

The Legal Framework for Indigenous Language Rights in the United States

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*We need not conjecture about the possible implications of culturally and linguistically repressive policies; their tragic results are etched in our nation's soul...*¹

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I. INTRODUCTION

The indigenous people, who have occupied the land from time beyond history and memory, constitute just over 0.1% of the national population. Despite its statistical insignificance in the body politic and a centuries-long history of exclusion, exploitation, and forced assimilation by the dominant culture, today the indigenous group receives a wide range of economic and cultural support from the national government. A former

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¹ SANDRA DEL VALLE, LANGUAGE RIGHTS AND THE LAW IN THE UNITED STATES 275 (2003).

neglect of the native language in the educational system has since been rectified and, although still lacking any official status, the indigenous language is a compulsory subject in all aboriginal schools. Since 1962 the government has committed to the notion that the native population has “the right to receive instruction...which is intended not only to give information but also to awaken respect for the heritage from earlier generations and to imbue [students] with a feeling with their own people.” Weekly classes in the indigenous language were implemented, textbooks and grammars published, and courses in the language offered at national universities and at teacher training institutions. A newspaper is published for the indigenes partially in their own language and radio broadcasting in the minority language has been put into operation throughout the group’s territory.²

The indigenous population described above is the Sámi, also referred to as the Lapps, and the treatment they are accorded by the Kingdom of Sweden contrasts with the low degree of support for indigenous languages provided in the United States. Compared to that in Western European countries in general, awareness of and support for language rights in America are in a primitive state, and that underdeveloped condition is reflected in the specific situation of Native American languages. In this paper I will examine the current legal status of indigenous language rights in the U.S. and the legal framework for governmental support of these communities. Although the protections in place for indigenous languages exceed those for other U.S. linguistic minorities, it will be seen that these measures are still far short of what is required to promote language maintenance and revival based on scientific principles.

After a brief survey of the current condition of the indigenous languages in the

² See MEIC STEPHENS, *LINGUISTIC MINORITIES IN WESTERN EUROPE* 677-91 (1978).

U.S. and the concepts of language ecology and linguistic human rights (Part I), the basis for language rights in general under fundamental law—under the Constitution and multilateral human rights instruments—is described (Part II), followed by examination of the statutory and treaty bases specifically for indigenous language rights (Part III). I end with a critical look at the adequacy of this legal framework (Part IV).

We may never know precisely how many indigenous languages were in use in the current territory of the United States prior to contact in 1492, but the number probably ran into several hundreds.³ Today about 175 of these are still spoken, only 20 of which are used as “cradle languages.”⁴ Only about one-quarter of the surviving languages have speech communities larger than 1,000 souls.⁵ Entire families of languages have been reduced to small remnants of users.⁶ Even those with larger bodies of speakers are in precarious straits. Navajo, the indigenous language with the largest number of users at about 100,000,⁷ nonetheless faces precipitate decline in light of the shrinking number of young speakers: in 1968 90% of first graders spoke the language, but now only 30% do.⁸ The loss to Hawai‘ian illustrates the situation of most indigenous languages. In 1778 the population of the Hawai‘ian Islands is estimated to have been 800,000,⁹ presumably all native speakers. According to the 1990 Census,

³ S. REP. NO. 102-343, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2954.

⁴ Allison M. Dussias, *Waging War with Words: Native Americans’ Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901, 974 (1999).

⁵ *Id.*

⁶ Census data from 1990 (the latest with figures broken down by language groups) indicate six Amerindian language families in the U.S. with 1,000 or less speakers; the Tonkawa family of languages reported just three remaining speakers. U.S. CENSUS, AMERICAN INDIAN LANGUAGES SPOKEN AT HOME BY AMERICAN INDIAN PERSONS OVER 5 YEARS AND OVER IN HOUSEHOLDS: 1990, <http://www.census.gov/population/socdemo/race/Indian/ailang3.txt> (last visited Oct. 9, 2003).

⁷ Ken Hale, *The Navajo Language I*, in THE GREEN BOOK OF LANGUAGE REVITALIZATION IN PRACTICE 84 (Leanne Hinton & Ken Hale eds., 2001), hereinafter GREEN BOOK.

⁸ Dussias, *supra* note 4, at 975.

⁹ Sam L. No‘eau Warner, *The Movement to Revitalize Hawaiian Language and Culture*, in GREEN BOOK, *supra* note 7, at 133, 133.

slightly more than 8,800 speak the language, of which about 8,200 are bilingual (also speak English well or very well).¹⁰ Only 11 people reported being monolingual Hawai'ian speakers.¹¹

The devastation to human linguistic resources which these figures represent cannot be truly appreciated without considering the great diversity among the indigenous languages of the continent. Compared to Europe, where all the long-established languages fall into six stocks, or super families, the native languages of North America fall into about 50 stocks of languages as unrelated to one another as English and Arabic.¹² Nonetheless the rate of language loss is accelerating, producing what is described as a mass extinction of as many as 90% of currently existing languages.¹³ In the previous 20 years, the die-out has included the last speakers of several Amerindian languages, such as Roscinda Nolasquez, the last living speaker of Cupeño, and Red Thundercloud, the last human being who spoke Catawba Sioux.¹⁴

Gloomy statistics like these could be easily multiplied. In light of these grim figures, a number of linguists have argued that the "die-off" facing most of the world's languages is a crisis of global significance. They liken the loss of these languages to the rapid loss of wildlife species caused by expanding development and with similar dire consequences. The extinction of species diminishes the biodiversity which sustains the physical ecology; the extinction of languages, the repository of human experience and reflecting the myriad ways in which human beings understand the world, constitutes a

¹⁰ STATE OF HAWAII DATABOOK 2001, <http://www.state.hi.us/dbet/dbo1/01/013801.pdf> (last visited Nov. 1, 2003).

¹¹ *Id.* By way of comparison, over 55,000 state residents reported being speakers of Tagalog.

¹² DANIEL NETTLE & SUZANNE ROMAINE, VANISHING VOICES: THE EXTINCTION OF THE WORLD'S LANGUAGES 36 (2000). The indigenous languages of the Western Hemisphere together comprise about 150 stocks, or well over half the world's 249 stocks and far in excess of Eurasia with only 28. *Id.* Thus the lion's share of human linguistic resources exists in the New World languages alone.

¹³ DAVID CRYSTAL, LANGUAGE DEATH vii, 18 (2000).

¹⁴ Dussias, *supra* note 4, at 976; NETTLE & ROMAINE, *supra* note 12, at 2.

diminishment of the cognitive resources of humanity. Just as loss of a rare species of rainforest plant may take with it a chemical compound holding out great therapeutic promise, the death of each language means the unique world-view embodied in its lexical and grammatical structure is gone for all time. Language death represents a largely irrevocable diminishment of human intellectual potential.¹⁵

Consonant with such views on language ecology is the movement referred to as linguistic human rights or LHR.¹⁶ LHR is a growing interdisciplinary field bringing together linguists, educators, and lawyers for the purpose of developing programs and legal frameworks for protecting and promoting linguistic minorities and their languages. Some of the key goals of the LHR program, as articulated by one of the principal proponents of the discipline, Danish linguist Tove Skutnabb-Kangas, are (1) the right to identify with, learn and use in most official capacities one's mother tongue; (2) the right to become bilingual with one of the official languages of one's country; (3) the right not to be compelled to relinquish one's native language; and (4) the right to profit from the public education system regardless of one's primary language.¹⁷ The LHR discipline has an impressive following and literature in the academic and legal communities of Eastern and Western Europe, but has little adherence in the United States, where such an aggressive program of minority language promotion seems nearly inconceivable. For a country in the clutches of chauvinist English-only attitudes,¹⁸ protection—let alone promotion—of linguistic minorities (including all the indigenous languages, even where

¹⁵ For good introductions to the rationales and approaches of language ecology outlooks, see NETTLE & ROMAINE, *supra* note 12; CRYSTAL, *supra* note 13; GREEN BOOK, *supra* note 7.

¹⁶ For introductions, see LANGUAGE: A RIGHT AND A RESOURCE (Miklós Kontra et al. eds., 1999) and RIGHTS TO LANGUAGE (Robert Phillipson ed., 2000).

¹⁷ Shelley K. Taylor, *Common Practice and Linguistic Human Rights: A-Team vs. B-Team Coercion or the Construction of 'Utopia'*, in RIGHTS TO LANGUAGE, *supra* note 13, at 179, 180.

¹⁸ See the discussion of the English-only movements in DEL VALLE, *supra* note 1, at 54-81 and Dussias, *supra* note 4, at 951-63.

they are the numerical majority) is fraught with difficulties. As will be seen by turning now to the actual legal framework for indigenous language rights in the United States, there is a long way yet to travel to reach even the minimal standard envisioned by LHR advocates.

II. INDIGENOUS LANGUAGE RIGHTS UNDER FUNDAMENTAL LAW

The discussion of indigenous linguistic rights in the United States requires inquiry into two broad categories of sources: “fundamental” law and statutory law. The latter is the topic of the following Part; this Part deals with the protection of linguistic rights under more basic and presumably controlling sources. These can be divided into two categories: language rights as civil rights deriving from the Constitution and language rights as human rights stemming from multilateral international human rights instruments to which the United States is a party.

A word is required first about grouping this second source of rights together with constitutional guarantees as “fundamental law.” Under the Supremacy Clause¹⁹ the Constitution, federal laws, and treaties made under federal authority “shall be the supreme Law of the Land.” Despite the equal assignment of supreme power to all three sources, in practice the Constitution has been set at the apex of authority, with treaties and statutes ranking second, but of equal force between themselves.²⁰ Under this view, the international human rights treaties bear no greater authority than any other in the American legal framework. However, I would argue that they can be considered

¹⁹ U.S. CONST. art. VI, cl. 2.

²⁰ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 302 cmt. b, Reporters’ Notes 1 (1987) (now “firmly established” that treaties cannot contravene the Bill of Rights); *Reid v. Covert*, 354 U.S. 1 (1957). This is also explicit in some of the reservations the United States has entered to international agreements; *see, e.g.*, U.S. Reservations, Understandings and Declarations to the ICCPR, 138 CONG. REC. S4781 (1992).

analogous in status to constitutional strictures to the extent that many of the rights recognized in multilateral treaties have the status of *jus cogens*, peremptory norms of international law from which no state (or its subdivisions) can deviate.²¹ Such protections are considered binding on all states for the protection of their population regardless of internal legal rights regimes. Similarly, the customary international law of human rights is binding on the U.S.²² Thus their subject matter and their status in the international community place human rights agreements significantly above ordinary treaties by expressing not only specific state-to-state agreements, but by reflecting universal human concepts of right and justice.²³ It is proper to place international human rights with basic, deep-seated protections on a par with those provided in the Constitution.²⁴

A. LANGUAGE RIGHTS AS CIVIL RIGHTS

The civil rights protection for indigenous languages derives from two sources of constitutional magnitude. The first—applicable to all language communities in the United States—derives directly from the Constitution itself. The second—relating

²¹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. n (1987).

²² *Id.* § 702(g). Although customary international law is binding on federal and state governments (The Paquete Habana, 175 U.S. 677 (1900)), it may be required to yield to domestic executive, legislative, or judicial decisions to the contrary. See Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986). International law is also persuasive authority.

²³ LOUIS HENKIN, THE AGE OF RIGHTS 6-10 (1990).

²⁴ As a historical matter, one can consider the civil and political rights guaranteed in the Bill of Rights and the Reconstruction Amendments as inchoate forms of the more specific social, economic, and cultural rights which are the so-called “second generation” rights developed in post-war human rights regimes (see LOUIS HENKIN ET AL., HUMAN RIGHTS 475 (1999)). That is, though revolutionary at the time, the 18th-century concept of rights created only a generalized group of civil “umbrella” rights which would permit, indirectly, the attainment of the actual human goals of enjoyment of the specific social goods of “life, liberty and the pursuit of happiness.” The more developed 20th-century rights concept addresses these desired social goods directly (life, family, education, adequate livelihood) by according them the status of rights to which people are entitled. One may therefore speak of the modern “substantive” rights regimes as subserved by the broad, “procedural” rights such as those outlined in the Constitution. Under this conception, the Bill of Rights was a point of departure, not the end of the line, in the elaboration of protections for Americans’ liberties.

particularly to Amerindian languages—proceeds from the unique “trust doctrine” in federal Indian law.

1. Constitutional Provisions.²⁵

The Constitution contains no express protections for linguistic rights. But constitutional protections for rights have nonetheless been repeatedly discovered in the interstices of other provisions. Efforts to find constitutional protection for language rights have focused primarily on two provisions of the Fourteenth Amendment (and the analogous interpretations of the Fifth Amendment): the Due Process Clause and the Equal Protection Clause.²⁶ At the end of this section, I will also discuss the possibility of raising linguistic rights arguments via the First and Ninth Amendments.

Due Process. The Constitution guarantees no person can be denied “life, liberty, or property without due process of law.”²⁷ One aspect of this guarantee is “substantive due process,” the rubric under which a number of fundamental rights such as privacy have received constitutional protection despite textual silence. In light of the later open hostility to minority languages in the U.S., it is a curious fact that one of the cases considered the fountainhead of the modern era of substantive due process jurisprudence dealt precisely with the issue of language rights.

²⁵ A detailed discussion of how linguistic rights can be derived from established constitutional principles is provided in Cristina M. Rodríguez, *Accommodating Linguistic Differences: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133 (2001). For a review of the case law challenging the constitutionality of English-only requirements, see Brian L. Porto, Annotation, “English Only” Requirements for Conduct of Public Affairs, 94 A.L.R.5TH 537 (2001).

²⁶ DEL VALLE, *supra* note 1, at 23, calling the Fourteenth Amendment the “constitutional linchpin on which language minorities have traditionally sought to have their rights realized.” Language rights have not yet been pursued under the Privileges or Immunities Clause of the Amendment, and despite decisions like *Saenz v. Roe*, 526 U.S. 489 (1999) reviving the vitality of this clause, such use seems “doubtful.” *Id.* at 23-24 n.65.

²⁷ U.S. CONST. amends. V; XIV, § 1.

*Meyer v. Nebraska*²⁸ was a case that arose out of the animosities stirred up by the First World War. German-language communities had been a part of the American cultural fabric from colonial times and in some instances constituted substantial populations attaining semi-official status.²⁹ But in the emotionally charged atmosphere directly following World War I, Nebraska, Iowa, and Ohio had criminalized the use of German. The Nebraska statutes challenged in *Meyer* imposed fines for use of German in any school, public or private. Robert Meyer, a teacher in a Lutheran parochial school, was charged in a criminal indictment with “unlawfully [teaching] the subject of reading in the German language to Raymond Parpart, a child of 10 years, who had not attained and successfully passed the eighth grade.”³⁰ The Court declared these prohibitions unconstitutional violations of the due process protections. Justice McReynolds, writing for a seven-justice majority, identified the substance of the “liberty” protected by the Due Process Clause as

denot[ing] not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.³¹

Nonetheless, Justice McReynolds did not base the invalidation of the anti-German laws explicitly on the right of Meyer or Parpart to speak the language of their choice, but on several other footings. A major part of the *ratio decidendi* was the parental right to

²⁸ 262 U.S. 390 (1923); a companion case, *Bartels v. Iowa*, 262 U.S. 404 (1923), decided the same day as *Meyer*, struck down a similar Iowa statute. There, however, the same two dissenting justices in *Meyer*—Holmes, with Sutherland concurring—penned an opinion upholding the law as a rational desire to inculcate young children with English. *Id.* at 412. In a conjoined appeal, *Bartels* also struck down the corresponding Ohio law, but Holmes and Sutherland agreed that the separate *prohibition* on using German—as opposed to the *exclusive promotion* of English—was unconstitutional. *Id.* at 413.

²⁹ See DEL VALLE, *supra* note 1, at 10-12.

³⁰ *Meyer*, 262 U.S. at 396-97.

³¹ *Id.* at 399, citing some fourteen cases interpreting the Amendment starting with the Slaughterhouse Cases.

decide how children are best educated. Citing Plato's recommendation of making all children wards of the state and the Spartan practice of transferring all males at seven years old to military guardians, McReynolds stated such conceptions were "wholly different from those upon which our institutions rest."³² Moreover, the state's rationale of instilling American values into youth was insufficient to warrant the degree of intrusion into personal liberty.³³ Finally, the Court noted the possible influence of "[u]nfortunate experiences during the late war and aversion toward every character of truculent adversaries."³⁴ Justice McReynolds' opinion manifests no appreciation of a positive social good from linguistic diversity which a recognized right to language use would protect. At most the opinion views linguistic diversity as harmless, at least to the extent that a legal ban on use in education would be a disproportionate response.³⁵

Although the decision rested on other grounds besides pure linguistic rights, the facts of the case and their analytical inclusion within the Court's definition of constitutionally protected liberty show that prohibitions on language use cannot be justified simply by state interests in assimilation or the conveniences of a monolingual society. In what is probably the most language-supportive passage in McReynolds' opinion, he writes:

The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech,

³² *Id.* at 402.

³³ *Id.* "No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state." *Id.* at 403.

³⁴ *Id.* at 402.

³⁵ "Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable." *Id.* at 400. "It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child." *Id.* at 403.

but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.³⁶

Within four years came the Supreme Court's second application of substantive due process in the education arena, *Farrington v. Tokushige*.³⁷ Justice McReynolds, now writing for a unanimous Court, cited *Meyer* to strike down a state law severely restricting the operation of foreign language schools in Hawai'i. Interestingly, the challenged statute defined "foreign languages" as all languages except English and Hawai'ian.³⁸ While not banning outright schools teaching foreign languages (principally Japanese),

[e]nforcement of the act probably would destroy most, if not all, of them; and, certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.³⁹

Although acknowledging a strong state interest in imposing some linguistic uniformity, the restrictions again go too far: "We, of course, appreciate the grave problems incident to the large alien population of the Hawaiian Islands. These should be given due weight whenever the validity of any governmental regulation of private schools is under consideration; but the limitations of the Constitution must not be transcended."⁴⁰

An important case expanding the scope of *Meyer* was *Yu Cong Eng v. Trinidad*.⁴¹ Here the Philippine government had banned the keeping of books in any language other than English, Spanish, or an indigenous Filipino language. The law was patently aimed

³⁶ *Id.* at 401.

³⁷ 273 U.S. 284 (1927).

³⁸ *Id.* at 291.

³⁹ *Id.* at 298.

⁴⁰ *Id.* at 299.

⁴¹ 271 U.S. 500 (1926).

at the large Chinese commercial community. Though basing its decision as much on an equal protection rationale of intentional discrimination,⁴² the Supreme Court, in another unanimous decision written by Chief Justice Taft, also cited *Meyer* and progeny to hold the law impermissibly denied the Chinese their right to keep records in their own language.⁴³ Although upholding the government's right to require a record in a language suitable for state regulation, "it would be oppressive and arbitrary to prohibit all Chinese merchants from maintaining a set of books in the Chinese language...and thus prevent them from keeping advised of the status of their business and directing its conduct."⁴⁴ *Yu Cong Eng* is highly significant in extending the *Meyer* substantive due process analysis to language rights outside the framework of parental educational prerogatives.

Meyer has been cited by activists as anointing language choice as one of the "penumbral rights" protected by substantive due process.⁴⁵ Lower courts have since relied upon it in deciding questions of language rights⁴⁶ and it remains an authority for substantive due process that has been heavily relied upon.⁴⁷ Despite the subsequent silence of seven decades by the High Court, *Meyer* and *Farrington* stand as acknowledgments that the Constitution protects the right to pass on linguistic heritage to future generations, which is a core element of linguistic human rights—the right to preserve the language. *Yu Cong Eng* confirms, however, this protection is not

⁴² *Id.* at 524-25.

⁴³ *Id.* at 526-27.

⁴⁴ *Id.* at 525.

⁴⁵ DEL VALLE, *supra* note 1, at 37-38.

⁴⁶ *Id.* at 38; *see, e.g.*, *Mo Hock Ke Lok Po v. Stainback*, 74 F. Supp. 852, 854-56 (1947) *rev'd. on procedural point* 336 U.S. 368 (1949) (enjoining another Hawai'i territorial law restricting non-English language instruction); *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 945-46 (9th Cir. 1995) (en banc), *vacated as moot*, 520 U.S. 43 (1997); *Sandoval v. Hagan*, 7 F. Supp.2d 1234, 1314-15 (M.D.Ala. 1998), *aff'd*, 197 F.3d 484 (11th Cir. 1999), *rev'd. sub nom.* *Alexander v. Sandoval*, 532 U.S. 275 (2001).

⁴⁷ A Westlaw citation search conducted in October 2003 disclosed nearly 2,500 citations to *Meyer* in case law and scholarly works.

inextricably tied to the fundamental right of parental educational choice. We can therefore speak of constitutional protections of language rights under substantive due process as “dormant”—unrepudiated, but unused. As with the recent active employment of the venerable Alien Tort Claims Act as a basis today for enforcing international human rights in U.S. courts,⁴⁸ valid legal precepts which have long lain dormant can nonetheless provide a powerful basis for asserting contemporary claims.⁴⁹

Equal Protection. More recently, notably since the enactment of specific civil rights legislation and procedures in the 1960s, those who have sought to enforce language rights through the Constitution have relied primarily on the provisions of equal protection in the Fourteenth Amendment.⁵⁰ This may be because the Equal Protection Clause centrally concerns discriminatory treatment based on ethnicity and national origin, categories with which linguistic affiliation has strong ties.⁵¹ It may also be due to the courts’ greater comfort in dealing with the more concrete parameters of equal protection than the amorphous boundaries of substantive due process.

Whatever the reason, most modern language rights cases use equal protection as their centerpiece, though discriminatory effect and/or purpose were strong arguments in such early cases as *Yu Cong Eng*; even *Meyer* noted the invidious motives lurking behind the anti-German legislation there. The theory on which linguistic

⁴⁸ See *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (utilizing Alien Tort Claims Act to bring torture claim against former Paraguayan policeman). The Alien Tort Claims Act, codified at 28 U.S.C. § 1350, was enacted in the (First) Judiciary Act, 1 Stat. 73, 76-77 (1789).

⁴⁹ For a discussion of the vogue in bringing claims against foreigners—and American companies—complicit in human rights abuses under the Alien Tort Claims Act, see Beth Van Schaack, Romagoza v. Garcia: *Proving Command Responsibility Under ATCA and TVPA*, 59 GUILD PRAC. 170 (2002); Jenny B. Davis, *Old Law Bares Its Teeth*, A.B.A. J., Oct. 2003, at 20.

⁵⁰ The Equal Protection Clause “has set the parameters under which many language rights claims are decided.” DEL VALLE, *supra* note 1, at 23.

⁵¹ *Id.*; see also Andrew P. Averbach, Note, *Language Classifications and the Equal Protection Clause: When Is Language a Pretext for Race or Ethnicity?*, 74 B.U.L. REV. 481 (1994); Rodríguez, *supra* note 25, at 140-45, 161-63.

affiliation comes within the usual purview of equal protection is that language is an incident of ethnicity, ancestry, or national origin, all considered equivalent with racial discrimination in triggering the highest level of scrutiny.⁵² Treating language as an element of ethnicity is not always straightforward or uncontroversial.⁵³ But ethnicity, national origin, and race are frequently conflated with linguistic grouping,⁵⁴ so it should not be too great a stretch to include language-based discrimination within the scope of the Fourteenth Amendment. However, the attempts to do so have met with mixed success.

An important step in recognizing language grouping as within the ambit of the Equal Protection Clause is *Hernandez v. Texas*.⁵⁵ The Court there recognized Mexican-Americans as a suspect class whose systematic exclusion from jury service triggered strict scrutiny as much as racial exclusion. The Court rejected a narrow scope for equal protection and said the Fourteenth Amendment applied to other classifications—such as ancestry and national origin—singled out for different treatment.⁵⁶ It happened that in this case, the suspect group was one defined and self-defined in large part on linguistic distinctions.⁵⁷ Such a ruling fits well the underpinning rationales for strict scrutiny outlined in Justice Stone’s opinion in *United States v. Carolene Prods. Co.*⁵⁸ Not only do linguistic preferences expressed by “official English” or “English-only” measures inhibit

⁵² DEL VALLE, *supra* note 1, at 26.

⁵³ *Id.* at 26, 196-97; *see also* Averbach, *supra* note 51, at 481-83; Rodríguez, *supra* note 25, at 140-41.

⁵⁴ *See* DEL VALLE, *supra* note 1, at 26, citing the use of “German” as an ethnic, national, linguistic, and even racial label.

⁵⁵ 347 U.S. 475 (1954).

⁵⁶ *Id.* at 478-79.

⁵⁷ Chief Justice Warren noted, as an indication of invidious discrimination against Mexican-Americans in the community, that the courthouse toilets were segregated, the non-White bathroom bearing two signs: “Colored Men” and “Hombres Aquí.” *Id.* at 479-80. This graphical yoking together of linguistic and racial discrimination underscores the equivalence of the two.

⁵⁸ 304 U.S. 144, 153 n.4 (1938).

full participation of all citizens in the democratic process, but language barriers and restrictions constitute discrimination against “discrete and insular” minorities.⁵⁹ Interestingly, in this same passage Justice Stone cites *Meyer* and *Farrington* as examples of cases involving discrimination against a “national minority.”

But despite the seeming good fit of linguistic identity within the mainstream of suspect classifications triggering strict scrutiny, what the Court gave in one *Hernandez* decision, it took away in a later one. In *Hernandez v. New York*⁶⁰ a plurality of four justices rejected a *Batson*⁶¹ challenge to the peremptory removal of Hispanic jurors in a criminal case. Although recognizing that Latinos/Hispanics were a cognizable group for *Batson* equal protection analysis, the plurality held that the prosecution had offered a sufficient “race-neutral” [sic] reason for excusal, namely that the challenged jurors posed a risk that they would base their views of the evidence on their own understanding of the Spanish-language testimony rather than that of the court translator.⁶² While acknowledging the connection between language and ethnicity and that in some cases exclusion of jurors solely because they were Spanish-speaking might violate equal protection,⁶³ in this case the plurality distinguished intent to remove jurors because of their ethnicity from intent to remove based on their potential inability to accept an interpreter’s translation over their own. In doing so, the plurality seemed to

⁵⁹ It is hard to imagine a characteristic that makes a group more discrete and insular than being the last few dozen human beings left to speak a particular language, as is the case with most surviving Native American tongues. As for applying to linguistic classes the usual trait of immutability, see Rodríguez, *supra* note 25, at 142-45; and for evidence of majority bias against language groups, review of the facts of any of the *Meyer*-era cases will suffice. See also DEL VALLE, *supra* note 1, at 54-81 for a discussion of the invidious nativist bases of the English-only movement. For the specific bias, indeed animus, directed against Native American languages, see Dussias, *supra* note 4, at 905-38.

⁶⁰ 500 U.S. 352 (1991).

⁶¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁶² *Hernandez v. New York*, 500 U.S. at 361.

⁶³ “It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.” *Id.* at 371.

accept a “subjective test” for discriminatory intent.⁶⁴ Thus if the unequal treatment did not subjectively derive from a racial-ethnic basis, even though the characteristic used for the “neutral” reason for selection is central to the group’s identification as a suspect class, no equal protection violation occurs. As a result, a large class of jurors are potentially excludable on the basis of their language background, or essentially “because they are, in the courts’ estimation, overqualified.”⁶⁵ A number of courts have since followed the second *Hernandez* case to uphold exclusion of bilingual venirepersons.⁶⁶

To take one example of (comparatively) successful language rights litigation under equal protection, one outside the area of jury service, in *Katzenbach v. Morgan*⁶⁷ the Supreme Court upheld a section of the Voting Rights Act which prohibits disqualification by a literacy test of voters who had completed sixth grade in Spanish by an accredited Puerto Rican school. The Court found the ban was a proportionate and reasonable exercise of Congress’ enforcement powers under § 5 of the Fourteenth Amendment.⁶⁸ The Court’s decision in *Katzenbach* gave impetus to legislation extending the ban on literacy tests and requiring bilingual voter assistance for language groups comprising more than 5% of eligible voters,⁶⁹ and lower courts have since enforced these requirements.⁷⁰ Although *Katzenbach* thus represents a success story for equal protection of linguistic minorities, as Justice Harlan’s dissenting opinion

⁶⁴ Averbach, *supra* note 51, at 493-97.

⁶⁵ Rodríguez, *supra* note 25, at 133. *Hernandez v. New York* also raises theoretical questions about what constitutes the actual evidence in court, the witness’s words or the translator’s rendition, and why English-speaking jurors should be allowed to construe testimony but speakers of other languages not.

⁶⁶ See DEL VALLE, *supra* note 1, at 193-98 and Averbach, *supra* note 51, at 497-99 for discussion of some of these cases.

⁶⁷ 384 U.S. 641 (1966).

⁶⁸ *Id.* at 652.

⁶⁹ DEL VALLE, *supra* note 1, at 105.

⁷⁰ See *id.* at 105-08.

foreshadowed,⁷¹ the legislative history behind the Voting Rights Act may not suffice under the Court's current, more stringent standard for permissible § 5 enforcement.⁷² Were a private action brought today to enforce the same law, the decision could well go the other way.

Katzenbach and the two *Hernandez* decisions illustrate the current lack of permanent headway gained by equal protection arguments for linguistic rights, and many more examples could be adduced.⁷³ The Supreme Court's most recent treatment of language-based discrimination claims illustrates the two-steps-forward-one-step-back nature of this area of law.⁷⁴ In *Sandoval v. Hagan*⁷⁵ a disparate-impact claim was brought under Title VI of the Civil Rights Act⁷⁶ on the basis of discrimination due to national origin. In fact, what Martha Sandoval complained about was the refusal to provide a Spanish-language driver's test under the force of a new state English-only provision. The court's detailed analysis of the arguments, finding for the plaintiff, filled 72 pages. The Eleventh Circuit affirmed the district court in a 30-page, unanimous opinion.⁷⁷ However, in the end, the U.S. Supreme Court reversed, not on the merits of the discrimination claim, but on the basis that there was no private cause of action allowed under Title VI.⁷⁸

⁷¹ *Katzenbach*, 384 U.S. at 667-69 (Harlan, J., dissenting).

⁷² See *University of Alabama v. Garrett*, 531 U.S. 356 (2001) (14th Amendment enforcement rationale insufficiently supported by evidence of history of discrimination).

⁷³ For discussion of the background and decisions on equal protection language claims in the areas of citizenship and voting rights, employment, access to courts (civil and criminal), education, government benefits, and commercial dealings, see the relevant chapters in DEL VALLE, *supra* note 1.

⁷⁴ For a discussion of *Sandoval*, its background, and critique of the various opinions, see DEL VALLE, *supra* note 1, at 71-76.

⁷⁵ 7 F. Supp.2d 1234 (M.D. Ala. 1998).

⁷⁶ 42 U.S.C. § 2000d (2003).

⁷⁷ 197 F.3d 484 (11th Cir. 1999).

⁷⁸ 532 U.S. 275, 293 (2001). Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, disputed at length the majority's analysis of congressional intent in Title VI and would in any event find a right of private enforcement under 42 U.S.C. § 1983. *Id.* at 293 (Stevens, J., dissenting).

The *Sandoval* litigation reveals the sometimes precarious nature of language rights as viewed through an equal protection prism. First, because relevant civil rights legislation does not overtly protect linguistic communities or language use, plaintiffs like *Sandoval* must use surrogate categories such as “national origin” to prosecute their claims. While the lower courts in *Sandoval* passed on this argument, it is an additional hurdle which the language rights litigant must clear, one that could provide a basis for rejection of a claim as not covered by the statutes. Second, unless brought as a full-blown violation of the Equal Protection Clause, the language-bias litigant faces the increasingly common Supreme Court rationale of no private enforcement authority.⁷⁹ As the Court has held that statutory discrimination bans and constitutional equal protection claims alike require a showing of official intent,⁸⁰ controlling precedent “has placed a high hurdle for minorities seeking succor under the Equal Protection Clause.”⁸¹

Free Speech. Some claims brought for infringement of language rights have used, in addition to Fourteenth Amendment bases, a theory based on the First Amendment.⁸² In an important case involving the sweeping Arizona enactment of official English restrictions, a Spanish-speaking state employee and a Navajo-speaking member of the legislature challenged the measure’s constitutionality. A Ninth Circuit panel and then the Court of Appeals en banc offered lengthy analyses of the constitutional bases for language preferences and ruled for the plaintiffs.⁸³ The en banc

⁷⁹ See *infra* Part III.A.3 for just such a judicial defeat for Native American language claims.

⁸⁰ *Sandoval*, 532 U.S. at 280; *Washington v. Davis*, 426 U.S. 229 (1976).

⁸¹ DEL VALLE, *supra* note 1, at 28.

⁸² In the context of Native American language rights, see, e.g., *Office of Hawai’ian Affairs v. Dep’t. of Education*, 951 F. Supp. 1484, 1499 (D.Haw. 1996). In *Asian American Business Group v. City of Pomona*, 716 F. Supp. 1328, 1330 (C.D.Cal. 1989) the court struck down restrictions on non-English advertising as violating the Free Speech, as well as Due Process (overbreadth and vagueness) and Equal Protection Clauses.

⁸³ *Yniguez v. Arizonans for Official English*, 42 F.3d 1217 (9th Cir. 1994); *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (en banc).

opinion of Judge Reinhardt cites in its first paragraph *Meyer*, *Yu Cong Eng*, and *Farrington*, but its main support lies in a discussion of the First Amendment claims. Finding that “language is by definition speech,”⁸⁴ it rejected the appellants’ contention that choice of language is conduct which can be regulated at a lower level of scrutiny. Citing *Cohen v. California*,⁸⁵ Judge Reinhardt noted the Supreme Court had held the manner of expression can be as much a part of the message as the ideas conveyed.⁸⁶ The court’s analysis entails, then, that choice of language is a mode of expression choice, and so it would be a curious jurisprudence which protects offensively worded English messages on jackets but not sober political discussions in Navajo or Spanish. The court also rejected arguments that plaintiffs were seeking an affirmative right⁸⁷ and that there were legitimate state justifications for limiting employee speech.⁸⁸

The *Yniguez* decision was eventually vacated by the Supreme Court because of mootness (the plaintiff no longer worked for the state and so was not subject to the restraints of the challenged law).⁸⁹ Also, because the case had been pursued in federal court on constitutional grounds, the state courts had not had their first crack at ruling on the provision’s validity and the district court should have certified the question to the Arizona Supreme Court.⁹⁰ In the upshot, the state courts did consider the issues raised in *Yniguez* in a separate case, *Ruiz v. Hull*,⁹¹ and ruled in accord with the Ninth Circuit that the measure violated free speech and equal protection.

⁸⁴ *Yniguez*, 69 F.3d at 935.

⁸⁵ 403 U.S. 15 (1971).

⁸⁶ *Yniguez*, 69 F.3d at 935.

⁸⁷ *Id.* at 936-37 (citing precedent that U.S. courts recognize no affirmative right to provision of official materials in one’s own language). To the contrary, plaintiffs were seeking only to avoid negative state restrictions “gagging” use of their languages.

⁸⁸ *Id.* at 937-47 (again relying on *Meyer* and *Farrington* on sufficiency of state interests to ban language use).

⁸⁹ *Arizonans for Official English v. Arizona*, 520 U.S. 43, 74 (1997).

⁹⁰ *Id.* at 75-80.

⁹¹ 957 P.2d 984 (Ariz. 1998), *cert. denied*, 525 U.S. 1093 (1999).

The *Yniguez* and *Ruiz* decisions provide new ammunition for finding at least protective shields against government bans on language use. They recognize that on First Amendment grounds a strong presumption will lie that strict scrutiny standards must be met for impinging on choice of language as a mode of expression.⁹²

Retained Rights. Finally, one can consider whether language rights can be located in the ‘undisparaged rights’ retained by the people under the Ninth Amendment.⁹³ The amendment, providing that “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,” was a virtual superfluity for 170 years of its existence. Referred to as the “forgotten amendment,” only with Justice Goldberg’s reliance on it in his concurring opinion in *Griswold v. Connecticut*⁹⁴ did the Ninth Amendment receive any significant legal or scholarly attention.⁹⁵ Opinions on the amendment’s function vary from a mere truism to substantive protection for unenumerated rights.⁹⁶

It is beyond the scope of this study to decide the issue, but the Ninth Amendment, under either of the two modern interpretations case law has given it,⁹⁷ could be a potential source for linguistic rights as “retained by the people.” No published

⁹² Another potential line of attack might be to view official language preferences as “compelled speech” à la *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). But since a refusal to honor a choice to use *any* language regardless of practicality would then be deemed “forced speech,” an affirmative right to government accommodation by this means seems unlikely. More promising is a protective use of *Barnette* against outright language bans.

⁹³ For a collection of materials on the Ninth Amendment, see 1 *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (Randy E. Barnett ed., 1989), hereinafter *RIGHTS*, and 2 *THE RIGHTS RETAINED BY THE PEOPLE: CONSTITUTIONAL INTERPRETATION AND THE NINTH AMENDMENT* (Randy E. Barnett ed., 1992).

⁹⁴ 381 U.S. 479, 487 (1965) (Goldberg, J., concurring).

⁹⁵ Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, in *RIGHTS*, *supra* note 93, at 244. Caplan indicates that only seven prior Supreme Court cases had made reference to the amendment and only a handful of scholarly discussions had appeared before World War II.

⁹⁶ See Randy E. Barnett, *Ninth Amendment*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 589 (Kermit L. Hall ed., 1992).

⁹⁷ These are a “rights-powers” view—retained rights are the inverse of delegated powers—and a “power-constraint” view—retained rights exist beyond, and may conflict with, the delegated powers. *Id.* at 590-91.

case has so far addressed the Ninth Amendment in this context.⁹⁸ But it is clear that language rights are of a nature that would make them susceptible to treatment as unenumerated rights under two of the three theories for discovering penumbral rights suggested by Professor Barnett to limit the potentially wide-open scope for an active Ninth Amendment.⁹⁹ There is some reason for optimism regarding the active use of the amendment. First, Barnett's Presumptive methodology by which the amendment could become an active source of rights is strikingly like Justice Souter's definition of fundamental rights for due process purposes in his concurring opinion in *Washington v. Glucksberg*.¹⁰⁰ Thus there are already some leanings toward an expansive view of implied rights. Second, the originalists on the Supreme Court would be hard pressed to avoid an expansive meaning for the Ninth Amendment given the clear historical documentation that it was intended for the very purpose of protecting a myriad of enforceable rights which were not specifically named, denying the Ninth Amendment was mere surplusage.¹⁰¹

2. Rights Flowing from the "Trust Doctrine."

The constitutional position of Native Americans, particularly Indian tribes in the Lower 48 States, raises the possibility of finding one additional source for language

⁹⁸ In *Ruiz v. Hull*, 191 Ariz. 441, 446 n.4 (1998), the Arizona Supreme Court noted that a Ninth Amendment issue had been presented below, but was not pursued on appeal.

⁹⁹ Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, in *RIGHTS*, *supra* note 93, at 34-44. Barnett identifies an Originalist, Constructive, and Presumptive Method for limiting the field of unenumerated rights under the Ninth Amendment. Only the original intent method arguably precludes a language rights application.

¹⁰⁰ 521 U.S. 702, 752-73 (1997) (Souter, J., concurring). The crux of this view is that there is a presumption of liberty for any conduct not clearly socially deleterious, with the burden on the state to justify its restrictions in proportion to the public interest involved. Language rights could fit neatly under such a heading.

¹⁰¹ See Barnett, *supra* note 96, at 590 (indicating the amendment's relation to the conceptions of natural rights in the discussions of the Founding Fathers). See also James Madison, *Speech to the House of Representatives*, in *RIGHTS*, *supra* note 93, at 60-61. In arguing for passage of the Bill of Rights, Madison identified the Ninth Amendment as addressing "one of the most plausible arguments" against the proposed amendments and expressed confidence the courts would enforce these undisparaged rights.

rights unique to their linguistic communities: the so-called “trust doctrine.”¹⁰² The origin of this “often ambiguously stated concept”¹⁰³ is traced to the so-called Marshall Trilogy. In *Johnson v. McIntosh*,¹⁰⁴ Chief Justice Marshall laid the first stone in the foundation of federal-Indian relations in upholding the “discovery doctrine” which stripped Indians of their ultimate sovereignty as regards the ability to alienate their land to anyone except the United States. Marshall refined his analysis of the political status of Indian tribes in *Cherokee Nation v. Georgia*,¹⁰⁵ defining them as “dependent domestic nations” and finding “[t]heir relation to the United States resembles that of a ward to his guardian.”¹⁰⁶ The foundation was fully laid with the decision in *Worcester v. Georgia*,¹⁰⁷ where Marshall declared that the federal government’s authority over the Indians was supreme and exclusive of state interference.

These cases introduced two inextricably linked concepts into federal Indian law: plenary power and the trust doctrine.¹⁰⁸ The Marshall Trilogy together established an exclusive federal power over Indians based on a guardian-ward relationship. A half-century later the Supreme Court would use this combination of features to create Congress’ plenary power over Indians and their affairs.¹⁰⁹ The *U.S. v. Kagama* court

¹⁰² See FELIX S. COHEN, HANDBOOK OF INDIAN LAW 220-28 (Rennard Strickland ed., 1982); see also Rennard J. Strickland, *Native Americans*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 577, 580 (Kermit L. Hall ed., 1992).

¹⁰³ William J. Dunaway, *Eco-Justice and the Military in Indian Country: The Synergy Between Environmental Justice and the Federal Trust Doctrine*, 49 NAVAL L. REV. 160, 162 (2002). Dunaway gives a comprehensive history of the development of the doctrine through the different eras of Indian affairs policy. See *id.* at 180-93.

¹⁰⁴ 21 U.S. (8 Wheat.) 543 (1823).

¹⁰⁵ 30 U.S. (5 Pet.) 1 (1831).

¹⁰⁶ *Id.* at 17.

¹⁰⁷ 31 U.S. (6 Pet.) 515 (1832).

¹⁰⁸ See Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422, 437 n.71 (1984) for a discussion of the dialectic interaction of plenary power and trust doctrine.

¹⁰⁹ See *United States v. Kagama*, 118 U.S. 375, 384-85 (1886). See Roy Torgerson, Note, *Sword Wielding and Shield Bearing: An Idealistic Assessment of the Federal Trust Doctrine in American Indian Law*, 2 TEX. F. C.L. & C.R. 165, 173-77 (1996) for a discussion of this shift in the understanding of the federal-Indian relationship from *Cherokee Nation* to *Kagama*. See also COHEN, *supra* note 102, at 220.

expressly legitimized plenary power by reference to Indians' dependent status and the government's consequent duty to protect them.¹¹⁰ The language of a number of the Indian treaties—early treaties especially, but also pacts throughout the treaty-making era—explicitly stated the tribes' yielding of sovereign power to the U.S. and acknowledging its suzerainty were in exchange for the government's protection of the tribe.¹¹¹

I treat this protective guardianship here as being of constitutional dimensions. Although the trust doctrine as applied in contemporary law derives from a variety of sources—historical, constitutional, judicial, and administrative¹¹²—it is clear that the fountainhead in our jurisprudence must be Marshall's *Worcester* opinion, where the nature of the federal Indian power was first articulated. While he relied on a grab-bag of authorities, including the Articles of Confederation, acts of Congress, Indian treaties, and the historical course of dealings with the tribes,¹¹³ Marshall knew these would avail nothing if there were no textual basis in the Constitution for federal power. He relied on three provisions as triangulating exclusive *federal* authority over Indians: the power over war and peace, the treaty-making power, and the Indian Commerce Clause.¹¹⁴ Since plenary power and the trust doctrine crucially depend on one another—each justified by the existence of the other—it hardly seems possible to remove the trust doctrine from the constitutional pantheon while its twin, plenary power, remains enshrined there. Also

¹¹⁰ "From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power..." *Kagama*, 118 U.S. at 384.

¹¹¹ See, e.g., Treaty with the Teton Sioux, arts. 1, 2, 7 Stat. 250 (1825), and the Treaty with the Delawares, art. 11, 14 Stat. 793 (1866), 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 227-28, 941 (1904), available at <http://digital.library.okstate.edu/kappler> (last visited Nov. 7, 2003).

¹¹² Torgerson, *supra* note 109, at 167-69.

¹¹³ *Worcester*, 21 U.S. at 544-58.

¹¹⁴ *Id.* at 559, referring to U.S. CONST. art. I, § 8, cl. 3, 11-15; § 10, cl. 3; art. II, § 2, cl. 2.

as federal authority over Indians must ultimately derive from the Constitution itself if *Worcester* is to be maintained under a theory of limited government, the trust doctrine, which is just a characterization of the *nature* of that federal power, is also a constitutionally grounded notion. Finally, the pervasive acknowledgement of the trust doctrine on the federal level supports its being treated as a general rule of constitutional jurisprudence.¹¹⁵

The plenary power-trust doctrine nexus is similar to the feudal exchange of homage and protection, a yielding of power for guarantees of security. Except, unlike the feudal relation, which dealt with individuals, the federal guardian-ward relationship holds between *peoples*. In that light, the notion of ‘protection’ must naturally be construed not as simply physical security. To protect a *group* means to preserve its integrity and its survival *as a group*. It means maintaining the group’s essential characteristics which distinguish it from other groups: anything less would not “protect” it from extinction by melding with surrounding communities. Thus the protective guarantees made to the Indian tribes in exchange for sovereignty naturally entail security not just from physical marauders, but from cultural erosion as well.

This expansive vision of the trust doctrine is encountered in the case law as one of two major alternative interpretations. The relation of the federal government to the tribes has been described, often interchangeably, as that of a “trustee” and as a “guardian.” I see these as variants along the scale of specificity, and so not as

¹¹⁵ As commentators have noted (Dunaway, *supra* note 103, at 195; Torgerson, *supra* note 109, at 169), President Clinton’s Executive Order No. 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67, 249 (Nov. 6, 2000) constituted implementation of the trust doctrine in executive dealings with tribes. Torgerson identifies the same principles already appearing in early legislation such as the Northwest Ordinance and the Indian Trade and Intercourse Acts. *Id.* at 168. Thus all three branches at some time have acknowledged and bound themselves by a version of the trust doctrine.

irreconcilable as is sometimes claimed.¹¹⁶ These two types of fiduciaries differ: a trustee's duty can be described in terms of fiduciary "depth"—a high degree of loyalty and care as regards a narrow area of concern—whereas the guardian's duty has greater "breadth"—perhaps not to the same high standard as a trustee, but over a wider area of concerns, because the goal is to provide for the ward's "best interests" in general. The government's narrower trustee duties are the sort manifested in cases dealing with fiscal and proprietary affairs of the tribes. So, depending on the circumstances which established the obligation, the Supreme Court has either rejected¹¹⁷ or found¹¹⁸ an enforceable fiduciary duty as a trustee. But at the same time, the Court has also upheld trust duties relating more to the broader role of a guardian concerned with the overall best interest of the ward, not just specific fiscal matters.¹¹⁹

It is this broader, more protective "guardian" version of the trust doctrine that has been identified by some commentators as applicable for the protection of Indian cultural

¹¹⁶ Dunaway, *supra* note 103, at 193-94 distinguishes a middle level of duty where the obligations derive from specific statutes and treaties, but not imposing the strong trustee duties. He cites no cases which fall into this category, so it remains just a theoretical option which the Supreme Court has not yet implemented.

¹¹⁷ *United States v. Mitchell*, 445 U.S. 535 (1980) (Mitchell I); *United States v. Navajo Nation*, 537 U.S. 488 (2003).

¹¹⁸ *United States v. Mitchell*, 463 U.S. 206 (1983) (Mitchell II); *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

¹¹⁹ *Seminole Nation v. United States*, 316 U.S. 286 (1942) (federal government has "charged itself with moral obligations of the highest responsibility and trust" in Indian affairs); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (federal trust relation requires good faith conduct even in absence of specific statutory or treaty undertakings). *See also* COHEN, *supra* note 102, at 221: "However, where Congress is exercising its authority over Indians rather than some other distinctive power, the trust obligation apparently requires that its statutes be based on a determination that the Indians will be protected." Torgerson, *supra* note 109, at 180-81 likewise distinguishes two levels of fiduciary duty under the trust doctrine, but rejects the guardian version as ineffectual to protect Indian interests. But that depends on what interests one is seeking to preserve. If one wishes to use the proverbial shield against government encroachment on Indian sovereignty, the guardianship version is inapt. But if one seeks affirmative action as a sword to promote a protected right, the guardian side of the trust doctrine is more appropriate. Torgerson is mistaken to abstract the application of the trust doctrine away from the substantive rights to be protected. The two versions of fiduciary relation are complementary and both have their respective roles in upholding the rights of Indians.

rights.¹²⁰ Sharon O'Brien has noted a line of cases where an expansive interpretation of the trust doctrine has cast the federal government in the role of general defender of Indian welfare.¹²¹ A particularly relevant example she cites is *Santa Clara Pueblo v. Martinez*.¹²² O'Brien observes that the Court's upholding a discriminatory rule regarding tribal membership for children from mixed marriages was an instance where "the United States was obligated to protect Indian status and culture" by denying the complainant's claim.¹²³

If these arguments are valid that the guardian-style trust relationship is broad enough to encompass protection of cultural rights such as religious practices and measures to maintain and preserve the tribe as a distinct entity, there can be little doubt that language rights would come well within the scope of such a doctrine. Language is one of the prime incidents of ethnicity, and linguistic maintenance is one of the principal requirements for preservation of cultural distinction of the group. As will be seen below in Part III.A, the connection between cultural survival and language maintenance has been recognized expressly by Congress, which has also explicitly undertaken the primary responsibility for preserving that heritage to the future.¹²⁴ It must be admitted that the expansive guardian-based duty envisioned here and by the above commentators is far from established in Indian jurisprudence, but it provides one more

¹²⁰ See Sharon L. O'Brien, *Freedom of Religion in Indian Country*, 56 MONT. L. REV. 451, 474-84 (1995); Jeri Beth K. Ezra, Comment, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705, 728-35 (1989).

¹²¹ O'Brien, *supra* note 120, at 475-79, citing such cases as *Talton v. Mayes*, 163 U.S. 376 (1896) and *Morton v. Mancari*, 417 U.S. 535 (1974) as setting Indians in a separate realm of discourse as regards protections which the federal government is obliged to provide.

¹²² 436 U.S. 49 (1978); O'Brien, *supra* note 120, at 477.

¹²³ O'Brien, *supra* note 120, at 477.

¹²⁴ 25 U.S.C. §§ 2901(1)-(3), 2903(1) (2001); see text accompanying note 152, *infra*.

avenue for protection of indigenous language rights at a domestic, fundamental level.¹²⁵

B. LANGUAGE RIGHTS AS HUMAN RIGHTS

Several multilateral treaties addressing human rights to which the United States is a signatory provide at least indirect protections for linguistic minorities and guarantee non-discrimination based on language. This is indicative of a greater interest in linguistic rights in other countries and in international law than is found in American jurisprudence.¹²⁶ As these instruments can have the force of law in the United States,¹²⁷ they provide an additional source of protections for indigenous and other linguistic minorities.

1. Global Guarantees.

The international human rights regime begins with the Charter of the United Nations.¹²⁸ Although the Charter is considered to have a 'dual nature' of both constitutive and declarative functions,¹²⁹ no specific rights are spelled out there. Still, all

¹²⁵ The Native Hawaiian Recognition Act of 2003 (the Akaka Bill), S. 344, 108th Cong. § 2(3), (20) (2003), could be interpreted as extending the trust doctrine applicable to Indians to Hawai'ians. Indeed, the Select Committee's report on the Akaka Bill contains a lengthy discussion analogizing Hawai'ian natives to continental Indians and arguing for no legal distinction between them as regards federal powers and duties. S. REP. NO. 108-85, at 22-29 (2003). The report also quotes from 1920 congressional testimony by Secretary of the Interior Franklin Lane that the trust doctrine applied equally to Hawai'ians as to Indians. *Id.* at 13.

¹²⁶ For an overview of American language rights in comparison with European Union treatment, see Jennings Kohlberger, Note, *Using Principles of International Law to Reshape American Legislation on State Official English Laws*, 29 J. LEGIS. 253 (2003); see also DEL VALLE, *supra* note 1, at 328-45. For a discussion of the limitations of international human rights regimes to protect indigenous populations, see Joel Ngugi, *The Colonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa*, 20 WIS. INT'L. L.J. 297 (2002).

¹²⁷ See notes 19-22 *supra* and accompanying text. Ratified treaties are legally binding law, though if not self-executing, specific recourse may be lacking in the courts. If a state signs a treaty, it is at least committed to not taking any action contrary to the purposes of the agreement. Vienna Convention on the Law of Treaties, Apr. 24, 1970, art. 12, 1155 U.N.T.S. 331. The Vienna Convention was signed but not ratified by the United States; it is nonetheless treated as the customary law of treaties by the State Department. HENKIN ET AL., *supra* note 24, at 307.

¹²⁸ U.N. CHARTER, June 26, 1945, 3 Bevans 1153, 59 Stat. 1031 (1945).

¹²⁹ Edward Stettinius, Excerpt from Report to the President on the Results of the San Francisco Conference, by the Chairman of the United States Delegation, the Secretary of State, DEP'T. ST., PUB. 2355, CONF. SER. 72, June 26, 1945, at 4.

adherents are committed by Article 1(3) to “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to...language....” Members of the U.N. are pledged to joint and separate action to achieve these goals.¹³⁰ Member states also agree to act in good faith to fulfill their obligations under the Charter.¹³¹ The Charter therefore places non-discriminatory observance and promotion of human rights at the foundation of the obligations of member states, listing language explicitly as one of the prohibited bases for discrimination.

The particulars of these human rights and fundamental freedoms are contained in three instruments which together are sometimes referred to as the ‘International Bill of Rights’:¹³² the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant of Economic, Social and Cultural Rights (ICESCR).

The UDHR¹³³ was unanimously adopted by the General Assembly of the United Nations. Although it is not a treaty, it may have some of the force of customary international law.¹³⁴ Article 2 again lists language as one of the impermissible bases for invidious discrimination. Guarantees of equal protection (art. 7), nationality (art. 15), free speech (art. 19), realization of cultural rights (art. 22), education (art. 26), and participation in cultural life (art. 27) implicitly shield linguistic minorities.

¹³⁰ U.N. CHARTER, arts. 55, 56.

¹³¹ *Id.* art. 2(2).

¹³² HENKIN ET AL., *supra* note 24, at 320.

¹³³ G.A. Res. 217A, UN GAOR, 3rd Sess., Pt. I, at 71, UN Doc. A/810 (1948).

¹³⁴ RESTATEMENT (THIRD) OF FOREIGN RELATION LAW § 102, cmt. g (1987) (resolutions of international organizations passed by qualifying majorities may be binding on members); *see also id.* § 103 cmt. c (effect of non-binding resolutions) and § 701 cmt. d (at least some rights under UDHR are binding obligations under the U.N. Charter).

The ICCPR¹³⁵ provides a binding legal instrument for some of the UDHR provisions. It has been signed and ratified by the United States, but with the declaration that its substantive provisions are not self-executing. These provisions include the acknowledgment that all peoples have a right to freely pursue their cultural development (art. 1); to be free from discrimination based on language (arts. 2(1), 26); to have an effective remedy for violations of rights, even against officials (art. 2(3)); to have court documents and proceedings interpreted when required (art. 14(3)); to freedom of expression (art. 19); to freedom of association (art. 22); to protection of minors regardless of language (art. 24); and for linguistic minorities to use and enjoy language within their group (art. 27).¹³⁶

The United States has signed but not yet ratified ICESCR.¹³⁷ It repeats the anti-discrimination provisions of Articles 1 and 2 of the ICCPR, but adds no specific additional protections for language groups.¹³⁸

2. Regional Guarantees.

The United States is a party to the Charter of the Organization of American States (OAS).¹³⁹ It has been held that the appended American Declaration of the Rights

¹³⁵ ICCPR, Oct. 5, 1977, 999 U.N.T.S. 171, 138 CONG. REC. 8068 (1992).

¹³⁶ The General Assembly has passed a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res. 135, UN GAOR, 47 Sess. Supp. 49 at 210, UN Doc. A/RES/47/135 (1992), which was “inspired by the provisions of article 27” of the ICCPR. This provides more specific goals and measures states are to undertake to protect minorities, including providing where possible for “adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.” *Id.* art. 4(3). Also under consideration is a draft Declaration on the Rights of Indigenous Peoples, UN ESCOR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Docs. E/CN.4/Sub.2/1994/2/Add.1 (1994).

¹³⁷ ICESCR, Oct. 5, 1977, 993 U.N.T.S. 3.

¹³⁸ The International Labor Organization has promulgated a Convention Concerning Indigenous and Tribal Peoples, June 27, 1989, C169, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?c169> (last visited Oct. 31, 2003). The Convention contains requirements of protection and active promotion for indigenous languages, including native language instruction for children. The United States is a member of the ILO, but has not ratified the convention.

¹³⁹ O.A.S. CHARTER, Apr. 30, 1948, 119 U.N.T.S. 3, 96 CONG. REC. 13,613 (1950).

and Duties of Man¹⁴⁰ is an authoritative interpretation of members' Charter obligations.¹⁴¹ The U.S. has signed, but not ratified, the separate American Convention on Human Rights.¹⁴² The Charter lists cultural development as one of the OAS purposes (arts. 2(f), 30, 31), while the Declaration protects the right to expression "by any medium whatsoever" (art. IV), to participate in cultural life (art. XIII), and to cultural association (art. XXII). The Convention confirms these rights (arts. 13, 16), but also allows the regulation of voting on the basis of language (art. 23(2)). However, advocacy of hatred based on language is outlawed (art. 13(5)). States parties commit themselves to measures for progressively achieving the cultural rights standards of the Charter (art. 26).¹⁴³

Indigenous languages can therefore look to global and regional human rights guarantees for an additional source of legal protection. As will be argued in Part IV *infra*, international law is perhaps the best remaining avenue for protecting these languages.

III. LANGUAGE RIGHTS UNDER STATUTE AND TREATY

A. NATIVE AMERICAN LANGUAGES ACTS

Indigenous people in the United States have, since 1990, possessed a unique statutory protection which no other linguistic minority in the country has. This is the Native American Languages Act of 1990.¹⁴⁴ The force of this legislation is a "repudiation of past government policies aimed at suppressing and ultimately eradicating the

¹⁴⁰ O.A.S. Res. XXX, O.A.S. Off. Rec., OEA/Ser. L/I.4 Rev. (1965).

¹⁴¹ HENKIN AT AL., *supra* note 24, at 343 n.1.

¹⁴² ACHR, June 1, 1977, 1144 U.N.T.S. 123.

¹⁴³ A Proposed American Declaration on the Rights of Indigenous Peoples, Annual Report of the Inter-American Commission on Human Rights 1996, OEA/Ser. L/II.95 doc. 7 rev. at 633 (1997) includes obligations to take measures to promote indigenous language media and use in administrative, legal, and political affairs (art. VIII).

¹⁴⁴ Pub. L. No. 101-477, Title I; 104 Stat. 1152, 1153 (1990); codified at 28 U.S.C. §§ 2901-2906 (2001); hereinafter referred to as NALA.

traditional languages of the indigenous people of the United States and replacing them with English.”¹⁴⁵ In its ringing words, “NALA embodies the most explicit and sweeping endorsement of native-language maintenance ever issued by the federal government.”¹⁴⁶ But the promise of the lofty sentiments is attenuated by deficiencies in implementation and enforcement.

1. NALA of 1990.

Senator Daniel Inouye and nine co-sponsors introduced S. 1781 into the 101st Congress on October 23, 1989.¹⁴⁷ The bill was based on resolutions adopted at the International Native American Languages Issues Institute in 1988.¹⁴⁸ The Select Committee on Indian Affairs favorably reported on the bill on March 7, 1990, finding “[l]anguage is the basis of culture.”¹⁴⁹ The bill as amended in committee was passed unanimously by the Senate on April 3.¹⁵⁰ It was later incorporated into a Senate substitute of a House bill relating to Native American community colleges and passed both houses as S. 2167.¹⁵¹

A statement of findings at the start of NALA¹⁵² consists of 10 clauses which acknowledge the uniqueness of Native American languages and cultures, whose

¹⁴⁵ Dussias, *supra* note 4, at 939.

¹⁴⁶ DEL VALLE, *supra* note 1, at 290.

¹⁴⁷ 135 CONG. REC. S13,851 (1989). For a fascinating insider’s account of the passage of NALA and NALA 2 by a staffer of the Select Committee, see Robert D. Arnold, “...*To Help Assure the Survival and Continuing Vitality of Native American Languages*,” in GREEN BOOK, *supra* note 7, at 45.

¹⁴⁸ S. REP. NO. 101-250, at 3 (1990), reprinted in 1990 U.S.C.C.A.N. 1840.

¹⁴⁹ *Id.* at 1. The Department of Interior’s position letter took a stand against NALA, while still claiming the Department supported the promotion of Native American languages. *Id.* at 9. It cited costs and impracticality of implementing the language education provisions. Seeming to ignore the necessary role of primary users for the survival of any language, Interior stated “[f]inally, any legislation of this kind must ensure that the Native American language does not supplant English, as the main language.” *Id.* at 10.

¹⁵⁰ 136 CONG. REC. S3916 (1990).

¹⁵¹ 136 CONG. REC. S11,137, H9487 (1990). Arnold, *supra* note 147, at 46 indicates that the bill faced strong opposition in the House from the English-only lobby and was saved only by incorporating it into a measure not bearing the word “language” in its title.

¹⁵² 25 U.S.C. § 2901 (2001).

survival the United States has the responsibility to ensure. Noting the special status of Native Americans, including “the policy of self-determination for Native Americans,” the centrality of their language to their culture, and the widespread view of indigenous languages as “anachronisms,” Congress admits it has failed to maintain a consistent, clear, and comprehensive language policy, with the result that government actions have caused the suppression and extermination of Indian languages. Mention is made also of the link between native language suppression and lower academic achievement, an effect contrary to the public interest. Two clauses even make reference to ideas akin to language ecology notions of the loss of communicative resources and collective human experience through language loss. These findings constitute a broad *mea culpa* for centuries of cultural imperialism, appearing to mark “a clean break with the past as far as federal government policy toward Native American languages was concerned.”¹⁵³

Although some of these findings appear to refer to the specific legal posture of American Indians,¹⁵⁴ NALA applies not only to Amerindian, Eskimo, and Aleut peoples, but also to Native Hawai‘ians¹⁵⁵ and “any descendant of aboriginal people of any island in the Pacific Ocean that is a territory or possession of the United States.”¹⁵⁶ Thus, NALA applies to indigenous languages in general in U.S. territory, even though there is no long-standing history of eradication efforts against languages such as Chamorro in Guam, Palauan, or Sāmoan.¹⁵⁷

¹⁵³ Dussias, *supra* note 4, at 944.

¹⁵⁴ 25 U.S.C. § 2901(2): “special status is accorded to Native Americans...a status that recognizes distinct cultural and political rights, including the right to continue separate identities”; § 2901(8): “the United States policy of self-determination for Native Americans.”

¹⁵⁵ Defined as U.S. citizens who are provable descendants of inhabitants of Hawai‘i prior to 1778; 20 U.S.C. § 7517 (2002).

¹⁵⁶ 25 U.S.C. § 2902 (Supp. 2003).

¹⁵⁷ The Department of Interior opposed NALA in part because of its application to Pacific Islanders. S. REP. NO. 101-250, at 10 (1990). In his statement on signing NALA 2, President Bush the Elder also expressed reservations

Section 2903 declares it to be the policy of the United States to preserve, protect, and promote rights to use and develop Native American languages. To this end the government endeavors to encourage and support the use of indigenous languages in education, including making exceptions to teacher certification to facilitate instruction in native languages. Specifically recognized is the right of native governing bodies to order native language-medium instruction and to give official status to their languages.¹⁵⁸ Native language proficiency is to be given comparable academic credit by higher education institutions as they give for foreign language proficiency, and all levels of education are to be encouraged “where appropriate” to include indigenous languages in the curriculum.¹⁵⁹

Section 2904 in particular provides a strong assertion of right to public use of native languages; it reads: “The right of native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, including public supported education programs.” However, as if in counterbalance to this heady support for native languages’ preservation, NALA adds at the end that “[n]othing in this chapter shall be construed as precluding the use of Federal funds to teach English to Native Americans.”¹⁶⁰

The sole directive measure in NALA, Section 2905, requires the President to order all federal agencies to evaluate laws, policies, and procedures with an eye for how to best implement the policies of NALA. The President was directed to report back to

about including Hawai‘ians and Pacific Islanders within the scope of its programs as a race-based classification. *See* Statement by President George Bush upon Signing S. 2044, 28 WEEKLY COMP. PRES. DOC. 2133 (Nov. 2, 1992), *reprinted in* 1992 U.S.C.C.A.N. 2963.

¹⁵⁸ 25 U.S.C. § 2903(5), (6) (2001) .

¹⁵⁹ 25 U.S.C. § 2903(7), (8) (2001).

¹⁶⁰ 25 U.S.C. § 2906 (2001).

Congress by October 30, 1991 with recommendations to amend federal law to comply with NALA.

As can be seen, NALA is basically a statement of government policy; it contains no substantive mandates for achieving its goals.¹⁶¹ Despite its broad scope and denunciation of past injustices, the measure charts no particular course for how to reverse these depredations.¹⁶² Its educational policy statements only “encourage” state and local school officials to implement its suggestions.¹⁶³ Apart from the one provision in § 2905 to require administrative review of law and procedures, no concrete action is put into motion by NALA. The presidential report to appear no later than 1991 has not materialized.¹⁶⁴ Nor is it clear, as noted below, whether NALA even created any enforceable rights.¹⁶⁵ Only the bar in § 2904 against restrictions on native language use in any public proceeding and the confirmation in § 2903(5) and (6) of native governing bodies’ rights to mandate use of native languages in schools or official business seem to make new assertions of positive rights.

2. NALA of 1992.

In recognition of some of these deficiencies rendering NALA incomplete, Senator Inouye sponsored a new proposal in the next Congress to add authorization for specific

¹⁶¹ Dussias, *supra* note 4, at 944.

¹⁶² Dussias finds the statements assuming blame for past policies half-hearted. The findings in § 2901 state the devastation of native languages resulted from a lack of a clear and consistent policy by the government. She points out that the government actually had a clear and consistent policy, namely linguistic annihilation: “The findings failed to acknowledge, let alone condemn, the damage done by government efforts to eradicate Native American languages.” *Id.* at 941.

¹⁶³ The Select Committee on Indian Affairs stated “It is not the intent of this Act to create new Federal programs.” S. REP. NO. 101-250, at 3 (1990); the Congressional Budget Office estimated enactment “would result in no significant cost” to the government. *Id.* at 8. However, the Department of Interior’s strong opposition to NALA cited a potential cost of \$20 million to implement its educational demands. *Id.* at 10. Arnold, *supra* note 147, at 46 identifies this potential expenditure as the main objection from the Bush administration to the bill.

¹⁶⁴ Dussias, *supra* note 4, at 944 n.253.

¹⁶⁵ DEL VALLE, *supra* note 1, at 291.

language-promotion programs.¹⁶⁶ This became the Native American Languages Act of 1992.¹⁶⁷ Critics have noted that NALA lacked any teeth precisely in that none of its lofty goals were backed by budgeted programs.¹⁶⁸ NALA 2 was designed to address this deficiency by providing a specific grant program for assisting in language survival and appropriating funding for that purpose in the current and future years.¹⁶⁹

NALA 2 amended the Native American Programs Act to include a program for grants of up to three years for projects “ensuring the survival and continuing vitality of Native American languages.”¹⁷⁰ The application process is open to any organization eligible to receive funds under the Native American Programs Act and qualifying projects include those promoting intergenerational language use, training of language teachers, development of pedagogic materials, training in producing indigenous language broadcasting, and preservation of oral resources, as well as equipment for language projects.¹⁷¹ Grantees are required to provide 20% matching funds.¹⁷²

NALA 2 initially appropriated \$2 million for all these purposes for fiscal year 1993 “and such sums as may be necessary” for the following four years.¹⁷³ In subsequent years, however, Congress found the “sums necessary” to be half the original amount, returning to the initial level only in fiscal years 1998 and 1999,¹⁷⁴ remaining at \$2 million

¹⁶⁶ Dussias, *supra* note 4, at 946, quoting Sen. Inouye’s remarks on introducing the legislation.

¹⁶⁷ Pub. L. No. 102-524, 106 Stat. 3434 (1992), codified at 42 U.S.C. § 2991b-3, hereinafter NALA 2.

¹⁶⁸ Dussias, *supra* note 4, at 944-45; DEL VALLE, *supra* note 1, at 290-91.

¹⁶⁹ S. REP. NO. 102-343, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2954. The committee report not only cited the history of linguistic repression, but also language ecology concerns for the loss of language resources akin to loss of biodiversity. *Id.* at 3-4.

¹⁷⁰ 42 U.S.C. § 2991b-3(a) (2001).

¹⁷¹ *Id.* (b).

¹⁷² *Id.* (e).

¹⁷³ 42 U.S.C. § 2992d(f) (2001). This amount was a reduction by the House from \$5 million in the original Senate version. Dussias, *supra* note 4, at 949-50. *See* Arnold, *supra* note 147, at 48 for the struggle over the funding in the House which threatened to sink NALA 2 altogether.

¹⁷⁴ Dussias, *supra* note 4, at 950 n.290.

per annum since.¹⁷⁵

Although NALA 2 provides at last some concrete government support for the promotion and maintenance of indigenous languages, commentators have criticized the legislation on two accounts. First, the amount of funding appropriated to the task of drawing back from the brink of extinction over 150 languages in 30 states has been viewed as inadequate and disproportionate to the crisis these linguistic communities face.¹⁷⁶ Such expenditures do not “demonstrate a serious and sustained commitment on the part of Congress to attempt to undo the damage to the languages caused by past government policies.”¹⁷⁷ Second, the requirement of 20% matching funds is seen as setting a high barrier for many of the smallest and most endangered language communities.¹⁷⁸ The wide territory over which the available funds must be stretched and the fiscal hurdles facing the frequently tiny remnant communities severely limit the efficacy of NALA 2’s largesse.

3. Effects of NALA.

Efforts have been made since to amend NALA to add support for a specific program of total immersion instruction and preschools in Native American languages.

¹⁷⁵ 65 Fed. Reg. 5978, 5979 (Feb. 7, 2000) (FY 2000); 65 Fed. Reg. 64,705, 64,706 (Oct. 30, 2000) (FY 2001); 66 Fed. Reg. 51,794, 51,794 (Oct. 10, 2001) (FY 2002); 68 Fed. Reg. 2057, 2057 (Jan. 15, 2003) (FY 2003).

¹⁷⁶ DEL VALLE, *supra* note 1, at 291; Dussias, *supra* note 4, at 950 (noting the government spends \$1 million a year each to save Florida panthers, but \$2 million a year total for all endangered Native American languages). Contrast also the amounts spent on assimilation of natives. *See* 67 Fed. Reg. 30,833 (May 8, 2002) (allocating \$5 million to support teaching English to Native American children).

¹⁷⁷ Dussias, *supra* note 4, at 950.

¹⁷⁸ *Id.* The original S. 2044 imposed only a 10% matching requirement. The Administration for Native Americans in the Department of Health and Human Services, which would administer the NALA 2 grants, objected to this deviation from the usual level of matching in Indian programs. S. REP. NO. 102-343, at 9 (1992). Curiously, the Administration reports it had \$3.7 million available in fiscal year 2002 for language preservation and promotion uses under NALA 2. *See* Administration for Native Americans, *About the ANA*, at <http://www.acf.hhs.gov/programs/ana/about.html> (last updated Oct. 16, 2003). This indicates that as much as 85% of a typical year’s appropriation had not been awarded and had accumulated in the ANA’s coffers. The 20% hurdle may be part of the explanation for this, since there has been no shortage of applications for funds.

Sen. Inouye introduced S. 2688 in 2000 at the tail end of the second session of the 106th Congress. The Select Committee reviewed the results of NALA and NALA 2 and stated that 166 grants had been awarded totaling over \$13 million.¹⁷⁹ However, at the same time, there had been 737 applications seeking over \$63 million.¹⁸⁰ Nonetheless, it found that schools teaching native languages had been set up for Hawai'ians, Navajo, Choctaw, Mohawk, Northern Arapaho, Blackfeet, Yup'ik Eskimo, "various California tribes," and the Cochiti Pueblo.¹⁸¹ The new proposal would expand the granting authority to support established "survival schools" utilizing at least 700 hours per year of immersion instruction with the goal of achieving "functional fluency" within three years.¹⁸² In addition, money would be granted to establish child-parent "language nests" based on the model developed by the Maori in New Zealand.¹⁸³ With some reservations which were addressed in the amended substitute bill, the Clinton administration supported the proposal.¹⁸⁴

The bill was reported favorably out of committee and was passed by the Senate.¹⁸⁵ In the House it was referred to committee, but died there.¹⁸⁶ Sen. Inouye has since revived the measure as S. 575 in the 108th Congress. The bill, co-sponsored by Republican Senator Ben Campbell from Colorado, the only American Indian in the Senate, has been referred to committee; a companion measure, H.R. 2362, was

¹⁷⁹ S. REP. NO. 106-467, at 3 (2000).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 7.

¹⁸³ *Id.* at 6.

¹⁸⁴ *Id.* at 10-16 (statement of Assistant Secretary of Education Michael Cohen).

¹⁸⁵ 146 CONG. REC. S19,158 (2000).

¹⁸⁶ 146 CONG. REC. H10,033 (2000).

submitted in the House.¹⁸⁷

In light of low levels of financial support under NALA 2 and the limited express protections of the original NALA, promotion of indigenous languages under federal law remains largely a matter of well-intentioned policy statements.¹⁸⁸ The small store of judicial interpretation of NALA confirms this view. Two federal district court cases—decided by the same judge—have considered whether NALA provides any basis for the protection and promotion of the Hawai‘ian language. In *Tagupa v. Odo*¹⁸⁹ a Hawai‘ian-speaking attorney-plaintiff argued that an order requiring him to respond at a deposition in English violated the state constitution and his rights under NALA. Chief Judge Kay, ruling as a case of first impression, held there was no enforceable right under NALA. Despite the language of § 2904 that “[t]he right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding...” (emphasis added), the court held that Congress did not intend to apply NALA to judicial proceedings.¹⁹⁰ The court’s main reason for this holding appears to be that NALA was primarily concerned with educational use of indigenous languages. But Judge Kay also noted that Tagupa was a fluent English speaker and “no legitimate fact finding rationale supports his right to give a deposition in a language other than English.”¹⁹¹ Moreover, “permitting Mr. Tagupa to give his deposition in Hawaiian would

¹⁸⁷ S. 575, Bill Summary and Status File, THOMAS Legislative Information, Library of Congress, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:Sn00575:@@L&summ2=m&> (last visited Nov. 15, 2003).

¹⁸⁸ Dussias, *supra* note 4, at 972. Funding for Hawai‘ian language instruction has also been made separately available under the Native Hawaiian Education Act, 20 U.S.C. §§ 7511-17 (2003). But efforts to enforce these apparent entitlements have met the same roadblock as under NALA; *see* *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661 (9th Cir. 2000) (no private cause of action under NHEA to enforce its provisions).

¹⁸⁹ 843 F. Supp. 630 (D.Haw. 1994).

¹⁹⁰ *Id.* at 632. But note the Senate Select Committee on Indian Affairs took part of its testimony on NALA 2 from a witness speaking in Navajo. *See* Arnold, *supra* note 147, at 47.

¹⁹¹ *Tagupa*, 843 F. Supp. at 633.

only add needless delays and costs to this dispute...”¹⁹² Citing the Federal Rules of Civil Procedure requiring “just, speedy, and inexpensive” determinations and policy concerns over costs of civil litigation, the court attached first loyalty to expeditious process over linguistic rights. In other words, whatever protections NALA provides for indigenous languages, they are subordinate to generalized concerns for litigation costs and apparently subject to some sort of showing of need.¹⁹³

In *Office of Hawaiian Affairs v. Dep’t. of Education*¹⁹⁴ one State of Hawaii agency sought to sue another state agency to require better provision for Hawai’ian language instruction in public schools. Judge Kay dismissed most of the claims under the Eleventh Amendment immunity for states.¹⁹⁵ However, plaintiffs also sought injunctions against violations of NALA. The court found such relief would not be barred by the Eleventh Amendment, but as a matter of first impression, it found no private cause of action under NALA, using the criteria of *Cort v. Ash*.¹⁹⁶ Judge Kay found NALA did not create a private action because it failed the second prong of the *Cort* test.¹⁹⁷ He cited four reasons: (1) legislative history weighed against implying a cause of action; (2) NALA itself speaks only of general policies and makes no specific directives; (3) most of its language is merely hortatory; and (4) there is no affirmative evidence in NALA it was meant to apply to the states as opposed to the federal government. A similar rationale

¹⁹² *Id.*

¹⁹³ The exhortation of FED. R. CIV. P. 1 that the rules be construed also to secure a just determination seems a counterbalance to the expediency factors in the context of a litigant who expresses a preference for proceeding in his own language.

¹⁹⁴ 951 F. Supp. 1484 (D.Haw. 1996); hereinafter referred to as *OHA*. See Dussias, *supra* note 4, at 964-72 for an extended discussion of this case; see also DEL VALLE, *supra* note 1, at 291-92.

¹⁹⁵ *Id.* at 1490-93.

¹⁹⁶ 422 U.S. 66 (1975). A statute permits a private cause of action if (1) plaintiff belongs to a special group protected by the law; (2) there is legislative intent to create a cause of action; (3) a private cause of action is consistent with the statute’s purpose; and (4) the cause of action is not one traditionally relegated to state law. *Id.* at 76-79.

¹⁹⁷ *OHA*, 951 F. Supp. at 1494-96.

was used to deny that plaintiffs had a cause of action under 42 U.S.C. § 1983 to enforce NALA, because again it was vague and did not impose binding obligations on the states.¹⁹⁸ Finally, the court refused to extend the remedy of an injunction to address future effects of past discriminatory activities by the state,¹⁹⁹ opining that such relief is appropriate only to effect a transition from a discriminatory to an unbiased system and has never been applied outside the context of desegregating schools. Since linguistic discrimination was no longer practiced in Hawai'i, an injunction was not available to make whole those who were not directly victimized by unequal treatment.²⁰⁰

Judge Kay's analysis in *OHA* is subject to criticism. First, in seeking the legislative intent behind NALA, he relied primarily on President Bush's statement on signing NALA, which stated the President "construe[d] the guarantee to public use of Native American languages in 25 U.S.C. § 2904] as a statement of general policy and d[id] not understand it to confer a private right of action on any individual or group."²⁰¹ As Professor Dussias observes,²⁰² it is at least curious to consult pronouncements of the executive to determine legislative intent: "While this statement clearly expressed President Bush's opinion on whether NALA created a private cause of action, it said nothing about Congress' intent with respect to the issue. The court admitted that the congressional legislative history was silent on the issue...."²⁰³ But, in fact, the record of adoption of NALA does contain references to its being conceived of as more than just a

¹⁹⁸ *Id.* at 1497-98, citing the criteria for enforcement via § 1983 in *Wilder v. Virginia Hosp. Ass'n.*, 496 U.S. 498, 509 (1990).

¹⁹⁹ *See Milliken v. Bradley*, 433 U.S. 267, 290 (1977).

²⁰⁰ *OHA*, 951 F. Supp. at 1499-1501.

²⁰¹ Statement of President George Bush upon Signing S.2167, 26 WEEKLY COMP. PRES. DOC. 1703 (Nov. 5, 1990), *reprinted in* 1990 U.S.C.C.A.N. 1849-1. It should be noted that President Bush construed even the most directive provision of NALA, the executive review ordered by 25 U.S.C. § 2905, as merely "advisory" under a separation of powers analysis. *Id.*

²⁰² Dussias, *supra* note 4, at 968-69.

²⁰³ *Id.* at 969.

wistful statement of sympathy with indigenous communities. The report of the Senate Select Committee spoke of NALA as fulfilling a need for a clear statement on indigenous languages and “to provide Native Americans with a tool to develop programs that they believe will enrich their children and perpetuate their cultures.”²⁰⁴ It also referred to government steps to fulfill “the mandate of this Act.”²⁰⁵ Such language casts the legislation as more than simple expression of good intentions, but as providing a practical instrument for effecting its goals and as a “mandate” on at least federal agencies.

Another flaw in the *OHA* court’s reasoning, both as to the direct enforceability of NALA and its indirect enforcement under § 1983, is the finding of no intention to make NALA binding on the states. In the findings section,²⁰⁶ NALA views the improvement in academics and human potential deriving from promotion of native languages as inuring to the benefit of “the United States, individual states, and territories....” Thus, the provisions were meant to subserve both state and federal interests. Although the individual declarations of policy are expressed as efforts to “encourage” educational authorities (typically governed by state law) to comply, subsequent analysis of the relationship between NALA and state law has treated the statute as a true mandate which state agencies must obey. The Arizona Attorney General, considering the scope of the state’s bilingual education ban in public schools serving the Navajo Nation, stated that NALA denied the state authority to prohibit teaching of Native American languages

²⁰⁴ SEN. REP. NO. 101-250, at 3 (1990) (emphasis added).

²⁰⁵ *Id.* (emphasis added).

²⁰⁶ 25 U.S.C. § 2901(7) (2001).

whether the public schools were on or off the reservation.²⁰⁷ The Attorney General opined that NALA prohibited any application of the anti-bilingualism state law to federally or tribally run schools.²⁰⁸ *Alaskans for a Common Language v. Kritz*²⁰⁹ was a case dealing with the right to intervene in a case challenging the constitutionality of an English-only law. However, the facts underlying the technical issue revealed that both the state attorney general and the proponents of the initiative themselves assumed that NALA would limit the application of the state constitutional provision.²¹⁰ Finally, Judge Kay's ruling distinguished *Rice v. Cayetano*,²¹¹ which held that the state steps into the federal government's shoes in administering programs for Native Americans. Although *OHA* held that NALA did not impose a trust relationship on the state regarding language preservation as did the Admissions Act in *Rice* as regards native land programs,²¹² such a trust relationship pre-exists for American Indians in general, as noted *supra* in Part II.A.2, and was re-confirmed in NALA.²¹³ It could be argued despite *OHA* that *Rice* suggests states who proxy for the federal government in operating Indian programs must comply with NALA as would federal agencies.

Review of the case law treatment of NALA seems to confirm Professor Dussias' assessment that the statute "was revealed not to have provided a basis for relief for individuals who are aggrieved by government failures to honor the policies NALA

²⁰⁷ ARIZ. ATTY. GEN. OP. NO. I01-006 (R00-062) 4-6 (2001). The Opinion quotes from *OHA* but apparently rejects its reasoning on applicability to the states: "Given the broad language in NALA and the general liberal construction in favor of Native Americans, this analysis assumes that NALA applies to State public schools." *Id.* at 6 n.7.

²⁰⁸ *Id.* at 3.

²⁰⁹ 3 P.3d 906 (Alaska 2000).

²¹⁰ *Id.* at 910, 913.

²¹¹ 941 F. Supp. 1529, 1543 (D.Haw. 1996). *aff'd*, 146 F.3d 1075 (9th Cir. 1998), *rev'd. on other grounds*, 528 U.S. 495 (2000).

²¹² *OHA*, 951 F. Supp. at 1495-96.

²¹³ *See* 25 U.S.C. §§ 2901(2), 2903(1) (2001).

purported to establish.”²¹⁴ She contrasts the lack of enforcement provisions in NALA and other federal Indian legislation with explicit grants of right of private causes of action in official-English legislation which has appeared routinely in congressional hoppers.²¹⁵ If *Tagupa* and *OHA* were correctly decided and NALA provides nothing more than pious sentiments, this “casts into considerable doubt the real commitment of Congress to addressing continued violations of important Native American rights...[and] adds to the impression...that Congress lacks serious, sustained interest in protecting the languages that were so long a target of government eradication efforts.”²¹⁶

B. LANGUAGE RIGHTS IN TRIBAL TREATIES

Nineteenth-century Indian commissioners were little concerned with cultural matters in their dealings with the Indian tribes. Their primary interests were peace, boundaries, and respective property rights.²¹⁷ The development of the Indian treaties shows a gradual increase in complexity and broadening of the areas addressed. For instance, still under the Articles of Confederation, the Treaty of Hopewell with the Cherokees in 1785 included so-called ‘bad men’ articles dealing with extradition of wrongdoers.²¹⁸ Following the War of 1812 and uprisings by Tecumseh and the Creeks and Seminoles, Congress appeared more willing to provide additional concessions to Indians who entered into treaties with the U.S., and so provisions for material and social

²¹⁴ Dussias, *supra* note 4, at 971.

²¹⁵ *Id.*

²¹⁶ *Id.* at 972. Note also that even the latest expansion of NALA in S. 575, 108th Cong. § 4 (2003) limits its funding to native language immersion schools which have already been operating at least three years. Thus no support is contemplated for promoting efforts in communities—no matter how dire the threat of language extinction—lacking resources to launch and maintain a survival school on a private basis.

²¹⁷ A good example of such a minimal treaty is the Treaty with the Six Nations (1784); see FRANCIS PAUL PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 4-5 (3d ed. 2000).

²¹⁸ Articles V-VIII, *see id.* at 6-8.

programs start appearing in the pacts. Thus in the Treaty with the Choctaw in 1830,²¹⁹ the U.S. agreed to provide, among various material supports such as farming supplies and a smithy, education to a rotating group of 40 Indian youths for the next 20 years.

Promises of educational support in the form of school funding or actual schools became a regular feature of Indian treaties, particularly from the 1840s onward. The accords themselves seldom include any more details about the purpose or operation of the schools than the numbers to be provided or the students to be served. But occasionally, one can read between the lines whether or not the schools could be instruments of native language maintenance. For instance, an early treaty containing an education provision is the Treaty with the Kaskaskia,²²⁰ where the government agreed to fund a Catholic priest and instruction of children “in the rudiments of literature.” This suggests an exogenous curriculum devoted to non-Indian subjects. Many treaties, however, specify no more than that “suitable instructors” will be provided for the tribe.²²¹ These provisions could be read either way, as allowing for cultural maintenance or imposing assimilation. While several treaties appear to favor exogeny by placing educational policy explicitly in the hands of the federal executive,²²² some expressly place education under the authority of the tribe, thus favoring endogenous, culture-maintaining education. The Wyandots’ treaty in 1842, for instance, placed the government-funded school “under the direction of the chiefs.”²²³

²¹⁹ *Id.* at 53-57.

²²⁰ 7 Stat. 78 (1803), KAPPLER, *supra* note 111, at 67-68.

²²¹ *See, e.g.*, Treaty with the Nisqualli and Puyallup, 10 Stat. 1132 (1854), KAPPLER, *supra* note 111, at 663.

²²² *See, e.g.*, Treaty with the Menominee, 7 Stat. 342 (1831), KAPPLER, *supra* note 111, at 322, giving the Secretary of War discretion how to spend tribal educational funds.

²²³ 11 Stat. 581 (1842), KAPPLER, *supra* note 111, at 535.

Initially the schools, even when clearly aimed at “civilizing” the tribes, were presented as boons the tribes could voluntarily partake in. For instance, the Treaty with the Winnebago²²⁴ provided for education in basic skills (the Three Rs), agriculture, domestic sciences “according to their ages and sexes” and such other branches of “useful knowledge” which the President deemed worthy; the treaty made participation explicitly voluntary. However, as we draw toward the beginning of the Allotment Era in Indian affairs with its strong assimilationist philosophy, the function of the government-provided schools changes and is usually made explicit. In the Treaty with the Pawnee,²²⁵ for example, education was now mandatory, and failure to attend would result in a reduction to the family’s share of tribal annuities. In the Treaty of Fort Laramie in 1868, article 4 mentions that a number of schools are to be built “to provide the elementary branches of an English education.”²²⁶ Shortly after, individual treaty-making ended, but concurrently there arose the pernicious Indian boarding school program, whose overt purpose was cultural genocide, including most prominently the eradication of Indian language use among the next generation.²²⁷

The treaties therefore ignore any discussion of native tongues, and when they do address matters touching on languages, it is to arrange for their replacement by English. There are only two instances where even oblique references to native

²²⁴ 7 Stat. 370 (1832), KAPPLER, *supra* note 111, at 346.

²²⁵ 11 Stat. 729 (1857), KAPPLER, *supra* note 111, at 764-65.

²²⁶ PRUCHA, *supra* note 217, at 109-13. About a half dozen other treaties in the late 1860s likewise specified this as the goal of their educational provision. See KAPPLER, *supra* note 111, at 977-1022. A Report of the Board of Indian Commissioners in 1869 recommended employment of English teachers as means of reducing misunderstandings between Indians and Whites. See PRUCHA, *supra* note 217, at 133-34.

²²⁷ Dussias, *supra* note 4, at 909-10. The infamous Carlisle boarding school was established in 1879 and by 1885 the Bureau of Indian Affairs had instituted a strict English-only policy. *Id.* at 912-14. The cruel persecution of those who dared to use Indian tongues in the boarding schools continued into the mid-twentieth century, scarring and linguistically denuding native people right into the present. See Andrea Smith, *Soul Wound: The Legacy of Native American Schools*, AMNESTY NOW, Summer 2003, at 14, 15.

language preservation are encountered in the body of Indian treaties.²²⁸ In the Treaty with the Western Cherokee²²⁹ the government made its usual promise to provide for schools, but—perhaps in recognition of the unique position of the Cherokee in having their own writing system²³⁰—the government pledged \$1,000 to purchase a printing press “to benefit and enlighten them as a people, in their own, and our language.” Though yoked with the promotion of English, the treaty contemplates federal government support for the maintenance of Cherokee. In the 1866 Treaty with the Creeks,²³¹ which may be another unique situation due to a Reconstruction-era interest in civil rights, article 10 provided:

The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of persons and property within the Indian territory, *provided however*, said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs.

Although not referring specifically to language rights, this broad recognition of aboriginal Creek customs provides a potential basis for a legal argument against actions which “interfere with or annul” the tribe’s traditional linguistic practices.

Indigenous peoples can find virtually no protection of language rights in the Indian treaties. In the first place, only a limited number of indigenous groups had concluded treaties with the United States before the cessation of treaty-writing in

²²⁸ The only other reference to language is in the provision in several treaties for a government-funded interpreter. For instance, the Treaty with the Snake, 14 Stat. 683 (1865) states in article 8 that the government will provide a Snake interpreter for the reservation. This may be read as a recognition that Northern Paiute could continue to be spoken on the reservation and the government would treat with the Snake on that basis.

²²⁹ 7 Stat. 311 (1828), KAPPLER, *supra* note 111, at 288-92.

²³⁰ Interestingly, the Cherokee plenipotentiaries signed the treaty using Sequoyah’s syllabary for their language. *Id.* n. m.

²³¹ See PRUCHA, *supra* note 217, at 98-101. The treaty also outlawed slavery among the Creek.

1871.²³² Without recognition by treaty or other official act, indigenous groups' rights are extremely limited.²³³ Second, even when formal treaties have been entered into, Congress still has the power to abrogate unilaterally any of their provisions in the public interest,²³⁴ even by implication.²³⁵ Thus protection for indigenous languages under the treaty regime is ephemeral at best, being based on implied readings of a few instruments having no special sanctity in the legal framework.

IV. ADEQUACY OF THE LEGAL RESPONSE

As may be gathered from the above review of the current legal framework for protecting indigenous language rights in the United States, there is a palpable gap between even the most supportive policy statements and the reality of governmental action. The expressions of support in NALA currently are just that, and the funding so far provided under NALA 2 is "meager."²³⁶

As discussed above,²³⁷ the United States has lost its revolutionary and progressive lead in the area of rights. It is now lagging behind the rest of the world by clinging to first generation civil rights and resisting efforts to recognize and promote the second generation of human rights, including linguistic human rights. Noted sociolinguist Joshua Fishman has identified three types of "language defense"

²³² There are over 360 treaties and agreements in Kappler's collection, but many of these are multiple treaties with the same groups; for example, the Five Civilized Tribes, the Sioux, and the Potawatomi each have nearly a dozen treaties with the U.S. As the government recognizes 556 native groups (65 Fed. Reg. 13,298 (Mar. 13, 2000).), obviously many Indian communities have no treaty. Many of these are the California mission Indians and the New Mexico Pueblos, who seem to have been treated as coming under U.S. sovereignty 'pre-domesticated' under Spanish and Mexican law.

²³³ Cf. *Tee Hit Ton Indians v. United States*, 348 U.S. 272 (1955) (absent confirmation by federal act indigenous group's title to land could be extinguished without compensation).

²³⁴ See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

²³⁵ See *United States v. Dion*, 476 U.S. 734 (1986) (Congress impliedly abrogated tribal eagle hunting rights in passing amendment to Eagle Protection Act).

²³⁶ Dussias, *supra* note 4, at 982.

²³⁷ See note 24, *supra*.

regimes.²³⁸ The first is called permissive defense, which is the civil rights-type umbrella protection against forced relinquishment of one's language. This is the standard U.S. approach to language rights.²³⁹ But it is the lowest level and least effective means of promoting language survival. Echoing Dussias' description of NALA, permissive rights are "largely symbolic gestures."²⁴⁰ The next level up is active language defense, which seeks to remedy past and current deleterious conditions for language survival. This is analogized to curative focus in medicine and consists of non-substantive measures which are "frequently too little [and] commonly too late."²⁴¹ The highest and most effective level of language defense is preventive (proactive) defense, which is equated in efficacy with preventive medicine. Proactive measures, such as have been implemented in Belgium, Québec, Catalonia, and Switzerland, actively promote the threatened language through legal status provisions and practical support ranging from funding of education and private cultural groups to economic development schemes.²⁴²

It is clear from this description of hierarchical language defense regimes that the United States scheme for indigenous language protection is at the most primitive stage of development. This must change if the indigenous languages in this country are to survive. A great deal of excellent work has been implemented—despite governmental apathy—at the grassroots level toward the survival of Native American languages.²⁴³ Such unofficial movements, especially in the face of official disinterest or even hostility,

²³⁸ Joshua Fishman & Gella Schweid Fishman, *Rethinking Language Defense*, in RIGHTS TO LANGUAGE, *supra* note 16, at 23, 24-27.

²³⁹ Indeed, Fishman & Fishman cite *Meyer v. Nebraska* as an example of this sort of defense regime. *Id.* at 24.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 25.

²⁴² *Id.* at 26-27.

²⁴³ For a survey of some of this work, see Dussias, *supra* note 4, at 982-90 and chapters discussing the efforts to revitalize Pueblo, Navajo, Hawai'ian, Karuk, Paiute, Arapaho, Mono, Inuit, Innu, Ohlone, and a number of languages of Southern California, Arizona, and Oklahoma in GREEN BOOK, *supra* note 7.

are recognized as being vitally important and often very effective.²⁴⁴ The Irish experience shows that official state recognition and titular respect for the minority language alone do not suffice to ensure survival.²⁴⁵ However, there remains a very broad area of concerns where private actors are powerless and only action by public entities can have significant impact.

Education is a prime example: schools and educational policy are an area often coming exclusively under the aegis of the government and private stakeholders may have limited influence.²⁴⁶ While many educational initiatives to save languages have begun with private efforts,²⁴⁷ the success of such efforts remains circumscribed in the absence of at least toleration by state educational authorities. As education of the next generation is frequently seen as the primary bulwark against language extinction, effective implementation of a revitalization program must secure cooperation of any bodies responsible for this area.²⁴⁸

Other areas vital to language survival which require public entity involvement include the need for coherent, comprehensive language planning policies based on

²⁴⁴ NETTLE & ROMAINE, *supra* note 12, at 176-86.

²⁴⁵ Despite being recognized as the official national language, Gaelic has continued to lose speakers since Irish independence. A number of factors have been identified as contributing to the lack of success, such as over-reliance on education, lack of central planning, and economic isolation of the language-reserved areas (*Gaeltachtaí*). See STEPHENS, *supra* note 2, at 460-61; REG HINDLEY, *THE DEATH OF THE IRISH LANGUAGE* 194-95, 203-07 (1990). In our times, a force having equal or greater potency than schoolhouse education is use of mass media for language-supportive uses. See, e.g., Colleen Cotter, *Continuity and Vitality: Expanding Domains Through Irish-Language Radio*, in GREEN BOOK, *supra* note 7, at 301 (outlining success of minority-language broadcasts); Stephen Greymorning, *Reflections on the Arapaho Language Project, or When Bambi Spoke Arapaho and Other Tales of Arapaho Language Revitalization Efforts*, in GREEN BOOK, *supra* note 7, at 287 (experience and results of dubbing Disney's *Bambi* into Arapaho). Access to modern media and technology is obviously a complex and expensive undertaking, and in the case of broadcasting, often requiring government cooperation.

²⁴⁶ Consider how the federal divide in the United States limits the power of even the national government to influence the curriculum. For example, take the restriction to hortatory phrases in the educational portions of NALA, see notes 159 and 197 *supra* and accompanying text.

²⁴⁷ The 'language nest' programs for Native American languages to be supported by pending bill S. 575 draw on the experience of voluntary nests organized in Hawai'i by the group 'Aha Pūnana Leo. See S. REP. 106-467, at 1 (2000). See also Michelle Nijhuis, *Tribal Talk*, SMITHSONIAN, Nov. 2003, at 36 (describing privately organized efforts to revive Blackfoot among tribal youth).

²⁴⁸ Twelve chapters in GREEN BOOK, *supra* note 7, are devoted to educational issues.

current linguistic research.²⁴⁹ The list of participants and complex, expert-driven activities necessary to a language revitalization program²⁵⁰ shows that such efforts are well beyond the capabilities of small survivor communities. Three of the six conditions identified by linguist David Crystal under which language revival movements have succeeded relate to the minority language's relationship to the dominant community,²⁵¹ conditions over which the language group itself may have very little control. The need for a broader, public approach to even the smallest community's language crisis is underscored by arguments that one of the largest threats to linguistic human rights is the effect of economic globalization and integration.²⁵² Such forces are frequently beyond the power of even national governments to control or influence.

In light of this discussion, it should be clear that at least one essential part of a plan for saving the indigenous languages of the United States is a supportive legal framework, one that not only provides passive protection against forced disglottalization of the threatened linguistic community, but actively and preventively seeks to promote the languages' survival. To date, NALA may provide a manifesto for a higher level of language defense, and NALA 2 perhaps may prime the pump for more than nominal funding for revitalization efforts. But if we desire to save the remaining indigenous languages from imminent extinction, immediate, concerted, and substantive action is required. The maximal program of full, preventive language defense appears unachievable when one considers the scope of success vis-à-vis the unmet need in the

²⁴⁹ See Leanne Hinton, *Language Planning*, in GREEN BOOK, *supra* note 7, at 51.

²⁵⁰ See CRYSTAL, *supra* note 13, at 154-56.

²⁵¹ *Id.* at 130-43. These are the minority's prestige, wealth, and legitimacy relative to the dominant culture. Crystal's sixth condition is access to modern technology (*Id.* at 141-43.), which I have indicated may require state involvement. See *supra* note 245.

²⁵² See Michael Clyne, *Promoting Multilingualism and Linguistic Human Rights in the Era of Economic Rationalism and Globalization*, in RIGHTS TO LANGUAGE, *supra* note 16, at 160; François Grin, *Market Forces, Language Spread and Linguistic Diversity*, in LANGUAGE: A RIGHT AND A RESOURCE, *supra* note 16, at 169.

12 years since the passage of NALA. Even a remedial, active defense policy may be unrealistic in today's budgetary environment and in light of the contemporary, popular conceit that we live in a 'color-blind society' where calls for special protective measures for particular disadvantaged groups receive jaundiced regard or even open hostility. And in view of the continued strength of the chauvinist English-only views in many parts of this country and in Congress,²⁵³ it may even be too much to establish a minimal program of simply holding the line against eradication by exclusion and malign neglect.

The prognosis for indigenous languages in the United States is grim indeed. In the face of a dire need for even museum-like preservation of the remaining languages, there seems to be little convincing pressure behind the sort of legislative effort necessary to stem the continuing loss of linguistic resources. The insider strategy has yielded minimal results. Perhaps the best hope for the surviving indigenous language communities in the United States lies in an outsider strategy, like the one advocated by Michael Tigar.²⁵⁴ Tigar points to international law as the next, best forum for the activities of the "lawyer as insurgent" in reshaping the legal landscape. Despite the present administration's desire to "bestride the narrow world like a Colossus," the effects of the global market and increased international integration may—eventually—bring the maverick U.S. into better compliance with international law, including the increased recognition of linguistic human rights.²⁵⁵ A resort to the conscience and

²⁵³ See Dussias, *supra* note 4, at 951-63.

²⁵⁴ MICHAEL TIGAR, *LAW AND THE RISE OF CAPITALISM* 312-19 (2d ed. 2000).

²⁵⁵ Particularly promising is the requirement under Article 2 of the ICCPR that states provide effective remedies for violations of human rights, even by state officials. Such provisions have frequently provided a vehicle for prosecuting human rights abuses, even where proof of more substantive violations may be lacking. See, e.g., *Rodriguez v. Uruguay*, Human Rights Committee, U.N. Doc. CCPR/C/51/D/322/1988, Annex (1994) (Uruguayan amnesty law found to violate Article 2 right to effective remedy by granting impunity to state officials implicated in torture). Denial of effective enforcement through private actions is the current Supreme Court's favorite means for crabbing the recognition of rights, as was seen in *Sandoval*. See text accompanying note 79, *supra*. See also *Lyng v.*

support of the broader, international community, ironically enough, may represent for some of these highly threatened languages the arrival of the 7th Cavalry just in the nick of time.

Northwest Indian Cemetery Protective Assoc., 485 U.S. 439 (1988) (no private cause of action under the American Indian Religious Freedom Act) and *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (age discrimination claim barred by state's sovereign immunity).

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