Constitutionalism and Language Communities: A Possible Synthesis for an Uncertain Future

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I. INTRODUCTION

We must thank the organizers for the scientific discussions that have made this ambitious publication possible under the theme of constitutionalism. By so doing, they have provided a shield against an otherwise predictable and cautious reading of contributions on language rights, and framed the language question in its social, political and cultural dimensions. Therefore, it has been possible to explore implicit issues that cut through the constitutional debate and to take a fresh look at constitutionalized forms of collective life. Rather than simply provide an inventory of language rights, the theme of constitutionalism refers to an open concept of the debate regarding the future of minority languages, and raises the issue of the kind of society that we will have. We often have to examine things as they are. This perspective, sometimes forgotten at law, has been used in this work to produce an exceptionally lucid collection of ideas.

The difficulty of this task must not be minimized, however. Constitutionalism itself can have multiple meanings.1 When considered as an historical movement, it refers to the earliest examples of liberal democr-

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1 This paper is a theoretical essay. It offers a critical synthesis of the writings of the people who have been kind enough to contribute to this work. Like any exercise of its type, it exists in a particular context. While it is supported by the contributions of all of the authors whose efforts made this work possible, it offers a comparative reading from a particular perspective. In it, the reader will observe the influence of political science and sociology. I would like to thank José Worthing for agreeing to read the text, but any inaccuracies in the text are the author’s alone.

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1 Some authors list as many as six, which may differ from the meanings advanced by other authors. The scope of the list that follows must therefore necessarily be modest. See Ralph C. Chandler, Richard A. Enslen and Peter G. Renstrom, The Constitutional Law Dictionary (Santa Barbara, Cal.: ABC-Clio Information Service, 1985), at 16.
racy and the rule of law. The *Age of Revolution* springs immediately to mind,\(^2\) the era that instituted constitutions as a mechanism for circumscribing government power (this being the *constitutionalism* of Montesquieu)\(^3\) or an instrument by which individual liberties could be shielded from the exercise of arbitrary political will (Locke or Rousseau).\(^4\) This specific concept of constitutionalism, however, suggests that the movement that led to the creation of modern constitutions became frozen in time, and that it became institutionalized in the form of the stability of constitutional instruments.\(^5\) The political debate it embodied comes down to a learned discourse on the exegetical interpretation of a rule. It is the source of the idea of *constitution as norm* found in the writings of Locke and Kelsen,\(^6\) or *constitution as institution*, as conceived by Hegel.\(^7\) Even when taken together with the original ideals of modern democracy, those definitions of *constitutionalism* lead, at most, to a "[TRANSLATION] doctrine that a written constitution is needed in order to limit government action and guarantee liberty."\(^8\) That kind of constitution, based on the support of the greatest number, can never be much more than a constitution of the majority.

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\(^4\) With respect to John Locke, we would refer to Chapter 8 of *Traité du gouvernement civil* (Paris: GF-Flammarion, 1984), at 250-73 (Concerning Civil Government). We are also thinking of Jean-Jacques Rousseau in the *Contrat social*, Jean-Jacques Rousseau, *Œuvres complètes*, vol. 3 (Paris: Gallimard, 1964), at 347-470.


\(^7\) That definition also corresponds broadly to the position occupied by the Canadian constitution before 1982. With respect to these distinctions between two concepts of the constitution, as a rule or as the institutional framework of the state, see Olivier Beaud, "Constitution et constitutionnalisme" in Philippe Raynaud & Stéphane Rials, *Dictionnaire de philosophie politique* (Paris: Presses universitaires de France (coll. Quadrige), 1996), at 133-42.


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Among theoreticians of speak of “tyranny of the majority” today, must review the necessity of the laws to be adjusted to constitutional norms to be prerequisite is present, we are in the era of democracy. The question is to be the constitution of the life in society, a privileged generation?\(^11\) This point of consti-stitutionalism, making constitution, making constitution, this also calls for the authority to law as a hierarchy, minority cannot be examined defined angle of *legal order* lead to the rhetorical cloister. The reality of minorities would be promptly obliterated in a sanitized system of law. I unspoken that is the basis for us (André Braen).

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\(^9\) Alexis de Tocqueville, *Démocratie en Amérique* (Paris: Génoise, 1851), at 3

\(^10\) Those institutions are seen as *Papers* See, inter alia, *Federalist Papers* (New York: New Am.


\(^12\) Here we are referring to the 1851, the theoretical propositions of K Francois Michaud & Michel Troper, *de jurisprudence/Story scientia, 1992*,)
Among theoreticians of democracy, Tocqueville was the first to speak of "tyranny of the majority." That caveat is the reason why we, today, must review the necessary underpinnings of democracy by expanding the forms of expression a minority may use to express its will to exist. That perspective relates directly to a democracy's right to call for the laws to be adjusted or changed, but a minority may also call for constitutional norms to be reinterpreted and even altered. When that prerequisite is present, we can see the contemporary meaning of constitutionalism. It is no longer a movement, frozen in time that led to modern democracy. The question can be briefly summarized as follows: can the constitution be the site of an ongoing discourse about the nature of life in society, a privileged ground, if not the subject of collective deliberation? This point of convergence brings us beyond the set concept of constitution, making constitutionalism the expression of democratic movement. This also calls for a re-examination of our traditional approach to law as a hierarchy of norms. The legitimacy of political authority is no longer determined solely by historical sources; it transcends the mechanical "majority rule" litmus test and calls for a reflection on standards to be met in the course of deliberations by which parameters of collective life are constantly being redefined. As well, the future of constitutionally established relations between majority and minority cannot be examined from the rarefied and apparently well-defined angle of legal organization of diversity. That perspective would lead to the rhetorical cloister that characterizes the traditional legal form. The reality of minorities' experiences, here of language minorities, would be promptly obliterated and relegated to what is not spoken of in a sanitized system of law. It is in fact precisely all what has remained unspoken that is the basis for the collective work that is now offered to us (André Braen).

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12 Here we are referring to the normativist version of legal positivism, and thinking of, inter alia, the theoretical propositions of Kelsen. See the excerpts offered by Christophe Grzegorczyk, Françoise Michaut & Michel Troper, Le positivisme juridique (Paris: Librairie générale de droit et de jurisprudence/Story scientia, 1992), at 137-58.
When considered from this perspective, constitutionalism once again becomes a movement mobilized against the arbitrary exercise of power and domination, even by the majority. The need for this can be seen in the evolution of language rights. The exegetic interpretation of the law, the refusal to have regard to the facts in a particular sociological context as known and acknowledged as they may be, and adherence to precedents based on a formal interpretation of the Constitution are all the enemies of a more dynamic concept of constitutionalism. And this is the point of view that is most common among the authors of this work. Most of them refer to the limitations that we have called, in this context, paper equality, the equality recognized by constitutional instruments that are blind to the concrete experience of language minorities.

The authors whose papers are brought together here wanted to address the fact of language, rather than the rights formally granted to language minority groups. They have sought to place these themes "in context," by examining some of the ideas underpinning paper equality.

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14 A contrario, the point of view expounded by our colleague Brent Tyler makes it clear how the risk that arises with an exegetic interpretation of legal normativity is that the majority’s linguistic propensities will be systematically favoured. It is entirely paradoxic, if we narrow our focus from the Canadian context to the Quebec context, that the provisions of the constitution have tended to favour a movement that is the opposite of the original movement that justified protecting national linguistic minorities by making linguistic groups that are plainly in the minority in Canada and in North America (francophones) into majority groups, from a narrow referential point of view. This reversal derives from the assumption that language rights can be interpreted without regard to the reality of the continental context. This asymmetry is addressed later. It appears to disprove the idea developed by Henri Lacordaire (1802-1861), that “[TRANSLATION] between the strong and the weak, between the rich and the poor, between master and servant, it is liberty that oppresses and the law that sets free.” Lacordaire, here, plainly and correctly contrasts the rule of law and lawlessness. But once a legal system has been established, all of the nuances suggested by Tocqueville become essential. Lacordaire’s view on the law as liberator seems to make sense only from something other than the standpoint of strict exegesis of the law, because in fact, for Brent Tyler, such exegesis seems to endorse the idea that the constitution in the literal sense of the word — the constitution taken at its word” — systematically serves the interests of the majority. In recent years, however, it has been the re-reading of the constitution from a sociological perspective that has strengthened minority rights and given meaning back to the concept of constitutionalism as a democratic movement.

ve, constitutionalism once meant the arbitrary exercise of power. The need for this can be seen in the exegesis of the Constitution by particular social and political entities. These are all constitutionalism. And this is the reason for the authors of this work. have called, in this context, for constitutional instruments to be granted to minority groups in language. Together here wanted to address formal and informal themes, "in which the idea of paper equality." Des Académiens du Nouveau-Brunswick (1986) S.C.J. ns].

Brent Tyler makes it clear that a normative perception of the majority's rights is entirely paradoxical, if we narrow the scope of the constitutional provisions, it is clear that the majority's rights are protected in the minority in Canada from a narrow referential point of view. It can be interpreted without regard to context. It appears to disprove the normative conception of the majority in recent years, because of the context. What this suggests that Tocqueville becomes make sense only from something other in fact, for Brent Tyler, such a perspective makes sense of the world, the constitution of the majority. In recent years, however, a sociological perspective that has strengths in political and constitutionalism as a democratic model was supported in the recent decisions in the [1] 2 S.C.R. 217, R. v. Beaulac, [1999] c] and Arsenault-Cameron v. Prince of Wales ["Arsenault-Cameron"] trilogy, [university of moncton], and Michel Bastarache, ed., 1 Blais, 2004), at 31-37.

Their contributions bring to light the ideological, social and political issues that surround the definition, interpretation, mobilization and implementation of language rights. By extension, they call on new perspectives that encourage us to go beyond the concepts that are traditionally used for discourse about minority status. Those perspectives call for the question to be re-framed, and provide a foundation for new principles that, in the future, should never be absent from discourse about language in Canada.

II. THE ISSUES SURROUNDING GENUINE LINGUISTIC EQUALITY

"The Constitution is a living tree." This metaphor, which is often cited by the Supreme Court of Canada, illustrates the flexibility that is needed in any process of constitutional interpretation. However, its full implication should be underscored. In particular, since the adoption of the Canadian Charter of Rights and Freedoms in 1982, the Constitution cannot be interpreted in isolation from an analysis of the social, political and cultural environment in the society of reference. As we have said, the constitution is to be read "in context." But while credit must be given to the "living tree" metaphor, we must also acknowledge that unless there is deliberate and determined action brought to bear, the constitutional tree will always tend to spread its branches more beneficially on the sunniest side, and to suffer the effects of the shade from the other surrounding "living trees." This metaphorical reversal deserves further consideration. The authors of this work have, at least, sought to bring to the forefront the ideological, social and political issues that surround any contemporary interpretation of minority language rights.

A. The Paradigmatic Issues Involved in Recognition of Language Rights

The authors first point out that the definition of these rights always involves consideration of particular values. Those values are generally


17 At least, it is this caution that we are invited to exercise in these very recent studies: Andrée Lajoie, Jugeements de valeur (Paris: Presses universitaires de France, 1997) and Andrée Lajoie, Quand les minorités font la loi (Paris: Presses universitaires de France, 2002).
the ones held in the period when the rights were established. They inevitably reflect a universe of particular representations, and are often a response to a specific historic context. This is an aspect that is addressed by Dunbar, Magnet and Packer. In this respect, we have much to learn from the European experience. In Europe, the ebb and flow of language rights, throughout the 20th century, ran up against a form of denial that derived either from a move to strengthen national identity or from the imperatives of global security (in the period following the Great War), before it acquired a kind of sanctity through the recognition of fundamental rights. Today, the emphasis is placed more on the protection of minority cultural and language rights. These successive shifts in emphasis illustrate how the effort to define language rights will encounter impediments or catalysts in the problems or inadequacies of a period in time. The political context that provides the reference point is very largely, in this case, a function of the continental or international context. Similarly, the rights in question will be designed to benefit different reference entities, depending upon that context, which may be a territory (in a security context), the individual (in terms of fundamental rights) or the community (in the context of the recognition of cultural or minority rights). These differing approaches are amply addressed by Réaume and Milian-Massana, and those successive shifts suggest a kind of lucidity. Regardless of the point of view that we might adopt today on the question, the protection of language rights is not a response to any absolute historical imperative. It has found justification, or been stifled by, the diverse range of paradigms and agendas, not to say ideologies, that have dominated the public arena at different times.

At the same time, and contrary to the fixed concept of legal normativity that is often adopted, there are significant variations in the law, even where there have been no changes to the provisions of statutes or constitutions. Those shifts certainly do not provide any shield from the influence of the dominant paradigmatics of the period, even when that influence is out of step with the evolution of social debate; and the right does not always prevail, as collective directions taken, although

In fact, on a more continental level, adopted out of old habits of hibio, the concrete expression of the concrete approach the imprimatur of the courts, reluctance of governments to apply the law. For exlanguage rights involves a more the majority has a continuin of the rights that language minorities hold in Canada enjoy very specific legal procedures in the form of negative rights of dependency; it is a respons of this perspective is with Magnet and Doucet. As a concept, sometimes been taken by the language rights are imperfectly translated into practice. Apparently, these obstacles concept of the law that is ascribed for the statutory and regulatory authorities responsible for it is still generally the order of language rights must be given to linguistic communities, support provided to ensure these approaches would be understood as "collective rights," however, themselves reflect directions that such public broader social contexts.

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18 We know that these fundamental freedoms (which are properly classified as civil and political rights) are sometimes questioned in the "security" context that developed after September 11, 2001. The aim here is to demonstrate that regression is always possible in the realm of political justifications, and that neither the law nor openness to social innovation and cultural diversity progresses in a strictly linear fashion.

ere established. They inescapable, and are often as an aspect that is addressed to, we have much to learn of the ebb and flow of language against a form of denial that rational identity or from the following the Great War), the recognition of fundam more on the protection of successive shifts in empha-sage rights will encounter inadequacies of a period in the reference point is very mental or international context which may be a factor (in terms of fundamental recognition of cultural or not). The concept of legal normal-ization variations in the law, the provisions of statutes or provide any shield from the period, even when that of social debate; and the right does not always prevail, as we too often believe, over the broader collective directions taken, although it may put up a lengthy resistance.

In fact, on a more continuous basis, the “established” legal reflexes, adopted out of old habits of domination and dependence, may well hinder the concrete expression of rights even though they have been given the imprimatur of the courts. This conservatism may be seen, first, in the reluctance of governments to give practical effect to changing interpretations of the law. For example, while the very idea of collective language rights involves a more proactive concept of the law (the idea that the majority has a continuing duty to minorities), the essential elements of the rights that language minorities (and in particular the francophone minorities) of Canada enjoy today have in fact been won as a result of specific legal proceedings — that is, to all intents and purposes, in the form of negative rights. This state of affairs is the legal consequence of dependency; it is a response to the social context created by domination. This perspective is well documented in this work by Réaume, Magnet and Doucet. As a consequence, the generous approach that has sometimes been taken by the Supreme Court of Canada has been only imperfectly translated into the real world of socio-legal relationships.

Apparently, these obstacles are largely also a function of the narrow concept of the law that is adhered to by the principal actors responsible for the statutory and regulatory definition of the law, or by the judicial authorities responsible for implementing it (Soublière). Paper equality is still generally the order of the day. If we are to get beyond it, language rights must be given concrete expression in the offer of services to linguistic communities, but even more importantly, there must be support provided to ensure the vitality of the communities in question; these approaches would be consistent with the idea of “language rights” understood as “collective rights.” These different functions of the law, however, themselves reflect varying concepts of public action, and the directions that such public action will take will also be a function of broader social contexts.

B. The Social Issues Involved in Recognizing Language Rights

While the recognition of individual language rights is largely a function of the paradigmatic (if not ideological) references of the period, the implementation of those rights, and the translation of those rights into concrete action, is also a function of a set of other social factors, which a number of authors have sought to identify in the pages of this collective work. A number of those authors have stressed the fact that a study of the evolution of language rights could not underemphasize a fundamental component of the problem: linguistic identity and reference language are factors in distinction and social exclusion.20

This is a blind spot in the analysis of language rights when those rights are tacitly understood to be individual rights. That perspective indirectly denies the fact that the aim of the protection afforded to minorities is not simply to protect them from the state, but also to protect them from social domination by a majority. Notably Magnet underlines the fact that being a minority is itself a form of resistance to the market, that is, to the pressure of a competing culture that is capable of dominating it on numerous levels at once.21 This explains the dependent status in which language minority communities find themselves, the most blatant expression of that dependency lying precisely in the fact that their rights are given concrete recognition only in so far as they are asserted. This is the point of view expressed by Daniel Boivin. That legal status in itself, however, reflects a broader social reality.

The recognition of these more symbolic than real rights means that the law ultimately conceals a portion of the situation that it should be helping to remedy, when it enshrines the principle of an illusory equality. This is the position taken by Robert Dunbar, but also by Lorena Sekwan Fontaine and Gérald Beaudoin. Minority status is, first, a social fact. Each speaker is the bearer of cultural capital that is valued to varying degrees, depending on the reference society in which the speaker lives.22 That reference language will inevitably correspond, in any given collectivity, to a will, by extension, engender depending upon the degree to which a minority's status will be maintained or devalued. We know that status will get in the way of a competence in relation to a majority group whose members will have the same effects self-censorship — particular in the Canadian context, this court challenges program, with of powerlessness that had perhaps been only partially dischide and institutional in nature.

From a broader socio-structural perspective, the minority's progress is understood as the reference situation, particularly among the francophone language community; the situation is that a situation that the francophone schools, which and in the linguistic transfer among what are called "exclamations that one cannot Lachapelle and Landry, because, which foresees an until"

21 This is also a perspective that is often developed by new social movement theoreticians.
Language rights is largely a reflection of the period, translation of those rights set of other social factors, identify in the pages of this essay stressed the fact that a dual not underemphasize a utopian identity and reference exclusion.

Language rights when those social rights. That perspective: protection afforded to majority state, but also to protect Notably Magnét underlines of resistance to the market, that is capable of dominating the dependent status in themselves, the most blatant in the fact that their rights as they are asserted. This is not. That legal status in itself, than real rights means that the situation that it should be incipie of an illusory equal-
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any given collectivity, to a particular image and social status, which will, by extension, engender more or less negative social arrangements depending upon the degree to which the language group is socially valued or devalued. We know that for the members of most language minorities, that status will generally give rise to feelings of linguistic incompetence in relation to the language of the majority. Within language majority groups themselves, when they are in minority situations, it will have the same effects. This situation leads to a severe form of self-censorship—particularly in relation to the mobilization of the right—which, when it is practised, verges indirectly on denial of the right. In the Canadian context, this tendency has gradually come to justify the court challenges program, which tends indirectly to remedy a situation of powerlessness that had persisted for too long. However, that type of solution only partially discharges the “social mortgage” carried by every social minority, and necessarily, by every language minority.

From a broader socio-demographic perspective, minority status exacerbates the minority’s problem of legitimacy, where the minority is understood as the reference group. As concerns linguistic transfers, this situation, particularly among francophones, takes the form of a very obvious attraction among children in the minority to the dominant, anglophone language group; that is, to the socially valued reference group. That situation then takes the form of both a decline in attendance at francophone schools, which lose enrolments to anglophone institutions, and in the linguistic transfers—generally toward English—observed among what are called “exogamous” couples. These, at least, are the conclusions that one cannot help but reach from reading the studies by Lachapelle and Landry, notwithstanding Landry’s surprising hypothesis, which foresees an unlikely reversal in the direction of linguistic

23 In this sense, it is eminently worth noting, on re-reading the White Paper submitted for discussion in the months leading up to the enactment of the Charter of the French language in Quebec, that the justification for affording the French language greater protection in Quebec was defined as deriving mainly from the need to address the social status of francophone Quebecois, defined here as a group that had been rendered as a minority, rather than as a minority group. See the Dossier du Devoir, No. 3, “Vers une charte de la langue française au Québec : recueil de textes sur le Livre blanc et le projet de loi n° 1” (Montreal: Imprimerie Populaire, 1977).

transfers, in favour of francophone schools, among the children of exogamous couples.\textsuperscript{25}

However, this situation of generalized cultural dependency does not sufficiently highlight one final problem, which is pointed out in these pages by Jackman. Linguistic discrimination is overlaid on a form of multidiscrimination. Particularly in English Canada, language minority status also goes hand in hand with significant aging of the population, lower levels of educational achievement (for reasons having to do with language competency and economic dependency, which are readily understandable) and lower labour force participation by French speakers — all being characteristics that promote economic impoverishment of the communities affected, and even reduce the genuine opportunity to employ the law through legal proceedings. They at least make apparent the limitations inherent in a right to linguistic equality that has been formally framed as a right, but that is not constantly viewed in its general sociological context.\textsuperscript{26}

C. The Political Issues Involved in Recognizing Language Rights

Behind these statistical facts, however, other issues creep in — issues of a political nature. They lead directly to the more general problem of power. The question is therefore addressed in terms of its primary dimension, the ability of one group to impose its will on the other in the course of their ongoing relations. The power in question is both social power, which is more diffuse (Packer), and the power instituted by the state (Boileau). Thus Pierre Foucher, also writing in this work, opens the debate directly by proposing that inaction on the part of the state in several Canadian provinces be regarded as a form of “unconstitutionalality by omission.” Inertia is the exercise of a power. This is just as true when a lack of resources is argued to justify the omission, and even more true when some resources are eliminated. This is the perspective that illustrates the consistent justification for noteworthy change in Canada over the first hundred years when the omissions are mine.

The recognition of the principle of cultural existence and the effective linguistic equality and the guarantees that are in the best possible position to flourish. It is

The political issues discussed here, however, are not as clearly addressed by the state (Leitch and Power). This is paper equality and shows that public institutions must be continually checked. The fact that it is impossible to reverse it, when it becomes the situation raises a host of related but recognition of the right to understand it. When language rights come.

\textsuperscript{25} This hypothesis suggests that we look at exogamous marriage as having “hidden potential.” Because the children of exogamous couples see that they are entitled to attend francophone schools, Landry hypothesizes an eventual recovery in the number of children who are likely to attend the minority schools in the future as a result of the rising numbers of exogamous couples.

\textsuperscript{26} For an historical review of these trends, see the paper by Alain-Robert Nadeau, also published in this volume.

\textsuperscript{27} This issue was of course addressed in other ways...
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cultural dependency does not hich is pointed out in these on is overlaid on a form of Canada, language minority ant aging of the population, x reasons having to do with tency, which are readily icipation by French speakers conomic impoverishment of t the genuine opportunity to They at least make apparent tistic equality that has been constantly viewed in its gen-

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per by Alain-Robert Nadeau, also pub-
en more true when some rights that have been recognized are simply eliminated. This is the perspective adopted by Gérard-A. Beaudoin, who illustrates the consistency of a phenomenon that explains, in part, why no noteworthy change in respect of language rights was achieved in Canada over the first hundred years of Confederation (Magnet). Even when the omissions are minor, they must not be allowed to conceal the fact that there is a significant difference between a formal response to the requirements of equality and actual, concrete recognition of those rights (Boileau). As well, there is a qualitative difference between mere recognition of the principle of equality, the negative protection of lan-
guage rights, the effective defence of those rights, social promotion of linguistic equality and the granting of concrete powers to the commu-
ties that are in the best position to guarantee that their linguistic and cultural existence and experience is preserved and flourishes. That is also the scale against which we must measure the allocation of space in the governance landscape, whether that allocation depends entirely on the good will of the majority or of the communities in question. On the other hand, the example of Wales, offered by Williams, makes very plain the need to support language communities, and to provide them with the powers and resources that they need in order for their language of reference to flourish. It is even essential to their common destiny.

The political issues surrounding the question of linguistic equality, however, are never as clearly visible as in the fact that it is impossible to ensure that this principle of equality will be honoured by public institutions, which are essentially established to meet the needs of the majority (Leitch and Power). This situation, once again, reveals the limits of paper equality and shows that the law alone is never sufficient; that it must be continually checked against reality, and particularly the reality of public institutions that perpetuate the established power relationships. The fact that it is impossible to have a trial in one’s own language provides an oft-cited example of the relative power of the majority language, when it becomes the sole language of institutions, because that situation raises a host of related issues (Aucoin, Boivin and Soulière). But is recognition of the right to speak French at a trial before a judge who does not understand it the best guarantee of equality (Gruben)?

When language rights come down to this vague “right to have the right,”

27 This issue was of course addressed in Société des Acadiens, supra, note 13.
it must be recognized that the concept of linguistic equality has lost its meaning. Access to French schools is plainly another example of the same problem, with the structural consequences that are immediately apparent. This is also the case when it comes to the language used by the RCMP in policing, which varies geographically (Aucoin).

The problem of power relationships — in the political sense — also arises. In that context, the weight of majority public opinion amounts to one form of cultural domination, among others. That problem is stated directly by André Braïn, but also by Michel Doucet, who recognize that governments have, “[TRANSLATION] as a general rule, a policy of non-intervention in respect of language rights, unless such non-intervention causes even more problems than intervention.” Once again, the result is that inertia is the rule most often followed, and in a number of Canadian provinces this results in the preservation of a status quo whose consequences for minority language communities (in particular for francophone communities), are familiar ones. Entirely unexpectedly, this is what Jack Jedwab attempts to demonstrate in these pages. He points to the lukewarm support in francophone public opinion in Quebec for French as the predominant language of signs, and refers to this opinion when he questions the legitimacy of the approach that the Supreme Court imposed in this respect in La Chaussure Brown’s Inc.28 and in Allan Singer Ltd.29 He then outlines the role that public opinion should play when it comes to the direction taken by language policies.30 The other side of this coin, if we follow the logical thread of Jedwab’s reasoning, is that the hostility often expressed by the anglophone majority in the other provinces of Canada in respect of the rights of francophones would justify assimilationist policies in virtually all cases.

Given these facts, the real issue surrounding the power relationships between majority and minority is largely one of the financial and material resources that are, in practice, devoted to respect for the rights of minority members and promotion of their linguistic personality. In this instance, there is no way of precluding that the good will of the majority simply becomes an expres Memmi, in the late 1950s, good faith,”31 a form of pa justify both the fiduciary po riginal communities and the position in which francoph Linda Cardinal at least poi Canada’s francophone popu to which those community: and that this fact must be tal the prerequisites of linguistic political determinants of the or non-recognition of langua

III. FIVE THINGS TO TAKE THE N

The foregoing comments side the avenues that are ge oignition of language rights rights, as the authors of thi provide a better outline of t discussion, in its dual lega universe of possible choice discussion.

A. The First Step: Adopti

One of the major diffici e of language lies in the re cional dimension. In that dis as a technique of communic By extension, the language i access to services in the l strips the linguistic referenc

30 Astonishingly, Jedwab, in this tenuous exposition, conflates public opinion with other social facts and suggests that public opinion be recognized as being of the same order as demolinguistic data.
31 Albert Memmi, Portrait du (lished in English as “Portrait of the Earthscan, 1965)).
Constitutionalism and Language Communities

Simply becomes an expression of a particular form of what Albert Memmi, in the late 1950s, called "[TRANSLATION] the colonialism of good faith," a form of paternalism that, in Canada, has managed to justify both the fiduciary power of the Crown in its relations with Aboriginal communities and the extreme dependency that characterizes the position in which francophone minority populations have been kept. Linda Cardinal at least points out that the limits on public funding for Canada’s francophone population is an indirect expression of the extent to which those communities are politically dependent on the majority, and that this fact must be taken into account in any realistic approach to the prerequisites of linguistic equality — that it is an inherent part of the political determinants of that (in)equality and underlies the recognition or non-recognition of language minority communities.

III. Five Things That Must Be Done in Order to Take the Necessary Steps Forward

The foregoing comments indirectly illustrate the need to step outside the avenues that are generally followed in the discourse about recognition of language rights. They touch on the very nature of those rights, as the authors of this work have said a number of times, and provide a better outline of the still uncertain parameters for the present discussion, in its dual legal and political aspects. They delineate the universe of possible choices and set a new general direction for the discussion.

A. The First Step: Adopting a Concept of Cultural Rights

One of the major difficulties encountered in discourse about the issue of language lies in the reduction of the issues to their narrowly functional dimension. In that discourse, language is more or less understood as a technique of communication, without regard for its cultural aspects. By extension, the language issue is then reduced to a problem involving access to services in the language of the minority. That perspective strips the linguistic reference of its collective dimension, and makes it,

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potentially, a subject matter of individual choice. This reductionist approach both reinforces the overly facile idea that a reference language is an individual right and eclipses the broader problem of linguistic competition at the North American scale. For all intents and purposes, it denies the community dimension of language. The reversal that is needed in this approach calls for language rights to be recognized as cultural rights, as is suggested in these pages, in their own words, by Robert Dunbar, Joseph-Yvon Thériault and Linda Cardinal. This means that language must be recognized as a collective creation, and as a prerequisite for the collective life of each community: Language as Cultural Enterprise (Résumé).

B. The Second Step: Questioning the Concept of “Minority”

We must also examine the concept of “linguistic minority,” a concept that tends to establish a disqualifying category when considered alongside a primary definition of democracy. It reflects both fragility and dependency in relation to something identified as a “majority,” which is the source of real political authority. On the other hand, when “minority” is understood as a human group that carries on the legacy of a world vision and a mode of expression that is itself a reference point in the history of human groups, language gains back some of its social bases, and, as an expression of common destiny, the essence of its political meaning. That perspective is found, at least a coherent form, within the politics of recognition. In their contributions to this work, foreign experts like Jan Velaers in fact demonstrate the fragility of a strictly numerical definition of the concept of “minority” and the limitations of that perspective in relation to the sociological and political dimensions of the problem.


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C. The Third Step: Thinking About Language Rights as “Positive” Rights

Given that, as Jackman and Vaz point out, there is a strong correlation between linguistic identity and a number of other socio-economic characteristics, language status often seems to be a source of systematic discrimination. Vaz proposes clearly that language be recognized as a ground of social discrimination, as defined in section 15 of the Charter; doing this tends to identify clearly a factual situation that the statistics have already amply established. Jackman proposes, for that reason, to put the question of language rights back into the more general context of the right to substantive equality: Equality Right Status. Boivin also proposes using section 15 of the Charter to gain access to the courts. It is uncertain, however, whether a definition of language rights as economic and social rights might limit the scope of the meaning encompassed by the concept of language, particularly when language rights are considered as cultural rights from the broader perspective suggested here. In fact, from a strictly legal point of view, it has been settled law since Mahe that section 15 cannot be used to expand the scope of the specific language-related provisions of the Charter. On the question of the official use of English and French, the framers have expressly established the constitutional scheme that will apply to language rights in Canada. That being so, there is nothing to prevent section 15 from being used to combat discrimination based on language in private relationships. Thus, when some people cast their gaze at the realm of economic and social rights — and in particular refer to subsection 15(2) of the Charter — they are led indirectly to the idea of a more proactive and informed right, an idea to which some authors of this work have referred as the approach to be preferred when we seek to protect language rights. By extension, that perspective highlights the often symbolic nature of the concept of linguistic equality, and enables us to state the problem in terms of how to “put the right into practice” — that is, what the concrete prerequisites are for the right to be exercised.

D. The Fourth Step: The Socio-political Contextualization of the Concept of Equality

Johanne Poirier demonstrates the difficulty of transposing Belgium's linguistic institutions to Canada and stresses the need to place any call for linguistic equality in a sociological and political context. Whatever form it takes, and whatever institutions are devised to secure it, the idea of equality cannot be divorced from reality (Réaume). Accordingly, a simple observation seems to be necessary. Where two languages are present, it is likely that one of them will be more threatened than the other and that it will ultimately be threatened by the other. Any aesthetic consideration about some theoretical equality between the languages, or "symmetrical" treatment of their legal status, tends to deny the very reality that the right is supposed to remedy. The question can be put even more simply: Which of these two languages is at risk of disappearing? No question can be clearer, particularly in the North American context. It single-handedly incorporates the conclusions of Jackman and Magnet and of a majority of the contributors to this work. When we have had to choose between a dubious principle that we find comfortable and an observable reality that we find distressing, history will condemn us for being unable to choose the reality. This point of view, however, requires that we adopt a pluralist perspective on the concept of equality, a perspective that questions the value of a purely formal definition of that concept.

E. The Fifth Step: Giving Effect to All of the Consequences of the Concept of Collective Rights

One of the major difficulties of legal discourse derives from the fact that it proposes solutions to new problems by constantly referring to the existing normative parameters. The law still acts as a conservative principle. The stability that is the whole of reality within terms of which are established by the common temptation to an inclination that tends to is properly characterized as have criticized this reduct Linda Cardinal and Josep have here is a clash between social life and political life. ever, it can be said, as Réa production. A language does that speaks it. That evidenc strate the fact of common defended by Alan Patten as we said earlier, be dealt with conceptualization of their re fact been approved by the Cameron, but in the future.

All of these considerati Canadian law illustrate the established legal categories place in a vacuum. It is part sion of which can be seen continental or international negotiated to protect minori approaches provide a new p that allows us to see the com plification of a more genera

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35 This point of view was also addressed by Joseph-Yvon Thériault in his critique of the policies established during the Trudeau government era. See also Bastarache, supra, note 15.
36 On this specific aspect of the question, see also the work by Joseph Elliot Magnet, Modern Constitutionalism: Identity, Equality and Democracy (Markham, Ont.: LexisNexis Butterworths, 2004), at 151-56.
37 Pierre Noreau, "L'innovation sociale et le droit : est-ce bien compatible?" in Fonds de recherche sur la société et la culture, Le développement social au rythme de l'innovation (Sainte-Foy, Qc.: Presses de l'Université du Québec, 2004), at 73.
38 See, inter alia, the paper by linguistique aux droits des minorités in
39 In this volume Alan Patten's placing greater weight on protection of of individuals from other groups, wh political community.
40 In this volume, and from ano need to understand the approach adopt between the respective spheres of pri comparison between Quebec's and Nev
41 Supra, note 15.
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IV. REDEFINITION OF LANGUAGE ISSUES IN THE INTERNATIONAL CONTEXT

Discourse about language in Canada has for too long been confined within the established constitutional framework. What this means is that the debates and conflicts that arise in respect of language have generally been given expression within the sterilizing confines of public law, in whose rarefied atmosphere they become mummified. This also goes some way toward explaining why the attempts that have been made to reform Canadian federalism and establish parameters for other kinds of political relationships between the language communities, or between the provinces and the federal state to which they belong (a prospect that also includes the scenario of Quebec seceding from Canada), are regarded as legitimate outside the Canadian political context.

On the international scene, the justification for raising the issue of language arises in a completely different context, one which, by contrast, illustrates the reductionist nature of our own contemporary discourse. The European contributors to this work place great emphasis on the theme of linguistic diversity (Williams, Groppi, Miliand-Massana). The issue is also finding expression, and perhaps a fresh justification, in the promotion of cultural diversity: see the Universal Declaration on Cultural Diversity (UNESCO), the Declaration on the Rights of Indigenous Peoples and the European Charter for Regional or Minority Languages. This point of view is commented on by Stephen Tierney, who, like others, stresses the recognition of minority languages in Europe as a dimension of “European cultural heritage” and even as the “cultural heritage of humankind.”

This thesis alone provides us with a fresh perspective on all the justifications ordinarily cited in support of the protection of language minorities in Canada. It supports the idea that we cited a little earlier: that all linguistic facts are the expression of a cultural fact, which is itself the expression of a collective undertaking. It can become a reality only with each specific language community. That perspective does lead to doubts as to whether language right central government, both be increase those communities they can exercise only mi model for minority langu ardly of becoming mere relic survival is proffered as proguage minority “one more sney). The experiments that other hand, are based on t various forms of devolutio even the granting of a part autonomy (Groppi).

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42 Bastarache, supra, note 15.
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as to whether language rights can be fully guaranteed by an omniscient central government, both because that type of protection will inevitably increase those communities’ dependency on an institution over which they can exercise only minor influence and because the trusteeship model for minority languages places those languages in constant jeopardy of becoming mere relics of folklore, at which point their “clinical” survival is proffered as proof of their development. It makes each language minority “one more artefact in the museum of languages” (Tierney). The experiments that have been undertaken in Europe, on the other hand, are based on the creation of active policies that involve various forms of devolution of power and resources (Williams) and even the granting of a particular form of administrative and political autonomy (Groppi).

There are three separate consequences when this perspective is adopted. The first involves the need, not to say the obligation, to place the responsibility for the cultural development of language communities in the hands of those communities. As we shall see, this must not be seen as abandoning them; rather, as was mentioned above, it is a necessary devolution, with each party knowing that the fate of language minorities will not be determined in Ottawa, but will be decided in very concrete terms within each community in question, in managing its relations with other communities.

Of course, this approach does not in any way diminish the responsibility of the federal and provincial governments in respect of cultural diversity, because that diversity is becoming an international responsibility; that is, the responsibility that each nation has to all other nations. That obligation, however, provides a different perspective on the justification for the protection of minority languages, and particularly the protection of the French fact in Canada. That responsibility is then no longer a persistent historical irritant, but rather a collective responsibility. It brings in a new justification for distinguishing the responsibilities of each state for its historic languages, in particular where those languages are forced to compete with immigrant languages. It is quite clear, from this new perspective, that the primary cultural responsibility of each state is to promote the historic languages that it has an obligation to allow to flourish, while the protection of immigrant languages and cultures is first and foremost the responsibility of the countries of origin of these foreign nationals and new Canadian citizens. This point of view is complementary to the one advanced by Alan Patten in this volume. He posits that Canada will increasingly have to assume responsibility for its
capacity to promote the development of minority communities in Canada, and for the inadequacies of earlier language policies. Inevitably, Canada will have to go beyond paper equality in order to meet that responsibility, which entails a duty to achieve the result, not merely to make the effort.

There is a third necessary consequence of this reframing of the justifications involved in the language issue. The collective responsibility of each population in each state, in respect of linguistic diversity, carries with it equivalent responsibilities in respect of indigenous languages. That is the issue addressed by Sekwan Fontaine. There is therefore a common cause linking the linguistic fate of the Aboriginal people in Canada and that of the language minorities, particularly francophones, the reasons having to do with the very principle of cultural diversity and what it means in the North American context. The ways in which these issues hit home are expressed in multiple ways, particularly in regard to recent interpretations of section 35 of the Constitution Act, 1982 dealing with Aboriginal rights, which are themselves defined as collective rights. This is a perspective that language rights advocates will increasingly be able to draw on in the wake of the most recent decisions of the Supreme Court regarding language.

This reframing of the justifications for language rights, however, is significantly changing the nature of discourse about language, if only because it has shifted the state’s obligation to protect cultural minorities onto the international stage. It expresses the share of responsibility for cultural diversity that must be shouldered by each state. Here again, we can see two practical consequences from the direction that this emerging international law is taking. The first such consequence involves the new-found legitimacy bestowed on the language issue by its elevation to a subject matter in the relations among states. That legitimacy bolsters the legitimacy of language rights advocates themselves and provides them with a way around the existing deadlocks in opinion, to which Braën and Doucet refer. While we must not overestimate the short-term impact of these changes in perspective, we cannot rule out the possibility that they will lead to a change in the power relationships in Canada’s political space by providing the traditional standard-bearers in this area

43 Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

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Even more importantly, finding of the concrete actor discourse, language minorit government off against the prov help of a number of opening the courts off against the ex ment, at both the federal at what dubious complicity consequence of these shiftin communities in a position o tector. Two judges in these j the limitations of judicial as quality. The question for the issue onto the internationa if it allows for access to o Canadian political context an polycentric scenario to which

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45 Cardinal, supra, note 24.
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any event, those changes call for a re-reading of language rights that incorporates this new reference paradigm (c.f. section III.A of this paper). 

Even more importantly, this new perspective will encourage a re-de 

ining of the concrete actors in the language arena. In the present-day 

discourse, language minorities have generally played the federal go 

government off against the provincial legislatures, and since 1982 (with the 

help of a number of openings created by decisions of the courts), played 

the courts off against the executive and legislative branches of govern 

ment, at both the federal and provincial levels, always with the somewhat dubious complicity of the federal government. The first consequence of these shifting alliances has been to put those minority communities in a position of ongoing dependency on a third-party protector. Two judges in these pages, Sharpe J. and Rouleau J.A., point out the limitations of judicial action as a remedy for chronic forms of inequality. The question for the future is whether the shift of the language issue onto the international stage will bring other actors onto the scene, if it allows for access to other political and judicial forums outside the Canadian political context and system of law. This is an extension of the polycentric scenario to which Newman refers in this volume. 

V. CONCLUSION 

What can we say in conclusion? When language is viewed as a colle 

tive fact, it can no longer be understood as a reality objectified by the 

law. It comprises one of the concrete prerequisites for collective life. 

Language can then no longer be rigidly defined as an individual right, if 

only because it is the product of and prerequisite for a collective activ 

ity. It can also no longer be viewed narrowly, as a vector of communica 

tion, and it must be seen as a world view. Recognition of this social fact 

calls on us to go beyond the right, understood in its subjective and ind 

ividualized form; language can be recognized, protected and promoted, 

in this sense, only as a collective right. That right, as we have seen, is 

ot a mere legal abstraction; it always assumes the existence of concrete 

social relationships. Those relationships are what connect the members 

of a particular community with one another, as they connect that com-

45 Cardinal, supra, note 24.
munity and its members with other communities. In the context of those relationships, language is a factor in the balance of power, which is a function of each community’s ability to impose its will on the other. We therefore cannot discuss language rights without taking into consideration the overall context in which the activities of the communities in question are carried on, and so we need to recognize the asymmetry in the respective status of each language community. The very idea that certain language communities must be given particularly favourable treatment derives from the fact that without specific protection, the cultural diversity that is expressed by those communities will be jeopardized, as will an expression of the diversity of social life and even of humankind itself. This diversity is, in itself, an expression of the common good, and the political authorities accordingly have a positive duty to protect it. By extension, inaction in any form is an expression of a kind of passive discrimination that favours the community most able to impose its will. This situation calls for the reality of each community to be considered in its context, always applying a consistent cultural “precautionary principle.” It calls for special support to be given to the communities most vulnerable to disappearing because of their fragility or dependency on others. We have to return to the reality principle.

In practical terms, the principle of symmetry of rights, or the principle of formal equality (as they have been formulated by positive law), can result only in a more favourable treatment of the culture most able to impose its will, whether by reason of cultural hegemony or of social, economic or political domination. It is a fact that when no distinction is made to the manner in which individuals or communities whose status is unequal are treated, more favourable treatment is, to all intents and purposes (and with the bonus of the legitimacy of the law), given to the socially advantaged group. That observation underlies any critical theory of the law. We must acknowledge that Canada’s language laws have not always avoided this tendency, and that they have not always recognized the virtues of asymmetry in the treatment of language minorities in Canada. The need to do this calls on us to question the legal aesthetic that has often placed threatened language communities on the same footing as dominant language that they have minority status in the Canadian cultural, political and international context. Rights textualization, which is a pretense.

Some of the most recently written toward this more optimistic time, although this is rather accumulating demoscience only way that we will be able to understand the parameters of the current discursive communities is if we reframe the call that most of the con in it they discuss the major linguistic diversity, as an broader stage of global cultu

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46 There is no more sensitive expression of this fact than the virtually opposite meanings that bilingualism has for the members of the linguistic minority and majority.

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pport to be given to the com-
because of their fragility or
the reality principle.
mety of rights, or the princi-
formulated by positive law),
ent of the culture most able
lural hegemony or of social,
t that when no distinction is
: communities whose status is
ment is, to all intents and
acy of the law), given to the
on underlies any critical the-
Canada’s language laws have
: they have not always recog-
tment of language minorities
to question the legal aesthetic
ge communities on the same

footing as dominant language communities, claiming as justification
that they have minority status in a provincial context and disregarding
the Canadian cultural, political and social context or the continental or
international context. Rights have no concrete meaning without that con-
textualization, which is a prerequisite for contemporary constitutionalism.

Some of the most recent decisions of the Supreme Court have
tended toward this more open concept of constitutionalism. It is about
time, although this is rather small consolation, given that we have been
accumulating demo-linguistic data in Canada for over 140 years. The
only way that we will be able to move toward a redefinition of the pa-
rameters of the current discourse about the future of minority language
communities is if we reframe the way we look at minority status. That is
the call that most of the contributors to this work sought to answer, and
in it they discuss the major issues involved in the efforts to enhance
linguistic diversity, as an expression of our responsibilities on the
broader stage of global cultural diversity.