Language Rights: Constitutional Misfits or Real Rights*

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Une politique linguistique peut s'appuyer sur une approche territoriale ou personnelle. Ni l'une ni l'autre, toutefois, ne permet une compréhension adéquate des droits linguistiques enchâssés dans la Constitution du Canada. La protection des minorités de langue officielle exige donc une conception différente des droits linguistiques, une nouvelle vision de ces droits où la dimension communautaire ou collective est aussi importante que la dimension personnelle ou individuelle.

As central as the question of language is to Canadian political history, we lack a comprehensive theory of language rights. Under what circumstances and to what extent should the use of particular languages be legally protected? What is the rationale for the protection of language? The answers to these questions would provide a general normative framework capable of describing the extent to which the legal regulation of language can be justified. This, in turn, would provide a normative backdrop against which to assess the particular language provisions in force in a particular jurisdiction. Without such an account the language provisions of the Canadian Constitution risk marginalization as constitutional misfits, not fully at home in a rights granting document, or may end up being forced into a mold that works for other rights but turns language rights into a virtual dead letter.

The dominant paradigm for language policy debates has been the distinction between territorialist policies and those grounded in the personality principle. This focuses debate on whether language use should be regulated by territory, requiring people to adapt to the language of

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the place, or in accordance with the linguistic preferences of speakers, wherever they reside. Policy grounded in territoriality tends to favour unilingualism, while the personality principle is more friendly to bilingualism. While these connections — territorialism/unilingualism; personality principle/bilingualism — are not a matter of strict logic, they mark the standard approaches to language regulation. Each model is grounded in an understanding of the nature of the interest in language, but each of these leading conceptions hampers the effort to achieve full integration of language rights into the constitutional framework as meaningful protections for minority language use.

Arguments in favour of territorialism tend to be instrumentalist and aggregative in form, and for that reason lead to the promotion of unilingualism. Such justifications vary according to the end aimed at — economic efficiency, administrative convenience, and national unity (or at least social peace) are among the most prominent contenders. These arguments conceive of language as a means to extraneous ends, and of people's interest in their language as reducible to a common denominator and amenable to being traded off against competing interests through a calculation of costs and benefits. It seems to me that most of the thinking about language policy to date has been largely in the aggregative mode.[1] However, this model reveals only a very impoverished understanding of the importance of language to its speakers. Most such accounts are either openly critical of Canada's official languages regime or at best seek merely to explain its existence and features without purporting to justify them. This they can only do with some unease. The value of the use of any particular language depends entirely on how well it serves these other goals. This contingent quality renders puzzling the creation of a constitutionlized rights regime for language.

An alternative approach would be a rights-based one. Language policy, even the constitutional protection of language, has not usually been analyzed as falling within the domain of human rights. The articulation of a rights framework for thinking about language protections has had to struggle to establish itself against the dominance of the aggregative

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[1] C. Michael MacMillan, *The Practice of Language Rights in Canada* (Toronto: University of Toronto Press, 1998); Scott Reid, *Lament for a Notion: The Life and Death of Canada's Bilingual Dream* (Vancouver: Arsenal Pulp Press, 1993); Kenneth D. McRae, "The Principle of Territoriality and the Principle of Personality in Multilingual States" (1974) Int'l J. of Soc. L. 33; Jean A. Laponce, *Languages and their Territories* (Toronto: University of Toronto Press, 1987); original French version *Langue et territoire* (Québec: Presses de l'Université Laval, 1984).

approaches. A human rights account eschews the logic of instrumentalism and aggregation. It would articulate a human interest in one's language that is sufficiently important to resist aggregation and to justify the imposition of obligations on others to protect that interest, and thus put that interest on the same moral plane as the other interests that ground human rights. The personality principle adopts a rights-based model; however, it has often been articulated in ways that adopt an individual rights paradigm, indeed, one grounded in negative liberty. This captures part of the interest in language better than the competing model, but still misses a great deal.

In order to put language rights on a sure constitutional footing, we must release language policy from the grip of the instrumental and aggregative logic embedded in territorialist thinking and provide an account of the interest in language that focuses not only on the individual speaker, but on the ongoing commitment of a community of language speakers to the maintenance of their collective life in a particular language. This provides the foundation upon which a meaningful set of constitutional protections for language can be built, but such an approach brings with it its own normative challenges. There is still much to be done to meet these challenges.

I. Language as Instrument

A. Instrumentalist Arguments for Unilingualism: The Road to Territorialism

My first task is to reveal the shortcomings of the understanding of the interest in language that makes the most sense of the territorialist account of language policy. The appeal to territory, as a basis for language policy, is best understood as tying official provision for the use of a particular language to the existence of a geographical concentration, of some degree, of users of that language. Services are provided, for example, in geographically defined regions within a given jurisdiction in which there is such concentration, but not elsewhere.

"Territorial unilingualism," then, designates a model that advocates unilingualism within a given territory.[2] It holds that each territory needs

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[2] Philippe Van Parijs uses the label "territorial separation" to designate the same approach. Philippe Van Parijs, "Must Europe Be Belgian? On Democratic Citizenship in Multilingual

a language it can call its own and *vice versa*.[3] Anyone wanting to make his or her home within a given territory must adapt to the language of the place. This approach starts from the undeniable human phenomenon that grounds the idea of territoriality: speakers of the same language tend to group themselves together geographically. From this is derived the prescription that in an ideal world state boundaries would coincide with or follow "natural" linguistic boundaries, so that everyone within a given state territory would speak the same language. The geographic territory over which the state has jurisdiction would coincide with the territory over which one language holds sway. Any newcomers would be required to assimilate to the language already "in possession" of a given territory.

However, while it is true that there is a geographical concentration to language use, speakers of a language often do not group themselves neatly. Thus, we cannot realistically use linguistic boundaries to define states. Instead, the model takes existing boundaries as given, and attempts to realize the ambition of "one language/one territory" by prescribing language use within existing territories as legally defined. Instead of "one language/one territory" (where there is a common language, there should be one state), we get "one territory/one language" (where there is one state, there should be a common language).

Where a state happens to include more than one language group, this approach recommends either dividing the larger state into different linguistic regions, or choosing one language as the favoured one for the entire territory. Either strategy ends up with adopting the language of the majority within a given territory.[4] Two sorts of justifications are commonly offered for territorial unilingualism: one grounded in efficiency, the other based on the value of social solidarity.

Instrumental justifications based on convenience and efficiency treat language use like the issue of which side of the road to drive on — it

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Politics" in Catriona McKinnon & Iain Hampsher-Monk, eds., *The Demands of Citizenship* (London: Continuum, 2000), at 244.

[3] Perhaps the clearest proponent of this strong version of the territoriality approach is Laponce, *supra*, note 1. Van Parijs, *id.*, seems equally supportive, relying heavily on Laponce.

[4] For an outline in the context of Canadian political history of the tendency of territorial solutions to produce majoritarian outcomes reinforcing homogeneity rather than pluralism, see Ramsay Cook, "Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921" in *Studies of the Royal Commission on Bilingualism and Biculturalism*, No. 4 (Ottawa: Information Canada, 1969).

matters little which one we choose, so long as we select one and everyone adopts it. Uniformity maximizes ease of communication within the country and therefore contributes to efficiency in commercial affairs and the administration of government. It keeps costs down and productivity high. This account of the principles of language regulation locates the point or value of language in its instrumental usefulness as a means of communication. The majoritarianism of this approach falls out from its aggregative, consequentialist vision. Where there is a dominant language, the choice of that language is rendered salient. If there are more speakers of English than of French in a given territory, we maximize benefits by choosing English, or *vice versa*. This treats the interests of people in speaking a particular language as appropriately subject to aggregation and trade-off against competing interests. The loss to speakers of one language is outweighed by the gains overall in efficiency.

A second version of this story places the justification for territorial unilingualism not in efficiency, but in the social benefits of cohesion, or at least the avoidance of the social conflict that often accompanies the mixing of two or more language groups. In an age, it is argued, in which we cannot rely on direct relations between compatriots, nor on some historically effective cultural commonalities such as religious conviction in order to provide a foundation for social cohesion, a common language can create a basis for social solidarity.[5] Fostering linguistic commonality will be conducive, it is sometimes thought, to political stability and a greater willingness of citizens to bear the reciprocal sacrifices necessary for the common good. The choice of the majority language as the tool selected in pursuit of unity betrays an aggregative framework. The benefits of unity are deemed to outweigh the costs to the minority of loss of their language. More people more quickly and easily will be able to be brought into the network through choice of the majority language, and it is the end that is important. The rest will be eventually absorbed, their loss merely transitional. On either of these versions, the loss to minority

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[5] This appeal to a common language as a basis for solidarity is a constant theme of the Larose Report, Commission des états généraux sur la situation et l'avenir de la langue française au Québec, *Le français, une langue pour tout le monde: un nouvelle approche stratégique et citoyenne* (Québec: Gouvernement du Québec, 2001) online at <http//:www/etatsgeneraux.gouv.qc.ca/pdf /COM1-021_Rapport_final.pdf> last accessed January 24, 2002.

language speakers is not treated as particularly onerous, or to the extent that it is, the greater numbers on the other side justify its imposition.[6]

B. Then Why Is Canada Officially Bilingual?

On either of these instrumentalist accounts, countries which officially pursue a policy of bilingualism, of state support for more than one language group, call for some explanation. Indeed, Canada's constitutionalization of language protections, made part of the foundation of the federation in 1867 and extended and reinforced in 1982 with the introduction of the *Canadian Charter of Rights and Freedoms*,[7] seems even more odd.

One might explain Canadian language policy as a simple result of *realpolitik*. The respective clout of the two official language communities in 1867 required some accommodation of the interests of each for confederation to occur. For breakdown to be avoided thereafter, some further concessions in respect of language were necessary in 1982, according to this story. Unilingualism might be the normal and preferable state of affairs, but sometimes a minority has the numerical or perhaps economic strength to be disruptive, and in this case, pragmatic and instrumental considerations of social peace and political stability militate in favour of accommodating the demands of the minority. When the costs of breakdown exceed those of accommodating the linguistic minority, the balance is in favour of bilingualism.

This account means that what this approach takes to be the proper political principles of language regulation, instrumental ones grounded in either efficient communication or social solidarity, cannot themselves *justify* official bilingualism. Indeed, these instrumental principles are critical of the attempt to foster two languages within the same political unit. The fact of bilingualism may be *explained* by the political power of the francophone minority, but the *justification* of the current regime lies

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[6] A variation on this version is Laponce's advocacy of territorial unilingualism for the sake of preserving languages in contact with others with more adherents. Laponce, *supra*, note 1. Here the end is survival of a particular language rather than solidarity amongst all residents of the territory, but that end is taken to justify the cost inflicted on those within that territory who happen to speak another language — their interests must be sacrificed to the greater good of the survival of the favoured language.

[7] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

wholly in the fact that it represents the bargain made in order to create Canada in the first place and to keep it together. The instrumental consideration of keeping the Canadian federation intact is clearly at odds with the basic objective of fostering either effective and efficient communication or solidarity.

On this model it would make sense to interpret existing language protections restrictively. After all, they do not protect any basic human interest; they merely represent a necessary political concession. They may have been placed in a constitutional document such as the Charter, but this can be interpreted as mere window dressing, designed to make beneficiaries feel good, but not indicative of any fundamental affiliation between these provisions and the genuine human rights otherwise included in the Charter. Treating language protections as though they were human rights provisions would simply end up giving the minority more than they bargained for at the expense of other genuinely legitimate interests.

This is a very common conception of language policy — an instrumentalist and aggregative understanding of the interest in language combined with a power politics explanation of the forces that have prevented the achievement of unilingualism. It has arguably informed much political practice, in Canada and elsewhere. It has sometimes infiltrated constitutional adjudication in Canada as well.[8] This model of language policy may indeed have motivated the behaviour and informed the understandings of some key political actors throughout Canadian history. However, the fact that political leaders of the past have not recognized language use as a human right does not tell against it being one, any more than the fact that most people had no opportunity to have a say in their country's governance until very recently means that the right to vote is not a fundamental human right. The political motivation behind a law is different from the normative foundation for it. Sometimes they coincide; when they do not, only the latter is relevant to the law's justification.

If we take the social solidarity account seriously, it is even clearer that Canada's official bilingualism defies logic. If Canada is a single nation it should be pursuing a policy of linguistic uniformity; if, as Qué-

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[8] *MacDonald v. Montréal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460; *Société des Acadiens du Nouveau-Brunswick v. Assn. of Parents for Fairness in Education*, [1986] S.C.J. No. 26, [1986] 1 S.C.R. 549.

bec separatists suggest, Canada is two nations it makes more sense to split these into two independent states, each of which can then pursue the "normal" path of unilingualism. Each can then effectively use language to foster a sense of national identification. At best, Canada's federal system is an imperfect compromise — more or less satisfactory, depending on who you talk to — trying to negotiate the pull of forces tending in opposite directions. Viewed in this way, however, the risks of this strategy are obvious. In many circles it is thought to inhibit the development of a genuine sense of *Canadian* national unity by foregoing the benefits of national uniformity as well as by contributing to a sense of provincial identity that is in fact a competing basis for social solidarity. At the same time, those restrictions on language regulation that exist provincially are experienced as an irritant, or worse, as a serious impediment to the provincial mission. It is not hard to see how English Canadian intolerance of bilingualism and French Canadian yearnings for greater autonomy arise out of this understanding of language policy.

If one adds to this the belief that the key instrument of Québécois nationhood, the French language, is especially vulnerable because of its minority status in North America, the argument for independence becomes even more urgent and the argument against official bilingualism more strident. This position tends to be grounded in a kind of linguistic Darwinism that treats language use as inherently competitive:[9] coexistence of two language groups inevitably works to the advantage of the dominant language and against the minority. If the French language is to be preserved, and with it the Québec nation, political sovereignty is necessary. The only way to protect the French language in North America is to isolate it from contact with and therefore competition with English. Only a sovereign Québec, so the argument goes, would have the plenary powers necessary vigorously to protect French and, to the extent necessary, suppress competitors. From the point of view of the separatist, Canada's official bilingualism can only be seen as a tragic mistake — destined to destroy the French language and the national aspirations of the Québec people in the long run, and in the meantime

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9 See, *e.g.*, Laponce, *supra*, note 1, at 70: "... a dominant language in close contact with a minor language tends to exclude, eliminate, and achieve total victory over the minor. A normal state between languages is that of war."

creating a constant irritant in English Canada that prevents it from getting on with the business of its own project of nation-building.

Instrumental justifications of language rights that appeal to the goal of efficient communication or the needs of national unity militate heavily in favour of unilingualism. Either may be able to offer an account of the political intrigues or misjudgments that might explain how Canada came to have an official language regime, but neither can provide a very robust justification for that regime. On either analysis, Canada's language policy is either a necessary but expensive compromise, or a tragic mistake.

Furthermore, the instrumental justifications of ease of communication counterbalanced by the political need to make concessions in order to get the federation off the ground sits only uneasily with the constitutionalization of Canadian language policy. If these are the sorts of political objectives the weight of which can fluctuate over time, it makes little sense to constitutionally entrench the balance as it exists at a particular point in time, thereby requiring cumbersome constitutional amendments in order to redress a shift in the balance. Nor does this provide a very cogent account of the federal government's willingness to assume new constitutional obligations in respect of government services in 1982, nor New Brunswick's voluntary submission to the full array of minority language protections.

Likewise, the account of language policy as an instrument in fostering social solidarity provides a stronger argument for the division of Canada than for a regime of official bilingualism. Even if one accepts the imperfect compromise explanation of the Canadian regime, it cannot explain those restrictions on language regulation that have been imposed provincially. It may make sense to make federal institutions bilingual, but why should the Québec, Manitoba, and New Brunswick courts and legislatures be bound to accommodate the minority official language? And why should all provinces have had the language of education — a key area of public policy — partially removed from their sphere of autonomy? These exceptions threaten to overwhelm the rule of regional linguistic autonomy dictated by the social solidarity account.

Thus, an instrumentalist/aggregative account seems a poor account of a system that gives constitutional protection to the use of more than one language. If there is no account available that makes better sense of the inclusion of language protections in a constitutional bill of rights, we should expect language rights to be perceived as constitutional misfits and interpreted accordingly.

II. Language Protections as Human Rights

Canada's language policy may be misguided or mistaken. However, these conclusions depend on the validity of their normative foundation — on the argument that language use is properly a matter of majority rule and not a matter of human rights. To challenge these normative claims we need a plausible account of language use as an aspect of fundamental human rights which can provide a more attractive basis for official bilingualism in Canada and our existing language protections in particular. This approach involves taking seriously the key features of the Canadian regime — its constitutional entrenchment in a series of rights-granting provisions, and its rejection of wholesale provincial unilingualism — and looking for a normative vision that would explain and justify these features. The Canadian regime may still be imperfect, even judged by a human rights based framework. But a rights based account would provide a different footing from which to imagine improvements.

The dominance of the instrumentalist and aggregative account of language policy requires explanation. It may be that it is not in the interests of the political, or even academic, elites of the dominant language in a multilingual country to articulate the entitlement of the minority to protection for its language as an *entitlement*, even if they are benignly tolerant of our actual official language policy. Meanwhile the population concentration of French-speaking Canadians in Québec has made it possible for its elite to concentrate on fortifying its political power base within the province, either through the accumulation of greater powers within federalism or through independence. In the meantime, francophones outside of Québec have been repeatedly sacrificed on the altar of majoritarian politics and backroom deals, and anglophone Québeckers stand to suffer the same kind of fate in an independent Québec. The consequences of our national failure to give sustained attention to the normative underpinnings of a national language policy have been tragic, and threaten to be repeated unless we develop a new understanding.

What kind of a story do we have to tell about the rationale for language protections in order to make a plausible case that they are human rights? Normally we reserve Charters of Rights for those provisions that have a non-aggregative rationale. These legal rights protect moral rights;

they are grounded in or justified by moral rights.[10] And moral rights are, in turn, grounded in important human interests. Moral rights defy the aggregative logic of other kinds of moral argument. To say that I have a right is to say that some interest deserves protection even in the face of substantial benefits accruing to others from its violation. It may not be absolute, but it is immune to unrestricted, routine cost-benefit analyses. The challenge, then, in demonstrating that language protections are human rights protections is to articulate a set of human interests in language that have this character.

We must be able to argue that there is a vital human interest in language, one capable of justifying the imposition of duties on others to protect or secure that interest. The sort of interest relevant to a theory of language rights is the interest in using a particular language, namely, one's mother tongue. This focuses attention on the claim of the speakers of a particular language to the protection of its use. Our concern, then, is the extent to which *their* ability to *use* this particular language should be protected and why.

Understood in instrumental terms, the interest in language is altogether too thin to motivate the language struggles that are familiar to multilingual countries and to explain people's attachment to their mother tongue. The social cohesion argument gestures towards a richer understanding of the importance of language. It glimpses the special importance to its speakers that makes language a binding force between people capable of motivating trust, co-operation, and mutual sacrifice. But the territorialist, and therefore unilingualist, version of the argument turns a blind eye to the value *each* community places on its *own* language in order that it may purport to justify exclusive imposition of the *majority* language in a given territory. But why should we think that linguistic affiliation can be so easily manipulated; that no wrong is done in the attempt? To the extent that language forms an aspect of identity and provides a basis for belonging — as the social cohesion argument claims it does — it does so organically, as an outgrowth of the communal life of a group of people. People who already enjoy this sense of belonging within a given language community are not likely to relinquish it easily in pursuit of ready-to-wear solidarity with members of another community. To force them to do so is likely to produce merely

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[10] Leslie Green, "Are Language Rights Fundamental?" (1987) 25 Osgoode Hall L.J. 640, at 647.

an *ersatz* national unity. While the social cohesion account implicitly recognizes a deeper value to the majority of its language (whose language is the selected instrument of social cohesion), it expects minority groups to treat identification with a language purely instrumentally, as something to be done for the sake of a greater sense of collective purpose. It provides no account of why we should expect a minority to value its language any differently than the majority does.

A. The Personality Principle: Reduction to the Individual

At first glance, the personality principle has the right form to challenge the instrumentalism and ultimate unilingualism of the territorial model. Conventional analyses of the personality principle treat language use as a personal entitlement, capable of enforcement by individuals wherever they are and whatever the circumstances, regardless of their impact on aggregate welfare. However, this presupposes a heavily individualistic account of the interest in language. Language rights are conceptualized as protection for the individual's choice of language. This puts linguistic freedom on a par with freedom of expression and religion, and implies a commitment to universality, as well as an appeal to the sanctity of individual choice. In other words, these rights are portable because they are universal, and they are universal because individual autonomy in respect of important aspects of how one leads one's life is valuable. Insofar as the language in which one lives can be regarded as part of one's conception of the good, linguistic choice can easily be encompassed by an individualistic personal autonomy model. It is undoubtedly the case that this conception of autonomy has some role to play in a comprehensive account of language regulation. For much the same reasons that a state should not dictate religious belief or observance, compelling people to abandon one language in favour of another is normatively suspect. The question is whether an individualistic story about autonomy can provide a foundation for language rights that will provide for meaningful protection of minority language use.

In its classical statement, this model also conceptualizes personal rights as negative liberties. Others must refrain from interfering with one's exercise of choice of language on this model, but need incur no positive obligations in order to facilitate that choice. As long as freedom of linguistic choice is interpreted merely as a negative liberty, the analogy to other classical, universal human rights is perfectly apt. The negative model also fits the classical human rights model by applying

equally to the speakers of all languages whatever territory they find themselves in, and whatever language is the object of choice, whether mother tongue or some other. However, if confined to this individualistic, negative liberty version, the personality model cannot provide very secure protection for minority language use. Majorities do sometimes go so far as to seek formally to prohibit the use of minority languages, but they rarely have to in order to accomplish the *de facto* dominance of the majority language, even the ultimate elimination, through assimilation, of minority languages.

The personality model is a pure linguistic tolerance model. As such, it cannot account for the most distinctive features of the Canadian language rights regime — the entrenchment of certain positive obligations to foster the ability to use one's language, but the restriction of these protections to members of only two language communities designated as official. A tolerance model protects all speakers of all languages equally, but provides only freedom from interference, not positive support. We have to go beyond understanding the importance of language as simply one of the things individuals choose as part of a conception of the good in order to provide a justification for a positive language rights regime. We must also explain why only French and English attract protection without falling back into the world of *realpolitik*.

B. The Intrinsic Value in Language: Language as Cultural Enterprise

To overcome the reduction of language to its uses inherent in the territorialist model we must understand language as itself a manifestation of human creativity which has value independent of its uses. This is true not only of language in the abstract, but of particular languages. Each language has intrinsic value as an end in itself. Although it may express ideas, concepts, myths, and traditions that have equivalents in other languages, it is a unique form of expression and valuable as such.

To overcome the individual preference model embedded in the personality principle, we must treat language as a communal enterprise, valuable as such. Participation in the ongoing re-creation of the social practice of a language is integral to the formation and renewal of culture. Language is intrinsically bound up with the way of life, the culture, it helps create. This is true not just in the abstract, but in the particular — *each* language is integrally connected to the particular way of life created through its use. Participation in these kinds of communal forms

of human creativity is an intrinsic part of the value of such a way of life. The particular form language takes for a particular group of people takes on intrinsic value *for them* because it is *their* creation. Language is a collective accomplishment for the group that consists of its speakers.

This is the understanding of the importance of language that makes sense of the idea that protecting it can justify the imposition of duties on others. The fact that language has an instrumental dimension makes it vulnerable to the manipulation of its usefulness. The external purposes for which language is useful can themselves be extremely important to people. Therefore the best way to weaken a language is to lessen its usefulness in achieving these other ends. Likewise battles for the protection of language will revolve around improving its usefulness in important domains. However, what motivates this desire to protect the usefulness of one's language is the attribution to it of intrinsic value because of its deeper connection to a specific community and its way of life. Because language does have extraneous uses it is easy to be pulled back in the direction of thinking of its protection exclusively in instrumental terms, but it is crucial to the development of an adequate conception of language rights as constitutional rights that we avoid this temptation.

To perceive the intrinsic value of language makes evident that *each* language has intrinsic value for those whose language it is. This is as true for a minority within a given political unit as for the majority. It explains why francophone Québécois insist on the preservation of their language despite being surrounded by predominantly English-speaking provinces; it explains, likewise, the desire of anglophone Québeckers to maintain their linguistic community, as well as that of francophones outside of Québec. This is the reality suppressed by the invocation of social solidarity to insist that each state rally around the use of a single language. While it implicitly recognizes the intrinsic value of its language to the majority (whose language is the one to be used to build solidarity), it expects minority groups to treat identification with a language purely instrumentally, as something to be done for the sake of a greater sense of collective purpose, ignoring the intrinsic value they place on their own language.

This account of the value of language shifts away from a fully individualized understanding and reveals a collective interest capable of justifying the imposition of obligations. This presents the maintenance of a language community as a complex group practice. Individuals are, of course, involved in that practice and it is partly through their choices

that the practice is either maintained or abandoned. But there is a "forest" as well as individual "trees." At least part of what gives choices value is the fact that they collectively constitute participation in the larger, group enterprise. It is in and through participation with others in the creation and sustaining of a language, and the cultural forms it is used to create, that value is created. That larger enterprise should take centre stage in the analysis. A language is sustained as countless individual acts of participation cumulate and conjoin as lives are lived. Tolerating each of them individually is relatively easy, but not enough. Creating the conditions under which a community, as a whole, can carry on and even flourish is a very different project.

The shift away from an individual focus to a focus on language communities should redirect our constitutional theorizing — the task is to articulate a set of constitutional values that make sense in the context of regulating the interaction between communities and between government and communities rather than between individual and between government and individuals. We need, for example, to further develop the idea of autonomy as a concept that can be applied to a community as a whole so that we can make sense of the notion that the collective commitment of a community to its language deserves respect and should attract support. Connected to this is the need to develop a notion of equality or equal respect owed by government to linguistic communities. As with the constant pull of the instrumentalist conception of language, the fact that these sorts of constitutional values have been first developed in the context of individual rights thinking will require a constant struggle against the assumptions of the individualistic model. Yet there may be much to learn from existing accounts of these values. Rather than attempting to start from scratch, we may well find that familiar ideas can be adapted to the context of protecting human interests that are better thought of in collective terms.

At the same time, keeping in touch with the individualistic versions of key constitutional values should remind us that although language practice is a collective phenomenon, language communities also consist of individuals, and they should count too in constitutional thinking. In other words, in addition to the usual challenges of coming to terms with how the protection of language rights may conflict with other legitimate social objectives, we must be prepared to face the potential for conflict within language communities or between communities and individual members.

Attending to the group dimension of language as a social practice also grounds any plausible account of why it is French and English that attract protection in Canada, and also future debates about whether new language communities should be added to the language rights regime. If language rights protect the vitality of linguistic communities, we need an existing viable community to claim the protection. In an ideal world in which co-existing linguistic communities had always treated each other with respect and created national institutions that fostered the autonomy and well-being of each, the fact of that original status would be reflected in and protected by the relevant communities' selection as attracting official language status. In the less than ideal world that we inhabit, any requirement of viability should be tempered by the need to redress past wrongs that may have damaged the vitality of an official language minority. Generally speaking, governments should not be rewarded for past wrongdoing by being relieved of future obligations. Nevertheless, if language rights are conceived of as designed to support a full communal life within a particular linguistic milieu, there must be a critical mass of speakers of that language to make a full life possible. This is what explains why it is not the case that every immigrant community that brings a new language to Canada is entitled to official language status.

III. Conclusion

The challenges I have outlined are significant, but so are the constitutional possibilities. Instead of letting language rights be relegated to the category of constitutional misfits, we have the opportunity to use the normative challenges distinctive of the language context to craft a new way of thinking about traditional constitutional values — one more conducive to the protection of group interests. Much of the groundwork has been laid for meeting the challenges ahead. I look forward to seeing how the debate will continue to unfold in the future.