Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States

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In *Hernández v. New York*,[1] the Supreme Court held that prosecutors may strike potential jurors from the venire on the basis of their ability to speak a language other than English. Courts have consistently treated bi- and multilingualism as reasonable grounds for excluding individuals from participation in an institution long considered to be a fundamental site of civic engagement. Courts seem to fear that bilingual jurors will disrupt jury deliberations that are carefully cabined by legal procedures, which include court-sponsored translations of foreign-language testimony. The *Hernández* Court, despite its deference to the prosecutors, complicated the issue in its plurality opinion by highlighting the centrality of language to individual personality and the interpretation of meaning.

> It would be common knowledge in the locality that a significant percentage of the Latino population speaks fluent Spanish, and that many consider it their preferred language, the one chosen for personal communication, the one selected for speaking with the most precision and power, the one used to define the self.[2]

As the Supreme Court seems to have recognized in *Hernández*, suspicion of bilingualism in the selection of jurors has the bizarre effect of excluding bi- and multilinguals from participating in courtroom activities because they are, by the courts' estimations, *over*qualified.

Courts' clumsy treatment of the bilingual juror reflects a fundamental deficiency in our legal system. No coherent theory of the nature of language as a legal category exists. Indeed, language defies simple definition. It is at once a tool of communication, a lens through which people orient themselves to the world, and a symbol of allegiance to culture. It shapes the amorphous concept of identity and organizes the

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[1] 500 U.S. 352 (1991).

[2] *Id.* at 363–64.

concrete details of our lives. Language thus proves difficult to formulate as a legal construct because it is unclear whether to treat language as culture, ethnicity, or behavior. Much academic debate swirls around the question of official English, and political as well as educational controversy surrounds bilingual education. Bi- or multilingual ballots, courtroom translators, and the administration of public services in more than one language have all been sources of legal and scholarly controversy. Surprisingly, little effort has been made to understand how these rights or protections relate to one another and whether they can be understood as creating a particular status for the linguistic minority in American legal culture.

Throughout American history, language has informed the ways in which Americans have understood conflicts among different immigrant populations. Demands for bilingual education coincided with the nation's inception and the establishment of German and French language schools in Pennsylvania and Louisiana, respectively.[3] One scholar notes that the leaders of the Revolution issued key documents, including the Articles of Confederation, in German and French.[4] In the early years of the Republic, multilingualism was encouraged as a means of accessing scientific and artistic literature. Many of the states of the Southwest began as bilingual entities, conducting official business in English and Spanish. In New Mexico, territorial laws had to be translated *from* Spanish *to* English.[5]

Today, bilingualism finds itself in a more precarious position. For example, contemporary discussions of language policy are dominated by popular initiatives to abolish bilingual education in public schools in states such as Arizona and California, where voters have approved ballot initiatives to replace bilingual instruction with English immersion classes.[6] The combination of sizable immigration flows and a perceived strain on public resources and public culture have made the citizenship and language nexus urgent once again. The debate does not break down neatly into two camps, one pro-official English and the other pro-minority language rights. Instead, the meaning of concepts that undergird the language debate, such as inclusion, integration, and assimilation, are themselves contested. The debate concerns whether language should be un-

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[3] Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 290 (1992); *see generally* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 9–85 (James Crawford ed., 1992) (providing several accounts of the status of language rights throughout American history).

[4] Shirley Brice Heath, *Why No Official Tongue?, in* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY, *supra* note 3, at 20, 23.

[5] Perea, *supra* note 3, at 320.

[6] William Booth & Rene Sanchez, *Drug Reform Initiatives Receive Support of Voters*, WASH. POST, Nov. 9, 2000, at A48. Voters in Arizona approved the initiative to end bilingual education in public schools in November 2000, following the lead of California voters' approval of Proposition 227 in the spring of 1998.

derstood as a deficiency to be overcome, a personal characteristic that deserves protection from discrimination, or a group status that demands preservation. The answers that existing law provides constitute a patchwork of protections that lack an underlying conception of a larger political or constitutional project.

In this Article, I develop a comprehensive theory of what the legal status of language and linguistic minorities should be. By looking first to political and constitutional theory and then to doctrine and practice, I demonstrate that the concept of "language rights" has meaning in an American context and is not just reserved for officially multilingual societies such as Canada or Spain. I ultimately conclude that language is relevant to the individual's legal status and should be treated as such through a legal regime that accommodates linguistic difference and its effects. Accommodation will foster the participation of linguistic minorities by incorporating their linguistic practices into public life and recognizing that language is simultaneously mutable and constitutive.

This thesis unfolds as follows: First, existing case law treats language largely as a matter of antidiscrimination law. Such a narrow view proves insufficient as a way of understanding how language organizes people's lives and how linguistic minorities should be treated. A practical scheme for guiding judicial and legislative treatment of linguistic difference first requires a theoretical framework for understanding language as a legal category. The principle of free and equal access to participation in public life animates the language debate and should be at the heart of any effort to protect and empower linguistic minorities. Moreover, the ideological and cultural overtones of that debate suggest the potential to create language-based status hierarchies. Free and equal participation by linguistic minorities remains elusive when their linguistic practices are regarded as inferior to English-language customs. Reifying the dominant language in public discourse ensures that institutions of public life will be remote to those whose orientations encompass other languages.

Second, inherent in this status construction lies a tension between a commitment to equal participation and functionalist concerns. The arguments in favor of a lingua franca, which emphasize national unity and efficiency of communication, misconceive the nature of political participation and elide important demographic transformations underway in this country. Rather than thinking of political community in terms of a national conversation, we should understand it as a set of diversified and diffuse interactions that can occur in communities of all kinds through a variety of media. I resolve the tension between functionalist and status concerns by presenting a theory of *fluid civic identity*, or a vision of citizenship that allows the individual to have multiple foci of affiliation, including multiple cultural and linguistic affiliations.

This fluid civic identity more closely approximates the ways in which people interact with others and shape their private and public lives

than does a belief in American citizenship based on common culture, conduct, or practices. This view helps define a community of principle that enables broad and equal participation in public institutions by minorities in general and linguistic minorities in particular. The assimilationist and perhaps even integrationist thrust of the belief in a common citizenship no longer maps onto the reality of a nation in which communities of linguistic minorities are constantly replenished. Even as second and third generation immigrants become native English speakers, the combination of increasingly insignificant borders and constant waves of immigration ensure that linguistic difference exists in this country on a continuum that will never be absorbed into a monolingual mainstream.

The final challenge becomes crafting conditions that enable multiple communities with vastly different, "thick" forms of ethnic identity to interact with one another within a common community of principle without forcing individuals and groups to abandon the affiliations meaningful to them. The solution is accommodation. Applying a fluid conception of political community to the language debate does not demand that all linguistic minorities be transformed into monolingual English speakers but rather that linguistic difference be accommodated and multilingualism be embraced as a public asset. This theory of accommodation assumes that linguistic difference, in contrast to race or ethnicity under the existing legal regime, should be treated as relevant to an individual's status before the law. While current legal understandings of race and ethnicity necessarily inform the debate over how linguistic difference should be treated, we need not be bound by the existing doctrinal treatment of these categories in defining the legal status of the linguistic minority. Instead, we should broaden the inquiry and look to how the law accommodates other forms of difference—namely religion—to assist in the development of a legal theory of language. When consistent with the goal of eradicating language-based status differences to enable free and equal access and participation, the state should create space for linguistic minorities, as linguistic minorities, in public institutions.

In order to give this theory of accommodation meaning, we must consider the myriad spheres of life in which linguistic difference presents challenges and adjust the accommodation model to the demands of each particular sphere. In certain spheres, such as the workplace, linguistic minorities should be protected against discrimination, even if the state remains agnostic to the legitimacy of linguistic difference. Linguistic difference must never create a barrier to the protection of basic rights. In other spheres, the commitment to accommodation demands that the state abandon its agnosticism and take steps to preserve linguistic difference, such as including linguistic minorities in the formation of juries. This accommodation finds justification both in the nature of language as constitutive and in the unfolding desire of linguistic minorities to maintain a fluid civic identity, which bi- and multilingualism facilitate.

Among the issues inevitably raised by these arguments are (1) whether American citizenship requires us to give up any of our affiliations; (2) to what extent we must be conscious of differences among citizens; and (3) whether the state should participate in the perpetuation of these differences. This Article addresses these issues in three Parts. Part I sets the ground rules for the language rights debate by discussing language in terms of what I call the *mutability continuum*. One of the deficiencies in the existing, ad hoc approach to language rights is the failure to understand that linguistic minorities form a diverse group that contains everyone from the completely monolingual, non-English-speaking immigrant to the completely bilingual citizen. The second half of Part I assesses this conception of language as it relates to various strands of political theory in order to sketch the vision of political community that undergirds the Article and to define further the idea of fluid civic identity.

Part II situates language in a constitutional framework, contextualizing it within contemporary legal understandings of other forms of difference. I first explore how linguistic minorities parallel racial and ethnic minorities and consider what the law on the latter tells us about how the law should treat the former. Although our natural inclinations may lead us to treat language as a function of ethnicity, the race/ethnicity paradigm does not adequately capture the role of language in the life of the individual speaker or in communities of linguistic difference. Thus, in order to understand how language might be treated "on its own terms," the second section of Part II draws an analogy between language and another form of constitutionally protected difference: religion. Religion provides an instructive parallel because, like language, it constitutes identity, shapes the individual's worldview, and represents a defining feature of communities of difference. The law struggles to accommodate religious difference. Extending beyond the race/ethnicity paradigm and exploring this method of accommodating difference establishes the contours of a theory according to which language can be accommodated.

Finally, to demonstrate how this theory would work in practice, Part III explores the existing law of language and discusses actual language controversies. This Part moves through the spheres within which linguistic difference has presented legal challenges and discusses how that difference can be accommodated to advance fluid civic identity. Part III begins from a baseline of antidiscrimination law in the workplace and proceeds by examining the relevance of language to courtroom proceedings, education, and the administration of social services, raising the question of whether linguistic difference is a barrier to be overcome or a status worth preserving from state-sponsored erosion.

I. A THEORETICAL FRAMEWORK

A. The Demographic Background Conditions of the Language Debate

Conflicting demographic pressures form an important set of background conditions for this Article. In short, as non-English-speaking populations continue to expand in this country, they increasingly resist the processes of assimilation and engage in self-conscious efforts to preserve the indicia of their non-American origins. At the same time, the incentive to learn English exerts a considerable force on linguistic-minority communities that is only intensified by the demands of a technology-driven and globalized economy. The combination of the sheer number of linguistic minorities, the strength of their non-American cultural affiliations, and the inevitable effects of living in a country—and even a world—in which English is dominant complicates decisions about how far to take linguistic accommodation.

While the theories offered in this Article are not intended to apply only to Latino communities, the growth and character of this country's Latino populations make the case for accommodation of linguistic minorities particularly dramatic and highlight the tensions created by the aforementioned background pressures.[7] First, according to Department of Labor statistics, Latinos are the fastest growing ethnic minority in the United States; the number of Latinos in the work force will have increased to 10% by the year 2000.[8] At present, approximately 31 million Latinos live in the United States, and sometime between 2000 and 2007 that number will reach 40 million.[9] The Census Bureau projects that by 2020 more than 52 million Latinos (representing close to 20% of the total population) will reside in the United States.[10] By 2050, the Bureau estimates that the percentage will rise to nearly twenty-five.[11] The ethnic population that represents the most significant source of language controversy is expanding as a demographic unit and becoming increasingly

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[7] As will become clear in my discussion of accommodation in different spheres in Part III, there are certain types of accommodation that depend on the size and nature of the linguistic-minority community in question. Other language protections—most notably the antidiscrimination protections—apply regardless of the size of the community affected. Moreover, fluid civic identity does not depend on the existence of demographic trends as significant as those that are shaping the Latino community in the United States. I refer repeatedly to the status of Latinos as a linguistic minority in order to make the best case for robust accommodation.

[8] Steven I. Locke, *Language Discrimination and English-Only Rules in the Workplace: The Case for Legislative Amendment of Title VII*, 27 TEX. TECH L. REV. 33, 44 (1996).

[9] Tony Affigne, *Latino Politics in the United States: An Introduction*, 33 POL. SCI. & POL. 523, 523 (2000) (citing 1998 U.S. Bureau of the Census statistics).

[10] HISPANIC AMERICANS: A STATISTICAL SOURCEBOOK 11 (Louise L. Horner ed., 1999) (citing data from BUREAU OF THE CENSUS, *Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1995 to 2050*, *in* CURRENT POPULATION REPORTS P25 (1996)).

[11] *Id.*

complex as a subgroup of the American political community.[12] This population growth may stem just as much from births and deaths within the borders of the United States as it does from immigration. As one political scientist notes, "between 1990 and 1997, the Latino population, on the strength of increased child-rearing among Latino families and ongoing immigration, grew four times faster than the overall U.S. population."[13]

The Spanish language, spoken in many forms and with varying degrees of facility, represents a significant element of this demographic mix. In 1999, approximately 48% of Latino households spoke Spanish, 33% spoke English, and the remainder spoke a combination of the two languages.[14] According to the 1990 Census, more than 17 million of the 230.4 million Americans speak Spanish at home, and 31.8 million speak languages other than English.[15] On the eve of the official release of statistics from the 2000 Census, we can safely assume that the proportion of bi- and multilinguals has grown considerably over the last decade.

At the same time, evidence measuring the acquisition of language skills among immigrant populations suggests that Spanish-speaking immigrants today are learning English as quickly as their European counterparts of the nineteenth and early twentieth centuries.[16] Empirical studies confirm a classic three-generation pattern of language acquisition: the first generation is monolingual, the second is bilingual, and in the third, English becomes the preferred language.[17] Some studies even suggest that the rate of "Anglicization" of Spanish speakers is fast approaching a two-generation pattern.[18]

Perhaps the most salient background condition of all is the global dominance of the English language. The extent to which English has become a common international language, coupled with its dominance in this country, ensure that the incentive to learn English is omnipresent. Indeed, this incentive has long existed independently of government sanction and has engendered nearly universal knowledge of the English

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[12] *See, e.g.*, Affigne, *supra* note 9, at 525 (citing evidence that ongoing immigration has made the character of Latino communities more complex, dynamic, and difficult to organize); Rachel F. Moran, *Foreword—Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1, 20–21 (1995) (discussing the complex identities of Latinos in the United States).

[13] Affigne, *supra* note 9, at 524.

[14] Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 609 (1999) (citing Andrew Pollack, *The Fight for Hispanic Viewers: Univision's Success Story Attracts New Competition*, N.Y. TIMES, Jan. 19, 1998, at D1).

[15] Perea, *supra* note 3, at 360.

[16] Peter W. Schroth, *Language and Law*, 46 AM. J. COMP. L. 17, 18 (1998).

[17] Carol Schmid, *Language Rights and the Legal Status of English-Only Laws in the Public and Private Sector*, 20 N.C. CENT. L.J. 65, 71 (1992).

[18] *Id.*

language, even in the absence of government-imposed standards.[19] The increasingly global orientation of the economy and the international mobility of labor and capital strengthen the incentive. Today, between 94% and 96% of the American population speaks English at some level, and 85% of English speakers claim it as their native tongue.[20]

The existence of de facto English-language requirements in this English-dominant society forms a necessary and important background condition for the language debate. On the one hand, it can be concluded that no serious threat to the English language exists, regardless of how many linguistic minorities populate the United States.[21] Moreover, the existence of informal incentives to learn English obviates the need for state-sanctioned promotion of a common language. The American political community, then, should be able to sustain robust accommodation of linguistic difference as a counterweight to the homogenizing force of English dominance. Yet, given that the importance of learning English cannot be ignored, some may argue that we should instead accelerate the acquisition of English skills through a narrow understanding of language rights that aggressively encourages such acquisition, even at the expense of minority languages. While the issues do not admit to easy resolution, consideration of sociolinguistics underscores the dramatic need for an approach to linguistic minorities that embraces and even perpetuates what may seem like an identity in tension with itself.

B. The Salient Characteristics of Language

Before formulating a theory of linguistic accommodation, this Article must examine relevant features of language itself. The field of sociolinguistics reveals that language has social, cultural, and functional features that parallel other ascriptive legal categories but nevertheless require that language be treated uniquely.

1. Language as Constitutive of Identity

A common refrain of sociolinguistics is that language and identity formation are intimately linked. "Transmitting information . . . the speaker is using language to make statements about who she is, what her group loyalties are, how she perceives her relationship to her hearer, and what sort of speech event she considers herself to be engaged in."[22] In other words, even when used solely as a communicative device, language assists in the process of self-definition and in the development of social

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[19] *See* Perea, *supra* note 3, at 303.
[20] *Id.* at 347.
[21] Cornell & Bratton, *supra* note 14, at 692.
[22] RALPH FASOLD, THE SOCIOLINGUISTICS OF SOCIETY, at ix (1984).

relationships arising from that definition. Language represents a "multi-purpose instrument."[23] Given this social function of language, the fact that it defines the essence of cultural identity should come as no surprise. Those who share a consensus on language form speech communities. These communities are defined largely by birth, and linguistic consensus finds cultural and social expression through them.[24] Whereas ethnic affiliation may have at one time depended on geographical proximity and shared occupations, in a modern urban world it is defined in terms of a need for "political and social support in pursuit of common interest" and is marked by sources of difference—especially language.[25] Sociolinguist Joshua Fishman notes:

> [Language] is more likely than most symbols of ethnicity to become the symbol of ethnicity. Language is the recorder of paternity, the expressor of patrimony and the carrier of phenomenology. Any vehicle carrying such precious freight must come to be viewed as equally precious in and of itself. The link between language and ethnicity is this one of sanctity-by-association . . . . Anything can become symbolic of ethnicity . . . but since language is the prime symbol system to begin with and since it is commonly relied upon . . . to enact and call forth all ethnic activity, the likelihood that it will be recognized and singled out as symbolic of ethnicity is great indeed.[26]

Fishman's assessment captures the reason that ethnic identity becomes impoverished without the linguistic dimension. Given the symbolic and psychological significance attached to language, sociolinguistic research also reveals that using language to erect boundaries between the people and their government results in feelings of alienation and political impotence.[27] Language's strong correlation to personhood renders it a devastating political tool. The phenomenon observed by sociolinguists in which linguistic forms are assigned "good" and "bad" status, or prestige value, underscores the extent to which language and social and ethnic identity are inextricable.[28]

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[23] Henry L. Bretton, *Political Science, Language, and Politics*, *in* LANGUAGE AND POLITICS 431, 434 (William O'Barr & Jean F. O'Barr eds., 1977).

[24] *See* NANCY FAIRES CONKLIN & MARGARET A. LOURIE, A HOST OF TONGUES 110, 113 (1983).

[25] John J. Gumperz & Jenny Cook-Gumperz, *Introduction: Language and the Communication of Social Identity*, *in* LANGUAGE AND SOCIAL IDENTITY 1, 5 (John J. Gumperz ed., 1982).

[26] Joshua A. Fishman, *Language and Ethnicity*, *in* LANGUAGE, ETHNICITY AND INTERGROUP RELATIONS 15, 25 (Howard Giles ed., 1977).

[27] William M. O'Barr, *Boundaries, Strategies, and Power Relations: Political Anthropology and Language*, *in* LANGUAGE AND POLITICS, *supra* note 23, at 405, 414.

[28] *See* CONKLIN & LOURIE, *supra* note 24, at 115; *see also* RALPH FASOLD, LANGUAGE IN SOCIETY 4 (1992).

2. Language as Mutable

When considered from the perspective of the individual and in contrast to race, language seems to be a highly mutable characteristic. Unlike race, language abilities are subject to the constant pressures of the dominant English-speaking culture and can be dramatically altered and reformulated over the course of a lifetime.[29] While race and ethnicity may be subject to similar alteration over the course of generations, unlike language, they are not typically subject to complete eradication after two generations. The appropriate response to this mutability is not to eradicate linguistic difference; indeed, sociolinguistics tells us that language is tied closely enough to race and ethnicity to make such a response constitutionally problematic. Rather, the response should be to accommodate linguistic difference, much in the way that the law struggles to accommodate religious minorities and to enable the free exercise of religion.

Just as one may lapse in and out of religious devotion or convert to another faith entirely, language skills can be acquired, ignored, and rediscovered after periods of disuse. Moreover, just as religion scholars debate the question of the inalienability of faith, arguing that religion should be understood as an immutable characteristic and not as an affiliation freely chosen,[30] sociolinguists present language as a multilayered phenomenon whose mutability exists on a continuum, exposing choice of language as a fictional construct. Thus, the language debate cannot be understood simply as a conflict between English speakers and non-English speakers. As two scholars have recently cast it, "The language question is not one of English language acquisition; instead it concerns the degree to which English and associated cultural traits completely replace Latino antecedents in the second and third generations."[31] In other words, linguistic-minority communities are made up of individuals who have varying levels of facility with and attachment to English and non-English languages. Given the complexity of speech communities, the theory of language rights this Article advances does not stop at establishing a set of protections for those who have not yet acquired English. Rather, I present language rights in terms of the mutability continuum, recognizing the insights of sociolinguistics that language and language acquisition are phenomena woven into the fabric of ethnic communities and their people.

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[29] *See* CONKLIN & LOURIE, *supra* note 24, at 113 (noting that although most aspects of language are stabilized by adolescence, changes may continue to take place throughout life, especially for those whose social reference groups shift).

[30] *See, e.g.*, Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, *in* RELIGIOUS LIBERTY IN THE SUPREME COURT 483 (Terry Eastland ed., 1993); Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 132–33 (1997).

[31] Cornell & Bratton, *supra* note 14, at 611.

Consider, for example, the placement of the following three types of linguistic minorities at different points along the mutability continuum. First, the mutability status of monolinguals, whether they are new immigrants or long-time residents, is conditioned on not being able to speak English. While such non-English speakers serve as the primary reference point against which language controversies are defined, by no means do they encompass the totality of experience that should inform a coherent theory of language rights. Bilinguals, who may be either immigrants or members of the first American-born generation of ethnic communities, can be described as native speakers of one or two languages. Bilinguals may also begin as linguistic outsiders whose social and professional success depends largely on their ability to assimilate to the linguistic mainstream. Their "assimilation," however, should be understood as the acquisition of a "new style" added to a retained preexisting one rather than as a rejection of previous linguistic affiliations.[32]

Finally, long-entrenched, fully developed ethnic communities may consist of speakers of varying degrees of bilingualism, some of whom may, in practice, speak only English. Some bilinguals may be more comfortable speaking English than non-English, whereas other bilinguals may more frequently and confidently call on their non-English-language skills. Mexican American communities in the Southwest, which have maintained their nondominant language even as it has evolved in response to centuries of pressure from a dominant, English-speaking culture, offer rich examples of this continuum. Populated by recent immigrants as well as by family lines that have lived in the Southwest since it was part of Mexico, these communities comprise individuals with dramatically different language skills, but for whom both Spanish and English serve as points of reference. Over generations, English and Spanish have interacted, and both languages have taken on vocabulary and meaning from one another, forming the linguistic stock of the Southwest. Indeed, despite the dominance of English, precisely because language is malleable, the presence of linguistic difference may in fact contribute to making English a richer, more effective language. Efforts to suppress or eradicate non-English preclude those languages from contributing to the vocabulary and idioms of English and from amplifying the English-speaker's ability to express meaning. Language thus demonstrates its permeability—its mutable dimension.

The possibility of bilingualism does suggest that language can be an object of choice. But when we conceive of bilingualism as a complex phenomenon that is best described by a continuum along which English and non-English gradually become interlaced, it becomes much more difficult to conclude that bilingualism can be suppressed by the individual speaker upon command. Despite language's permeability, the adapta-

[32] *E.g.*, CONKLIN & LOURIE, *supra* note 24, at 113.

tions that linguistic minorities make remain markers of linguistic difference, inseparable from the cultural communities from which they emanate. Linguistic difference retains an immutable dimension precisely because it has been interwoven into the linguistic development of the speaker. Bilinguals do not choose which language they speak; two different languages form their speech identities and capacities.

In her work on accents and antidiscrimination law, Mari Matsuda notes that sociolinguists have demonstrated that accents are culturally created and situate people socially.[33] She argues that even if accent is changeable and adaptable, no person should be required to alter core parts of her identity in order to participate in public life. Similarly, the law's treatment of bilingualism as an individual characteristic that can be turned off once the threshold of English proficiency has been crossed misconceives the nature of linguistic difference and diversity. While the goal of language policy should be to ensure that all people become capable of speaking English, it should also strive to accommodate linguistic difference, treating it as a significant feature of complex minority communities.

Ultimately, this discussion has characterized language as more than purely functional. To be sure, cases may arise in which language is most appropriately understood as a tool; the positions of 911 operators, air traffic controllers, and others intimately connected to the immediate delivery of public safety services demand a capacity to communicate first and foremost. But it is by no means clear that monolingualism best advances the interests of public safety and efficiency of communication. Moreover, in the vast majority of language-based controversies, where language marks cultural, group, and political identity, language-based restrictions should be narrowly drawn and justified by compelling business or institutional necessity.

The countervailing demographic developments outlined above suggest the need for an inclusive and dynamic vision of political identity that can accommodate the diverse speech communities that exist at all points along the mutability continuum. Theories of integration supported by assimilationist assumptions and the rush to sustain the dominance of English as a common social and political language fail to understand both the linguistic and cultural complexities of the mutability continuum.[34] In order to accommodate the demographic trends outlined above, as well as to respect the centrality of language to identity and orientation, this Article now turns to fluid civic identity, the notion that it is only by

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[33] Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1363 (1991).

[34] For a discussion of the status-related harms that result from a failure to respect the complex nature of the mutability continuum, see *infra* notes 104–121 and accompanying text.

recognizing and accommodating the multiple affiliations of linguistic minorities that a viable American political community can be sustained.

C. Fluid Civic Identity and the Incorporation of Linguistic Difference into Theories of Political Community

By fluid civic identity, I mean a form of participation that engages public life but rejects the claim that participation must occur on the basis of a thick form of common cultural commitment and with reference to common conduct or practices. Fluid civic identity, at its core, disavows assimilation. It offers a vision of the political community intended to enable participation in public life and to enhance the individual's access to the multiple spheres in which participation occurs. A fluid approach to civic identity meshes with visions of a national community of principle insofar as that community is structured in terms of free and equal access.

In order to foster engagement and to create free and equal access, civic identity must be fluid in the sense that the participation motivated by it must be inclusive and diffuse. By inclusive, I mean that participation in political and social life cannot require that the participant repress or ignore meaningful cultural and linguistic affiliations. This inclusiveness enables civic identity to be fluid, because it establishes a form of participation that can accommodate multiple modes of communication held by single individuals and communities alike. By diffuse, I mean that participation should be understood as decentralized. The conditions of participation must allow it to be localized and sometimes fragmented in the interest of true engagement.

This concept responds to the belief that meaningful civic engagement occurs through a kind of national conversation in which people centralize their political focus on a common project. Behind this belief rests an assumption that decisionmaking must occur through the use of common customs, one of which is a common language. If we define our overarching community of principle as centered around free and equal access and participation, it simply does not make sense to structure participation in terms of a common national identity. Actual political and social engagement more frequently occur on less rarefied and more localized terms, even when national issues are at stake. Indeed, fluid civic identity can be analogized to theories of federalism that contend that power is best distributed in a decentralized fashion and that true problem solving will more likely occur in communities bound by a personalized form of affiliation.[35] A realistic vision of political community must ac-

[35] I do not premise my argument on theories of federalism, or on the view that there are substantive areas of law and public life that are better handled by state government institutions rather than those of the federal government. I refer to federalism only by way of analogy.

knowledge that these affiliations may include geographical, cultural, or linguistic particularities. Some of these communities may be diverse and some may be ethnically defined, and the motivation for participation may stem from both culture and principle. This approach also acknowledges that participation occurs across diverse spheres that require different levels of involvement at different times in order to sustain themselves—spheres such as the workplace, the courtroom, the classroom, and the social realm. A fluid approach to civic identity might even redeem the vision of a national community, because it accommodates the myriad affiliations according to which the people of a diverse nation actually frame their participation, thereby strengthening their motivation to participate at all.

Fluid civic identity acquires concrete meaning when juxtaposed with observations about ethnic and linguistic-minority communities. Some scholars have defined the civic identity of ethnic minorities as reflective of a "bordered identity," according to which those minorities feel a dual sense of place and people.[36] But Latino identity in particular has been described as "widely inclusive and fluid . . . not statically determined by one single experience of commonality."[37] The metaphor of the border, therefore, does not accurately capture an arguably emerging trend in the Latino community specifically and among ethnic minorities generally. Cultural and linguistic minorities who seek access to mainstream American life while longing to retain a connection to an ethnic cultural heritage need not live in liminal ethnic spaces or find themselves caught between two worlds—one present and American, one past and foreign. Instead, the concept of fluid civic identity, according to which the features of an ethnic identity may be incorporated into public life, strengthens an existing but conflicted desire among minorities to participate in the mainstream without repressing an ethnically or linguistically different past.

I contend that the nature of immigration at this stage in history, coupled with a legal and social climate more tolerant of ethnic and racial difference, has created a social context in which ethnic minorities seek to retain the characteristics that make them culturally different from the American mainstream. In other words, the paradigm of the immigrant bent on assimilation is not only no longer accurate, but also, in many communities, anathema. Again, the Latino community puts this conclusion into clear relief. Scholars writing on the Latino population have noted that

> They have been here for 450 years and for 45 seconds . . . . They are establishing Spanish as a second language in the United States alongside English . . . . They are breaking the

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[36] *E.g.*, Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503, 506 (1998).

[37] *Id.* at 512.

> melting pot. They want to assimilate and to remain separate, to be part of the mainstream and to retain their own identity. Not a national identity with a geographic enclave, not another Quebec, but identity conferred by a larger culture of history, myth, geography, religion, education, language, and affairs of state.[38]

Latinos desire a profoundly antiassimilationist form of integration. Over the last year, a media frenzy has erupted over the increasing cultural and political significance of the Latino population. At the heart of the reportage on the demographic explosion stands a recognition that second and third generation Hispanic Americans are increasingly reluctant to allow their ties to Latin America to erode as the result of the passage of time. Consequently, the definition of "American" itself is changing to include features of Latin culture that until recently were considered foreign.[39]

As national borders decline in significance, the inflow of linguistic minorities promises to continue indefinitely,[40] continually replenishing linguistic-minority communities such that a complete transition of these communities to the English-only model will no longer be possible. This trend will sustain what I have called the mutability continuum. Because of the proximity of Latin America and the increasing interdependence of the nations of the Americas, Spanish-speaking linguistic minorities in particular are likely to retain geographic and cultural affiliations that will be marked by linguistic difference.[41] The ability to use Spanish publicly will be integral to the willingness of such groups to incorporate themselves into the American mainstream. Given the likelihood that demographically powerful communities intend to maintain this dual affiliation, multilingualism should be regarded as a resource rather than as a threat to national unity. The bi- or multilingual individual thus becomes a complete public personality rather than a conflicted individual caught be-

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[38] THOMAS WEYR, HISPANIC U.S.A. 1 (1988).

[39] *See, e.g.*, Affigne, *supra* note 9, at 524. For an example of the journalistic reporting on this phenomenon, see Brook Larmer, *Hispanics are Hip, Hot, and Making History*, NEWSWEEK, July 12, 1999, at 48. In a related story, it was noted that whereas Latinos over thirty-five are more likely to identify themselves as American, those under thirty-five are more likely to identify themselves as Hispanic or Latino, despite their removal from the immigration experience. This generational change in attitude demonstrates that demographic changes in the Latino population are likely to be accompanied by a concomitant desire to sustain a self-consciously Latino community. *See* John Leland & Veronica Chambers, *Generation Ñ*, NEWSWEEK, July 12, 1999, at 52.

[40] Cornell & Bratton, *supra* note 14, at 608 (noting also that Latinos in particular have family networks that keep them tied to their countries of origin).

[41] In their analysis of the economic costs of English-only policies, Cornell and Bratton emphasize that, in a transnational world, it would be foolish to assume that homogeneity reduces costs in all cases. *Id.* at 658. The notion that a common language produces efficiency gains does not square with the demographic reality of a globalized world or of an American Southwest increasingly affected by Latin American immigration.

tween two worlds and separable into the private (non-English-speaking) person and the public (English-speaking) one.[42]

Ultimately, given that my goal is to encourage broad and inclusive participation in civic life, the salient characteristics of language as described above suggest that accommodation should be pursued as a way to structure public life according to the principle of fluid civic identity for several reasons. First, accommodation helps counter the sense of alienation that linguistic and ethnic minorities feel from mainstream politics and social life. Recognition of linguistic difference and the acceptance of multilingualism as an asset will help bring people who might otherwise disengage from public institutions into the public sphere, serving the interest of broad and equal participation. Second, as the Supreme Court has recognized, bilingual individuals inhabit two communities and can serve as a bridge to bring those communities together.[43] Fostering bilingualism creates an intermediate space through which non-English speakers and the dominant culture can interact. As the Supreme Court has stated, "Language permits an individual both to express a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. Bilinguals, in a sense, inhabit two communities, and serve to bring them closer."[44]

Finally, accommodation recognizes that language, identity, and orientation are closely connected, and that as a result, attempts to elide linguistic difference set a baseline for participation that is not only unworkable but fundamentally unfair. Such a baseline forces minorities to choose either an integration that will lead to the attenuation of constitutive cultural practices or isolation and disempowerment.

The concepts of fluid civic identity and accommodation are, of course, susceptible to critiques from various theoretical camps. In order to clarify the parameters of my theory, a brief detour into some of the political theory that pervades legal scholarship is necessary. I focus on three schools of thought. The civic republican school, according to which the political community should be regarded as a world of common meaning so as to sustain political commitment, presents the first major

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[42] For example, multilingualism has formed the basis of social and educational policy in nations such as India in order to ameliorate the consequences of colonialism in a way that sustains the ethnic language alongside the dominant national language. *See* FASOLD, *supra* note 22, at 8–12 (describing the development of multilingual nations).

[43] *See* Hernández v. New York, 500 U.S. 352, 370 (1991) (holding that though the use of the peremptory challenge to exclude potential jurors on the basis of ethnicity violates the Equal Protection Clause of the Fourteenth Amendment, in this case the prosecutor provided good reason for striking jurors based on their ability to speak Spanish). Of course, Justice Kennedy speculates in the same breath that linguistic difference may also be divisive. *Id.* at 371. The Court does not reach the question of whether language is a subset of ethnicity or race but at least recognizes the importance of language to identity and the resulting political consequences of that connection.

[44] *Id.* at 370.

challenge. But ultimately, the brand of common citizenship emphasized by civic republicans proves elusive as a practical matter and divisive as an aspiration. Liberal theory, with its emphasis on principle-based participation and consensus, elevates understandings of citizen participation beyond a call for common cultural practices. It also raises questions, fundamental to the language debate, concerning the extent to which the introduction of personal affiliations into the political dialogue jeopardizes efforts to achieve free and equal access. But liberal theory leaves unclear how or whether inescapable cultural differences should be allowed to enter into the political conversation. Multicultural theory thus offers valuable insights in the language context, as it helps explain why ethnic and cultural difference should be recognized—and even embraced—in public life. At the same time, it raises the possibility that such incorporation, if allowed to unfold unchecked, may threaten the existence of a political community whose participants are capable of engaging one another on common ground. Ultimately, my goal is to find a way to incorporate certain multicultural insights into the parameters of the liberal political conversation.

1. Civic Republican Understandings of Participation

Perhaps the most formidable obstacle to a fluid conception of civic identity is the belief in the need for a common, historically defined identity—a common heritage to which all citizens feel connected. In the legal literature, the civic republican school of thought most closely approximates the English Only movement's call for common Americanness. Stated succinctly, the basic goals of the revival of civic republicanism in the historical and legal academies include: (1) to understand the role that republican theory has played in shaping our institutions; and (2) to defend a view of our institutions as designed to improve the deliberative capacity of citizens so that they may better participate in political life and government.[45] The overarching project, according to Cass Sunstein, is to harness the human capacity to take charge of history—a process that can only happen through public citizenship in a community consciously and jointly shaping its policy.[46] On one level, republican theory seems congenial to a vision of fluid civic identity that strives to enhance the access of all citizens to public life. Proponents of republicanism emphasize the

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[45] In his contributions to the republican revival, Cass Sunstein delineates four defining features of the theory: (1) deliberation in politics, which subjects private interests to critical scrutiny, and which is made possible by civic virtues; (2) the equality of political actors, which eliminates sharp disparities in political participation; (3) a vision of universalism, exemplified in the notion of a common good; and (4) the primary importance to citizenship of participation in governmental processes. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1540–42 (1988).

[46] *Id.* (citing HANNA PITKIN, FORTUNE IS A WOMAN: GENDER AND POLITICS IN THE THOUGHT OF NICOLO MACHIAVELLI (1984)).

need for political engagement as a constitutive interest of the person. This engagement involves "the ongoing revision of the normative histories that make political communities sources of contestable value and self-direction for their members."[47] Understood in these terms, republican theory seems to tolerate the acceptance of difference in the political community precisely because of its awareness that the contours of that community are constantly contested and evolving.[48]

Despite this acceptance of a dynamic community, the emphasis in republican theory remains on commonality. For example, in his discussion of the theory, Frank Michelman counterpoises the concepts of pluralism and remembrance. While pluralism doubts or denies our ability to communicate in ways that change others' views on normative questions, remembrance of the origins of our system in certain historical public acts can deeply inform our understanding of what it means for a people to be both "self-governing and under the law."[49] The debate as conceived by Michelman involves a contested recollection of some kind of common past upon which citizens draw to shape their identity as a people.[50] In other words, the foundations of the political community consist of a discursive myth of American identity, whose features may be debatable, but in whose basic truth all citizens trust.[51] This vision of national cohesion, exemplified in cases such as *Minersville v. Gobitis*,[52] runs throughout American history, suggesting the historical role of republican theory in shaping our relationship to the political community and to the state.[53] The joint work among citizens that represents the hallmark of republican theory can occur only when citizens are willing to identify common terms, even as they enter the conversation from perspectives of difference.

By contrast, fluid civic identity assumes that the terms of the conversation are moving targets. For participation to be a realistic possibility, citizens' multiple affiliations must be embraced and not subsumed. Michelman himself wonders if the extension of the "circle of citizens" to include genuine diversity compromises republican thinking about juris-

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[47] Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988).

[48] *Id.* at 1502. Michelman refers to this element of republican community as the capacity for "jurisgenerative politics" and insists that it play a role in any explanation of citizenship or participation. *Id.*

[49] *Id.* at 1507.

[50] *Id.* at 1513.

[51] *Id.* at 1514.

[52] 310 U.S. 586 (1940) (holding that a requirement that students recite the pledge of allegiance did not violate the First Amendment), *overruled by* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that Jehovah's Witnesses could not be compelled to pledge allegiance to the flag at the beginning of the school day). For further discussion of *Barnette*, see *infra* note 131 and accompanying text.

[53] *See* Nomi Maya Stolzenberg, *A Book of Laughter and Forgetting: Kalman's "Strange Career" and the Marketing of Civic Republicanism*, 111 HARV. L. REV. 1025, 1068 (1998) (reviewing LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996)).

generative politics.[54] Michelman wants to reclaim republicanism from its "ancient context of hierarchical . . . communities" and reframe it in terms of the modern longings for equality of respect and liberation from ascriptive social roles.[55] Yet, in liberating citizens from ascriptive identities, it becomes hard to ignore the flip side: that republicanism might also wrest citizens from meaningful cultural affiliations and practices, such as language, that orient them to the world and to one another.[56]

When understood in this way, the republicans appear to be engaging in work similar to that of English Only activists. Potential citizens must be transitioned into the political community, the story goes. For example, certain forms of bilingual education[57] seem clearly compatible with and necessary for the forging of strong, communal ties. The courts' concerns with ensuring that all children, regardless of national origin, be given the tools to live the good American life echo this longing for a common civic purpose or a shared understanding of long-term aspirations. The communitarian belief that the "members of a political community have a collective right to shape the resident population"[58] lies at the heart of some courts' understanding of bilingual education as an object of popular control.[59] Moreover, Part III demonstrates that the language debate in the educational context concerns not only the production of functionally literate Americans but also the formation of culturally literate Americans. This view of language rights considers how to translate power to the citizen. However, its methods involve melting linguistic difference into mainstream identity as minority affiliations become subsumed by historically defined commonality. By contrast, my vision of fluid civic identity holds that for participation to be meaningful, citizens must be allowed to draw from their diverse practices and affiliations.

Finally, perhaps the most pronounced divergence of fluid civic identity from republican theory stems from the latter's almost exclusive emphasis on the government-centered aspects of citizenship. In the republican political community, little space exists for the personal to shape one's

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[54] *See* Michelman, *supra* note 47, at 1505.

[55] *Id.* at 1526.

[56] In her critique of the modern-day republicans' efforts to abandon republicanism's historical tendencies toward homogeneity and the tyranny of the majority, Linda Kerber expresses doubt that the republicans can have their cake and eat it too. She questions the feasibility of removing from a theory intimately tied to a historical phenomenon those traditional features its rebuilders wish it not to have. Linda Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1668 (1988). "American dissenters," Kerber argues, "traditionally want liberalism with their republicanism; a large state with participatory democracy; a neutral state with substantive visions of the public good; minority rights with majority rule." *Id.* at 1672.

[57] The minority view of bilingual education (which argues that curricula should not only teach English but also reinforce affiliations with the culture of origin) would seem incompatible with this republican form of integration.

[58] MICHAEL WALZER, SPHERES OF JUSTICE 52 (1983).

[59] *See, e.g.*, Valeria G. v. Wilson, 12 F. Supp. 2d 1007 (N.D. Cal. 1998).

identity as a citizen. At this point, liberal theorist Bruce Ackerman's dualist theory sharpens the picture. The concept of participation he introduces makes room for the *quasi*-public and private dimensions of citizenship.[60] The descriptive qualities of his dualist theory—that citizens need a respite from times of political mobilization—also represent dualism's liberating potential. The dualist understanding of how politics unfolds suggests that it is perfectly acceptable in a constitutional regime for the people to retreat from the common political community into their various local communities. While this should not be taken as an endorsement of ethnic isolationism or selfishness, the concept of the private citizen includes the freedom to live and work in a private and *quasi*-public way according to one's own normative or comprehensive theories of the world. Implicit in dualism lies a recognition that political participation can be diffuse and occur in numerous contexts that are at different stages of remove from the traditional sphere of participation—namely, voting. To make participation meaningful as a principle, we must recognize that different kinds and levels of participation foster civic engagement. In the context of linguistic minorities, accommodation of linguistic difference makes sense because it enables such varied participation.[61]

Ultimately, language rights could be formulated in a manner consistent with republican theory. If crafted as a tutelary right, or a right to be taught English, language protection can be designed to prepare people for citizenship functionally and to enable linguistic minorities to affiliate with the discursive myth of the American dream central to republican theory. However, this view of the political community constrains efforts to accommodate linguistic difference and sidesteps the demographic and social forces outlined above. From the strictly republican standpoint, extensive accommodation proves problematic for two reasons: (1) active state participation in the preservation of affiliations that compete with the public identity central to republican citizenship would frustrate the processes of jurisgenerative politics; and (2) broad, as opposed to token, rec-

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[60] *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 295–322 (1991).

[61] Not surprisingly, Michelman locates a characteristic strain in civic republicanism that respects a non-state-centered notion of citizenship and encompasses not just formal participation in affairs of the state but also the citizen's presence in public and social life at large. Michelman, *supra* note 47, at 1531. Similarly, Sunstein points to de Tocqueville's understanding of a variety of groups, some in local government, others purely private, that furnish alternatives to purely state-based participation. Sunstein, *supra* note 45, at 1578. Sunstein rejects the classical understanding of republicanism, which draws a sharp distinction between public and private interests, in favor of a universalism that recognizes social difference in politics. *Id.* at 1563. Yet, as noted above, the extent to which social differences are allowed to influence the political process, and the extent to which the same process can be devolved to include non-public activity while still pursuing the republican agenda, remain contested. Ultimately, a theory that purports to incorporate liberty and equality, public and private, and commonality and difference, without any consequences or sacrifices, gives rise to suspicion. The effort to decentralize the notion of participation only renders more problematic civic republicanism's emphasis on a common heritage as a guiding force behind participation.

ognition of the existence of non-public- and non-state-centered possibilities for citizenship compromises the republican vision of a constant form of deliberative participation. Given that this republican formulation fails to capture the nature of participation in a simultaneously pluralistic and globalized society, a liberal, dialogic approach to political participation may offer a better alternative.

2. *Liberalism, Dialogue, and the Accommodation of Linguistic Difference*

In its simplest form, liberalism does not take a stand on any substantive theory of the good. Principles of neutrality prohibit anyone who holds power from asserting that "his conception of the good is better than that asserted by any of his fellow citizens, or that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens."[62] Some theorists point to the rhetoric of neutrality as supportive of the vision of a color-blind Constitution or the view that a political culture can exist unmarked by any difference other than the difference of opinion.[63] Yet, while theorists of the neutral state claim that it does not condone a way of life but rather intervenes only to adjudicate conflicts between ways of life, this position itself arguably endorses a conception of the good.[64]

Ultimately, debating whether the state acts neutrally when it serves as a mediator of conflict among different comprehensive belief systems does little to advance our understanding of citizenship. Rather, what should concern us is how the state structures that mediation, and whether the liberal view accommodates the "diversity of human types."[65] Through its emphasis on promoting dialogue among citizens, contemporary liberal theory offers a viable theoretical basis for the accommodation of linguistic difference and the promotion of free and equal participation.

Bruce Ackerman's liberal theory, in particular, depends on the existence of neutral dialogue. He defines "political talk" as a device for organizing citizens who would otherwise be free to follow different paths to the good life: "The task of political conversation is to make it possible

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[62] BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11 (1980).

[63] *See, e.g.*, William Galston, *Defending Liberalism*, 76 AM. POL. SCI. REV. 621, 622 (1982).

[64] *See id.* at 625. Galston describes the neutral state as follows: ignorance about the good implies relativism, which mandates tolerance, which in turn requires a neutral state, which demands that all individuals be treated as equals and in a manner that neither presupposes nor imposes what we lack. *Id.* Because individuals are morally equal, the state must be morally neutral. *Id.* Galston embraces this neutrality but at the same time contends that liberal societies that rest on the belief that the development of individual capacities is an important element of the good are the most conducive to individual development. *See id.* at 627.

[65] *Id.* at 627.

for each citizen to defend his power without declaring himself intrinsically superior . . . ."[66] In essence, neutral dialogue seeks to build a common conversational referent, despite difference. Yet unlike republican theory, neutral dialogue appears not to demand that difference be transcended, but only that difference be subject to criticism so that citizens may develop their identities in conversation with one another rather than in isolation.[67] In the public forum, citizens engaged in dialogue may find things to talk about besides the moral truth or cultural superiority, such as how people who disagree about the moral truth might nonetheless approach the problem of peaceful coexistence.[68] Precisely because the liberal state does not aim to discover moral truths, citizens must recognize themselves as under certain dialogic obligations to one another.[69] The liberal state's "first principles of rationality" demand that each citizen be able to offer a reason in defense of her position when asked to do so by those who may be disadvantaged by her exertion of power.[70] Unlike the republican vision, the aim of social justice in a liberal state, according to Ackerman, should not be about constructing a new, or metapolitical, community, but rather about designing institutions that will guarantee individuals the right to live as they choose.[71] There is, in the end, no conversational victor.[72]

Similarly, recognizing that a public conception of justice must be independent of controversial philosophical and religious doctrines, John Rawls offers the notion of an "overlapping consensus."[73] Public agreement among citizens on the principles or convictions that are common to their comprehensive worldviews constitutes this consensus. Social unity is not based on all people affirming the same conception of the good. Instead, citizens shape political culture by publicly accepting a political conception of justice that regulates the basic structures of society. Rawls writes, "A political conception is at best but a guiding framework of deliberation and reflection . . . . [I]f it has narrowed the gap between the conscientious convictions of those who accept the basic ideas of a constitutional regime, then it has served its practical purpose."[74] To achieve an agreement akin to what Rawls imagines, it is necessary that citizens define the parameters of justice as fairness through cooperation or as co-

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[66] ACKERMAN, *supra* note 62, at 359.

[67] The republican view of neutrality, if it can be called neutral, calls for consistent application of the correct substantive theory. Contrast this view with the liberal belief that a neutral state must allow members to live their lives according to their own substantive theories of the good.

[68] Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 8 (1989).

[69] *Id.* at 10.

[70] ACKERMAN, *supra* note 62, at 372.

[71] *Id.* at 376.

[72] Ackerman, *supra* note 68, at 19.

[73] JOHN RAWLS, POLITICAL LIBERALISM 133–72 (1996).

[74] *Id.* at 156.

ordinated activity based on fair terms—virtues critical to a constitutional regime. According to Rawls, to avoid relying on comprehensive doctrines to define a political conception of justice, the terms of social cooperation must be consistent among citizens.[75] For social agreement to be genuine, people must be situated fairly. As this Article emphasizes, the parameters within which citizens define an overlapping consensus or realize their sources of agreement must be inclusive in order to account for a dynamic view of the individual person as citizen.

The search for commonality thus requires ongoing dialogue among people. For example, Rawls recognizes that free persons must be regarded as capable of revising and changing their views of the good and should therefore not be defined according to a particular conception of the good.[76] This constant redefinition of self suggests that people should be free to understand their civic identities and their relationships to one another as fluid. At the heart of dialogic theory appears a concern similar to the principles at the heart of fluid civic identity: free and equal access to political dialogue must be possible in order to enable citizens to negotiate their differences and achieve consensus in the face of these differences. Dialogic theories in general attempt to mediate between different moral and ethical visions of the good life and define points of commonality on which people with different and ever-changing normative views of the world can agree. Because agreement among people who hold vastly different comprehensive views of the world will prove difficult, social institutions must be structured to facilitate communication. Given the differences among people that Rawls himself recognizes as vital, if cooperation is to be possible, the political conversation and the structures of public life must be shaped to account for these differences. Rather than focus on how people may actually reach reasonable agreement when they hold different conceptions of the good life, this Article concerns itself with how political and social institutions should be structured to make this conversation possible.

One of the questions that emerges when we consider the political community in dialogic terms is the method or orientation of that conversation itself—the question of language. The liberal conception of dialogue implies more than literal conversation. Even when people speak the same language, words are filtered through different sets of expectations that are shaped by a host of biases and affiliations. Perhaps dialogue is best understood as the unfolding of relationships through communication within communities, among communities, and between citizens and the institutions that represent them. Within this framework, dialogue and the sense of civic identity fostered by dialogue can be fluid. In a world filled with linguistic minorities, such communication necessitates institutions

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[75] *Id.* at 157–58.
[76] *Id.* at 72.

and practices that accommodate the needs of participants and accept the tools of conversation, including linguistic tools, as they exist. When considered in the context of the language debate, then, liberal dialogic theory gives rise to questions similar to those sparked by republican theory. Such questions include: (1) whether the state is responsible for making citizens capable dialogic participants; (2) how a state interested in promoting dialogue should defend the rights of citizens to participate; and (3) whether liberal dialogue permits the infiltration of personal affiliations into the political conversation.

While the accommodation of linguistic difference may promote free and equal access and participation, it also creates a space in public life for personal, ethnic, and cultural affiliations. Because language represents more than a conversational tool, the accommodation of linguistic difference requires the acceptance of personal cultural attitudes in the political conversation. One cannot be a sincere and committed participant in a dialogue about the future of the political community without having a source of meaning on which to base one's contributions. The goal of accommodating linguistic minorities is to preserve the means by which these minorities express and derive meaning.

Whether this structural introduction of personal affiliations into the dialogue among citizens undermines the liberal attempt to define public life in terms of a community of principle proves a difficult question to answer. The greatest potential deficiency of liberal dialogic theory as a means of understanding how linguistic minorities should be treated may well prove to be its aversion to including personal affiliations within the dialogic parameters. Free and equal participation depends upon language accommodation, but that accommodation may give rise to certain costs that liberal theorists may not be willing to bear.

Accommodation of linguistic difference need not threaten the basic project of creating an overlapping consensus. A person's linguistic affiliation may be closely linked to a culture-based, principled vision that rejects equality and free participation. However, language itself, at its core, is not an ideology or normative worldview. Rather, language provides an individual with her orientation to the world around her, including her orientation to a cultural identity. Accommodating linguistic difference does not require acceptance of all of the normative views expressed via that difference, nor is it synonymous with accommodation of culture. Nevertheless, accommodating linguistic difference will introduce personal commitments into the political conversation that will at least complicate efforts to foster cooperation among citizens, perhaps simply by virtue of introducing a degree of linguistic distance among citizens.[77] In

[77] Rawls' view of the public and the political differs from the definition of those same concepts that undergird my theory of fluid civic identity. Whereas Rawls' overlapping consensus seems to be focused on purely political discussion understood in electoral and rep-

order to justify the creation of some linguistic separation among participants in the political conversation and to examine more fully the role that personal commitments play in the formation of a meaningful civic identity, this Part concludes with a consideration of theories of culture, autonomy, and difference.

3. Multicultural Theories of Participation

The primary value of culture-based theories of autonomy stems from their recognition that personal, ethnic, and cultural affiliations form important components of public identity and the ways in which people express themselves in the public sphere. Multiculturalism can take the form of state support and protection of ethnic or religious practices. In its most aggressive incarnation, rather than rely on accommodation within a common community of principle to account for difference, culture-based theory supports the creation of ethnic enclaves within larger nations as the ultimate vindication of cultural autonomy. The promotion of such culture-based segmentation frustrates the effort to create a fluid civic identity that permits people to retain or acquire multiple affiliations as part of their public personas. While fluid civic identity can support the rights of citizens to retreat into their culturally defined communities in search of meaning for living or personal values, it calls primarily for structuring public institutions in a manner that discourages such retreats as rejections of participation in public life. However, because the extent to which such differences should be included in public life remains unclear in the work of liberal theorists, it is useful to turn to multicultural theorists such as Will Kymlicka for guidance, despite the above reservations.

Kymlicka, perhaps the foremost proponent of multicultural political theory, begins his analysis of multicultural citizenship by charging liberals with having failed to discuss explicitly the rights of ethnic and national minorities.[78] He contends that individual freedom is intimately bound to membership in one's national group and that this fact must be incorporated into definitions of citizenship.[79] In other words, ethnic membership, *as membership*, constitutes identity, such that a person acting in public life cannot be divorced from her affiliation with a national group. The capacity to participate, or to be an autonomous agent in political culture, demands the "availability of meaningful options [which depend]

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resentative terms, the theory of accommodation presented in this Article covers a broader range of institutions, perhaps lessening the tension over the extent to which the two views are willing to allow personal affiliations to enter into public discussion. Part of the thrust of a fluid approach to citizenship is a recognition that civic identity is forged through participation in multiple spheres. Public life is more varied than political life, strictly understood. To sustain a principle of free and equal access, the public should be understood as encompassing the multiple spheres of citizenship.

[78] WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 51 (1995).

[79] *Id.* at 52.

on access to a societal culture and on understanding the history and language of that culture."[80] Indeed, perhaps the best lesson to draw from multiculturalism is that the affiliations that tie people to their communities can be robust and varied. My vision of fluid civic identity not only recognizes that access and participation require such feelings of affiliation but also acknowledges that these feelings can be tied to multiple identities and multiple media.

In order to bring such ethnic affiliations into the public sphere effectively, Kymlicka offers a conception of group rights that regards groups of people, as defined by particular characteristics, as political actors.[81] This conception of group rights shares an important feature with fluid civic identity: namely, the recognition that participation by cultural minorities in mainstream political life is possible once we accept that the impulse to participate may be shaped in large part by the practices of and ties to culturally defined groups. For Kymlicka, liberal protections of freedom of association prove insufficient to give minority cultures the political recognition they require.[82] The liberal fear may be that group rights will undermine the sense of cooperation that holds liberal societies together. However, group rights can be designed so that they do not isolate people from the political community but rather include minorities and promote participation.[83] Moreover, a group-based citizenship need not imply that the rights of citizenship will be substantively differentiated. Instead, groups may pursue their interests *as groups* based on the needs of the group—a process that encompasses the diffuse and community-based nature of participation.

Kymlicka concludes that most liberal theorists have in fact recognized that citizenship does not merely represent a legal status defined by a set of rights and responsibilities. Rather, citizenship expresses an identity, which in a democratic, multinational state becomes increasingly

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[80] *Id.* at 83. At this point, Kymlicka makes a distinction that seems to dissolve later. He argues that, unlike immigrants, national minorities (such as the Quebecois or Native Americans) have the sort of societal cultures that should be protected because immigrants arrive intending to integrate into mainstream culture. *Id.* Not only does this fail to describe accurately contemporary waves of immigration, it fails to account for the fact that immigrants cannot shed their cultural ties immediately upon arrival. Moreover, the same autonomy arguments attach to those who arrive in new countries, even if by choice.

[81] *Id.* at 130. To be sure, Kymlicka recognizes that the demands of some groups may exceed what liberalism can accept. Internal, illiberal restrictions on the rights of minority group members may fly in the face of basic liberal precepts. For instance, certain groups may not seek a community within which individual freedom and personal autonomy are valued and promoted. Kymlicka is willing to accept that, although tolerance is a liberal value, promoting freedom and autonomy may require intolerance toward illiberal groups. *Id.* at 153–54.

[82] *See id.* at 107–08.

[83] Indeed, Kymlicka notes that first- and second-generation immigrants who remain proud of their heritage are also among the most patriotic citizens of their new countries, and that the desire for group or poly-ethnic rights is a desire for inclusion that is consistent with participation in, and commitment to, mainstream institutions. *Id.* at 178.

difficult to reconcile with a conception of citizenship based on common culture or purpose.[84] A commitment to group-differentiated rights can change *how* minorities participate in public life without encouraging them not to participate.[85] For ethnic minorities, the recognition of their status as ethnically different may prove critical to their ability to affiliate freely with their adopted political community. In other words, recognition of difference is central to any act of fostering among minorities a sense of loyalty to the American nation.[86]

In general, Kymlicka's multicultural perspective seems to depend on the existence not of a diversity of ethnicities but of actual nations of people capable of advancing legitimate claims to self-government, such as the Quebecois, Puerto Ricans, Palestinians, and indigenous peoples. If the public acceptance of difference depends on a preexisting bargain with the dominant political community, Kymlicka's ideas will be difficult to generalize, particularly in the United States. Moreover, if our understanding of culture-based rights relies on the presence of actual national communities, the ability to deal with the rights of immigrants will be constrained. Using the status of nations within nations to define our multicultural aspirations inhibits progress toward a fluid civic identity where cultural and linguistic minorities will remain free to change their orientations to the political community, as Rawls suggests free people must be able to do.

However, if we define the multicultural goal not as creating separate political communities for minorities but as enabling them to participate in the existing one, the recognition of difference does not promote balkanization, nor does it depend on the existence of a precise set of historical circumstances. Ultimately, the accommodation of linguistic minorities does not require a robust theory of group rights. We can still maintain our civil rights laws' orientation toward the protection of the individual and nevertheless recognize that the individual will engage in public life through her multiple community affiliations. Taking a fluid approach to civic identity that recognizes that an individual's center may shift over the course of her lifetime not only accounts for demographic trends but also avoids a futile attempt to foster that which does not exist—a fixed cultural reference point. Encouraging a fluid form of participation will ensure that the communities that provide the cultural identity central to a robust political identity have a fighting chance of surviving as part of the civic landscape.

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[84] *Id.* at 192.

[85] *Id.* at 78.

[86] Much of Kymlicka's theory depends on the existence of preexisting bargains between majority and minority cultures. *Id.* at 119. Throughout his analysis, Kymlicka returns to the question of the terms of the bargain, differentiating between minority groups that were once distinct societies in the space they currently occupy, and immigrants, who may or may not come with a ready-made community attached.

The vision of fluid civic identity developed above represents an effort to identify the preconditions necessary for broad participation in public life. A fluid approach to civic identity recognizes the fact that articulations of a common, historically defined American culture frame participation in a manner not accessible to all people. Given the importance of cultural and linguistic affiliations to the act of public participation, this fictional common culture cannot be given primacy in public life. The fluid view accepts the liberal notion of a political community based on principle but adds to that vision the recognition that the structures created to facilitate cooperation or dialogue must account for salient differences in orientation, such as linguistic differences. The mutability continuum of language itself demonstrates that a person's and a community's affiliations can be multiple and changeable. Language affects the ways in which people orient themselves both to the world and to one another. Within a linguistic-minority community, there may be multiple orientations marked by varying degrees of closeness to the country, culture, and language of origin. To sustain a community of principle through cooperation, we must recognize that free and equal access requires accommodation of the multiple affiliations that are a part of linguistic minorities' lives. Active participation requires that this accommodation occur across the myriad spheres of public and semipublic life. Engagement can be fostered by participation that is allowed to be at once inclusive and diffuse and that is facilitated by the accommodation of different practices and orientations.

II. The Constitutional Context

To determine how fluid civic identity meshes with our constitutional traditions, we must consider how language relates to the various categories of difference with which American constitutional law typically deals: race, ethnicity, and religion. As compared to extant doctrine concerning these forms of difference, a constitutional law of language does not exist. In both scholarship and case law, legal understandings of language on its own terms are remarkably underdeveloped. Language as a marker of difference has been largely subsumed into the category of ethnicity, and the standard cultural assimilation story has obscured linguistic difference as a feature of identity that should be contemplated when discussing the American rights regime. This Part demonstrates how language fits between existing lines of constitutional analysis and why the constitutional traditions that emphasize a deliberative political culture on the one hand and the protection of individual rights on the other are best advanced through the accommodation of linguistic minorities. It first explores how linguistic difference relates to the race-based integration narrative as well as discussions of difference, color-blindness, and status-based subordination. Because language fits only awkwardly into existing law designed

to integrate and protect racial and ethnic minorities, however, this Part then turns to consider what light the constitutional accommodation of religious difference sheds on the ways in which linguistic difference should be treated by the law and incorporated into our institutions.

A. The Relevance of Race and Ethnicity to Language as a Legal Category

Courts and scholars alike commonly assess language-based claims in terms of doctrines elaborated to protect and integrate racial and ethnic minorities. When language controversies arise, courts traditionally frame the legal question in terms of whether the discrimination alleged is tantamount to intentional discrimination based on race and not whether there has been impermissible discrimination based on language. In this section, I argue that language should not be analyzed as if it were race, and that for two reasons, efforts to understand language as its own legal category should not depend on existing legal approaches to race.

First, the courts themselves remain undecided about the relationship between race and language and therefore offer few guidelines for making language-based claims using race-based doctrine. For example, in *Hernández v. New York*,[87] the Court's consternation over how to treat language was evident. In his plurality opinion, Justice Kennedy upheld the use of peremptory strikes against potential bilingual jurors and found that the case did not require the Court to resolve "the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes."[88] Despite declining to treat language-based distinctions as race discrimination for the purposes of *Batson*[89] analysis, Justice Kennedy both recognized the close relationship between language and ethnicity and acknowledged that bilingualism is a complex phenomenon in its own right.[90] In her concurring opinion, however, Justice O'Connor concluded that "[n]o matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race."[91] In other words, language is not race and therefore does not deserve the same level of protection. As Part III demonstrates, the lower courts have only further confused this issue, underscoring the conceptual difficulties of using doctrine on race to deal with language-based claims.

Second, the race/ethnicity paradigm does not help the cause of accommodating linguistic difference because current, color-blind legal in-

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[87] 500 U.S. 352 (1991).

[88] *Id.* at 371.

[89] Batson v. Kentucky, 476 U.S. 79 (1986) (holding that peremptory strikes based on race alone are impermissible).

[90] *Hernández*, 500 U.S. at 371.

[91] *Id.* at 375 (O'Connor, J., concurring).

tuitions concerning race are overtly hostile to accommodation. Language and ethnicity are powerfully connected, suggesting that they should be treated similarly. However, current doctrine that declares race and ethnicity to be irrelevant to the individual's legal status[92] undercuts this Article's basic assumption that linguistic difference bears directly on the individual's ability to participate freely in public life. Thus, once we set accommodation as the goal, the courts' current framework for evaluating race provides limited guidance for achieving that goal.

Of course, the race/ethnicity paradigm is not entirely inapposite. Despite its limitations, particular elements of extant law on race and ethnicity support the possibility of accommodation, and there are ways of understanding the courts' current approaches to racial integration and equality that are congenial to the accommodation of linguistic difference. Indeed, understanding language as a difference that should be accommodated in order to promote equal participation could contribute to a reevaluation of the law's conclusions on the links between race, culture, and behavior. Perhaps the language debate will lead to a realization that race and ethnicity, because of their connection to cultural practices, are relevant to a person's capacity and desire to participate in the public sphere. Understanding language on its own terms, coupled with an awareness of the profound connection between language and ethnicity, may well support a reorientation of the color-blind paradigm to permit forms of race-consciousness targeted at achieving equal participation. Such a rethinking would enable those concerned with pressing language accommodation in the courts to explore fully the links between language and ethnicity without risking the courts' creation of a language-blind paradigm that would thwart accommodationist efforts.

We may leave open the possibility of reorienting the law's treatment of race to reflect what the language debate teaches us about the relationship between culture and behavior. Insofar as we seek doctrinal guidelines for accommodating language, however, this Article must accept the limits of the race paradigm and draw whatever possible from existing law to support a theory of accommodation. The limitations and possibilities of the race paradigm appear most clearly in two different strands of the current color-blind approach to race: desegregation jurisprudence and the tiered scrutiny regime of equal protection analysis. This section demonstrates that while it is possible to develop a conception of integration consistent with fluid civic identity, the law's reluctance to link equality with the recognition of difference renders an integration-oriented, color-blind approach incomplete. I conclude that the language question instead

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[92] *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (holding that strict scrutiny should be applied to all racial classifications); Richmond v. J.A. Croson Co., 488 U.S. 469, 500, 515–16 (1989) (emphasizing that the Fourteenth Amendment's guarantee of equal protection applies to individuals, and that a benign purpose for a racial classification carries little weight as a state interest).

should be approached as a matter of resolving status conflicts. Fluid civic identity requires an approach to difference that recognizes the discriminatory consequences of eliding difference in the name of color-blind equality. Linguistic minorities, while first class citizens as English speakers, should not become second class citizens as speakers of non-English.

1. The Meaning of Integration

Courts and legislators often understand linguistic difference as a barrier to be overcome in the process of integrating cultural minorities into American life.[93] For example, the prime "training grounds" for citizenship—the public schools—are understood by courts as forums designed in part to exert a socializing influence and create common interests among students.[94] Linguistic difference, in this context, may be a barrier to equal citizenship insofar as such equality emanates from a shared conception of political or social identity.[95] However, one need not regard integration solely or even primarily as a cultural objective. The kind of integration at the heart of fluid civic identity focuses on the removal of structural impediments to the advancement of minorities.

If we begin our definition of integration with reference to the principle as espoused in *Brown v. Board of Education*,[96] the difficulty of using an integration paradigm to accommodate difference emerges immediately. Some theorists argue that, taken to its natural conclusion, *Brown* denies minority cultures separate status and encourages minorities' equal participation without regard for their differences.[97] Will Kymlicka, for example, characterizes *Brown* and the civil rights movement as impediments to his vision of ethnic justice because they engendered a color-blind vision of the law:

> But the influence of *Brown* was soon felt in areas other than race relations, for it seemed to lay down a principle which was equally applicable to relations between ethnic and national groups. According to this principle, injustice is a matter of arbitrary exclusion from the dominant institutions of society, and

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[93] *E.g.*, Equal Educational Opportunities Act ("EEOA") of 1974, 20 U.S.C. § 1703(f) (1994) (requiring that educational agencies take appropriate action to overcome language barriers in schools); Valeria G. v. Wilson, 12 F. Supp. 2d 1007 (N.D. Cal. 1998) (holding that the replacement of bilingual education with English immersion could constitute appropriate action to overcome language barriers).

[94] *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986); Ambach v. Norwich, 441 U.S. 68, 77–78 (1979) (citing social science research on the role of public education in teaching values).

[95] For an analysis of how courts have treated language in the education context, see *infra* Part III.B.3.

[96] 347 U.S. 483 (1954).

[97] *E.g.*, KYMLICKA, *supra* note 78, at 59.

> equality is a matter of non-discrimination and equal opportunity to participate. Viewed in this light, legislation providing separate institutions for national minorities seems no different from the segregation of blacks. The natural extension of *Brown*, therefore, was to remove the separate status of minority cultures, and encourage their equal participation in mainstream society.[98]

Yet, this formulation of "integration" as equal participation could prove congenial to accommodating linguistic difference if understood as something other than a call for racially and ethnically balanced communities and institutions. An integrationist principle based on a belief in free and equal access need not be assimilationist or require that people shed important differences. Equal access could mean the right to participate in a public life that is not necessarily organized around a racially balanced and ultimately homogenized mainstream.

Elements of the *Brown* decision itself support a principle of integrated citizenship that accommodates difference. *Brown* connected citizenship to personal qualities and correlated citizenship status with freedom from feelings of isolation that stem from a condition of difference. The difference the Court targeted for eradication in *Brown* was not racial difference but rather the difference of circumstance. This distinction implies that racial justice demands mutual tolerance and respect, not sameness. In his analysis of *Brown*, David Strauss notes that the decision's emphasis on the status of blacks in the community links the case to what he calls the "stigma" and "subordination" concepts of discrimination, or the popular modern notion that certain state actions are discriminatory and constitutionally impermissible because they reduce the minority in question to the status of a subject race.[99] The desire to avoid stigma rests in part on the concept of affiliation that, as I argue in Part I, proves central to effective participation in public life.

The way in which the integration story begun by *Brown* has unfolded challenges a balance-oriented approach to integration but may also be useful as support for the accommodation of difference, even though the courts may not have intended such a result. The most recent desegregation jurisprudence rejects the creation of racial balance in the public schools as a constitutionally legitimate goal. Not only has the Court for-

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[98] *Id.* at 58–59. To be sure, Kymlicka problematizes this version of *Brown*. He does so by (1) differentiating national minorities from black Americans, and (2) arguing that destroying separate institutions for national minorities burdens them with the "badges of inferiority" in the same way that separate institutions for blacks had racially discriminatory consequences. *Id.* at 60.

[99] David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 948–49 (1989).

bidden states to use the suburbs to integrate inner-city schools,[100] but it has also held that districts cannot be held responsible for segregation in schools that is caused by voluntary residential segregation.[101] In effect, the law's attempt to treat all people neutrally and as free agents in their decisionmaking has provided justification for the existence of nonintegrated communities. While those who favor integration might see these decisions as undermining egalitarian aspirations, the decisions also reflect a reality about the nature of civic identity that can be used to benefit minorities seeking accommodation of their difference. At the heart of these decisions stands a recognition of the rights of communities to define themselves through their own choices about where and how to live.[102] Whatever its merits as a matter of education policy, the long line of *Brown* progeny helps us to realize, at least in principle, that the process of dismantling racially determined barriers to the institutions of public life need not be synonymous with the creation of racially and ethnically balanced communities. The courts have fashioned a principle of integration based on equal access rather than on racial balance that reflects a simultaneously inclusive and diffuse conception of participation. In other words, if we understand integration in terms of creating a national community based on an overarching principle of free and equal access, the organization of smaller communities within that national community may be defined through private choices based on difference as long as the public and quasi-public institutions that overlie such communities are designed to accommodate the differences that emerge.

Extending the traditional integration paradigm to the language debate ultimately exposes the difficulty of applying a balance-oriented approach to linguistic minorities. For example, desegregation has repeatedly frustrated efforts to advance bilingual education curricula. The provision of funds for bilingual instruction depends on the existence of a critical mass of non-English speakers and is undermined by the drive to

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[100] Milliken v. Bradley, 418 U.S. 717, 748–49 (1974) (holding that there can be no interdistrict remedy absent an interdistrict violation). In *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995), the Court held that one of the main goals in school desegregation cases should be to return school districts to local control. Indeed, the focus of school desegregation jurisprudence has shifted from integrating the public schools to ensuring that the public schools provide appropriate remedial and compensatory programs as well as sufficiently equal educational programs. *See* Milliken v. Bradley, 433 U.S. 267 (1977); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 261–62 (1999).

[101] *E.g.*, Armour v. Nix, 446 U.S. 930 (1980) (upholding the lower court's ruling that Atlanta school officials could not be required to remedy school segregation resulting from residential segregation).

[102] Critical race theorists further complicate the integration story by demonstrating that the assumption that all blacks should seek integration—an ostensibly neutral rule imposed by courts on the race conversation in the name of *Brown*—is in fact an assimilationist vision that exposes color-blindness as a fiction. *See* Jerome M. Culp, Jr., *Black People in White Face: Assimilation, Culture, and the* Brown *Case*, 36 WM. & MARY L. REV. 665, 678–79 (1995).

avoid the isolation of racial and ethnic groups.[103] There are a number of ways to interpret this phenomenon. First, if bilingual education is meant to help linguistic minorities assimilate, then assimilation depends in part on segregation. Nevertheless, this segregation only further entrenches linguistic difference by ensuring that linguistic-minority communities remain geographically and probably culturally cohesive, frustrating assimilative goals. Second, to the extent that our vision of equal justice depends on the rights of individuals to make choices about how to construct their communities, the ability of racial and ethnic minorities to maintain ties to their non-mainstream identities must be included in that vision. Regardless of whether bilingual education serves as an integrative device or as a means of preserving cultural difference, its existence, made necessary by the presence of linguistic minorities in the first place, underscores the cultural complexity of the total political community. A balance-oriented integration paradigm simply cannot handle the challenges raised by communities of linguistic difference.

By contrast, the recognition of the importance of self-defining communities to politics fits nicely with a fluid approach to civic identity. Because individuals hold multiple affiliations that give their participation in public life context and meaning, treating the political actor atomistically proves inconsistent with the very nature of public participation. A fluid model of politics rejects the notion of a common political center toward which individuals owe allegiance and replaces it with a dynamic model within which actors affiliate freely with multiple groups and political identities as they participate in public life. This trend toward multiplicity may seem anathema to the traditional integrationist ideal, but it proves perfectly consistent with the realization, outlined in Part I, that participation occurs in myriad spheres and is motivated by multiple orientations. Thus, participation by and access for minorities can be fostered to the extent that political and social institutions are able to incorporate salient differences, such as language diversity, into their parameters, even as hopes for the creation of a racially balanced but neutral mainstream fall by the wayside.

2. *The Language Debate as Status Conflict*

When we move from the integration context, the underlying principles of which are sufficiently malleable to create room for the incorporation of linguistic difference into public life, to traditional equal protection analysis and the tiered scrutiny regime, the possibilities for accommodation using race-based doctrine are more limited. The courts' current color-blind approach actively prohibits state decisionmaking based on

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[103] *E.g.*, Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321, 357–58 (1987).

certain categories of difference absent the elusive compelling state interest. Because language has a functional component and bears on the speaker's capacity to participate in public life, it would be inappropriate to add language to the list of suspect classes as currently understood. Indeed, scholarly critiques of color-blindness point to the very drawbacks that render strict scrutiny a problematic test to use in accounting for the role that language plays in defining social and legal relationships. Scholars note that the failure of color-blind constitutionalism to recognize difference saddles courts with an inability to appreciate the social positions that correspond to race and ethnicity.[104] The treatment of race as a fixed, immutable trait allows courts to consider race as an "objective, apolitical" characteristic and therefore as a characteristic divorced from social context.[105] When race is understood this way, color-blind strict scrutiny seems appropriate because color-consciousness is more likely to lead to discrimination through the invidious use of racial classifications than to remediation of discrimination. In other words, in the name of race neutrality, courts are required to overlook the social realities that correspond to racial classifications and ultimately end up ignoring the persistence of racial subordination.

Existing scholarship offers an alternative to the color-blind interpretation of equal protection guarantees. The formulation of equality as an antistatus or antisubordination principle, while marginal as a doctrinal matter, captures the social reality of linguistic minorities and provides constitutional justification for efforts to accommodate linguistic difference.[106] The failure to account for factors such as linguistic difference when devising policies or laws designed to integrate minorities into public life threatens to inhibit free and equal participation. Linguistic minorities may be constrained not just by communication barriers but by discrimination that stems from the cultural construction of language. Considering the language debate in terms of status conflict thus adds a second dimension to the language-equality narrative by more explicitly defining, in cultural terms, the discrimination that linguistic minorities face. By considering the status-based approach to understanding differ-

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[104] *E.g.*, Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 18 (1991).

[105] *Id.* at 27–36. The treatment of race as an immutable characteristic is further undermined by the increasingly multiracial nature of our society. The more multiracial the population, the more likely it is that race will come to represent an affiliation to which an individual may, in some sense, choose to subscribe. Like language, race can be said to exist along a mutability continuum. This recognition underscores the need to reconsider the formal, categorical approach to race in favor of an equal protection jurisprudence designed to help courts understand how race and the practices associated with race relate to the individual's capacity to participate in public life.

[106] For an example of the antisubordination approach, see Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 1 (1988). Karst locates in the equal citizenship principle of the Fourteenth Amendment a prohibition against the treatment of groups or individuals as members of an inferior caste.

ence, we move one step closer to completing a framework within which to ground fluid civic identity in actual legal practice.

Throughout American history, controversies surrounding linguistic difference have centered around calls for national unity and have been inflected by value- and culture-laden overtones. The debates have never been strictly about the efficiency of communication. Lawyers have long understood the cultural dimension of language controversies. The state attorneys in *Meyer v. State*[107] defended the state's proscription against language instruction before the ninth grade with the following argument:

> To allow the children of foreigners . . . to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always *think* in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended . . . to require . . . that until they had grown into [the English language] and until it had become a part of them, they should not in the schools be taught any other language.[108]

The lawyers in *Meyer* understood that the language a person speaks and is taught shapes how she thinks and helps determine her cultural affiliations. The fact that the presence of non-English languages in public life has historically been seen as a sign of an impending Tower of Babel suggests that some believe that linguistic minorities pose a threat to cultural coherence that should be vigorously resisted.[109]

Critics of the English Only movement situate it in this historical tradition, which has defined American identity through the law of language.[110] By aligning the language debate with cultural allegiances, the English Only movement has set the terms of the debate as the American versus the foreign, with the English language as the symbol of national unity. The English Only movement's philosophy reflects the fact that debates over language often involve debates over status. According to the movement, languages other than English and the cultures with which they are associated are unintelligible and therefore do not belong in the public sphere. The movement's goals include the designation of English as the official language, the restriction of government funding for bilingual education to short-term transitional programs only, and the control

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[107] Meyer v. State, 187 N.W. 100 (Neb. 1922).

[108] *Id.* at 102 (emphasis added).

[109] *But see* Perea, *supra* note 3, at 352 n.455 (noting that the "inability of many persons to understand Spanish does not make the language itself inherently unintelligible, or any less intelligible than English").

[110] *Id.* at 277.

of immigration to counterbalance the perceived trend toward language segregation.[111] In response to the dramatic growth of the Latino population, the movement's leaders ask: "Will the present majority peaceably hand over its political power to a group that is simply more fertile?"[112] The movement is concerned not just with the perpetuation of a majority culture, but with the perpetuation of the right culture.

In the public at large, the use of language as a marker of status remains legitimate in a way that similar use of race and ethnicity does not. In her work on accent, Mari Matsuda observes that employers openly admit to having discriminated on the basis of accent and feel free to establish overt workplace regulations restricting the use of non-English. She writes, "we come up against the insider/outsider culture of dominance that is so fundamental to our understanding of the universe that we don't see it as ideology."[113] Language-based differences are seen as legitimate tools of social ordering. Indeed, sociolinguists themselves recognize that in different social contexts languages have different prestige values. As Juan Perea notes in his discussion of sociolinguistics, "discourse itself . . . and the ordering of discourse . . . reflect hierarchy and relationships of power in society."[114] Efforts to relegate languages other than English to the so-called private sphere suggest a desire to preserve status hierarchies, much as the characterization of domestic violence and sexual harassment as part of the personal sphere reinforces gender hierarchies. Even the protection of linguistic difference as a liberty interest beyond the reach of the state—the approach taken by the Court in *Meyer v. Nebraska*[115]—reinforces a hierarchy according to which the dominant language controls public discourse and decisionmaking, even as linguistic difference is allowed to persist in people's private lives.

This picture of the language debate provides a concrete example of the cultural and legal theories that describe social relationships in terms of status-based dynamics. For example, in his development of a constitutional approach to the dismantling of status hierarchies, Jack Balkin explains that "[t]he Constitution cannot be neutral in cultural struggles because democracies will not always dismantle unjust status hierarchies on their own."[116] Combatants in culture wars, according to Balkin, fight over the extent to which existing forms of social stratification should persist or be transformed.[117] Like those who have used status-conflict analysis to assess bilingual education controversies,[118] Balkin draws from the work

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[111] *Id.* at 343.
[112] *Id.* at 345.
[113] Matsuda, *supra* note 33, at 1397.
[114] Perea, *supra* note 3, at 352.
[115] 262 U.S. 390 (1923).
[116] Jack Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2367 (1997).
[117] *Id.* at 2320.
[118] *E.g.*, Moran, *supra* note 103.

of Joseph Gusfield on the temperance movement, who writes: "Each status group operates with an image of correct behavior which it prizes and with a contrasting conception in the behavior of despised groups whose status is beneath theirs."[119] Resolution of these conflicts requires that the Constitution be understood to reach not just civil and political rights but equality of social and cultural status.[120]

As the analysis of bilingualism and the mutability continuum presented in Part I suggests, simply pulling non-English speakers up to the English-speaking rung will not solve the language-status conundrum. A view of citizenship that ties theories of equality both to sense of self and to relative social position[121] calls for the accommodation of linguistic minorities; the complexity of linguistic-minority communities as embodied in the mutability continuum suggests that such accommodation should be broad in order to account for the full range of linguistic difference. A status-based approach to language rejects symbolic state declarations of a dominant culture as marked by language in favor of the accommodation of linguistic difference in the public sphere.

Using this status model allows us to venture outside the color-blind paradigm to consider how difference affects social position. We need not rely on race-neutral integration as the only method of redress. The status model, which defines our constitutional goal as the eradication of forms of second-class citizenship, could in fact be said to reject the integration paradigm as an impossible aspiration. According to the status approach, the processes of social ordering based on difference will constantly frustrate attempts to shape a harmoniously integrated mainstream. Moreover, fashioning a common civic identity through an integration defined in terms of common practices could require making status-based choices that might be constitutionally impermissible—a result that would be particularly likely once we characterize the Constitution's equality principles as antisubordination requirements. When this status dimension is combined with a free and equal access principle, the justification for robust accommodation of linguistic difference becomes clear. Regarding linguistic-minority practices as less socially desirable than English-language customs inhibits free and equal participation by linguistic mi-

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[119] JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 14–15 (2d ed. 1986), *quoted in* Balkin, *supra* note 116, at 2331.

[120] *See* Balkin, *supra* note 116, at 2343–44.

[121] Balkin refers to Karst's formulation of egalitarian citizenship as supportive of an antistatus Constitution. He writes:

> [Karst's] equal citizenship principle holds that each individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member. Stated negatively, the principle forbids the organized society to treat an individual as a member of an inferior or dependent caste or as a nonparticipant.

Id. at 2353 n.129.

norities. The cultural dimension of language highlights the need for a fluid formulation of civic identity according to which linguistic difference can be incorporated into the public sphere rather than assimilated out of it.

Ultimately, challenges arising from conditions of difference tend to pit cultural diversity against the assimilationist impulse. Attempts to make public life accessible to racial and ethnic minorities need not coincide with a belief in the value of balance-oriented integration or with identification of a mainstream. Additionally, a conclusion that government can avoid sponsoring assimilation simply by respecting cultural difference misunderstands the reality of the linguistic minority. Mere respect for linguistic differences will not prevent those differences from being obstacles to meaningful participation. Moreover, precisely because of the pressures outlined in Part I and the malleability of language generally, mere respect will not counter the erosion of linguistic differences, which has status implications by virtue of the fact that endangered languages and the people who speak them become marginalized.

For several reasons, existing jurisprudence on race and ethnicity offers an incomplete paradigm. First, while racial desegregation doctrine can be interpreted to permit the accommodation of difference, it does not offer coherent justifications or guidelines for that accommodation. Second, because the color-blind approach to equality heavily restricts the extent to which the law can affirmatively take account of race and ethnicity, understanding language as a function of race would subject language to a strict scrutiny that would thwart accommodationist objectives. Because language ability may be eroded and the social status assigned to non-English faces demotion under the pressures of an English-dominant society, protection of linguistic minorities requires a recognition of difference distinct in kind from the antidiscrimination protections currently afforded racial and ethnic minorities.

Once we accept that the appropriate response to the mutability continuum is not to eradicate the linguistic difference but to treat it as a status concern that we must legally accommodate, guidelines for that accommodation must be derived from some other existing source. Despite the limitations just discussed, extant equal protection law suggests a potentially workable, albeit incomplete basis for a cause of action based on language discrimination: intermediate scrutiny. Creating a language classification would allow courts to address language discrimination as a problem on its own terms and not as a problem related to race discrimination. As will become clear in Part III, accommodating linguistic difference requires an ability to make subtle distinctions concerning the nature of language as it plays out in the various spheres of participation. Not only would the application of strict scrutiny restrict the use of such gradations, but also its emphasis on remedying historical discrimination belies the fact that the language question is addressed to contemporary and

future-oriented demographics arising from forces such as globalization, constant immigration, and aversion on the part of minorities to assimilation. But to the extent that language needs a home in equal protection doctrine, the application of intermediate scrutiny would allow courts to account for the impact that language has on linguistic minorities' orientation to social and legal institutions while still requiring language-based distinctions to be connected to a legitimate objective. Rather than assess language as a function of race, courts could approach language-based distinctions using a level of scrutiny designed to capture the unique features of language.

Yet, while fitting language into the scrutiny regime will help courts protect linguistic minorities *qua* linguistic minorities from discrimination, the complex status concerns surrounding linguistic difference remain. As noted above, the eradication of language-based status distinctions requires more than antidiscrimination protection—it requires the incorporation of linguistic difference into public life. Precisely because extant doctrine dealing with race rejects the notion that race is relevant to a person's capacity to participate, we must venture outside the race and ethnicity context to consider how the law accommodates another form of difference in order to develop a blueprint for accommodating language.

B. The Accommodation of Religious Difference as a Model for the Language Debate

Scholars have drawn parallels between Establishment Clause jurisprudence and opposition to the symbolic effects of English-only legislation.[122] Decisions such as *Engel v. Vitale*[123] equate the symbolic power of government support of particular religious beliefs with an establishment of religion that threatens oppression and destroys diversity: "[W]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[124] Similarly, declarations of English as the official language suggest government support for a mainstream public culture that compromises diversity and perpetuates language-based status inequalities. The courts' chosen antidote to the establishment of religion has been the accommodation of religious difference. For a lesson in the accommodation of difference, this Article turns to the law of religion.

Accommodation of religious difference depends on various principles, most of which can be applied to some degree to language. Religious freedom constitutes an element of personal liberty that the law not only

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[122] Perea, *supra* note 3, at 363–70.
[123] 370 U.S. 421 (1962).
[124] *Id.* at 431, *quoted in* Perea, *supra* note 3, at 364.

tolerates but also affirmatively protects. Courts have designed accommodation to ensure that the application of the law is sensitive to the ways in which religious adherents have chosen to organize their lives around their beliefs. One scholar has argued that free exercise doctrine is "informed by the attitude that religion and religious practices are important and valuable aspects of human experience."[125] Indeed, the constitutional protection of religion has been said to be justified by religion's centrality in the formation of the individual's moral identity.[126] Accommodation also has deep historical roots that can be traced to the recognition that both stability and freedom of conscience in a religiously diverse society depend on the state's ability to enable free exercise without giving primacy to any single belief system. This purpose ultimately requires that generally applicable laws be adjusted to make the balance possible.

Like race and ethnicity, religion and language constitute identity, shape the individual's worldview, and represent defining features of communities of difference. At the same time, the law, which emphasizes color-blindness when it comes to race and ethnicity, struggles to accommodate religious difference by enabling its free exercise. In turning to religion to develop a theory of language accommodation, I do not mean to suggest that language bears a stronger resemblance to religion than it does to ethnicity, nor do I recommend that parties pressing language-based claims adopt the machinery of accommodation used in religion case law. Rather, I look to religion to find a justification for accommodating difference.[127] Because language has a behavioral component, religion offers a rich analogy for the purposes of this Article: the law recognizes the conduct-oriented aspects of religion as worthy of accommodation, even as it ignores conduct or behavior arguably associated with race and ethnicity. Additionally, while the law accepts that religious difference affects how believers interact with the state and in the public sphere, the state is prohibited from favoring any particular religion. From the law's perspective, then, no status hierarchies among religions exist. The question raised by religion as a marker of difference is thus similar

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[125] Gotanda, *supra* note 104, at 65–66.

[126] David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491, 508 (1994).

[127] Some scholars have used the principles elaborated under the Free Exercise Clause to develop a theory for how sexual orientation should be regarded by the law. *See, e.g., id.*; William N. Eskridge, *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411 (1997). Eskridge argues that the overarching principle that emerges from the law of religion is "the idea of benign religious variation. It is both acceptable and good that we are a nation of diverse religious communities. . . . [R]eligious diversity is good because it offers spiritual and emotional satisfaction to a broader range of people." *Id.* at 2429. This notion of benign variation suggests why the incorporation of linguistic difference into the public sphere could have stabilizing and liberating benefits similar to those accrued by the acceptance of religious diversity.

to the issues raised in the language debates: how can law and society accommodate cultural difference without also compromising a commitment to a common goal, whether it be the goal of a state neutral as to religion or the formation of a principle-based political community?

The parallel between religion and language is imperfect for a few reasons. First, as a category, language falls somewhere between the Free Exercise and Establishment Clauses. Whereas the Bill of Rights has enshrined one's right and capacity to worship as one pleases, no constitutional directive on language exists. At the same time, and perhaps more importantly for this Article, whereas the proscription against state entanglement with religion operates in constitutional tension with free exercise principles, no corresponding constitutional prohibition against state involvement in language policy sets limits on the accommodation of linguistic difference. Because language is not synonymous with an ideology or a belief system, state accommodation of linguistic difference does not present the neutrality problems that often arise in the accommodation of religions, which themselves sometimes challenge the commitment to basic principles of freedom or equality.

Though language is not itself a belief system, its intimate connection to ethnicity does suggest that linguistic differences may be attached to culturally defined, normative worldviews. Language does not, however, inherently reject the concept of a community of principle. Language is more properly understood as a set of practices that orients individuals to the various possibilities for structuring their normative takes on the world. Indeed, examples of state-sponsored multilingualism run throughout American history and have not given rise to the kind of state orthodoxy or factional infighting that the Establishment Clause was enacted to prevent.[128] It is the failure to accommodate language that results in the sorts of consequences the Establishment Clause is meant to avoid—the privileging of certain beliefs at the expense of diversity and freedom. Thus, to the extent that the Establishment Clause exists to prevent religion-based oppression, the limiting principle behind it need not be applied to the accommodation of language—particularly because accommodating linguistic difference will not likely reverse the dominance of the English language. To the extent that a limiting principle for linguistic accommodation is necessary, however, I argue that accommodation should be permitted insofar as it is intended to enhance linguistic minorities' participation in the various spheres of civic life.

Second, scholars distinguish religious communities of shared belief and common characteristics, guided by a normative authority and inter-

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[128] *See* Perea, *supra* note 3, at 284–323. While Perea also raises countervailing tensions in favor of the exclusive use of English, the point is that state sponsored multilingualism does not present establishment problems of constitutional proportions. *See* Perea, *supra* note 3.

pretive identity, from racial and ethnic communities. The protection of religious freedom is arguably, at its core, about safeguarding the fundamental freedom of conscience—a principle difficult to apply to language. Of course, this may be too stark. While ethnic communities may lack the normative "belief system" of religions, the former do have "a shared history, a community, which ... asserts a tug on its members"[129] that generates feelings of affiliation and belonging in ways similar to religion. Like religion, language shapes an individual's orientation to the world at large and to the people around her, affecting the way in which she understands social relationships and processes social stimuli. Because religious beliefs shape how believers function socially and politically, a theory of simple respect or tolerance proves insufficient. Because "belief and action cannot be neatly confined in logic-tight compartments,"[130] accommodation of religious behavior becomes necessary to protect the religious system as a whole. Similarly, language itself affects linguistic minorities' capacities to function politically and socially. Given the mutability continuum, mere tolerance of, and respect for, linguistic difference will not protect it from erosion. A theory of accommodation thus seems just as important to the preservation of language as it does to the preservation of religion.

Accommodation of religious minorities affords them the ability to live consistently with the law without having to compromise religious principles. Similarly, the accommodation of linguistic minorities would give them what native English speakers possess inherently—the ability to function and participate within American social and political institutions. Just as free exercise jurisprudence ensures that the law remains sensitive to the ways in which religious adherents have chosen to organize their lives, the law should take account of the ways in which language organizes the lives of linguistic minorities. This section examines the principles at work behind the courts' efforts to accommodate religion, a form of difference with which language shares important features.

1. Legal Attempts to Accommodate Religious Difference

Without question, the Supreme Court's religion-related jurisprudence speaks of the importance of common ground. However, even as the Court appeals to what could be described as assimilationist principles, it recognizes the importance of preserving certain distinctive features of individual religious communities. Though the balance the Court has struck has not always been in favor of difference, the case law in this area at least acknowledges a tension between difference and assimilation. The

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[129] STEPHEN CARTER, DISSENT OF THE GOVERNED 69 (1998).

[130] Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (upholding exemption for Amish community from requirement of public school attendance after the eighth grade).

Court has tried to resolve this tension with reference to traditions of participatory democracy, the rights of the dissenter, and the diffusion of power away from a dominant cultural group.

For example, in *West Virginia Board of Education v. Barnette*,[131] the Court upheld the rights of school children who were Jehovah's Witnesses to refrain from saluting the American flag as part of their school's daily programs. Despite previous articulations of the importance of this symbolic activity to national unity and to the inculcation of patriotism among school children,[132] the Court held that the right to self-determination supported the students' exception to pledging allegiance to a common community.[133] While the decision did not turn on the fact that the students were members of a particular religious minority, implicit in the Court's defense of the free speech rights of the dissenter was a recognition that beliefs emanating from a dissenter's minority point of view may justify exempting her from an affirmation of the symbols and myths that promote a common American identity. The Court wrote, "As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . [W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."[134]

In *Sherbert v. Verner*,[135] one of the foundational cases in the development of the theory of religious accommodation, the Court explored the extent to which generally applicable legislation might burden free exercise rights. The Court held that a statute disqualifying a Seventh Day Adventist from receiving unemployment benefits because she conscientiously refused to work on a Saturday—her Sabbath—imposed a burden on her free exercise of religion.[136] The Court contrasted the policy, which forced the appellant to "choose between following the precepts of her religion and forfeiting benefits," with the state's observance of a Sunday Sabbath, noting that the majority of believers in the state were not required to make the same choice.[137] In other words, in order to ensure that the state treated the Seventh Day Adventist and the majority of believers equally, the Court recognized the need to accommodate the appellant's religious difference. Additionally, the *Sherbert* Court established that to justify burdening the free exercise of religion, the state must demonstrate that it has a compelling state interest.

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[131] 319 U.S. 624 (1943).
[132] *E.g.*, Minersville v. Gobitis, 310 U.S. 586 (1940).
[133] *Barnette*, 319 U.S. at 624.
[134] *Id.* at 641.
[135] 374 U.S. 398 (1963).
[136] *Id.* at 403.
[137] *Id.* at 404.

Sherbert v. Verner and cases like it[138] illustrate that when the state defines its relationship to its individual citizens, it must respect and accommodate differences among citizens that reflect identity or belief rather than elide them through ostensibly neutral legislation. According to the Court, accommodation is justified as long as it does not render the recipient an unproductive member of society. Indeed, the goal of creating productive citizens often demands the accommodation of difference. When applied to linguistic minorities, effective accommodation requires that the state make room for linguistic difference in the public sphere rather than ignore its existence or attempt to eradicate it.

The Court significantly curtailed its accommodation of religion in *Employment Division v. Smith*.[139] In *Smith*, while the Court recognized that generally applicable laws may sometimes require exceptions for religious minorities, it drew the line at making an exception to the drug laws for members of the Native American church who use peyote in their religious rituals.[140] This refusal to accommodate a minority religious practice may well reflect the Court's concern for public health and safety rather than its suspicion of the accommodation of religion as a principle. Moreover, neither Justice O'Connor and the three dissenters in *Smith* nor Congress found the majority's weakening of the compelling government interest requirement for burdening religious minorities entirely persuasive. *Smith* thus generated heated public debate over the accommodation of religion, prompting Congress to pass the Religious Freedom Restoration Act ("RFRA"),[141] which guaranteed expansive accommodation of the practices and policies of religious organizations by resurrecting *Sherbert v. Verner*'s compelling state interest requirement.[142]

While the scope of the accommodation of religion as a technical matter of law has been restricted in recent years, as a matter of public debate the question remains open, and strong support for expansive accommodation exists. For example, in her concurrence in *Smith*, Justice O'Connor criticized the Court for allowing the government to prohibit, without justification, conduct mandated by a religion so long as it applies the prohibition universally.[143] Though agreeing with the Court's decision

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[138] *E.g.*, Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989) (holding that a refusal by a Christian to work on Sundays did not permit the state of Illinois to deny him unemployment benefits); Thomas v. Review Bd., 450 U.S. 707 (1981) (holding, in an 8-1 decision, that Indiana's denial of unemployment benefits to a Jehovah's Witness, who left his job at a munitions factory based on his religious objections to war, violated the Free Exercise Clause).

[139] 494 U.S. 872 (1990).

[140] *Id.* at 890.

[141] 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

[142] Though the Court later invalidated RFRA as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), it did so on the grounds that the law exceeded Congress's power to pass remedial legislation under Section Five of the Fourteenth Amendment, and not based on opposition to principles of accommodation.

[143] *Smith*, 494 U.S. at 893 (O'Connor, J., concurring).

to uphold the Oregon law, she recognized the need for active state involvement in ameliorating differential harm to cultural minorities.[144] In her concurring opinion in *City of Boerne v. Flores*,[145] Justice O'Connor agreed with the Court's invalidation of RFRA on federalism grounds but dissented from the Court's disposition of the case. She wrote that the Court should have used *Boerne* to reexamine the holding in *Smith*, which she continued to believe was wrongly decided, and to reinstitute the compelling state interest test.[146]

> [T]he Free Exercise Clause is not simply an antidiscrimination principle that protects only against those laws that single out religious practice for unfavorable treatment. Rather, the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible government interference, even when such conduct conflicts with a neutral, generally applicable law.[147]

Justice O'Connor concluded that, in following *Smith*'s lead, the lower courts have abandoned efforts to reasonably accommodate religious practices, thereby undermining the free exercise of religious liberty.[148]

In a subsequent interpretation of *Smith*, the Court further complicated the accommodation issue by holding that "[f]acial neutrality is not determinative" of a law's constitutionality because "[t]he Free Exercise Clause protects against governmental hostility which is masked as well as overt."[149] In invalidating several city ordinances that regulated or banned animal sacrifice, the Court in *Church of the Lukumi Babalu Aye v. City of Hialeah* noted that any legislative effort designed to persecute or oppress a religion or its practices is constitutionally impermissible, despite its facial neutrality.[150] Several of the Justices urged that the Court reconsider *Smith*, emphasizing that efforts to narrow the Court's free exercise jurisprudence run counter to principles of accommodation and religious liberty.[151]

A closer look at two particular cases in which courts have struggled over whether to accommodate religious minorities will advance our understanding of accommodation. In *Mozert v. Hawkins County Board of*

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[144] *Id.* at 902–03.
[145] 521 U.S. 507 (1997).
[146] *Id.* at 547 (O'Connor, J., concurring).
[147] *Id.* at 546 (citations omitted).
[148] *Id.* at 547.
[149] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993).
[150] *Id.* at 542.
[151] *E.g.*, *id.* at 564–77 (Souter, J., concurring) (noting that efforts to confine *Sherbert* and other like cases to the granting of unemployment benefits have been repeatedly rejected by the Court).

Education[152] and *Board of Education of Kiryas Joel Village School District v. Grumet*,[153] the courts grappled with requests for accommodation that they ultimately determined to be impermissible. While the courts rejected the groups' claims for state recognition of their religious differences, the reasoning of the various opinions in these two cases nevertheless suggests how cultural minorities might be accommodated by a majority with countervailing interests. Moreover, the religious minorities in these cases sought simultaneously to opt out of public institutions when it suited their religious agendas and to enjoy the benefits of those institutions when participation in them proved consistent with their belief systems. By contrast, the accommodation of linguistic minorities proposed in this Article involves a reorientation of existing political and social spheres to incorporate linguistic difference into public life rather than the creation of an opt-out alternative. While this reorientation may change the character of those spheres, this Article's theory of linguistic accommodation searches for ways to promote engagement rather than encourage disengagement. Despite these differences, *Mozert* and *Kiryas Joel* raise questions that are instructive in the language context.

2. Straddling the Insider/Outsider Divide

As devout Christians, appellants in *Mozert* sought to have their children exempted from a reading program at their public school.[154] They believed that the curriculum exposed the children to literature anathema to their fundamental religious values. The *Mozert* plaintiffs wanted at once to be part of and exempt from the public school system, defining their participation in the public institution according to the dictates of their minority worldview. They wished to be neither insiders nor outsiders.[155] Rather than allow the state to perpetuate what it perceived to be an unresolvable tension, the Sixth Circuit suggested that the parents send their children to private school or teach them at home.[156] In other words, the court could not sanction state involvement in such divided loyalty. The court held that the school's requirement that students follow a prescribed reading program did not create an unconstitutional burden under the Free Exercise Clause, because it did not force them to affirm or deny a belief or to engage in a practice prohibited by their religion.[157]

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[152] 827 F.2d 1058 (6th Cir. 1987).

[153] 512 U.S. 687 (1994).

[154] *Mozert*, 827 F.2d at 1060.

[155] *See* Nomi Maya Stolzenberg, *He Drew a Circle That Shut Me Out: Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 590 (1993).

[156] *Mozert*, 827 F.2d at 1067.

[157] *Id.* at 1069.

The *Mozert* court justified its holding first by appealing to the views of educators who regard public schools as an "assimilative force" that brings together diverse and conflicting elements in a pluralistic society on a broad but common ground.[158] The court extended this reasoning by pointing to Supreme Court jurisprudence advocating the teaching of tolerance in schools as essential to a democratic society.[159] The religious difference in question challenged the court's tolerance-based conception of democratic politics, according to which participants respect one another's differences without taking affirmative positions on those differences. In response, the court conflated pluralism and assimilation, implying that when in conflict, the latter should trump the former. The assumption that society's ultimate aspiration should be to achieve commonality despite differences of worldview undergirded the court's conditional toleration of pluralism. This move suggests the possibility that such a tolerance-oriented understanding of diversity may work against the preservation of difference.

Scholarly commentary elaborates the complex and problematic quality of the tolerance principle defined in the *Mozert* opinion and offers reasons why the case may have been wrongly decided. One scholar argues that the court's refusal to allow the students to opt out of the reading program while remaining part of the rest of the public school curriculum demonstrates that "participation in general society 'estopped' the plaintiffs from objecting to assimilation."[160] She also states that the court's "agnostic" support of the principle of toleration in effect undermined the respect for individual beliefs that toleration would seem to require.[161] Moreover, she points out that the court ignored the possibility that its decision would estrange the children from their parents as well as from their parents' community of belief:[162] in the *Mozert* plaintiffs' eyes, "[t]he standpoint of neutrality estranged the children from their parents' tradition by turning religious absolutes into matters of personal opinion."[163] Religious accommodation thus proves a hollow guarantee when it requires religious communities to separate themselves from public institutions in order to be accommodated at all. Religious pluralism and diversity—ends embraced by the court—seem doomed from the outset as long as accommodation is ultimately defined in assimilationist terms.

As in the most difficult cases of religious accommodation, the relationship among tolerance, assimilation, and the accommodation of difference lies at the heart of language controversies, making the former a useful parallel for understanding the latter. While the *Mozert* court's opinion

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[158] *Id.* at 1068 (quoting Ambach v. Norwich, 441 U.S. 69 (1979)).
[159] *Id.* (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).
[160] Stolzenberg, *supra* note 155, at 637.
[161] *Id.* at 630.
[162] *Id.* at 609.
[163] *Id.* at 612.

on religious accommodation opposes partial, belief-based separation from public life, it does not preclude something akin to fluid civic identity. Linguistic minorities seeking to retain their multiple cultural and linguistic affiliations while participating in public institutions have an easier case than the *Mozert* plaintiffs did. The parents in *Mozert* rejected participation in a culture of diversity on ideological grounds. By contrast, because language is tied most closely to capacities for understanding and not to a normative belief system, accommodation of linguistic difference does not reject participation in public institutions. Once linguistic minorities are recognized as having public status as linguistic minorities, they gain the capacity to participate in all spheres of civic life.

Finally, as has been noted previously, in the language context, the lack of a constitutional provision similar to the Establishment Clause leaves the door open for broad accommodation. The current color-blind approach to equal protection could be said to amount to a type of establishment clause forbidding active state perpetuation of certain kinds of difference. The comparison of language and religion, however, demonstrates that language constitutes the kind of difference that the courts should not ignore. As with religion, the law must face the challenges raised by linguistic difference by accommodating that difference to the greatest extent possible. At the same time, parameters of liberal tolerance, which forbid accommodation of religious difference for those seeking split participation, need not be invoked when the difference presenting the challenge is not, at its core, an ideological or normative one. Whereas the infiltration of religion into the public school curriculum would create serious constitutional problems, the recognition of linguistic difference in the formulation of curricula would not threaten the development of a state orthodoxy. Moreover, the incentive to learn English delineated in Part I exposes as merely rhetorical the notion that a Tower of Babel will ensue if linguistic minorities are accommodated.

Indeed, the presence of an incentive to learn English creates the very tension that accommodation should be designed to alleviate in the interest of sustaining diversity. The power of the dominant language to erode minority languages should be balanced by the facilitation of participation by linguistic minorities at all points along the mutability continuum. Opting for accommodation instead of tolerance guards against the forced assimilation of linguistic minorities. In addition, to the extent that the erosion of linguistic difference is simply inevitable, we can prevent the dislocation of linguistic minorities who retain non-English affiliations through accommodation. The bilingual individual will ultimately serve as a model who can simultaneously operate in an English-speaking world, armed with her cultural affiliations as legitimate markers of political identity, and in communities of difference, armed with her understanding of majority culture as a source of power. Accommodation structured around such a model should be acceptable to courts worried about state-

sponsored balkanization and state entanglement in normative questions of belief.

3. State-Sponsored Separation

The case of *Board of Education of Kiryas Joel Village School District v. Grumet*[164] offers a variation on the accommodation sought by the *Mozert* plaintiffs. Rather than demanding the right to opt out of select portions of the public school curriculum, appellants in *Kiryas Joel* defended an arrangement under which the state directly sponsored separate educational institutions for their minority religious community. Though the majority of the children of the Village of Kiryas Joel, a legally incorporated community of Satmar Jews organized pursuant to the laws of New York, attended private religious schools, the handicapped children of the community required special education services that the private schools did not have the resources to provide.[165] In response to the trauma experienced by the handicapped children upon being sent to public schools in the neighboring district, the New York State legislature designated Kiryas Joel as a separate school district eligible for public funding for special education.[166] The Supreme Court found the statute to be an impermissible delegation of state authority to a group defined by its common religion.[167] Because the Kiryas Joel district did not receive its governmental authority as one of many communities eligible for such treatment under a general law, the Court found that there could be no assurance that the next religious community seeking its own school district would receive funding.[168] The arrangement thus constituted an impermissible preference of a particular religious group.[169] This case of religious difference forced the Justices to join the debate over the extent to which the state should be involved in the perpetuation of that difference.

In holding that the Establishment Clause had been violated, the Court drew a line that proves useful in determining what other forms of difference the state may sponsor directly. Where the issue in an accommodation case is the extent to which the state has been fused with religion, a distinction must be drawn between a government's purposeful delegation of authority on the basis of religion and a delegation of power to individuals whose religious identities are incidental to their receipt of civic autonomy.[170] According to the Court, accommodation does permit religiously homogenous groups to exercise political power, so long as

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[164] 512 U.S. 687 (1994).
[165] *Id.* at 691–92.
[166] *Id.* at 693.
[167] *Id.* at 690.
[168] *Id.* at 703.
[169] *Id.* at 704–05.
[170] *See id.* at 699.

that power is conferred without specific regard to religion.[171] Applying this analysis to the language context, in which no Establishment Clause neutrality requirement exists, the delegation of state benefits to minority groups *as minority groups* may be permissible as a form of accommodation of difference.

In his concurrence, Justice Kennedy offered a slightly different interpretation. He concluded that New York's action constituted impermissible, state-sponsored segregation, reasoning that the state's recognition of group difference became impermissible once the state participated in undoing the "weld[ing] together" of minority communities commanded by the Constitution.[172] According to Justice Kennedy, the state creation of a minority school district undermined the effort to form a common political community. At the same time, Justice Kennedy rejected the Court's contention that an accommodation proves invalid because of the risk that other groups might not be granted the same accommodation and argued that such a limitation constitutes a needless restriction on the legislature's right to respond to unique problems.[173]

As Justice Kennedy's concurrence illustrates, accommodation of difference need not raise the slippery slope problem: the accommodation of one unique group need not require the same treatment for all groups that might be able to claim similar status.[174] Instead, accommodation of difference should be calibrated to respond to the constraints of the particular sphere of public life in which accommodation is sought and to the nature of the minority seeking the accommodation. The scope of the state's role should be defined by determining the significance of the harm threatened by a failure to accommodate and by whether the accommodation sought involves opting out of the institution in question.

In his dissent, Justice Scalia formulated a version of accommodation that not only sidesteps the Establishment Clause problem but also lends support to a group-based view of power distribution. He distinguished between the state's delegation of authority to a church and the facts of *Kiryas Joel*: New York delegated power to a group chosen according to its cultural characteristics, not according to its belief system or status as a religion.[175] According to Justice Scalia, "The neutrality demanded by the Religion Clauses requires the same indulgence toward cultural characteristics that *are* accompanied by religious belief."[176] Justice Scalia also identified a deficiency in the Court's reading of the religion clauses:

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[171] *Id.* at 706–07.

[172] *Id.* at 728–29 (Kennedy, J., concurring).

[173] *Id.* at 722–23.

[174] This recognition proves critical to justifying a controlled approach to the accommodation of linguistic minorities, particularly in the spheres where accommodation depends on the existence of a sizable community of the minority language speakers.

[175] *See Kiryas Joel*, 512 U.S. at 734 (Scalia, J., dissenting) (quoting Wright v. Rockefeller, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting)).

[176] *Id.* at 741.

while the Court struck down New York's scheme on the grounds that it violated a principle of neutrality, that invalidation was itself not neutral because it contributed to the weakening of a minority community defined by cultural characteristics that could have been legitimately accommodated under the Constitution.[177]

Of course, accommodation of difference need not extend as far as the state-sponsored separation struck down in *Kiryas Joel*. Despite the Court's invalidation of the scheme, we can reconstruct from the various opinions a recognition that the state has some latitude in taking into account cultural differences in its decisionmaking, particularly when those differences bear on the abilities of the people in question to participate. The Court's reasoning in *Kiryas Joel* thus coincides with a vision of fluid civic identity according to which minorities seek accommodation not to separate themselves from the public sphere but to engage in the institutions of public life. This inclusion requires an accommodation of cultural characteristics, the oversight of which would make inclusion ineffective or even impossible. Accommodation of linguistic minorities allows them to participate in the majority culture, but with the recognition that different forms of communication are necessary to make their participation effective.

Behind the theory of accommodation lies a belief that social and political value can be derived from the preservation of cultural minority groups. In his analysis of *Kiryas Joel*, Abner Greene defends the existence of minority cultural communities by arguing that the American constitutional order is best understood in terms of "permeable sovereignty" that allows homogenous communities to exercise public as well as private power.[178] He essentially parallels this view of power to the federalist design and its interest in the diffusion of power to normative communities from which state power can be checked.[179] To be truly liberal, or agnostic with regard to normative, belief-centered matters, the state must be willing to intervene when majoritarian consensus leads to differential harm.[180] The New York state legislature took precisely this kind of action in creating the Kiryas Joel School District. Greene defends this view by revealing inconsistencies in the Court's treatment of communities of difference. Specifically, he points to the lesson of *Milliken v. Bradley*:

> [C]itizens may, of their own volition, move away from other citizens . . . and still govern themselves as a public entity. They may not . . . use this public power to exclude [others], but if the

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[177] *Id.* at 748.

[178] Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 4 (1996).

[179] *Id.* at 5, 17, 52.

[180] *Id.* at 9.

> public power . . . runs in effect to a group homogenous as to religion or race, then it is wrong to say that the government has "segregated" . . . .[181]

If the Court wants to protect the private choices of citizens to define the parameters of their communities, state accommodation of those choices should not be withdrawn automatically when minority groups exercise them. Given that language represents a no less salient basis around which people organize their lives and identities, despite the fact that language lacks a clearly definable ideological component, this conclusion is no less relevant to language than it is to religion.

But the view of accommodation that depends on the preservation of homogenous communities of difference may be problematic for linguistic minorities. Dissident subcultures are more easily identified than communities of linguistic difference. The "new ethnicity" is not, after all, bound by geography.[182] The Satmar sect, with its well-defined worldview, contrasts dramatically with communities defined by linguistic characteristics existing along the mutability continuum. Indeed, the fluidity of the mutability continuum and of a civic identity that encourages multiple orientations presupposes that there will be some level of engagement with people outside the linguistic-minority community. The mutability continuum demands a flexibility for which the notion of permeable sovereignty based on the existence of autonomous subgroups cannot fully account. Accommodation should not be designed to create language enclaves but to make it possible for linguistic minorities to incorporate the dominant language into their identities and communities without being coerced into assimilation. This view of linguistic accommodation need not involve the delegation of state power to linguistic-minority communities in the same vein as the *Kiryas Joel* scheme, but as the following discussion indicates, this approach does justify expansive accommodation.

4. Conclusions on the Religion-Language Parallel

The Supreme Court's recognition of the right of culturally defined communities to separate themselves from the laws that govern reached a high point in *Wisconsin v. Yoder*.[183] In that case, the Court recognized the right of Amish parents to remove their children from public schools after the eighth grade.[184] Ironically, the more segregated a religious group demands to be, the less likely courts will use the rhetoric of commonality and national unity to militate against its claims for accommodation.

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[181] *Id.* at 45.
[182] *See* Gumperz & Cook-Gumperz, *supra* note 25, at 5.
[183] 406 U.S. 205 (1972).
[184] *Id.* at 218.

While the Court may be willing to ignore self-segregation selectively in the case of religion, it remains wary of involving state power in the perpetuation of difference. Much Court doctrine, however, establishes that discrimination based on religion depends heavily on a healthy theory of accommodation.[185] That theory has several characteristics. First, principles of associational liberty often require that the state respect differences among citizens. The Constitution enshrines the value of religious diversity, and in elaborating the reasons for protecting such diversity, courts consistently point out that religion defines an individual's worldview and shapes her interactions with other people. Both of these features are also inherent in language. Second, the Court remains concerned that seemingly neutral legislation neither harm religious minorities nor interfere with fundamental free exercise rights. The state's "neutral" preference for English, to the exclusion of other languages, threatens the same kinds of harm as religious preferences: discrimination against the minority that leads to disengagement by that minority from the public sphere.

Finally, in its struggles over how to accommodate minority religious communities, the Court has recognized that communities of difference must somehow be taken into account as the state defines its relationship to the body politic. While the Court's accommodation of religious minorities in this regard has been less generous, the lesson to be drawn from this branch of religion law is that minority communities defined by their differences shape the ways in which individuals orient themselves to the public sphere. The Court's reluctance to accommodate minority religious communities stems from an aversion to state entanglement with groups defined by their religious beliefs. In the case of language, however, the threat of entanglement carries less serious consequences. Though robust linguistic accommodation may require state support for minority cultural practices, language as a system orients individuals to the world around them without prescribing a particular normative view of that world. State involvement with linguistic-minority communities thus does not threaten the creation of a state orthodoxy or the possibility of ideological repression.

In the end, whereas the claims of religious minorities seeking accommodation often involve requests for exemptions from generally applicable laws or mainstream institutions, the type of accommodation advanced in this Article encourages participation by incorporating linguistic difference into the public sphere. Of course, linguistic minorities, tied as they are to ethnic communities, may want to retreat into those communities rather than enter into the linguistic and cultural mix of a diverse society. But it is precisely because such tendencies are inescapable that an effective approach to participation must be fundamentally antiassimi-

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[185] *E.g.*, Thomas v. Review Bd., 450 U.S. 707, 717–18 (1981).

lationist. If we come to understand civic identity as fluid, then it becomes possible to envision a scenario in which minorities remain free to live their day-to-day lives as part of culturally defined communities but are nevertheless connected to the body politic by public institutions designed to accommodate salient differences in the interest of broad participation. Whereas accommodation counterbalances the "opt-out" impulse, the failure to accommodate, by ensuring that some linguistic minorities will remain isolated, may actually encourage the tendencies toward balkanization that assimilationists fear. An analysis of the law of language provides an understanding of how these principles of accommodation might work in practice.

III. The Law's Treatment of Linguistic Difference

In *Valeria G. v. Wilson*,[186] a federal district court reviewed the legality of California's Proposition 227, which replaced bilingual education in public schools with English immersion programs.[187] The court concluded that, though the language debate necessarily focuses on national origin minorities, it is in truth a neutral debate about "which system will . . . enable [children] to function as American citizens and enjoy the opportunities and privileges of life in the United States."[188] Decisions like *Valeria G.* demonstrate that some conception of language rights does exist in American legal culture. Language acts as a factor in the decisions concerning the distribution of resources, in the education of people for life and citizenship, and in efforts to achieve social integration. A survey of the cases through which courts have come to terms with the relationship between language and these issues reveals that the character of the language debate depends on the sphere in which it arises. What separates court decisions conceptually is whether the controversy in question concerns the *capacity* to speak English, the *propensity* to speak a foreign language, or the *right* to participate in the privileges and duties of citizenship in a language other than English.

In exploring the different ways in which courts have treated language, this analysis begins with an antidiscrimination baseline, reasoning that, regardless of the size or power of the linguistic-minority community, no person should be discriminated against because of her linguistic status. The effort to protect linguistic minorities from discrimination has been most elaborate in the spheres of the workplace and the classroom. Because linguistic difference affects the ways in which people integrate themselves into communities and institutions, this analysis continues by examining those spheres in which bilingualism should be regarded as an

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[186] 12 F. Supp. 2d 1007 (N.D. Cal. 1998).
[187] *Id.* at 1012.
[188] *Id.* at 1014–15.

asset and in which the law must account for the fact that communities along the mutability continuum will always exist. Through the discussion of the courtroom, the classroom, the commercial sphere, and the administrative state, it becomes apparent that to accommodate linguistic difference, the state may have to participate to some degree in the perpetuation of that difference.

The vast majority of the cases that have dealt with the status of non-English speakers in the various spheres involve Spanish speakers, which should come as no surprise given that Latinos represent the largest linguistic-minority group in this country.[189] Indeed, the fact that courts have most frequently mediated language controversies involving Spanish-speaking minorities underscores the irony of identity-based politics: to demonstrate a condition of powerlessness, a group must in fact have a modicum of power, even if that power is merely strength in numbers. But as was emphasized at the outset, the principles and policies elaborated in this Article are not limited to the protection of the right to speak Spanish, and the legal treatment of Spanish speakers can be extrapolated to describe the status of linguistic minorities generally.

That the doctrinal development of language rights has unfolded predominantly in relation to Latino communities raises a few questions. Should the scope of the protection afforded a linguistic minority be a function of the percentage of the population that speaks that particular non-English language? What is enough of a language to accommodate? Is it possible that the more familiar a language is, the more easily public institutions will be able to accommodate that language? The problem of where to draw the line in deciding which linguistic minorities should receive which forms of accommodation will not admit to a simple, principled solution given the extraordinary number of languages. While certain language rights, such as the right to be free from discrimination based on language ability or preference, may easily extend to all linguistic minorities, the language rights that require more robust accommodation, such as the right to receive an adequate education or the right to have access to certain public services, require affirmative state action and may therefore necessitate that distinctions be drawn based on the size of linguistic-minority communities.

The difficulty of the questions posed above underscores the fact that appreciating the unique status of language gives rise to complex policy problems. This analysis does not definitively resolve these concerns by articulating a comprehensive blueprint for accommodation in the different spheres. Instead, this analysis identifies the challenges raised in each sphere, notes the ways in which courts have dealt with them, and offers suggestions as to how accommodation in each sphere can be made most

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[189] *See supra* notes 7–15 and accompanying text.

consistent with the principles of equal access and civic engagement that inhere in the concept of fluid civic identity.

A. The Antidiscrimination Baseline and Language Regulations in the Workplace

Courts have long grappled with how to apply antidiscrimination protections to linguistic minorities in order to ensure them equal protection under the laws. The contours of this language right have been shaped predominantly in the context of workplace antidiscrimination suits.

1. Workplace Regulations and Title VII

Regulations established by employers that restrict the languages their employees may speak while on the job have been a common source of language-based antidiscrimination suits. A recent study found that ten percent of a sample population of employers admit to practicing discrimination based upon an individual's foreign appearance or accent.[190] Many who engage in such discrimination find nothing surprising or inappropriate about differentiating among employees according to their language abilities.[191] Employers generally premise their language restrictions on a desire to make customers feel comfortable. The concern that the customer not feel alienated by the speaking of non-English not only privileges the comfort of monolingual English speakers but also evinces an assimilationist assumption that public spaces must reflect common practices in order to remain harmonious. This phenomenon and the judicial opinions that confront it reflect confusion over whether language restrictions are tantamount to impermissible racial classifications. In the antidiscrimination context, courts struggle with how to characterize language, revealing the inadequacies of current law for assessing language discrimination.

Not all courts have failed to appreciate the impracticality of English-only workplace policies. In *Gutiérrez v. Municipal Court*,[192] the Ninth Circuit evaluated California's Proposition 63, or the California Official English Declaration, which included a provision authorizing these workplace regulations. The court declared the provision to be a "symbolic statement" rather than a meaningful measure to achieve efficiency in government and business operations and invalidated the state's language regulations on the premise that they did not meet the business necessity requirement established by the Equal Employment Opportunity Commis-

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[190] ROSINA LIPPI-GREEN, ENGLISH WITH AN ACCENT: LANGUAGE, IDEOLOGY, AND DISCRIMINATION IN THE UNITED STATES 157 (1997).

[191] *Id.*

[192] 838 F.2d 1031 (9th Cir. 1988) (striking down an English-only workplace rule).

sion ("EEOC").[193] Because the regulation in question affected both work-related and non-work-related intra-employee conversations, the measure's prohibition of Spanish speaking proved to be too sweeping for the court to accept. In fact, the court found that employees' abilities to speak Spanish, referred to by defendants as threatening to create a Tower of Babel, were actually essential in servicing non-English-speaking clients.[194] The court concluded that the argument that all employees must speak English to reduce the fears and suspicions of English-speaking coworkers "has an adverse impact on other persons based on *their* national origin. Existing racial fears or prejudices and their effects cannot justify a racial classification."[195]

In paralleling the language restriction to a racial classification, the *Gutiérrez* court based its invalidation of the workplace policy on the grounds that it constituted a form of prejudice closely akin to national origin or race discrimination. However, dicta from the court's opinion as well as the dissent's quarrel with the court's analysis reveal that the case involved a complex set of issues surrounding the relationship between language, culture, and the scope of antidiscrimination law. For example, the court emphasized that the EEOC regulations in question were premised on the possibility that English-only rules may "create an atmosphere of inferiority, isolation and intimidation."[196] The court elaborated on the relationship between language and national origin by noting that identity is tied to the use of one's primary tongue, which not only conveys particularized concepts but also underscores cultural affiliations.[197] In connecting the workplace restriction with the creation of an atmosphere of isolation and intimidation, the court suggested that cultural affirmation contributes to a positive sense of self that should be encouraged among employees.

In his dissent to the denial of rehearing en banc, Judge Kozinski identified a legitimate business necessity in the regulation. The employers, in order to assist supervisors in understanding the work conversations of their subordinates, legitimately sought to prevent employees from concealing the meaning of their conversations by not speaking English.[198] In reaching this straightforward conclusion, Kozinski pre-

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[193] *Id.* According to EEOC guidelines, an English-only rule is a burdensome condition of employment that might mask national origin discrimination and must therefore be justified by business necessity. *See* 29 C.F.R. § 1606.7 (1994). The guidelines currently assess English-only rules as follows: (1) a rule applied at all times will be presumed to violate Title VII and will be closely supervised; and (2) a rule applied only at certain times may be permitted where an employer can show it is justified by business necessity. *Id.* § 1606.1(a).

[194] *Gutiérrez*, 838 F.2d at 1042.

[195] *Id.* at 1043 (citing Palmore v. Sidoti, 466 U.S. 429, 433–34 (1984)) (emphasis added).

[196] *Id.* at 1039 (quoting 29 C.F.R. § 1606.7 (1987)).

[197] *Id.*

[198] *Gutiérrez v. Mun. Court*, 861 F.2d 1187, 1191 (9th Cir. 1988) (Kozinski, J., dis-

sented his view of language's status. He contended that the United States has been able to avert the language agonies experienced by countries such as Canada because, as "a nation of immigrants, we have been willing to embrace English as our public language, preserving native tongues and dialects for private and family occasions."[199] Kozinski appealed to a standard assimilationist narrative according to which immigrants shed their non-American cultural affiliations in public spaces, such as the workplace, as part of an affirmation of their new civic identities as cultural Americans.

Understood in this framework, the business necessity justification treats linguistic-minority status as a barrier to integration into public life.[200] The *Gutiérrez* court suggests, however, that the nature of interpersonal relations in the workplace proves more complicated and varied than a straightforward assimilationist narrative would allow. According to the court, there must be space for employees to engage in personal conversations in the languages most accessible to them; furthermore, the presence of non-English in the workplace could well advance business interests by facilitating communication with a public increasingly marked by linguistic diversity.[201] A general prohibition on non-English in the workplace represents an overly blunt instrument in service of a crude vision of the American public sphere.

2. *The Bilingual/Monolingual Divide*

In *García v. Gloor*,[202] the Fifth Circuit complicated the discrimination question by distinguishing bilingual workers from their non-English-speaking counterparts.[203] Offering a theory of language mutability, the court found that no language protections attached to the bilingual worker.[204] In other words, once someone has acquired English, language can no longer be considered a function of her national or cultural identity. Instead, language becomes a choice—a mutable characteristic. In sustaining the workplace language restriction, the court made no attempt to determine whether valid business reasons for the English-only rule existed. The status of the worker as bilingual enabled the court to conclude that the regulation did not impose a functional burden on the speaker.[205] The court therefore deferred to the employer's construction of the regulation.

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senting from denial of rehearing en banc).

[199] *Id.* at 1187.

[200] In this context, by "public life" I mean not just citizen participation in government, but relations and communications in civil and economic society.

[201] *Gutiérrez*, 838 F.2d at 1042.

[202] 618 F.2d 264 (5th Cir. 1980).

[203] *Id.* at 268–69.

[204] *Id.*

[205] *Id.*

The Ninth Circuit recently tackled this divide in *García v. Spun Steak Co.*[206] In defense of its workplace restrictions on the use of non-English, the employer offered the standard "work place harmony" justification.[207] The court found that genuine issues of material fact existed as to whether an employee who did not speak English was adversely affected by an English-only rule.[208] Yet the court also concluded that employees who spoke both Spanish and English failed to show that the English-only requirement had significant adverse effects on the terms, conditions, or privileges of their employment in violation of Title VII.[209] For the *Spun Steak* court, the fact that bilingual workers had the capacity to communicate in English militated in favor of sustaining the regulations.

Similarly, in *Dimaranan v. Pomona Valley Hospital Medical Center*,[210] the court evaluated a workplace rule established by a hospital administration that prohibited a nurse from speaking Tagalog while on duty. The court held that (1) the hospital's restriction of the use of Tagalog by nurses working in a particular unit during the evening shift did not constitute an English-only rule; and (2) the language restriction was motivated by an attempt to promote workplace harmony within the unit and not an attempt to discriminate on the basis of national origin.[211] In other words, because the rule did not apply comprehensively to all non-English speakers, it did not constitute the kind of English-only rule that courts have found to violate Title VII. The court further noted that for a plaintiff to prevail on a Title VII disparate treatment claim, she must prove with circumstantial evidence of animus that the employer intended to discriminate against a particular group.[212] In this case, the rule evinced no animus because the person who instituted the policy had been the plaintiff's benefactor and was concerned not with the use of Tagalog in the nursing wards but with the breakdown of unit cohesion among nurses.[213]

The *Dimaranan* analysis resembles the reasoning in another major workplace regulation decision: *Jurado v. Eleven-Fifty Corp.*[214] In *Jurado*, a disc jockey challenged his termination for his refusal to stop speaking Spanish on his radio broadcasts.[215] The Ninth Circuit held that (1) the

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[206] 998 F.2d 1480 (9th Cir. 1993).
[207] *Id.* at 1483.
[208] *Id.* at 1488.
[209] *Id.*
[210] 775 F. Supp. 338 (C.D. Cal. 1991).
[211] *Id.* at 342. The court also held that the plaintiff had established that her demotion and transfer were partially motivated by impermissible retaliation for her filing charges with the EEOC and a Title VII lawsuit. *Id.* at 347. Thus, while the language directive itself did not violate Title VII, the demotion of the plaintiff did do so because Title VII protects the right of employees to oppose management policies. *Id.*
[212] *Id.* at 343.
[213] *Id.* at 343–44.
[214] 813 F.2d 1406 (9th Cir. 1987).
[215] *Id.* at 1408.

plaintiff failed to establish a prima facie case of disparate treatment; (2) the plaintiff failed to show that he was engaging in protected activity because his Spanish-language broadcasts did not constitute opposition to management policy; and, most importantly, (3) the plaintiff's claim that the English-only regulation disproportionately disadvantaged Hispanics was without merit because the plaintiff was bilingual.[216] The court concluded that the station manager had the right, as a businessperson, to base his station policy on his belief that the Mexican and black audiences were not essential to the success of his station.[217]

The plaintiff in *Jurado* based his civil rights claim not only on his own right to speak another language while performing his job—the same claim made in *Dimaranan*—but also on the importance of making the radio station's broadcasts accessible to the Spanish-speaking communities of Los Angeles. The court treated the first part of his claim as incoherent given that the plaintiff had the capacity to broadcast in English.[218] He, and those similarly situated, could not have been disadvantaged by a rule that did not prevent them from fulfilling their job description as envisioned by their employers. Moreover, the court rejected his group-based claim, elevating the radio station's right to define its target audience above the right of the disc jockey himself to define the community to be served by the station.[219] Community-based claims advanced by the plaintiff had no place in the antidiscrimination analysis applied by the court. The success of the station did not depend on its ability to reach monolingual Spanish speakers, and as a result, the court found that the language regulation could not have been motivated by racial animus.[220]

Indeed, the *Jurado* plaintiff's community-based claim was weak. In Los Angeles, the airwaves are likely full of stations and programs targeting Spanish speakers. For the purpose of developing an accommodationist practice, however, the element worth highlighting is the court's conditioning of the extension of antidiscrimination protection to language on the claimant's capacity to speak English. In the *Jurado* court's view, the ability to speak English may justify discrimination based on the decision to speak non-English. Language restrictions are increasingly evaluated from the premise that language represents a mutable characteristic and is therefore not a proxy for race or ethnicity. As a consequence, policies based on language can be easily justified by business necessity.[221]

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[216] *Id.* at 1409–13.

[217] *See id.* at 1411.

[218] *Id.*

[219] *Id.*

[220] *Id.* at 1410.

[221] For example, in *Prado v. L. Luria and Son, Inc.*, 975 F. Supp. 1349 (S.D. Fla. 1997), the court dismissed EEOC guidelines as not having the force of law and found that "choice of language, like other behaviors, is a matter of individual preference." *Id.* at 1354. The court also found, in response to Prado's claim that managers' and employers' ridicul-

To the extent that antidiscrimination law should be concerned with protecting individuals from harm resulting from non-merit-based discrimination, the manner in which courts have treated bilinguals in the workplace proves problematic. In his analysis of the English Only movement, Bill Piatt stresses that "mutability analysis fails to take into account the individual's interest in viewing the world through his or her culture. It also fails to inquire whether less restrictive measures are available to satisfy the majority's concerns, rather than resorting to blanket denials of the right to another world view."[222] In bifurcating linguistic-minority status into bilingual and non-English-speaking categories, the *Gloor, Spun Steak, Dimaranan*, and *Jurado* courts transformed the antidiscrimination mandate into a functional protection, or a protection of an individual's capacity to understand basic English. These courts separated language protection not only from the national origin paradigm but also from the realities of the mutability continuum.

A recent challenge to a government requirement that public school teachers in Puerto Rico pass a Spanish-language version of the certification exam further reflects the tensions that emerge from courts' efforts to deal with language controversies in antidiscrimination terms. In *Smothers v. Benitez*,[223] the federal district court tried to fit the language question into the structures of antidiscrimination law. The court reasoned that minorities could be protected by identifying language ability with national origin.[224] "New languages can be learned and old ones forgotten; however, the knowledge of a language, insofar as it is an ethnic characteristic, leaves identifiable traces like accents, surnames, and behavior patterns. . . . Where these traces are used to discriminate against a certain group, language becomes an indicia of national origin."[225] The court questioned the regulation based on its observation that the English-speaking plaintiff, as a minority, stood to be disadvantaged by the majoritarian political process and therefore deserved antidiscrimination protection from language restrictions. "The use of one's language is an

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ing of her accent created a hostile work environment, that the "mere utterance of comments which the employee deems offensive is not, alone, conduct so severe or pervasive as to create an objectively hostile or abusive environment." *Id.* at 1356. The court predicated this conclusion on the fact that Latinos were not in the minority in the Luria work force. *Id.* Prado's lack of technical minority status cast suspicion on her allegations of a hostile work environment based on language discrimination. The combination of the court's view of language as a preference and the fact that other workers of the same ethnicity surrounded Prado supported the employer's business necessity justification, suggesting that courts may be willing to separate language from national origin—but not with the intention of giving language itself protected status.

[222] BILL PIATT, ONLY ENGLISH? 180 (1990).

[223] 806 F. Supp. 299 (D.P.R. 1992).

[224] *Id.* at 306.

[225] *Id.* Other courts have also held that language may be considered as a proxy for national origin under equal protection analysis. *E.g.*, Olagues v. Russoniello, 797 F.2d 1511 (9th Cir. 1986) (holding that classifications based on language are tantamount to classifications based on national origin).

important aspect of one's ethnicity, and should not be sacrificed to government or business interests without good cause."[226] Because of the particular vulnerability of language minorities, the court closely scrutinized the motivations of the Department of Education with a kind of heightened rationality test and ordered that discovery be conducted to determine whether discriminatory intentions motivated the regulation.[227]

Despite the court's efforts, antidiscrimination law proved inadequate to account for the concerns at play. First, the court noted that courts traditionally have had difficulty dealing with the monolingual/bilingual divide.[228] In the case of monolinguals, language has been understood as a pretext for ethnicity and therefore as an impermissible basis on which to discriminate. However, once an ethnic minority has acquired English-language skills, it appears as if courts no longer regard language as a discriminatory classification. Language's ties to ethnicity depend entirely on its status as a tool and not on its status as a marker of identity or orientation, underscoring that courts tend to view language in purely functional terms.

Similarly, the *Smothers* court concluded that unless the language law in question can be linked with national origin, strict scrutiny should not be applied.[229] If the burden placed on the linguistic minority cannot be traced to intentional discrimination based on national origin, the Equal Protection Clause cannot be used to protect the linguistic minority.[230] Thus, the courts' antidiscrimination approach to language rights offers an incomplete and sometimes awkward way of thinking about language. Once courts divorce language from race and national origin, they become unable to recognize that language restrictions form structural impediments to participation and create disincentives for civic engagement, even absent deliberate, race-based discrimination. The *Smothers* court at least broached this tension:

> [S]hould laws arise which threaten rights like the access to social services, or education, or employment, or voting, which are not fundamental rights, yet are important to the existence of a group in society, there should be a mechanism for examining those laws other than the dull instrument of the rational relation

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[226] *Smothers*, 806 F. Supp. at 309.

[227] Given that many private schools in Puerto Rico are bilingual, the court also surmised that the Spanish-language requirement could have been unnecessary. *See id.* at 309–10.

[228] *Id.* at 308.

[229] *Id.*

[230] The court's reasoning in *Olagues*, 797 F.2d at 1511, cited by the *Smothers* court, points to a similar conclusion. The *Olagues* court distinguished rules that simply involve general classifications between English-speaking and non-English-speaking individuals from rules that use language as a means of isolating a particular group. Only the latter can be invalidated under equal protection analysis. *See id.*

> test. The traditional rational relation test may not adequately balance the interests involved where the majority language group burdens minority language groups. Any law which uses language as the basis for classification should be closely examined to see whether its effect is unduly burdensome to any particular language group for impermissible reasons.[231]

Ultimately, the deficiencies of the antidiscrimination paradigm for dealing with linguistic difference, which are highlighted by the workplace regulation cases, also arise repeatedly in the contexts of the courtroom, the classroom, and the administrative state. Seemingly neutral policies of general applicability inhibit linguistic minorities' access to institutions of civic life. To understand how accommodation can be expanded beyond a strictly antidiscrimination approach, this analysis now turns to those threatened spheres.

B. A Preservationist Framework and Accommodation in the Courtroom, the Classroom, and the Administrative State

This section explores the spheres in which the accommodation of linguistic difference has the potential effect of preserving minority communities and recognizing the reality of the mutability continuum. Accommodation in these spheres expands language rights from a limited view based on liberty concerns to a view that emphasizes the equality dimension of participation, acknowledging the importance of community in legal institutions. In the final analysis, rather than merely protecting linguistic minorities from discrimination, the accommodation of linguistic minorities in the preservationist spheres creates a space for public expression of linguistic difference and incorporates linguistic minorities *as linguistic minorities* into public institutions, even going so far as to permit a relationship between the state and its citizens that does not depend on the capacity to understand English.

1. Language Rights in the Private Sphere

The rights to speak languages other than English and to pass that language on to one's children have long been recognized as fundamental. In *Meyer v. Nebraska*,[232] the Supreme Court struck down a statute forbidding foreign-language instruction in the public schools until after the eighth grade. The Court defined the activity prohibited by the statute as a liberty interest. "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and mor-

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[231] *Smothers*, 806 F. Supp. at 308.
[232] 262 U.S. 390 (1923).

ally, is clear; but the individual has certain fundamental rights which must be respected."[233] Though nodding in the direction of the Nebraska legislature's desire to shape a "homogenous people,"[234] the thrust of the Court's opinion defined foreign-language instruction as sufficiently harmless to constitute a matter of private concern—private in the sense that it remained beyond the authority of the state to proscribe.[235] In other words, given that language instruction did not pose a threat to public or civic order, the state could take no position as to its legitimacy as a pedagogical choice. Though the Court's opinion in *Meyer* abounds with references to particular visions of the public good, its ultimate conclusion proves to be a neutral one intended to foster freedom of choice and to preserve a private sphere in which cultural differences might find expression.

While this case establishes an important background condition for the language debate in that it links the preservation of culture to fundamental liberty concerns, it provides little guidance for the accommodation of linguistic minorities in the public sphere. This section challenges the assumption, implicit in *Meyer*, that linguistic and cultural difference should be considered as part of the private sphere, or as one of the rights of the autonomous family. Instead, linguistic difference should be accommodated in the public sphere, based on principles of equal access and community-supported participation in civic life. Indeed, the right to have a familial culture or to sustain cultural autonomy in the private sphere proves anemic if not supported by a public accommodation of that culture. Particularly in the case of language—as the mutability continuum suggests—ignoring linguistic difference in public and social spaces leads to the erosion of that difference. As linguistic difference becomes marginal and irrelevant to the public lives of individuals and communities, it loses its legitimacy in home and family life as well.

The first step in accommodating linguistic difference in the public sphere in a preservationist sense leads to the commercial realm. For example, in 1988 the city of Pomona, California enacted an ordinance that required businesses that advertised with signs in foreign characters to devote at least half of their signs to English alphabetical letters. In *Asian American Business Group v. City of Pomona*,[236] the court struck down the ordinance as unconstitutional. The decision acknowledged that language has expressive features that fall under the parameters of the First Amendment but yet resolved the dispute by analogizing language to national origin in an uncomfortable balancing of First and Fourteenth Amendment concerns.[237] The court found that language could be used as

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[233] *Id.* at 401.
[234] *Id.* at 402.
[235] *Id.* at 403.
[236] 716 F. Supp. 1328 (C.D. Cal. 1989).
[237] *Id.* at 1332.

an expression of national origin, culture, and ethnicity and recognized that cultural identity is intimately tied to language.[238] The ordinance in question therefore amounted to content-based regulation, and because it bore no relationship to the commercial function of the sign, it failed First Amendment scrutiny.[239] Moreover, the court concluded that, although an equal protection claim generally must show an intent to discriminate, the challenged ordinance was explicitly based on national origin and was therefore facially discriminatory and invalid.[240]

The court found that the content-based restriction resulted not because Pomona regulated what businesses could advertise but because it regulated *how* they could advertise. The content to which the court referred was the expression of ethnic and linguistic identity through a non-English sign, whose meaning changed when juxtaposed with English words.[241] This attempt to straddle the First and Fourteenth Amendments—to predicate a finding of impermissible content regulation on the restriction of an expression of ethnic identity—reflects the difficulties courts have had in coming to terms with the legal significance of language as a category. As will be demonstrated below, the courts' underdeveloped conception of language often leads them to frame the language debate in First Amendment terms when their underlying concern is really equal access.

Perhaps a better way to understand what was at stake in the *City of Pomona* decision is to frame the case in terms of a community's right to structure its business and social relations as it chooses. The defense of a commercial sphere in which linguistic minorities can transact business without having to defer to the dominant language—the sphere essentially protected in *City of Pomona*—supports the perpetuation of linguistic-minority communities. A liberty interest becomes a community interest. Yet even the English Only movement tolerates the use of non-English in private and quasi-private settings; the movement itself emphasizes that its proposals would not prohibit the use of languages other than English in unofficial situations, such as in communication among family members, in religious ceremonies, or in private business.[242] What English Only supporters may or may not apprehend, however, is that this cultural autonomy in the private sphere suffers if it does not translate into the public sphere. A community's interests that are tied to the ability to engage in transactions in non-English become diminished if those interests cannot be expressed in public institutions as well. To resolve these tensions, this

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[238] *Id.* at 1330.
[239] *Id.* at 1331.
[240] *Id.* at 1332.
[241] *Id.* at 1330.
[242] *See* U.S. English, *In Defense of Our Common Language . . . , in* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY, *supra* note 3, at 143, 145.

section now considers how the state might adopt accommodationist principles to allow for such expression as it shapes its relationship with linguistic minorities.

2. Linguistic Difference in the Courtroom

In the courtroom, two different accommodationist challenges emerge: (1) the need of non-English speakers for services such as translators and bilingual attorneys to protect their rights as defendants; and (2) the task of factoring linguistic difference and bilingualism into the composition of juries. While courts have made considerable efforts to accommodate the non-English-speaking defendant, few attempts have been made to accommodate bi- or multilinguals in the formation of the jury. Courts regard language ability—both the inability to speak English and bi- or multilingualism—as reasonable bases for excluding individuals from the jury. This view of language has the effect of excluding entire communities from participation in courtroom processes. This section briefly considers the rationale courts have used to accommodate the non-English-speaking defendant and then challenges the reasons courts have given for excluding bilinguals from the jury, suggesting why a theory of accommodation requires that linguistic minorities not be subject to peremptory strikes based on their language abilities.

a. Accommodating the Defendant

It seems almost axiomatic that the individual defendant should not be disadvantaged by her linguistic difference when she becomes part of the legal system. When thrust into an adversarial relationship with the state, the defendant must be able to understand the processes by which the allegations against her are proven and through which her freedom is negotiated by her lawyer and the government. The constitutional rights to counsel and against self-incrimination would otherwise be meaningless.[243] To ensure that this critical form of accommodation occurs, it should be part of the responsibility of the court, when it appoints counsel, to ensure that linguistic difference has been taken into account. In communities with large linguistic-minority populations, finding a bilingual attorney will probably not tax the resources of the court. Linguistic minorities living in comparative isolation, however, are less likely to have access to the full panoply of protections, suggesting that the rights of the defendant depend on the nature of the community in which she lives. The degree to which linguistic difference can be accommodated thus depends, at least in part, on the existence of communities of linguis-

[243] *But see, e.g.*, United States *ex rel.* Torres v. Brierton, 460 F. Supp. 704, 706 (N.D. Ill. 1978) (holding that no right to a bilingual attorney has ever been found).

tic minorities—a connection that should not be forgotten in discussions of assimilation and diversity.

Most reported cases that allege inadequate accommodation of the defendant revolve around the appointment of an unqualified interpreter or the outright denial of an interpreter.[244] In *Negrón v. New York*,[245] the Second Circuit held that a Spanish-speaking homicide defendant was entitled to the services of a translator and that the failure to provide a translator rendered the trial constitutionally infirm. The court's failure to accommodate linguistic difference prevented the defendant from participating in his own defense in any meaningful way. The court pointed to the right to cross-examine witnesses and the ability to respond directly and specifically to testimony as basic elements of fundamental standards of fairness implicit in the Due Process Clause.[246] More specifically, the court noted that the defendant did not have the ability to respond to the most damning testimony of the investigator from the District Attorney's office, who himself could have testified in Spanish.[247] In other words, even absent the provision of an interpreter to provide systematic and specific translation, the court had at its disposal other methods of accommodating the defendant's linguistic difference.[248] The *Negrón* court's reasoning suggests that where accommodation is necessary, there is no reason to privilege English at trial. The court described what the trial must have been like for the unassisted defendant: "To Negrón, most of the trial must have been a babble of voices."[249] The court further noted that if a defendant lacks the ability to consult with his attorney, then "the adjudication loses its character as a reasoned interaction and becomes an invective

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[244] *See* Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 892 (1986).

[245] 434 F.2d 386 (2d Cir. 1970).

[246] *Id.* at 389.

[247] *Id.* at 388–89.

[248] *But see* United States v. DeJesus Boria, 518 F.2d 368 (1st Cir. 1975) (holding that the trial court did not err in failing to require Spanish testimony to be recorded in Spanish for the benefit of the defendant). In *DeJesus Boria*, counsel had requested a simultaneous Spanish translation for her client, asking the court to provide channel-hearing devices carrying actual voices of those speaking in an all-English version and an all-Spanish version. *Id.* at 370. The court found that such a system would require additional court and personnel costs and must be left to Congress to create. *Id.* at 371. Particularly in jurisdictions in which a significant percentage of defendants are members of linguistic minorities, accommodation along these lines would seem to be a good investment of resources in the interest of protecting defendants' rights. Compare also the courts' accommodation of language ability in criminal cases with accommodation in civil cases. In *Cota v. Southern Arizona Bank and Trust Co.*, 497 P.2d 833 (Ariz. Ct. App. 1972), the court invalidated a default judgment on the basis that the lack of English fluency caused the defendant to miss his court date. Decisions like *Cota* suggest that other elements of the judicial process, such as the service of process, summonses, and subpoenas, should occur in languages other than English when necessary to ensure that the system functions effectively and fairly with respect to defendants.

[249] *Negrón*, 434 F.2d at 388.

against an insensible object."[250] Linguistic accommodation thus proves necessary to ensure that defendants receive not only fair but also rational trials; defendants not accustomed to asserting their rights against the authority of the state may not know that they have rights to assert in the first place.[251] Accommodation through translation becomes indispensable to the integrity of the criminal justice system.

The *Negrón* decision contrasts with the Seventh Circuit's more recent pronouncement on translation in *United States v. Rosa*.[252] The court held that the district court's failure to provide a Spanish-language interpreter at a hearing at which the defendant waived her right to a jury trial was not an abuse of discretion. This conclusion rested on the court's determination that it was the defendant's responsibility to bring to the court's attention her inability to understand fully the proceedings.[253] Whereas in *Negrón*, the defendant's language barrier was obvious to the court, in *Rosa*, the defendant, who was able to speak some English, did not appear to the court to have comprehension problems.[254]

While the decision whether to use interpreters has traditionally been left to the discretion of trial courts, the *Rosa* court's conclusions on accommodation fail to understand the nature of language. Given the existence of a mutability continuum, the degree to which a defendant with limited English-speaking capacities understands the legal proceedings of which she is a part cannot be easily determined. Moreover, placing the burden on the linguistic minority to make her language deficiency known to the court represents an inadequate form of accommodation. Instead, an evaluation of the defendant's capacity to understand meaningfully the proceedings could be part of the court's pretrial responsibilities. If a deficiency truly exists, the defendant will not be able to express the full extent of her incomprehension.

Despite these problems, the extensive litigation over courtroom interpretation ultimately reveals that the machinery exists to accommodate linguistic difference.[255] The Model Code of Professional Responsibility for Interpreters in the Judiciary treats the interpreter as an officer of the court rather than as a witness or an expert.[256] Mechanisms for accommodating linguistic difference in the courtroom could be built into the structures of the courtroom and could be governed by the procedural

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[250] *Id.* at 389.

[251] *See id.* at 390.

[252] 946 F.2d 505 (7th Cir. 1991).

[253] *Id.* at 507.

[254] *Id.* at 507–08.

[255] The federal courts certify interpreters in Spanish, Haitian Creole, and Navajo; they "anticipate providing certification in Cantonese, Mandarin, and Korean"; and they "have a procedure in place to determine 'otherwise qualified status' for Arabic, Italian, Russian, Mien, and Hebrew." Charles M. Grabeau, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 255 (1996).

[256] *See id.* at 309–12, 361–74.

safeguards and rules that attend all courtroom business. Though the corps of courtroom interpreters may need to be expanded,[257] courts have an infrastructure that could even be employed to accommodate linguistic difference in other areas of courtroom activity—specifically, in the composition of the jury.

b. The Composition of the Jury

Recent controversies over venue changes in high profile criminal trials involving minority victims, such as Rodney King in Los Angeles and Amadou Diallo in New York, demonstrate the persistence of the belief in the jury as an institution that dispenses community justice. A tension exists between the vision of the trial as governed by rationalized legal and evidentiary rules and historical understandings of the jury that have emphasized its role as a forum for community participation in the administration of the legal system. Still, the latter remains an important factor to be weighed in defining who may be excluded from the jury.[258] The practice of excluding non-English speakers and bilinguals from the jury cuts against this community tradition. Particularly in communities in which linguistic minorities represent sizable portions of the population and also account for a significant number of criminal defendants and civil litigants, the exclusion of people with the capacity to understand non-English for fear of corrupting the "inviolate" jury deliberations with different languages—or different methods of interpretation—effectively precludes participation by large communities of people.[259] Moreover, attempts to privilege the English speaker as well as the English-language narrative ignores the realities of a multilingual society, ultimately compromising the effectiveness of the legal system by unnecessarily constraining the language of the courtroom. The case law on language-based peremptories demonstrates how linguistic-minority communities are inappropriately disadvantaged by a system that privileges English. While the courts must function predominantly in English for uniformity and efficiency's sake, a theory of accommodation permits the use of non-English-language testimony and bilingual jurors in cases in which the search for truth and the rights of the community to participate would be served by allowing non-English into the courtroom.

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[257] As of 1996, only six states had formal training programs for court interpreters. *See id.* at 255.

[258] I have presented my views on the community function of the jury elsewhere. *See* Cristina M. Rodríguez, Note, *Clearing the Smoke-Filled Room: Women Jurors and the Disruption of an Old-Boys' Network in Nineteenth-Century America*, 108 YALE L.J. 1805, 1835–40 (1999).

[259] *Cf.* Taylor v. Louisiana, 419 U.S. 522, 537 (1975) (noting that excluding women from the jury, by excluding an identifiable segment of the population from the administration of justice, might be inconsistent with the nation's democratic heritage).

The most recent development in this sphere unfolded in New Mexico in January 2000. The Supreme Court of New Mexico held that the state constitution prohibits the automatic exclusion of prospective jurors who do not speak English or Spanish.[260] The district court had issued an order noting it is the state's duty to provide interpreters for Spanish-speaking jurors free of charge at every step of the process, from orientation to trial.[261] In response to the New Mexico Supreme Court's affirmation of the district court, the Attorney General's office announced that the Administrative Office of the Court would develop uniform rules and procedures for handling non-English-speaking jurors, including the provision of interpreters during court proceedings.[262]

New Mexico's defense of the right of non-English speakers to serve as jurors exemplifies robust accommodation. Given the demographics of the state and the interest in fostering inclusive institutions, it makes sense to include monolingual Spanish speakers—a principle that could be extrapolated to other communities where non-English-speaking populations are sizable. Even to the extent that New Mexico's decision might not be feasible for large portions of the judicial system—indeed, as will be seen below, it is inconsistent with federal case law—the development in that state alone is instructive.

First, the immediate response of the Attorney General's office highlights the fact that state bureaucracies exist to formulate efficient and effective means of accommodating the courts' recognition of difference. The fear that the legal system might not be able to provide the extra resources necessary to accommodate linguistic minorities diminishes once we recognize that the infrastructure exists to handle accommodation. Second, critics of the decision pointed to the interpretative problems that would result from the new rule.[263] For example, how can courts be sure that a translator's rendition of English-language testimony to a Cantonese-speaking juror will be accurate? Quite simply, in a multilingual society, this problem can never be avoided. Foreign-language testimony is currently translated into English for the English-speaking jury to evaluate. The notion that the use of translators will render jury deliberations

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[260] *See* Elizabeth Amon, *Breaking a Language Bar in N.M.*, NAT'L L.J., Feb. 7, 2000, at A13 (noting that the New Mexico Supreme Court, in a ruling from the bench in *State v. Gonzales*, No. CR-99-139 (N.M. Jan. 19, 2000), held that potential non-English-speaking jurors cannot be eliminated on the basis of their language skills). As an officially bilingual state, English- and Spanish-speaking jurors have traditionally served in New Mexico. In its ruling, the New Mexico Supreme Court quoted from the state constitution. Article VII, Section 3 of the state constitution reads: "The right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write the English or Spanish languages." N.M. CONST. art. VII, § 3.

[261] *Justices: Language No Barrier for Jury Duty*, ALBUQUERQUE J., Jan. 20, 2000, at A1.

[262] *See id.*

[263] *See id.*

"inviolate" represents nothing more than a legal fiction. Jury deliberations are inherently interpretive and to suppose otherwise ignores the way in which the system functions, even absent the requirement that non-English-speaking jurors be included.

On the federal level, courts have not grappled extensively with the question of whether non-English-speaking individuals should be accommodated as jurors.[264] Instead, the battle in the federal courts has been over the bilingual juror and whether bi- or multilingual jurors may be stricken based on their language abilities. In *Hernández v. New York*,[265] the Supreme Court found that while the use of peremptory strikes to exclude Spanish-speaking jurors raised a plausible (but not necessary) inference that language might be a pretext for race discrimination, excluding bilingual jurors through the use of a strike did not violate the Constitution.[266] Like the courts in the Title VII cases, the Court in *Hernández* treated language not as a marker of national origin but as a potentially mutable characteristic that had bearing on the capacity of the individual to perform the task in question. Unlike the Title VII cases discussed above, however, *Hernández* left open a few doors.

First, though pointing to the mutable nature of language, the Court nevertheless identified language as a function of culture: "Language permits an individual both to express a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. Bilinguals, in a sense, inhabit two communities, and serve to bring them closer."[267] The Court, in a sense, recognized the possibility of a fluid civic identity. Second, as discussed in Part II, in holding that a race-neutral reason for a peremptory challenge means a reason other than race, the Court did not resolve the more difficult question of the breadth with which the concept of race should be understood for equal protection purposes. Though the Court found that the trial court could have reasonably inferred that the peremptory strike of the Spanish-speaking jurors had nothing to do with their status as minorities, the Court did not ignore the relationship between language and that status.

The dissent took the issue forward a step by insisting that "[a]n avowed justification that has a significant disproportionate impact will

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[264] *But see* United States v. Aponte-Suárez, 905 F.2d 483 (1st Cir. 1990) (noting that the English-only requirement of the federal jury selection system did not violate the Fifth and Sixth Amendment rights of the defendant even though it excluded two-thirds of the population from the jury). In *United States v. López*, No. 86 CR 513, 1987 U.S. Dist. LEXIS 9544, at *1 (N.D. Ill. Oct. 15, 1987), the defendant moved for a bilingual jury, arguing that those who did not speak Spanish would be unable to understand tape-recorded evidence. The court rejected the challenge on the grounds that no cases have held a bilingual jury to be necessary. *Id.* at *1–*2.

[265] 500 U.S. 352 (1991).

[266] *See id.* at 371–72; *see also id.* at 375 (O'Connor, J., concurring in the judgment).

[267] *Id.* at 370 (plurality opinion).

rarely qualify as a legitimate, race-neutral reason sufficient to rebut the prima facie case because disparate impact itself is evidence of discriminatory purpose."[268] That the Court adopted the presumption of race neutrality inhibited it from reaching the questions Justice Kennedy posed in the plurality opinion regarding the scope of race as a category. Yet the Court clearly raised the possibility that language might be considered something more than a choice or mutable characteristic.[269] Just as cases such as *Batson v. Kentucky*[270] and *Strauder v. West Virginia*[271] do not exclusively concern discrimination against blacks but do address the right of blacks to participate *as minorities* on the jury, *Hernández* suggests that linguistic minorities might deserve access to political institutions as linguistic minorities.

Indeed, though the Supreme Court sustained the trial court's conclusion that the prosecutors did not dismiss the Spanish-speaking jurors on account of their race as marked by their language abilities, the Court did not reject the possibility that bilingual jurors could serve as jurors—notwithstanding their capacities to understand translated testimony in its original language. Facing the reality that bilingual jurors would interpret foreign-language testimony according to their own comprehension rather than as stated in court translations, the Court suggested that bilingual jurors could be held responsible for bringing to the attention of the judge any discrepancies they find in the translations.[272] In dicta, the Court also rejected the notion that a Spanish-speaking juror might have undue influence in a trial conducted in New York City because there is a significant Spanish-speaking population in that locality.[273] Moreover, the Court expressed concern that a prosecutor's use of a potential juror's language abilities might amount to a classification that would effectively exclude a significant percentage of the population, defined by its ethnicity, from the jury pool.[274]

Most courts have taken a stance far less favorable to accommodation than the unresolved musings of the *Hernández* Court. Both before and after *Hernández*, lower courts that have grappled with the use of peremptory strikes against bilingual jurors have consistently justified their decisions in favor of exclusion with two basic arguments: (1) discrimination based on language is not invidious because it is based on an actual ability; and (2) bilingual jurors may interpret non-English testimony in ways different from the court, thereby undermining the authority of the court.

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[268] *Id.* at 376 (Stevens, J., dissenting).
[269] *Id.* at 371 (plurality opinion).
[270] 476 U.S. 79 (1986).
[271] 100 U.S. 303 (1879).
[272] *Hernández*, 500 U.S. at 364.
[273] *Id.* at 363–64.
[274] *Id.* at 363.

For example, in *United States v. Ramos Colón*,[275] the court held that federal requirements that jurors be proficient in English did not result in jury panels that were unfair cross sections of the community.[276] The court found that the composition of the jury furnished no basis for an inference of systematic or deliberate discrimination.[277] Because the exclusion of Spanish-speaking jurors was based on a legitimate conclusion about the potential jurors' language abilities—features directly relevant to the trial—the use of the language classification was not invidious in the same way that striking jurors based on their race or ethnicity would have been.[278]

Some courts have recognized that even language-based exclusions may be problematic. In *Pemberthy v. Beyer*,[279] the district court held that striking jurors based on "their status as native Spanish speakers," the characteristic that "in essence, defines [the Latino] community[ ] and exposes it to irrational discrimination . . . . is, by definition, a decision to strike all Latino jurors."[280] The district court also noted that the belief that Spanish speakers would have difficulty accepting court translations of evidence amounted to a "group-based assumption[ ] about the capacity, behavior, and trustworthiness of Spanish speakers."[281] On appeal, the Third Circuit nevertheless held that these bases for concern were not substantial enough to outweigh the prosecutor's interest in peremptorily challenging a juror because of his ability to understand a foreign language.[282] According to the court of appeals, language did not map onto race or ethnicity, though the court recognized that the close relationship between language and ethnicity requires judges to be sensitive to potential overlap in motivations.[283]

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[275] 415 F. Supp. 459 (D.P.R. 1976).

[276] *See id.* Puerto Rico offers a particularly poignant example of the exclusionary nature of strict English-language requirements. In *Ramos Colón*, the court reasoned that even though Spanish is the language of Puerto Rico, English is the language of the United States, whose legal institutions govern Puerto Rico. *Id.* at 465. The court elevated the use of English in the courts from being merely a practical device to being a "constitutional imperative." *Id.* at 465; *see also* United States v. Aponte-Suárez, 905 F.2d 483, 491–92 (1st Cir. 1990). In *United States v. Benhumar*, 658 F.2d 14 (1st Cir. 1981), the court concluded that even though the English proficiency requirement tends to exclude a number of jurors in Puerto Rico, litigants have an interest in the preservation of a national (as opposed to local) forum, conducted in a national (as opposed to local) language. This formulation seems to be targeted at the English-speaking minority rather than to the vast majority of potential litigants on the island. For those who do not speak English, the right to a national forum conducted in English is meaningless. Moreover, those who are bilingual most likely do not compartmentalize their language abilities into a national (English) language and a local (Spanish) language.

[277] *Ramos Colón*, 415 F. Supp. at 463–64.

[278] *Id.* at 464.

[279] 800 F. Supp. 144 (D.N.J. 1992).

[280] *Id.* at 160.

[281] *Id.* at 162.

[282] Pemberthy v. Beyer, 19 F.3d 857, 870 (3d Cir. 1994).

[283] *Id.* at 865. The court did concede, however, that repeated strikes of Spanish-

The courts' struggle to connect language with race or ethnicity in order to evaluate the treatment of language in the courtroom exposes the inadequacies of using traditional antidiscrimination paradigms to accommodate linguistic minorities. Dependence on the race paradigm sets an "invidious discrimination" standard, yet prosecutors are always able to articulate a reason, i.e., language ability, for excluding bilingual jurors, thereby evading the invidiousness issue. The courts' sanction of language-based peremptories nevertheless excludes entire communities from the jury. Regardless of whether that exclusion stems from animus, an identifiable segment of the population has been removed from a community institution, compromising efforts to ensure that defendants are tried by juries of their peers. Language-based peremptories also close off an avenue of participation for linguistic minorities. However, any effort to integrate non-English speakers into public life in general necessitates incorporating linguistic difference into the particular institutions that govern the communities that may be defined by their bilingualism. Perhaps the Supreme Court itself, in *Taylor v. Louisiana*,[284] identified a standard that would circumvent the inadequacies of the race paradigm but still bar exclusions based on bilingual status. The Court noted the possibility that the exclusion of an identifiable segment of the population from the jury runs counter to our democratic traditions.[285] That segment need not be defined by a suspect classification in order to be protected. It need only represent an identifiable community. In countless jurisdictions, linguistic minorities would clearly meet this standard.

The second basic argument used by courts to justify exclusion of bilingual jurors is that these jurors might interpret non-English testimony differently than court-sponsored translations. For example, in *Pemberthy*, the substance of a Spanish telephone conversation was a major issue at

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speaking jurors might raise the possibility that the prosecutor was trying to rid the jury of Latinos. The court concluded that because language ability coincides closely with ethnicity, if such a pattern were to arise, the striker's motivation might be subject to question. *Id.* at 872.

In addition to declining to define language ability as an impermissible basis for exclusion, courts have been tolerant of prosecutors' conclusions, based on surface impressions, concerning a potential juror's language inabilities. *See* United States v. Taylor, 92 F.3d 1313 (2d Cir. 1996) (declining to apply a *Batson* analysis to the government's striking of a juror based on her accent because the court concluded the prosecution would have applied the same standard to a white person with a heavy accent).

Language "deficiencies" sometimes do not come to the attention of the courts. For example, in *Thornburg v. United States*, 574 F.2d 33 (1st Cir. 1978), the defendant challenged his conviction on the basis that at least one and maybe four of the jurors were unable to understand English. The court held that too much time had passed to determine if this situation had biased the trial, and that, in any case, all appropriate language screening procedures had been followed. *Id.* at 35–36. Given that such problems are likely to arise with frequency, particularly in diverse jurisdictions, a court that is prepared to accommodate linguistic difference is more likely to be able to deal with such language difficulties.

[284] 419 U.S. 522 (1975).

[285] *Id.* at 537.

trial, as was the meaning of certain Colombian colloquialisms and the ability of the police officer who did the translation to understand them.[286] At the hearing, the prosecutor testified that he had stricken every Spanish-speaking juror

> because [he] felt that the interpretation of the language would be a very integral part of the case. [He] didn't want one or two people on the jury who might know Spanish who might disagree with the interpretation as counsel would put forth to have sort of like a more important place on a jury.[287]

Whereas the district court found that these concerns represented a pretext for discrimination against the Latino community, the court of appeals interpreted the prosecutor's statements at face value—as concerns that Spanish-speaking jurors would have difficulty accepting translations.[288] The recognition that bilingual individuals cannot suppress their language abilities only exacerbates this fear. The district court in *Pemberthy* found that no native speaker could ever set aside her knowledge of a language and restrict herself to the evidence as presented. Whereas the district court viewed the resulting exclusion as bias, the court of appeals determined that it was a legitimate means of guaranteeing a fair trial.

An accommodationist view of the jury would reject this analysis and contend that the possibility of differing interpretations should not be seen as a danger. The chance that multiple interpretations might push the jury closer to the truth should actually be considered an asset. As suggested by the Supreme Court in *Hernández*, bilingual jurors can be instructed to point out to the judge the deficiencies they perceive in translations. In addition, jury deliberations are inherently interpretive processes. Even if the entire proceeding takes place in a single language, the nature of language is such that different people may interpret the same statement in a variety of ways. Issues such as the credibility of witnesses and the believability of facts are usually left to the jury to resolve. The adversarial system exists because of a recognition that truth may not always be determined by a sober investigation of the facts. The rules of evidence defer to lawyers' narrative constructions of their cases by, for example, permitting the admission of reputation evidence to impeach witnesses as well as defendants.[289] Jurors will always bring personal assumptions to their evaluation of testimony. Given this arrangement, to conclude that a bilingual juror, who might bring to the attention of the court a mistake or nu-

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[286] *Pemberthy*, 19 F.3d at 865; *see also* United States v. Alcontar, 897 F.2d 436 (9th Cir. 1990) (upholding prosecutor's striking of two potential jurors who spoke Spanish fluently and of a third juror who had a thick accent).

[287] *Pemberthy*, 19 F.3d at 863.

[288] *See id.* at 866.

[289] *E.g.*, FED. R. EVID. 404, 608.

ance in the evidence presented to the jury, undermines the "inviolate" deliberations of the jury ultimately proves incoherent.

3. The Bilingual Education Debate

In the educational sphere, courts generally have treated linguistic difference as a barrier to be overcome and have regarded the education of linguistic minorities as a straightforward antidiscrimination issue. In the Supreme Court's only direct treatment of language to date, *Lau v. Nichols*,[290] the Court held that a school district's failure to provide programs for non-English-speaking students to assist them in overcoming their language barriers constituted a violation of Title VI of the Civil Rights Act of 1964. This decision spawned a host of regulations and statutes that led to the proliferation of bilingual education programs in public schools across the country.[291] Though *Lau* frames language in the educational sphere in antidiscrimination terms, far broader issues are at stake when it comes to education and language. For instance, in the public schools, where inculcating self-esteem and forging civic identity represent important pedagogical concerns, the status implications of linguistic difference are at their most serious. The extent to which schools should be participating in the preservation or elimination of cultural differences inevitably arises as a concern.

Bilingual education is a highly contested policy matter that is beyond the scope of this Article. The purpose of this discussion is to emphasize that given the importance of education to the general deflation of impermissible status distinctions, linguistic difference in the educational sphere should not be regarded as a barrier to be overcome but as a source of intellectual strength. Curricula concerned with disestablishing language-based status distinctions must deal with the fact that if linguistic minorities are not educated and made literate in their non-English languages, their abilities to use those languages and those languages' status will decline. Non-English languages should, at the very least, be regarded as "civilized" in the sense that formal instruction in them should form some part of the education of linguistic minorities. The integration of such language instruction into the classroom will vary depending on the resources and demographics of particular school districts. For example, Spanish-language instruction might be appropriate for all students, regardless of their linguistic backgrounds, in states such as California and Texas. Ultimately, at the same time that schools must recognize the *Lau* directive that all students should have equal opportunity to learn and thrive in an English-dominant world, the accommodation of linguistic minorities re-

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[290] 414 U.S. 563 (1974).

[291] *See, e.g.*, Ethan Bronner, *Bilingual Education is Facing Push Toward Abandonment*, N.Y. TIMES, May 30, 1998, at A1.

quires that the overriding aim of language policy in the educational sphere be to respect meaningfully linguistic difference by regarding non-English as worthy of study. The history of the legal system's treatment of bilingual education both acknowledges and criticizes this view.

Prior to the Court's decision in *Lau*, certain protections for linguistic minorities had already been crafted. Title VII of the Elementary and Secondary Schools Act was passed at a time of growing concern for the status of Mexican Americans in the Southwest.[292] The Act itself did not require that school districts implement bilingual education programs. Rather, it created a grant program to help train teachers and administrators and to support educational projects to educate students with limited English proficiency.[293] With its decision in *Lau*, the Supreme Court held that Title VI required public school districts to remedy language barriers but declined to mandate the type of remedy that should be employed.[294] Though recognizing that the San Francisco school district had the duty to take affirmative action in rectifying its students' language deficiencies so that they might have access to a meaningful public education, the Court left the decision concerning the type of program to best achieve this goal to the policy debate. The *Lau* Court declined to reach the equal protection question, instead finding that the school district had violated Title VI regulations defining the obligations of government entities receiving federal assistance.[295]

The federal government's interpretation of *Lau* gave rise to a language policy that treated linguistic difference as a barrier to be overcome, holding that discrimination occurs when non-English-speaking students are not given instruction in English. The U.S. Department of Health, Education, and Welfare ("HEW") guidelines drafted just prior to the *Lau* decision, which became known as the *Lau* remedies, defined equal access to education by all students regardless of race and national origin as requiring school districts to "rectify the language deficiency in order to open"[296] instruction to non-English-speaking students.[297] While

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[292] *See* Martha Jiménez, *The Educational Rights of Language-Minority Children*, *in* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY, *supra* note 3, at 243, 244; *see also* Serna v. Portales Mun. Sch., 351 F. Supp. 1279 (D.N.M. 1972) (holding that it would be a deprivation of equal protection for a school district to effectuate a curriculum that is not tailored to the needs of minority students).

[293] Jiménez, *supra* note 292, at 244.

[294] *See* Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1022 (N.D. Cal. 1998) (citing *Lau*, 414 U.S. at 563).

[295] *See Lau*, 414 U.S. at 566–69. Congress enshrined this approach to linguistic difference the same year in the EEOA. 20 U.S.C. §§ 1701–1720 (1994). The EEOA provides, inter alia, that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." *Id.* § 1703.

[296] Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970).

[297] *See* Policies on Elementary and Secondary School Compliance with Title VI of the

concerned with unequal treatment, the *Lau* remedies still set as their ultimate civil rights objective the rapid acquisition of English by linguistic minorities and the minimization of separate language tracks in schools.[297] The guidelines did not give bilingualism priority or treat it as a condition of value. As conceived by the federal government just prior to *Lau*'s antidiscrimination decision, the right to bilingual education consisted of a right to acquire the language skills necessary to participate in an English-dominant society.

Subsequently, courts have continued to construe language as a deficiency to be overcome. In *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*,[299] the Ninth Circuit held that Title VI did not require schools to provide non-English-speaking students a bilingual-bicultural education. Rather, the *Guadalupe* court read *Lau* to require merely that school districts "take affirmative steps to rectify the language deficienc[ies]" of non-English-speaking students.[300] The *Guadalupe* court did not, however, end its inquiry with a straightforward application of *Lau*. It added an assimilationist conceptual dimension not contemplated by the Supreme Court. It premised its denial of appellants' request for bilingual education programs on a theory that "linguistic and cultural diversity within the nation state, whatever may be its advantages from time to time, can restrict the scope of the fundamental compact."[301] Linguistic difference represented a barrier to be overcome in the eyes of the court because the "consent of the people" necessary for the survival of the nation-state depends on the existence of a healthy political culture, which "attenuates as it crosses linguistic and cultural lines."[302] The *Guadalupe* court reached beyond the statutory analysis of *Lau* to conclude that the Constitution establishes a compact the contours of which cannot be mandated by the courts but must be determined by the people.[303] An educational system that transcends "multiple linguistic and cultural centers"[304] represents an essential precondition for this social working-out of the nature of the political community.

In the wake of *Lau*, the battle over the appropriate remedy for educational inequalities created by linguistic difference became a battle over diversity and its effects on common culture. Courts have not understood the "right" in question as a right to language but as a right to the *English* language. The Court's decision in *Lau* did acknowledge that enabling student participation in education requires accounting for linguistic dif-

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Civil Rights Act of 1964, 33 Fed. Reg. 4955 (Mar. 23, 1968).

[298] *See* Jiménez, *supra* note 292, at 245–46.

[299] 587 F.2d 1022, 1029 (9th Cir. 1978).

[300] *Id.* at 1024 (quoting *Lau*, 414 U.S. at 568).

[301] *Id.* at 1027.

[302] *Id.*

[303] *Id.*

[304] *Id.*

ference. This accounting, however, is qualified: to the extent that it takes time for language barriers to be overcome, language differences must be acknowledged;[305] the recognition of other languages as legitimate tools extends only until English can be acquired.

The cultural implications of language instruction have long been debated as well. *United States v. Texas*[306] offers a case in point. The court held that by virtue of its inadequate bilingual educational services, the state had failed to remedy past discrimination based on ethnicity.[307] In assessing the Title VI claim, the court reasoned, "it would make little sense to conclude that Congress, with the EEOA, after identifying a serious problem in the nation's schools and requiring affirmative measures to overcome it, would permit any course of conduct, however ineffectual or counter-productive, to satisfy its mandate."[308] Though the court recognized that *Lau* did not require bilingual education, it held that the limited bilingual education programs restricted to primary lower grades were analogous to partial desegregation plans.[309] In other words, to meet the effectiveness requirements that the court found to be present in *Lau*, it concluded that bilingual education programs should not only span the grade levels, but also be integrated into the entire school curriculum, including physical education, shop, and home economics classes.[310]

The court's call for a comprehensive remedy stemmed both from its observation that all children would benefit from exposure to diversity and from its conclusion that eradicating the "deep sense of inferiority [and] cultural isolation" engendered by historical segregation of linguistic and ethnic minorities demands more than mere integration.[311] The court concluded that "the policy of using English exclusively in the Texas public schools must be seen, not as neutral or as benign, but rather as one more vehicle to maintain these children in an inferior position."[312] The status dimension of the language debate proved inescapable to the court.[313]

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[305] *See Lau*, 414 U.S. at 568.

[306] 506 F. Supp. 405 (E.D. Tex. 1981) (entering, inter alia, injunctive relief in the form of bilingual education for plaintiffs in sweeping desegregation suit), *rev'd*, 680 F.2d 356 (5th Cir. 1982) (finding that the Texas legislature's 1981 enactment of the Bilingual and Special Language Programs Act rendered the district court's injunctive relief moot). The act mandated bilingual education in elementary schools and in school districts with twenty or more students with limited English proficiency in the same grade. *Texas*, 680 F.2d at 372.

[307] *Texas*, 506 F. Supp. at 428.

[308] *Id.* at 433.

[309] *Id.* at 436.

[310] *Id.* at 436–39.

[311] *Id.* at 415.

[312] *Id.* at 414.

[313] Indeed, recognizing these concerns, the Texas Bilingual Education Act of 1973 had already established that integration would be better achieved through the implementation of bilingual education. *Id.* at 417. (citing TEX. EDUC. CODE ANN. § 21.451 (Vernon Supp. 1980)). *Cf.* Martin Luther King Junior Elementary Sch. Children v. Ann Arbor Sch. Dist. Bd., 473 F. Supp. 1371 (E.D. Mich. 1979). This case raises the possibility that courts might

In the end, even as the court recognized the importance of having a space for Spanish language in the public school system, it also concluded that "bilingual education is designed to fill an educational vacuum until a particular child is able to function adequately in an all-English classroom."[314] The court noted that bilingual instruction as a remedy for unlawful discrimination serves as a *transitional* program. The ultimate goal of language policy remained transition to the English-speaking mainstream.[315]

Most courts have been much less enthusiastic about bilingual education, expressing concern that bilingual education programs track and therefore segregate linguistic minorities from the mainstream student population with significant consequences for the quality of education those minorities receive. In *Castañeda v. Pickard*,[316] the Fifth Circuit rejected a challenge to a bilingual education program premised on the argument that overemphasis on the acquisition of English-language skills adversely affected students' cognitive development. The court dismissed the contention that the *Lau* guidelines[317] did not establish the teaching of

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identify language as a marker of difference that schools should recognize in diversity language curricula. The plaintiffs in the case asked the court to require the school district to take into account the cultural differences of the students in question by recognizing those differences deliberately in its language instruction. The court expressed concern over the possibility that English-language instruction that failed to account for, and even devalued, students' home language systems might erect psychological barriers to learning. *See id.* at 1381. The court thus found it "appropriate to require the defendant Board to take steps to help its teachers to recognize the home language of the students and to use that knowledge in their attempts to teach reading skills in standard English." *Id.* at 1383. The court effectively required that language instruction demonstrate cultural sensitivity.

[314] *Texas*, 506 F. Supp. at 419.

[315] *Id.* at 441 ("Unless they receive instruction in a language they can understand pending the time when they are able to make the transition to all-English classrooms, hundreds of thousands of Mexican American children in Texas will remain educationally crippled for life, denied the equal opportunity which most Americans take for granted.").

[316] 648 F.2d 989, 1015 (5th Cir. 1981).

[317] The court gave limited weight to the *Lau* guidelines, finding that they were the result of a policy conference by HEW and had not been developed through the usual administrative procedures employed to draft administrative regulations. *See id.* at 1007. Moreover, the guidelines had been written before *Regents of the University of California v. Bakke*, 438 U.S. 912 (1978), declared Title VI to be coterminous with the Equal Protection Clause and before *Washington v. Davis*, 426 U.S. 299 (1976), established an intent requirement for Fourteenth Amendment discrimination claims.

At the same time, however, section 1703(f) of the EEOA, which makes it unlawful for an educational agency to fail to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs, codified the essential holding of *Lau*. 20 U.S.C. § 1703(f) (1994). The *Castañeda* court noted that the plain language of the EEOA does not require intent. *Castañeda*, 648 F.2d at 1001. Thus, while the validity of *Lau* as a judicial interpretation of Title VI or the Fourteenth Amendment is in question, the "essential holding of *Lau*, i.e., that schools are not free to ignore the need of limited English-speaking children for language assistance to enable them to participate in the instructional program of the district, has now been legislated by Congress, acting pursuant to its power to enforce the Fourteenth Amendment." *Id.* at 1008. The Fifth Circuit asked whether Congress intended to go beyond *Lau*, which required schools to take some action, to require that schools take "appropriate action." *Id.*

English as the primary goal of language remediation.[318] In reaching this conclusion, the court expressed concern over the labeling of students with language deficiencies, fearing that limited capacity to speak English would be conflated with "low intelligence" and that non-English-speaking students would be tracked into remedial or low-level classes throughout the public schools.[319] This fear, coupled with the fact that the EEOA does not require school districts to adopt any particular kind of language program so long as language barriers are effectively overcome,[320] creates a substantial barrier for those with claims like the plaintiffs' in *Castañeda*, who asked the court to create a bilingual education requirement.

In the most recent pronouncement on bilingual education, the district court in *Valeria G.* held that remedies for linguistic barriers should take the form of transitional programs, or efforts designed to ensure that all students gain access to what the court called "the American dream of economic and social advancement"[321] through the possession of the social good of the English language. This transitional approach to language protections aims to ease non-English speakers into social and political life conceived in terms of an English-speaking mainstream. The petitioners in *Valeria G.* challenged the assimilationist version of the right to language instruction and defended bilingual education on the grounds that its denial constituted national origin discrimination.[322] These activists had an educational vision that embraced the native language during the acquisition of English with the aspiration of creating bilingual, bicultural students. While still accepting integration into the larger student body as the ultimate goal of bilingual education, this posture reflects a desire to make languages other than English part of that process.

The court, consistent with the majority of precedent, rejected this view. In construing the EEOA,[323] the court found that

> Congress' use of the less specific term "appropriate action" [in the EEOA] rather than "bilingual education" indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and

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[318] *Castañeda*, 648 F.2d at 1006.

[319] *Id.* at 997.

[320] *See id.* at 1008.

[321] Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1013 (N.D. Cal. 1998).

[322] Petitioners argued that Proposition 227 violates Title VI of the Civil Rights Act of 1964 by imposing an unjustifiable disparate impact based on national origin, and they contended that the referendum, by establishing an English immersion program, denied linguistic minority students meaningful access to a comprehensive academic curriculum. *See id.* at 1022.

[323] Equal Educational Opportunities Act, 20 U.S.C. §§ 1701–1720 (1994).

techniques they would use to meet their obligations under the EEOA.[324]

The court found discrimination to be a nonissue in the case precisely because it construed bilingual education to be a mere policy means to the ultimate end of ensuring that California school children are able to enjoy the best life in the United States.[325] Because sheltered English immersion on its face proved consistent with an assimilationist approach to bilingual education, Proposition 227 did not trigger the discrimination question. The court noted that no constitutional right to language instruction has ever been recognized.[326] Instead, the absence of transitional language instruction generally constitutes a statutory violation.

In the end, the status concerns in the educational sphere are in tension with the law's overwhelming conclusion that Title VI and perhaps even the Equal Protection Clause require language instruction only to transition linguistic minorities into all-English classrooms. Since California passed Proposition 227, there has been renewed and vigorous debate over whether bilingual education should be abolished. Voters in Arizona passed a ballot initiative similar to California's in November 2000 that banned bilingual education in public schools.[327] By contrast, in New York City, educators and officials are contemplating offering English immersion programs as an option, leaving traditional bilingual education in place—largely in response to the demand for those programs from linguistic minorities.[328] Though recently released data suggest that the English immersion programs in California have had some kind of salutary effect on the test scores of non-English-speaking students,[329] the claims of bilingual education advocates still encompass the assumption that educating children in their non-English language of origin has inherent pedagogical and intellectual benefits. Banishing all forms of bilingual education from the public classroom thwarts the development of an edu-

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[324] *Valeria G.*, 12 F. Supp. 2d at 1017 (citing *Castañeda*, 648 F.2d at 1008–09).

[325] *Id.* at 1016.

[326] *Id.* at 1024–25.

[327] *See* Booth & Sanchez, *supra* note 6.

[328] *See* Jacques Steinberg, *Answers to an English Question*, N.Y. TIMES, Oct. 22, 2000, at 37 (noting that despite studies demonstrating that students in bilingual programs have difficulty transitioning into English-speaking classes, even after as many as eight years, bilingual education remains supported by parents with a "fierce desire" to have their children retain their native language).

[329] The test scores of students who would have been in bilingual classes prior to passage of Proposition 227 have risen along with the test scores of the general student population, belying the claim of bilingual education advocates who argued that the abolition of bilingual education would cause scores to plummet. Jacques Steinberg, *Increase in Test Scores Counters Dire Forecast for Bilingual Ban*, N.Y. TIMES, Aug. 20, 2000, at A1. The rise in scores cannot be tied strictly to the change in bilingual education programs, however, as class size has dropped, other educational reforms have been implemented, and test scores of all students have risen. *Id.*

cational and social asset in our increasingly multicultural world—namely, multilingualism.

The difficulty of resolving this educational challenge ultimately suggests that any reconciliation will have to be left to the policy realm. Of all the spheres in which language raises access and participation difficulties, the educational sphere is perhaps the least susceptible to legal influence. Indeed, linguistic minorities themselves hotly contest the direction that language instruction should take. In California, for example, even after the passage of Proposition 227, educators and community members continue to press the need for at least some instruction in Spanish.[330] Given the deference that courts grant local school districts[331] combined with the contraction of *Lau* and the courts' reluctance to recognize the culture-status relationship inherent in educational language policy, accommodating linguistic minorities in the educational sphere depends only marginally on legal intervention. Linguistic minorities will benefit when Americans begin to value their bilingualism as they value and respect the bilingualism of the well-educated. If we can transcend our American parochialism to see that bilingualism is in fact a good that should be cultivated, the principles of access and engagement behind a fluid view of civic identity will be best served.

4. The Provision of Public Services

The most recent effort to accommodate linguistic difference in the provision of public services transpired in Alabama. In *Sandoval v. Hagan*,[332] the Eleventh Circuit upheld a permanent injunction against the Department of Public Safety's enforcement of the English-only Amendment to the state constitution.[333] The Department had instituted a policy requiring all portions of the driver's license examination process to be administered exclusively in English; interpreters, dictionaries, and other aids were forbidden. The State Attorney General justified the policy by citing the need to preserve the safety and integrity of the licensing process.[334] At trial, evidence introduced by the policy's opponents established

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[330] *See* Don Terry, *Bilingual Education Lives After All*, N.Y. TIMES, Oct. 3, 1998, at A7; *see also* James Traub, *The Bilingual Barrier*, N.Y. TIMES, Jan. 31, 1999, § 6 (Magazine), at 32 (noting that some students choose to stay in bilingual programs even when they are fluent English speakers in an effort to preserve their minority language).

[331] *E.g.*, *Castañeda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981) (stating that federal courts are ill-equipped to determine if action is appropriate, and Congress has given few guidelines).

[332] 197 F.3d 484 (11th Cir. 1999), *cert. granted sub nom.* Alexander v. Sandoval, 121 S. Ct. 28 (2000).

[333] *Id.* at 487. The Amendment contains the following language: "The legislature and officials of the state of Alabama shall take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced." *Id.* at 488 (quoting ALA. CONST. amend. 509).

[334] *Id.* at 488.

that the regulation effectively denied hundreds of state residents driver's licenses, which in turn affected their ability to obtain employment, child care services, and other life essentials.[335] In deciding the merits of the case, the court relied on the antidiscrimination paradigm.

In invalidating the Department's rule, the court first cited *Lau* for the proposition that the decision and its subsequent legislative history "unambiguously notify state recipients of federal funds that English-language policies, which cause a disparate impact on the ability of non-English speakers to enjoy federal benefits, may violate Title VI."[336] The court noted that multiple agency regulations supplement this nondiscrimination purpose and link English-language policies having disparate impact with national origin discrimination.[337] Though the court framed the case in straightforward disparate impact terms with minimal discussion of the particular relationship between linguistic difference and the provision of state services, it predicated its argument on the fact that certain features of national origin demand accommodation when failure to accommodate would harm national origin minorities. Though the court did not find language and national origin to be synonymous, it identified an unmistakable nexus between the two factors.[338]

Of course, not all courts have been as troubled by the disparate impact of monolingual government services. In *Soberal-Pérez v. Heckler*,[339] the court dismissed a lawsuit seeking the translation of Social Security forms into Spanish, finding that guarantees against national origin discrimination are not to be confused with access to government by non-English speakers.[340] The court simultaneously drew a conceptual line between protection against discrimination and the right to positive access to state-administered benefits and characterized linguistic-minority status as outside the scope of protections afforded by antidiscrimination law. The court construed the lawsuit as an attack on monolingual government programs and rejected the implicit assumption of the lawsuit that the Constitution mandated multilingual government.[341] The court rejected the na-

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[335] *Id.* at 489–90. The court also found that the ability of the Department of Public Safety to accommodate the illiterate and the disabled demonstrated its ability to accommodate difference. *Id.* at 508.

[336] *Id.* at 497. It should not come as a surprise that *Lau* more aptly supports accommodation of linguistic difference in the provision of straightforward public services than in the educational system, where the policy debate over what constitutes harm to linguistic minorities is more contested.

[337] *Id.* at 499.

[338] Because the court made its decision based on disparate impact analysis, it did not have to reach the question of whether language may serve as a proxy for national origin. No claims of animus against linguistic minorities were made in the case. *See id.* at 509.

[339] 717 F.2d 36 (2d Cir. 1983).

[340] *Id.* at 41.

[341] *Id.* at 42–43 (stating that it was not irrational for the Secretary to choose English as the language in which to conduct her official affairs (citing Carmona v. Sheffield, 325 F. Supp. 1341, 1342 (N.D. Cal. 1971))).

tional origin-language nexus out of apprehension over its potential implications. Implicit in the court's repudiation of the right to government assistance in languages other than English stood a belief in the preservation of a set of common public linguistic practices. While celebrating the nation's ethnic diversity, the court refused to require the state to accommodate the consequences of that diversity as an antidiscrimination matter.

The parties in *Yñiguez v. Mofford*[342] fought a similar battle over Arizona's Article XXVIII, the "English as the Official Language" provision of the state constitution, which required that "[t]his state and all political subdivisions of this state shall act in English and in no other language."[343] The elements of the case augment the antidiscrimination picture presented by *Sandoval* and highlight a number of unique difficulties raised by a failure to accommodate linguistic minorities in the realm of public services. In *Mofford*, the trial court invalidated Article XXVIII, expressing a concern for the free speech rights of linguistic minorities similar to the *Asian American Business Group v. City of Pomona*[344] court. While Arizona contended that Article XXVIII only circumscribed the activity of the state in its sovereign capacity, the court found that a realistic danger of unconstitutional application existed and therefore declared the article invalid.[345]

In its incarnation at the appellate level, *Yñiguez v. Arizonans for Official English*[346] further revealed the importance of accommodation in the public services sphere. The Ninth Circuit, after rehearing the case en banc, held that by using its regulatory powers to require the exclusive use of the English language, the state violated the First Amendment rights of public employees.[347] Despite efforts by the Attorney General to narrow the scope of Article XXVIII, the court accepted the broad meaning given by the district court.[348] In effect, the court found that the article prohibited "the use of any language other than English by all officers and em-

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[342] 730 F. Supp. 309 (D. Ariz. 1990).

[343] ARIZ. CONST. art. XXVIII, § 3.

[344] 716 F. Supp. 1328 (C.D. Cal. 1989) (acknowledging that language has expressive features).

[345] *Mofford*, 730 F. Supp. at 314.

[346] 69 F.3d 920 (9th Cir. 1995) (en banc), *vacated on other grounds by* 520 U.S. 43 (1997) (holding that the state government employee's suit became moot when the employee resigned, and expressing no view on the correct interpretation of the English-only provision or on its constitutionality).

[347] More specifically, the court held that (1) the provision was overbroad; (2) the decision to speak in a language other than English is expressive conduct that cannot be proscribed permissibly; (3) the state cannot simply prohibit all persons within its borders from speaking in the tongue of their choice; and (4) the state employee was entitled to nominal damages. *Id.* at 920.

[348] The court rejected the Attorney General's contention that the article did not apply to social-service providers. The existence of exceptions for certain acts of public school teachers suggests that it does apply to DMV employees and the like. *Id.* at 929.

ployees of all political subdivisions in Arizona while performing their official duties."[349]

The court's invalidation of Article XXVIII on First Amendment overbreadth grounds, like the *City of Pomona* court's use of the First Amendment,[350] underscores that courts have difficulty dealing with language. The First Amendment angle offers a necessary but awkward doctrinal hook for the defense of the more extensive rights which the courts lack the vocabulary and precedent to address. While the *Arizonans for Official English* court may well have been concerned with the free speech rights of the public employees,[351] its larger concern centered around linguistic minorities' ability to access state-provided services.[352] The court held that Article XXVIII "significantly restricts communications by and with government officials and employees and interferes with the ability of the non-English-speaking populace of Arizona to receive information and ideas."[353] The court regarded the right of the population at large to receive information about state services as equally important to the rights of employees to speak in their chosen languages.[354] This conclusion suggests that the court sought to protect the free speech rights of public employees, because the employees facilitate communication between the government and the public it serves.[355] In other words, by striking down the English-only provision, the court ensured that the state's relationship with linguistic minorities would continue to be mediated through personnel who could accommodate the population's differences.[356]

Though the court grounded its decision in a principle of tolerance of difference, the implications of its emphasis on open access to state services and the provision of information in an inclusive and empowering manner are more robust than basic tolerance might suggest. The court characterized the provision of governmental services and information as a matter of public import and underscored a belief that in order for the state to distribute its resources fairly, it must accommodate linguistic difference.[357] The court distinguished this case from cases holding that non-English speakers have no affirmative right to compel state governments to provide information in a language that they can

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[349] *Id.* at 928–31.

[350] *City of Pomona*, 716 F. Supp. at 1331–32.

[351] For example, the court notes that the appellant, prior to the amendment of the constitution, was fluent and literate in English and Spanish, and communicated with clients in a combination of English and Spanish as necessary. She stopped speaking Spanish on the job after the amendment passed for fear it made her vulnerable to discipline. *See Arizonans for Official English*, 69 F.3d at 924.

[352] *Id.* at 923, 932–33.

[353] *Id.* at 941 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 757 (1976)).

[354] *See id.* at 936–37.

[355] *See id.*

[356] *Id.* at 933.

[357] *Id.* at 940.

comprehend.[358] The court stopped short of identifying a right to complete accommodation. But in recognizing the utility of bi- and multilingual employees, the court did point to the need to recognize linguistic difference in defining an inclusive state-to-citizen relationship.[359] The court also implicitly recognized the existence of a mutability continuum, or the reality that the individuals who require access to state services will always have diverse language abilities.

Finally, the *Arizonans for Official English* court, like the *Sandoval* court, rejected the national unity arguments made by the defenders of the English-only provision, concluding that "the state cannot achieve unity by prescribing orthodoxy."[360] While acknowledging the legitimacy of encouraging the acquisition of English, the court also deferred to the American tradition of diversity. In recognizing that non-English can be used to express solidarity and in understanding that language represents a complex system of meaning that shapes the individual's orientation to the world,[361] the court presented a more sophisticated understanding of language than most other courts have. The risk of alienating linguistic-minority communities with an English-only rule requires that their linguistic differences be accommodated, not ignored.[362] Though the court claimed that its analysis did not extend this far, the reasoning of the opinion leads to the conclusion that the principle of equal access supports an affirmative right to accommodation in the social services arena. While the First Amendment approach to language discrimination does not ensure that equality principles and citizen participation will be advanced, the right to receive information, properly understood, is a right to access, which proves meaningless unless accompanied by the accommodation of difference.

5. Accommodation in the Political Process

Linguistic accommodation would also be appropriate in the sphere of the political process itself. Such accommodation would secure a preservationist approach to language rights with a recognition that politicians, before they become representatives in government, must establish their relationship with the people based on an understanding of the people's salient differences. Indeed, the world of politics is perhaps the most amenable to linguistic accommodation, as the need to appeal to the people who cast the votes provides the driving force behind representative democracy. Of course, this same process has been largely responsible for producing the English-only invective designed to appeal to the majority's

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[358] *Id.* at 936–37.
[359] *Id.* at 942–43.
[360] *Id.* at 946.
[361] *Id.* at 947.
[362] *See id.*

patriotism. Such appeals to majority sentiment will become increasingly irrelevant, however, as the nation's demographics change and if linguistic minorities become part of the multiple spheres of civic life according to the parameters set by the preceding discussion.

The Voting Rights Act of 1965 already makes provisions for the issuance of bilingual ballots and voting materials.[363] The Act includes Congress's finding that, "where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process," and as a result, English-only elections are prohibited.[364] In 1975, Congress amended the statute to require that written and oral voter assistance be made available so long as a single language group accounts for five percent of the voting population in a single jurisdiction and where the English literacy rate of the community in question is below the national average.[365] This elaborate triggering mechanism for bilingual voting assistance suggests not that the right is a circumscribed one, but that Congress has recognized that the failure to accommodate language minorities in the electoral process leads to the disenfranchisement of cognizable sectors of the population.

Opponents of these measures contend that immigrants will be discouraged from making the effort to learn English if they can function easily, and even vote, without learning English.[366] Opponents also point to the fact that certain literacy requirements attend the naturalization process, suggesting that all citizens should be able to read English ballots.[367] Yet, according to experts, to pass the naturalization test, a prospective citizen need only command English at a third-grade level, and education experts designate the fifth-grade level as the dividing line between functional illiteracy and literacy.[368] Voting materials frequently are written at a high school or college level.[369] Indeed, Congress has acknowledged that to protect the individual right to vote, the existence of communities of language minorities must be taken into consideration. The danger of disenfranchisement outweighs the possibility that linguistic minorities, when accommodated, will become complacent about learning English. To strengthen this protection of the right to vote, there are several possibilities for reform. Though the bilingual voting materials requirement as

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[363] The language provisions of the Voting Rights Act, 42 U.S.C. §§ 1971–1974(e) (1994), protect language minorities, which the Act defines as individuals who are "American Indian, Asian American, Alaskan Natives, or of Spanish heritage." 42 U.S.C. § 1973aa-1a(e).

[364] 42 U.S.C. § 1973b(f)(1).

[365] 42 U.S.C. §§ 1973aa-1a(b)(2)(A)(i)(I), 1973aa-1a(b)(2)(A)(ii).

[366] John Trasviña, *Bilingual Ballots: Their History and a Look Forward*, *in* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY, *supra* note 3, at 258, 263.

[367] *Id.*

[368] *Id.*

[369] *Id.*

it now stands extends until 2007,[370] the continued presence and growth of language minority communities suggests that the Act's guarantees should continue. It may even be appropriate to expand the list of language minorities protected to reflect changes in the population and to consider resetting the points at which bilingual voter assistance is triggered. And it remains the responsibility of local election officials who preside over precincts containing the requisite number of minority language voters to make the bilingual assistance as effective as possible.

Other forms of accommodation might also enhance linguistic minorities' access to the political process. For example, the Federal Communications Commission could promulgate broadcasting regulations requiring certain amounts of airtime to be devoted to political advertisements in non-English; the parameters of this requirement could be set in a manner similar to the triggering mechanisms used for bilingual ballots. Indeed, at the heart of the Ninth Circuit's invalidation of Arizona's English-only provision lay a concern for the ability of lawmakers and candidates to communicate with their constituents.[371] One town in Texas recently responded to this need by enacting a Spanish-only law requiring that all public business be conducted in Spanish in order to best serve the predominantly Spanish-speaking population.[372] While this action represents an exclusive extreme, the reality that non-English-speaking populations will continue to grow as forces in public and civic life cannot be ignored.

IV. CONCLUSION

The principles elaborated in each of the above spheres—access, inclusion, and community—provide a template for extending the accommodation of linguistic minorities to all spheres of civic life. Some forms of the accommodation described above may require the expenditure of government resources to ensure that all people have equal access to public institutions. Other forms of accommodation require a redefinition of how the law conceives of language and how the state mediates its relationship with linguistic minorities. Ultimately, the realities of contemporary society necessitate that linguistic minorities be given status before the law *as linguistic minorities* and not as citizens on the transitional road to the English-only mainstream.

Language as a marker of difference and a feature of identity shapes the status of the linguistic minority in the public sphere and must be recognized as a relevant characteristic before the law. The theory of accom-

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[370] 42 U.S.C. § 1973aa-1a(b)(1).

[371] *See* Yñiguez v. Arizonans for Official English, 69 F.3d 920, 941 (9th Cir. 1995) (en banc).

[372] *See* Richard Estrada, *Spanish-Only Town Ignores Need to Honor a Common Civic Culture*, SUN SENTINEL (Fort Lauderdale, Fla.), Aug. 24, 1999, at 15A.

modation articulated here begins with the premise of free and equal access. Ensuring that linguistic minorities have equal access to the multiple spheres of civic life requires a recognition that language profoundly orients the individual to the people and world around her. The presence of a mutability continuum in communities throughout the United States requires that the accommodation of linguistic difference be robust if equal participation is to be possible for people at all points along that continuum. A complete theory of participation must account for the influence of personal affiliations in facilitating engagement with public and civic institutions. When individuals feel free to sustain their ties to multiple communities, defined in part by different languages, communication in the public sphere will be more open and inclusive, despite the fact that it may not be in a lingua franca.

This view of participation leads us to the Article's overarching vision of fluid civic identity—an approach to public life that accounts for several factors: (1) that participation occurs across diverse spheres of activity and therefore requires different forms of accommodation; (2) that linguistic minorities can be integrated into a political community without an assimilationist agenda; and (3) that localized communities defined according to cultural practices exist and often represent the sites of the most meaningful participation in public life. This diffuse and inclusive vision of public participation represents the best hope for the survival of a participatory civic tradition in the midst of a society whose diversity will continue to expand as borders disappear and as the concept of a common culture becomes increasingly foreign.