

INDIVIDUAL RIGHTS AND GROUP RIGHTS IN THE EUROPEAN UNION'S APPROACH TO MINORITY LANGUAGES

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Abstract

The European Union rights discourse is dominated by talk of individual, and not group, rights. Individual market actors are the constitutive atoms of European Union law. Within this legal framework, the onus has been on the Member States to protect and contribute to minority language groups. This paper examines some of the ways Member States accommodate and recognize the minority language groups residing within Europe, and subsequently analyzes the compatibility of these measures with the EC Treaty in light of the European Court of Justice's (ECJ) willingness to invoke the Treaty in an increasing array of situations. Specifically, the article argues that the expansive view of EU citizenship taken by the ECJ in the *Martinez Sala* case (confirmed judicially by subsequent cases and legislatively by important directives) increases the range of situations for which the EU's non-discrimination principle may invalidate these Member State group rights measures. The ECJ's willingness to interpret citizenship expansively is troubling because it has not taken a similar expansive interpretation of the concept of minority group rights. After discussing the theoretical background and practical importance of the distinction between individual rights and group rights, this article discusses the key ECJ cases involving the conflict of group language rights and individual Community rights. Ultimately, the paper concludes by recommending (1) the ECJ adopt a new interpretive approach to analyzing Member States' bona fide efforts to protect minority language groups; or (2) the Member States modify the EC Treaty in one of three ways to permit group rights in the field of minority language protection without running afoul of the individual rights of EU citizens embodied in the non-discrimination principle.

I. INTRODUCTION

The European Union (EU) is a supranational entity comprised of twenty-five member states, and vests rights with the individuals that are citizens of those Member States. However, Europe as a cultural space consists of many more constitutive groups that are currently left out of the structural legal framework of European integration. Minority language groups, in particular, have been the subject of efforts by Member States to protect and preserve linguistic diversity within their borders. The extent and variety of solutions employed by Member States to protect their resident autochthonous languages testifies to the importance of accommodating minority languages into the European legal landscape.

The thesis of this paper is that the European Court of Justice's¹ jurisprudence puts the legality of these measures in jeopardy, and that in order to ensure the continued vitality of minority languages within the Member States, it may be necessary to formulate new protective strategies to replace some of the old methods whose compatibility with the Treaties is, by now, dubious. This paper will be divided into three parts that aim:

- (1) to provide a brief overview of the legal structures Member States have erected to protect the linguistic and cultural diversity within their borders, as well as the efforts made by the various EU institutions to do the same;
- (2) to elaborate a theoretical and practical distinction between *group* rights and *individual* rights; and characterize the process of European economic and social/political integration, in contrast to the approach taken by the Member States, as fundamentally centered on individual, and not group, rights—an approach which is inadequate to protect minority languages; and

¹ Hereinafter “ECJ.”

- (3) to examine the salient ECJ cases in this field in the light of the group rights/individual rights distinction, and analyze their effect on efforts to protect and preserve minority languages and cultures.

In conclusion I will recommend an interpretive strategy that would permit the ECJ to consider group rights for minority languages as a sui generis subject of EU law and thereby minimize the risk that bona fide group-protective measures will run afoul of the non-discrimination principle contained in EC Treaty Article 12. That failing, I argue further that minority groups and Member States should refocus their political efforts to address minority language concerns in the EC Treaty itself, since the expanded notion of EU citizenship and the ECJ's willingness to invoke the EC Treaty's non-discrimination principle in new contexts have placed many Member State efforts to create minority language group rights in potential conflict with the EC Treaty.

II. LEGAL AND CONSTITUTIONAL TREATMENT OF LINGUISTIC DIVERSITY IN THE MEMBER STATES AND IN THE EUROPEAN UNION

It is estimated that one out of every eight citizens of the European Union speaks a minority language.² Keeping in mind that the Treaty of Amsterdam in 1997 included the first and only treaty reference to minority populations,³ it is hardly surprising that the Member States have addressed the issue of minorities independently of the EU. The Member States' attempts at accommodating minorities have taken on different forms, and have achieved varying success. Since the legal treatment of minorities (and minority languages in particular) has been guided primarily by the Member States, any study of

² Francesco Palermo, *The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ*, 8 MAASTRICHT J. EURO. & COMP. L. 299 (2001).

³ *Id.* at 300.

minority rights must begin there, before proceeding to the EU's—and the ECJ's—treatment of the issue. In other words, in order to know how European integration affects minority rights, it is essential to analyze the current domestic protections for these groups, and how these legal protections may conflict with the Treaties.

Five modes of addressing minorities in Member State law are most prevalent:⁴ first, formal constitutional recognition of multiple official languages; second, constitutional incorporation of protection for linguistic minorities; third, establishing autonomous zones or communities with special language rights; fourth, central legislative accommodation and recognition; and fifth, permitting small scale, informal local measures designed to accommodate minority languages. Most Member States employ hybrid forms of protection of their minority cultures and languages, making use of multiple protective strategies. What follows is a representative sample of strategies utilized by various Member States to incorporate linguistic minority protection.

A. FORMAL CONSTITUTIONAL RECOGNITION OF MULTIPLE OFFICIAL LANGUAGES

When a minority language achieves official status, it obtains a unique legal status within the state.⁵ Often, citizens may invoke a right to utilize the minority language in

⁴ The division into five categories is rough and by no means complete. Nearly all Member States make use of several protective legal measures. The division into five serves only to highlight some of the more prominent legal structures.

⁵ An example from the United States is the Hawaiian Constitution, which provides that “English and Hawaiian shall be the official languages of Hawaii” HAW. CONST. art. XV, § 4. However, Hawaiian “shall be required for public acts and transactions only as provided by law.” *Id.* The state legislature has ruled out mandatory use of Hawaiian, enacting a statute that succinctly states, “Hawaiian shall not be required for public acts and transactions.” HAW. REV. STAT. § 1-13 (Michie 2005). In addition, the legislature has enacted a sort of supremacy provision that gives binding effect to the English version of a law, “[w]henever there is found to exist any radical and irreconcilable difference.” *Id.* The jurisprudence addressing article XV, section four has interpreted the provision restrictively, and courts, as a general matter, do not

any official capacity. Official documents must often be provided in the official minority language as well. The most obvious case of formal *constitutional* recognition is Ireland. Ireland's Constitution declares that the Irish language (Gaeilge, in Irish) is the "first official language" of Ireland, though it technically a minority language, and less frequently used than English—the "second" official language.⁶ Finland is another example, where the Swedish-speaking minority is protected by the official status of Swedish in Finland.⁷

Through a unique constitutional apparatus, the Belgian Constitution impliedly recognizes three official languages. Belgium can be divided into three ethno-linguistic groupings, with a Flemish-speaking majority (about 60 percent), a sizable francophone minority (about 39 percent) and a small but significant regionally concentrated German-speaking population (about one percent).⁸ Article 2 of the Belgian Constitution divides Belgium into three linguistic "Communities": a German-speaking Community, a Flemish-speaking Community, and a French-speaking Community. In addition, Article 3

seem to be too apt to read implied rights to invoke Hawaiian language rights where such rights are not necessary. *See, e.g.,* Tagupa v. Odo, 843 F.Supp 630, 631 (D. Haw. 1994) (upholding a magistrate judge's grant of a protective order denying a deponent the "right" to conduct a deposition in Hawaiian despite deponent's fluency in English).

⁶ Ir. CONST., 1937, art. 8, available at <http://www.taoiseach.gov.ie/upload/static/256.pdf> (last visited February 16, 2006). Interestingly, Ireland was the only signatory to the treaties that did not require that its national and official language should be a working language at the Community level. *See* Niamh Nic Shuibhne, *The Impact of European Law on Linguistic Diversity*, 5 IRISH J. EURO. L. 63, 69 (1996); *but see infra* note 67.

⁷ The Finnish Constitution establishes both Finnish and Swedish as national languages. *See* SUOMEN PERUSTUSLAKI [Constitution] art. 17 (Finland), available at http://www.om.fi/uploads/54begu60narbnv_1.pdf (last visited February 16, 2006).

⁸ *See Languages of Belgium*, in SIL INT'L, ETHNOLOGUE: LANGUAGES OF THE WORLD (Raymond G. Gordon Jr., ed. 2005), available at http://www.ethnologue.com/show_country.asp?name=BE (last visited Aug. 14, 2006).

provides that Belgium is comprised of three regions: the Walloon region, the Flemish region, and the Brussels region.⁹ Roughly speaking, the francophone Community resides in Walloon, along with the German-speaking minority. Brussels is split between Flemish and French speakers. Each Community elects a Community Council to act on its behalf.¹⁰ The constitution lays out a complicated scheme of government that grants to the linguistic communities varying degrees of autonomy over core cultural competences including education, cultural policy, and inter-Community cooperation. A sort of minority veto exists as well. The Communities are grouped in the federal parliament such that if three-quarters of a linguistic group believe a proposed law threatens to “gravely damage” inter-Community relations, the dissenting group may halt the legislative process and initiate a set of special review procedures.¹¹ The regional governments are elected by the Community Councils¹² and their powers are derived from devolutions from the federal government.¹³

Notably, and unlike the Finnish and Irish examples, Belgium’s federal constitution does not recognize any official languages *per se*,¹⁴ but instead attempts to map its

⁹ The Belgian Constitution also creates four “linguistic regions” including the three spoken languages and the bilingual Brussels area. *See* BELG. CONST., art. 4. This division is more symbolic than of juridical consequence, where the regional and community groupings emerge as more relevant.

¹⁰ *See id.*, arts. 115-21.

¹¹ *See id.*, art 54; *see also* Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511, 551-52 (1991).

¹² *See* BELG. CONST., art. 122.

¹³ *See id.*, art. 39.

¹⁴ The regions, by contrast, do have official languages. The official language of the Flemish Region is Dutch. The official languages of the Walloon Region are Dutch and French. The Brussels Region is also officially bilingual.

constitutional system onto an already-existing linguistic situation. The regions and Communities themselves must determine, by way of procedures outlined in the federal constitution, the trajectory of their own linguistic policy. To use the popular legal binary, Belgium is concerned primarily with granting procedural rights to linguistic groups, and eschews substantive rights at the federal level. Though German is an “implied” official language, rights to use German are limited in scope geographically; it is officially *recognized* in only nine municipalities in the province of Eupen and Saint Vith.¹⁵ Thus, though the Constitution recognizes the German-speaking minority and incorporates it into the constitutional order, on the ground German speakers can rely on limited regional rights. The constitution thus divides Belgium’s geographic space according to the languages spoken in those regions. The Belgian Constitution presupposes an interaction between minority language groups and the majority Flemish Community on the federal and regional levels.

B. CONSTITUTIONAL MANDATE TO PROTECT MINORITIES

A state’s constitution may mandate that the state take certain action to protect the diversity contained within its borders. In such an arrangement, the linguistic policy is distributed, pursuant to the constitutional mandate, top-down from the central government instead of horizontally from a sub-state entity. Italy is the Member State wherein the largest number of minority populations reside.¹⁶ Article 6 charges the Italian

¹⁵ *Id.*

¹⁶ An estimated 2.5 million people belong to at least 12 minority groups within Italy. Francesco Palermo, *The Italian Draft Bill on Linguistic Minorities*, in MINORITY RIGHTS IN EUROPE 55 (Snezana Trifunovska, ed. 2001).

Republic with “protecting linguistic minorities with appropriate norms.”¹⁷ Nevertheless, and in part due to the protections already in place from the regions system,¹⁸ the Italian Parliament only passed general protective legislation pursuant to its Article 6 powers in 1999—51 years after the Constitution entered into force.

The 1999 law protects the language and culture of the Albanian, Catalán, German, Greek, Slovene and Croat populations, as well as those speaking French Provençal, Friulan, Ladin, Occitan, and Sardinian. Of particular note is the categorization of minority group rights. Parliament singled out *groups*¹⁹ in need (or deserving, in the eyes of some of the right-leaning political parties²⁰) of protection, rather than establishing minimum guarantees generally applicable to all *individual* citizens. Of course, such treatment may be inevitable for effective protection mandated by Article 6, but it also underscores the gravamen of that constitutional mandate: to protect linguistic and cultural minorities means to protect designated *groups* of citizens.

¹⁷ COSTITUZIONE [COST.], art. 6 (translation is mine). The centrality of this article is emphasized by its location after articles 4 and 5 (guaranteeing the right to work and respecting the autonomy of localities) and before articles 7 and 8 (dividing the Italian republic from the Vatican and establishing freedom of religion).

¹⁸ See discussion part II.C *infra*. Indeed, the 1999 law does not apply to the five regions which have passed more protective legislation regarding minority languages. Palermo, *supra* note 16, at 61.

¹⁹ And did so crudely, perhaps, at least to a reader versed in American Fourteenth Amendment jurisprudence. Antoni Milian i Massana makes the same point, in a slightly different context, referring to the Province of Bolzano’s separation of German- and Italian-speaking students. To Massana, the “separate but equal” idea fails when the criteria for separation of students bears no relation to the education of the students—a circumstance that distinguishes racist segregation from functional linguistic separation. ANTONI MILIAN I MASSANA, DERECHOS LINGÜÍSTICOS Y DERECHO FUNDAMENTAL A LA EDUCACIÓN. UN ESTUDIO COMPARADO: ITALIA, BELGICA, SUIZA, CANADA, Y ESPAÑA 134-37 (1994).

²⁰ Palermo, *supra* note 16, at 63.

The effect of the 1999 law is to establish a minimum level of protection in accordance with Article 6, but only for the enumerated minorities. A few of the salient provisions of the law include: permission for nursery school instruction in minority languages, and teaching minority culture and traditions in elementary and secondary schools; permission to use minority languages in official capacity, including before justices of the peace (low-level judges); authority for the regions to enter into conventions regarding transmission of programming relevant to minorities, as well as permission for regions to grant financial aid to the media to implement use of minority languages.

C. DECENTRALIZED AUTONOMOUS ZONES REGULATING THEIR OWN LANGUAGE POLICY

Decentralization involves a central state ceding some of its authority in the cultural-linguistic realm to sub-state political entities and institutions, usually on a territorial basis. Decentralization is short of a full-blown federal system, where a sub-state entity may be granted limited sovereignty. However, by decentralizing or devolving control over the linguistic sphere of government activity, decentralization improves efficiency, as well as enhancing democracy and legitimacy.²¹ Ultimately, because sovereignty is not shared, the sub-state authorities are responsible to the central state.²²

Italy provides an instructive example of decentralization. In addition to its constitutionally-mandated protective competence, the Italian Constitution sets up a system of regions, and grants limited autonomous status to the five regions where linguistic minorities are most entrenched: Friuli-Venezia Giulia, Val d'Aosta, Trentino-

²¹ See Montserrat Guibernau, *Nations Without States: Political Communities in the Global Age*, 25 MICH. J. INT'L L. 1251, 1260 (2004).

²² See *id.*

Alto Adige, Sardegna, and Sicilia. The rights that attach to minority speakers originate in legislation passed by the regional governments, and such rights are connected to the territory, not the residents, of the regions.²³

Spain's 1978 Constitution adopts a similar decentralized constitutional system with respect to its autochthonous languages.²⁴ Despite establishing Castilian as the official language of Spain, the preamble to the Constitution "proclaims its intention protect all Spaniards and all the people of Spain in the exercise of their human rights, their cultures, traditions, *languages*, and institutions."²⁵ The inclusion of "languages" in a preamble's laundry list falls short of the unambiguous protective mandate contained in Article 6 of the Italian Constitution, but nevertheless indicates the central role Spain plays in protecting Spanish language and culture. Article 2, in turn, guarantees a "right to autonomy" for the "nationalities and regions of which [Spain] is composed"²⁶

As far as decentralized linguistic policy is concerned, the more interesting passage is Article 3 of the Spanish Constitution, which explains how the "right to autonomy" is exercised in the linguistic realm. Article 3, after establishing Castilian as the official language of Spain, declares that the "remaining Spanish languages also have official

²³ For example, a French-speaking inhabitant of the Val d'Aosta can only make use of her language rights within the Val d'Aosta, and may not rely on those protection outside the region. This anomaly results in part from the Italian Parliament's decision not to expand regional language rights to a nation-wide application. *See id.* at 55; *see also* Criminal Proceedings against *Bickel and Franz*, Case C-274/96, [1998] ECR I-7637.

²⁴ For a more complete discussion of the Spanish Constitution and linguistic rights, see Giovanni Poggeschi's appropriately titled article *The Linguistic Struggle in the Almost Federal Spanish System*, in *THE CONSTITUTIONAL AND POLITICAL REGULATION OF ETHNIC RELATIONS AND CONFLICTS* 313, 315 (eds. Zagar, Jesih, & Bester 1999).

²⁵ CONSTITUCIÓN [C.E.], preamble (emphasis added) (translation is mine).

²⁶ *Id.* art 2.

status in the autonomous communities, in accordance with their respective Statutes.”²⁷

Among the seventeen autonomous communities, provided for in the Constitution itself, are various groups that have historically had languages of their own (as well as nationalist aspirations), such as Catalonia, the Basque Country, and Galicia.²⁸ The basic law for the autonomous communities is found in their respective Statutes of Autonomy. Pursuant to Article 3 of the Constitution, the Statute of Aragon promises a forthcoming law (yet to arrive) protecting Aragonese, and Catalán enjoys equal status with Castilian in Catalonia, the Balearic Islands, and recognition of a dialect in Valencia. Galician is an official language in Galicia²⁹, and the Basque language has official status (along with Castilian, of course) in the Autonomous Basque Community, as well as limited recognition in the community of Navarra.

The autonomous communities effect linguistic politics and legislation on a regional level, providing local protection for the local languages. The example of Catalonia is instructive as to how the system functions. Prior to August 2006, the linguistic policy of Catalonia was determined in the *Ley de política lingüística* which the

²⁷ *Id.*, art 3. The Spanish Constitution does not use the term “minority” as the Italian Constitution does. Giovanni Poggeschi hypothesizes that this absence may be due to the greater proportion of Spaniards who communicate in an alternate language. See Giovanni Poggeschi, *Linguistic Rights in Spain*, in MINORITY RIGHTS IN EUROPE 85 (ed. Snezana Trifunovska 2001).

²⁸ See Guibernau, *supra* note 21, at 1262; see also Montserrat Guibernau, *Spain: Catalonia and the Basque Country*, in MICHAEL O’NEILL & DENNIS AUSTIN, DEMOCRACY AND CULTURAL DIVERSITY 56 (2000).

²⁹ Recent events exposed a less salubrious effect of minority language policy in Galicia. Due to a new law requiring Galician language ability for *all* public service employees, there was a critical shortage of firefighters to battle the fires afflicting Galicia during the summer of 2006. See *Out of Control*, FIN. TIMES, Aug. 11, 2006, at 8.

Catalán Parliament (or *Generalitat*)³⁰ enacted in 1997 under the jurisdiction of the autonomous community and in accordance with Article 148(17) of the Spanish Constitution concerning the rights of the communities to teach in the local language and encourage minority culture and research. The law reaffirmed the official status of Catalán, and included a right to be answered in Catalán by a person in the public administration. The law also included a number of provisions encouraging the use of Catalán in universities. The most striking aim of that law concerned the use of Catalán by the media and in the sphere of economic activity. All radio and TV channels operating within Catalonia must broadcast at least 50% of the time in Catalán, and radio music must include 25% of songs in Catalán. The law contained further ambitious intrusions aimed at stimulating many fields of culture industry.³¹

In August 2006, though, Catalan linguistic policy underwent an epochal transformation with the entry into force of a new Statute of Autonomy, approved by the Catalan voters on July 18, 2006. The new Statute goes much further than the *Ley de política lingüística*. Now, Catalán is “the language of normal and preferential use in Public Administration bodies and in the public media of Catalonia.”³² Perhaps even more significantly, the Statute makes Catalán “the language of normal use for teaching and

³⁰ Each autonomous community has a single chamber legislative assembly. Following regional elections, the leader of the majority party usually assumes the presidency of the community. For a discussion of the political institutions of the autonomous communities, see Guibernau, *supra* note 21, at 1263-64.

³¹ See generally Poggeschi, *supra* notes 24, 27.

³² See Statute of Autonomy of Catalonia, art. 6.1 (2005).

learning in the educational system.”³³ The Statute also grants official status to Occitan, one dialect of which, Aranese, is spoken in the province of Aran in Catalonia.³⁴ Article 33.1 of the Statute grants to *citizens* “the right to linguistic choice.”³⁵ However, later the Article refers to “each individual[’s] . . . right to use the official language of his or her choice.”³⁶ It is unclear whether this distinction between citizen and individual³⁷ will affect the treatment of Catalán speakers in practice, or whether all persons will be able to avail themselves of the right to use Catalán. The right to linguistic choice applies to all administrative, notarial, registration, or judicial procedures. Communications by Catalonian public officials will be executed in Catalán, without prejudice to the rights of Castilian speakers.³⁸ There is even a “right to be attended” to in Catalán that can be invoked against private establishments, provided they are “open to the public.”³⁹

D. AFFIRMATIVE PROTECTION AND RECOGNITION FROM CENTRAL GOVERNMENT

Other Member States administer similar policies from the *central* government authorities—lacking as they do the decentralized regional, or community, structure of

³³ *Id.*; see also *id.*, art. 35.1 (“Catalán shall be used as the teaching and learning language for university and non-university education.”).

³⁴ *Id.*, art. 6.5. Practically speaking, only “citizens of Aran” possess the right to deal with the Generalitat in Occitan. See *id.*, art. 36.2.

³⁵ *Id.*, art. 33.1.

³⁶ *Id.*

³⁷ In U.S. law, the distinction between citizen and person has a particular importance in the context of the Fourteenth Amendment to the U.S. Constitution. See generally Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges and Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J. L. & LIB. 334 (2005).

³⁸ Statute of Autonomy of Catalonia, art. 50.5.

³⁹ *Id.*, art. 34.

Spain and Italy. In the Netherlands, for instance, the Frisian language is spoken in Friesland, a province with a population of 610,000.⁴⁰ Almost 55% of the provincial population considers Frisian to be their mother tongue, and about 75% know how to speak it.⁴¹ The Dutch government has stated formally that, along with Dutch, Frisian is an indigenous language of the Netherlands.⁴² Parliament has gone beyond mere recognition, by enacting measures aimed at accommodating Frisian speakers in Friesland, including *inter alia*: detailed rules on the use of Frisian in an administrative or judicial capacity; rules establishing the legal basis for changing toponymical names from Dutch into Frisian; provisions to encourage the use of Frisian in schools.⁴³

Though the Frisian language is not threatened, and seems to be enjoying a wide range of accommodating measures from the central Dutch government, it must be remembered that the Dutch Constitution is silent with respect to minority languages,⁴⁴ and that the Friesland province has no decentralized grant of authority, from the constitution or otherwise, to take affirmative protective measures. In the Netherlands, the *central* government guarantees minority language rights primarily pursuant to treaty obligations.⁴⁵ Similar concessions are made for the Mirandés community in northern Portugal.⁴⁶

⁴⁰ Floris Van Laanen, *The Frisian Language in the Netherlands*, in MINORITY RIGHTS IN EUROPE, *supra* note 27, at 72.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Indeed, the Netherlands are one of two members of the European Community having a written constitution which has no mention of official languages. The other is Denmark. *Id.*

Another fascinating permutation of this strategy resulted in the “Good Friday Agreement” entered into between Ireland and the United Kingdom in 1998. That treaty, among other more urgent objectives, granted limited formal recognition to Irish and various dialects of Scots in Northern Ireland.⁴⁷

E. NONMANDATORY AND DISCRETIONARY ACCOMMODATION

A fifth mode of member states’ linguistic accommodation—nonmandatory accommodation—is prevalent, most notably, in the United Kingdom and France. Within the United Kingdom, there are communities of speakers of the following languages, none of which have any formal recognition by the state: Welsh, Irish, Gaelic, Cornish, Scots, and Ulster Scots.⁴⁸ The furthest Parliament has gone in protecting minority languages is to provide limited discretion for local courts and public administrators to use the Welsh language where appropriate.⁴⁹ The other languages enjoy no formal legal status, but as is the case with Gaelic, are sometimes used in a local administrative capacity.⁵⁰

⁴⁵ See, e.g., International Covenant on Civil and Political Rights (“ICCPR”), art. 27, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁴⁶ See Lei n.7/99, Reconhecimento oficial de direitos linguísticos da comunidade mirandesa, (29 Jan 1999); see also Despacho Normativo n. 35/99 (5 Jul 1999) (implementing regulations to provide Mirandés education, including a limited grant of power to local institutions (“*entidades da comunidade*”) to participate in the coordination of cultural and educational projects).

⁴⁷ *Agreement Reached in the Multi-Party Negotiations*, Apr. 10, 1998, U.K.-Ire., 37 I.L.M. 751, 769-70 [hereinafter Good Friday Agreement].

⁴⁸ <http://eurolang.net/State/uk.htm>.

⁴⁹ *Id.*

⁵⁰ *Id.*

France, more than any other Member State, adopted the “ostrich approach” to its minority languages.⁵¹ Article 2 of the French Constitution is notably the only article of that document addressing language: “French is the language of the Republic.”⁵² Postcolonial France has been the prototype of an assimilation-oriented society,⁵³ and has yet to extend formal recognition to its autochthonous minority languages, despite the fact that an estimated 9 million or so French citizens speak a minority language.⁵⁴ Indeed, the French accession to the European Charter of Regional and Minority Languages was stonewalled by the high French constitutional court because certain provisions in the Charter purported to create group rights (in violation of the unity of the French Republic) and to grant quasi-official status to minority languages (in violation of Article 2 of the Constitution).⁵⁵ The French government has passed a handful of administrative decrees

⁵¹ See Adeno Addis, *Cultural Integrity and Political Unity: The Politics of Language in Multilingual States*, 33 ARIZ. ST. L.J. 719, 730-31 (2001).

⁵² LA CONSTITUTION, art. 2 (amended in 1992) (translation is mine).

⁵³ See Palermo, *supra* note 2, at 302 (discussing the unitary conception of French *citoyenneté*). Cf. also. Loi n. 75-1349 du 31 décembre 1975 (“la loi Bas-Lauriol”). That law rendered obligatory the use of the French language for various commercial activities, so much so that recourse to foreign words could be used in the obligatory French version only if there was no similar French expression. Perhaps appropriately, the President of the Republic at the time the law was passed was Valéry Giscard D’Éstaing; the Prime Minister was Jacques Chirac. In the field of language policy, Suzanne Citron relates much of French intransigency and repression of its minority languages back to the leaders of the Third Republic (1870-1940) who, as “heirs of the revolutionaries, were like [their ancestor revolutionaries], impermeable to the idea of a possible existence of cultures other than their own in France.” SUZANNE CITRON, *L’HISTOIRE DE FRANCE: AUTREMENT* 174 (1992).

⁵⁴ See *Les 75 Langues Minoritaires de France*, L’HUMANITÉ, June 25, 1999, available at <http://www.humanite.presse.fr/journal/1999-06-25/1999-06-25-291951> (last visited 16 Feb. 2006).

⁵⁵ See CC decision no. 99-412DC, June 15, 1999, Rec. ___. One commentator has suggested that the Conseil constitutionnel’s sweeping conclusions all but extinguished the hope for focused constitutional amendments designed to clear the way for passage of the Charter. See Karin Oellers-Frahm, *International Decision: Charte Européenne des Langues Régionales ou Minoritaires*, 93 AM.J.INT’L L. 938941 (1999).

and laws regarding the school instruction of minority languages, as well as their presence in the mass media. Such measures are predictably toothless, and are nearly always phrased so as to give ultimate discretion to the teachers, school administration, or those wielding discretion of the public media.⁵⁶

F. EUROPEAN UNION EFFORTS TO PROTECT MINORITY LANGUAGES

While Member States have developed an elaborate architecture of minority language rights, the European Union has not pursued the point with comparable zeal—at least not at the legal level.⁵⁷ Indeed, the European Union does not *formally* recognize linguistic minorities.⁵⁸ This is not to say the EU has not visited the issue of regional and minority languages; to the contrary, the E.C. institutions have made numerous soft law pronouncements and funded projects to protect minority languages. The EU should be commended for its growing concern about minority rights, but this paper argues that such efforts are limited by the structural incompatibility of European integration with the legal

⁵⁶ See, e.g., Loi n. 51-46 du 11 janvier 1951 (“la Loi Deixonne”) (“Des instructions pédagogiques seront adressés aux recteurs en vue d’autoriser les maîtres à recourir aux parlers locaux dans les écoles primaires et maternelles *chaque fois qu’ils pourront en tirer profit* pour leur enseignement, notamment pour l’étude de la lange française.”) (emphasis added). See also Loi n. 84-52 du 26 janvier 1984 (“la Loi Savary”) (accomplishing a comprehensive overhaul of the French university system, and including only a passing reference to the importance that the education system “*veille à la promotion et à l’enrichissement de la langue française et des langues et cultures régionales*”) (emphasis added). Such treatment was extended to all levels of education in 1989. For media, a decree was issued in 1987 urging the national radio authorities to contribute “to the expression and information of cultural, social, and professional communities.” See *supra* note 32 (translations are mine).

⁵⁷ See Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives*, 44 HARV. INT’L L. J. 331, 358-59 (2003). In her otherwise searching article, Professor Caruso puts too little emphasis on the current structural incompatibility of EU law with protection of minority rights. It is not enough to say the “complex legacy of the economic integration project” constitutes an “institutional limit” burdening the “Union’s commitment to minority languages”. *Id.*, at 358. The ethos of the integration project has been universalizing and centered on *individual* rights, and not *group* rights. This point is discussed in more detail below.

⁵⁸ Palermo, *supra* note 2, at 299.

protection of regional and minority linguistic groups. Nevertheless, the EU seems determined to protect, albeit within its limited sphere of competences, such languages, and some of its prominent efforts are described here.

i. SOFT LAW AND PROJECT FUNDING

The European Parliament, for instance, has made four Resolutions from 1981 to 1994 regarding the situation of minority language communities.⁵⁹ In response to the 1981 Resolution,⁶⁰ Parliament created the European Bureau of Lesser Used Languages (“EBLUL”) in 1982.⁶¹ That same year, Parliament initiated the B3-1006 budget line, entitled “Promotion of Regional and Minority Languages”, which provides funds for financing measures supporting minority languages.⁶² Parliament used B3-1006 to finance projects to sustain regional and minority languages, including the EUROMOSAIC network⁶³ and MERCATOR,⁶⁴ and provided support for studies on the interface of language and integration.⁶⁵

⁵⁹ See *Resolution on a Community Charter of Regional Languages and Cultures and on a Charter of Rights of Ethnic Minorities*, O.J. C287/106 [1981]; *Resolution on Measures in Favour of Linguistic and Cultural Minorities*, O.J. C68/103 [1983]; *Resolution on the Languages and Cultures of the Regional and Ethnic Minorities in the European Community*, O.J. C318/160 [1987] (regretting the lack of progress made in response to previous resolutions); *Resolution on Linguistic Minorities in the European Community*, O.J. C61/110 [1994].

⁶⁰ The so-called “Arfé report”, named after the Italian Rapporteur, Gaetano Arfé.

⁶¹ The EBLUL has as its mission the promotion of active EU policy-making in favor of regional or minority languages and the defense of linguistic rights. The languages EBLUL aim to protect are indigenous, and do not include the languages of immigrant communities, or dialects of official Member State languages. EBLUL considers itself to be representative of over 50 million EU citizens. EBLUL is not an EU institution, but is funded mainly by the Commission. See generally http://europa.eu.int/comm/education/policies/lang/langmin/langmin_en.html.

⁶² A budget line is an addendum annually appropriated by the Parliament devoting funds to an area of its choosing. Budget Line B3-1006 has been renewed every year since its inception. See Gabriel Van Toggenburg, *The EU's Endeavours For Its Minorities*, in MINORITY RIGHTS IN EUROPE, *supra* note 27, at 205, 215 n.30.

More recently, the European Union and the Council of Europe joined together to proclaim 2001 as the “European Year of Languages.”⁶⁶ The Commission has also funded a number of innovative education projects, covering not only the official languages of the Community,⁶⁷ but minority languages as well.⁶⁸ The effect of these and countless other measures the Community doubtless will undertake cannot be measured. While their effect may escape us, the undeniable message is to be applauded: the EU cares about minority languages. However, in the end, these and other such programs lack the strictures of legal norms and rules that the Member States already have in place.

In July of 2006, the European Parliament granted to speakers of Catalán, Basque, or Galician the right to communicate with the EU legislature in their native language. The success of the Spanish minorities is no doubt due in part to their strong domestic political position, as well as the recent successes of the Catalán minority in expanding their Statute of Autonomy. Excepting these Spanish minority languages, parties may

⁶³ The EUROMOSAIC network combines resources and scholars from Barcelona’s Institut de Sociolinguística Catalana, the Centre du recherche sur le plurilinguisme in Brussels, and Bangor’s Research Centre Wales. *Id.* at 215.

⁶⁴ MERCATOR is a computer database which aims to improve the circulation of information regarding minority languages within and without the EU. Adam Biscoe, *The European Union and Minority Nations*, in *MINORITY RIGHTS IN THE ‘NEW’ EUROPE* 89, 102 n.48 (Peter Cumper and Steven Wheatley eds., 1999).

⁶⁵ *See id.*

⁶⁶ European Parliament and Council Decision 1934/2000, 2000 O.J. (L 232) 1.

⁶⁷ There are twenty-one working languages of the Community—the official languages of each Member State. On July 13, 2005, Irish was included as a working language to go into effect January 2007.

⁶⁸ Caruso, *supra* note 57, at 359.

communicate with EU institutions only in official EU languages.⁶⁹ A recent report by the EU Parliament Committee on Culture and Education called for all EU institutions to communicate with citizens in their own national languages, irrespective of the official status of the language at the EU or Member State level.⁷⁰

ii. ARTICLE 151

The only hard treaty law prior to the Treaty of Amsterdam even acknowledging the existence of minorities within the European Union is Article 151 (ex Art. 128) of the EC Treaty, which instructs the Community to “contribute to the flowering of the cultures of the Member States, while *respecting their national and regional diversity* and at the same time bringing the common cultural heritage to the fore.”⁷¹ Article 151 also instructs the Community to “take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote diversity of its cultures.”⁷² Article 151 mirrors Article 22 of the Charter of Fundamental Rights of the European Union, which states that the EU “shall respect cultural, religious and linguistic

⁶⁹ Cf. *supra* note 67.

⁷⁰ Bernat Joan I Marí, Draft Report on a New Framework Strategy for Multilingualism, June 29, 2006, para. 22, *available at* http://eurolang.net/files/draft_multilingualism.pdf (last visited Aug. 14, 2006). The Draft Report also calls for the amendment of EC Treaty Articles 13 and 151, the inadequacies of which are discussed in the paragraphs that follow. *See id.*, para. 28.

⁷¹ Treaty Establishing the European Community [hereinafter EC Treaty], art. 151, O.J. C 340/173 (2003) (emphasis added). Article 151 further provides “[t]he Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures,” thus creating an affirmative obligation on the part of the Community to recognize the impact economic integration has on local and regional cultures and languages. *Id.*

⁷² *Id.* at para. 4.

diversity.”⁷³ The inclusion of Article 151 in the Maastricht Treaty evinces the delegates’ concern with the effects of the integration project on regional cultural diversity, but it does not constitute the clear competence or mandate that the EU would need to act decisively and affirmatively—as the Member States have done—in favor of collective group rights for minorities.

In stark contrast to the core economic Community competences, the impact of Article 151 has not produced significant results, and is limited to the funding of a small handful of cultural projects.⁷⁴ Indeed, some scholars have argued that minorities have benefited more from legislation passed under market-based treaty provisions—relying on a chance confluence of market demands with group demands for rights—than under Article 151 itself.⁷⁵ If that is true, the future of minority rights in the European Union currently hangs in the balance between an unsteady combination with market considerations on the one hand, and on the other, a steady stream of funded projects with debatable effects.

iii. PROTECTION OF MINORITIES AS ACCESSION CRITERION

The fall of the Berlin Wall in 1989 awakened the Community to the vital stake it had in the stability and progress of their neighbors to the East.⁷⁶ This renewed interest

⁷³ Charter of Fundamental Rights of the European Union, Dec. 7, 2000, art. 22, 2000 OJ (C 364). The Charter is an ambitious set of commitments assented to by all three legislative-executive institutions of the EU. It has no status as positive law at the moment, however. It has been incorporated into the text of the EU Constitution discussed *infra* in Part II.F.v.

⁷⁴ The most influential programs have been merged into one program entitled CULTURE 2000. Palermo, *supra* note 2, at 300 n.6.

⁷⁵ *Id.* at 300 (mentioning importance of Council Directive of 1977 providing for education of children of migrant workers in their mother tongue).

⁷⁶ See Florence Benoît-Rohmer, THE MINORITY QUESTION IN EUROPE: TOWARDS A COHERENT SYSTEM OF PROTECTION FOR NATIONAL MINORITIES 29 (1996). Benoît-Rohmer

found expression in the so-called European Agreements with Central and Eastern European nations.⁷⁷ In 1993, at the Copenhagen Summit, the Council adopted a Commission Report on enlargement that provided, *inter alia*, that a condition precedent to any eventual accession to the E.C. was respect for and protection of the rights of minorities.⁷⁸ These conditions are now embodied in the Community's Association Agreements, which require the recognition of minority nations.⁷⁹ The EU's foreign policy has focused on the protection of minorities in non Member States outside the accession context as well.⁸⁰

Interestingly, there was (and is, pending acceptance of the EU Constitution) no such requirement for the current Member States of the European Union. Some commentators have criticized the Union that the recognition of minority rights is an ideal to be consumed abroad, but ignored in the internal market.⁸¹ Indeed, Article 6 of the

highlights the Pact on Stability (1995), a political undertaking (but not a treaty) signed by the members of the Organization for Security and Cooperation in Europe, as a momentous achievement for its contribution to stability and management of border conflicts and minority issues after the Yugoslav crisis. The European Union chaired the two regional round table conferences

⁷⁷ The European Agreements included Poland, Hungary, Slovakia, the Czech Republic, Bulgaria, and Romania. Biscoe suggests the interest in East Europe was motivated by a fear of "right wing authoritarian and nationalist forces" intent on stepping into the power vacuum. Biscoe, *supra* note 64, at 97.

⁷⁸ *Conclusions of the Presidency of the European Council in Copenhagen*, SN 180/93 (June 21-22 1993) ("Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and *respect for and protection of minorities*, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces in the Union.") (emphasis added).

⁷⁹ Biscoe, *supra* note 64, at 98.

⁸⁰ *See id. passim*.

⁸¹ *See, e.g.*, Bruno de Witte, *Politics Versus Law in the EU's Approach to Ethnic Minorities*, in *EUROPE UNBOUND: ENLARGING AND RESHAPING THE BOUNDARIES OF THE*

Treaty on European Union replicates the language of the Copenhagen Agreements, but omits the reference to the respect and protection of minorities.⁸² Protection of minority rights is a *sine qua non* for the admission into the European Union, but once a state enters the EU, it seems, rights for the minorities residing within its boundaries lose their legal protection. In a sense, the requirement emphasizes the blind spot within the EU framework: the EU pressures future members to shore up constitutional and legal protection for minorities *ex ante*, because it knows that once admitted, such efforts are currently outside the scope of the Treaties, and the EU will be powerless to address them.⁸³

iv. ARTICLE 13

The Amsterdam Treaty included Article 13 at the urging of those wishing to pressure the EU into solidifying a firm foundation for social rights.⁸⁴ That article applies

EUROPEAN UNION 137 (Jan Zielonka ed., 2002) (2000) (defining the minority rights requirement as “an export article and not one for domestic working consumption”); Grainne De Burca, *On Enlargement of the European Union: Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union*, 27 *FORDHAM INT’L L.J.* 679, 700-01 (2004).

⁸² Treaty on European Union, art. 6, O.J. C 340/173 (1997).

⁸³ It could be argued that the inclusion of a minority rights requirement in the accession criteria, which are based on the common constitutional principles of the Member States, implies the existence of a common constitutional obligation on the part of all, including current, Member States. *See* Palermo, *supra* note 3, at 301. Such an argument may be internally coherent, but the discussion *supra* on the Member States’ constitutional treatment of minorities belies this point. There is great diversity in treatment, and some Member States still hold tight to their “proclaimed homogeneity.” Benoît-Rohmer, *supra* note 50, at 18 (mentioning France and Greece, in particular). *But see* Bruno de Witte, *Surviving in Babel? Language Rights and European Integration*, in *THE PROTECTION OF MINORITIES AND HUMAN RIGHTS 277* (eds. Dinstein & Tabory 1992) (“There seems to be a gradual emergence of a common European standard for the treatment of linguistic minorities . . .”).

⁸⁴ Several European parliamentarians became advocates for minority groups in Amsterdam. *See* Toggenburg, *supra* note 62, at 228.

the non-discrimination principle embedded in Article 12⁸⁵ to a wider array of situations.

The text reads as follows:

Without prejudice to the other provisions of this Treaty and within its limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁸⁶

In granting the Community the competence “to take appropriate action” to combat discrimination, Article 13 opens a new juridical space for Community action. However, closer examination reveals that unanimity is required⁸⁷ for any action, and the limiting phrase “within its limits of the powers conferred by it upon the Community” suggests a more modest scope than Article 12’s “within the scope of application of this Treaty.”⁸⁸ Another limitation is the exclusively consultative role held by the European Parliament, which is the Community organ that minority groups can most easily access. A still more

⁸⁵ Article 12 provides as follows:

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

EC Treaty, art. 12.

⁸⁶ *Id.*, art. 13.

⁸⁷ Some commissioners sought, unsuccessfully, to introduce qualified majority voting into the Article 13 law-making process. Toggenburg, *supra* note 62, at 228.

⁸⁸ This is especially clear after the ECJ’s ruling in *Maria Martinez Sala v. Freistaat Bayern*, Case C-85/96, [1998] E.C.R. I-2691 [hereinafter *Martinez Sala*], which greatly expanded the scope of Article 12 by a broad reading of Article 18’s creation of EU citizenship.

fundamental limitation is the lack of competence for the EU to enact measures of positive discrimination in favor of minorities.⁸⁹

Nevertheless, Article 13 moves in the right direction to protection for minorities in two ways. First, the Article explicitly recognizes that discrimination exists. Article 13 instructs the Community to “combat” a pre-existing problem. Second, Article 13 moves away from market criteria towards a substantive protective competence for the EU. Article 13 authorizes the Community to take affirmative measures to eradicate discrimination not just based on nationality, but of eight other categories of difference. It is albeit a small step, but I believe an important one, in the development of EU law with respect to minorities. Even though it does not grant the EU *carte blanche* to legislate on behalf of minority groups, Article 13 acknowledges the minority *group* difference that exists in the EU,⁹⁰ and incorporates it for the first time in a grant of power to the Community institutions.

v. THE EU CONSTITUTION⁹¹ AND MINORITY LANGUAGES

The Draft Constitution for the European Union, presented in July 2003, omitted any mention of minority rights.⁹² Advocacy groups mobilized to express outrage over the lacuna and obtained some interesting language in the current Constitutional Treaty

⁸⁹ Toggenburg, *supra* note 62, at 230.

⁹⁰ This acknowledgment is, on my reading, evident in the inclusion of discrimination based on “racial or ethnic origin,” which would apply equally to non-EU minorities and autochthonous minorities within the Member States. Implicit in the concept of discrimination based on “racial or ethnic origin” is discrimination against a minority *group*.

⁹¹ The Treaty was signed by Council members on October 29, 2004, and is now open for consideration by the various Member States. Following the “no” votes of France and the Netherlands, the momentum for ratification has been dissipated.

⁹² See DRAFT TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, submitted to President of European Council on July 18, 2003, Doc. CONV 850/03, *available at* <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (last visited Aug. 14, 2006).

subject to popular approval in the respective Member States. Article I-2 states that “[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”⁹³ Structurally, this language is front and center. However, closer examination reveals that it possesses more in common with preambular language than anything else. The phrase is descriptive and not prescriptive, and would not create a new competence for Community action. Interestingly, the language recalls the Copenhagen criteria for accession discussed *supra*, and may correct the asymmetrical obligations inhering in those criteria.⁹⁴ In so doing, the proposed Article I-2 may provide a lowest common denominator for countries with abysmal records of protecting minority rights. What—if any—the contours of such a minimum obligation would be are not apparent from the text and not susceptible to an expansive reading by the ECJ.

Another passage merits attention. Article I-3(3) includes in a list of the EU’s objectives a hortatory reminder to “respect its rich cultural and linguistic diversity, and . . . ensure that Europe’s cultural heritage is safeguarded and enhanced.”⁹⁵ This passage, unlike Article I-2, formed part of the original July 2003 Draft Constitution. In it, we have the first mention of linguistic diversity in an EU treaty. However, the language largely tracks Article 151 and absent a more specific command, is unlikely to create an EU competence to act on behalf of minority languages.

⁹³ TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, Oct. 24, 2004, art. I-2, O.J. (C 310) 1 (2004) available at http://europa.eu.int/constitution/en/lstoc1_en.htm (last visited May 10, 2005).

⁹⁴ See *supra* note 81 and accompanying text.

⁹⁵ *Id.*, art. I-3(3).

Any discussion of the EU Constitution must at least acknowledge the events of the Dutch and French “no” votes, and the more general failure of the pro-Constitution forces to present a compelling case in favor of ratification. The reasons for the “no” votes, and the successive stalling of the ratification process, are manifold. Whether voters were expressing their desire for “less Europe” or for a more coherent Europe (i.e., “yes to Europe, but not *this* Europe”) is a question up for debate,⁹⁶ but it is indisputable that the “no” advocates were able to tap into diffused sentiment that held, rightly or wrongly, that the EU was distant from its citizens. The perception that European integration means homogenization of the Member States’ cultures and particularities is a common theme that anti-Europe political forces, especially on the Right, have made use of repeatedly. Of course, the “no” vote is too complicated to be reduced to a mere nationalistic appeal to sovereignty and identity, but the success of the anti-integration appeal to “less Europe” depends in part on the EU’s own failure to take into account the continued resonance and relevance of identity in the EU citizenry.

This inadequacy is a broad phenomenon, mostly outside the scope of this article. However, the conflict between individual and group rights in the context of minority languages is one particular manifestation of this broad failure. Solving the minority language problem will do very little, in itself, to remedy the failure of the pro-integration forces to construct a compelling narrative as to why further integration is desirable, but to the extent that such an approach allows the EU to develop a vocabulary sufficient to accommodate non-market and cultural realities, it may contribute to the discussion of EU integration.

⁹⁶ See TOMMASO PADOA-SCHIOPPA, *EUROPA: UNA PAZIENZA ATTIVA* 36-38 (2006).

III. EUROPEAN INTEGRATION AND THE CONFLICT BETWEEN GROUP RIGHTS AND INDIVIDUAL RIGHTS

A. INDIVIDUAL VERSUS GROUP RIGHTS: WHY THE DISTINCTION MATTERS

At this stage, it will be helpful to step back a bit and sketch the boundaries of the categories of group rights and individual rights as those terms are used in this article. The generality of the phrase “group rights” may cause some confusion.⁹⁷ If we are to label group privileges as “rights,” then there must be some action that separates these “rights” from, say, a mere rhetorical appeal to a group or collectivity, with reference to a normative prescription. A legal right, in general, is an entitlement or justified claim that a legal system recognizes as legitimate according to a correct interpretation of its own rules and principles.⁹⁸ As the term is used in this article, “group rights” refer to legal entitlements or privileges, dispensed by the sovereign, to individuals by virtue of their membership to a community. This definition necessarily excludes the right of a group (say, to self-determination or secession), which are addressed to a group qua nation or “people.” The group language rights that are of importance in the context of European integration are vested in individuals, but are not available to all individuals qua individuals. Instead, recourse to these rights is conditioned on the existence of (1) a relevant group and (2) an individual’s membership in that group. This concept of group rights, then, recognizes linguistic minorities as a protectable group, but opts to protect individuals belonging to the group rather than protecting the group as such. In this vein,

⁹⁷ An extensive discussion of the concept of group rights can be found in MARLIES GALENKAMP, *INDIVIDUALISM VERSUS COLLECTIVISM: THE CONCEPT OF COLLECTIVE RIGHTS* (1998).

⁹⁸ See Dwight G. Newman, *Collective Interests and Collective Rights*, 49 AM. J. JURIS. 127, 128 (2004).

it is possible to speak of “group subjectivity” even though the rights are, *sensu strictu*, granted to individuals.

A cursory discussion of the importance of the individual in modern thought may provide a helpful background. Since World War II and the establishing of the United Nations, individual rights have displaced group rights as the dominant form of protecting individuals.⁹⁹ A U.N. study observed, with respect to the League of Nations system of minority protection, that

This whole system [of minority group protection] was overthrown by the Second World War. All the international decisions reached since 1944 have been inspired by a different philosophy. The idea of a general and universal protection of human rights is emerging. It is therefore no longer only the minorities in certain countries which receive protection, but all human beings in all countries.¹⁰⁰

Of course, the emphasis on the individual is hardly a Twentieth Century invention. One of the key characteristics of modernity is the progressive privileging of the individual, in the religious and social, as well as the juridical, realms. Thus, Christianity re-ordered the individual’s relation to the cosmos by putting him in direct communion with God. The Reformation was a further development of modern religion’s emphasis on individual communion with the divine. The Renaissance¹⁰¹ and the Enlightenment,¹⁰² too, are periods thought of primarily in terms of their development of

⁹⁹ James D. Wilets, *The Demise of the Nation-State: Towards a New Theory of the State Under International Law*, BERKELEY J. INT’L L. 193, 206 (1999).

¹⁰⁰ Study of the Legal Validity of the Undertakings Concerning Minorities, U.N. DOC E/CN.4/367.

¹⁰¹ See, e.g., JACOB BURCKHARDT, *THE CIVILIZATION OF THE RENAISSANCE IN ITALY* 98-119 (1990); cf. also GIORGIO VASARI, *THE LIVES OF THE ARTISTS* (describing the Renaissance as a reawakening of painting from a long slumber spurred on by the individual genius, or *ingegno*, of Tuscan artists such as Cimabue, Duccio di Buoninsegna, and Giotto).

ideas of, respectively, humanistic and rationalist individualism. Radical individualism in the form of subjectivism and existentialism developed in the first half of Twentieth Century.

Unanchored from the values and roots that tied its constituent groups together,¹⁰³ European society in the period leading to the Second World War witnessed a radical re-ordering of the State, individuals, and groups. Despite their outward appeals to group identity, the fascism and National Socialism that convulsed Europe in the 1920s and 1930s were not so much a revival of group solidarity as they were symptoms of a growing dissolution of traditional values that were enforced in part by group accountability. The post-World War II emphasis on individual rights results from a realization that the dissolution of group solidarity had left individuals powerless against an Almighty State.¹⁰⁴

¹⁰² See, e.g., IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (1995) (moral law requires that humans are treated as ends in themselves, and never as means). In a different iteration of Enlightenment individualism, the “social contract” models of both Locke and Rousseau liberate individuals from the natural law framework and make their continued participation in society depend, at least theoretically, on their consent.

¹⁰³ Heidegger and Weber discuss this phenomenon at length from different viewpoints. Compare Martin Heidegger, *The Question Concerning Technology*, in *BASIC WRITINGS* 307 (David F. Krell, ed. 1993) (warning that reliance on technology threatens to “enframe” the entire human experience and undermine any conception of human beings beyond functional means to an end) with Max Weber, *Science as a Vocation*, in *MAX WEBER: ESSAYS IN SOCIOLOGY* 129, 155 (H.H. Gerth & C. Wright Mills, eds., 1946) (describing modernity in terms of rationalization and intellectualization, which “disenchant” man from the sense of religiosity that “in former times swept through the great communities like a firebrand, welding them together”).

¹⁰⁴ Hannah Arendt did not consider the modern State’s tendency to centralize and expand political life to be, in and of itself, problematic. Instead, the totalitarian problem resulted when nationalist ideology became conflated with the State. The atomized individualism inherited from the Nineteenth Century liberalism was connected to the State by the “solid cement of national sentiment.” See Hannah Arendt, *The Nation*, in *ESSAYS IN UNDERSTANDING 1930-1945: FORMATION, EXILE, AND TOTALITARIANISM* 206, 209 (1994).

The free-market utopianism of Twentieth Century liberalism is a different movement in the same direction toward the dominion of the individual. Individual rights have been used to drive the integration of post-World War II Europe under the theory that economic interdependence would eradicate nationalistic violence. The EU can be conceptualized both as a contribution to, and consequence of, an ever-increasing individual-centered legal rights framework. Of course, these sketches are rendered with the broadest of brushes, and are meant merely as a general evidence of the increasing alienation of group solidarity and belonging in the modern period.

However, the appeal to the group or collectivity still resonates with us.¹⁰⁵ Groups still “matter.” It is still possible to refer to ethnic or cultural solidarity, and the importance of “cultural diversity” testifies to a general recognition that we also see cultures and groups as irreducible to mere aggregates of individuals. Some commentators have sought to portray the EU as an inflexible mechanism moving towards assimilation and normalization, to the detriment of particularities.¹⁰⁶ This view has assumed the negative to be true as well: namely, that group rights will, for better or worse, occasion an erosion of the individual rights framework on which the EU legal order is premised. A basic assumption of this article is that such a reductive approach

¹⁰⁵ Dwight Newman provides the example of Quebecois secession as an example of the moral resonance of group-thinking. According to Newman, supporters of secession do not say “there are seven million Quebecois that desire secession, therefore secession is obligated.” Instead, appeals to independence refer to a “distinct culture, a distinct identity, and so on.” Newman, *supra* note 98, at 145. Of course, the appeal to a group necessarily depends on a multiplicity of persons, but the persuasiveness of the argument for a group right (e.g., a right to secession) does not depend on the number of persons. The relevance of numbers is at best tangentially relevant.

¹⁰⁶ Padoa-Schioppa discusses these critiques in *EUROPA: UNA PAZIENZA ATTIVA*, *supra* note 96 at 70-72.

fails to appreciate the potential complementarity of individual and group rights. Indeed, to the extent that failure to accommodate minority languages into the EU legal framework provides an excuse for otherwise integration-sympathetic groups to subvert the integration process, the destiny of the EU may be, in part, tied up with the destiny of minority language groups.¹⁰⁷

An oft-cited example of a strong group rights language is found in Article 27 of the International Covenant on Civil and Political Rights, which states:

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 other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.¹⁰⁸

The rights themselves are vested in individuals, but only those individuals who are members of a cultural group. Therefore, a necessary precondition to the vesting of any rights under Article 27 in individual “persons belong to . . . minorities” is the existence of a group. Article 27 *refers outward* toward an extant cultural situation. Because it relies on a descriptive state of cultural affairs, it is different than merely a grant of group rights to certain collectivities. It is also different than a general and universal individual right to associate, because here, again, the law refers outward to certain extant groups.

Another example, discussed *supra* in Part II.B, is the Italian Republic’s 1999 Law passed pursuant to Article 6 of the Italian Constitution. That law mandates certain guarantees that the government must provide to members of enumerated cultural and linguistic minorities. Indeed, that law in many respects goes much further than Article

¹⁰⁷ Cf. Addis, *supra* note 51, at 725-26 (“The choice, therefore, is not between national unity on the one hand and the acknowledgement and affirmation of linguistic differences on the other hand. Rather, the issue is what institutional structures would enable us to strengthen national unity while affirming and cultivating linguistic diversity.”).

¹⁰⁸ ICCPR, art. 27.

27. Not only does the law prevent discrimination against members of certain minorities, but it also provides for affirmative rights that members of the minority community may invoke in public life.

Victor Segesvary's distinction here between *sui generis* group rights and quasi-group rights is helpful. *Sui generis* group rights are "derived from the constitution of a specific social and cultural environment by groups of men, having its distinctive symbolic orderings, belief- and value-systems, and particularly important, shared historic experience."¹⁰⁹ *Sui generis* group rights are invoked so that a community may flourish. The group language rights discussed in this article are *sui generis* group rights. Quasi-group rights (e.g., rights for the disabled, homosexual rights) arise merely because of accidental or biological facts that link the individuals together into the group. There is no *cultural* commonality of homosexual persons or disabled persons: there are merely homosexual and disabled persons across numbers of cultures. The *sui generis* group right aims to protect cultural or linguistic communities as a legal subject independent of the individual members of that group.

Other group or collective rights are based on the aggregative interests of the individual members that constitute the group, and are thus distinguishable from *sui generis* group rights. A labor union is an example of such a collectivity. It may be important to protect the right for labor to organize, but it makes no sense to say that the United Auto Workers itself has a right to exist. Instead, its members each possess an individual right to organize. The right, though, is functional, and does not depend on an extant situation, but rather the possibility and potential for different organizations and

¹⁰⁹ Victor Segesvary, *Group Rights: The Definition of Group Rights in the Contemporary Legal Debate Based on Socio-Cultural Analysis*, 3 INT'L J. GROUP RIGHTS 89, 102 (1995).

groupings in the future. In the case of a union, the “group” right is merely an aggregative right of the individual members. If ever the members decided that a greater number preferred a splinter union, then the UAW would perhaps cease to exist, and no one would lament the violation of its “rights.”

An illustrative example of a group right—as distinguished from a mere aggregate of individual rights—is a special fishing right granted to an indigenous community.¹¹⁰ Let us suppose that the state grants to members of that community the right to fish in the salmon-rich streams that run through the community’s traditional homeland year-round. These fishing rights are at once individual rights and group rights. For any non-fishing individual, it may be sensible to trade his rights for an alternative privilege or payment. More interestingly, other individuals may garner a personal satisfaction, unrelated to their community-belonging, from fishing. For example, maybe it is cheaper to fish than to buy at market, or perhaps it is a day’s ride to the next comparable stream. However, assuming the state could grant some substitutive privilege or payment to compensate for the aggregate individual interests, the individual would not suffer, but the community would. In this example, the *sui generis* group right is intended as the bulwark to protect the community from suffering *even if the individuals are “bought off.”* The *sui generis* group right recognizes the intrinsic value of the group and cannot be derived from the rights of the individual members.

B. THE EU AND INDIVIDUAL RIGHTS

From the perspective of the Member States, integration is fundamentally a process of surrendering sovereignty. Member States formerly exerted plenary powers over their

¹¹⁰ I borrow this example from Newman, *supra* note 98 at 156.

internal markets, foreign affairs, and borders; now, with the expansion of qualified majority voting, the extent of Member State participation in those fundamental competences can be as minimal as casting a losing vote against a majority of other states.¹¹¹ From the inception of the EEC, minorities subject to the centralized policies of the Member States hoped that the progress towards integration would occasion a diminution of Member State authority and a concomitant increase in autonomy for regions and the minorities that often have greater leverage on the sub-state level.¹¹² Expectations were high that the European Community's approach would create a one-way ratchet, moving inevitably to more minority protection.

The Community institutions have fallen short of these aspirations, and Member States, as we have seen *supra*, have, with varying success and enthusiasm, propped up the minority and regional languages with a protective legal framework. The reason for the EU's failure is that the EU has opted for an individual rights—and not a group rights¹¹³—

¹¹¹ The ECJ, in *Van Gend en Loos*, describes the Community for what it is: “the [European] Community constitutes a *new legal order* of international law for the benefit of which *states have limited their sovereign rights . . .*” *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] ECR 1. The EU has become increasingly active in the day-to-day affairs of its citizens, having largely accomplished its goal of market integration, and recently moving toward a substantive concept of citizenship. See, e.g., *Martinez Sala*, *supra* note 88. The surrender of state sovereignty in the field of application of the Treaties is necessary for the achievement of the Treaties' objectives. While such surrender was integral to the European economic integration, the process exacted (and exacts today) a price on the protection of cultural and linguistic minorities.

¹¹² See de Witte, *supra* note 83, at 277. Hopes that integration would allow for the development of a “Europe of Regions” relied on a neofunctionalist conception of a European Community that forges connections and linkages between substate and suprastate groups that ultimately weaken the exclusive power of the Member States. For an elaboration on the neofunctionalist conception of integration, see generally Paul Craig, *The Nature of the Community*, in *THE EVOLUTION OF E.U. LAW* 49 (eds. Craig & de Búrca 1999).

¹¹³ Nathan Glazer has written on these dueling approaches to rights of minorities in the context of race in the United States. He suggests that multicultural nations (and by analogy, supranational polities like the EU) all must engage in a debate over which rights approach to take

approach to realize its overarching goal that the “internal market is to comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured”¹¹⁴ An integrated Europe is a single market, and the individual market actors are its constitutive atoms. Minority group rights, which have been the subject of so much Member State law, do not fit easily into—and indeed may be at odds with—this market-based framework.¹¹⁵ The concept of *sui generis* group rights—and the idea that linguistic minorities may be irreducible legal subjects—has not yet entered into the mainstream vocabulary of Community institutions.

Europe’s legal space is now defined by two sets of actors (EU institutions and Member State governments) and the resulting form of governance has naturally had an effect on citizens’ rights. The transfer of sovereignty from Member States to the EU interrupts the relationship between the individual and the state as dispenser of rights.¹¹⁶

to further justice. See NATHAN GLAZER, *ETHNIC DILEMMAS: 1964-1982*, 254-70 (1983). A similar debate has raged the past few decades in American Equal Protection jurisprudence. For the most part, the Supreme Court has taken an individual rights approach to the 14th Amendment. See generally *Washington v. Davis*, 426 U.S. 229 (1976); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1980); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). However, dicta from the Court’s recent decision in *Grutter v. Bollinger*, may suggest an increased willingness to look at group rights, at least for a period of time. See *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (Justice O’Connor’s 25-year plan seems to suggest that a group rights approach may be necessary for a period of time).

¹¹⁴ EC Treaty, art. 14(2).

¹¹⁵ Biscoe believes the “ethos of European integration” sees regional cultural diversity as “an optional extra” which is sacrificed in the drive to create the single market and the perception of a need to remain competitive in the global economy. Biscoe, *supra* note 64, at 90. Where marketplace issues conflict with cultural diversity, the market will always win. He closes his article with a remonstrance to minority groups: “[m]inority nations, and multi-nation states which are concerned that European economic integration has implications for their cultural diversity, should take note.” *Id.* at 99.

¹¹⁶ See Jacqueline Bhabha, *Citizenship and Post-National Rights in Europe*, 51 INT’L SOC. SCI. J. 11 (1999). Professor Bhabha sees in European integration a useful context to examine the

The ECJ has held that the EU creates directly effective rights that individuals can rely on against their Member States and EU institutions.¹¹⁷ These legal entitlements are the implements that have driven the economic integration of Europe. The directly effective Community economic rights, however, have collateral reverberations felt throughout Europe as a community of *nations* or *language groups* (as distinguished from a community of *markets*), and despite the EU's undeniable overtures to minority groups,¹¹⁸ these effects can destabilize the group rights framework the Member States. This destabilizing effect will only amplify as EU individual rights continue to expand beyond traditional market-oriented rights into substantive social and political norms. This phenomenon will be discussed *infra* in more depth, but for the moment it suffices to point out that some domestic rules that aim to ensure group language rights are bound to conflict with fundamental principles of EU law. The EU's approach to minority language has been handicapped by its failure to recognize the *sui generis* subjectivity of language groups. The individualist emphasis of the EU institutions is a major cause for this failure.

interaction between the role of the State and the role of supranational bodies in enforcing citizens' rights.

¹¹⁷ See, e.g., *Van Gend en Loos*, *supra* note 111. Moreover, the EC Treaty creates rights that may be invoked to limit private actions as well. See *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, C-43/75 [1976] ECR 455.

¹¹⁸ See discussion Part II.F. *supra*. See also De Witte, *supra* note 83, at 288. Prof. De Witte posits that the prevailing ethos at the various EU intergovernmental conferences held that economic integration affected linguistic communication only *informally*, in contrast to the *formal* political decision to focus on a common market. His article was written in 1992, so one must wonder if his impressions were different at the Amsterdam conference.

B. ARTICLES 12 AND 39

Treaty articles 39¹¹⁹ and 12¹²⁰ are examples of how individual economic rights at the Community level can conflict with Member States' efforts to protect *groups* of citizens. Both articles prohibit discrimination on the basis of nationality and are among the most important to the integration effort.¹²¹ Article 39's prohibition aims to secure the freedom of movement for workers, and Article 12 is a general prohibition of such discrimination "within the scope of application" of the Treaty. Article 12 has been described as a right to equal treatment, while Article 39 has been considered more limited, as it applies only to workers.¹²² Paragraph 4 exempts public service employment from the scope of Article 39, in addition to general public policy, security, and health.¹²³

¹¹⁹ Article 39 provides that "freedom of workers shall be secured within the Community." Moreover, "such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work or employment." EC Treaty, art. 39. Article 39 has direct effect, but was also implemented by Regulation 1612/68. *See Rutili v. Minister for the Interior, C-36/75, [1975] ECR 1219.* The article also has horizontal direct effect as established in *Roman Angonese v. Cassa di Risparmio di Bolzano SpA, Case C-281/98, [2000] ECR I-4139, paras. 34-36 [hereinafter Angonese]*.

¹²⁰ Article 12 provides that "[w]ithin the scope of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." EC Treaty, art. 12.

¹²¹ Prof. John Handoll anticipated the import of Article 39 when he wrote that the ECJ's approach to Article 39 in the decades before *Martinez Sala* reflected the underlying belief that "a worker is more than a worker; he is an embryonic Community citizen." John Handoll, *Article 48(4) EEC and Non-National Access to Public Employment*, 13 EURO. L. REV. 223, 240 (1988).

¹²² Annette Schrauwen, *Sink or Swim Together? Developments in European Citizenship*, 23 FORDHAM INT'L L.J. 778, 780 (2000).

¹²³ The ECJ case law has all but read the exceptions out of the text of Article 39 and their implementing directive 64/221. For example, in *Rutili* the court held that in order for the public policy exception to obtain, the discrimination must be justified by *Community* public policy concerns, not Member State concerns. *Rutili, [1975] ECR at 1223. See also Allué v. Università di Venezia, C-33/88, [1989] ECR 1591* (limiting "public service" exception to the exercise of "direct or indirect powers conferred by public law and . . . the discharge of functions whose purpose is to safeguard the general interests of the State or of other public authorities and which

The commitment to creating a single frontier-less market relies on a mobile labor supply moving efficiently and without obstacles to where it is valued most. Articles 12 and 39 aim to make free supply of labor a reality by vesting rights with individual workers and EU citizens.¹²⁴ By eradicating parochial discrimination in the labor market, the EU not only ensures fair treatment, but affirmatively *encourages* the movement of workers.¹²⁵

An obvious conflict between Article 39 and a Member State minority group right would be a hypothetical rule passed by the autonomous Spanish region of Catalonia requiring local businesses to employ a specified percentage of Catalanian residents in factories. Article 3 of Regulation 1612/68 explains that even “indirect” discrimination on the basis of nationality is prohibited under Article 39.¹²⁶ Thus, such a provision would be a clear violation of Regulation 1612/68 since Catalanian residents are predominantly Spanish citizens. Such a law would threaten the free movement of workers that Article 39 and Regulation 1612/68 aim to achieve. Such a law would patently be designed to have a protectionist, anti-integration discriminatory effect that benefits a group at the expense of individual labor market actors. The nexus between the hypothetical law and Article 39 is all too clear.

therefore require a special relationship of allegiance to the State on the part of persons occupying them and reciprocity of rights and duties which form the bond of nationality”).

¹²⁴ “For example, if a Spaniard cannot get a job as a machinist in Germany because there are arbitrary language requirements, or because the local council will not provide housing, or because his Moroccan wife will be excluded, or because he has to purchase costly visa requirements, then his free movement will be hampered.” Bhabha, *supra* note 116, at 14.

¹²⁵ See Á. Castro Oliveira, *Workers and Other Persons: Step-By-Step from Movement to Citizenship, Case Law 1995-2001*, 39 COMMON MARKET L. REV. 77 (2002).

¹²⁶ Regulation 1612/68, O.J. C 344/12.

As mentioned *supra* in Part I.F.iv, Article 12 articulates a broad commitment to anti-discrimination “within the scope of application of [the EC] Treaty.”¹²⁷ The key question, then, is how far the EC Treaty’s “scope of application” extends. If the “scope of application” of the Treaty extends beyond workers’ freedom of movement, then Article 12 sweeps even more broadly than Article 39. To the extent that Article 12 embodies the same principle but applies it to a wider range of conduct, Article 12 will only increase in relevance. By corollary, the non-discrimination principle will apply to an increasing array of Member State acts, many of which may not facially seem implicated by the Treaty at all. Recent cases have confirmed that this is true. The expanding “scope of application” of the Treaty results from the citizenship concept introduced to the EC Treaty at Maastricht.¹²⁸

C. *MARTINEZ SALA AND THE EXPANSION OF INDIVIDUAL CITIZENSHIP RIGHTS*

The ECJ, in the *Martinez Sala* case,¹²⁹ interpreted Article 12 as applying to all citizens residing lawfully in a Member State. Ms. Sala, a Spanish citizen, had resided in Germany for over thirty years, and had been receiving social welfare benefits in the form of a child-raising allowance since 1986. She had entered Germany to work, but she had been unemployed for over a decade. She had applied for a German residence permit, which the authorities were disinclined to give her.¹³⁰ She then applied for her welfare

¹²⁷ EC Treaty, art. 12.

¹²⁸ The Treaty of Maastricht contained, for the first time, a provision on EU citizenship. That provision is now found in EC Treaty, article 18.

¹²⁹ *See supra* note 88.

¹³⁰ The German authorities had their hands tied because they did not want to issue the permit to a non-worker, but were prohibited from repatriating her by Article 6(a) of the European Convention on Social and Medical Assistance.

benefits. The welfare authorities required Ms. Sala to produce a residence permit, which she could not, of course, do. German citizens were required only to prove their residence. Not being able to produce the permit, she was denied the benefits.

The ECJ ruled that requiring an EU citizen to produce a residence permit when German citizens were not so required constituted impermissible discrimination on the basis of nationality in violation of Article 12.¹³¹ Recalling that Article 12 applies “within the scope of application of the Treaty,” the ECJ had to decide which aspects of the EC Treaty were implicated. The ECJ held that the child-raising allowance was a family benefit under Regulations 1612/68 and 1408/71 and thus fell within the scope of the Treaty.¹³² Most striking, though, was the ECJ’s separate finding that *citizenship alone*, and not worker status, brought Ms. Sala within the scope of the Treaty: “[a]s a national of a Member State, lawfully residing in the territory of another Member State, [Ms. Sala] . . . comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship.”¹³³ The implication of the holding in *Martinez Sala* is that the individual right to equal treatment attached to the mere fact of EU citizenship.¹³⁴ No longer, it seems, would the ECJ require a nexus between the discrimination and the exercise of a community economic right (e.g., Article 39 and freedom of movement for workers). In the post-*Martinez Sala* EU, a Member State must beware not only of enacting measures

¹³¹ *Martinez Sala*, at paras. 64-65.

¹³² *Id.* at paras. 39-44.

¹³³ *Id.* at para. 61.

¹³⁴ The EU Constitution, if ratified, would make this principle of individual rights flowing from citizenship explicit in the Treaty text.

that may impede the exercise of individual economic rights, but also of discriminating against *any* EU citizens who happen to be in the country legally—even casually.

Subsequent cases have confirmed this strong view of EU citizenship as a political and social, and not merely economic, right. The *Trojani* case,¹³⁵ for example, involved a French national applying for social assistance benefits in Belgium. The ECJ directed the Belgian courts to determine whether the petitioner fell within the ambit of any of Articles 39, 43 (applying to the freedom of establishment), and 49 (applying to the freedom to provide services) of the EC Treaty. However, even if the Belgian courts answered that question negatively, the ECJ observed that

a citizen of the European Union who does not enjoy a right of residence in the host Member State under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision. . . . However, once it is ascertained that a person in a situation such as that . . . is in possession of a residence permit, he may rely on Article 12 EC in order to be granted social assistance benefit[s].¹³⁶

The ECJ cited to *Martinez Sala* and *Trojani* in the 2005 case *Queen v. London Borough of Ealing*. In that case, the Court summarized the *Trojani* case as establishing that “a citizen of the Union who is not economically active may rely on the first paragraph of Article 12EC where he has been lawfully resident in the host Member State for a certain

¹³⁵ *Trojani v. Centre Public d’Aide Social de Bruxelles*, Case C-456/02 [2004].

¹³⁶ *Id.*, para. 2; *accord* *Grzelczyk v. Centre public d’aide sociale*, Case C-184/99, [2001] ECR I -6193 (“[A] citizen of the European Union, lawfully resident in the territory of a host Member State, can rely on Article 6 [now Article 12] of the Treaty in all situations which fall within the scope *ratione materiae* of Community law. Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State, as conferred by Article 8a [now Article 18] of the Treaty.”).

time or possesses a residence permit.”¹³⁷ *Borough of Ealing* held that an EU citizen’s rights under Article 12 prohibited the United Kingdom from conditioning receipt of subsidized school loans on a student’s “settlement” in the country. The British government conceded that under the terms of the “settlement” provision of the loan regulation, most non-British Community students would be “unsettled” despite being legally resident in the country. The ECJ expressly disavowed the holdings in the earlier *Lair*¹³⁸ and *Brown*¹³⁹ cases which had held that the assistance was primarily related to education and social policy and therefore not within the scope of the Treaty.

Moreover, in 2004, the European Council and the EU Parliament promulgated Directive 2004/38, which governs the free movement of EU citizens. Thus, in part, Directive 2004/38 supplants Regulation 1612/68, discussed *supra* in Part II.C, which addressed the free movement of workers—a more limited subset of individuals. The directive provides *inter alia* standards according to which “Union citizens” (defined as nationals of a Member State) are to be permitted entry to, residence in, and exit from other Members States. Importantly, the directive creates a near-absolute “right of residence” during the three months following entry into the host Member State.¹⁴⁰ Beyond three months, EU citizens may remain in a host Member State provided they are studying (with health insurance), working, conducting business, or even merely in

¹³⁷ Queen (on the application of Dany Bidar) v. London Borough of Ealing, para. 37, Case C-209/03, [2005] ECR I-2119.

¹³⁸ *Lair*, Case C-39/86 [1988] ECR I-3161.

¹³⁹ *Brown*, Case C-197/86, [1988] ECR I-3205.

¹⁴⁰ Council Directive 2004/38, art. 6.1, 2004 O.J. (L 158) (corrigendum published at 2004 O.J. (L 229)), available at http://eurlex.europa.eu/LexUriServ/site/en/oj/2004/l_158/l_15820040430en00770123.pdf (last visited Aug. 14, 2006).

possession of sufficient resources to avoid becoming a burden on the host Member State's social assistance system.¹⁴¹ Most important for our purposes is Article 24.1, which codifies the equal treatment principle flowing from *Martinez Sala*:

Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, *all Union citizens* residing on the basis of this Directive in the territory of the host Member State *shall enjoy equal treatment* with the nationals of that Member State within the scope of the Treaty.¹⁴²

While the directive does provide the ubiquitous general reservations for “public policy, public security or public health,”¹⁴³ there is no exception for group-protective measures designed to protect minority languages.

Martinez Sala and Directive 2004/38 affect the minority language problem only by implication. Ms. Sala, for instance, had nothing to do with Germany's efforts to protect languages or minorities; she was denied a simple welfare benefit and the ECJ found that denial was in violation of her rights as an EU citizen to be free from discrimination. Before evaluating the impact of *Martinez Sala*'s expansive concept of citizenship on Member State protections of minority languages, it is necessary to survey the actual ECJ rulings in cases where group language rights collide with individual Community rights.

IV. MAJOR ECJ CASES ADDRESSING CONFLICT BETWEEN MINORITY LANGUAGE RIGHTS AND COMMUNITY INDIVIDUAL RIGHTS

The ECJ interprets the European treaties, and to the extent a Member State law limits the full enjoyment of the freedoms and rights provided by the treaties and

¹⁴¹ *Id.*, art. 7.1.

¹⁴² *Id.*, art. 24.1 (emphasis added).

¹⁴³ *Id.*, art. 27.1.

Community law, the ECJ is charged with affirming the supremacy of EU law¹⁴⁴ and declaring the domestic measure to be in conflict with treaty law. The ECJ decisions in this field have articulated and defined the principles of non-discrimination and freedom of workers and persons. Since the treaties are concerned with individual rights, the ECJ in its role as treaty interpreter, has usually found Member State measures to protect language groups in violation of Community law.

A. THE *GROENER*¹⁴⁵ CASE

The *Groener* case involved a 1979 Irish Ministry of Education regulation that required schoolteachers to pass an Irish language proficiency exam as a precondition to attaining a permanent post. When Ms. Groener, a Dutch national and art teacher, failed her test, she was denied a position over the objection of the school which desired to hire her. Groener alleged that the regulation violated Article 39 (then Article 48) and, in particular, was not justified by Article 3(1) of the implementing Regulation 1612/68 which permits states to condition employment on linguistic knowledge when “required by reason of the nature of the post to be filled.”¹⁴⁶

The ECJ held that the regulation did not violate Community law for a combination of reasons. The Court attached importance to the official primary

¹⁴⁴ Unlike the U.S. Constitution, the European Union treaties do not contain an explicit textual foundation for the supremacy of Community law. The ECJ has guided the affirmation of Community supremacy through its case law. See *Costa v. Ente Nazionale Per L'Energia Elettrica (ENEL)*, Case 6/64, [1964] ECR 585 (holding that in cases of conflict, Community law must be supreme over domestic law because to hold otherwise would render the direct applicability and direct effect of Community law meaningless). *Costa* also reminded Member States that, by entering into the European Union, they have limited their sovereign rights. *Id.*

¹⁴⁵ *Groener v. Minister for Education and the City of Dublin Vocational Educational Committee*, Case 379/87, [1989] ECR 3967.

¹⁴⁶ Regulation 1612/68, art. 3(1), O.J. 344/12.

constitutional status of the Irish language.¹⁴⁷ Pointing out the concerted effort by the Irish government to preserve and promote its linguistic heritage, the Court also warned Ireland not to go too far:

The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language. However, the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstances be *disproportionate in relation to the aim pursued* and the manner in which they are applied must not bring about discrimination against nationals of other Member States.¹⁴⁸

The requirement of proportionality¹⁴⁹ was met in *Groener* for two reasons. First, the “privileged relationship” between a teacher and students allowed Article 3(1) to apply beyond instructors teaching the Irish language.¹⁵⁰ Ireland wanted to protect and promote the language, not merely to teach it, and requiring all teachers to be competent would encourage spoken Irish in the halls, during recess, and in other classes. Second, the regulation required competence, not fluency, in Irish. To require fluency, the Court suggested, could constitute “a level of knowledge [that] is not disproportionate in relation to the objective pursued.”¹⁵¹ The Court also warned that any requirement that the

¹⁴⁷ See *supra* note 6 and accompanying text.

¹⁴⁸ *Groener*, at para. 19 (emphasis added).

¹⁴⁹ Prof. Shuibhne compares the cautious proportionality inquiry to a “general international trend” regarding affirmative action. See Shuibhne, *supra* note 6, at 71.

¹⁵⁰ To so require would, as Advocate General Darmon pointed out in his opinion, “treat [Irish] as a dead language like Ancient Greek or Latin, and as a language incapable of further development.” *Groener*, Opinion of AG Darmon, at para. 22.

¹⁵¹ *Id.*, at para. 21.

language certification be acquired within the Member State would be a violation of the principle of non-discrimination.

At the time, the *Groener* decision was welcomed cautiously by advocates for minority languages and rights. It appeared the ECJ signed off on a regulation aimed to protect the Irish language notwithstanding the clear disadvantage to non-Irish teachers searching employment in Ireland. The decision considered the Irish language as a subject that could be legally protected. Perhaps more importantly, the ECJ was willing to recognize that encouraging the usage of minority languages contributed collaterally and indirectly to the flourishing of the language's speakers.

Commentators wondered how far the Court was willing to extend this logic. Was the ECJ willing to provide a "real recognition of the legitimacy of national concerns in relation to national cultural heritage"?¹⁵² Or was this case an outlying situation, limited to the Irish anomaly of constitutional recognition and primacy of the minority group's language? Would the same analysis hold when the language was protected only regionally? The subsequent cases dispelled hopes that the ECJ was willing to recognize a general Member State interest in providing *sui generis* group rights to minority language speakers.

B. THE *BICKEL/FRANZ*¹⁵³ CASE

¹⁵² Bryan M.E. McMahon, *Case Comment on Groener*, 27 COMMON MARKET L. REV. 129, 139 (1990). If so, as Prof. McMahon asserted triumphally, "[t]he bureaucrats and the economists will have to recognise that cultural diversity cannot be indiscriminately swapped in the name of economic unity." *Id.*

¹⁵³ Criminal Proceedings against Bickel and Franz, Case C-274/96, [1998] ECR I-7637.

Bickel/Franz came before the ECJ on a preliminary reference¹⁵⁴ from a criminal court in the Trentino-Alto Adige region of Italy on the Austrian border. Article 100 of the Statute for the region¹⁵⁵ provided a special right for German-speaking residents of the region to have any criminal proceedings against them conducted in German.¹⁵⁶ *Bickel*, who was an Austrian lorry driver, was being prosecuted for driving under the influence. *Franz*, a German tourist, had been charged with possession of an illegal weapon after a customs search. Neither spoke Italian, and accordingly petitioned the Italian court to conduct the proceedings in German. The Italian court referred the following question to the ECJ:

Do the principles of non-discrimination as laid down in the first paragraph of Article 12, the right to movement and residence for citizens of the Union as laid down in Article 18 and the freedom to provide services as laid down in Article 49 of the Treaty require that a citizen of the Union who is a national of a Member State and is present in another Member State be granted the right to call for criminal proceedings against him to be conducted in another language where nationals of that State in the circumstances enjoy such a right?¹⁵⁷

The ECJ separated the referral into two questions:¹⁵⁸ first, did the right at question implicate the Treaty?; and second, if the treaty was implicated, could the region limit the application of that right to residents of the region?

¹⁵⁴ See EC Treaty, art. 234.

¹⁵⁵ See discussion *supra* Part II.C.

¹⁵⁶ Special Statute for the Trentino-Alto Adige Region, Presidential Decree No. 670/1992, art. 100. *Cf. supra* Part I.C.

¹⁵⁷ *Bickel/Franz*, at para. 11.

¹⁵⁸ The ECJ, not to be outdone in prolixity, reformulated the referral thus: “the national court is essentially asking whether the right conferred by national rules to have criminal proceedings conducted in a language other than the principal language of the State falls within the scope of the Treaty and must accordingly comply with Article [12] thereof. If so, the national court also asks whether Article [12] of the Treaty precludes national rules, such as those at issue, which, in

The Court ruled that the regulation did involve the individual Treaty rights of Bickel and Franz. Article 12 required that in any situation governed by Community law, EU citizens be placed on equal footing with citizens of the respective Member States.¹⁵⁹ The “linguistic rights and privileges of *individuals*” merited the Court’s strictest attention.¹⁶⁰ The mere fact that Bickel and Franz were EU citizens exercising their right to free movement under Article 18 of the EC Treaty¹⁶¹ implicated the Treaty and as such, the prohibition of discrimination contained in Article 12 applied. The Court also relied on Article 49, and the freedom to receive services, as an alternate basis for asserting jurisdiction.¹⁶² The Treaty applied despite the fact that criminal proceedings are normally an internal affair, reserved to the exclusive discretion of the Member States.¹⁶³

respect of a particular language other than the principal language of the Member State concerned, confer on citizens whose language is that particular language and who are resident in a defined area the right to require that criminal proceedings be conducted in that language, without conferring the same right on nationals of other Member States traveling or staying in that area, whose language is the same.” *Id.* at para. 12.

¹⁵⁹ *Id.* at para. 14.

¹⁶⁰ *Id.* at para. 13 (emphasis added).

¹⁶¹ Article 18 is the same provision the ECJ relied on, that same year, to decide *Martinez Sala*.

¹⁶² *Id.* at para. 15.

¹⁶³ The ECJ had already held that Community law set certain limits to the discretion of Member States in the field of criminal law. In the *Cowan* case, a British national, exercising his Community right to receive services in France, was injured and sought compensation pursuant to a French penal law that provided restitution to victims of assault. The ECJ held that France must extend the privilege to the British national in order to avoid violating Article 12. *See Cowan v. Trésor Public*, Case 186/87 [1989] ECR 195. *See also* *Ministère Publique v. Heinrich Maria Mutsch*, Case 137/84, [1985] ECR 2681, where a German-speaking Luxembourg citizen was arrested in Belgium and sought to have proceedings conducted in German as Belgian law allows for German-speaking Belgian citizens. The Court drew on Article 39 and the free movement of workers guaranteed by Regulation 1612/68 and ruled that Belgium could not deny Mutsch, as a lawful resident worker in Belgium, the right to have proceedings conducted in German. It will be observed that *Bickel/Franz* brings a nearly identical legal issue before the court, with the key difference being the non-applicability of Article 39 and the freedom of movement for workers.

In response to the second question, the ECJ found the discrimination to be in violation of Article 12 non-discrimination principle. The Italian government, in its brief, stressed that the scope of the right was to accommodate an insular minority, and its aim was “to recognize the ethnic and cultural identity of persons belonging to the protected minority.”¹⁶⁴ Essentially, the Italian government staked its case on a group rights justification. Its argument implicitly recognized the rights of Bickel and Franz *qua* Community citizens, but contended that those rights were satisfied by the availability of translators.¹⁶⁵ The special right reserved for German-speaking residents did not apply to nonresident German speakers simply because those persons were not part of the minority group Italy aimed to protect.¹⁶⁶ The Court instead focused on the reality that, on the ground, and regardless of Italy’s motivation, German-speakers from Austria and Germany were at a disadvantage compared to German-speaking Alto Adige residents. The Court framed Article 100 as a protection of German-speakers in Alto Adige; the Italian government claimed Article 100 protected only members of the Alto Adige German-speaking minority.

In its decision, the Court reaffirmed that for a residence requirement to be permissible under Community law, it must be based on objective criteria independent of

¹⁶⁴ *Bickel/Franz*, at para. 21.

¹⁶⁵ *Id.* at para. 25.

¹⁶⁶ The same argument was put forward by the Italian government when it intervened in the Mutsch case. See Palermo, *supra* note 2, at 304-05. See also Andrea Gattini, *La non discriminazione di cittadini comunitari nell’uso della lingua nel processo penale: il caso Bickel*, 82 RIVISTA DI DIRITTO INTERNAZIONALE 106, 107 (1999) (“Il principale argomento avanzato dal Governo era che le norme nazionali adottate a tutela di una minoranza ufficialmente riconosciuta potessero riguardare soltanto le persone appartenenti a detta minoranza e residenti nella zona in cui fosse insediata.”).

nationality as well as proportionate to the legitimate aim of the national provisions.¹⁶⁷ Furthermore, the Court repeated what it had stated in *Groener*: protecting a linguistic minority is a legitimate objective *per se*. In this case, however, the Court found Article 100 of the Statute to be disproportionate since the rights could be extended with little expense to cover German-speaking nationals of other Member States exercising their right to freedom of movement.¹⁶⁸ To summarize Advocate General Jacobs' argument, protecting a local linguistic minority is perfectly in harmony with the Treaty, but denying visitors the right to use German was neither necessary nor appropriate to achieve that goal.¹⁶⁹ The Court agreed with the Advocate General, noting that "[i]t does not appear . . . from the documents before the Court that that aim would be undermined if the rules in issue were extended to cover German-speaking nationals of other Member States exercising their right to freedom of movement."¹⁷⁰

For those waiting for the ECJ to adopt a hands-off approach regarding Member State protections of minority languages in the aftermath of *Groener*, *Bickel/Franz* is a staggering blow. For Austrian and German tourists who cross the frontier into Trentino

¹⁶⁷ *Bickel/Franz*, at para. 27.

¹⁶⁸ *Id.* at para. 29. Remember that the region already had a bilingual judiciary in place.

¹⁶⁹ *See id.*, Opinion of A.G. Jacobs, at para. 41. *See also* Barry Doherty, *Bickel—Extending the Boundaries of European Citizenship?*, 8 IRISH J. EURO. L. 70, 77 (1999) (providing a cogent summary of the A.G.'s arguments); Gattini, *supra* note 112, at 114 (discussing the A.G.'s opinion in detail).

¹⁷⁰ *Bickel/Franz*, at para. 29.

Alto-Adige to enjoy the mountains (and all other EU citizens who are more comfortable with German than Italian),¹⁷¹ the case is a welcome gesture.¹⁷²

Notably absent from the ECJ opinion was consideration of the *intentional* discriminatory effect of the law. Article 100 was included in the Statute to guarantee an efficient and comprehensible trial for German-speaking residents; it was *also* intended to accommodate an insular group of German-speakers living in Trentino-Alto Adige, not the casual tourist whose links to the region are ephemeral. Throughout the opinion, the Court never considers the real policy impetus behind Article 100: to protect the German-speaking minority group against outside influences (as provided by the Italian Constitution) including (one could even say *especially*) other German-speakers.¹⁷³ The Court's pronouncements on the *per se* validity of measures to protect linguistic minorities ring hollow if the Court is disinclined to consider the very reason for their existence.

Bickel/Franz suggests that the ECJ is ready to intervene when Member State rules designed to protect minority *groups* conflict with the exercise of *individual* Community rights. In *Bickel/Franz*, the ECJ elides the real purpose of the provision in question, and focuses exclusively on the effect on individuals. It may be objected that Article 100 deals with criminal proceedings, and has little to do with preserving culture; the other side of

¹⁷¹ See Doherty, *supra* note 169, at 77 (“Behind this dense formulation is an unresolved question: what does it mean to say that a person’s language is German? . . . the concept is curiously undefined.”).

¹⁷² Cf. Christoph J.M. Safferling, *Case Comment on Bickel/Franz*, 94 AM.J.INT’L L. 155, 159 (2000).

¹⁷³ “Since the South Tyrol [Alto Adige] arrangement is so complex and based mainly on the protection of a minority group against outside influences, particularly by making immigration to South Tyrol difficult, it is not surprising that portions of this legislation conflict with EC law.” Palermo, *supra* note 3, at 309.

that coin is equally true: even if the right is extended to non-residents, no harm is done to the Region's interests and purposes. It is not clear whether extending the language right in this case to all German speakers will attenuate the right's force vis-à-vis the German-speaking Alto Adige denizens.¹⁷⁴ However, when combined with the EU's expansion from a purely economic union into a social and political union bound together by citizenship, the effects of the ECJ's failure to countenance group rights as a sui generis legal subject can hardly be underestimated. Indeed, we see the deleterious effects of such an approach in the *Angonese* case, discussed next.

C. THE *ANGONESE*¹⁷⁵ CASE

In *Angonese*, the ECJ had occasion to reexamine the conflict in *Groener* between non-discriminatory access to employment against the legitimacy of procedures for gauging linguistic competence. In that case, the Court again fielded a preliminary reference from a local Italian court in Trentino-Alto Adige. The case involved an applicant to a position at a local private bank, the Cassa di Risparmio di Bolzano.¹⁷⁶ Angonese applied to enter into a competition for advertised positions at the bank. The advertisement stipulated that candidates needed to possess a certificate—called the *patentino*—as proof of their linguistic competence in both German and Italian. The bank would not accept any other form of certification and the province of Bolzano, capital of the Alto Adige, was the only authority that administered the *patentino* examination.

¹⁷⁴ In this case, there was no evidence that extending the right to all German speakers would increase court costs. See *Bickel/Franz*, para. 30.

¹⁷⁵ See *supra* note 119.

¹⁷⁶ I am summarizing the facts of the case from the reported opinion and a case comment. See Robert Lane & Niamh Nic Shuibhne, *Case Comment on Angonese*, 37 COMMON MARKET L. REV. 1237 (2000).

When Angonese presented his application, complete with documentation from his university training in Vienna that testified to his bilingualism, the bank denied him because he did not possess the *patentino*. He then brought suit in the local Italian court in Bolzano, alleging that the denial of his application violated Article 39 as well as Regulation 1612/68. The local court referred the following question to the ECJ:

Is it compatible with Article [39](1), (2), and (3) of the EC Treaty . . . to make the admission of candidates to a competition organized to fill posts in a company governed by private law conditional on possession of the official certificate attesting to knowledge of local languages issued exclusively by a public authority of a Member State . . . ?¹⁷⁷

The first part of the Court's opinion established the horizontal direct effect of Article 39 and Regulation 1612/68.¹⁷⁸ Next, the Court proceeded to address the merits of the requirement that applicants possess the *patentino*. The Court reasoned that since the *patentino* was issued only in Bolzano, and the majority of Bolzano residents are Italian, nationals of other Member States were at a disadvantage.¹⁷⁹ The requirement could, as in *Bickel/Franz*, be justified on the basis of proportionality.¹⁸⁰ However, by barring candidates from proving their ability by any other means, the bank's action was

¹⁷⁷ *Angonese*, at para. 15.

¹⁷⁸ *Id.* at paras. 15-36. This portion of the ruling garnished much more attention from EU scholars than the subsequent ruling on the merits of the requirement. Asserting the horizontal direct effect of a fundamental freedom such as the freedom of movement for workers contained in Article 39 is indeed a momentous development in EU law, and will undoubtedly undercut efforts to protect minority languages by prohibiting even private parties from making certain distinctions in favor of the minority languages.

¹⁷⁹ *Id.* at para. 40.

¹⁸⁰ *Id.* at para. 42. Again, the Court pronounced the legitimacy of the aim (in this case, ascertaining linguistic competence), and then summarily rejected it.

disproportionate and amounted to indirect discrimination in violation of Community law.¹⁸¹

Angonese is further testament to the Court's willingness to find a link to Community law in an increasing variety of legal situations—in this case, a *private* employment relationship. Again, the Court announces that the language-related provision is *per se* legitimate, but then summarily strikes it down. Relying on a dictum from *Groener*, the Court ruled that “the principle of non-discrimination precludes any requirement that the linguistic knowledge in question must have been acquired within the national territory.”¹⁸² In *Angonese*, the Court treats the *patentino* requirement as though its sole aim was to ascertain individual applicants' knowledge of German. Again, the Court's approach is one of institutional blindness, as if to say “we rule on individual Community rights, and have no competence to consider the purposes of domestic language policy.”

The Court sees the aim of the requirement in different terms than the employer and the Bolzano minority. The focus is on the Community rights of individuals that speak the minority language, and not the flourishing of the minority language group itself. It is almost certain that the bank had adopted a policy requiring the *patentino* in part because it could thus encourage employment among local Bolzano residents, and perhaps foster banking relationships with the local bilingual population.¹⁸³ In this respect

¹⁸¹ *Id.* at paras. 45-46.

¹⁸² *Id.* at para. 43.

¹⁸³ In this context, it is important to remember that no one questioned *Angonese's* knowledge of German. After all, he presented degrees he received at the University of Vienna, as well as proof *Id.* at para. 8.

the *patentino* requirement was analogous to the Irish requirement at issue in *Groener*: it served an immediate functional purpose, but also had a collateral effect of contributing to the flourishing of the minority group. In the same respect *Angonese* is different than *Bickel/Franz*. The language right provided to criminal defendants did not reverberate collaterally to the benefit of the German-speaking community. However, *Angonese* is evidence of the dangers of extending the *Bickel/Franz* interpretation of the non-discrimination principle to an increasing array of bona fide group rights aimed at contributing to the cultural life of minority language groups.

It may be said that in applying Community law to situations as in *Angonese*, the ECJ is taking “free movement” and “non-discrimination” to their logical conclusion. Nevertheless, such a rigid formalist approach is rarely required of judicial institutions, and one must wonder how prudent such an approach is in the context of language.¹⁸⁴ Language is always a politically sensitive issue because it is so intimately connected with the preservation of regional and cultural identity. To the extent the ECJ’s current approach ignores the sui generis nature of group rights, it glosses over this cultural and political sensitivity. The broad interpretation of European citizenship flowing from *Martinez Sala*, *Trojani*, and Directive 2004/38 means that EU citizens will be able to claim community rights in an increasing range of scenarios. And as the scope of Community law widens, the space for group rights to operate shrinks correspondingly. Such a dynamic is, to put it lightly, inadequate.

D. BEYOND ARTICLE 12: MOVING TOWARDS A NEW VOCABULARY OF SUI GENERIS GROUP RIGHTS

¹⁸⁴ See Lane & Shuibhne, *supra* note 176, at 1247.

The inadequacy results from the failure of EU law to conceive of minority language groups as proper subjects of EU law. The proportionality test will almost always result in the striking down of Member State's group protections because the Member States' interests are defined narrowly. Member States have thus signed away most of their sovereign rights to provide any group protection that conflicts—even indirectly—with Community Law. Member States have a reduced incentive to address minority concerns at the group level, since such measures are bound to conflict with the freedom of movement of persons and workers, as well as the principle of non-discrimination. The irony is that just as the EU is abandoning its exclusive economic *telos*, and developing into a social and political union, equal footing for minority languages may very well be in jeopardy.

I believe an alternate approach is available in this context. When Member States grant special group rights to minority language groups, they are not violating the non-discrimination principle; instead, they are implicitly recognizing the inadequacy of the absolutist interpretation of such a principle. Minority groups merit exceptional treatment because their situation is exceptional (or *sui generis*, to again borrow Segesvary's formulation). Insofar as EU law fails to recognize this, the minority language groups are the first casualty. Stated differently, the current state of EU law *lacks a sufficient vocabulary* to treat minority language groups as legally protectable subjects.

A comparison to U.S. law may be of value at this juncture. Compare the race segregation of schoolchildren in *Brown v. Board of Education*¹⁸⁵ to the discrimination at issue in, e.g., *Angonese*. In some respects, the distinctions drawn are similar: individuals pertaining to certain groups are afforded different treatment based on the mere fact of

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347 U.S. 483 (1954).

their belonging to a group. Only at the most abstract level, however, does the analogy hold. A closer examination of the distinction reveals an important difference. In the case of *Brown*, the distinction drawn bore no relation to the aim sought. At some point in the American South, it may have been morally legitimate to maintain that separate schooling was necessary for the development of the schoolchildren. At that time, then, race was therefore inextricably intertwined with the education system. But by the 1950s the distinction had become sheer arbitrariness. It no longer was morally or empirically permissible to maintain that segregating the races aided in the education of children. Stripped of the logical connection to the education system, the distinction was nothing more than a pretextual method of enforcing an extant social order.

However, in the case of *Angonese*, the distinction drawn (impliedly, between Bolzano-resident German-speakers and other German-speakers) bore an identifiable relation to the aim of contributing to the flourishing of the local community. The policy in *Angonese*, then, was not a pretextual and protectionist attempt to favor entrenched economic interests. It was not, in short, the sort of distinction that the EU has fought against so successfully over the years. Unlike the segregationist motive in *Brown*, the state interest in preserving national culture and languages is not immoral or undesirable; indeed, it is subject to continual affirmations to the contrary, at both the EU level (indeed, by the ECJ itself) and the Member State level.

Admittedly, the distinction will not always be so clear as between *Brown* and *Angonese*, but the ECJ has the institutional expertise and experience of drawing such distinctions. Throughout its history, the ECJ has exhibited boldness and shrewdness in smoking out illegitimate protectionist motives disguised as legitimate exercises of

Member State power. The fundamental problem is that the ECJ cannot gauge the tightness of the connection between a distinction and an aim if it does not recognize the aim for what it truly is. Instead of framing the interest as an accommodation for minority language speakers, the ECJ should consider the well-being of the community of speakers as a *sui generis* and irreducible subject of European law.

The ease with which the ECJ formally endorses the legitimacy of protecting minority languages renders this inadequacy all the more complicated. Policymakers and litigants do not need to convince the ECJ of the importance of linguistic diversity; from *Groener* to *Angonese*, the ECJ has expressly recognized the importance of the interest. Instead, they need to develop a new vocabulary altogether. To start with, the ECJ should recognize that laws protecting a group of minority language speakers are not meant purely to maintain the number of individuals who are familiar with, or speak, that language. If that were true, then it would be enough to assert, as the ECJ has often done, that language proficiency requirements are a legitimate objective to pursue. Oftentimes, such laws are intended to vest rights only in members of that community to the exclusion of non-members.

Of course, not all minority-protective domestic laws are equally at risk of being struck down under the current framework. For example, the quasi-federal system of the Spanish autonomous communities in itself stands little chance of violating the EC Treaty. Similarly, the simple constitutional or codified recognition of multiple official languages will certainly not raise eyebrows in Brussels. These protections (especially the latter) are, however, largely symbolic. While the symbolic order of a language group is constitutive of that group, and reinforces its sense of identity, a language's long-term survival

depends on its ability to remain relevant in the lives of its speakers not merely symbolically. In this context, it is not so much the creation of the Catalanian *Generalitat*¹⁸⁶ that matters as how the *Generalitat* contributes to the flourishing of the Catalanian community—and, by extension, their language. However, laws that condition grant substantive rights to individuals by virtue of their membership in a linguistic community are most at risk, and are almost certain to provoke litigation in the European courts.¹⁸⁷ As such, even if the procedural protections discussed *supra* do not, in themselves, appear to be on a collision course with the EC Treaty, their effectiveness may be undermined by tying the hands of the local lawmakers who are unable to provide substantive and affirmative protections for local languages.

This article has been primarily concerned with laws impeding the free movement of workers and EU citizens, and it is true that any domestic laws that place non-members at a disadvantage vis-à-vis linguistic community members are at most risk. However, it is not difficult to conceive of minority-protective laws that counteract the free movement of services or capital either. To take a current example, the newly amended Statute of Autonomy for Catalonia creates a right for individual Catalonians to be served in Catalán.¹⁸⁸ If a French national perceives a good business opportunity in Catalonia, but speaks no Catalán and anticipates serving a primarily Spanish client base, can that French businessman obtain redress in the ECJ if a barrage of complaints file in from potential Catalán consumers complaining of his lack of respect for their language rights? Or what

¹⁸⁶ See *supra* note 30.

¹⁸⁷ Whether such substantive rights are dispensed from the central government or sub-state legislative entities is of no moment.

¹⁸⁸ See *supra* note 39 and accompanying text.

result where an Austrian broadcasting company looking to purchase a local radio station in Trentino-Alto Adige to expand its Italian coverage decides the transaction is no longer favorable if it must broadcast in German too on account of regional or even central government regulations mandating a certain percentage of German broadcasting? Rather than declaring a moratorium on such laws, it makes more sense to charge the ECJ with an honest inquiry into the motives of the Member State (or regional) legislatures promulgating the laws.

V. CONCLUSIONS

Member States may expect more group protective measures to be invalidated by the ECJ if there is any link, even a tenuous link, to the EC Treaty. What would follow could be a race to the bottom, with the least protective Member States being vindicated because their protections extended to minority groups are so paltry as to not conflict with the Treaty.

There is considerable potential for development in the interaction of Community law and Member State law with respect to minority language rights. After *Bickel/Franz*, *Angonese*, and *Martinez Sala*, the time is ripe for addressing these problems. What is necessary is a recognition of minority language groups as subjects of sui generis group rights, as discussed *supra* in Part III.A. Assuming the ECJ does not alter its course *sua sponte*, at least three strategies are possible. First, the Member States could explicitly grant competence to the EU to address minority language concerns. In this context, Article 151 represents a tentative, though incomplete, step in the right direction. A truly effective competence must include an explicit mention of minority rights, and provide a means of implementation that does not require unanimity. The chief difficulty with such

an approach is that it displaces the political discussions about minority rights away from the Member States to Brussels without tempering the general applicability of Article 12's non-discrimination norm.¹⁸⁹ As we have seen, the Member States and their sub-state units have demonstrated more enthusiasm and experience in addressing the minority language concerns.

Second, Member States could temper the rigor with which the ECJ interprets the consequences of the individual rights flowing from the four freedoms and beyond. This solution too would require Treaty modification. Perhaps a compromise similar to Article 5's subsidiarity principle could be possible;¹⁹⁰ the ECJ would simply look the other way when some Member State measures conflict with an EU provision such as the non-discrimination norm. Articles I-2 and I-3(3) of the Constitution are promising proposals in this regard, but the experience from Article 151 should caution against an exaggerated optimism. More explicit language is likely needed in order for the ECJ to approve of group-based preferences that conflict with core EU principles enshrined in the Treaties.

Third, Member States could include a directly-effective affirmative action treaty provision permitting action by Member States to ensure substantive equality for minority groups, linguistic or otherwise.¹⁹¹ Substantive equality, in this instance, would apply on a

¹⁸⁹ For a discussion of the difficulties inhering in selecting a Community-level language policy, see Niamh Nic Shuibhne, *Does the Draft Constitution Contain a Language Policy?* (Feb. 2004) at 6, available at <http://www.ciemn.org/mercator/pdf/simpshuibhne.pdf#search=%22%22does%20the%20draft%20EU%20constitution%20contain%20a%20language%20policy%3F%22%22> (last visited Aug. 14, 2006).

¹⁹⁰ See EC Treaty, art. 5.

¹⁹¹ Cf. EC Treaty, art. 141. Article 141(4) provides that “[w]ith a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

group basis, with minorities having equal opportunities to witness the flourishing of their languages.

Whatever the action is, the EU should act soon. The funded projects to help preserve minority languages, the soft law pronouncements, and the changing mood about European integration all testify to the anxiety in the EU that somehow, something must be done to address this tension between individual rights and minority group rights. Given the current stalled state of the integration discourse in light of the 2005 vetoes, it may be a particularly propitious moment to move ahead. Of course, the lack of adequate protection for minority language rights itself did not hold up the ratification of the EU Constitution; however, a decisive step to address this and similar problems could provide some momentum in the effort to mute the anti-integrationist discourse of Europe as the grand destroyer of cultural particularities.