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# COMPARATIVELY SPEAKING: LANGUAGE RIGHTS IN THE UNITED STATES AND CANADA

*Samuel W. Crowe\**

“Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it.”<sup>1</sup> When a language disappears, the culture it encompasses follows suit. In both the United States and Canada, language rights for those nations’ largest linguistic minorities take on the character of the people that they represent. For Latin-Americans, the ability to speak Spanish is paramount to the preservation of their culture, just as the ability to speak French remains essential to Quebecois culture in Canada. The same applies to Native Peoples and their respective tribes in both countries. There is a divide, however, between these neighboring nations in terms of linguistic protections and preservations, as well as with the methods employed by the respective governments to reach those ends. This paper will examine not only the differentiating approaches to language protections between the United States and Canada, but also the diverging rationales utilized by these nations in justifying the existence and furtherance of those rights.

## I. INSTITUTIONS OF CANADIAN LANGUAGE LAW

### A. Constitutionally-Protected Language Rights under Canada’s *Charter of Rights and Freedoms*.

Under the *Charter of Rights and Freedoms* (hereafter referred to as the “*Charter*”), English and French are the official languages of Canada, enjoying equal status and privileges within the Parliament and government of Canada.<sup>2</sup> Additionally, the *Charter* affords both languages those same protections in the province of New Brunswick,<sup>3</sup> Canada’s only “truly bilingual”

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<sup>1</sup> *Mahe v. Alberta*, [1990] 1 S.C.R. 342, ¶ 40 (Can.).

<sup>2</sup> Canadian Charter of Rights and Freedoms § 16(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) [hereinafter Canadian Charter].

<sup>3</sup> *Id.* § 16(2).

province in both constitutional and practical terms.<sup>4</sup> More specifically, Section 16 of the *Charter* provides New Brunswick Anglophones and Francophones with English and French rights to “distinct educational institutions” as well as “distinct cultural institutions” deemed necessary for the preservation and promotion of those linguistic communities.<sup>5</sup> The use of either language in Parliamentary proceedings is protected, as is the bilingual publication of Canadian statutes, records, and journals of Parliament, giving both English and French legislation equal authoritative weight.<sup>6</sup> Furthermore, the use of either language in Canada’s federal courts and in New Brunswick’s provincial courts is protected under Section 19 of the *Charter*.<sup>7</sup>

The *Charter* also imposes a duty on the Canadian government to provide bilingual services for its citizens who communicate with any central office of the Parliament or in the government of Canada.<sup>8</sup> That same right extends to other offices and institutions in particular circumstances “where there is a significant demand for communications . . . and services from that office in such language[.]” or where it is reasonable, due to the nature of the office, that communications with and services from that office be available in both languages.<sup>9</sup> In terms of other languages spoken in the country, the *Charter* also protects other regional, non-official languages from abrogation by Sections 16 through 20 of the acquired or enjoyed rights and privileges of such languages.<sup>10</sup>

Section 23 of the *Charter* defines Minority Language Educational Rights. Citizens whose first language is part of the English or French linguistic minority within their resident province have the right to have their children instructed in that language within that province at the primary and secondary school levels.<sup>11</sup> The provision also extends to those citizens who received their primary school instruction in English or French in Canada, and reside in a province where that language of instruction is part of the English or French linguistic minority within that province.<sup>12</sup> Another element of Minority Language Educational Rights under Section 23 includes “continuity of language

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<sup>4</sup> *Basic Facts*, GOV’T OF N.B., [http://www2.gnb.ca/content/gnb/en/gateways/about\\_nb/basic\\_facts.html](http://www2.gnb.ca/content/gnb/en/gateways/about_nb/basic_facts.html) (last visited Mar. 25, 2012) (stating New Brunswick is Canada’s only official bilingual province and about thirty-three percent of the population is French-speaking).

<sup>5</sup> Canadian Charter, *supra* note 2, § 16.

<sup>6</sup> *Id.* § 17-18.

<sup>7</sup> *Id.* § 19.

<sup>8</sup> *Id.* § 20(1).

<sup>9</sup> *Id.* § 20(1)(a)-(b).

<sup>10</sup> *Id.* § 22 (applying to the Northwest Territories and Nunavut, both of which provide protection for several regional languages.).

<sup>11</sup> Canadian Charter, *supra* note 2, § 23(1)(a).

<sup>12</sup> *Id.* § 23(1)(b).

instruction,” giving Canadians who have had a child receive instruction in either English or French in Canada the right to have all of their children receive primary and secondary school instruction in the same language.<sup>13</sup> Lastly, under Section 23(3), the aforementioned educational rights apply:

[W]herever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority instruction; and includes where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.<sup>14</sup>

There are caveats to the *Charter*’s linguistic rights, however. Each right is subject to the “limitations clause” of Section 1, which allows the Federal government to justify certain infringements of those rights.<sup>15</sup> Section 59 of the *Constitution Act, 1982* places restrictions on the application of *Charter* Section 23 rights to Quebec, rendering the applicability of Section 23 asymmetrical to Quebec in comparison to the rest of Canada. Additionally, Section 27 of the *Charter* provides for the “preservation and enhancement of the multicultural heritage” of Canadians.<sup>16</sup> As Canadian jurisprudence and legislation will reflect, multiculturalism and linguistic rights go hand in hand.

## B. Linguistic Legislation – From Past to Present

In addition to the *Charter*, Canadians enjoy the benefit of other linguistic protections at the federal and provincial levels of government. Prior to the *Charter*’s enactment in 1982, however, little existed in terms of entrenched language rights. In fact, it was not until confederation in 1867 that English and French enjoyed official equal status in the country.

Beginning with the *Quebec Act, 1774*,<sup>17</sup> the British Parliament attempted to resolve Anglo-Franco tensions after the Seven Years War by re-establishing French private law and guaranteeing freedom to practice the Catholic religion in Quebec. None of the provisions dealt specifically with language, but language and religion were closely related during that period.<sup>18</sup>

<sup>13</sup> *Id.* § 23(2).

<sup>14</sup> *Id.* § 23(3)(a)-(b). See generally *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3 (Can.) (discussing what numbers might warrant minority language instruction).

<sup>15</sup> See generally *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.) (discussing Canadian Charter § 1 limitation on substantive rights).

<sup>16</sup> Canadian Charter, *supra* note 2, § 27.

<sup>17</sup> Quebec Act, 14 Geo. 3, c. 83 (1774) (U.K.).

<sup>18</sup> See Andre Braen, *Language Rights*, in CANADIAN CONSTITUTIONAL LAW 1338 (Patrick Macklem et al., eds., 4th ed. 2010).

In 1792, upon the creation of the provinces of Upper (Ontario) and Lower (Quebec) Canada, French was abolished in the former.<sup>19</sup> After rebellions in both Upper and Lower Canada against British colonial governance in 1837-1838, Lord Durham conducted an inquiry into the causes of the insurrection.<sup>20</sup> He recommended that both provinces unite to ensure that the Francophone population became a minority, thereby hastening its assimilation into English Canada.<sup>21</sup> Based on Durham's recommendations, Britain adopted the *Act of Union* in 1840, with Section 41 of the Act abolishing French as a language of legislation.<sup>22</sup> The British Parliament would repeal Section 41 in 1848, adopting an act designed to establish a process of translation and publication of laws in both English and French.<sup>23</sup>

With Canada's 1867 Confederation came the first entrenchment of language rights in the *Constitution Act, 1867*. While the Act contained only one provision granting language rights, Section 133, it would prove momentous as the foundation of Canada's bilingual institutions. Section 133 specified the right to use either English or French in the Parliament of Canada and in the Quebec legislature, as well as in the courts of both Canada and Quebec.<sup>24</sup> After the *Charter*, Canada's *Official Languages Act of 1988* expanded on the linguistic rights provided under *Charter* Sections 16 through 23 by providing "facilities for the simultaneous interpretation of the debates and other proceedings of Parliament from one official language into the other."<sup>25</sup> The Act also provided Canadians with the right to receive services from Crown Corporations in addition to federal departments in both official languages.<sup>26</sup> The legislation committed the Government of Canada to enhancing the vitality of the English and French Canadian linguistic minority communities, supporting and assisting their development, and fostering the full recognition and use of both English and French in Canadian society.<sup>27</sup> The Act further stipulated that federal institutions had the duty to ensure that positive measures were taken for the implementation of those commitments.<sup>28</sup> Part VI of the Act mandated that Anglophone and Francophone Canadians not be discrimi-

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<sup>19</sup> LANGUAGE RIGHTS IN CANADA 21 (Michel Bastarache, ed., 2d ed. 2004).

<sup>20</sup> See generally *1839-Lord Durham's Report*, CBCLEARNING, <http://www.cbc.ca/history/EPCONTENTSE1EP7CH5LE.html> (last visited Mar. 20, 2012).

<sup>21</sup> Braen, *supra* note 18, at 1338-39.

<sup>22</sup> *Id.* at 1339.

<sup>23</sup> *Id.*

<sup>24</sup> Constitution Act, 1867, § 133, 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, app. II, no. 5 (Can.).

<sup>25</sup> Official Languages Act, R.S.C. 1985, c. 31, § 4(2) (Can.) (stating this provision also extends to Federal court proceedings under § 15(2)).

<sup>26</sup> *Id.* § 3 (stating a "Crown Corporation" falls within the Act's definition of a "Federal Institution").

<sup>27</sup> *Id.* § 41(1)(a)-(b).

<sup>28</sup> *Id.* § 41(2).

nated against based on ethnic origin or first language learned when it comes to employment opportunities and advancement in federal institutions.<sup>29</sup>

In terms of the provinces, Quebec implemented its *Charter of the French Language* (Bill 101) in 1977, making French its official language for legislation, administration of justice, and public administration.<sup>30</sup> Recently, the Quebec National Assembly amended the legislation to limit access to English language schooling by no longer recognizing one year of private English language schooling in Quebec as fulfilling the eligibility criteria to attend a publicly funded English school in Quebec.<sup>31</sup> Prior to the *Charter's* conception and entrenchment of bilingualism in New Brunswick, the province instituted bilingual official language legislation in 1969. The legislation was the first of its kind in Canada, making New Brunswick Canada's only officially bilingual province. The New Brunswick Act's protections are echoed by Sections 16 through 20 of the *Charter*.

In an effort to protect its Francophone population, the province of Ontario enacted the *French Language Services Act* in 1986.<sup>32</sup> The Act designates districts and municipalities with significant numbers of Francophone residents for the provision of provincial government services in French. The districts include Algoma, Cochrane, Nipissing, Sudbury, and Timiskaming, along with the united counties of Prescott and Russell.<sup>33</sup> The municipalities include the notable cities of Brampton, Hamilton, Kingston, London, Mississauga, Ottawa, Sudbury, Toronto, and Windsor.<sup>34</sup> The territory of Nunavut also employs an official language act, adding Inuit to English and French as its official languages.<sup>35</sup> The Northwest Territories also implemented official language legislation in 1988 and protected several regional Aboriginal languages. Aside from English, French and Inuktitut, Chipewyan, Cree, Dogrib, Gwich'in, and Slavey are also official languages within the territory.<sup>36</sup>

### C. Canadian Language Jurisprudence

Since the patriation of the *Charter* in 1982, the Supreme Court of Canada has equated language rights with free expression and cultural identity. Sev-

<sup>29</sup> *Id.* § 39-40.

<sup>30</sup> *Charter of the French Language*, R.S.Q., c. C-11 (Can.) [hereinafter *Bill 101*] (stating Quebec's official language legislation has become a lightning rod for the separatist Bloc Québécois political party in opposition to Federalist Canadian policies on language and culture.).

<sup>31</sup> U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2003 – CANADA (2003).

<sup>32</sup> *French Language Services Act*, R.S.O. 1990, c. F.32 (Can.).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Official Languages Act*, S. Nu. 2008, c. 10 (Can.).

<sup>36</sup> *Official Languages Act*, R.S.N.W.T. 1988, c. 56, § 4 (Can.).

eral cases demonstrate the Court's treatment of bilingual governance and education, individual linguistic liberties, and minority language rights for the sake of cultural preservation. Prior to patriation, the Court tackled with the language issue in *Attorney General of Quebec v. Blaikie (No. 1)* in 1979.<sup>37</sup> In *Blaikie*, the Court dealt with several issues stemming from Quebec's enactment of Bill 101 in relation to the requirements outlined by Section 133 of the *Constitution Act, 1867*. In Title I of Bill 101, the Quebec National Assembly placed restrictions upon English with such provisions as making official only the French text of the statutes and regulations passed by the Assembly.<sup>38</sup> The Court found that Section 133 applied to all legislation and regulations, thereby rendering the Quebec National Assembly's restrictions a violation of Section 133.<sup>39</sup> The Court reasoned that it would be practical to extend the Section 133 requirement to legislative enactments.<sup>40</sup>

After patriation, the Supreme Court of Canada took a firm stance on protecting bilingualism in provincial language legislation. One notable occasion was in 1985 with their advisory opinion in *Reference re Manitoba Language Rights*.<sup>41</sup> In 1890, the Manitoba legislature passed official language legislation for the province stipulating that Manitoba's provincial legislature and courts use only English and legislative acts were only to be printed and published in English.<sup>42</sup> In order to follow the Act, the Manitoba legislature ceased publication of its records in French shortly thereafter.<sup>43</sup> The Supreme Court opined that the legislative acts not enacted, printed, and published in both English and French were invalid and had no legal force and effect.<sup>44</sup> The Court, however, deemed the current acts of the legislature – those enacted and published only in English – to have temporary force and effect for the minimum period necessary for their translation, re-enactment, and publication.<sup>45</sup>

The Court wrestled again with provincial official language provisions in 1988 in *Ford v. Quebec (Attorney General)*, a consolidation of cases initiated by Montreal-area merchants in response to their violations of Bill 101.<sup>46</sup> After receiving complaints, Quebec's Office of French Language instructed the merchants to comply with Bill 101 by informing and serving

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<sup>37</sup> *Attorney General of Quebec v. Blaikie (No. 1)*, [1979] 2 S.C.R. 1016 (Can.).

<sup>38</sup> *Id.* at 1020.

<sup>39</sup> *Id.* at 1030.

<sup>40</sup> *Id.* at 1016 & 1022.

<sup>41</sup> *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (Can.).

<sup>42</sup> *Id.* ¶ 9.

<sup>43</sup> *Id.* ¶ 10.

<sup>44</sup> *Id.* ¶ 168.

<sup>45</sup> *Id.*

<sup>46</sup> *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 (Can.).

their customers in French, as well as replacing their bilingual French and English signs with unilingual French ones.<sup>47</sup> The Supreme Court, led by Chief Justice Brian Dickson, held that Bill 101 violated the freedom of expression protected by Section 2(b) of the *Charter*,<sup>48</sup> and that the violation could not be justified under Section 1 of the *Charter*.<sup>49</sup> The Court reasoned that while the underlying aim of Bill 101 to protect French was just, it could not justify the prohibition of other languages.<sup>50</sup> Perhaps most importantly in the majority's opinion, Chief Justice Dickson merged linguistic rights with cultural identity, a practice that came to embody the Supreme Court's treatment of language rights:

Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is . . . a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality.<sup>51</sup>

The Court has also discussed the right of individuals to use their first language in provincial and federal courts. In *Société des Acadiens v. Association of Parents*,<sup>52</sup> the Supreme Court ruled on minority language rights under Section 19(2) of the *Charter*.<sup>53</sup> The Société alleged that their constitutional language rights were infringed when a judge with insufficient French language skills heard its application for leave to appeal.<sup>54</sup> The Court held that fundamental justice ensures that an accused Francophone has the right to an interpreter during his or her trial, but language rights do not guarantee the right to be heard by a judge who speaks French.<sup>55</sup> The Court here adopted a restrictive approach to language rights under the *Charter*.

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<sup>47</sup> *Id.* at Part I.

<sup>48</sup> Canadian Charter, *supra* note 2, § 2(b).

<sup>49</sup> *Ford*, 2 S.C.R., ¶ 83.1-2.

<sup>50</sup> *Id.* ¶ 83.3.

<sup>51</sup> *Id.* ¶ 40.

<sup>52</sup> *Societe des Acadiens du Nouveau-Brunswick, Inc. v. Ass'n of Parents for Fairness in Educ.*, [1986] 2 S.C.R. 460 (Can.).

<sup>53</sup> Canadian Charter, *supra* note 2, § 19(2).

<sup>54</sup> *Societe des Acadiens du Nouveau-Brunswick, Inc., v. Ass'n of Parents for Fairness in Educ.*, ¶ 3.

<sup>55</sup> *Id.* ¶ 53.



In *R. v. Beaulac*, the British Columbia Supreme Court denied Jean Victor Beaulac his right to be heard in French, finding that his English skills were adequate; the court subsequently convicted him of murder.<sup>56</sup> Beaulac appealed to the Supreme Court of Canada, claiming rights under Section 530 of the Criminal Code of Canada, which allows the accused to use English or French in court.<sup>57</sup> The Court overturned Beaulac's conviction and in doing so clarified its position on the protection of language rights:

The objective of protecting official language minorities . . . is realized by the possibility for all members of the minority to exercise independent, individual rights[,] which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided.<sup>58</sup>

The Court further opined that a right to a fair trial did not subsume language rights, holding that if the right of the accused to use English or French in court proceedings was limited because of proficiency in the other language, there would in effect be no distinct language right.<sup>59</sup> In this case, the Court adopted a broad and purposive approach to language rights in the *Charter*, overturning the restrictive interpretation previously adopted in *Société des Acadiens*.<sup>60</sup> The Court does not extend the right of language use in municipal court proceedings, however, ruling in *Charlebois v. Saint John (City)*<sup>61</sup> that municipalities constitute separate entities from those of "institutions" and therefore have fewer language responsibilities than those held by other government institutions.<sup>62</sup>

The Canadian Supreme Court has also discussed minority language educational rights under Section 23 of the *Charter*,<sup>63</sup> most notably in *Mahe v. Alberta*.<sup>64</sup> Parents of Francophone students claimed that their Section 23 rights were not satisfied by the existing educational system in the city of Edmonton, nor by the legislation under which it operated, which resulted in an erosion of their cultural heritage contrary to the

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<sup>56</sup> *R. v. Beaulac*, [1999] 1 S.C.R. 768, ¶ 8 (Can.).

<sup>57</sup> *Id.* ¶¶ 8-9.

<sup>58</sup> *Id.* ¶ 20.

<sup>59</sup> *Id.* ¶ 47.

<sup>60</sup> *Id.* ¶ 25.

<sup>61</sup> *Charlebois v. St. John (City)*, [2005] 3 S.C.R. 563 (Can.).

<sup>62</sup> *Id.*

<sup>63</sup> Canadian Charter, *supra* note 2, § 23.

<sup>64</sup> *Mahe v. Alberta*, [1990] 1 S.C.R. 342, ¶ 40 (Can.).

intent of the *Charter*.<sup>65</sup> They argued that Section 23 guaranteed the right to the “management and control” of a Francophone school run by a Francophone school board.<sup>66</sup> The Court first examined Section 23, finding that the preservation and promotion of English and French, along with their respective cultures, through the means of minority language education in provinces where a majority of the population does not speak it was its chief purpose.<sup>67</sup> The Court agreed with the plaintiffs, holding that the numbers of minority language students in Edmonton warranted minority language representation on school boards.<sup>68</sup> In order to comply with Section 23, the province had to enact legislation to provide minority language parents in Edmonton with management and control over minority language instruction in the city.<sup>69</sup> The Court, however, refused to address exactly how many students might be required in order to warrant such a minority lingual program.<sup>70</sup>

In terms of expanding minority language educational rights to the linguistic majority within a province’s population (i.e. guaranteeing English instruction for French students in Quebec), the Court rejected this proposition in *Gosselin v. Quebec (Attorney General)*.<sup>71</sup> The appellants here claimed that Bill 101, which provided access to English language schools in Quebec only to children who had received or were receiving English language instruction in Canada or whose parents studied in English in Canada at the primary level, discriminated between children who qualified and the majority of French-speaking Quebec children who do not.<sup>72</sup> They argued further that equality required that all children in Quebec have access to publicly funded English language education in the province.<sup>73</sup> The Court disagreed, maintaining that the goal of Section 23 (to ensure that the English community in Quebec and the French communities of the other provinces flourish) was distinct from offering minority language instruction to

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<sup>65</sup> *Id.* ¶ 3.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* ¶ 39.

<sup>68</sup> *Id.* ¶ 106.

<sup>69</sup> *Id.* ¶¶ 106 & 118-120.

<sup>70</sup> *Id.* ¶ 51.

<sup>71</sup> *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 238 (Can.).

<sup>72</sup> *Id.* ¶ 1.

<sup>73</sup> *Id.*

the majority.<sup>74</sup> Principles of equality did not dictate that the right to minority language education extends to those who comprise a province's linguistic majority.

The Court took a decisive step in enforcing Section 23 in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*.<sup>75</sup> Here, the Court dealt with the remedies available under section 24(1) of the *Charter*<sup>76</sup> for the realization of minority language education rights under Section 23.<sup>77</sup> Section 23 created a right for Francophone and Acadian Nova Scotians to French instruction, if those students were of a sufficient number.<sup>78</sup> In 1996, several Francophone families in five school districts tried to invoke that right, requesting new buildings and programs for primary and secondary education, and the Nova Scotia government affirmed that Section 23 mandated the fulfillment of that request.<sup>79</sup> After two years passed without progress, the Supreme Court of Nova Scotia intervened to order that the province use its best efforts to build French-language school facilities by certain dates, and that the court could monitor progress of those efforts.<sup>80</sup> The Supreme Court of Canada agreed with the Nova Scotia Supreme Court, finding that Section 24's judicial approach to remedies should remain flexible and responsive to the needs of a given case.<sup>81</sup> Furthermore, under the provisions of Section 24, courts had the authority to grant a remedy that it considered "appropriate and just" under the circumstances.<sup>82</sup>

Despite the Supreme Court's discussion of (and willingness to enforce) Section 23 of the *Charter*, there are still several inherent issues with minority linguistic education. One such issue is that these rights attach to the parent rather than the child. If the parents' English or French language instruction took place outside of Canada, the child is not entitled to receive instruction in that language. Additionally, non-Canadian citizens living in Canada do not have access to the Section 23 right, nor do their children, even if they are Canadian citizens. More troubling are the Court's actions in *Mahe*, refusing to specify how many students constitute a "sufficient amount" for a minority lan-

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<sup>74</sup> *Id.* ¶¶ 29-30.

<sup>75</sup> *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 (Can.).

<sup>76</sup> Canadian Charter, *supra* note 2, § 24(1)

<sup>77</sup> *Doucet-Boudreau*, 3 S.C.R. ¶ 1 (holding "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.").

<sup>78</sup> *Id.* ¶¶ 2 & 4.

<sup>79</sup> *Id.* ¶ 4.

<sup>80</sup> *Id.* ¶ 1 & 6-7.

<sup>81</sup> *Id.* ¶ 59.

<sup>82</sup> *Id.* ¶ 45.

guage program. While this posture gives the Court flexibility in interpreting Section 23, it also leaves the issue unresolved and open to future litigation.

Another issue is the aforementioned unbalanced application of these Section 23 rights to Quebec compared with the rest of Canada's provinces and territories. One such restriction holds that, in Quebec, a child may be instructed in English but only if at least one parent or sibling received English instruction in Canada. This restriction forces immigrants settling in Quebec to send their children to French-speaking schools, even if their mother tongue is English.

Ultimately, Canadian language jurisprudence reflects the Supreme Court's dedication to the preservation and advancement of language rights within the English and French populations, especially in terms of cultural identity and expression. It also demonstrates a reluctance to wade into the quagmire that Section 23 of the *Charter* presents, leaving the Court effectively handcuffed when it comes to adjudicating minority language education.

## II. INSTITUTIONS OF AMERICAN LANGUAGE LAW

### A. "Official English" Legislation and the Assimilation of Students with Limited English Proficiency

Despite the lack of an official language stipulation in its federal Constitution, several American states possess official language laws within their respective constitutions. In the last thirty years in particular, likely in response to the growing Latino population and a fear of American disunity,<sup>83</sup> several American states have followed the "Official English" or "English-Only" movement to make English the official language of the United States.<sup>84</sup> Overall, twenty-seven states have followed this path of *de jure* recognition of the language in their respective constitutions.<sup>85</sup> Of those states, only Alabama, Arizona, California, Colorado, Florida, and Utah adopted the law by

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<sup>83</sup> See Lupe S. Salinas, *Immigration and Language Rights: The Evolution of Private Racist Attitudes into American Public Law and Policy*, 7 NEV. L.J. 895, 902 (2007) (quoting remarks by former Speaker of the House Newt Gingrich on assimilating immigrants into an English-speaking American society).

<sup>84</sup> See David Michael Miller, *Assimilate Me. It's as Easy as (Getting Rid Of) Uno, Dos, Tres*, 74 MO. K.C. L. REV. 455, 456 (2005).

<sup>85</sup> James Crawford, *Language Legislation in the U.S.A. – State Official English Laws*, <http://www.languagepolicy.net/archives/langleg.htm> (last visited Apr. 26, 2011).

voter initiative.<sup>86</sup> Of the remaining states, twenty enacted the legislation by statute without a plebiscite.<sup>87</sup> Only Nebraska has enacted its official language law by constitutional amendment without voter initiative, as in 1920 it became first state to declare English as its official language.<sup>88</sup> Nebraska's amendment required that all official proceedings, records, and publications be in English, and that the teaching of common school subjects in English apply to all schools.<sup>89</sup> Not until nearly fifty years later did another state make such a declaration when Illinois enacted official English legislation in 1969 by statute, repealing its previous declaration of "American."<sup>90</sup>

The major influx of official English legislation came during the 1980s, which saw fourteen states enact such measures: Virginia (1981); Indiana, Kentucky, and Tennessee (1984); California (1986); Arkansas, Mississippi, North Dakota, North Carolina, and South Carolina (1987); Colorado and Florida (1988).<sup>91</sup> The trend continued into the 1990s with Montana, New Hampshire, and South Dakota enacting legislation in 1995, Georgia and Wyoming in 1996, and Missouri in 1998.<sup>92</sup> States carried on this practice into the new millennium, as Utah adopted official English in 2000. Iowa followed suit in 2002, as did Arizona in 2006, while Alaska, Idaho, and Kansas rounded out the group in 2007.<sup>93</sup>

The absence of official language legislation at the federal constitutional level is not from a lack of effort. In 1996, the House of Representatives passed the *Language of Government Act* in an effort to make English the official language of the federal government.<sup>94</sup> The provisions of the Act would amend the *Immigration and Nationality Act*<sup>95</sup> to conduct public ceremonies for the admission of new citizens solely in English.<sup>96</sup> The *Language of Government Act*'s stated purpose was to "maintain a language common to all people" by preserving "unity in diversity" while preventing "division along linguistic lines."<sup>97</sup> Further, the Act obligated the federal government to preserve and enhance English as an official language by offering more opportunities for non-English speakers to learn the language.<sup>98</sup> The Senate,

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<sup>86</sup> *Id.*

<sup>87</sup> *See* Crawford, *supra* note 85.

<sup>88</sup> *See* Siman Act, 1919 Neb. Laws c. 249. The United States Supreme Court ruled the Siman Act was unconstitutional in *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>89</sup> NEB. CONST. art. I, § 27.

<sup>90</sup> 5 ILL. COMP. STAT. 460/20 (1969).

<sup>91</sup> Crawford, *supra* note 85.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Language of Government Act of 1995, H.R. 345, 104th Cong. (1995).

<sup>95</sup> Immigration and Nationality Act § 12, 8 U.S.C. § 1423 (2004)

<sup>96</sup> H.R. 345, *supra* note 94.

<sup>97</sup> *Id.* § 2(a)(4).

<sup>98</sup> *Id.* § 162.

however, voted down the Act and it never came to fruition. As of 2011, members of Congress proposed a nationwide initiative with the *English Language Unity Act* to “declare English as the official language of the United States, to establish a uniform English language rule for naturalization, and to avoid misconstructions of the English language texts of the laws of the United States.”<sup>99</sup> At the time of writing, the legislation is still pending.

In terms of linguistic education, the trend in the United States is for the assimilation of Limited English Proficiency (“LEP”) students through English-only instruction. Previously, Title VII of the *Elementary and Secondary Education Act* of 1965 (“ESEA”) governed linguistic education.<sup>100</sup> Title VII of the ESEA provided programs for bilingual students to receive instruction in their native language, thereby gradually assimilating them into English.<sup>101</sup> Over time, however, state educational reforms – such as California’s Proposition 227 and Arizona’s Proposition 203 – began to erode the bilingual education provisions of the ESEA, until in 2001 when it was invalidated by President George W. Bush’s signing of the *No Child Left Behind Act*.<sup>102</sup> Title III of *No Child Left Behind*, which principally addressed LEP students, replaced “bilingual education” with “English language acquisition” throughout the statute.<sup>103</sup> Specifically, the statute purports to help LEP students “attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic . . . standards as all children are expected to meet.”<sup>104</sup> The *No Child Left Behind Act* also intends to hold states accountable for increasing English proficiency in its schools by requiring “demonstrated improvements” in the English proficiency of LEP students each fiscal year, as well as “adequate yearly progress” for LEP students.<sup>105</sup> As American case law will demonstrate, states have broad discretion in terms of the educational programs it incorporates in order to comply with *No Child Left Behind*.

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<sup>99</sup> English Language Unity Act of 2011, H.R. 997, 112th Cong. (2011).

<sup>100</sup> Indian, Hawaiian, and Alaska Native Education, 20 U.S.C. § 7401 et seq. (1965).

<sup>101</sup> JAMES CRAWFORD, *ADVOCATING FOR ENGLISH LEARNERS: SELECTED ESSAYS* 124-127 (2008).

<sup>102</sup> Travis W. England, *Bilingual Education: Lessons from Abroad for America's Pending Crisis*, 86 WASH. U. L. REV. 1211, 1220-1222 (2009).

<sup>103</sup> *Id.* at 1222.

<sup>104</sup> English Language Acquisition, Language Enhancement, and Academic Achievement Act, 20 U.S.C. § 6812(1). This Act was originally enacted as the Elementary and Secondary Education Act of 1965.

<sup>105</sup> *No Child Left Behind*, 20 U.S.C. § 3102 (2001).

## B. Federal and State Minority Language Protections

Despite the advent of "Official English" legislation and the linguistic reformation of the American educational structure, several protections for non-English speakers exist in the United States. Other than the ESEA in 1965, the *Voting Rights Act* enacted by Congress the same year eliminated the English-only qualification for voting in elections.<sup>106</sup> Congress found pervasive voting discrimination against citizens of linguistic minorities on a national scale, as well as denial of equal educational opportunities by State and local governments, "resulting in severe disabilities and continuing illiteracy in the English language."<sup>107</sup> In addition, where State and local officials conduct elections only in English, they exclude language minority citizens from participation in the electoral process.<sup>108</sup> In 2006, Congress continued the legacy established by the *Voting Rights Act* by renewing it for another twenty-five years.<sup>109</sup>

In addition to the *Voting Rights Act*, President Bill Clinton enacted Executive Order No. 13166 in the year 2000.<sup>110</sup> The order specifies compliance standards that recipients of federal grants must follow to ensure the programs and activities that are normally provided in English are accessible to LEP persons, thus not discriminating based on national origin.<sup>111</sup> Recipients of the grants must take "reasonable steps" to ensure meaningful access to their programs by LEP persons.<sup>112</sup> These reasonable steps depend on three factors: (1) the number or proportion of LEP persons in the eligible service population; (2) the frequency with which LEP individuals encounter the program, (3) the importance of the service provided by the program, and; (4) the resources available to the recipient.<sup>113</sup>

In terms of specific language protections, Congress preserved Native American language rights with its enactment of the *Native American Programs Act* of 1974.<sup>114</sup> The legislation awarded federal grants to ensure the "survival and continuing vitality of Native American languages."<sup>115</sup> The Act further stipulates that the grants may be used for the creation of Native

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<sup>106</sup> Voting Rights Act, 42 U.S.C. § 1971 (1965).

<sup>107</sup> See Suspension of the Use of Tests or Devices in Determining Eligibility to Vote, 42 U.S.C. § 1973b-f(1).

<sup>108</sup> *Id.* § 1973b-f(4).

<sup>109</sup> *Bush Signs Voting Rights Act Extension: Historic 1965 Law Renewed for 25 Years*, ASSOCIATED PRESS (July 27, 2006), <http://www.msnbc.msn.com/id/14059113/>.

<sup>110</sup> Exec. Ord. No. 13,166, 65 Fed. Reg. 159 (Aug. 16, 2000).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Native American Programs Act of 1974, 42 U.S.C. § 2991b-3(a)(2) (2006).

<sup>115</sup> *Id.*

American language projects to transfer the language from one generation to another, for the training of Native Americans to teach or serve as interpreters or translators, and for the dissemination of materials used to teach and enhance a Native American language.<sup>116</sup>

In addition to federally enacted measures, several states have implemented laws protecting the rights of linguistic minorities. Among the fifty states, Hawaii is the only officially bilingual state in the United States, recognizing Hawaiian along with English as its official languages.<sup>117</sup> In Louisiana, protections exist for the French language for Cajun and Creole speakers.<sup>118</sup> The Council for the Development of French in Louisiana (“CODOFIL”) oversees the development and expansion of programs designed to promote French culture, heritage, and language.<sup>119</sup> Additionally, CODOFIL promotes French language immersion educational programs and instruction at all levels of elementary and secondary education in the state, as well as increasing the number of French immersion schools in the state.<sup>120</sup>

### C. American Language Jurisprudence

In contrast to their Canadian counterparts, the United States Supreme Court has considered language-related statutes and policies on relatively fewer occasions. Given the lack of a *de jure* official language in the United States Constitution, federal courts have considerable latitude in determining the constitutionality of linguistic regulations. In doing so, they have associated language rights and the ability to educate students in a multilingual setting with discriminatory measures, often applying the Fourteenth Amendment’s Equal Protection or Due Process Clauses.

The Court first discussed this issue in *Meyer v. Nebraska*, a post-World War I case dealing with German language instruction in Nebraska schools.<sup>121</sup> In 1919, the Nebraska legislature passed a statute prohibiting the teaching of any language other than English to students in private or public schools until the students had successfully passed the eighth grade.<sup>122</sup> The statute’s intended purpose was to promote civic development by restraining the education of young students in foreign languages and ideals before they could learn English and “acquire American ideals.”<sup>123</sup> The State charged Robert T.

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<sup>116</sup> *Id.* § 2991b-3(b)(1)-(3).

<sup>117</sup> HAW. CONST. art. XV, § 4.

<sup>118</sup> *See* LA. CONST. art. XII, § 4; *see also* LA. REV. STAT. ANN. § 43:204 (2007).

<sup>119</sup> Council for the Development of French in Louisiana, LA. REV. STAT. ANN. § 25:651 (1968).

<sup>120</sup> *Id.*

<sup>121</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>122</sup> *Id.* at 398.

<sup>123</sup> *Id.* at 401.



Meyer, a parochial school teacher, with violating the statute by teaching reading in the German language to a ten year old child.<sup>124</sup> The Supreme Court examined the Due Process Clause to determine whether the statute as applied infringed on Meyer's Fourteenth Amendment liberties.<sup>125</sup> The Court held that the statute was arbitrarily applied and "without reasonable relation to any end within the competency of the State."<sup>126</sup> While it admittedly understood and acknowledged the purpose of the Nebraska statute,<sup>127</sup> the Court nonetheless reasoned that knowledge of the German language was not harmful but rather was "helpful and desirable."<sup>128</sup>

In *Katzenbach v. Morgan*,<sup>129</sup> the Court dealt with the constitutionality of Section 4(e) of the *Voting Rights Act* of 1965.<sup>130</sup> The Act provided that no person who successfully completed sixth grade in a Puerto Rican school where the language of instruction was other than English was to be denied the right to vote in any election because of the inability to read or write English.<sup>131</sup> Registered voters in New York City challenged Section 4(e)'s constitutionality, arguing that it prohibited the enforcement of New York's state election laws requiring an ability to read and write English as a condition of voting.<sup>132</sup> The registered voters cited the Court's ruling in *Lassiter v. Northampton County Board of Election*,<sup>133</sup> which upheld North Carolina's English literacy requirement for voters, as support for their argument.<sup>134</sup> The Supreme Court rejected the voters' *Lassiter* argument, upholding Section 4(e) of the Act as appropriate legislation to enforce the Fourteenth Amendment's Equal Protection Clause.<sup>135</sup>

In 1991, the Court discussed linguistic issues in criminal proceedings with *Hernandez v. New York*.<sup>136</sup> Here, Dionisio Hernandez appealed the New York state courts' rejection of his claim that the prosecutor in his criminal trial used peremptory challenges to exclude Latinos from the jury because of their ethnicity.<sup>137</sup> The prosecutor explained to the trial court that he challenged the potential jurors not because of their race but because of their ina-

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<sup>124</sup> *Id.* at 397.

<sup>125</sup> *Id.* at 399.

<sup>126</sup> *Id.* at 403.

<sup>127</sup> *Id.* at 402.

<sup>128</sup> *Id.* at 400.

<sup>129</sup> *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

<sup>130</sup> 42 U.S.C. § 1971, *supra* note 106, § 4(e).

<sup>131</sup> *Katzenbach*, 384 U.S. at 643.

<sup>132</sup> *Id.* at 643-44.

<sup>133</sup> *Lassiter v. Northampton County Bd. of Election*, 360 U.S. 45 (1959)

<sup>134</sup> *Katzenbach*, 384 U.S. at 649.

<sup>135</sup> *Id.* at 658.

<sup>136</sup> *Hernandez v. New York*, 500 U.S. 352 (1991).

<sup>137</sup> *Id.* at 355.

bility to listen and follow along with the court's Spanish interpreter.<sup>138</sup> Hernandez argued that the potential jurors' Spanish-speaking ability bore such a close relation to ethnicity that exercising a peremptory challenge on linguistic grounds violated the Fourteenth Amendment Equal Protection.<sup>139</sup> The Court disagreed with Hernandez, finding that the prosecutor offered a race-neutral basis for the peremptory strikes, resting neither on the intention to exclude Latino or bilingual jurors nor on stereotypical assumptions about Latinos or bilinguals.<sup>140</sup> While the prosecutor's criterion resulted in the disproportionate removal of prospective Latino jurors, that disproportionate impact did not turn the prosecutor's actions into a *per se* violation of equal protection.<sup>141</sup>

Despite its ruling, the Supreme Court's majority provided important dicta in *Hernandez* regarding future adjudication of race-based discrimination in peremptory challenges on linguistic grounds:

We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. And, as we make clear, a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination.<sup>142</sup>

In a pointed dissent, Justice Stevens adopted this reasoning in challenging the *Hernandez* majority's acceptance of the prosecutor's actions. He opined that justifying the prosecutor's actions would result in a disproportionate disqualification of Spanish-speaking jurors, as the explanation that was race-neutral on its face was still unacceptable since it constituted "merely a proxy for a discriminatory practice."<sup>143</sup> Stevens also alluded to the availability of less-restrictive means to accomplish the goal of jurors comprehending and following the court's interpreter, such as making the official translation alone

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<sup>138</sup> *Id.* at 356.

<sup>139</sup> *Id.* at 360.

<sup>140</sup> *Id.* at 361 (stating "The prosecutor's articulated basis for these challenges divided potential jurors into two classes: those whose conduct during *voir dire* would persuade him they might have difficulty in accepting the translator's rendition of Spanish-language testimony and those potential jurors who gave no such reason for doubt.").

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 371-72.

<sup>143</sup> *Id.* at 379.

as evidence or having the jurors bring to the judge's attention any disagreements they might have had with the translation.<sup>144</sup>

Equally as important to what the Court has addressed in regards to language is what it has failed to address. In *Alexander v. Sandoval*,<sup>145</sup> the Supreme Court refused to address the emergence of state English-only language regulations. After Alabama amended its state constitution to make English its official language, James Alexander, Director of the Alabama Department of Public Safety, ordered that the Alabama driver's license test be given only in English.<sup>146</sup> Martha Sandoval sued Alexander under Sections 601 and 602 within Title VI of the *Civil Rights Act* of 1964,<sup>147</sup> claiming that the English-only test policy subjected non-English speakers to discrimination based on their national origin.<sup>148</sup> Section 601 prohibited discrimination on the basis of "race, color, or national origin" by programs or agencies that receive federal funding – such as the Alabama Department of Public Safety.<sup>149</sup> Section 602 authorized federal agencies "to effectuate the provisions of [Section 601] . . . by issuing rules, regulations or orders of general applicability."<sup>150</sup>

More specifically, Sandoval invoked a regulation that the United States Department of Justice promulgated under Section 602, prohibiting agencies and programs receiving federal funding from taking actions that resulted in a disparate impact on persons of a certain race, color, or nationality. The Court avoided the issue of whether the English-only policy had the effect of discriminating on the basis of national origin, deciding instead to rule on the question of whether there was a private cause of action to enforce the Department of Justice's regulation.<sup>151</sup> The Court failed to take a stance on state implementations of English-only laws and policies, leaving states free to enact further unilingual measures (such as the aforementioned state constitutional amendments dictating an official language).

The Court followed its hands-off approach to state application of language education law in *Horne v. Flores*,<sup>152</sup> a case dealing with language education under the *Equal Educational Opportunities Act* ("EEOA")<sup>153</sup> and *No Child Left Behind*. The case arose from litigation in Arizona in 1992 when a group of English Language-Learner ("ELL") students and their parents from the Nogales school district filed a class action, alleging that the state violated

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<sup>144</sup> *Id.*

<sup>145</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>146</sup> *Id.* at 278-79.

<sup>147</sup> *Civil Rights Act* of 1964, 42 U.S.C. § 21 (1964).

<sup>148</sup> *Sandoval*, 532 U.S. at 279.

<sup>149</sup> *Id.* at 278.

<sup>150</sup> *Id.* at 279.

<sup>151</sup> *Id.*

<sup>152</sup> *Horne v. Flores*, 129 U.S. 2579 (2009).

<sup>153</sup> *Equal Educational Opportunities Act*, 20 U.S.C. § 1703 (1974).

the EEOA, which required states “to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”<sup>154</sup> In 2000, the United States District Court for the Arizona District entered a declaratory judgment in respect to Nogales and in 2001 extended the order to apply throughout the state.<sup>155</sup> Over the next eight years, the students and parents repeatedly sought relief from the District Court’s orders, but to no avail. During the course of the case, Congress passed *No Child Left Behind* to replace the EEOA.

To determine if continued enforcement of the District Court order would be equitable, the United States Supreme Court examined four significant changes over the course of the case’s proceedings: (1) Arizona’s adoption of a new ELL instructional methodology applying a structured English immersion approach; (2) Congress’s enactment of *No Child Left Behind*; (3) structural and management reforms in the school district; and, (4) an increase in overall education funding.<sup>156</sup> The changes established that the Nogales school district was no longer in violation of the EEOA but was taking appropriate action to remove language barriers in its schools despite having not satisfied the original District Court order.<sup>157</sup> The Court reasoned, “Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA.”<sup>158</sup>

While the Supreme Court has been hesitant to rule on English-only legislation, other federal courts have been more willing to undertake language adjudication. The Ninth Circuit of the United States Court of Appeals wrestled with California’s Proposition 227 and the dismantling of the state’s public bilingual education programs in *Valeria v. Davis*.<sup>159</sup> On June 2, 1998, California voters passed Proposition 227 by a sixty-one percent majority.<sup>160</sup> The law declared that California’s government and public schools had a “moral obligation and a constitutional duty” to ensure that all students attain literacy in the English language.<sup>161</sup> Proposition 227 replaced California’s public school bilingual education programs, which originally taught Limited English Proficient (“LEP”) students in their native language, into a system of “structured English immersion” where children were “taught English by being taught in English.”<sup>162</sup> The initiative further provided that LEP students of

<sup>154</sup> *Flores*, 129 U.S. at 2588.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 2600.

<sup>157</sup> *Id.* at 2602.

<sup>158</sup> *Id.* at 2588 (citing *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir., 1981)).

<sup>159</sup> *Valeria v. Davis*, 307 F.3d 1036 (2002).

<sup>160</sup> *Id.* at 1037.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1038.

similar English proficiency be taught together, while English learners were to be instructed through sheltered English immersion during a transition period of no more than one year.<sup>163</sup>

In the 1996-97 academic year, Hispanic students accounted for over eighty-two percent of the LEP student population, and Proposition 227's popular campaign linked bilingual education to the Latino community, singling out Hispanics on ballot materials, press releases, and published opinion pieces.<sup>164</sup> The Court of Appeals determined that the statute did not violate Equal Protection, finding that the purpose of Proposition 227 was to improve education (rather than remedy racial discrimination) and that there was no evidence that the initiative was motivated by racial means.<sup>165</sup> The court reasoned that the mere fact that California's LEP student population was predominantly Hispanic, and that proponents of the Proposition specifically identified Hispanics during the initiative's campaign, did not suffice to create an Equal Protection claim.<sup>166</sup>

Given the history of the American judicial system concerning linguistic issues, it is apparent that courts want to leave themselves broad discretion in future discussions of language rights, especially with those issues becoming more prevalent on American judicial dockets. Indeed, it seems that "attention paid to language does not equate to attention paid to linguistic rights."<sup>167</sup>

### III. COMPARATIVELY SPEAKING – DIVERGING LEGAL AND SOCIAL PATHS

#### A. The Canadian Cultural "Mosaic" and its Advancement of Bilingualism

From its days as a British colony in the wake of Britain's conquest of New France in the Seven Years War in 1763, to confederation in 1867, to patriation in 1982, to the present, much of Canada's history consists of cultural and linguistic tension between English and French Canadians. As a result, for reasons both legal and practical, the country undertook its bilingual character and multicultural mosaic. Some scholars suggest that Canada did not take on its bilingual character until the 1960s, when the Royal Commission on Bilingualism and Biculturalism reported, "relations between English and French Canadians had deteriorated to a point where the two groups' will

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1041.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1042.

<sup>167</sup> Paul Conor Hale, *Official, National, Common or Unifying: Do Words Giving Legal Status to Language Diminish Linguistic Human Rights?* 36 GA. J. INT'L & COMP. L. 221, 235 (2007).

to live together was in jeopardy.”<sup>168</sup> It is in that spirit of uniting two distinct cultures that the *Charter’s* linguistic and cultural protections came to fruition, and where the Supreme Court of Canada enforces language rights on cultural grounds. Due in large part to this intertwining of English and French Canadian interests, rather than the separation of these “two solitudes,” Canada’s existence remains intact.<sup>169</sup>

Bilingual status for English and French has led to an emergence of a bilingual Canadian population. Anglophones comprise fifty-eight percent of Canada’s total population compared to twenty-two percent for Francophones.<sup>170</sup> Quebec is the only province that enjoys a Francophone majority, with over 5.8 million speakers.<sup>171</sup> There has been an emergence of a bilingual population in Quebec, however, with over two million speakers professing to know both English and French.<sup>172</sup> Similar to Quebec, Nunavut’s official language provisions cater to the majority of its population of Inuktitut speakers (approximately 20,100 people or about sixty-eight percent of the population).<sup>173</sup> Despite this, English speakers account for roughly twenty-six percent of Nunavut’s population, while many amongst the small Francophone enclave in the territory possess a working knowledge of English.<sup>174</sup> Furthermore, with the adoption of official bilingual districts, Francophones in predominantly English speaking Western Canada are able to maintain their linguistic and cultural enclaves in Manitoba and Saskatchewan just as they would in Quebec or New Brunswick.<sup>175</sup> What has transpired in these regions can likely be attributed to the constitutional entrenchment of bilingualism, promoting the preservation of culture through linguistic rights while providing a practical means of cross-cultural communication and understanding between Anglophones and Francophones.

It has been bilingualism and accommodation, rather than unilingual assimilation, that has preserved the vitality of the Canadian confederation. The preservation of language rights in two official languages ensures that one language does not simply dominate the nation’s cultural landscape, which would undoubtedly pressure all linguistic minorities to assimilate into the

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<sup>168</sup> Jack Jedwab, *Crisis What Crisis? The Recognition Issue and Canadian Identity Crises*, 13 CONST. F. 17, 19 (2005).

<sup>169</sup> Donald G. Cartwright & Colin H. Williams, *Bilingual Districts as an Instrument in Canadian Language Policy*, 7 TRANS. OF THE INST. OF BRIT. GEOGRAPHERS 474, 492 (1982).

<sup>170</sup> JOHN-PIERRE CORBEIL ET AL., PORTRAIT OF OFFICIAL LANGUAGE MINORITIES IN CANADA – ANGLOPHONES IN QUEBEC 12 (Statistics Canada 2010).

<sup>171</sup> *Id.* at 11.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 12.

<sup>174</sup> *Id.*

<sup>175</sup> Cartwright & Williams, *supra* note 169, at 479.

dominant language.<sup>176</sup> As one scholar notes, “positive state intervention” to promote minority languages protects against unrestrained competition between languages.<sup>177</sup> Such competition would lead to the “subordination of minority languages to the dominant language, of the minority community to the dominant community,” thereby destroying the Canadian cultural mosaic.<sup>178</sup> In contrast to blaming bilingualism for the lack of Canadian unity,<sup>179</sup> bilingualism and multiculturalism more than likely saved the confederation and defined its character today. The merging of linguistic rights and cultural identity made this possible.

## B. The Clash between American “Melting Pot” English Assimilation and Emerging Multilingualism in the United States

Through the early development of the United States, the American landscape consisted of a multiethnic and multilingual mosaic similar to their Canadian counterparts. As one scholar aptly illustrates:

Demands for bilingual education coincided with the nation's inception and the establishment of German and French language schools in Pennsylvania and Louisiana, respectively. [L]eaders of the Revolution issued key documents, including the Articles of Confederation, in German and French. In the early years of the Republic, multilingualism was encouraged as a means of accessing scientific and artistic literature. Many of the states of the Southwest began as bilingual entities, conducting official business in English and Spanish. In New Mexico, territorial laws had to be translated *from Spanish to English*.<sup>180</sup>

Scholars argue that given America's rich ethnic and linguistic history, and with the influx of immigrants from non-English speaking regions (such as Asia and Latin America), the assimilation of those peoples into the English language and the American “melting pot” tears at the fabric of diversity and cultural heritage.<sup>181</sup> Census demographers predict that the Latino population will have increased to sixty-seven million people – roughly twenty-four per-

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<sup>176</sup> Pierre A. Coulombe, *Language Rights in French Canada* in CANADIAN CONSTITUTIONAL LAW 1338 (Patrick Macklem et al., eds., 4th ed. 2010).

<sup>177</sup> *Id.* at 1340-41.

<sup>178</sup> *Id.*

<sup>179</sup> Salinas, *supra* note 83 (quoting remarks by Newt Gingrich on Canadian bilingualism).

<sup>180</sup> Cristina M. Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R. – C.L. L. REV. 133, 134 (2001).

<sup>181</sup> Miller, *supra* note 84, at 458.

cent of the American population – by 2050.<sup>182</sup> With an exponential rising demographic of Spanish speakers, it is apparent that the United States faces a growing challenge in terms of language rights and in appropriating the proper legislation and adjudication to account for this shift. Even federally enacted measures such as Executive Order No. 13,166 fall short because of their true intended purpose: to enable minorities' transition to the English-speaking mainstream, rather than recognizing substantive linguistic rights.<sup>183</sup>

The United States Supreme Court stated that language “permits an individual to express both a personal identity and membership in a community.”<sup>184</sup> Despite such a statement, the Court has been inconsistent in its inclusion of language as a discrimination class worthy of protection under the Equal Protection Clause.<sup>185</sup> Instead of viewing language in a cultural sense and adjudicating accordingly, the Court continues to tangle with linguistic rights on a case-by-case basis with ever-changing precedent creating an obstacle to consistent jurisprudence. The Court's treatment of language as a matter of antidiscrimination law creates a narrow view, proving insufficient as a means of understanding how language organizes people's lives and how linguistic minorities should be treated.<sup>186</sup> Such treatment of language rights creates the inherent problem that once the language barrier is overcome, the minority in question ceases to have legal status as a language minority.<sup>187</sup> Rather than simply a mere right against discrimination, language is all at once a tool of communication, a way people view themselves compared to the rest of the world, and a symbol of allegiance to culture.<sup>188</sup>

With the continued increase of linguistic minority populations in the United States, the debate between English assimilation education and bilingual education will also become more prevalent. According to a 2005 study of state linguistic education programs, five different policies were in place with many states utilizing a combination of different policies, creating a problem of uniformity in the application of *No Child Left Behind*.<sup>189</sup> As immigrant children now encompass the fastest growing sector of the United States child population, and because the majority of those children are non-English speakers, the debate for bilingual versus assimilation education will likely come to a head.<sup>190</sup> Adding fuel to the fire are studies suggesting that

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<sup>182</sup> Salinas, *supra* note 83.

<sup>183</sup> Cristina M. Rodriguez, *Language and Participation*, 94 CAL. L. REV. 3, 707 (2006) [hereinafter *Language and Participation*].

<sup>184</sup> *Hernandez v. New York*, 500 U.S. 352, 370 (1991).

<sup>185</sup> *Hale*, *supra* note 167.

<sup>186</sup> Rodriguez, *supra* note 180, at 135.

<sup>187</sup> *Language and Participation*, *supra* note 183, at 706.

<sup>188</sup> Rodriguez, *supra* note 180, at 133-34.

<sup>189</sup> England, *supra* note 102, at 1218-19.

<sup>190</sup> *Id.* at 1211.



English-only programs are underperforming in comparison to the once bilingual educational programs, sparking further debate over the efficacy of the former.<sup>191</sup>

The United States faces a similar prospect in the near future to that of Canada in its earliest form. The Canadians, through the *Charter of Rights and Freedoms* and Supreme Court of Canada jurisprudence, have managed to unite two distinct societies under the auspice of bilingualism and multiculturalism. Their cultural mosaic, in contrast to America's melting pot, promotes linguistic expression as a means of presenting one's identity. It is a decision that the United States will have to make in the years to come, whether to foster the emergence of a linguistic minority through the guise of multiculturalism or to continue its path of assimilation in an English-speaking American society. Its decision, as this paper demonstrates, carries serious implications for language rights and cultural identity.

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<sup>191</sup> *Id.* at 1237.