

2007

Individual Rights and Group Rights in the European Union's Approach to Minority Languages

Robert Weber

Follow this and additional works at: http://digitalcommons.law.utulsa.edu/fac_pub



Part of the [Law Commons](#)

Recommended Citation

17 Duke J. Comp. & Int'l L. 361 (2007).

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Articles, Chapters in Books and Other Contributions to Scholarly Works by an authorized administrator of TU Law Digital Commons. For more information, please contact daniel-bell@utulsa.edu.

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

ROBERT F. WEBER*

INTRODUCTION

The European Union (EU)¹ is a supranational entity comprised of twenty-five member states, and vests rights with the individual citizens of those Member States. However, Europe as a cultural space consists of many more constitutive groups that are currently left out of the structural legal framework of European integration. Minority language groups, in particular, have been the subject of efforts by Member States to protect and preserve linguistic diversity within their borders. The extent and variety of solutions employed by Member States to protect their resident autochthonous languages testifies to the importance of accommodating minority languages into the European legal landscape.

The thesis of this Article is that the European Court of Justice (ECJ) jurisprudence puts the legality of these measures in jeopardy,

Copyright © 2007 by Robert F. Weber.

* Law Clerk to the Honorable Richard W. Goldberg, United States Court of International Trade. J.D., University of Michigan, 2005; A.B., Duke University, 2001.

1. The European Union is comprised of three “pillars”: the European Community (EC or Community), the Common Foreign and Security Policy, and the Police and Judicial Cooperation in Criminal Matters pillar. This article is concerned exclusively with the EC, which is itself comprised of various institutions, including, most importantly, the European Parliament, the European Council, the European Court of Justice, and the European Commission. The various treaties discussed herein have created and defined all three pillars, but the institutions that are charged with defining, enforcing, and explicating the important non-discrimination norms are all part of the EC, and have little relevance in the context of the other pillars. References therefore will be made to “EC law” and “the EC” to describe the relevant institutions and laws. There is one important exception to this rule of thumb: the crucial concept of “citizenship” is referred to as “EU citizenship,” following the example of Article 17 of the Treaty Establishing the European Community, which refers to “Citizenship of the Union.” Treaty Establishing the European Community art. 17, Mar. 25, 1957, 298 U.N.T.S. 11, *as amended by* Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C 340) 1, *as amended by* Treaty of Nice, Feb. 26, 2001, 2001 O.J. (C 80) 1, *consolidated version reprinted in* 2002 O.J. (C 325) 33 [hereinafter EC Treaty].

and that to ensure the continued vitality of minority languages within the Member States, it may be necessary to formulate new protective strategies to replace some of the old methods whose compatibility with the EC Treaty is, by now, dubious. This Article will be divided into three parts that aim:

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

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

I. LEGAL AND CONSTITUTIONAL TREATMENT OF LINGUISTIC DIVERSITY IN THE MEMBER STATES AND IN THE EUROPEAN COMMUNITY

It is estimated that one out of every eight citizens of the European Union speaks a minority language.² Given that the 1997

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

Treaty of Amsterdam included the first and only treaty reference solely directed to minority populations,³ it is hardly surprising that the Member States have addressed the issue of minorities independently of the EC. The Member States' attempts at accommodating minorities have taken on different forms, and have achieved varying success. Because the legal treatment of minorities (and minority languages in particular) has been guided primarily by the Member States, any study of minority rights must begin there, before proceeding to the EC's—and the ECJ's—treatment of the issue. In other words, to know how European integration affects minority rights, it is essential to analyze the current domestic protections for these groups, and how these legal protections may conflict with the EC Treaty.

Five modes of addressing minorities in Member State law are most prevalent⁴: first, formal constitutional recognition of multiple official languages; second, constitutional incorporation of protection for linguistic minorities; third, establishing autonomous zones or communities with special language rights; fourth, central legislative accommodation and recognition; and fifth, permitting small scale, informal local measures designed to accommodate minority languages. Most Member States employ hybrid forms of protection for their minority cultures and languages, making use of multiple protective strategies. What follows is a representative sample of strategies utilized by various Member States to incorporate linguistic minority protection.

A. Formal Constitutional Recognition of Multiple Official Languages

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

3. *Id.* at 300.

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

5. An example from the United States is the Hawaiian Constitution, which provides that “English and Hawaiian shall be the official languages of Hawaii.” HAW. CONST. art. XV, § 4. However, Hawaiian “shall be required for public acts and transactions only as provided by law.” *Id.* The state legislature has ruled out mandatory use of Hawaiian, enacting a statute that succinctly states, “Hawaiian shall not be required for public acts and transactions.” HAW. REV. STAT. § 1-13 (2006). In addition, the legislature has enacted a sort of supremacy provision that gives binding effect to the English version of a law “[w]henever there is found to exist any radical and irreconcilable difference.” *Id.* The jurisprudence addressing Article XV, § 4 has

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

Through a unique constitutional apparatus, the Belgian Constitution impliedly recognizes three official languages. Belgium can be divided into three ethno-linguistic groupings, with a Flemish-speaking majority (about fifty-five percent), a sizable francophone minority (about forty percent) and a small but significant regionally concentrated German-speaking population (about five percent).⁸ Article 2 of the Belgian Constitution divides Belgium into three "Communities": a German-speaking Community, a Flemish-speaking Community, and a French-speaking Community.⁹ In addition, Article 3 provides that Belgium is comprised of three regions: the Walloon region, the Flemish region, and the Brussels region.¹⁰ Roughly speaking, the francophone Community resides in Walloon, along with the German-speaking minority.¹¹ Brussels is split between Flemish

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

6. IR. CONST. art. 8, available at http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf. Interestingly, Ireland was the only signatory to the treaties that did not require that its national and official language should be a working language of the European Community. See Niamh Nic Shuibhne, *The Impact of European Law on Linguistic Diversity*, 5 IRISH J. EURO. L. 63, 69 (1996); but see *infra* note 91.

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

8. See Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511, 551-52 (1991).

9. See BELG. CONST. art. 2.

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

11. 4 NEW ENCYC. BRITANNICA 828 (15th ed. 1986).

and French speakers.¹² The Walloon region and the Flemish region are located, respectively, in southern and northern Belgium. Each Community elects a Community Council to act on its behalf.¹³ The constitution lays out a complicated scheme of government that grants to the linguistic communities varying degrees of autonomy over core cultural competences including education, cultural policy, and inter-Community cooperation. A sort of minority veto exists as well. The Communities are grouped in the federal parliament such that if three-quarters of a linguistic group believe a proposed law threatens to “gravely damage” inter-Community relations, the dissenting group may halt the legislative process and initiate a set of special review procedures.¹⁴ The regional governments are elected by the Community Councils¹⁵ and their powers are derived from devolutions from the federal government.¹⁶

Notably, and unlike the Finnish and Irish examples, Belgium’s federal constitution does not recognize any official languages *per se*,¹⁷ but instead attempts to map its constitutional system onto an already-existing linguistic situation. The regions and Communities themselves must determine, by way of procedures outlined in the federal constitution, the trajectory of their own linguistic policy.¹⁸ To use the popular legal binary, Belgium is concerned primarily with granting procedural rights to linguistic groups, and eschews substantive rights at the federal level. Though German is an “implied” official language, rights to use German are limited in scope geographically; it is officially *recognized* in only the nine municipalities that make up the German-speaking Community.¹⁹ In

12. 4 NEW ENCYC. BRITANNICA 584 (15th ed. 1986).

13. See BELG. CONST. arts. 115-21.

14. See *id.* art. 54; see also Cutler & Schwartz, *supra* note 8 at 551-52.

15. See BELG. CONST. art. 122.

16. See *id.* art. 39.

17. The regions, by contrast, do have official languages. The official language of the Flemish Region is Dutch. The official languages of the Walloon Region are Dutch and French. The Brussels Region is also officially bilingual. See Venice Comm’n, Venice, Italy, Mar. 8-9, 2002, *On Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities Could Be Applied in Belgium*, CDL-AD 1, para. 22 (2002) (Mar. 12, 2002), available at [http://www.venice.coe.int/docs/2002/CDL\(2002\)021-e.asp](http://www.venice.coe.int/docs/2002/CDL(2002)021-e.asp).

18. BELG. CONST. arts. 129-30.

19. See Wouter Pas, *A Dynamic Federalism Built on Static Principles: The Case of Belgium*, in *FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS* 157, 158-59 (G. Alan Tarr, et al. eds., 2004) (“In 1970, the Belgian State was divided into four territorial linguistic regions: The Dutch-speaking region, the French-speaking region, the bilingual region of Brussels-Capital, and the German-speaking region The authorities in each region may, in

addition, the federal government has granted German speakers limited rights to use German in administrative capacities in a small group of municipalities in the French-speaking Walloon region.²⁰ Thus, though the constitution recognizes the German-speaking minority and incorporates it into the constitutional order, on the ground German speakers can rely on limited regional rights. The constitution thus divides Belgium's geographic space according to the languages spoken in those regions. The Belgian Constitution presupposes an interaction between minority language groups and the majority Flemish Community on the federal and regional levels.

B. Constitutional Mandate to Protect Minorities

A state's constitution may mandate that the state take certain action to protect the linguistic diversity contained within its borders. In such an arrangement, the linguistic policy is distributed, pursuant to the constitutional mandate, top-down from the central government instead of horizontally from a sub-state entity. Italy is the Member State wherein the largest number of minority populations reside.²¹ Article 6 charges the Italian Republic with "protect[ing] [its] linguistic minorities with appropriate [norms]."²² Nevertheless, and in part due to the protections already in place from the regions system,²³ the Italian Parliament passed general protective legislation pursuant to its Article 6 powers in 1999—fifty-one years after the Constitution entered into force.

The 1999 law protects the language and culture of the Albanian, Catalán, German, Greek, Slovene, and Croat populations, as well as those speaking French Provençal, Friulan, Ladin, Occitan, and Sardinian.²⁴ Of particular note is the categorization of minority group

principle, only use the official language of that region in their dealings with citizens."); Venice Comm'n, *supra* note 17, para. 21.

20. Venice Comm'n, *supra* note 17, para. 27.

21. An estimated 2.5 million people belong to at least twelve minority groups within Italy. Francesco Palermo, *The Never-Ending Story? The Italian Draft Bill on Linguistic Minorities*, in *MINORITY RIGHTS IN EUROPE* 55, 55 (Snezana Trifunovska ed., 2001).

22. COST. art. 6 (Italy) (translation is the author's). The centrality of this article is emphasized by its location after articles 4 and 5 (guaranteeing the right to work and respecting the autonomy of localities) and before articles 7 and 8 (dividing the Italian republic from the Vatican and establishing freedom of religion).

23. See discussion *infra* part I.C. Indeed, the 1999 law does not apply to the five regions that have passed more protective legislation regarding minority languages. Palermo, *supra* note 21, at 61.

24. Law n.482, 297 Gazz. Uff., Dec. 20, 1999, art. 2 [hereinafter 1999 Law], available at <http://www.parlamento.it/leggi/99482l.htm>.

rights. Parliament singled out *groups*²⁵ in need (or deserving, in the eyes of some of the right-leaning political parties²⁶) of protection, rather than establishing minimum guarantees generally applicable to all *individual* citizens. Of course, such treatment may be inevitable for effective protection mandated by Article 6, but it also underscores the gravamen of that constitutional mandate: to protect linguistic and cultural minorities means to protect designated *groups* of citizens.

The effect of the 1999 law is to establish a minimum level of protection in accordance with Article 6, but only for the enumerated minorities. A few of the salient provisions of the law include: permission for kindergarten instruction in minority languages,²⁷ and teaching minority culture and traditions in elementary and secondary schools,²⁸ permission to use minority languages in dealings with government offices and entities including before justices of the peace (low-level judges),²⁹ and authority for the regions to enter into agreements regarding transmission of programming relevant to minorities, as well as permission for regions to grant financial aid to the media to implement use of minority languages.³⁰

C. Decentralized Autonomous Zones Regulating Their Own Language Policy

Decentralization involves a central state ceding some of its authority in the cultural-linguistic realm to sub-state political entities and institutions, usually on a territorial basis. Decentralization is short of a full-blown federal system, where a sub-state entity may be granted limited sovereignty. However, by decentralizing or devolving control over the linguistic sphere of government activity, decentralization improves efficiency, as well as enhancing democracy

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

26. Palermo, *supra* note 21, at 63.

27. 1999 Law, arts. 4-6.

28. *Id.* art. 4(2).

29. *Id.* arts. 7, 9.

30. *Id.* arts. 12, 14.

and legitimacy.³¹ Ultimately, because sovereignty is not shared, the sub-state authorities are responsible to the central state.³²

Italy provides an instructive example of decentralization. In addition to its constitutionally-mandated protective competence, the Italian Constitution sets up a system of regions, and grants limited autonomous status to the five regions where linguistic minorities are most entrenched: Friuli-Venezia Giulia, Val d'Aosta, Trentino-Alto Adige, Sardegna, and Sicilia. The rights that attach to minority speakers originate in legislation passed by the regional governments, and such rights are connected to the territory, not the residents, of the regions.³³

Spain's 1978 Constitution adopts a similar decentralized constitutional system with respect to its autochthonous languages.³⁴ Despite establishing Castilian as the official language of Spain, the preamble to the Constitution "proclaims its intention [p]rotect all Spaniards and peoples of Spain in the exercise of human rights, of their cultures and traditions, and of their languages and institutions."³⁵ The inclusion of "languages" in a preamble's laundry list falls short of the unambiguous protective mandate contained in Article 6 of the Italian Constitution, but nevertheless indicates the central role Spain plays in protecting Spanish language and culture. Article 2, in turn, guarantees a "right to autonomy" for the "nationalities and regions of which [Spain] is composed."³⁶

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

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

32. See *id.* at 1261.

33. For example, a French-speaking inhabitant of the Val d'Aosta can only make use of her language rights within the Val d'Aosta, and may not rely on those protection outside the region. This anomaly results in part from the Italian Parliament's decision not to expand regional language rights to a nationwide application. See Palermo, *supra* note 21, at 55-56; see also Case C-274/96, *Criminal Proceedings against Bickel and Franz*, 1998 E.C.R. I-7637.

34. See generally, C.E. arts. 143-58 (Spain). For a more complete discussion of the Spanish Constitution and linguistic rights, see Giovanni Poggeschi's appropriately titled article *The Linguistic Struggle in the Almost Federal Spanish System*, in *THE CONSTITUTIONAL AND POLITICAL REGULATION OF ETHNIC RELATIONS AND CONFLICTS* 313, 315 (Mitja Žagar, Boris Jesih & Romana Bešter eds., 1999).

35. C.E. pmbl. (emphasis added) (translation is the author's), available at http://www.boe.es/datos_iberlex/normativa/TL/ConstitucionINGLES.pdf.

36. *Id.* art. 2.

of Spain, declares that the “remaining Spanish languages also have official status in the autonomous communities, in accordance with their respective Statutes.”³⁷ Among the seventeen autonomous communities, provided for in the Constitution itself, are various groups that have historically had languages of their own (as well as nationalist aspirations), such as Catalonia, the Basque Country, and Galicia.³⁸ The basic law for the autonomous communities is found in their respective Statutes of Autonomy. Pursuant to Article 3 of the Constitution, the Aragon’s Statute of Autonomy promises a forthcoming law (yet to arrive) protecting Aragonese,³⁹ and Catalán enjoys equal status with Castilian in Catalonia,⁴⁰ the Balearic Islands,⁴¹ and Valencia.⁴² Galician is an official language in Galicia,⁴³ and the Basque language has official status (along with Castilian, of course) in the Autonomous Basque Community,⁴⁴ as well as limited recognition in the community of Navarra.⁴⁵

The autonomous communities effect linguistic politics and legislation on a regional level, providing local protection for the local languages. The example of Catalonia is instructive as to how the system functions. Prior to August 2006, the linguistic policy of Catalonia was determined by the *Ley de política lingüística* which the Catalán Parliament (or *Generalitat*)⁴⁶ enacted in 1997 under the

37. *Id.* art. 3. The Spanish Constitution does not use the term “minority” as the Italian Constitution does. Giovanni Poggeschi hypothesizes that this absence may be due to the greater proportion of Spaniards who communicate in an alternate language. See Giovanni Poggeschi, *Linguistic Rights in Spain*, in MINORITY RIGHTS IN EUROPE 85, *supra* note 21.

38. See Guibernau, *supra* note 31, at 1262; see also Montserrat Guibernau, *Spain: Catalonia and the Basque Country*, in DEMOCRACY AND CULTURAL DIVERSITY 55 (Michael O’Neill & Dennis Austin eds., 2000).

39. Statute of Autonomy for Aragon, art. 7, available at <http://www.aragob.es/pre/cido/estatut1.htm> (last visited June 18, 2007).

40. The Catalanian Statute of Autonomy goes one step further than the analogous provisions in other Statutes of Autonomy, and actually declares Catalán to be the “preferred” language for official use. Statute of Autonomy for Catalunya, art. 6.1 (2006).

41. Statute of Autonomy for the Balearic Islands, art. 3.1.

42. Statute of Autonomy for the Valencian Community, art. 7.

43. Recent events exposed a less salubrious effect of minority language policy in Galicia. Due to a new law requiring Galician language ability for *all* public service employees, there was a critical shortage of firefighters to battle the fires afflicting Galicia during the summer of 2006. See Observer, *Ridiculous in Any Language*, FIN. TIMES: FT.COM, Aug. 10, 2006, www.ft.com (search for “Galicia” and “experienced firefighters”).

44. Statute of Autonomy for the Basque Country, art. 6.

45. Statute of Autonomy for Navarra, art 9.2.

46. Each autonomous community has a single chamber legislative assembly. Following regional elections, the leader of the majority party usually assumes the presidency of the

jurisdiction of the autonomous community and in accordance with Article 148(17) of the Spanish Constitution concerning the rights of the communities to teach in the local language and encourage minority culture and research.⁴⁷ The law reaffirmed the official status of Catalán, and included a right to be answered in Catalán by a person in the public administration.⁴⁸ The law also included a number of provisions encouraging the use of Catalán in universities.⁴⁹ The most striking aim of that law concerned the use of Catalán by the media and in the sphere of economic activity. All radio and TV channels operating within Catalonia must broadcast at least 50% of the time in Catalán, and radio music must include twenty-five percent Catalán or Aranese songs.⁵⁰ The law contained further ambitious intrusions aimed at stimulating many fields of culture industry.⁵¹

However, in August 2006, Catalan linguistic policy underwent an epochal transformation with the entry into force of a new Statute of Autonomy, approved by the Catalan voters on July 18, 2006. The new Statute goes much further than the *Ley de política lingüística*. Now, Catalán is “the language of normal and preferential use in Public Administration bodies and in the public media of Catalonia.”⁵² Perhaps even more significantly, the Statute makes Catalán “the language of normal use for teaching and learning in the educational system.”⁵³ The Statute also grants official status to Occitan, one dialect of which, Aranese, is spoken in the province of Aran in Catalonia.⁵⁴ Article 33.1 of the Statute grants to *citizens* “the right to linguistic choice.”⁵⁵ However, later the Article refers to “each individual[’s] . . . right to use the official language of his or her choice.”⁵⁶ It is unclear whether this distinction between citizen and

community. For a discussion of the political institutions of the autonomous communities, see Guibernau, *supra* note 31, at 1262-63.

47. *Ley de política lingüística*, 1/1998, Jan. 7, 1998.

48. *See id.* arts. 2-3.

49. *See, e.g., id.* art. 22.

50. *See id.* art. 26.

51. *See generally* Poggeschi, *The Linguistic Struggle*, *supra* note 34; Poggeschi, *Linguistic Rights in Spain*, *supra* note 37.

52. Statute of Autonomy of Catalunya, art. 6.1.

53. *Id.* art. 35.1 (“Catalán shall be used as the teaching and learning language for university and non-university education.”).

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

55. *Id.* art. 33.1.

56. *Id.*

individual⁵⁷ will affect the treatment of Catalán speakers in practice, or whether all persons will be able to avail themselves of the right to use Catalán. The right to linguistic choice applies to all administrative, notarial, registration, or judicial procedures.⁵⁸ Communications by Catalonian public officials will be executed in Catalán, without prejudice to the rights of Castilian speakers.⁵⁹ There is even a “right to be attended” to in Catalán that can be invoked against private establishments, provided they are “open to the public.”⁶⁰

D. Affirmative Protection and Recognition from Central Government

Lacking the decentralized regional, or community, structure of Spain and Italy, other Member States administer similar policies from the *central* government authorities. In the Netherlands, for instance, the Frisian language is spoken in Friesland, a province with a population of 610,000.⁶¹ Almost fifty-five percent of the provincial population considers Frisian to be their mother tongue, and about seventy-five percent know how to speak it.⁶² The Dutch government has stated formally that, along with Dutch, Frisian is an indigenous language of the Netherlands.⁶³ Parliament has gone beyond mere recognition, by enacting measures aimed at accommodating Frisian speakers in Friesland, including *inter alia*: detailed rules on the use of Frisian in an administrative or judicial capacity; rules establishing the legal basis for changing toponymical names from Dutch into Frisian; and provisions to encourage the use of Frisian in schools.⁶⁴

Though the Frisian language is not threatened, and seems to be enjoying a wide range of accommodating measures from the central Dutch government, it must be remembered that the Dutch

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

58. Statute of Autonomy of Catalunya, arts. 33.1-2.

59. *Id.* art. 50.5.

60. *Id.* art. 34.

61. Floris Van Laanen, *The Frisian Language in the Netherlands*, in MINORITY RIGHTS IN EUROPE, *supra* note 21, at 67, 69.

62. *Id.*

63. *Id.*

64. *Id.* at 70, 76-79.

Constitution is silent with respect to minority languages,⁶⁵ and that the Friesland province has no decentralized grant of authority, from the constitution or otherwise, to take affirmative protective measures. In the Netherlands, the *central* government guarantees minority language rights primarily pursuant to treaty obligations.⁶⁶ Similar concessions are made for the Mirandés community in northern Portugal.⁶⁷

Another fascinating permutation of this strategy resulted in the “Good Friday Agreement” entered into between Ireland and the United Kingdom in 1998. That treaty, among other more urgent objectives, granted limited formal recognition to Irish and various dialects of Scots in Northern Ireland.⁶⁸

In recent years, the United Kingdom has made similar allowances for the 659,000 Welsh speakers in Wales⁶⁹ and the sixty thousand Scottish Gaelic speakers in Scotland.⁷⁰ Prior to 1993, the United Kingdom merely provided a limited discretion for local judges and administrative officials to permit the use of Welsh. With the passage of the Welsh Language Act of 1993, Parliament placed the Welsh language on official status with English in dealings with the public sector.⁷¹ The Welsh Language Act breaks with a predominant policy of Anglicization and represents a significant change in the United Kingdom’s posture regarding the Welsh minority living in the United Kingdom.⁷² Parliament made a similar, though less expansive,

65. Indeed, the Netherlands is one of two members of the EC having a written constitution that has no mention of official languages. The other is Denmark. *Id.* at 72.

66. In other words, the requirement in Dutch law to respect linguistic minorities comes from Dutch accession to international agreements rather than an internal constitutional mandate. *See, e.g.*, International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, U.N.T.S. 171 [hereinafter ICCPR].

67. *See* Lei n.7/99, Reconhecimento oficial de direitos linguísticos da comunidade mirandesa (official recognition of the language rights of the Mirandes Community); *see also* Despacho Normativo n. 35/99 (implementing regulations to provide Mirandés education, including a limited grant of power to local institutions (*entidades da comunidade*) to participate in the coordination of cultural and educational projects).

68. Agreement Reached in the Multi-Party Negotiations, U.K.-Ir., Apr. 10, 1998, 37 I.L.M. 751, 769-70 (1998) [hereinafter Good Friday Agreement].

69. Omniglot Writing Systems & Languages of the World: Welsh (Cymraeg), <http://www.omniglot.com/writing/welsh> (last visited Apr. 16, 2007).

70. Omniglot Writing Systems & Languages of the World: Scottish Gaelic (Gàidhlig), <http://www.omniglot.com/writing/gaelic> (last visited Apr. 16, 2007).

71. *See* Welsh Language Act, 1993, c. 38 (U.K.).

72. *Cf.* Leila Sadat Wexler, *Official English, Nationalism, and Linguistic Terror: A French Lesson*, 71 WASH. L. REV. 285, 337 nn. 215-16 (1996) (discussing examples of the United Kingdom’s monolingual tendencies).

overture to the Scottish Gaelic speakers by promulgating the Gaelic Language (Scotland) Act 2005.⁷³ That act granted a limited official status to Scottish Gaelic in Scotland.

E. Nonmandatory and Discretionary Accommodation

A fifth mode of Member States' linguistic accommodation—nonmandatory accommodation—is prevalent, most notably, in France. France, more than any other Member State, has adopted the “ostrich approach” to its minority languages—sticking its head in the sand rather than acknowledging its linguistic minorities in any meaningful way.⁷⁴ Article 2 of the French Constitution is notably the only article of that document addressing language: “French is the language of the Republic.”⁷⁵ Postcolonial France has been the prototype of an assimilation-oriented society,⁷⁶ and has yet to extend formal recognition to its autochthonous minority languages, despite the fact that an estimated 9 million French citizens speak a minority language.⁷⁷ Indeed, the French accession to the European Charter of Regional and Minority Languages was stonewalled by the high French Constitutional Council because certain provisions in the Charter purported to create group rights (in violation of the unity of the French Republic) and to grant quasi-official status to minority languages (in violation of Article 2 of the Constitution).⁷⁸ The French

73. Gaelic Language (Scotland) Act, 2005, c. 7 (U.K.).

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

75. LA CONSTITUTION art. 2 (Fr.) (translation is the author's).

76. See Palermo, *supra* note 2, at 302 (discussing the unitary conception of French *citoyenneté*). Cf. Law No. 75-1349 of Dec. 31, 1975, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Jan. 4, 1976, p. 189 (known as “la loi Bas-Lauriol”). That law rendered obligatory the use of the French language for various commercial activities, so much so that recourse to foreign words is prohibited except where there is no similar French expression. In the field of language policy, Suzanne Citron relates much of French intransigency and repression of its minority languages back to the leaders of the Third Republic (1870-1940) who, as “heirs of the revolutionaries, were, like [their ancestor revolutionaries], impervious to the idea that cultures other than their own [French] culture could exist in France.” SUZANNE CITRON, *L'HISTOIRE DE FRANCE: AUTREMENT* 174 (1992) (translation is the author's).

77. See *Les 75 langues minoritaires de France*, L'HUMANITE (Fr.), June 25, 1999, available at <http://www.humanite.fr/journal/1999-06-25/1999-06-25-29195>.

78. See CC decision no. 99-412DC, June 15, 1999, Rec. 71 (Fr.). One commentator has suggested that the Conseil constitutionnel's sweeping conclusions all but extinguished the hope for focused constitutional amendments designed to clear the way for passage of the Charter. See Karin Oellers-Frahm, *International Decision: Charte Européenne des Langues Régionales ou Minoritaires*, 93 AM. J. INT'L L. 913, 938-41 (1999).

government has passed a handful of administrative decrees and laws regarding the school instruction of minority languages, as well as their presence in the mass media.⁷⁹ Such measures are predictably toothless, and are nearly always phrased so as to give ultimate discretion to the teachers, school administration, or those exerting control over the public media.⁸⁰

F. European Community Efforts to Protect Minority Languages

While Member States have developed an elaborate architecture of minority language rights, the European Community has not pursued the point with comparable zeal—at least not at the legal level.⁸¹ Indeed, the EC does not *formally* recognize linguistic minorities.⁸² This is not to say the EC has not visited the issue of regional and minority languages; to the contrary, the EC institutions have made numerous soft law pronouncements and funded projects to protect minority languages. The EC should be commended for its growing concern about minority rights, but this Article argues that such efforts are limited by the structural incompatibility of European integration with the legal protection of regional and minority linguistic groups. Nevertheless, the EC seems determined to protect,

79. See, e.g., Law No. 51-46 of Jan. 11, 1951, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 13, 1951, p. 483 (known as “la Loi Deixonne”) (permitting school instructors to draw on local languages when doing so would benefit instructors’ lesson plans, particularly when teaching the French language). See also Law No. 84-52 of Jan. 26, 1984 Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 27, 1984, p. 431, 432 (known as “la Loi Savary”) (requiring the government to “see to the promotion and enrichment of the French language, as well as the regional languages and cultures.”). Such treatment was extended to all levels of education in 1989. Law No. 89-486 of July 10, 1989, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 14, 1989, p. 8860 (explaining that instruction in local languages forms an important basis of general education at all levels). For media, a decree was issued in 1987 urging the national radio authorities to contribute “to the expression and information of cultural, social, and professional communities.” See Décret of Nov. 13, 1987, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 15, 1987, p. 13326, arts. 3,6.

80. See *id.*

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

82. Palermo, *supra* note 2, at 299.

albeit within its limited sphere of competences, such languages, and some of its prominent efforts are described here.

1. *Soft Law and Project Funding.* The European Parliament, for instance, passed four Resolutions between 1981 and 1994 regarding the situation of minority language communities.⁸³ In response to the 1981 Resolution,⁸⁴ Parliament created the European Bureau of Lesser Used Languages (EBLUL) in 1982.⁸⁵ That same year, Parliament initiated the B3-1006 budget line, entitled “Promotion of Regional and Minority Languages,” which provides funds for financing measures supporting minority languages.⁸⁶ Parliament used B3-1006 to finance projects to sustain regional and minority languages, including the EUROMOSAIC network⁸⁷ and MERCATOR,⁸⁸ and provided support for studies on the interface of language and integration.⁸⁹

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

84. Called the “Arfé resolution” after the Italian Rapporteur, Gaetano Arfé. See *Resolution on a Community Charter of Regional Languages and on a Charter for Rights of Ethnic Minorities*, 1981 O.J. (C 287) 106-07.

85. The EBLUL has as its mission the promotion of active EC policy-making in favor of regional or minority languages and the defense of linguistic rights. The languages EBLUL aim to protect are indigenous, and do not include the languages of immigrant communities, or dialects of official Member State languages. EBLUL considers itself to be representative of over fifty million EU citizens. EBLUL is not a Community institution, but is funded mainly by the Commission. See generally European Commission, Education and Training: Regional and Minority Languages, http://ec.europa.eu/education/policies/lang/languages/langmin/ebul_en.html (brief description of EBLUL’s history and mission, providing a link to the EBLUL website).

86. A budget line is an addendum annually appropriated by the Parliament devoting funds to an area of its choosing. Budget Line B3-1006 has been renewed every year since its inception. See Gabriel von Toggenburg, *The EU’s Endeavours for its Minorities*, in MINORITY RIGHTS IN EUROPE, *supra* note 21, at 205, 214 n.30.

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

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

89. See *id.*

More recently, the European Parliament and the Council of Europe joined together to proclaim 2001 as the “European Year of Languages.”⁹⁰ The Commission has also funded a number of innovative education projects, covering not only the official languages of the Community,⁹¹ but minority languages as well.⁹² The effect of these and countless other measures the Community doubtless will undertake cannot be measured. While their effect may escape us, the undeniable message is to be applauded: the EC cares about minority languages. However, in the end, these and other such programs lack the strictures of legal norms and rules that the Member States already have in place.

In July 2006, the European Parliament granted to speakers of Catalán, Basque, or Galician the right to communicate with the EC legislature in their native language.⁹³ The success of the Spanish minorities is no doubt due in part to their strong domestic political position, as well as the recent successes of the Catalán minority in expanding its Statute of Autonomy. Excepting these Spanish minority languages, parties may communicate with EC institutions only in official EC languages.⁹⁴ A recent report by the EC Parliament Committee on Culture and Education called for all EC institutions to “communicate with citizens in their own national” languages, irrespective of the official status of the language at the EC or Member State level.⁹⁵

2. *Article 151.* The only hard treaty law prior to the Treaty of Amsterdam even acknowledging the existence of minorities within the EC is Article 151 of the EC Treaty, which instructs the Community to “contribute to the flowering of the cultures of the Member States, while *respecting their national and regional diversity* and at the same time bringing the common cultural heritage to the

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

91. There are twenty-one working languages of the Community—the official languages of each Member State. On July 13, 2005, Irish was included as a working language effective January 2007. See Andres Ortega, *How Brussels is Coping with the growing Tower of Euro-babel*, FIN. TIMES (London), Jan. 26, 2006, at The Future of Europe 5.

92. Caruso, *supra* note 81, at 359.

93. *SNP Bid to Boost Gaelic*, ABERDEEN PRESS & J., July 6, 2006, at 4.

94. Cf. Biscoe, *supra* note 88.

95. *Italian Draft Report on a New Framework Strategy for Multilingualism*, at 6, COM (2005) 0569, June 29, 2006, available at http://eurolang.net/files/draft_multilingualism.pdf. The Draft Report also calls for the amendment of EC Treaty Articles 13 and 151, the inadequacies of which are discussed *infra*. See *id.* at 7.

fore.”⁹⁶ Article 151 also instructs the Community to “take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote diversity of its cultures.”⁹⁷ Article 151 mirrors Article 22 of the Charter of Fundamental Rights of the European Union, which states that the EU “shall respect cultural, religious and linguistic diversity.”⁹⁸ The inclusion of Article 151 in the Maastricht Treaty evinces the delegates’ concern with the effects of the integration project on regional cultural diversity, but it does not constitute the clear competence or mandate that the EC would need to act decisively and affirmatively—as the Member States have done—in favor of collective group rights for minorities.

In stark contrast to the core economic Community competences, the impact of Article 151 has not produced significant results, and is limited to the funding of a small handful of cultural projects.⁹⁹ Indeed, some scholars have argued that minorities have benefited more from legislation passed under market-based treaty provisions—relying on a chance confluence of market demands with group demands for rights—than under Article 151 itself.¹⁰⁰ If that is true, the future of minority rights in the EC currently hangs in the balance between an unsteady combination with market considerations on the one hand, and on the other, a steady stream of funded projects with debatable effects.

3. *Protection of Minorities as Accession Criterion.* The fall of the Berlin Wall in 1989 awakened the Community to the vital stake it had in the stability and progress of its neighbors to the East.¹⁰¹ This

96. EC Treaty art. 151 (emphasis added).

97. *Id.*

98. Charter of Fundamental Rights of the European Union art. 22, 2000 OJ (C 364) 13. The Charter is an ambitious set of commitments assented to by all three legislative-executive institutions of the EC. It has no status as positive law at the moment, however. It has been incorporated into the text of the EU Constitution. See discussion *infra* Part I.F.5.

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

100. *Id.* at 300 (mentioning importance of Council Directive of 1977 which provides for “education of children of migrant workers in their mother tongue”).

101. See FLORENCE BENOÎT-ROHMER, *THE MINORITY QUESTION IN EUROPE: TOWARDS A COHERENT SYSTEM OF PROTECTION FOR NATIONAL MINORITIES* 30-31 (1996). Benoît-Rohmer highlights the Pact on Stability (1995), a political undertaking (but not a treaty) signed by the members of the Organization for Security and Cooperation in Europe, as a momentous achievement for its contribution to stability and management of border conflicts and minority issues after the Yugoslav crisis. The European Union chaired the two regional round table conferences.

renewed interest found expression in the so-called European Agreements with Central and Eastern European nations.¹⁰² In 1993, at the Copenhagen Summit, the Council adopted a Commission Report on enlargement that provided, *inter alia*, that a condition precedent to any eventual accession to the E.C. was respect for and protection of the rights of minorities.¹⁰³ These conditions are now embodied in the Community's Association Agreements, which require the recognition of minority nations.¹⁰⁴ The EU's foreign policy has focused on the protection of minorities in non-Member States outside the accession context as well.¹⁰⁵

Interestingly, there was (and is, pending acceptance of the EU Constitution) no such requirement for the current Member States of the European Union. Some commentators have criticized the Union, alleging that the recognition of minority rights is an ideal to be consumed abroad, but ignored in the internal market.¹⁰⁶ Indeed, Article 6 of the Treaty on European Union replicates the relevant language of the Copenhagen Agreements, but omits the reference to the respect and protection of minorities.¹⁰⁷ Protection of minority rights is a *sine qua non* for admission into the EC, but once a state enters, it seems, rights for the minorities residing within its boundaries lose their legal protection. In a sense, the requirement

102. The European Agreements included Poland, Hungary, Slovakia, the Czech Republic, Bulgaria, and Romania. Biscoe suggests the interest in East Europe was motivated by a fear of "right wing authoritarian and nationalist forces" intent on stepping into the power vacuum. See Biscoe, *supra* note 88, at 97 (citing DESMOND DINAN, EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION 478 (3d ed. 2005)).

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

104. Biscoe, *supra* note 88, at 97.

105. See *id. passim*.

106. See, e.g., Bruno de Witte, *Politics Versus Law in the EU's Approach to Ethnic Minorities*, in EUROPE UNBOUND: ENLARGING AND RESHAPING THE BOUNDARIES OF THE EUROPEAN UNION 139 (Jan Zielonka ed., 2002) (defining the minority rights requirement as "an export product and not one for domestic consumption"); Graïne De Burca, *Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union*, 27 FORDHAM INT'L L.J. 679, 700-01 (2004).

107. Compare Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, as amended by Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C 340) 145 ("The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.") with *Presidency Conclusions*, *supra* note 103.

emphasizes the blind spot within the EC framework: the EC pressures future members to shore up constitutional and legal protection for minorities *ex ante*, because it knows that once admitted, such efforts are currently outside the scope of the Treaties, and the EC will be powerless to address them.¹⁰⁸

4. *Article 13.* The Amsterdam Treaty included Article 13 at the urging of those wishing to pressure the EC into solidifying a firm foundation for social rights.¹⁰⁹ That article applies the non-discrimination principle embedded in Article 12¹¹⁰ to a wider array of situations. The text reads as follows:

Without prejudice to the other provisions of this Treaty and within its limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin,¹¹¹ religion or belief, disability, age or sexual orientation.

In granting the Community the competence “to take appropriate action” to combat discrimination, Article 13 opens a new juridical space for Community action. However, closer examination reveals that unanimity is required¹¹² for any action, and the limiting phrase “within its limits of the powers conferred by it upon the Community” suggests a more modest scope than Article 12’s “within the scope of

108. It could be argued that the inclusion of a minority rights requirement in the accession criteria, which are based on the common constitutional principles of the Member States, implies the existence of a common constitutional obligation on the part of all, including current, Member States. See Palermo, *supra* note 2, at 301. Such an argument may be internally coherent, but the discussion *supra* on the Member States’ constitutional treatment of minorities belies this point. There is great diversity in treatment, and some Member States still hold tight to their “proclaimed homogeneity.” BENOÎT-ROHMER, *supra* note 101, at 18 (mentioning France and Greece, in particular). But see Bruno de Witte, *Surviving in Babel? Language Rights and European Integration*, in THE PROTECTION OF MINORITIES AND HUMAN RIGHTS 277, 278 (Yoram Dinstein & Mala Tabory eds., 1992) (“There seems to be a gradual emergence of a common European standard for the treatment of linguistic minorities . . .”).

109. Several European parliamentarians became advocates for minority groups in Amsterdam. See von Toggenburg, *supra* note 86, at 228.

110. EC treaty art. 12. (“Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.”).

111. *Id.* art. 13.

112. Some commissioners sought, unsuccessfully, to introduce qualified majority voting into the Article 13 law-making process. Von Toggenburg, *supra* note 86, at 228 n.103.

application of this Treaty.”¹¹³ Another limitation is the exclusively consultative role held by the European Parliament, which is the Community organ that minority groups can most easily access. A still more fundamental limitation is the lack of competence for the EC to enact measures of positive discrimination in favor of minorities.¹¹⁴

Nevertheless, Article 13 moves in the right direction to protection for minorities in two ways. First, the Article explicitly recognizes that discrimination exists. Article 13 instructs the Community to “combat” a pre-existing problem.¹¹⁵ Second, Article 13 moves away from market criteria towards a substantive protective competence for the EC institutions. Article 13 authorizes the Community to take affirmative measures to eradicate discrimination not just based on nationality, but on eight other categories of difference.¹¹⁶ It is a small step, but an important one, in the development of Community law with respect to minorities. Even though it does not grant the EC *carte blanche* to legislate on behalf of minority groups, Article 13 acknowledges the minority *group* difference that exists in the EC,¹¹⁷ and incorporates it for the first time in a grant of power to the Community institutions.

5. *The EU Constitution*¹¹⁸ and *Minority Languages*. The original Draft Constitution for the European Union, presented in July 2003, omitted any mention of minority rights.¹¹⁹ Advocacy groups mobilized to express outrage over the lacuna and obtained some interesting language in the amended Constitutional Treaty currently subject to popular approval in the respective Member States. Article I-2 states, “The Union is founded on the values of respect for human

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

114. Von Toggenburg, *supra* note 86, at 230.

115. EC Treaty art. 13.

116. *See id.*

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

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

119. *See generally* European Convention, July 18, 2003, *Draft Treaty Establishing a Constitution for Europe*, CONV 850/03, available at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>.

dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”¹²⁰ Structurally, this language is front and center: it is the fourth sentence, and the second article, of the entire document. However, closer examination reveals that it possesses more in common with preambular language than anything else. The phrase is descriptive and not prescriptive, and would not create a new competence for Community action. Interestingly, the language recalls the Copenhagen criteria for accession discussed *supra*, and may correct the asymmetrical obligations inhering in those criteria.¹²¹ In so doing, the proposed Article I-2 may provide a “lowest common denominator” for countries with abysmal records of protecting minority rights. What—if any—the contours of such a minimum obligation would be are not apparent from the text and due to the general and descriptive quality of the language, it is likely not susceptible to an expansive reading by the ECJ.¹²²

Another passage merits attention. Article I-3(3) includes in a list of the EU’s objectives a hortatory reminder to “respect its rich cultural and linguistic diversity, and . . . ensure that Europe’s cultural heritage is safeguarded and enhanced.”¹²³ This passage, unlike Article I-2, formed part of the original July 2003 Draft Constitution. In it, there is the first mention of linguistic diversity in an EU treaty. However, the language largely tracks Article 151 and absent a more specific command, is unlikely to create an EU competence to act on behalf of minority languages.

Any discussion of the EU Constitution must at least acknowledge the events of the Dutch and French “no” votes, and the more general failure of the pro-Constitution forces to present a compelling case in favor of ratification.¹²⁴ The reasons for the “no” votes, and the successive stalling of the ratification process, are manifold. Whether voters were expressing their desire for “less Europe” or for a more coherent Europe (meaning, “yes to Europe,

120. Treaty Establishing a Constitution for Europe art. I-2, Oct. 24, 2004, 2004 O.J. (C 310) 1 [hereinafter European Constitution].

121. See *supra* notes 106, 108 and accompanying text.

122. But see SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 12-13 (2006) (describing the Preamble to the U.S. Constitution as its most important language).

123. European Constitution, *supra* note 120, art. I-3(3).

124. In 2005, France and the Netherlands submitted the ratification to a referendum vote, and voters rejected the proposed text soundly. See *French Say Firm ‘No’ to EU Constitution*, BBC NEWS, May 30, 2005, <http://news.bbc.co.uk/2/hi/europe4592243.stm>; *Dutch Say ‘No’ to EU Constitution*, BBC NEWS, June 2, 2005, <http://news.bbc.co.uk/2/hi/europe4601439.stm>.

but not *this* Europe”) is a question up for debate,¹²⁵ but it is indisputable that the “no” advocates were able to tap into diffused sentiment that held, rightly or wrongly, that the EC was distant from its citizens.¹²⁶ The perception that European integration means homogenization of the Member States’ cultures and particularities is a common theme that anti-Europe political forces, especially on the Right, have made use of repeatedly.¹²⁷ Of course, the “no” vote is too complicated to be reduced to a mere nationalistic appeal to sovereignty and identity, but the success of the anti-integration appeal to “less Europe” depends in part on the EC’s own failure to take into account the continued resonance and relevance of identity in the EU citizenry.

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

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

126. See, e.g., *Saying “No” to EU Constitution*, IRISH TIMES, June 14, 2005, at 17; Robert Mason Lee, *“Non” and Then “Nee,”* MACLEAN’S, June 13, 2005, at 26; see also Andreas Follesdal & Simon Hix, *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, EUROPEAN GOVERNANCE PAPERS (EUROGOV), NO. C-05-02, at 4-6, available at <http://www.connex-network.org/eurogov/pdf/egp-connex-C-05-02.pdf>; Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 655 (1999) (“The most fundamental [weakness of the EC aspirations as a constitutional order] is that there is not yet any European ‘people’—no demos—in whom sovereignty can be said to have originally resided, which was then constitutionally delegated the Community without going through the intermediation of the Member States.”).

127. See Ambrose Evans-Pritchard, *Euroceptics in Line for Major Breakthrough on Polling Day*, DAILY TELEGRAPH (London), June 1, 2004, at 8.

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

A. Individual Versus Group Rights: Why the Distinction Matters

At this stage, it will be helpful to step back a bit and sketch the boundaries of the categories of group rights and individual rights as those terms are used in this Article. So far, it has surveyed some of the protective strategies that Member States and the EC employ to foster and protect autochthonous groups of minority language speakers. The argument of this article is that some of these measures, insofar as they are addressed to groups and not individuals, may cause, or create the potential to cause, conflicts with core principles of Community law, in particular the non-discrimination principle. These measures are different in key respects from individual rights.

The generality of the phrase “group rights” may cause some confusion.¹²⁸ If we are to label group privileges as “rights,” then there must be some action that separates these “rights” from, say, a mere rhetorical appeal to a group or collectivity, with reference to a normative prescription. A legal right, in general, “is an entitlement or justified claim that a legal system recognizes” as legitimate according to a “correct interpretation of its own rules and principles.”¹²⁹ As the term is used in this article, “group rights” refer to legal entitlements or privileges, dispensed by the sovereign, to individuals by virtue of their membership to a community. This definition necessarily excludes the rights of a group to, say, self-determination or secession, which are addressed to a group qua nation or “people.” The group language rights that are of importance in the context of European integration are vested in individuals, but are not available to all individuals qua individuals. Instead, recourse to these rights is conditioned on the existence of (1) a relevant group and (2) an individual’s membership in that group. This concept of group rights, then, recognizes linguistic minorities as a protectable group, but opts to protect individuals belonging to the group rather than protecting the group as such. In this vein, it is possible to speak of “group

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

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

subjectivity” even though the rights are, *sensu strictu*, granted to individuals.

A cursory discussion of the importance of the “individual” in modern thought may provide a helpful background. Since World War II and the establishing of the United Nations, individual rights have displaced group rights as the dominant form of protecting individuals.¹³⁰ A U.N. study observed, with respect to the League of Nations system of minority protection, that

[T]his whole system [of minority group protection] was overthrown by the Second World War. All the international decisions reached since 1944 have been inspired by a different philosophy. The idea of a general and universal protection of human rights and fundamental freedoms is emerging. It is therefore no longer only the minorities in certain countries which receive protection, but all human beings in all countries[.]¹³¹

Of course, the emphasis on the individual is hardly a twentieth-century invention. One of the key characteristics of modernity is the progressive privileging of the individual, in the religious and social, as well as the juridical, realms.¹³² For instance, Christianity re-ordered the individual’s relation to the cosmos by putting him in direct communion with God. The Reformation was a further development of modern religion’s emphasis on individual communion with the divine. The Renaissance¹³³ and the Enlightenment,¹³⁴ too, are periods thought of primarily in terms of their development of ideas of, respectively, humanistic and rationalist individualism. Radical

130. See James D. Willets, *The Demise of the Nation-State: Towards a New Theory of the State Under International Law*, 17 BERKELEY J. INT’L L. 193, 206 (1999).

131. U.N. Doc. E/CN.4/367, at 70 (1950).

132. See Victor Segesvary, *Group Rights: The Definition of Group Rights in the Contemporary Legal Debate Based on Socio-Cultural Analysis*, 3 INT’L J. GROUP RTS. 89, 95 (1995) (discussing the “sacralization” of the individual).

133. See, e.g., JACOB BURCKHARDT, *THE CIVILIZATION OF THE RENAISSANCE IN ITALY* 98-119 (S.G.C. Middlemore trans., Penguin Books 1990) (1860); see also GIORGIO VASARI, *THE LIVES OF THE ARTISTS* 49-81 (George Bull, trans., 1987) (describing the Renaissance as a reawakening of painting from a long slumber spurred on by the individual genius of Tuscan artists such as Cimabue and Giotto).

134. See, e.g., IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* (James W. Ellington trans., Hackett Publishing 3d ed. 1993) (1785) (Moral law requires that humans are treated as ends in themselves, and never as means.); Allen W. Wood, *The Supreme Principle of Morality*, in *CAMBRIDGE COMPANION TO KANT & MODERN PHILOSOPHY* 351, 352-54 (Paul Guyer ed., 2006). In a different iteration of Enlightenment individualism, the “social contract” models of both John Locke and Jean Jacques Rousseau liberate individuals from the natural law framework and make their continued participation in society depend, at least theoretically, on their consent.

individualism in the form of subjectivism and existentialism developed in the first half of twentieth century.

Unanchored from the values and roots that tied its constituent groups together,¹³⁵ European society in the period leading to the Second World War witnessed a radical re-ordering of the State, individuals, and groups. Despite their outward appeals to group identity, the fascism and National Socialism that convulsed Europe in the 1920s and 1930s were not so much a revival of group solidarity as they were symptoms of a growing dissolution of traditional values that were enforced in part by group accountability. The post-World War II emphasis on individual rights results from a realization that the dissolution of group solidarity left individuals powerless against an almighty state.¹³⁶

The free-market utopianism of twentieth-century liberalism is a different movement in the same direction toward the dominion of the individual. Individual rights have been used to drive the integration of post-World War II Europe under the theory that economic interdependence would eradicate nationalistic violence and empire building.¹³⁷ The EC can be conceptualized both as a contribution to, and consequence of, an ever-increasing individual-centered legal rights framework. Of course, these sketches are rendered with the broadest of brushes, and are meant merely as a general evidence of

135. Martin Heidegger and Max Weber discuss this phenomenon at length from different viewpoints. Compare Martin Heidegger, *The Question Concerning Technology*, in BASIC WRITINGS 307 (David F. Krell, ed., William Lovitt trans., 1993) (1977) (warning that reliance on technology threatens to “enframe” the entire human experience and undermine any conception of human beings beyond functional means to an end) with Max Weber, *Science as a Vocation*, in ESSAYS IN SOCIOLOGY 129, 155 (H.H. Gerth & C. Wright Mills eds., 1946) (describing modernity in terms of rationalization and intellectualization, which “disenchant” man from the sense of religiosity that “in former times swept through the great communities like a firebrand, welding them together”).

136. Hannah Arendt did not consider the modern state’s tendency to centralize and expand political life to be, in and of itself, problematic. Instead, the totalitarian problem resulted when nationalist ideology became conflated with the state. The atomized individualism inherited from the nineteenth-century liberalism was connected to the state by the “solid cement of national sentiment.” Hannah Arendt, *The Nation*, in ESSAYS IN UNDERSTANDING 1930-1945, at 206, 209 (Jerome Kohn, ed., 1994).

137. See GEORGE A. BERMANN ET AL., CASES & MATERIALS ON EUROPEAN UNION LAW 3-5 (2002); Robert Schuman, Fr. Foreign Minister, Declaration of 9 May 1950 (May 9, 1950), available at http://europa.eu/abc/symbols/9-may/decl_en.htm (“The pooling of coal and steel production will immediately provide for the setting-up of common bases for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.”).

the deterioration of group solidarity and belonging in the modern period.

However, the appeal to the group or collectivity still resonates.¹³⁸ Groups still “matter.” It is still possible to refer to ethnic or cultural solidarity, and the importance of “cultural diversity” testifies to a general recognition that we also see cultures and groups as irreducible to mere aggregates of individuals. Some commentators have sought to portray the EC as an inflexible mechanism moving towards assimilation and normalization, to the detriment of particularities.¹³⁹ This view has assumed the negative to be true as well: namely, that group rights will, for better or worse, occasion an erosion of the individual rights framework on which the European legal order is premised. A basic assumption of this Article is that such a reductive approach fails to appreciate the potential complementarity of individual and group rights. Indeed, to the extent that failure to accommodate minority languages into the Community legal framework provides an excuse for otherwise integration-sympathetic groups to subvert the integration process, the destiny of the EC may be, in part, tied up with the destiny of minority language groups.¹⁴⁰

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

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.¹⁴¹

138. Dwight Newman provides the example of Québécois secession as an example of the moral resonance of group-thinking. According to Newman, supporters of secession do not say “there are seven million Québécois that desire secession, therefore secession is obligated.” Instead, appeals to independence refer to a “distinct culture, a distinct identity, and so on.” See Newman, *supra* note 129, at 145. Of course, the appeal to a group necessarily depends on a multiplicity of persons, but the persuasiveness of the argument for a group right (for example, a right to secession) does not depend on the number of persons. The relevance of numbers is at best tangentially relevant.

139. Padoa-Schioppa discusses these critiques in *EUROPA*, *supra* note 125, at 70-72.

140. Cf. Addis, *supra* note 74, at 725-26 (“The choice, therefore, is not between national unity on the one hand and the acknowledgement and affirmation of linguistic differences on the other hand. Rather, the issue is what institutional structures would enable us to strengthen national unity while affirming and cultivating linguistic diversity.”).

141. International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

The rights themselves are vested in individuals, but only those individuals who are members of a cultural group. Therefore, a necessary precondition to the vesting of any rights under Article 27 in individual “persons belong to . . . minorities” is the existence of a group.¹⁴² Article 27 *refers outward* toward an extant cultural situation. Because it relies on a descriptive state of cultural affairs, it is different than merely a grant of group rights to certain collectivities. It is also different than a general and universal individual right to associate, because here, again, the law refers outward to certain extant groups.

Another example, discussed *supra* in Part I.B, is the Italian Republic’s 1999 Law passed pursuant to Article 6 of the Italian Constitution. That law mandates certain guarantees that the government must provide to members of enumerated cultural and linguistic minorities.¹⁴³ Indeed, that law in many respects goes much further than Article 27. Not only does the law prevent discrimination against members of certain minorities, but it also provides for affirmative rights that members of the minority community may invoke in public life.¹⁴⁴

Victor Segesvary’s distinction here between *sui generis* group rights and quasi-group rights is helpful. *Sui generis* group rights are “derived from the constitution of a specific social and cultural environment by groups of men, having its distinctive symbolic orderings, belief- and value-systems, and particularly important, shared historic experience.”¹⁴⁵ *Sui generis* group rights are invoked so that a community may flourish.¹⁴⁶ The group language rights discussed in this article are *sui generis* group rights. Quasi-group rights (for example, rights for the disabled, gay rights) arise merely because of accidental or biological facts that link the individuals together into the group.¹⁴⁷ There is no *cultural* commonality of homosexual persons or disabled persons: there are merely homosexual and disabled persons across numbers of cultures. The *sui generis* group right aims to protect cultural or linguistic communities as a legal subject independent of the individual members of that group.¹⁴⁸

142. *Id.*

143. *See supra* notes 24, 28-30 and accompanying text.

144. *See supra* note 29 and accompanying text.

145. Segesvary, *supra* note 132, at 102.

146. *Id.*

147. *See id.*

148. *Id.*

Other group or collective rights are based on the aggregative interests of the individual members that constitute the group, and are thus distinguishable from *sui generis* group rights. A labor union is an example of such a collectivity. It may be important to protect the right for labor to organize, but it makes no sense to say that the United Auto Workers (UAW) itself has a right to exist. Instead, its members each possess an individual right to organize. The right, though, is functional, and does not depend on an extant situation, but rather the possibility and potential for different organizations and groupings in the future. In the case of a union, the “group” right is merely an aggregative right of the individual members. If ever the members decided that a greater number preferred a splinter union, then the UAW would perhaps cease to exist, and no one would lament the violation of its “rights.”

An illustrative example of a group right—as distinguished from a mere aggregate of individual rights—is a special fishing right granted to an indigenous community.¹⁴⁹ Let us suppose that the state grants to members of that community the right to fish in the salmon-rich streams that run through the community’s traditional homeland year-round. These fishing rights are at once individual rights and group rights. For any non-fishing individual, it may be sensible to trade his rights for an alternative privilege or payment. More interestingly, other individuals may garner a personal satisfaction, unrelated to their community-belonging, from fishing. For example, maybe it is cheaper to fish than to buy at market, or perhaps it is a day’s ride to the next comparable stream. However, assuming the state could grant some substitutive privilege or payment to compensate for the aggregate individual interests, the individual would not suffer, but the community would.¹⁵⁰ In this example, the *sui generis* group right is intended as the bulwark to protect the community from suffering *even if the individuals are “bought off.”* The *sui generis* group right recognizes the intrinsic value of the group and cannot be derived from the rights of the individual members.¹⁵¹

149. See Newman, *supra* note 129, at 156-57.

150. See *id.* at 157.

151. Cf. *Id.* at 156 (“[W]e can say that his individual interests, while not wholly derivative from, are nonetheless secondary to the primary collective interest.”).

B. The EC and Individual Rights

From the perspective of the Member States, integration is fundamentally a process of surrendering sovereignty. Member States formerly exerted plenary powers over their internal markets, foreign affairs, and borders; now, with the expansion of qualified majority voting, the extent of Member State participation in those fundamental competences can be as minimal as casting a losing vote against a majority of other states.¹⁵² From the inception of the European Economic Community (EEC), minorities subject to the centralized policies of the Member States “hoped that the progress towards integration would occasion a diminution” of Member State authority and a concomitant increase in autonomy for regions and the minorities that often have greater leverage on the sub-state level.¹⁵³ Expectations were high that the EC’s approach would create a one-way ratchet, moving inevitably to more minority protection.

The Community institutions have fallen short of these aspirations, and Member States, discussed *supra*, have, with varying success and enthusiasm, propped up the minority and regional languages with a protective legal framework. The reason for the EC’s failure is that the EC has opted for an individual rights—and not a group rights¹⁵⁴—approach to realize its overarching goal that the

152. The ECJ, in *Van Gend en Loos*, describes the Community as “a new legal order of international law for the benefit of which states have limited their sovereign rights.” Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1. The EC has become increasingly active in the day-to-day affairs of its citizens, having largely accomplished its goal of market integration, and recently moving toward a substantive concept of citizenship. See, e.g., Case C-85/96, *Martinez Sala v. Freistaat Bayern*, 1998 E.C.R. I-2691. The surrender of state sovereignty in the field of application of the Treaties is necessary for the achievement of the Treaties’ objectives. While such surrender was integral to the European economic integration, the process exacted (and exacts today) a price on the protection of cultural and linguistic minorities.

153. de Witte, *supra* note 108, at 277. Hopes that integration would allow for the development of a “Europe of Regions” relied on a neofunctionalist conception of a EC that forges connections and linkages between substate and suprastate groups that ultimately weaken the exclusive power of the Member States. For an elaboration on the neofunctionalist conception of integration, see generally Paul Craig, *The Nature of the Community*, in *THE EVOLUTION OF E.U. LAW* 1, 49 (Paul Craig & Gráinne de Búrca eds., 1999).

154. Nathan Glazer has written on these dueling approaches to rights of minorities in the context of race in the United States. He suggests that multicultural nations (and by analogy, supranational polities like the EC) all must engage in a debate over which rights approach to take to further justice. See NATHAN GLAZER, *ETHNIC DILEMMAS: 1964-1982*, at 254-70 (1983). A similar debate has raged the past few decades in American Equal Protection jurisprudence. For the most part, the Supreme Court has taken an individual rights approach to the Fourteenth Amendment. See generally *Washington v. Davis*, 426 U.S. 229 (1976); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267

“internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured.”¹⁵⁵ Individual market actors are the constitutive atoms of the European Union. Minority group rights, which have been the subject of so much Member State law, do not fit easily into—and indeed may be at odds with—this market-based framework.¹⁵⁶ The concept of *sui generis* group rights—and the idea that linguistic minorities may be irreducible legal subjects—has not yet entered into the mainstream vocabulary of Community institutions.

Europe’s legal space is now defined by two sets of actors (EC institutions and Member State governments) and the resulting form of governance has naturally had an effect on citizens’ rights. The transfer of sovereignty from Member States to the Community interrupts the relationship between the individual and the state as dispenser of rights.¹⁵⁷ The ECJ has held that the European treaties create directly effective rights that individuals can rely on against their Member States and EC institutions.¹⁵⁸ These legal entitlements are the implements that have driven the economic integration of Europe. The directly effective Community economic rights, however, have collateral reverberations felt throughout Europe as a community of *nations* or *language groups* (as distinguished from a community of *markets*), and despite the EC’s undeniable overtures to minority

(1980); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). However, dicta from the Court’s recent decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), may suggest an increased willingness to look at group rights, at least for a period of time. See *Grutter*, 539 U.S. at 342 (Justice O’Connor’s comment that the court “expect[s] that 25 years from now, the use of racial preferences will no longer be necessary” seems to suggest that a group rights approach may be necessary for a period of time).

155. EC Treaty art. 14(2).

156. Biscoe believes the “ethos of European integration” sees regional cultural diversity as “an optional extra” which is sacrificed in the drive to create the single market and the perception of a need to remain competitive in the global economy. Biscoe, *supra* note 88, at 90. Where marketplace issues conflict with cultural diversity, the market will always win. He closes his article with a remonstrance to minority groups: “Minority nations, and multi-nation states which are concerned that European economic integration has implications for their cultural diversity, should take note.” *Id.* at 99.

157. See Jacqueline Bhabha, *Citizenship and Post-National Rights in Europe*, 51 INT’L SOC. SCI. J. 11 (1999). Professor Bhabha sees in European integration a useful context to examine the interaction between the role of the state and the role of supranational bodies in enforcing citizens’ rights.

158. See, e.g., Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1. Moreover, the EC Treaty creates rights that may be invoked to limit private actions as well. See also Case C-43/75, *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, 1976 E.C.R. 455.

groups,¹⁵⁹ these effects can destabilize the group rights framework of the Member States. This destabilizing effect will only amplify as EC individual rights continue to expand beyond traditional market-oriented rights into substantive social and political norms. This phenomenon will be discussed *infra* in more depth,¹⁶⁰ but for the moment it suffices to point out that some domestic rules that aim to ensure group language rights are bound to conflict with fundamental principles of Community law. The EC's approach to minority language has been handicapped by its failure to recognize the *sui generis* subjectivity of language groups. The individualist emphasis of the Community institutions is a major cause for this failure.

C. Articles 12 and 39

EC Treaty articles 39¹⁶¹ and 12¹⁶² exemplify how individual economic rights at the Community level can conflict with Member States' efforts to protect *groups* of citizens. Both articles prohibit discrimination on the basis of nationality and are among the most important to the integration effort.¹⁶³ Article 39's prohibition aims to secure the freedom of movement for workers, and Article 12 is a general prohibition of such discrimination "within the scope of application" of the Treaty. Article 12 has been described as a right to equal treatment, while Article 39 has been considered more limited,

159. See *supra* discussion Part I.F. See also de Witte, *supra* note 108, at 288. Prof. de Witte posits that the prevailing ethos at the various EU intergovernmental conferences was that economic integration affected linguistic communication only *informally*, in contrast to the *formal* political decision to focus on a common market. *Id.* His article was written in 1992, so one must wonder if his impressions were different at the Amsterdam conference. *Id.*

160. See *infra* discussion Part IV.

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

162. Article 12 provides, "Within the scope of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." EC Treaty art. 12.

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

as it applies only to workers.¹⁶⁴ Paragraph 4 exempts public service employment from the scope of Article 39, in addition to general public policy, security, and health.¹⁶⁵ The commitment to creating a single frontier-less market relies on a mobile labor supply moving efficiently and without obstacles to where it is valued most. Articles 12 and 39 aim to make free supply of labor a reality by vesting rights with individual workers and EU citizens.¹⁶⁶ By eradicating parochial discrimination in the labor market, the EC not only ensures fair treatment, but affirmatively *encourages* the movement of workers.¹⁶⁷

An obvious conflict between Article 39 and a Member State minority group right would be a hypothetical rule passed by the autonomous Spanish region of Catalonia requiring local businesses to employ a specified percentage of Catalanian residents in factories. Article 3 of Regulation 1612/68 explains that even “indirect” discrimination on the basis of nationality is prohibited under Article 39.¹⁶⁸ Thus, such a provision would be a clear violation of Regulation 1612/68 since Catalanian residents are predominantly Spanish citizens. Such a law would threaten the free movement of workers that Article 39 and Regulation 1612/68 aim to achieve. Such a law would patently be designed to have a protectionist, anti-integration discriminatory effect that benefits a group at the expense of individual labor market actors. The nexus between the hypothetical law and Article 39 is all too clear.

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

165. See EC Treaty art. 39(4). The ECJ case law has all but read the exceptions out of the text of Article 39 and their implementing directive 64/221. For example, in *Rutili* the court held that in order for the public policy exception to apply, the discrimination must be justified by *Community* public policy concerns, not Member State concerns. *Rutili*, 1975 E.C.R. at 1223. See also Case C-33/88, *Allué v. Università di Venezia*, 1989 E.C.R. 1591 para. 7 (limiting “public service” exception to the exercise of “direct or indirect participation in the exercise of powers conferred by public law and . . . the discharge of functions whose purpose is to safeguard the general interests of the State or of other public authorities and which therefore require a special relationship of allegiance to the State on the part of persons occupying them and reciprocity of rights and duties which form the bond of nationality”).

166. “For example, if a Spaniard cannot get a job as a machinist in Germany because there are arbitrary language requirements, or because the local council will not provide housing, or because his Moroccan wife will be excluded, or because he has to purchase costly visa requirements, then his free movement will be hampered.” Bhabha, *supra* note 157, at 14.

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

168. Regulation 1612/68, 1968 J.O. (L 257) 1 (EEC).

Article 12 articulates a broad commitment to anti-discrimination “within the scope of application of [the EC] Treaty.”¹⁶⁹ The key question, then, is how far the EC Treaty’s “scope of application” extends. If the “scope of application” of the Treaty extends beyond workers’ freedom of movement, then Article 12 sweeps even more broadly than Article 39. To the extent that Article 12 embodies the same principle but applies it to a wider range of conduct, Article 12 will only increase in relevance. By corollary, the non-discrimination principle will apply to an increasing array of Member State acts, many of which may not facially seem implicated by the Treaty at all. Recent cases have confirmed that this is true.¹⁷⁰ The expanding “scope of application” of the Treaty results from the citizenship concept introduced to the EC Treaty at Maastricht.¹⁷¹

D. *Martinez Sala* and The Expansion of Individual Citizenship Rights

The ECJ, in the 1998 *Martinez Sala* case,¹⁷² interpreted Article 12 as applying to all citizens residing lawfully in a Member State. Ms. Sala, a Spanish citizen, had resided in Germany for over thirty years, and had been receiving social welfare benefits in the form of a child-raising allowance since 1986.¹⁷³ She had entered Germany to work, but she had been unemployed for over a decade.¹⁷⁴ She had applied for a German residence permit, which the authorities were disinclined to give her.¹⁷⁵ She then applied for her welfare benefits.¹⁷⁶ The welfare authorities required Ms. Sala to produce a residence permit,¹⁷⁷ which she could not, of course, do. All persons legally resident in the country were eligible for the benefit, but German citizens were required only to prove their residence, and foreign nationals had to

169. EC Treaty art. 12.

170. *See infra* discussion Part II.C.

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

172. *See supra* note 113.

173. Case C-85/96, *Martinez Sala v. Freistaat Bayern*, 1998 E.C.R. I-2691 paras. 2-4.

174. *Id.*

175. *See id.* para. 14. The German authorities had their hands tied because they did not want to issue the permit to a non-worker, but were prohibited from repatriating her by Article 6(a) of the European Convention on Social and Medical Assistance. *See id.* paras. 11-12, 14.

176. *Id.* para. 15.

177. *Id.* para. 16.

produce a residence permit.¹⁷⁸ Not being able to produce the permit, she was denied the benefits.¹⁷⁹

The ECJ ruled that requiring an EU citizen to produce a residence permit when German citizens were not so required constituted impermissible discrimination on the basis of nationality in violation of Article 12.¹⁸⁰ Recalling that Article 12 applies “within the scope of application of the Treaty,” the ECJ had to decide which aspects of the EC Treaty were implicated.¹⁸¹ The ECJ held that the child-raising allowance was a family benefit under Regulations 1612/68 and 1408/71 and thus fell within the scope of the Treaty.¹⁸² Most striking, though, was the ECJ’s separate finding that *citizenship alone*, and not worker status, brought Ms. Sala within the scope of the Treaty: “As a national of a Member State, lawfully residing in the territory of another Member State, [Ms. Sala] . . . comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship.”¹⁸³ The implication of the holding in *Martinez Sala* is that the individual right to equal treatment attached to the mere fact of EU citizenship.¹⁸⁴ No longer, it seems, would the ECJ require a nexus between the discrimination and the exercise of a community economic right (for example, Article 39 and freedom of movement for workers). In the post-*Martinez Sala* EC, a Member State must beware not only of enacting measures that may impede the exercise of individual economic rights, but also of discriminating against *any* EU citizens who happen to be in the country legally—even casually.

Subsequent cases have confirmed this strong view of EU citizenship as a political and social, and not merely economic, right. The *Trojani* case, for example, involved a French national applying for social assistance benefits in Belgium.¹⁸⁵ The ECJ directed the Belgian courts to determine whether the petitioner fell within the ambit of any of Articles 39, 43 (applying to the freedom of establishment), or 49 (applying to the freedom to provide services) of

178. *Id.* paras. 49-50.

179. *Id.* paras. 16-17.

180. *Id.* paras. 64-65.

181. *Id.* para. 62.

182. *Id.* paras. 39-45.

183. *Id.* para. 61.

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

185. Case C-456/02, *Trojani v. Centre Public d’Aide Social de Bruxelles*, 2004 E.C.R. I-07573 paras. 9-10 (Sept. 7, 2004).

the EC Treaty.¹⁸⁶ However, even if the Belgian courts answered that question negatively, the ECJ observed that

a citizen of the [European] Union who does not enjoy a right of residence in the host Member State under Articles 39 EC, 43 EC or 49 EC may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision. . . . However, once it is ascertained that a person in a situation such as that . . . is in possession of a residence permit, he may rely on Article 12 EC in order to be granted social assistance benefit[s].¹⁸⁷

The ECJ cited to *Martinez Sala* and *Trojani* in the 2005 case *Queen (on the application of Dany Bidar) v. London Borough of Ealing*.¹⁸⁸ In *Bidar*, the Court summarized the *Trojani* case as establishing that “a citizen of the Union who is not economically active may rely on the first paragraph of Article 12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit.”¹⁸⁹ *Bidar* held that an EU citizen’s rights under Article 12 prohibited the United Kingdom from conditioning receipt of subsidized school loans on a student’s “settlement” in the country.¹⁹⁰ The British government conceded that under the terms of the “settlement” provision of the loan regulation, most non-British Community students would be “unsettled” despite being legally resident in the country.¹⁹¹ The ECJ expressly disavowed the holdings in the earlier *Lair*¹⁹² and *Brown*¹⁹³ cases, which had held that the assistance was primarily related to education and social policy and therefore not within the scope of the Treaty.¹⁹⁴

186. *Id.* para. 27.

187. *Id.* para. 46; *accord* Case C-184/99, *Grzelczyk v. Centre Public d’Aide Sociale*, 2001 E.C.R. I-6193 (“[A] citizen of the European Union, lawfully resident in the territory of a host Member State, can rely on Article 6 [now Article 12] of the Treaty in all situations which fall within the scope *ratione materiae* of Community law. Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State, as conferred by Article 8a [now Article 18] of the Treaty.”).

188. *See* Case C-209/03, *In Re Dany Bidar v. London Borough of Ealing* paras. 23, 27, 2005 E.C.R. I-2119.

189. *Id.* para. 37.

190. *Id.* para. 63.

191. *Id.* para. 67.

192. Case C-39/86, *Lair v. Universitat Hannover*, 1988 E.C.R. I-3161.

193. Case C-197/86, *Brown v. Sec’y of State for Scotland*, 1988 E.C.R. I-3205.

194. *Id.* para. 38-39; *Lair*, 1988 E.C.R. I-3161 para. 15.

Moreover, in 2004, the European Council and the European Parliament promulgated Directive 2004/38, which governs the free movement of EU citizens.¹⁹⁵ Thus, in part, Directive 2004/38 supplants Regulation 1612/68, discussed *supra* in Part II.C, which addressed the free movement of workers—a more limited subset of individuals.¹⁹⁶ The directive provides *inter alia* standards according to which “Union citizens” (defined as nationals of a Member State) are to be permitted entry to, residence in, and exit from other Members States.¹⁹⁷ Importantly, the directive creates a near-absolute “right of residence” during the three months following entry into the host Member State.¹⁹⁸ Beyond three months, EU citizens may remain in a host Member State provided they are studying (with health insurance), working, conducting business, or even merely in possession of sufficient resources to avoid becoming a burden on the host Member State’s social assistance system.¹⁹⁹ Most important for our purposes is Article 24.1, which codifies the equal treatment principle flowing from *Martinez Sala*:

Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, *all Union citizens* residing on the basis of this Directive in the territory of the host Member State *shall enjoy equal treatment* with the nationals of that Member State within the scope of the Treaty.²⁰⁰

While the directive does provide the ubiquitous general reservations for “public policy, public security or public health,”²⁰¹ there is no exception for group-protective measures designed to protect minority languages.²⁰²

Martinez Sala and Directive 2004/38 affect the minority language problem only by implication. Ms. Sala, for instance, had nothing to do with Germany’s efforts to protect languages or minorities; she was denied a simple welfare benefit and the ECJ found that denial was in violation of her rights as an EU citizen to be free from discrimination.²⁰³ Before evaluating the impact of *Martinez Sala*’s expansive concept of citizenship on Member State protections of

195. Council Directive 2004/38, 2004 O.J. (L 158).

196. *See id.* *See also* Regulation 1612/68, *supra* note 168.

197. *See* Council Directive 2004/38, *supra* note 195, arts. 5-7.

198. *See id.* art. 6.1.

199. *Id.* art. 7.1.

200. *Id.* art. 24.1 (emphasis added).

201. *Id.* art. 27.1.

202. *See generally id.*

203. Case C-85/96, *Martinez Sala v. Freistaat Bayern*, 1998 E.C.R. I-2691 para. 23.

minority languages, it is necessary to survey the actual ECJ rulings in cases where group language rights collide with individual Community rights.

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

The ECJ interprets the European treaties, and to the extent a Member State law limits the full enjoyment of the freedoms and rights provided by the treaties and Community law, the ECJ is charged with affirming the supremacy of Community law²⁰⁴ and declaring the domestic measure to be in conflict. The ECJ decisions in this field have articulated and defined the principles of non-discrimination and freedom of workers and persons. Since the treaties are concerned with individual rights, the ECJ in its role as treaty interpreter, has usually found Member State measures to protect language groups in violation of Community law.

A. The *Groener*²⁰⁵ Case

The *Groener* case involved a 1979 Irish Ministry of Education regulation that required schoolteachers to pass an Irish language proficiency exam as a precondition to attaining a permanent post.²⁰⁶ When Ms. Groener, a Dutch national and art teacher, failed her test, she was denied a position over the objection of the school that desired to hire her.²⁰⁷ Groener alleged that the regulation violated Article 39 (then Article 48) and, in particular, was not justified by Article 3(1) of the implementing Regulation 1612/68 which permits states to condition employment on linguistic knowledge when “required by reason of the nature of the post to be filled.”²⁰⁸

204. Unlike the U.S. Constitution, the European treaties do not contain an explicit textual foundation for the supremacy of Community law. The ECJ has guided the affirmation of Community supremacy through its case law. See Case 6/65, *Costa v. Ente Nazionale Per L'Energia Elettrica (ENEL)*, 1964 E.C.R. 585 (holding that in cases of conflict, Community law must be supreme over domestic law because to hold otherwise would render the direct applicability and direct effect of Community law meaningless). *Costa* also reminded Member States that, by entering into the EC, they have limited their sovereign rights. *Id.*

205. Case 379/87, *Groener v. Minister for Educ. and City of Dublin Vocational Educ. Comm.*, 1989 E.C.R. 3967.

206. See *id.* para. 2.

207. See *id.*

208. See *id.* para. 3; see also Regulation 1612/68, *supra* note 168, art. 3(1).

The ECJ held that the regulation did not violate Community law for a combination of reasons. The Court attached importance to the official primary constitutional status of the Irish language.²⁰⁹ Pointing out the concerted effort by the Irish government to preserve and promote its linguistic heritage, the Court also warned Ireland not to go too far:

The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language. However, the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstances be *disproportionate in relation to the aim pursued* and the manner in which they are applied must not bring about discrimination against nationals of other Member States.²¹⁰

The requirement of proportionality²¹¹ was met in *Groener* for two reasons. First, the “privileged relationship” between a teacher and students allowed Article 3(1) to apply beyond instructors teaching the Irish language.²¹² Ireland wanted to protect and promote the language, not merely to teach it, and requiring all teachers to be competent would encourage spoken Irish in the halls, during recess, and in other classes. Second, the regulation required competency, not fluency, in Irish. A requirement of fluency, the Court suggested, could be “disproportionate in relation to the objective pursued.”²¹³ The Court also warned that any requirement that the language certification be acquired within the Member State would be a violation of the principle of non-discrimination.²¹⁴

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

209. See *supra* note 6 and accompanying text.

210. *Groener*, 1989 E.C.R. 3967 para. 19 (emphasis added).

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

212. To so require would, as Advocate General Darmon pointed out in his opinion, “treat [Irish] as a dead language like [A]ncient [G]reek or [L]atin, and as a language incapable of further development.” *Groener*, 1989 E.C.R. 3967, Opinion of AG Darmon para. 22.

213. *Id.* para. 21.

214. *Id.* paras. 31-33.

importantly, the ECJ was willing to recognize that encouraging the usage of minority languages contributed collaterally and indirectly to the flourishing of the language's speakers.

Commentators wondered how far the Court was willing to extend this logic. Was the ECJ willing to provide a "real recognition of the legitimacy of national concerns in relation to national cultural heritage?"²¹⁵ Or was this case an outlying situation, limited to the Irish anomaly of constitutional recognition and primacy of the minority group's language? Would the same analysis hold when the language was protected only regionally? The subsequent cases dispelled hopes that the ECJ was willing to recognize a general Member State interest in providing *sui generis* group rights to minority language speakers.

B. The *Bickel/Franz*²¹⁶ Case

Bickel/Franz came before the ECJ on a preliminary reference²¹⁷ from a criminal court in the Trentino-Alto Adige region of Italy on the Austrian border.²¹⁸ Article 100 of the Statute for the region²¹⁹ provided a special right for German-speaking residents of the region to have any legal proceedings against them conducted in German.²²⁰ Bickel, who was an Austrian lorry driver, was being prosecuted for driving under the influence.²²¹ Franz, a German tourist, had been charged with possession of an illegal weapon after a customs search.²²² Neither spoke Italian, and accordingly petitioned the Italian court to conduct the proceedings in German.²²³ The Italian court referred the following question to the ECJ:

Do the principle of non-discrimination as laid down in the first paragraph of Article 6 [now Article 12], the right of movement and

215. Bryan M.E. McMahon, Case Comment, Groener, 27 COMMON MKT. L. REV. 129, 139 (1990). If so, as Prof. McMahon asserted triumphantly, "The bureaucrats and the economists will have to recognize that cultural diversity cannot be indiscriminately . . . [swept] in the name of economic unity." *Id.*

216. Case C-274/96, Criminal Proceedings against Bickel and Franz, 1998 E.C.R. I-7637.

217. See EC Treaty art. 234.

218. *Bickel/Franz*, 1998 E.C.R. I-7637 paras. 1-4.

219. See *supra* discussion Part I.C.

220. Special Statute for the Trentino-Alto Adige Region, Presidential Decree No. 670/1992, art. 100, available at http://www.regione.taa.it/GIUNTA/normativa_it/statuto/statuto_speciale.pdf. Cf. *supra* Part I.C.

221. *Bickel/Franz*, 1998 E.C.R. I-7637 para. 3.

222. *Id.* para. 4.

223. *Id.* para. 5.

residence for citizens of the Union as laid down in Article 8a [now Article 18] and the freedom to provide services as laid down in Article 59 [now Article 49] of the Treaty require that a citizen of the Union who is a national of one Member State but is in another Member State be granted the right to have criminal proceedings against him conducted in another language where nationals of the host State enjoy that right in the same circumstances?²²⁴

The ECJ separated the referral into two questions: first, did the right at question implicate the Treaty?; and second, if the treaty was implicated, could the region limit the application of that right to residents of the region?²²⁵

The Court ruled that the regulation did implicate the individual Treaty rights of Bickel and Franz.²²⁶ Article 12 required that in any situation governed by Community law, EU citizens be placed on “equal footing” with citizens of the respective Member States.²²⁷ The “linguistic rights and privileges of *individuals*” merited the Court’s strictest attention.²²⁸ The mere fact that Bickel and Franz were EU citizens exercising their right to free movement under Article 18 of the EC Treaty²²⁹ implicated the Treaty and as such, the prohibition of discrimination contained in Article 12 applied.²³⁰ The Court also relied on Article 49, and the freedom to receive services, as an alternate basis for asserting jurisdiction.²³¹ The Treaty applied despite

224. *Id.* para. 11.

225. The ECJ, not to be outdone in prolixity, reformulated the referral thus: “the national court is essentially asking whether the right conferred by national rules to have criminal proceedings conducted in a language other than the principal language of the State falls within the scope of the Treaty and must accordingly comply with Article [12] thereof. If so, the national court also asks whether Article [12] of the Treaty precludes national rules, such as those in issue, which, in respect of a particular language other than the principal language of the Member State concerned, confer on citizens whose language is that particular language and who are resident in a defined area the right to require that criminal proceedings be conducted in that language, without conferring the same right on nationals of other Member States traveling or staying in that area, whose language is the same.” *Id.* para. 12.

226. *See id.* para. 14.

227. *Id.*

228. *Id.* para. 13 (emphasis added).

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

230. *Id.* para. 17. In *Bickel/Franz*, the ECJ refers to Article 6, which was the precursor to Article 12. After the judgment came down, virtually all the treaty articles were renumbered by the Treaty of Amsterdam. *See* BERMANN ET AL., *supra* note 137, at 23.

231. *Bickel/Franz*, 1998 E.C.R. I-7637 para. 15.

the fact that criminal proceedings are normally an internal affair, reserved to the exclusive discretion of the Member States.²³²

In response to the second question, the ECJ found the discrimination to be in violation of Article 12 non-discrimination principle.²³³ The Italian government, in its brief, stressed that the scope of the right was to accommodate an insular minority, and its aim was “to recognize the ethnic and cultural identity of persons belonging to the protected minority.”²³⁴ Essentially, the Italian government staked its case on a group rights justification. Its argument implicitly recognized the rights of Bickel and Franz *qua* Community citizens, but contended that those rights were satisfied by the availability of translators.²³⁵ The special right reserved for German-speaking residents did not apply to nonresident German speakers simply because those persons were not part of the minority group Italy aimed to protect.²³⁶ The Court instead focused on the reality that, on the ground, and regardless of Italy’s motivation, German-speakers from Austria and Germany were at a disadvantage compared to German-speaking Alto Adige residents.²³⁷ The Court

232. The ECJ had already held that Community law set certain limits to the discretion of Member States in the field of criminal law. See Case 186/87, *Cowan v. Trésor Public*, 1989 E.C.R. 195; see also Case 137/84, *Ministère Publique v. Heinrich Maria Mutsch*, 1985 E.C.R. 2681. In *Cowan*, a British national, exercising his Community right to receive services in France, was injured and sought compensation pursuant to a French penal law that provided restitution to victims of assault. *Cowan*, 1989 E.C.R. 195 paras. 2-3. The ECJ held that France must extend the privilege to the British national in order to avoid violating Article 12. *Id.* para. 20. Additionally, in *Mutsch*, a German-speaking Luxembourg national was arrested in Belgium and sought to have proceedings conducted in German as Belgian law allows for German-speaking Belgian citizens. *Mutsch*, 1985 E.C.R. 2681 paras. 2-3. The Court drew on Article 39 and the free movement of workers guaranteed by Regulation 1612/68 and ruled that Belgium could not deny Mutsch, a lawful resident worker in Belgium, the right to have proceedings conducted in German. *Id.* paras. 14-18. It will be observed that *Bickel/Franz* brings a nearly identical legal issue before the court, with the key difference being the non-applicability of Article 39 and the freedom of movement for workers.

233. *Bickel/Franz*, 1998 E.C.R. I-7637 para. 31.

234. *Id.* para. 21.

235. See *id.*

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

237. See *Bickel/Franz*, 1998 E.C.R. I-7637 para. 25 (“The majority of Italian nationals whose language is German are in a position to demand that German be used throughout the proceedings in the Province of Bolzano, because they meet the residence requirement laid down

framed Article 100 as a protection of German-speakers in Alto Adige; the Italian government claimed Article 100 protected only members of the Alto Adige German-speaking minority.

In its decision, the Court reaffirmed that for a residence requirement to be permissible under Community law, it must be based on objective criteria independent of nationality as well as proportionate to the legitimate aim of the national provisions.²³⁸ Furthermore, the Court repeated what it had stated in *Groener*: protecting a linguistic minority is a legitimate objective.²³⁹ In this case, however, the Court found Article 100 of the Statute to be disproportionate since the rights could be extended with little expense to cover German-speaking nationals of other Member States exercising their right to freedom of movement.²⁴⁰ To summarize Advocate General Jacobs' argument, protecting a local linguistic minority is perfectly in harmony with the Treaty, but denying visitors the right to use German was neither necessary nor appropriate to achieve that goal.²⁴¹ The Court agreed with the Advocate General, noting, "It does not appear . . . from the documents before the Court that that aim would be undermined if the rules in issue were extended to cover German-speaking nationals of other Member States exercising their right to freedom of movement."²⁴²

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

by the rules in issue; the majority of German-speaking nationals of other Member States, on the other hand, cannot avail themselves of that right because they do not satisfy that requirement.").

238. *Id.* para. 27.

239. Case 379/87, *Groener v. Minister for Educ. and City of Dublin Vocational Educ. Comm.*, 1989 E.C.R. 3967 paras. 18-19.

240. *Bickel/Franz*, 1998 E.C.R. I-7637 para. 29. Remember that the region already had a bilingual judiciary in place.

241. *See id.*, Opinion of A.G. Jacobs para. 41. *See also* Barry Doherty, *Bickel—Extending the Boundaries of European Citizenship?*, 8 IR. J. EUR. L. 70, 77-78 (1999) (providing a cogent summary of the A.G.'s arguments); Gattini, *supra* note 236, at 114 (discussing the A.G.'s opinion in detail).

242. *Bickel/Franz*, 1998 E.C.R. I-7637 para. 29.

more comfortable with German than Italian),²⁴³ the case is a welcome gesture.²⁴⁴

Notably absent from the ECJ opinion was consideration of the *intentional* discriminatory effect of the law. Article 100 was included in the Statute to guarantee an efficient and comprehensible trial for German-speaking residents; it was *also* intended to accommodate an insular group of German-speakers living in Trentino-Alto Adige, not the casual tourist whose links to the region are ephemeral. Throughout the opinion, the Court never considers the real policy impetus behind Article 100: to protect the German-speaking minority group against outside influences (as provided by the Italian Constitution) including (one could even say *especially*) other German-speakers.²⁴⁵ The Court's pronouncements on the *per se* validity of measures to protect linguistic minorities ring hollow if the Court is disinclined to consider the very reason for their existence.

Bickel/Franz suggests that the ECJ is ready to intervene when Member State rules designed to protect minority *groups* conflict with the exercise of *individual* Community rights. In *Bickel/Franz*, the ECJ elides the real purpose of the provision in question, and focuses exclusively on the effect on individuals. It may be objected that Article 100 deals with criminal proceedings, and has little to do with preserving culture; the other side of that coin is equally true: even if the right is extended to non-residents, no harm is done to the region's interests and purposes. It is not clear whether extending the language right in this case to all German speakers will attenuate the right's force vis-à-vis the German-speaking Alto Adige denizens.²⁴⁶ However, when combined with the EC's expansion from a purely economic union into a social and political union bound together by citizenship, the effects of the ECJ's failure to countenance group rights as a *sui generis* legal subject can hardly be underestimated.

243. See Doherty, *supra* note 241, at 77 ("Behind this dense formulation is an unresolved question: what does it mean to say that a person's language is German? [T]he concept is curiously undefined.").

244. Christoph J.M. Safferling, Case Comment, *In Re Bickel and Franz*, 94 AM. J. INT'L L. 155, 159 (2000).

245. Palermo notes, "Since the South Tyrol [Alto Adige] arrangement is so complex and based mainly on the protection of a minority group against outside influences, particularly by making immigration to South Tyrol difficult, it is not surprising that portions of this legislation conflict with EC law." Palermo, *supra* note 2, at 309.

246. In this case, there was no evidence that extending the right to all German speakers would increase court costs. See *Bickel/Franz*, 1998 E.C.R. I-7637 para. 30.

Indeed, the deleterious effects of such an approach are presented in the *Angonese* case, discussed next.

C. The *Angonese*²⁴⁷ Case

In *Angonese*, the ECJ had occasion to reexamine the conflict in *Groener* between non-discriminatory access to employment against the legitimacy of procedures for gauging linguistic competence. In that case, the Court again fielded a preliminary reference from a local Italian court in Trentino-Alto Adige.²⁴⁸ The case involved an applicant to a position at a local private bank, the Cassa di Risparmio di Bolzano.²⁴⁹ Roman Angonese applied to enter into a competition for advertised positions at the bank.²⁵⁰ The advertisement stipulated that candidates needed to possess a certificate—called the *patentino*—as proof of their linguistic competence in both German and Italian.²⁵¹ The bank would not accept any other form of certification and the province of Bolzano, capital of the Alto Adige, was the only authority that administered the *patentino* examination.²⁵²

When Angonese presented his application, complete with documentation from his university training in Vienna that testified to his bilingualism, the bank denied him because he did not produce the *patentino*.²⁵³ He then brought suit in the local Italian court in Bolzano, alleging that the denial of his application violated Article 39 as well as Regulation 1612/68. The local court referred the following question to the ECJ:

Is it compatible with Article [39] (1), (2), and (3) of the EC Treaty . . . to make the admission of candidates for a competition organised to fill posts in a company governed by private law conditional on possession of the official certificate attesting to knowledge of local languages issued exclusively by a public authority of a Member State . . . ?²⁵⁴

247. Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA*, 2000 E.C.R. I-4139.

248. *Id.* para. 1.

249. This summary of the facts is based on the reported opinion and a case comment. See Robert Lane & Niamh Nic Shuibhne, Case Comment, *Angonese*, 37 COMMON MKT. L. REV. 1237, 1237 (2000).

250. *Angonese*, 2000 E.C.R. I-4139 para. 5.

251. *Id.*, Opinion of A.G. Fennelly para. 2.

252. *Id.*

253. *Id.* para. 9.

254. *Id.* para. 15.

The first part of the Court's opinion established the horizontal direct effect of Article 39 and Regulation 1612/68.²⁵⁵ Next, the Court proceeded to address the merits of the requirement that applicants possess the *patentino*.²⁵⁶ The Court reasoned that since the *patentino* was issued only in Bolzano, and the majority of Bolzano residents are Italian, nationals of other Member States were at a disadvantage.²⁵⁷ The requirement could, as in *Bickel/Franz*, be justified on the basis of proportionality.²⁵⁸ However, by barring candidates from proving their ability by any other means, the bank's action was disproportionate and amounted to indirect discrimination in violation of Community law.²⁵⁹

Angonese is further testament to the Court's willingness to find a link to Community law in an increasing variety of legal situations—in this case, a *private* employment relationship. Again, the Court announces that the language requirement is a legitimate state interest, but then summarily strikes it down.²⁶⁰ Relying on a dictum from *Groener*, the Court ruled that “the principle of non-discrimination precludes any requirement that the linguistic knowledge in question must have been acquired within the national territory.”²⁶¹ In *Angonese*, the Court treats the *patentino* requirement as though its sole aim was to ascertain individual applicants' knowledge of German and Italian. Again, the Court's approach is one of institutional blindness, as if to say “we rule on individual Community rights, and have no competence to consider the purposes of domestic language policy.”

The Court sees the aim of the requirement in different terms than the employer and the Bolzano community. The focus is on the Community rights of individuals that speak the minority language,

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

256. *Id.* para. 37.

257. *Id.* para. 40.

258. *Id.* para. 42. Again, the Court pronounced the legitimacy of the aim (in this case, ascertaining linguistic competence), and then summarily rejected it. *See id.* para. 44.

259. *Id.* paras. 44-46.

260. *Id.*

261. *Id.* para. 43.

and not the flourishing of the minority language group itself.²⁶² It is almost certain that the bank had adopted a policy requiring the *patentino* in part because it could thus encourage employment among local Bolzano residents, and perhaps foster banking relationships with the local bilingual population. In this respect the *patentino* requirement was analogous to the Irish requirement at issue in *Groener*: it served an immediate functional purpose, but also had a collateral effect of contributing to the flourishing of the minority group. In the same respect *Angonese* is different than *Bickel/Franz*. The language right provided to criminal defendants did not reverberate collaterally to the benefit of the German-speaking community. However, *Angonese* is evidence of the dangers of extending the *Bickel/Franz* interpretation of the non-discrimination principle to an increasing array of bona fide group rights aimed at contributing to the cultural life of minority language groups.

It may be said that in applying Community law to situations as in *Angonese*, the ECJ is taking “free movement” and “non-discrimination” to their logical conclusions. Nevertheless, such a rigid formalist approach is rarely required of judicial institutions, and one must wonder how prudent such an approach is in the context of language.²⁶³ Language is always a politically sensitive issue because it is so intimately connected with the preservation of regional and cultural identity. To the extent the ECJ’s current approach ignores the *sui generis* nature of group rights, it glosses over this cultural and political sensitivity. The broad interpretation of European citizenship flowing from *Martinez Sala*, *Trojani*, and Directive 2004/38 means that EU citizens will be able to claim community rights in an increasing range of scenarios. As the scope of Community law widens, the space for group rights to operate shrinks correspondingly. Such a dynamic is, to put it lightly, inadequate for the protection of minority language groups.

262. See *id.* para. 40 (“Since the majority of residents of the province of Bolzano are Italian nationals, the obligation to obtain the requisite Certificate puts nationals of other Member States at a disadvantage by comparison with residents of the province.”).

263. See Lane & Shuibhne, *supra* note 249, at 1246 (“Language is a politically sensitive issue in any context, but perhaps even more so where it is so intimately connected with the preservation and evolution of regional culture.”).

D. Beyond Article 12: Moving Toward a New Vocabulary of *Sui Generis* Group Rights

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

I believe an alternate approach is available in this context. When Member States grant special group rights to minority language groups, they are not violating the non-discrimination principle; instead, they are implicitly recognizing the inadequacy of the absolutist interpretation of such a principle. Minority groups merit exceptional treatment because their situation is exceptional (or *sui generis*, to again borrow Segesvary's formulation).²⁶⁴ Insofar as Community law fails to recognize this, the minority language groups are the first casualty. Stated differently, the current state of Community law lacks a sufficient vocabulary to treat minority language groups as *legally protectable subjects*.

A comparison to U.S. law may be of value at this juncture.²⁶⁵ Compare the race segregation of schoolchildren in *Brown v. Board of Education*²⁶⁶ to the discrimination at issue in, for example, *Angonese*. In some respects, the distinctions drawn are similar: individuals pertaining to certain groups are afforded different treatment based on the mere fact of their belonging to a group. Only at the most abstract level, however, does the analogy hold. A closer examination of the distinction reveals an important difference. In the case of *Brown*, the distinction drawn between black and white schoolchildren bore no

264. See Segesvary, *supra* note 132, at 102.

265. Cf. MASSANA, *supra* note 25, at 136-37 (contrasting *Brown* and racial segregation in the United States with the separation of schoolchildren in Bolzano).

266. 347 U.S. 483 (1954).

relation to the aim sought. During the Jim Crow era, the American political establishment may have considered it morally legitimate for Southern states to maintain that separate schooling was necessary for the development of the schoolchildren.²⁶⁷ At that time, then, it may be said that race was therefore inextricably intertwined with the education system, and consequently that segregation fostered the legitimate policy of education. But by the 1950s the distinction had become sheer arbitrariness. It no longer was morally or empirically possible to maintain that segregating the races aided in the education of children. Stripped of the logical connection to the education system, the distinction was nothing more than a pretextual method of enforcing an extant social order. But preserving Southern whites' privileges was not a valid state interest that could justify the distinction.²⁶⁸

267. Of course, this justification was largely pretextual even in the late nineteenth century. The cardinal purpose of segregation was the entrenchment of race hierarchies. See *U.S. Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (describing affirmative action as “designed to break down old patterns of racial segregation and hierarchy”); *Johnson v. Transportation Agency*, 480 U.S. 616, 628 (1987) (quoting *Weber*, 443 U.S. at 208); Sanford Levison et al., *What Are the Facts of Marbury v. Madison*, 20 CONST. COMMENT. 255, 275-76 (2003) (criticizing Justice Warren’s *Brown* opinion for its failure to take into account “the history of racial segregation in the South and the deep commitment of many of its white citizens to preserving an existing racial hierarchy”); Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1767 (2001) (lauding Justice Harlan’s dissenting opinion in *Plessy v. Ferguson* for its insight that “state sponsored segregation violated the Equal Protection Clause because . . . the law should not ignore that race-based exclusion was intentionally and inherently subordinating”). There also existed a scientific literature of American polygenesis that argued that the races were separate species. See John Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 314 n.660 (2003) (providing a description of the theory of polygenesis, which held that whites and blacks were separate species); Brian Willis, *Black Bodies, White Science: The Slave Daguerreotypes of Louis Agassiz*, 12 J. BLACKS HIGHER EDUC. 102, 102-03 (1996) (noting that “the American theory of polygenesis” popularized by Drs. Louis Agassiz and Samuel Morton purported to prove that different “races” were created separately). The fact that polygenesis was popularized in the mid-nineteenth century is no coincidence: as the country spiraled into civil war, it justified slavery based on science and religion. See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 101-05 (1996). Moreover, the polygenists used evolution to affirm “that races had been separate long enough to evolve major inherited differences in talent and intelligence.” *Id.* at 105.

268. This discussion of *Brown* is not intended as a summation of the doctrinal niceties of the U.S. Supreme Court’s Fourteenth Amendment jurisprudence as reflected in that case. Instead, it aims merely to articulate a comparison of the challenged discriminatory measures in both *Brown* and *Angonese* in order to draw an important distinction in the relative state interests at stake. In the case of school segregation at issue in *Brown*, the American legal and political establishment eventually exposed segregation as a morally and legally impermissible entrenchment of white privilege. In the case of the minority protection at issue in *Angonese*, the European legal and political establishment has, on the contrary, affirmed repeatedly the legitimacy of the state interest.

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

Admittedly, the distinction will not always be so clear as it is between *Brown* and *Angonese*, but the ECJ has the institutional expertise and experience of drawing such distinctions. Throughout its history, the ECJ has exhibited boldness and shrewdness in smoking out illegitimate protectionist motives disguised as legitimate exercises of Member State power.²⁶⁹ The fundamental problem is that the ECJ cannot gauge the tightness of the connection between a distinction and an aim if it does not recognize the aim for what it truly is. Instead of framing the interest as an accommodation for minority language speakers, the ECJ should consider the well-being of the community of speakers as a *sui generis* and irreducible subject of European law.

The ease with which the ECJ formally endorses the legitimacy of protecting minority languages renders this inadequacy all the more complicated. Policymakers and litigants do not need to convince the ECJ of the importance of linguistic diversity; from *Groener* to *Angonese*, the ECJ has expressly recognized the importance of the interest.²⁷⁰ Instead, it needs to develop a new vocabulary altogether.

269. See, e.g., Case 407/85, 3 Glocken GmbH v. USL Centro-Sud, 1988 E.C.R. 4233 (holding that Italian rules on pasta composition cannot be used to block pasta imports from other Member States); Case 178/84, Comm'n v. Germany, 1987 E.C.R. 1227 (holding that German beer purity laws cannot be used to stop importation of beer lawfully produced in other Member States); Case 112/84, Humboldt v. Directeur des Service Fiscaux, 1985 E.C.R. 1367 (holding that French tax regime was discriminatory when it contained dramatically higher rates for cars that no French carmaker produced); Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung Fur Branntwein (Cassis de Dijon), 1979 E.C.R. 649 (holding that German alcohol composition laws cannot be used to block importation of lawfully produced spirits).

270. See Case 379/87, *Groener v. Minister for Educ. and City of Dublin Vocational Educ. Comm.*, 1989 E.C.R. 3967 para. 19 ("The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language."). See also Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA*, 2000 E.C.R. I-4139 para. 44 ("[R]equiring an applicant for a post to

To start with, the ECJ should recognize that laws protecting a group of minority language speakers are not meant purely to maintain the number of individuals who are familiar with, or speak, that language. If that were true, then it would be enough to assert, as the ECJ has often done, that language proficiency requirements are a legitimate objective to pursue. Oftentimes, such laws and measures are intended to vest rights only in members of that community to the exclusion of non-members.²⁷¹

Of course, not all minority-protective domestic laws are equally at risk of being struck down under the current framework. For example, the quasi-federal system of the Spanish autonomous communities in itself stands little chance of violating the EC Treaty.²⁷² Similarly, the simple constitutional or codified recognition of multiple official languages will certainly not raise eyebrows in Brussels.²⁷³ These protections (especially the latter) are, however, largely symbolic. While the symbolic order of a language group is constitutive of that group, and reinforces its sense of identity, a language's long-term survival depends on its ability to remain relevant in the lives of its speakers not merely symbolically. In this context, it is not so much the creation of the Catalonian *Generalitat*²⁷⁴ that matters as how the *Generalitat* contributes to the flourishing of the Catalonian community—and, by extension, its language. However, laws that condition grant substantive rights to individuals by virtue of their membership in a linguistic community are most at risk, and are almost certain to provoke litigation in the European courts.²⁷⁵ As such, even if the procedural protections discussed *supra* do not, in themselves, appear to be on a collision course with the EC Treaty, their effectiveness may be undermined by tying the hands of the local lawmakers who are unable to provide substantive and affirmative protections for local languages.

This Article has been primarily concerned with laws impeding the free movement of workers and EU citizens, and it is true that any

have a certain level of linguistic knowledge may be legitimate and possession of a diploma such as the Certificate may constitute a criterion for assessing that knowledge . . .”).

271. Consider, for example, the requirement that a certain percentage of radio and television programming be conducted in Catalán. *See supra* note 50 and accompanying text.

272. *See supra* Part I.C.

273. *See supra* Part I.C.

274. *See supra* note 46.

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

domestic laws that place non-members at a disadvantage vis-à-vis linguistic community members are at most risk. However, it is not difficult to conceive of minority-protective laws that counteract the free movement of services or capital either. To take a current example, the newly amended Statute of Autonomy for Catalonia creates a right for individual Catalonians to be served in Catalán.²⁷⁶ If a French national perceives a good business opportunity in Catalonia, but speaks no Catalán and anticipates serving a primarily Spanish client base, can that French businessman obtain redress in the ECJ if a barrage of complaints file in from potential Catalán consumers complaining of his lack of respect for their language rights? Or what result where an Austrian broadcasting company looking to purchase a local radio station in Trentino-Alto Adige to expand its Italian coverage decides the transaction is no longer favorable if it must also broadcast in German on account of regional or even central government regulations mandating a certain percentage of German broadcasting? Rather than declaring a moratorium on such laws, it makes more sense to charge the ECJ with an honest inquiry into the motives of the Member State (or regional) legislatures promulgating the laws.

CONCLUSION

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

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

276. See *supra* notes 58-60 and accompanying text.

mention of minority rights, and provide a means of implementation that does not require unanimity. The chief difficulty with such an approach is that it displaces the political discussions about minority rights away from the Member States to Brussels without tempering the general applicability of Article 12's non-discrimination norm.²⁷⁷ As we have seen, the Member States and their sub-state units have demonstrated more enthusiasm and experience in addressing the minority language concerns.

Second, Member States could temper the rigor with which the ECJ interprets the consequences of the individual rights flowing from the four freedoms and beyond. This solution too would require Treaty modification. Perhaps a compromise similar to Article 5's subsidiarity principle could be possible;²⁷⁸ the ECJ would simply look the other way when some Member State measures conflict with a Community law provision such as the non-discrimination norm. Articles I-2 and I-3(3) of the Constitution are promising proposals in this regard, but the experience from Article 151 should caution against an exaggerated optimism. More explicit language is likely needed in order for the ECJ to approve of group-based preferences that conflict with core Community principles enshrined in the Treaties.

Third, Member States could include a directly effective affirmative action treaty provision permitting action by Member States to ensure substantive equality for minority groups, linguistic or otherwise.²⁷⁹ Substantive equality, in this instance, would apply on a group basis, with minorities having equal opportunities to witness the flourishing of their languages.

Whatever the action is, the EC should act soon. The funded projects to help preserve minority languages, the soft law pronouncements, and the changing mood about European integration all testify to the anxiety in the EC that somehow, something must be

277. For a discussion of the difficulties inhering in selecting a Community-level language policy, see Niamh Nic Shuibhne, *Does the Draft Constitution Contain a Language Policy?*, MERCATOR INT'L SYMPOSIUM: EUR. 2004: A NEW FRAMEWORK FOR ALL LANGUAGES? 6 (Feb. 2004), available at <http://www.ciemen.org/mercator/pdf/simp-shuibhne.pdf> (last visited June 18, 2007).

278. See EC Treaty art. 5.

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

done to address this tension between individual rights and minority group rights. Given the current stalled state of the integration discourse in light of the 2005 vetoes, it may be a particularly propitious moment to move ahead. Of course, the lack of adequate protection for minority language rights itself did not hold up the ratification of the EU Constitution; however, a decisive step to address this and similar problems could provide some momentum in the effort to mute the anti-integrationist discourse of Europe as the grand destroyer of cultural particularities.