

Outside of Fourteenth Amendment constitutional analysis of linguistic rights, both the First and Ninth Amendments may afford some protection. The Ninth Circuit Court of Appeals relied on the First Amendment to strike down Arizona's official English laws, stating that "[l]anguage is by definition speech, and the regulation of any language is the regulation of speech."⁹³ More importantly, the Supreme Court has held that manner of expression in the free speech context may be as important as the message of that speech.⁹⁴ Concerning the Ninth Amendment,⁹⁵ little can be said with any great certainty. The content and function of the Ninth Amendment may be anything "from a mere truism to substantive protection for unenumerated rights."⁹⁶ The latter interpretation of the Ninth Amendment argues that the people may retain any number of fundamental personal rights though the Constitution and Bill of Rights remain silent.⁹⁷

⁸⁸ Fife, *supra* note 44, at 335.

⁸⁹ *Id.* at 337.

⁹⁰ 347 U.S. 475 (1954).

⁹¹ Fife, *supra* note 44, at 337.

⁹² 500 U.S. 352 (1991) (agreeing with reasoning of respondents that bilingual jurors might not depend on foreign language testimony as translated in court).

⁹³ *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 935 (9th Cir. 1995), *vacated*, *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

⁹⁴ *Cohen v. California*, 403 U.S. 15, 26 (1971).

⁹⁵ The Ninth Amendment states: "The enumeration in the Constitutions of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

⁹⁶ Fife, *supra* note 44, at 343.

⁹⁷ *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring).

Concerning the enumeration of rights (or lack thereof), some words of wisdom from James Madison should be noted. Though Madison authored the Bill of Rights, he did not consider its existence necessary.⁹⁸ He cautioned that "there is a great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude."⁹⁹ That is, when rights are captured by the written word, listed and defined, they are necessarily limited in scope.¹⁰⁰ Moreover, Madison believed that allowing the public to define rights would narrow their scope even more than they would be by an assumed power.¹⁰¹ Nevertheless, through representative government, the public does define rights. Today, it seems that the majority public and their representatives want the definition of civil rights in the United States to be in English only.

The Constitution provides valuable but uncertain protection for linguistic rights. Currently, as far as may be surmised, its weaknesses in addressing language rights are in the same vein as the weaknesses discussed in international law. That is, in reading the Constitution, the judiciary has most often attached language rights to culture, ethnicity, and race. This mode of thinking promotes an "environmentalist approach."¹⁰² Linguistic environmentalism is primarily concerned with the protection of languages and cultures, not the protection of individuals. Though this conception of linguistic rights is prominent (if not dominant) in Europe,¹⁰³ protection and preservation of language should not be the chief goal of linguistic human rights for the United States.

Professor Bernard Bailyn says "there is a universe of rights, possessed by the people . . . still to be evoked and enacted into law."¹⁰⁴ However, concerning linguistic rights, the language amendments of the Comprehensive Immigration Reform Act of 2006 may indicate that this universe of rights is currently accessible only to those Americans who speak English.

⁹⁸ Letter From James Madison to Thomas Jefferson (Oct. 17, 1788), *available at* <http://www.etsu.edu/cas/history/docs/billrightsletter.htm>.

⁹⁹ *Id.*

¹⁰⁰ Dr. Bernard Bailyn, Remarks at the First Millennium Evening at the White House (Feb. 11, 1998) (transcript *available at* <http://clinton2.nara.gov/Initiatives/Millennium/bbailyn.html>).

¹⁰¹ Letter from James Madison, *supra* note 98.

¹⁰² Idil Boran, *Global Linguistic Diversity, Public Goods, and the Principle of Fairness*, in LANGUAGE RIGHTS AND POLITICAL THEORY 189, 208 (Will Kymlicka & Alan Patten eds., 2003).

¹⁰³ *See infra* Part II.B.

¹⁰⁴ Bailyn, *supra* note 100.

B. Language Laws and the European Union

Six years ago, the EU celebrated the “European Year of Languages” declaring that “[a]ll the European languages . . . are equal in value and dignity from the cultural point of view and form an integral part of European cultures and civilisation.”¹⁰⁵ Ironically, in celebrating the difference, the EU implicates that there is a point of view from which languages are not equal.¹⁰⁶

Beyond the four original languages, successive EU enlargements and political actions have created twenty-three official languages.¹⁰⁷ The official motto of the EU is “United in diversity.”¹⁰⁸ From this, it is said “that the many different cultures, traditions and *languages* in Europe are a positive asset for the continent.”¹⁰⁹ However, the “value and dignity” bestowed on language difference with aspirational words cannot be gauged in commensurate legal rights.¹¹⁰

The EU’s “purported commitment” to linguistic diversity is narrow in scope, conflicted in philosophy and generally over promised and under delivered.¹¹¹ It is estimated that forty-six million EU citizens—about one out of every ten—speak a language that is not the official language of their own Member State.¹¹² The Intergroup of Stateless Nations, created by Members of the European Parliament, gives voice to these constituents in stating that the “same legislative rights should be given to the languages of the stateless nations as for the official languages of the Member State.”¹¹³

In December 2001, the Laeken Declaration on the Future of the European Union (Laeken Declaration) proclaimed:

¹⁰⁵ European Year of Languages 2001, Council Decision 1934/ 2000, art. 2(a), 2000 O.J. (L232) 1 (EC).

¹⁰⁶ CREECH, *supra* note 20, at 60.

¹⁰⁷ Europa, Languages of Europe: The Official E.U. Languages, http://ec.europa.eu/education/policies/lang/languages/index_en.html (last visited Oct. 23, 2007).

¹⁰⁸ Europa, United in Diversity, http://europa.eu/abc/symbols/motto/index_en.htm (last visited Oct. 23, 2007).

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ European Year of Languages, *supra* note 105, art. 2(a).

¹¹¹ CREECH, *supra* note 20, at 44, 46–53.

¹¹² *Id.* at 49. Speakers of Catalan outnumber speakers of ten of the twenty-three official EU languages while Maltese, an official language, has less speakers than many native European languages. *Id.* at 45 n.180 (at least Welsh, Euskera, Frisian, Breton, Gallo and Russian). Ethnologue Country Index: Languages of Europe, http://www.ethnologue.com/country_index.asp?place=Europe (last visited Oct. 23, 2007) (follow “United Kingdom,” “Spain,” “Germany,” “France,” and “Latvia” hyperlinks).

¹¹³ CREECH, *supra* note 20, at 53 n.21.

Europe as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' *languages*, cultures and traditions. The European Union's one boundary is democracy and human rights.¹¹⁴

However, the Laeken Declaration has been criticized for making only a "subtle reference to the polyglot nature of the Union, but . . . no mention of the problems raised by linguistic diversity, let alone possible solutions to them."¹¹⁵ While the Laeken Declaration reinforced the European Union's commitment to widening the EU's democratic path, it overlooked a significant problem of linguistic diversity: "Absent from the declaration was any glimmer of recognition that the multilingual nature of the E.U. may actually be an obstacle to increased democratization."¹¹⁶

The growth of the European Union has two primary aspects: widening and deepening.¹¹⁷ Widening primarily refers to geographic enlargement of the EU and the increasing incorporation of diverse cultures (and their attendant languages).¹¹⁸ Deepening relates to the growing "commitment to human rights principles."¹¹⁹ Currently, a major concern is that the widening process is rapidly outstripping the deepening process.¹²⁰ Once an economic union of six countries using four languages, the EU is now a supranational organization comprised of twenty-seven countries with twenty-three regulation languages.¹²¹

¹¹⁴ EUR. COUNCIL OF THE TREATIES OF EUR. UNION, LAEKEN DECLARATION ON THE FUTURE OF THE EUROPEAN UNION, Dec. 15, 2001, *available at* <http://www.euconvention.be/static/LaekenDeclaration.asp> (emphasis added). The Laeken Declaration was a review by the European Council of the Treaties of the European Union with an outlook toward growth and potential (currently failed) constitutionalization. Laeken and the Trade Unions, *Tomorrow Europe* 2, Nov. 2001, *available at* <http://www.ciginfo.net/demain/files/tomorrow2en.pdf>.

¹¹⁵ CREECH, *supra* note 20, at 4.

¹¹⁶ *Id.* at 5.

¹¹⁷ STANLEY HENIG, *THE UNITING OF EUROPE: FROM CONSOLIDATION TO ENLARGEMENT* 63 (2d ed. 2002).

¹¹⁸ Wolfgang Wessels, *Widening and Deepening*, *INTERNATIONALE POLITIK*, Summer 2001, at 5, *available at* <http://en.internationalepolitik.de/archiv/2001/summer2001/widening-and-deepening.html>.

¹¹⁹ CREECH, *supra* note 20, at 5.

¹²⁰ ULRIKE GUÉROT, *THE BROOKINGS INST., U.S. EUROPEAN ANALYSIS SERIES: THE EUROPEAN PARADOX: WIDENING AND DEEPENING IN THE EUROPEAN UNION* 1 (2004).

¹²¹ *Irish Language to Get EU Status*, BBC NEWS, Dec. 27, 2006, *available at* <http://news.bbc.co.uk/2/hi/europe/6212033.stm>; *Romania and Bulgaria Join the EU*, BBC NEWS, Jan. 1,

The European Union's language regime finds its legal basis in several areas. The legal foundation for linguistic rights can be separated into two broad divisions: (1) Member State obligations under the European Community Treaty (EC Treaty) created and interpreted by EU institutions; and, (2) European human rights jurisprudence articulated in the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the European Charter for Regional or Minority Languages (ECRML) and the Framework Convention.

The original EC Treaty was written in the four agreed "official"¹²² languages of the first six Member States and declared that each version of the document was "equally authentic."¹²³ Further, the EC Treaty conferred authority on the ECHR to determine language rules for the Community institutions (except the European Court of Justice (ECJ)).¹²⁴ At the founding of the European Community, the first regulation ever issued by the European Council addressed the subject of language use.¹²⁵ All four founding languages¹²⁶ were treated equally and persons under the jurisdiction of a Member State were given a choice of language for corresponding with the Community institutions.¹²⁷ Also, each EC institution stipulated its own procedural rules on language use.¹²⁸ It was considered " 'imperative that the governments responsible for [the application of Community agreements] and the persons to whom they were to be applied could read them in their native language.' " ¹²⁹

2007, available at <http://news.bbc.co.uk/2/hi/europe/6220591.stm>.

¹²² CREECH, *supra* note 20, at 15 ("Despite common usage of the term, neither the E.U. nor the EC, as such, has any 'official' languages.").

¹²³ Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 33 art. 314 [hereinafter EC Treaty], available at <http://europa.eu.int/eur-lex/lex/en/treaties/index.htm> (follow "pdf" hyperlink under "Treaty establishing the European Community") [hereinafter EC Treaty].

¹²⁴ *Id.* art. 290.

¹²⁵ Regulation No. 1, 1958 O.J. SPEC. ED. 17.

¹²⁶ Note, the "quadrilingual" system was always artificial. Disregarding for now a multitude of minority languages, the official languages of Belgium, France, West Germany, the Netherlands, Luxembourg and Italy numbered six. Flemish, a dialect of Dutch, is the language of Flanders, and Luxembourgish is the language of Luxembourg. *Belgium*, in CIA WORLD FACTBOOK 2007, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/be.html>; *Luxembourg*, in CIA WORLD FACTBOOK 2007, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/lu.html>.

¹²⁷ Regulation No. 1, art. 2, 1958 O.J. SPEC. ED. 17.

¹²⁸ *Id.*

¹²⁹ CREECH, *supra* note 20, at 14 & n.18.

The EC Treaty establishes the European Commission (Commission),¹³⁰ the Council of the European Union (Council),¹³¹ the European Parliament (Parliament),¹³² and the European Court of Justice (ECJ).¹³³ While the rules of procedure regarding language use fall to the independent determination of each political body,¹³⁴ each institution has an obligation to respond to communications from the EU citizens in the Treaty language that the citizen chooses.¹³⁵ Otherwise, the institutions vary greatly in how multilingualism affects their operation. The Commission virtually handles all of its operations in English and French while the Parliament uses all of the EU regulation languages with “robust enthusiasm.”¹³⁶ Members of Parliament “have the right to speak in Parliament in the official language of their choice” accompanied by simultaneous translation.¹³⁷ The ECJ allows any Treaty language to be used as the language of the case.¹³⁸ Judges of the ECJ generally deliberate in French and then translate into the language of the case.¹³⁹ Though translations are provided in all of the Treaty languages, the language of the case is the only version of the decision that is legally authentic by default—any additional language versions must be authorized by the court.¹⁴⁰ Nevertheless, the court waits to issue judgments until translation has been completed in all the Treaty languages as the decision affects the entire Union.¹⁴¹

¹³⁰ EC Treaty, *supra* note 123, art. 7.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Regulation No. 1/58, art. 6, 1958 O.J. (385) 17.

¹³⁵ EC Treaty, *supra* note 123, art. 21.

¹³⁶ CREECH, *supra* note 20, at 24.

¹³⁷ EUR. PARL. R. PROC., available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20070903+RULE-138+DOC+XML+V0//EN&Language=EN&navigationBar=YES>. Note, Parliament's Rules of Procedure limited the use of a language to those having “official” status in the EU. Member of the European Parliament (MEP) Jill Evans of Plaid Cymru legally spoke an unofficial language after a rule change. However, the charged rule does not provide for translation of unofficial language speech. Thus, despite the symbolic nature of Ms. Evans speech, her words were only understood by two MEPs out of 732. *Welsh Language Debut in E.U.*, BBC NEWS, Nov. 17, 2004, http://news.bbc.co.uk/2/hi/uk_news/wales/4020467.stm.

¹³⁸ The Rules of Procedure of the Court of Justice of the European Communities art. 29, 1991 O.J. (L 176) (EC) [hereinafter ECJ Rules of Proc.], amended by Council Decision of 19 Apr. 2004, 2004 O.J. (L 132) (EC), available at <http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/txts.pdf>.

¹³⁹ CREECH, *supra* note 20, at 25.

¹⁴⁰ ECJ Rules of Proc., *supra* note 138, art. 31.

¹⁴¹ CREECH, *supra* note 20, at 25.

Linguistics experts often assert that true translation is impossible.¹⁴² Though the institutions have perfection as their goal, “there simply is no such thing as a fault-free translation. Every translation represents at best a diminishment, and at worst a corruption, of the original statement’s communicative value.”¹⁴³ Even so, the European Union cannot function without translation—many translations. For a single document to be translated into the twenty-three regulation languages it would take 506 translators.¹⁴⁴ A logistical solution to lower such tremendous transaction costs involves “‘pivot’ ” languages.¹⁴⁵ For example, the Parliament translates documents from lesser known languages into more popular languages.¹⁴⁶ Then, the document is retranslated to the requisite destination language.¹⁴⁷ The advantage is that this method eliminates the need for, perhaps, a Slovenian who can read Maltese and vice versa; instead, the same translation only requires finding a Slovenian and a Maltese who both read English (or French, German, et cetera). The major disadvantage is that the EU is playing a virtual “telephone game”¹⁴⁸ with legal documents. The problem is compounded by the fact that many words and phrases are tied into legal systems and are faux amis, false cognates, or, worse, lacunae.¹⁴⁹ Inevitably, something is lost in translation.

Textual analysis of a legal document when there are twenty-three “equally authentic” versions means “uncertainty as to the ‘real’ meaning of the text and . . . litigation that may be necessary to determine it.”¹⁵⁰ Theoretically “if

¹⁴² *Theories of Translation*, in *ENCYCLOPEDIA OF CONTEMPORARY LITERARY THEORY: APPROACHES, SCHOLARS, TERMS* 211, 213 (Irena R. Makaryk ed., 1993). As Oliver Wendell Holmes eloquently put it: “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

¹⁴³ CREECH, *supra* note 20, at 27.

¹⁴⁴ *Id.* at 27 n.95. The large number stems in part from a dedication to the most accurate translation. Every translator is paired with another and each is restricted to translation into his or her mother tongue and never the other way around. *Id.*

¹⁴⁵ *Id.* at 27.

¹⁴⁶ English, French, German, Italian, Polish, and Spanish. *Id.* at 27 n.94.

¹⁴⁷ *Id.* at 27.

¹⁴⁸ A childhood game in which the first of a line of persons whispers a phrase into the ear of the person next in line and so forth until the last person in the chain has received the message. When the last person is asked to declare the original message, it is often completely garbled.

¹⁴⁹ CREECH, *supra* note 20, at 28, 36. Even within a language itself words take on completely different meanings in a legal context, for example: brief but tender consideration of this sentence is a homonym party for those who have undergone conversion to legal English.

¹⁵⁰ *Id.* at 28.

ignorance of the law is no excuse, [then] neither is ignorance of a particular Regulation language" if each legal document is equally authentic in the eyes of the law.¹⁵¹

In spite of all of the rules of procedure and decisions of the institutions of the European Union attempting equal treatment of Europe's multiple (though Treaty-based only) languages, the same treatment does not extend to the European Union itself.¹⁵² That is, the EU institutions follow Regulation No. 1 and are legally bound, but a decision by the Court of First Instance, later affirmed by the ECJ, established that "Regulation No. 1 does not in fact represent a legally-binding norm of linguistic equality."¹⁵³

In 1993, the European Council established the Office for Harmonisation in the Internal Market (Trade Marks and Design) (OHIM).¹⁵⁴ OHIM limited the number of official languages to five of the ten Treaty languages at that time.¹⁵⁵ While applications could be in any "official languages of the European Community,"¹⁵⁶ applications required a "'second language'" chosen from one of the five OHIM languages.¹⁵⁷ Christina Kik, an attorney, challenged the exclusion of Dutch as a "second language."¹⁵⁸ Her application indicating Dutch as a second language was denied.¹⁵⁹ Ms. Kik appealed, was dismissed by the OHIM Board of Appeals, and then filed her action against OHIM and the Council in the Court of First Instance (CFI).¹⁶⁰

The allegation was based on the prohibition of discrimination on the grounds of nationality under Article 6 of the EC Treaty and maintaining a policy contrary to Article 21 of the EC Treaty permitting any EU citizen the right to correspond to Community institutions in any Treaty language and to receive a reply in that language.¹⁶¹ Greece entered on behalf of Ms. Kik citing "Regulation No. 1 . . . and the Court of Justice's repeated recognition of the

¹⁵¹ *Id.* at 29.

¹⁵² *Id.* at 13-15.

¹⁵³ *Id.* at 15.

¹⁵⁴ Council Regulation 40/94, art. 2, 1994 O.J. (L 11) 1 (EC), available at <http://oami.europa.eu/en/mark/aspects/reg/reg4094.htm>.

¹⁵⁵ *Id.* art. 115.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*; CREECH, *supra* note 20, at 33.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Case T-120/99, Kik v. Office for Harmonisation in the Internal Mkt., 2001 E.C.R. II-2235; CREECH, *supra* note 20, at 33.

¹⁶¹ EC Treaty, *supra* note 123, arts. 6, 21; CREECH, *supra* note 20, at 34.

equivalence of the Community's official languages."¹⁶² The Council boldly stated that "there is no Community law principle of absolute equality between the official languages."¹⁶³ After the CFI found for the Council, Ms. Kik took her appeal to the ECJ.¹⁶⁴ The ECJ announced that, despite multiple references to language in the EC Treaty, these "cannot be regarded as evidencing a general principle of Community law that confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances."¹⁶⁵ The *Kik* decision stands in contrast to a prior comment of the ECJ:

[The] language regime which allows the national courts and the parties to *express themselves in their own language*, constitutes a *fundamental right* in the Community system, and is consistent with the general language regime of the Communities, which is founded on the principle of the *equality of the official languages of the Member States* of the Union laid down in Regulation No 1 of the Council.¹⁶⁶

Weighing egalitarian interests against economic considerations, the shift in opinion seems to stem largely from pragmatic concerns as the EU expands.¹⁶⁷

As Member State obligations under the institutional framework of the EU are limited with respect to linguistic rights, EU human rights jurisprudence should be examined. The legal foundation for human rights in the EU stems from the "constitutional traditions common to the Member States" and "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories."¹⁶⁸ Unfortunately, with the failure of the Constitution for Europe, the requirement of EU accession to the ECHR was never formally adopted.¹⁶⁹ However, the Treaty

¹⁶² *Case T-120/99, Kik*, ¶¶ 35–45; CREECH, *supra* note 20, at 34.

¹⁶³ *Case T-120/99, Kik*, ¶ 52; EC Treaty, *supra* note 123, art. 290.

¹⁶⁴ *Case C-361/01, Kik v. Office for Harmonisation in the Internal Market*, 2003 E.C.R. I-8283.

¹⁶⁵ *Id.* ¶ 82.

¹⁶⁶ ECJ, REPORT ON TRANSLATION AT THE COURT OF JUSTICE 4 (1999) (emphasis in original).

¹⁶⁷ CREECH, *supra* note 20, at 38.

¹⁶⁸ *Case 4/73, J. Nold v. Comm'n of the Eur. Cmty.*, 1974 E.C.R. 491, ¶ 13.

¹⁶⁹ Egbert Myjer, *Can the EU Join the ECHR – General Conditions and Practical Arrangements*, in *THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE* 297, 300 (Ingolf Pernice et al. eds., 2006), available at http://www.ecln.net/elements/conferences/book_berlin/myjer.pdf.

on European Union expresses "human rights and fundamental freedoms" as part of the EU's foundation, and a non-discrimination clause was added to the EC Treaty stating that the EU may "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."¹⁷⁰ Notably absent from the list is language.

It was especially unfortunate for linguistic rights in the EU when the Constitution failed. Incorporated within the Constitution was the Charter of Fundamental Rights (CFR) and, within the CFR, language was added to the list of grounds for allegations of discrimination.¹⁷¹ Further, the CFR calls for respect for linguistic diversity.¹⁷² Since the Constitution failed to pass, "the [CFR] is not yet a legally binding document."¹⁷³ Constitutional proponents remain optimistic, indicating that "Advocates General at the [ECJ] now regularly cite [the CFR] in decisions" and "[t]he European Commission's human rights agenda for the future is clear: immediate implementation of the [CFR], while waiting for its integration into the constitutional text, and the Union's accession to the [ECHR]."¹⁷⁴

Until the EU accedes to the ECHR, it is enough that every Member State is a signatory.¹⁷⁵ Article 14 of the ECHR provides the right to non-discrimination on the basis of language.¹⁷⁶ However, in 1968, the Court of Human Rights decided "that Article 14 does not grant any implicit language

¹⁷⁰ EC Treaty, *supra* note 123, art. 13.

¹⁷¹ Const. for Eur. art. II-81(1), 2004 O.J. (C/310), available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/c_310/c_31020041216en00410054.pdf (follow "A Constitution for Europe" hyperlink; then "full text of the Constitution" hyperlink); Charter of Fundamental Rights of the European Union art. 21, Dec. 18, 2000, 2000 O.J. (C 364/1) [hereinafter CFR], available at http://www.europarl.europa.eu/Charter/pdf/text_en.pdf.

¹⁷² CFR, *supra* note 171, art. 22.

¹⁷³ Europa, What is the Current Status of the Charter?, http://ec.europa.eu/justice_home/unit/charte/en/faqs.html#1 (last visited Oct. 23, 2007).

¹⁷⁴ Europa, About the Charter Legal Status, http://ec.europa.eu/justice_home/unit/charte/en/about-status.html (last visited Oct. 23, 2007).

¹⁷⁵ European Court of Human Rights, Dates of Ratification of the European Convention on Human Rights and Additional Protocols, <http://www.echr.coe.int/ECHR/> (follow "Basic Texts" hyperlink, then "Dates of ratification . . .") (last visited Oct. 23, 2007).

¹⁷⁶ Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 222, amended by Protocol 11, Nov. 1, 1998 [hereinafter ECHR], available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

rights” thus, “Article 14 has . . . not been a significant source of language rights in Europe.”¹⁷⁷

Supplementing the ECHR is the European Charter for Regional or Minority Languages (ECRML).¹⁷⁸ The ECRML is strange as a convention because it does not protect individuals or minority groups; it protects languages.¹⁷⁹ Finally, the latest European agreement related to linguistic rights is embodied in the Framework Convention. Under the Framework Convention, unlike the ERCML, rights are vested in persons who “are entitled to exercise their rights both individually and in community with others.”¹⁸⁰ The ECHR, ECRML, and Framework Convention represent the closest adoption of language rights as human rights in Europe.

The lack of legal protection for linguistic rights in Europe was illustrated in the Belgian Linguistics case.¹⁸¹ A French-speaking family living in the Dutch-speaking Flanders challenged the exclusive use of Dutch in the educational system as discriminatory and an unlawful denial of “the right to education.”¹⁸² The Court of Human Rights found no violation or discrimination in denying French language education to the French-speaking family. In the aftermath, “advocates of minority language educational rights have looked elsewhere, principally to the UN instruments, for legal support.”¹⁸³

C. Unity in Diversity and the Melting Pot

By necessity, Europe pays far more attention to language issues than the United States. However, it seems that attention paid to language does not equate to attention paid to linguistic rights. The considerable differences regarding codification of language status, judicial interpretation within a set language regime and disparate policy decisions on language shed light on how linguistic rights remain underdeveloped in both the U.S. and the EU.

¹⁷⁷ Case “Relating to Certain Aspects of the Laws on the Use of Languages in Educ. in Belgium,” 1 Eur. Ct. H.R. 252 (ser. A) (1968); CREECH, *supra* note 20, at 134.

¹⁷⁸ European Charter for Regional or Minority Languages, Nov. 5, 1992, Europ. T.S. No. 148.

¹⁷⁹ Alain Viaut, *The European Charter for Regional or Minority Languages: Sociolinguistic Particularities and the French Configuration* 15 (Mercator, Working Paper 15, 2004), available at <http://www.ciemn.org/mercator/pdf/wp15-def-ang.PDF>.

¹⁸⁰ Framework Convention for the Protection of National Minorities, art. 3, Feb. 1, 1995, Europ. T.S. No. 157, 34 I.L.M. 351.

¹⁸¹ Case “Relating to Certain Aspects,” 1 Eur. Ct. H.R. 252 (ser. A) (1968).

¹⁸² *Id.*

¹⁸³ CREECH, *supra* note 20, at 141.

As mentioned, the EU has twenty-three official languages while the United States has none.¹⁸⁴ While the EU has used treaties to protect state languages, more languages remain unprotected than those receiving protection.¹⁸⁵ With the Senate amendments to the Comprehensive Immigration Reform Act of 2006, the United States legislature threatens to legalize English in similar fashion.¹⁸⁶ Today, neither the United States nor the EU expressly recognizes fundamental linguistic human rights. The European Constitution failed, and the U.S. Constitution remains silent.

The diverging views on language rights between the EU and the United States become apparent when comparing judicial decisions concerning linguistic rights in education. While in the United States, *Meyer v. Nebraska* established the right to language education in private schools, the U.S. Supreme Court, in *Lau v. Nichols*, and the European Court of Justice, in the Belgian Linguistics case, expressed opposing views on the right to language in public education.¹⁸⁷ In *Lau v. Nichols*, the Supreme Court decided that

[t]he failure of the San Francisco school system to provide English language instruction to approximately 1,800 students of Chinese ancestry who do not speak English, *or to provide them with other adequate instructional procedures*, denies them a meaningful opportunity to participate in the public educational program, and thus violates § 601 of the Civil Rights Act of 1964.¹⁸⁸

In the Belgian Linguistics case, more than eight hundred French-speaking children sought education in the French language in the Dutch-speaking region of Belgium.¹⁸⁹ Denying these children public education in their native language was justified as “protection of the linguistic homogeneity of the region.”¹⁹⁰ In the United States, the highest court said that “[t]eaching English

¹⁸⁴ Languages of Europe: The Official E.U. Languages, *supra* note 107.

¹⁸⁵ While there are over two hundred languages in Europe, only twenty-three are official languages of the EU Council of Europe, European Day of Languages, available at <http://www.ecml.at/edl/default.asp?t=info> (last visited Oct. 23, 2007).

¹⁸⁶ Comprehensive Immigration Reform Act of 2006, S.2611, 109th Cong. § 767 (2006).

¹⁸⁷ *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Lau v. Nichols*, 414 U.S. 563 (1974); Case “Relating to Certain Aspects of the Laws,” 1 Eur. Ct. H.R. 252 (ser. A) (1968).

¹⁸⁸ *Lau*, 414 U.S. at 563 (Syllabus) (emphasis added).

¹⁸⁹ Case “Relating to Certain Aspects,” 1 Eur. Ct. H.R. 252 (ser. A) (1968), at The Facts, ¶ 2.

¹⁹⁰ *Id.* at The Law II.B.13.

to the students of Chinese ancestry who do not speak the language is one choice. *Giving instructions to this group in Chinese is another.* There may be others.”¹⁹¹ From this, it is apparent that the ECJ was concerned with protecting language, while the Supreme Court recognized that the need for public education is paramount, regardless of which language a child speaks.

Despite broad recognition of linguistic rights in criminal proceedings at the international level, both the EU and the United States import peculiarities in this context.¹⁹² For instance, under *Hernandez v. New York*, prosecutors may use peremptory challenges to strike potential Latino jurors.¹⁹³ Defeating the challenge of racial discrimination, the Court accepted reasoning that involved distrust of bilingual jurors’ reliance on English interpretations of court proceedings originally spoken in the jurors’ (and the defendant’s) native tongue.¹⁹⁴ In the European Union, persons accused of a crime are entitled to be informed of charges against them and to have an interpreter in a language they “understand or speak.”¹⁹⁵ As broad as this right may seem, this provision can be rather limited. That is, a language that a person understands or speaks may not be his or her native language. For example, enjoying the free movement of persons of the EU, a polyglot traveler may be penalized for understanding or speaking multiple languages at a proficiency that may meet this undefined standard but does not reach the unattainable equality of his or her mother tongue.¹⁹⁶ When speaking and being understood are perhaps most important, both the United States and the EU fail to provide equivalent rights as those provided to persons who speak official or de facto official languages.

In Merchtem, Belgium there is a ban on speaking French in local schools.¹⁹⁷ In El Cenizo, Texas there is a local ordinance adopting Spanish as the town’s official language.¹⁹⁸ In the silence of the Constitution, or any other legislative

¹⁹¹ *Lau*, 414 U.S. at 565 (emphasis added).

¹⁹² ICCPR, *supra* note 16, art. 14.

¹⁹³ *Hernandez v. New York*, 500 U.S. 352 (1991).

¹⁹⁴ *Id.* at 61.

¹⁹⁵ ECHR, *supra* note 176, arts. 5(2), 6(3)(e).

¹⁹⁶ For instance, “Standard German” is spoken in Germany, Austria, Belgium, Italy, Denmark and other European states; however, when precise communication is required, it is unclear how “standard” the language might be. Ethnologue, German, Standard, http://www.ethnologue.com/show_language.asp?code=deu (last visited Oct. 23, 2007). For an analogous American situation, see *United States v. Perez*, 658 F.2d 654, 662 (9th Cir. 1981) (concerning argument between a juror and interpreter over the meaning of *La Vado*).

¹⁹⁷ *Belgian town bans school French*, BBC NEWS, Sept. 1, 2006, available at <http://news.bbc.co.uk/2/hi/europe/5305484.stm>.

¹⁹⁸ Claudia Kolker, *Spanish Becomes the Language of Government in a Texas Town*, L.A.

enactments, residents of the United States are enjoying linguistic freedom that the European Union has yet to attain. While the European Union, with its twenty-three official languages, professes strength in the diversity of languages and a desire for the greater movement of persons within its customs union, the proclaimed diversity restricts movement and seeks to fossilize linguistic borders which become increasingly artificial.¹⁹⁹ The United States, in not officially recognizing any language, may in fact recognize that language should not bar access to participation in the freedom the government secures.

IV. IMMIGRATION: THE U.S. AND MEXICO, THE EU AND THE MAGHREB

M. Requier-Desjardins wrote that "[t]he Mexico-North America and the Maghreb-Europe links have broadly similar underlying features" not least among them a "legacy of colonial domination."²⁰⁰ It is a valid distinction based on perspective to say that the primary conflicts in post-colonial nations "have not involved the languages of immigrants as much as the languages of annexed territory."²⁰¹ Nevertheless, annexed territory retained or returned to native populations yield massive populations of immigrants to the U.S. and EU.

Perhaps it is ironic that the name given to the Mexican separatist movement for reclamation of the Southwest United States is *La Reconquista*.²⁰² *La Reconquista* was the name of the Spanish "re-conquest" of the Iberian peninsula from the Moors during the Middle Ages.²⁰³ Today, Morocco, situated in the African Maghreb, is to Europe as Mexico is to the United

TIMES, Aug. 14, 1999, available at <http://www.uta.fi/FAST/US1/SPAN/elcenizo.html>.

¹⁹⁹ Languages of Europe: The Official E.U. Languages, *supra* note 107; European Year of Languages, *supra* note 105; EC Treaty, *supra* note 123, art. 39.

²⁰⁰ Denis Requier-Desjardins, *The Dynamics in Technical Change: Comparison between the Maghreb and Mexico and the Significance of the Maquiladora Experience*, in TECHNOLOGY AND TRANSITION: THE MAGHREB AT THE CROSSROADS 139, 142 (Girma Zawdie & Abdelkader Djeflat eds., 1996).

²⁰¹ Douglas A. Kibbee, *Language Rights and Immigrant Languages* 11, available at <http://www.utexas.edu/cola/insts/france-ut/archives/Fall2003/ConfLangImmigration/kibbee.pdf> (last visited Oct. 23, 2007).

²⁰² Valerie Richardson, *Mexican aliens seek to retake (stolen) land; Immigration-reform protesters urged by radicals to "reconquer" America's Southwest*, WASH. TIMES, Apr. 16, 2006, at A1.

²⁰³ Barbara Mikkelson & David P. Mikkelson, *Hispanic Leaders Speak Out!*, SNOPE.COM, <http://www.snopes.com/politics/quotes/hispanic.asp> (last visited Sept. 27, 2007).

States.²⁰⁴ Stating the obvious, the greatest source of foreign languages in a given country stems from foreigners. Less obvious is what to do with foreigners once they are within state borders with the intention of staying, and what to do about the foreign languages they speak.

Broad immigration policies between the United States and Member States of the European Union are rooted in two distinct legal principles—*ius sanguinis* and *ius soli*.²⁰⁵ In most EU states, a child of foreign legal residence born within a state becomes a foreign national based on the citizenship of his or her parents (*ius sanguinis*).²⁰⁶ On the other hand, a few European states grant citizenship when a person is born on state soil, regardless of his or her parentage (*ius soli*).²⁰⁷ The United States recognizes and incorporates both of these traditional legal principles.²⁰⁸

The United States is a genuine immigration country, while many European states, formerly emigration countries, have become de facto immigration countries and this difference may explain each countries' different approach to immigration policy.²⁰⁹ At the beginning of the twentieth century, the United States finished construction of the Statue of Liberty; this "Mother of Exiles" beckoned other nations to bring their "huddled masses" to the "New Colossus."²¹⁰ Representing only 5% of the world's population, the United States accepts more legal immigrants as permanent residents than the rest of the world combined.²¹¹ One hundred years after the construction of the Statue of Liberty, the Comprehensive Immigration Reform Act met the Senate floor.²¹²

²⁰⁴ Vermeren, *supra* note 19.

²⁰⁵ Rainer Münz, *Migration and Demographic Change in Europe*, in TOWARDS A COMMON EUROPEAN IMMIGRATION POLICY 1, 15 (Bernd von Hoffmann ed., 2003).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See 8 U.S.C. § 1401 (2000).

²⁰⁹ Karin Oellers-Frahm, *National Immigration Policies in Comparative Perspective*, in TOWARDS A COMMON EUROPEAN IMMIGRATION POLICY 33, 36 (Bernd von Hoffmann ed., 2003).

²¹⁰ EMMA LAZARUS, THE NEW COLOSSUS (1883), available at <http://www.nps.gov/stli/history/culture/index.htm> (follow "more . . ." hyperlink).

²¹¹ Nie Peng, *U.S. Population Hits 300 Million*, CHINA VIEW, Oct. 17, 2006 (concerning illegal immigrants, U.S. Border Patrol apprehension statistics estimate nearly four million people crossed U.S. borders in 2002). See also Letter from John McCain, U.S. Senator, to undisclosed recipient (Feb. 10, 2004), available at http://www.theamericanresistance.com/ref/letter_mccain_2004feb10.html.

²¹² S. 2611, 109th Cong. (2006).

For the European Union, the Schengen Agreement covers most of the Union's internal borders, but "diverging national interests" in Europe keep the EU "far from a common policy of immigration" from external countries.²¹³ Jonathan Faull was speaking to a group of American law students when he briefly described EU immigration problems.²¹⁴ He spoke of the proximity of wealthy Europe's southern borders to poorer countries in North and West Africa which are susceptible to large numbers of foreign immigrants who take many of the countries' low paying jobs and do not speak the nations' languages.²¹⁵ The issue, needless to say, was familiar to the Americans.

Regardless of positions on immigration, legal or illegal, immigration scholars in both the United States and the EU have made it clear that immigration is necessary.²¹⁶ In Western nations, an increase in wealth has meant a decrease in natural population growth.²¹⁷ However, it is often the case that countries want immigrant labor but not their attendant social problems, including their foreign languages. Views on immigrants and foreign languages range from outright xenophobia to re-imaginings of Babel before the fall.²¹⁸ While multilingualism is widely recognized as part of the everyday fabric of European culture, the trend in majority opinion in the United States is a desire for monolingualism.²¹⁹

Today, there are two dominant approaches to linguistic protection: the legalistic human rights approach and a linguistic ecology approach.²²⁰ A survey of European measures regarding language status laws indicates the EU's decision in favor of the linguistic ecology approach; individual state actions within the United States and legislation, such as the Comprehensive

²¹³ Oellers-Frahm, *supra* note 209, at 46; Europa, Summaries of Legislation, The Schengen Acquis and Its Integration into the Union, *available at* <http://europa.eu/scadplus/leg/en/lvb/l33020.htm> (last visited Sept. 22, 2007).

²¹⁴ Interview with Jonathan Faull, Director of European Affairs, Vrije Universiteit Brussel (VUB), in Brussels, Belg. (July 17, 2006).

²¹⁵ *Id.*

²¹⁶ Münz, *supra* note 205, at 18–19; *see generally* THOMAS J. ESPENSHADE, URB. INST. WHY THE UNITED STATES NEEDS IMMIGRANTS (1986).

²¹⁷ KEITH MONTGOMERY, UNIV. WIS. MARATHON CITY, DEP'T OF GEOG. & GEOL., THE DEMOGRAPHIC TRANSITION, <http://www.uwmc.uwc.edu/geography/Demotrans/demtran.htm> (last visited Oct. 23, 2007).

²¹⁸ *See generally* US-English.org, Making English the Official Language, <http://www.us-english.org/inc/>; UEA.org, What is UEA, http://uea.org/info/angle/an_kio.html.

²¹⁹ RASMUSSEN, *supra* note 82.

²²⁰ Kibbee, *supra* note 201, at 1.

Immigration Reform Act of 2006, indicate a growing willingness to follow in their footsteps—even if they are missteps.

In an apparent attempt to read the minds of immigrants, nations uniformly draw the implication that immigrants both accept the dominant language of their host state and desire assimilation.²²¹ However, “[v]irtually all . . . treaties, conventions and declarations dealing with linguistic rights specifically deny any rights for the languages of immigrants.”²²² Heinz Kloss, a German linguist, outlines four typical arguments supporting the denial of linguistic rights: the tacit compact theory (immigrants make an unspoken agreement to adapt); the take-and-give theory (the receiving state’s economic benefits require the cost of assimilation); the anti-ghettoization theory (isolation creates enclaves devoid of the host state’s culture and that of immigrants’ countries of origin); and the national unity theory (immigrants who maintain language are disruptive forces destabilizing the host state).²²³ Douglas Kibbee indicates flaws in each of these theories when applied to the U.S. immigration situation: the tacit compact theory ignores historical rights afforded to immigrants; the take-and-give theory ignores any benefits that may be gained by the host country; and, ghettoization and the national unity theory are most likely the result of restrictions and mistreatment by the host country.²²⁴ For Europe, the same theories apply, but with the adoption of official language laws there may be additional force behind the tacit compact theory.²²⁵

In the EU, every Member State has an official language.²²⁶ However, implementation of language policy varies. In France, the Académie française was established in 1635 for the purpose of defining and maintaining the French language.²²⁷ In fact, the legal system of France mandated the use of French well “before there even existed grammars and dictionaries of French.”²²⁸ Further, France enacted *Loi Toubon* in 1994 to promote French and defend the

²²¹ *Id.* at 2.

²²² *Id.* at 5.

²²³ Heinz Kloss, *Language Rights of Immigrant Groups*, 5 INT’L MIGRATION REV. 250, 254–58 (1971); Kibbee, *supra* note 201, at 6.

²²⁴ Kibbee, *supra* note 201, at 6.

²²⁵ See Oellers-Frahm, *supra* note 209, at 46.

²²⁶ Europa, Frequently Asked Questions about the European Union’s Policy on Languages, <http://europa.eu/languages/en/document/59> [hereinafter FAQ] (last visited Oct. 24, 2007). As noted earlier, Luxembourgish is Luxembourg’s official language but is not established as such in the European Union, *supra* note 126.

²²⁷ Académie française, L’histoire, <http://www.academie-francaise.fr/histoire/index.html> (last visited Oct. 23, 2007).

²²⁸ Kibbee, *supra* note 201, at 11.

language from invasion by foreign languages (especially English).²²⁹ These national policies within the EU exemplify and embrace a linguistic ecology theory over a linguistic human rights approach.

In disregard of the human rights approach to linguistic rights, France invoked a constitutional clause giving French official language status as grounds to reject the European Charter for Regional or Minority Languages in 1999.²³⁰ Regarding education, France imposes a ban on speaking any language other than French in the classroom, which "has certainly had a negative impact on the success of immigrant populations, and on the maintenance of immigrant languages."²³¹ Flatly, France's goal is to inculcate immigrants with the French language as quickly as possible.²³² Such a defensive posture does not favor language rights other than the language already enshrined in the state constitution.

In Spain, Article 3 of the Spanish constitution recognizes Castilian Spanish as the official Spanish language of the state.²³³ Further, "all Spaniards have the obligation to know [it] and the right to use [it]."²³⁴ Concerning the other Spanish languages, each is official in its respective Autonomous Community.²³⁵ Again, favoring linguistic ecology, the Spanish constitution states that "[t]he richness of the linguistic modalities of Spain is a cultural patrimony which will be the object of special respect and protection."²³⁶ Relying on the EU's commitment to diversity, the Spanish government has an agreement that "certain texts" be available in Catalan/Valencian, Basque and Galician.²³⁷ However, the cost to Spanish citizens requesting translation of any document other than these "certain texts" amounts to a tax on such speakers.²³⁸ More practically, non-official language speakers face a catch-22.²³⁹ Speakers

²²⁹ Law No. 94-665 of Aug. 4, 1994, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Aug. 5, 1994, p. 11392; Jon Henley, *Aux armes!*, *GUARDIAN UNLIMITED*, Aug. 29, 2003, available at <http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,1031712,00.html>.

²³⁰ Kibbee, *supra* note 201, at 10.

²³¹ *Id.* at 13.

²³² *Id.*

²³³ La Constitución Española de 1978, C.E. art. 3(1).

²³⁴ *Id.*

²³⁵ *Id.* art. 3(2).

²³⁶ *Id.*

²³⁷ FAQ, *supra* note 226.

²³⁸ CREECH, *supra* note 20, at 31.

²³⁹ Catch-22 is a term coined by Joseph Heller which refers to a paradox that results in one being a victim no matter the choice made. See generally JOSEPH HELLER, *CATCH-22* (1961).

of an unprotected language cannot request a translation if he or she does not, and, without translation, cannot, know a document exists.²⁴⁰ These problems are amplified throughout Europe for the thousands of immigrants arriving yearly through the Iberian Peninsula.²⁴¹

While the United States has not adopted any official language, this has not prevented individual states from doing so. For instance, in December, 2006, the governor of Utah ordered a Spanish-version of the state's website taken down after only two weeks of publication over fears that the site violated Utah law making English the state's official language.²⁴² During his term as Governor of Texas, President George W. Bush was known for vocalizing opposition to Official English and anti-bilingual-education proposals.²⁴³ Further, the Texas State Constitution does not confer official status on any language while multilingual services are prevalent in many areas of local government.²⁴⁴

Recall the differing viewpoints on language in *Lau v. Nichols* and the Belgian Linguistics case. In *Lau v. Nichols*, the Supreme Court decided that immigrants or the children of immigrants had the right to be educated in English or in their own language or any other solution that resulted in access to non-discriminatory public education.²⁴⁵ In the Belgian Linguistics case, the ECJ reinforced widespread European zeal for cultural and linguistic homogeneity.²⁴⁶ Here, one sees the beginnings of a linguistic human rights approach to language status in the United States and a linguistic ecology approach preserving the linguistic status quo with preference for the politically dominant languages already protected by official language status.

²⁴⁰ *Id.*

²⁴¹ *EU and Africa meet to discuss Migration Problems*, IMMIGRATION NEWS (Workpermit.com, London, U.K.), July 10, 2006, http://www.workpermit.com/news/2006_07_10/europe_africa/discuss_migration_problems.htm.

²⁴² Glen Warchol, *Governor Unplugs Español Web Site*, SALT LAKE TRIB., Dec. 14, 2006. Note, the website has since been republished with an addendum indicating compliance with Utah's official English laws. See Sitio Web Oficial para el Estado de Utah, <http://espanol.utah.gov> (last visited Sept. 8, 2007).

²⁴³ Crawford, *supra* note 21. More recently, President Bush has even delivered speeches in Spanish. Paul Brinkley-Rogers, *Bush Gets Bravos for Speech in Spanish*, MIAMI HERALD, May 6, 2001, at A1.

²⁴⁴ For instance, Texas' 211 information line provides assistance in ninety languages. Finding Help in Texas, Frequently Asked Questions, <https://www.211texas.org/211/faq.jsp> (last visited Sept. 22, 2007).

²⁴⁵ *Lau v. Nichols*, 414 U.S. 563, 569 (1974).

²⁴⁶ Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium," 1 Eur. Ct. H.R. 252 (ser. A) (1968), at The Law II.B.13.

V. CONCLUSION

While official language laws may serve the purposes of the European Union, an official language for the United States would be contrary to the country's history, its provision of civil rights and, perhaps, its Constitution. In looking at the EU's approach regarding linguistic human rights, the United States can correct its path by reference to the errors of its forebears.

Considering lessons from the past, the EU may have done better to emulate the Articles of Confederation rather than the U.S. Constitution. The failure of the European Constitution has betrayed both the optimists and the pessimists (if they had not made themselves known before). Since France and Denmark's referenda rejecting the treaty, both undying hope and open scorn have found their voice in the aftermath. While Brussels proposed an oath of allegiance to the EU and the Council of Foreign Relations, a British Member of the European Parliament scoffed, saying: "I swore an oath of allegiance to the Queen. I am not going to take kindly to an Italian gentleman telling me . . . to swear allegiance to something I don't agree with – a unified European state."²⁴⁷ The two viewpoints illustrate what Richard Creech calls "The Paradox of a Babel 'United in Diversity.'"²⁴⁸

Though Guy Verhofstadt, Prime Minister of Belgium, wrote *Forging "United States of Europe" is key to the future*, from the country at the heart of the European Union, the supranational organization's current construction more closely resembles a confederation than the American federal state.²⁴⁹

Proclaiming "unity in diversity," Europe is now fighting a different sort of war on two fronts. The EU's protection of language has been analogized to preservation of biodiversity.²⁵⁰ That is, each language of the Union is regarded as an asset and is treated like a species to be maintained and preserved.²⁵¹ However, while the analogy is sound, the process is unsure. In nature, survival takes care of itself. In the European Union, formerly by conquest and now by commerce, a select few languages dominate the institutions and operation of the organization. Each Member State has a long political history and deep

²⁴⁷ Anthony Browne, *Brussels Wants Immigrants to Swear Allegiance to EU*, TIMES ONLINE (U.K.), Sept. 2, 2005, <http://www.timesonline.co.uk/tol/news/uk/article561731.ece>.

²⁴⁸ CREECH, *supra* note 20.

²⁴⁹ Elaib Harvey, *United States of Europe*, BRUSSELS J., Dec. 2, 2005, <http://www.brusselsjournal.com/node/536>.

²⁵⁰ CREECH, *supra* note 20, at 63–65.

²⁵¹ *Id.*

cultural identities that lay behind the selection of a dominant language that belongs to the political majority of each respective state.

Decisions of the European Court of Justice support strict language regimes of Member States in maintaining cultural homogeneity in a Union that purports to be embracing diversity.²⁵² Also, the goal of linguistic environmentalism is suspect. As de facto immigration states demanding assimilation of newcomers, the EU is attempting to artificially preserve the status quo. In the United States, preservation has never been the status quo. When Art Torres, the Hispanic Chairman of the California Democratic Party, is asked by his white colleagues why he fights for affirmative action programs, he only half-jokingly responds “ ‘because you’re going to need them.’ ”²⁵³

Using words to give status to languages defines the EU’s artificial approach. The lack of an official language in the United States promotes a more prosperous environment for American ideals. Barring Native languages, no one in the United States speaks an indigenous tongue. In a laissez-faire approach, lack of official recognition of any language has allowed natural selection to choose the course. So long as the courts uphold claims to equal protection under the law, an unspoken power resides with the people. If rights are captured by the written word, listed and defined, they are limited in scope.²⁵⁴ Today, as the public majority and their representatives seek unnecessary status laws for the English language, the free market model in the development of language rights reports that the Spanish-only town of El Cenizo, Texas’ town residents and officials are now “squarely behind a push for English to be the language of choice for Americans.”²⁵⁵ Whatever the choice may be now, it may change in five, fifty or five hundred years. Hopefully, it will not require an act of Congress to make a choice that belongs to individuals.

²⁵² Europa: United in Diversity, *supra* note 108.

²⁵³ Mikkelsen & Mikkelsen, *supra* note 203.

²⁵⁴ Bailyn, *supra* note 100.

²⁵⁵ *Spanish-only Town Now Likes Sound of English*, CHI. SUN-TIMES, May 23, 2006, available at http://calbears.findarticles.com/p/articles/mi_qn4155/is_20060523/ai_n16411818.

