Language Rights and the Law in the United States

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Language Rights and the Law in the United States

Finding Our Voices

Sandra Del Valle

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With respect for the past and great hope for the future, this book is dedicated to my parents, Jose and Iris Del Valle, and my two daughters, Emily and Amanda.

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I am in search of my
mother tongue,
I am in search of the
mother tongue.
American can't hold me,
has always been my second language,
I am, in search. I seek my mother tongue.
More than the sounding of women
it is an understanding,
a knowing about cosmos,
this universe in all our bodies,
earth.

from *Mother Tongues – III*,
by Jacqueline Johnson

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Although this book was written by one person, it would not have come to fruition if I were not nurtured and developed by extraordinary and committed individuals: those who inspired me with their dedication to civil rights struggles, to Latinos and to true community empowerment. They have contributed to this book in different ways – some may have read drafts of the manuscript, others may have talked through legal and political issues with me; all of them filled me with a deep sense of justice that I tried to embody in my own life and work. Always, always they helped me find my own voice.

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Sandra Del Valle

Introduction

WHAT IS THIS BOOK ABOUT?

This book is an attempt to provide a comprehensive review of the legal status of minority languages in the US and to place that review within an historical and political context. I use the term "language rights" to refer to the set of laws and policies that regulate the treatment of minority languages and those who use minority, or non-English, languages in the US, the language minority communities themselves. The status of minority languages is reflected in decisions made as to whether a government actively restricts the use of minority languages, whether it accommodates them by, for instance, translating documents and judicial proceedings or whether it nurtures them by, for instance, providing long-term bilingual education programs. Throughout this book, I characterize the US policy toward minority languages as swinging from tolerant to hostile with a pragmatic rather than an idealistic core. From a history of tolerating minority languages in order to enlist the sympathies of recent immigrants for the American Revolution to the blatantly xenophobic repression of the German language during World War I to a kind of grudging acceptance of the presence of minority languages that characterized the late twentieth century, the treatment of minority languages has gone hand-in-hand with the status of language minority communities in the US.

For various reasons, it is important to me to use the rhetoric of "rights" in relation to language. First, it is an acknowledgment that language minorities do have claims on the use of their native languages in public and private places that cannot be easily abridged. Simple recognition of that fact alone can be empowering for language minorities and will also tell the public-at-large that language is itself a political and legal issue that cannot be taken for granted.

Second, language rights in the US are part of the civil rights world, a world where the word "rights" has not only social and political, but also definite legal consequences. In this civil rights realm, rights are ideas and claims that are taken so seriously that they can be, and are, made the subject of legislation, litigation, and Supreme Court pronouncements. Although language rights generally are a relative

newcomer to this world, they are one that both advocates and opponents must be prepared to see debated at the highest levels of our government.

This book then is about language rights law. It covers all of the law in this area of which I am aware from the perspective of one who passionately believes that language choice is a fundamental aspect of personhood and ought not to be limited except in extremely narrow situations.

No legal field, whether it is property, contracts, civil rights, or trusts and estates, can ever be extracted from its human element, so a legal work on minority languages is deeply embedded in the human experience. As a work dedicated to the legal dimensions of minority languages in the US, then, this book traces the development of a nation, of its people and of its attitudes toward language minorities. It is also an attempt to flesh out the role of language minorities in the development of our jurisprudence, a virtually un-explored area. The legal stories of these communities in the US are what this book hopes to document.

FOR WHOM IS THIS BOOK WRITTEN?

This book is written for activists, advocates, lawyers and non-lawyers, students, and all those who cannot be easily labeled whose hearts and minds are committed to the struggle for the promotion, preservation and protection of language minority communities in the US. Although I have tried hard to limit the use of *legalese*, the fact that I am a lawyer and that this is a book about law will undoubtedly make the reading harder for some than for others. If I alienate anyone because of the legal nature of the writing, I profoundly apologize, because the cause of language rights is not furthered by the loss of potential advocates. I would, however, ask that readers do use their best efforts to follow the book; I don't think careful readers will be disappointed.

WHY WAS THIS BOOK WRITTEN?

Mostly, this book was written because I felt I had a lot of knowledge about language rights law that would be most useful if shared with as many others as possible. I owe the opportunity to acquire this knowledge to the years I have spent as a lawyer at the Puerto Rican Legal Defense and Education Fund, a not-for-profit organization located in New York City that does a variety of civil rights work but specializes in language rights. While I have engaged in various kinds of work while at the Fund, I know that there is more work to be done than I or the Fund alone can handle and more work that could be done if language minority communities themselves were aware of their rights and could take the work into their own hands. Also, there are many lawyers whom I think would like to help the one or two members of language minority communities who might seek them out, but who simply don't have the base of knowledge necessary to begin helping them in any legal way. This book will help those lawyers help others.

This book was written at a particularly significant historical moment for language minorities. In the US, the question of minority language rights has taken on new resonance because of the explosive growth in immigration over the last decade, with unprecedented numbers of people coming from countries that have little or no tradition of English usage. The early analysis of the results of the 2000 Census took many by surprise when it showed that the Latino population, expected to reach record proportions in 2030, was already changing the face of the nation. The Asian population alone had grown by at least 41%[1] since the last Census taken a decade earlier and the Latino population had grown by 58%.[2] Not surprisingly then, the number of speakers of languages other than English grew at seven times the rate of English-only speakers and the rate of those who do not speak English "well" rose by 48.5%.[3] How the nation responds to these exciting demographic changes remains to be seen. Unfortunately, we have had some indications already that our newest immigrants are not being welcomed wholeheartedly, and that minority language usage will be the framework in which assimilation, acculturation, and nationalism will be debated. Specifically, federal anti-immigrant legislation has been passed, social services that appear to benefit immigrants are being reduced, many states have passed English-only laws, and bilingual education has become a lightning rod political issue rather than a strictly pedagogical matter.

Although I am a lawyer, I am not naive, nor self-indulgent enough to believe that the work that needs to be done is only, or even primarily, legal work. I think the book demonstrates repeatedly that the law is a crude tool for defining or protecting such fundamentally human attributes as language, ethnicity, or even race. Although these have been defined to a great extent in US society by the courts, legal language is the one kind of language that is indeed limited and that can contain only just so much of human experience.

Throughout this book, I point out the political battles that must be waged and the need to engage in very grassroots activity if language minority communities want to see real progress. I do know that having legal rights recognized and explicated in courts of law can be very helpful, but I have also seen those rights reduced to nothing more than mere words on paper because of the lack of a commitment to implementing court orders "on the ground."

Ultimately, this book is a work of advocacy. While I attempt to give an accurate and comprehensive account of language rights law, I do so as an act of arming people with knowledge – legal, political, and historical – whether or not they are language minorities themselves, and/or whether they are also lawyers, advocates, activists or students, so that their work on behalf of language minorities can be done more effectively. With this goal in mind, I critique certain judicial decisions, uncover common legal themes and judicial concerns, and provide recommendations for action and alternative legal paradigms where appropriate.

SECURING A PLACE FOR LANGUAGE RIGHTS IN THE CIVIL RIGHTS WORLD

Another goal for the book is to more firmly establish language rights as a legitimate field of legal study and as another pillar in the civil rights world along with the traditional areas of education, housing and voting rights. Civil rights law was, in a significant sense, born in 1954 with the school desegregation decision, *Brown v. Board of Education*. Civil rights law today still has all the markings of its birth – a negative rights structure that places a premium on remedying past acts of discrimination within a Black–White racial archetype. The many-hued immigrants of today, without a substantial, and sometimes without *any*, history of discrimination in the US, whose primary markers are ethnicity and the arguably mutable characteristic of minority language usage, simply do not fit the traditional civil rights model.

Complicating the task of integrating language rights into the civil rights world is the fact that language rights law, as a distinct field, is still in development. Indeed, some might say that it does not yet exist as a separate legal area. There are only a few Supreme Court decisions relating specifically to the claims made by language minorities, and those that have been made have been decidedly vague about how to analyze language-based claims, so there is little guidance for the lower courts. Basic decisions, like whether language minorities can be treated for constitutional purposes like ethnic minorities, are still undecided even though language minorities have had cases before US courts for at least a hundred years. Still, decisions implicating language rights can be found in a plethora of legal areas from constitutional law to criminal law to consumer law to employment to education and voting; their presence in all legal areas is growing.

In many instances, however, there are few common principles uniting the judicial reasoning and there is an *ad hoc* nature to many decisions as judges scramble to apply established legal principles to a new community, making, what may at least sound like new legal demands. Even in more established areas such as employment law there will be rogue courts that will chafe at the prospect of securing greater rights for language minorities and that make decisions based less on law than on bias. It seems that every set of facts can lead to completely different decisions simply depending upon which court was making the decision at which moment.

Language minorities, then, are a challenge to the civil rights world even as they represent the future into which civil rights law must evolve if it is to survive as an area for progressive lawyering. For there are still great social injustices in the US and intolerable acts of discrimination still take place. They are, however, more subtle than the mandated separation of races that occurred fifty years ago when racial discrimination was tolerated or even encouraged in some communities. Today, discrimination has gone underground, couched in the words of economics or administrative expediency: where a garbage dump is placed, how much financing a school receives, where a neo-natal intensive care unit is sited, all are decisions that can be made with negative consequences for minorities, but are much harder to label as invidious discrimination than were the acts of yesterday. There is little room

in the conventional "civil rights box" for these more sophisticated forms of discrimination, and the size of this box is getting smaller and smaller. For this is a nation currently hostile to civil rights generally, and traditionally suspicious of group-rights with their connotations of disparaging free choice and individuality. Our judiciary is one that dislikes second-guessing the decisions of legislators and policymakers. Meanwhile, language minorities who increase in number each day are stepping into the civil rights fray at an historically important moment. Which battles civil rights lawyers choose to fight and how they frame their arguments will help shape civil rights for the future; I contend that the complexities that language minorities bring to this process need to be integral to those considerations.

The fact that language rights law has not yet gelled into a known area of law with its own set of maxims and jurisprudence means only that the language minority community is still coming into its own from the civil rights litigation perspective. Even so there do exist certain cases, well-known amongst civil rights lawyers, that have formed the basis for other language rights decisions and cut across factual and regional variations. Cases like *Meyer v. Nebraska* in the due process field, *Hernandez v. New York* in the equal protection area, *Carmona v. Sheffield*, in the social services field, *Negron v. New York* in criminal justice, *Garcia v. Gloor* in the employment area, and *Puerto Rican Political Action Coalition v. Kusper* in the voting rights area. The cases are important from every perspective – in the development of civil rights law generally; for their impact, either positively or negatively, on language rights activism, and for their reflection of the national temper at an historical moment.

Indeed, this is an important time for language rights law, even if its future is cloudy. The language minority community in the US is growing, and will undoubtedly engage in more litigation, some of which may end up before the Supreme Court. With traditional civil rights law suffering the blows of a conservative federal judiciary over the past decade and the Supreme Court becoming more conservative itself, the resolution of those claims could have negative consequences for language minority communities generally. Still, there are local courts, state courts and circuit courts with progressive judges with politically astute and humane agendas that keep the original civil rights dreams of social equity alive. As with all emerging areas, there are opportunities for creative legal maneuvering for those interested in doing cutting-edge work. Although the shape of the final product is still unknown, more litigation will result in more decisions and, by the middle of the twenty-first century, we may very well have an established and more coherent body of language rights law.

THE CONTENT AND ORGANIZATION OF THE BOOK

This book is organized generally into areas of law in which there have been judicial decisions regarding language rights. All of those areas of which I am aware of case law have been covered, from criminal justice and consumer law to employment and voting rights. Since law is essentially a product of political and social

forces, I include chapters on the history of minority languages in the US, and try to integrate as much social and political analysis into the legal discussions as I can without detracting from the legal discussion. My feeling is that language minority communities need to know about all aspects of the struggle over language if they are to understand the nature of these struggles and be able to agitate for themselves.

The book begins with a summary of the historical treatment of minority languages during the period of the nation's formation, and covers the political and legal context of the World War eras. The cases covered in this section are particularly important because the nation was experiencing such a high degree of insecurity about its immigrant background that minority language usage was barely condoned and in the case of the German language clearly repressed. We see some of the most important language rights cases coming out of that period and the contribution made by language rights to the development of equal protection and due process law.

The second chapter brings us to the present in terms of the most recent examples of oppressive language policies with the passage of a host of English-only laws in the states. This chapter also contains an analysis of the popularity of English-only laws and the myths used by their proponents to disparage language rights today. This is an important chapter, particularly because it covers many themes and uncovers biases that are found in many judicial decisions discussed in later chapters.

The third chapter is on citizenship and voting rights, and brings us more formally into the specific areas of language rights law. I begin with the role that English literacy plays in the citizenship process because becoming a citizen is a fundamental experience for many language minorities and reflects a nation's basic conception of itself and what it feels are the characteristics bearing on citizenship. Since there is little law in this area, I have combined the law on citizenship with voting rights, an elemental expression of citizenship.

The fourth chapter concerns language rights in the workplace; this is one of the most developed areas of language rights law and one that we will likely see lead to litigation at the Supreme Court level. The areas covered in this comprehensive chapter include English-only workplace rules, compensation for bilingual employees, accent discrimination, and the duties of labor unions to their language minority members.

Chapter 5 is also very comprehensive, as it covers language in the classroom with all of the debates and litigation surrounding bilingual education included in detail. The historical, legislative, and pedagogical bases for bilingual education are discussed as well as the most recent assaults on bilingual education and the litigation that arose in the late twentieth and early twenty-first centuries in an attempt to protect bilingual education. The chapter also includes recommendations for continued action and agitation for activists interested in continuing the struggle for bilingual education in a hostile climate.

Chapter 6 discusses the specific issue of Native American education and the role that native language repression played in the political oppression of Native

Americans and the federal expansion into Indian-held land. This is a particularly brutal history, but one that all language minorities need to be aware of if they want to know the true nexus between language, politics, and power.

The seventh chapter concerns language in the courtroom context. As with employment, this is a very developed area of law, and notions of equal protection and due process are discussed in depth. The chapter is divided into three parts, with coverage of the criminal justice context on everything from interrogations and searches to plea bargains, trials, and sentencing procedures. Chapter 7 also covers the civil trial context and Immigration and naturalization Service (INS) hearings. There is also an in-depth discussion of the issues raised by bilingual jurors that were the basis for the most recent Supreme Court decision in the language rights arena. The last section of the chapter concerns the treatment of language minorities in prison and the extent and limits of the Eighth Amendment of the US Constitution.

Chapter 8 also looks at due process concerns outside the world of strictly judicial proceedings to one in which many language minorities often come into contact: administrative hearings within the context of governmental services such as public assistance and public housing. The reader will notice the much lower standards of due process protection offered to language minorities in this area, and the judicial unwillingness to require governmental translations of important documents.

The ninth chapter concerns consumer law, and pays close attention to those areas in which language minorities are most likely to be affected: commercial transactions and products liability. The section on commercial transactions will cover those situations in which products such as stoves or refrigerators or even personal loans are negotiated, and the role of language in that process. The section on products liability covers the duty of manufacturers to translate warnings and advisories on products for language minority members of the purchasing public.

The last chapter concerns international law, and is more aspirational than the others. It gives an overview of the role of international law in domestic civil rights litigation and summarizes those international law documents that do offer some protection to linguistic minorities. I acknowledge the limited role that international law plays in judicial thinking on civil rights, but argue for activists to continue to raise possible breaches of international law, regardless of judicial restraint, because of my own belief that the US must be held accountable to international human rights norms.

For the past ten years I have been primarily involved in the struggle over bilingual education in New York City. Bilingual education is given a prominent place in this book undoubtedly because of my deeper knowledge of the area. However, it is a prominence for which I am unapologetic. Viewing language rights generally through the prism of bilingual education has helped keep the focus of my work on the core issue of civil rights work generally and language rights work in particular: respect for minorities. For bilingual education cannot easily be legitimized by reference to the short-term self-interests of the majority. Its true nature must be faced: it demands more than simple toleration of native language usage; it requires nurturing; it demands more than modest accommodations, in the way that bilingual

voting ballots do; it cannot be excused as an administrative convenience or economic necessity, in the way that translated governmental documents can be. That bilingual education is currently one of the most unpopular civil rights in the country is not a happenstance. Bilingual education demands that language minorities be accepted *as* language minorities, and not as reflecting the inconvenience of a foreign language that must be and can be eradicated and replaced with the more convenient English language. Indeed, the defense of true bilingual education amounts to a demand that the majority culture give minorities the one most valuable asset that would make litigation unnecessary: respect.

My ultimate hope for this book is that, by making the law accessible, it gives language minority communities one of the tools necessary to demand and achieve that respect for themselves.

Notes

1. The Asian population grew by either 41% or 64% depending upon whether Asians alone are counted or Asians in mixed racial categories are counted. *See* CENSUS 2000 PH C-T-15. GENERAL DEMOGRAPHIC CHARACTERISTICS BY RACE FOR THE UNITED STATES: 2000 Table 4: General Demographic Characteristics for the Asian Population. *Compare to:* US CENSUS BUREAU DP-1 GENERAL POPULATION AND HOUSING CHARACTERISTICS: 1990 Data Set: 1990 Summary Tape File 1 (STF 1)-100 Percent data. Census information can be readily obtained at the Census Bureau's website: www.census.gov
2. *See* US CENSUS BUREAU DP-1 GENERAL POPULATION AND HOUSING CHARACTERISTICS: 1990 Data Set: 1990 Summary Tape File 1 (STF 1)-100 Percent data. *Compare to* US CENSUS BUREAU, THE HISPANIC POPULATION: Census 2000 Brief at 3.
3. *See* US CENSUS P035 AGE BY LANGUAGE SPOKEN AT HOME BY ABILITY TO SPEAK ENGLISH FOR THE POPULATION 5 YEARS AND OVER – Universe: Population 5 Years and Over Data Set: Census 2000 Supplemental Survey Summary Tables.

Chapter 1
A History of Language Rights: Between Tolerance and Hostility

INTRODUCTION

Advocates of English as an official language of the US often argue that it is the sole use of the English language, or at least its sole official use, that has acted as a "glue" to hold our country together since its inception.[1] They argue that immigrants of old did not receive special linguistically accommodating services and that they readily gave up their old customs and languages to happily "melt" into the new American mainstream.[2] The historical record, however, does not support their contentions. Indeed, during what could be seen as the country's most vulnerable stages – it's actual formation – bilingualism and multilingualism were much more prevalent than today amongst the population as a whole, and the use of minority languages was tolerated and officially sanctioned by state and local governments. Rather than leading to any de-stabilization, the use of minority languages helped the government coalesce its disparate peoples around the concept of the US as an entity reflecting democratic principles, a republican form of government and constitutionalism. The sense was that, by reaching out to language-minority communities in their own languages, they would witness the tolerant nature of the government, come to defend it, and support its philosophy and institutions.

Advocates can take much heart from this history, and ought to be aware of its dimensions. However, it cannot be concluded from this historical episode that the US is a minority-language-loving nation. The US, neither on the national nor the state levels, has engaged in the promotion of minority language usage for its own sake. Instead, its policies on language have been practical, assimilation-oriented and tolerant only to the extent necessary. It is probably most accurate to say that the

US tolerated and sustained instances of official multilingualism at certain historical periods because it made good, efficacious sense to do so.

This chapter is divided roughly into thirds. The first third begins with an overview of the nation's language policies at the time of its formation, the period when the nation grew from a group of colonies to its expansion across the west and its colonization of Puerto Rico, from roughly the early 1800s through 1917 when Puerto Rico's residents were granted US citizenship; it then discusses current language issues on the island. By providing this history I hope to ensure that language rights activists can effectively refute arguments that this nation has always been monolingual and that its strength is drawn from that linguistic homogeneity. Also, a review of the debates on minority language usage and its role in determining the fates of different territories still echoes today and reveals the very chauvinistic roots of modern language restrictionists.

The second part of the chapter discusses the growth and uses of the Fourteenth Amendment in language rights cases. This is then shown in "action" in the last third of the chapter, which covers language rights during the World War eras. This period is especially important for language rights advocates because during that time of national anxiety language minorities were viewed with extreme suspicion, and minority languages themselves were targeted for repression and even elimination. It was the World War I era that gave birth to the language rights case *Meyer v. Nebraska*, that would ultimately be decided by the US Supreme Court.

LANGUAGE RIGHTS DURING NATION-FORMATION

State efforts

Thomas Jefferson felt that the states themselves would best reflect the needs of their citizens and protect individual liberties against federal tyranny. Within the context of language rights, this precept was true at least in the nation's early years. The states necessarily had to be responsive to the demands of their citizens and when a powerful language-minority group, like the Germans in Ohio or Pennsylvania, took control of the executive or legislative machinery, their interests were championed. This led to a panoply of language tolerant policies including the public support of bilingual and minority language schools in some of these states.

This section will look a little more closely at these policies in those states where official bi- and multilingualism have had a sustained history.

Ohio and Pennsylvania

When Ohio became a state in 1802 it already was home to a substantial German community who were its first permanent settlers. Not surprisingly, then, the first legislative documents of the state issued in 1772 were printed in German. After 1833, however, the German immigration from Europe grew to "gigantic proportions," and many German language islands were established throughout the state with Cincinnati and Cleveland as favored areas.[3] Although there was no specific mention of the German language in the state's constitution, legislation was repeat-

edly passed from 1817 through the 1830s that allowed the printing of the state laws in German. By the 1880s, German was so prevalent in the state that Ohio was considered a bilingual state by an outside visitor.[4] This was possible, according to Kloss, because of a continuous and strong presence of German representation in the legislature. The strength of this representation is most noticeable in the attitude of at least one pro-German legislative club founded in 1912. Their mission, the cultivation of the German language and ethos was unabashedly presented:

> To cultivate German ideals, such as the German language, German gymnastics, German songs, and German lectures as well as liberal convictions.... Furthermore it is the objective of this club to work with all honest means toward perfecting the teaching of German in the public schools more and more until it has achieved equal status with English in the curriculum.[5]

Even before bilingual education became the lightning rod for issues of ethnicity and multiculturalism in the twentieth century, publicly supported minority language and bilingual education had existed in the US since the eighteenth century.[6] Most of the efforts to maintain separate minority-language schools supported with public funds were made by Germans in those geographical areas in which they were concentrated.

As with Ohio, from about 1710, Pennsylvania had been home to large numbers of the German community. By 1830, the ethnic Germans comprised one-third of the White population. In these areas, German was the standard language used. As in Ohio, public documents, including the proceedings of the Pennsylvania constitutional convention in 1776, were published in German. Germans achieved political power with the rise of the Jeffersonian party and from 1808 to 1855 every governor of the state was German.

As for the schools, by 1776 the Germans had established a sizeable network of German language schools; the bilingual Franklin College was founded in 1787, and the state superintendent of schools allowed for the public financing of German public schools to be on an equal footing with English language schools. The popularity of German language instruction did not end until the turn of the century.

In the meantime, in the 1837–1838 state constitutional convention, the issue of the language of instruction in public schools became a source of debate. The debate is important, says one law professor because it "demonstrates the lawmakers' sophisticated awareness, at an early time in this nation's history, of the implications of creating constitutional or statutory status for one or another language."[7]

Delegate Barnitz of York County expressed his concern that giving an official imprimatur to the English language would undermine the vitality of minority languages:

> That language carries with it something of authority, by means of its operation in the laws and the regulations of the laws; named unless some special provision is made for the education of the descendants of the German people in the German language, all those who may be in any respect concerned in the admin-

> istration of the laws, will be apt to believe that they have discharged the whole duty required of them by the constitution, so soon as they have seen the school law carried into operation in the English language. To my mind, this is a serious difficulty.[8]

Delegate Heister's position, however, ultimately was the successful one; he argued for leaving language choice to the individual and for those with political power to see to it that the legislature protects their interests. He said:

> The German population can have instruction in the German language, if they desire it. They constitute about one-third of the wealth and population of this state, and the legislature, in which body they have themselves their due portion of representatives, will not undertake to exclude them from having instruction in their own language, if they desire to receive it through that medium.[9]

In the end, the state's constitutional amendment made no mention of the language of instruction, and in 1837, the legislature did pass a law that permitted the founding of German language schools as co-equals with English language schools.

California

California has a rich linguistic history reflecting its origins as a Spanish colony, then a Mexican territory, with both Spanish and indigenous populations infusing it with their languages, histories and cultures.

California was under Spanish rule from about 1542 to 1822. From 1810 to 1821, however, the war in Mexico displaced Spanish rule from North America and in 1821 the *californios*, California's residents, were Mexican nationals. Mexicans had a hard time controlling the *californios*, however; between 1831 and 1836 California had eleven different government administrations and an additional three governors were simply ignored by the independent *californios*. Moreover, California was rich with cattle and became a beaver trapper's dream, both luring Yankees from the east and establishing wagon trails through Utah and to the US. In 1846 although the Yankee presence was still a minority, it was growing at a rapid rate, and the US government was becoming increasingly interested in acquiring the territory especially as it would give the nation access to the Pacific.

As California had no military might, it was, in some commentators' minds, a conquest waiting to happen.[10] The conquest happened as a result of the Mexican–American war being fought over Texas. The US was able to take possession of California without firing a shot. The war with Mexico ended in 1848 with the signing of the Treaty of Guadalupe Hidalgo. California became a state in 1850.

The Treaty is an important document for it provided that Mexican citizens who remained within the newly ceded territory for a year after ratification would become US citizens; it also granted certain religious, political and civic rights to the *californios*. The Treaty attempted to protect the language and culture of the native population. By the time the state began drafting its first constitution in 1849, the Gold Rush had driven thousands of Anglos to the area turning the *californios* into

minorities virtually overnight and making them into strangers in their own land. Yet respect, or at least empathy, for the conquered and a belief that the Treaty required linguistic tolerance, led to the codification of a bilingual state in the 1849 constitution. The constitution provided that "all laws, decrees, regulations and provisions emanating from any of the three supreme powers of this State, which from their nature require publication, shall be published in English and Spanish."[11] From 1852 to 1863 through a series of legislative enactments, procedures for the translation of the laws into Spanish were adopted.

Despite the generous language of the 1849 constitution, in 1855 English was declared to be the language of instruction in California's schools. The school language laws were meant to serve the later, White, immigrants and only mentioned the right to a "foreign language."[12] Spanish as a foreign language would not even have the cache of French or German until 1913, when it was added to the five living languages that could be taught in the state's schools.[13]

The linguistic rights freely given in the original constitution, however, became a source of great contention by the next constitutional convention in 1878. The arguments from both sides on whether to translate the laws into Spanish were heated, with one delegate arguing that the translation of documents into Spanish was no longer needed since the government was producing hundreds of documents in Spanish-only for "foreigners." Another delegate responded that the native born of California could not be called "foreigners."[14] Yet another delegate argued that the translations were at least morally, if not legally, required under the Treaty of Guadalupe Hidalgo. Delegate Ayers said:

> ... if I am not mistaken, in the treaty of Guadalupe Hidalgo there was an assurance that the natives should continue to enjoy the rights and privileges they did under their former Government, and there was an implied contract that they should be governed as they were before. It was in this spirit that the laws were printed in Spanish ... [i]t would be wrong, it seems to me, for this convention to prevent these people from transacting their local business in their own language. It does no harm to Americans, and I think they should be permitted to do so....[15]

The constitutional provision was passed anyway.[16]

The last official edition of the California laws in Spanish was published in 1878; in 1894 the English-only provision was re-adopted as an amendment to the constitution, and an English language literacy requirement was imposed for eligibility to vote. Despite the official pronouncements to the contrary, minority languages, especially the Spanish language, have continued to be an essential and dynamic ingredient in the character of California.

The role of linguistic diversity in California continues to be an unfortunate source of controversy and contention. The most recent manifestation of California's continuing discomfort in this area is the struggle over bilingual education which came to a heated climax in 1996. This struggle and its implications for the nation are discussed in Chapter 5 on bilingual education.

New Mexico

In 1804 the first Anglos entered New Mexico and by 1821 New Mexico had become part of Mexico. During this time, New Mexico did not enjoy status as a full-fledged member state of Mexico but came close to achieving that status just before the US occupation. As a result of the Mexican-American War, as discussed above, US troops entered the area in 1846 and it became a territory of the US in 1851. In the Treaty of Guadalupe Hidalgo, New Mexico was to become a state "at the proper time." Unlike the gold-rich and Anglo-dominated California, New Mexico would not see that time come until 64 years later, in 1912.[17] That the race and language of the people of New Mexico played a role in the federal government's hesitancy to grant it full statehood is well-documented.

In 1876, both the House and Senate committees on territories recommended statehood for New Mexico. However, the minority report of the House argued that the territory was not yet ready for statehood because the area was settled by "a people nine-tenths of whom speak a foreign tongue, most of whom are illiterate, and the balance with little American literature."[18] The people of New Mexico were described contemptuously as being neither European or Indian: "few are pure-blooded or Castilian, ...the rest being a mixture of Spanish or Mexican and Indian [living in a] condition of ignorance, superstition, and sloth that is unequaled by their Aztec neighbors, the Pueblo Indians."[19]

The domination of Spanish in the territory is obvious – there were few Anglos in New Mexico at the time. Indeed in 1874, 70% of the schools were conducted only in Spanish and 33% were bilingual; only 5% were conducted in English. The 1884 school law for the state stated:

> [e]ach of the voting precincts of a county shall be and constitute a school district in which shall be established one or more schools in which shall be taught orthography, reading, writing, arithmetic, geography, grammar and the history of the United States in either English or Spanish or both, as the directors may determine.[20]

By 1889 the percentages of schools conducted solely in Spanish had decreased, with 30% conducting their instruction in Spanish only and 42% in English only.[21]

Heinz Kloss says that the reason for the repeated refusal to make New Mexico a state was "the unwillingness to create a state in which most of the inhabitants were Spanish-speaking."[22]

> When, for example, in 1902 Congress established a special committee to investigate conditions in the territory, this committee almost completely ignored the economic and social prerequisites for statehood but concentrated almost exclusively on the use of Spanish in the courts, the schools, the families, and in the streets. The committee ascertained that English was still a foreign language for the mass of the population and declared that New Mexico would finally be permitted to become a state if its population, under the impact of domestic in-migration, became roughly acculturated.[23]

In an 1892 House report by the Committee on the Territories, the issue of race and language was directly addressed:

> [o]bjections [regarding 'the character of the population of the Territory'] have been urged against the admission of New Mexico which are not usually brought forward against the admission of other Territories.... It has been asserted that the people of New Mexico are not Americans; that they speak a foreign language and that they have no affinity with American institutions.[24]

The report sought to reassure the Congress on the worthiness of the Territory's statehood by arguing that Spanish was being replaced by English, and that "the people of New Mexico realize that they are a part of the Untied States, and that the English language is the national language, and it is a fixed and definite principle among them all that the English language shall be taught to every child in New Mexico."[25]

Despite the House's efforts, statehood was denied. The issue of the prevalence of Spanish in the territory took on extra vigor the next time statehood was considered in 1902. A republican Senator from Indiana, Albert Jeremiah Beveridge, chaired these hearings and, apparently forgetful of New Mexico's national, linguistic, and cultural heritage, was appalled at the Spanish character of the area. To gather evidence in opposition to the statehood movement, he attached to the record exhibits of legal notices in English and Spanish and hearings lists of criminal indictments showing a preponderance of Spanish surnames.[26] His contention was simple: New Mexico was an area populated by Spanish-speaking criminals, and as such unfit for statehood. The nexus between prejudice and language could not be made more baldly.

The investigation into New Mexico's readiness to become a state and the hearings chaired by Beveridge were precedential in their hostility to the population and in their search for incriminating uses of Spanish. Beveridge equated the prevalent use of Spanish with the foreign-ness of its population and also with its unworthiness to become a state.

During the hearings the term "Mexican" was used to refer to all Hispanics: natives as well as recent immigrants from Mexico itself. Everyone else was referred to as "American." Beveridge would not allow statehood for New Mexico that year, asserting that the "Mexicans " of the Southwest were "unlike us in race, language, and social customs." For Beveridge, statehood would be contingent upon assimilation. It was not until 1910 that there would finally exist just a bare English-speaking majority in New Mexico. Statehood came two years later.

Although Beveridge tried to leave his English-centric imprint on the documents creating the new state, New Mexico as a state continued the tradition of bilingualism that it had forged as a territory. Prior to becoming a state, New Mexico had long published its laws bilingually, writing originally in Spanish and then translating into English. The 1912 constitution, still in effect, contains a recitation of civil rights not to be denied anyone on the basis of their race, color, or ethnic descent, so

children of Spanish descent are not to be excluded from public schools or sent to separate public schools. There was even an arguable provision for bilingual education:

> the legislature shall provide for the training of teachers in the normal schools or otherwise so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish speaking pupils and students in the public schools and educational institutions of the state, and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students.[27]

The constitution also required that all laws passed by the legislature continue to be printed in English and Spanish and put the civil rights of speakers of English and Spanish on an equal footing by providing that:

> 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 except as may be otherwise provided in this constitution.[28]

Bilingual editions of the laws of New Mexico continued to appear until 1949. Spanish continued to be used in the House of Representatives where one-fifth of the salaries paid by the legislature in 1923 went to interpreters and translators.[29] The use of Spanish in the classroom, however, was not wholly supported. As noted earlier, the number of schools teaching only in Spanish dropped dramatically in the ten years after 1874 – no doubt reflecting the pressure on the populace to become a state and show its willingness to assimilate. By 1911 there were complaints that the New Mexico school authorities were outright neglecting the Spanish language in the schools. Kloss states that:

> [w]e may therefore assume that between 1900 and 1912, the year in which statehood was achieved, an almost complete removal of Spanish from the schools took place. It is even possible that this was one of the prerequisites for statehood, as had been the heavy Anglo-American immigration after 1900.[30]

Louisiana

The United States purchased Louisiana from the French in 1803 after a hundred years of French rule and approximately forty years of Spanish rule. Needless to say the area was multilingual, multi-hued and culturally diverse. Until 1830, a majority of Louisiana's population was of French descent. In 1805, while it was still a territory, the schools that existed (presumably private) were bilingual in French and English. Louisiana became a state in 1812, and its first constitution required that all laws, public records of the state and judicial and legislative written proceedings be promulgated in French and English. The subsequent constitutions of 1845, 1852, and 1864 contained similar provisions.

The first school law of the state was passed in 1847 and did not specifically address the language of the schools as much as it regulated the relationship between French and English language schools. This law was clear that the French school

could be the only public school of a district and that it should not be considered a special school. The school law of 1870 contained no express language provision, but left the decision about the subjects of instruction to the members of the school board.

It was not until after the Civil War, during which Louisiana was decidedly on the side of the south, that protections for the French language were eliminated from the constitution. The issue arose during the constitutional convention of 1864 when one delegate, Alfred Hills, said:

> I believe the English language is the official language of this country. I believe in a homogenous people, in one language and one system of law, and I believe that the publication of the laws of this State, or the proceedings of any convention, or any English court, in the French language, is a nuisance and ought to be abolished in this state or any other.[31]

The 1864 constitution expressly required that the common schools were to be conducted in English.[32]

When the democrats took control of the state in 1879, however, pro-French provisions were re-inserted in the constitution, although not as strongly as in the 1845 constitution. For instance, although English was again prescribed as the language of instruction in the public schools, in those towns or counties where French was the predominant language, the elementary subjects could also be taught in French provided that no additional expenses were incurred.[33] By1881, however, it was clear that French would not again have the ascendancy it did before the Civil War; after that year there were no more French editions of the state laws. By 1921, French was seen as superfluous. The 1921 constitution contained no references to the French language and required that all public school instruction be in English.[34]

Puerto Rico

The politics of language is played out nowhere more graphically than in Puerto Rico, where the island's continued intermediate status as neither an official colony of the US nor a recognized state is intricately tied to the place of Spanish on the island. Therefore, it is important in this instance to discuss some of the social and civic features of Puerto Rico in order to contextualize the language debate on the island.

Puerto Rico was one of the territories acquired by the US as a result of the Spanish–American War. A military government was formally installed in 1898 and continued until 1900 when it was replaced by a civil government under the Foraker Act. Brigadier General George W. Davis, who was the military governor the longest, proposed that under the civil government there be only a governor, executive council, and judiciary (all to be appointed), because he felt that "this island ... is not capable of carrying on such a government as Hawaii is able to maintain."[35] Under the Foraker Act, however, Congress approved a mix: an elected house of delegates to be checked by an appointed upper house, which had a majority of Americans, and a governor appointed by the US President who would enjoy veto power.

Under the Foraker Act, those residents of Puerto Rico as of the date of the signing

of the Treaty who did not elect to keep their Spanish allegiance and their children were to be "citizens of Puerto Rico and entitled to the protection of the US."[36] This protection, however, gave Puerto Ricans less than what they enjoyed under Spanish rule: they would not have US citizenship nor a vote in the House of Representatives.

In 1917 Congress passed the Jones Act, which granted collective US citizenship to citizens of Puerto Rico who wished. Still, the official status of Puerto Rico with respect to its relationship to the US is unclear; a series of Supreme Court decisions found that it was neither officially incorporated in the US nor could it be described as only a territory.[37] A 1953 United Nations resolution of which the US approved gave some shape to the relations between the island and the US:

> ... in accordance with the spirit of this resolution, the ideals embodied in the United Nations Charter, the traditions of the people of the United States and the political advancement attained by the people of Puerto Rico, due regard would be paid to the will of both the Puerto Rican and American peoples in the conduct of their relations under their present legal statute, and also in the eventuality that either of the parties to the mutually agreed association might desire any change in the terms of the association.[38]

The Foraker Act brought Puerto Rico within the US tariff wall and, as of 1902, Puerto Rico no longer enjoyed any trade protections in its dealings with the US. Free trade with the US gave a great impetus to the production of sugar; land devoted to sugar cane kept multiplying, as did land for tobacco and tobacco exports. The expansion of sugar production was accompanied by a concentration of ownership and control. From 500 little sugar mills producing 125 tons annually per mill in 1897, production went to 20,000 tons from each of 41 mills in 1938. Although there was a "500-acre rule" that prohibited one corporation from accumulating more than 500 acres of land, the law was not enforced. Indeed, 11 of the 41 mills were owned by four American companies that also owned 23.7% of the land; over half of the island's land was devoted to sugar production.[39] Since so much of the land was devoted to sugar production for export, the price for foodstuffs and agricultural products was high. As a result, Puerto Rican workers spent most of their income on food.[40]

Meanwhile, wage earners received low wages even by continental standards, and employment was irregular. Average annual earnings of a sugar worker in 1931 were $169 and after 1941, when New Deal improvements were implemented, the average annual earnings were $269.

Improvements began to be seen under Luis Muñoz Marín who founded the Democratic Peoples Party with the goal of implementing island-wide economic and social reforms. Under Muñoz's rule, the 500-acre rule was finally enforced and illegally-obtained lands were sold or simply given to Puerto Rican workers. Industries were jump-started, and social housing and highway systems, hotels and tourism became important sectors of economic development. From 1940 to 1958, education expenses increased eightfold and income increased almost fivefold.[41]

Muñoz also made significant contributions to the politics of Puerto Rico. He was

able to have a law passed that would provide for the popular election of the island's governor, and he became the first one so elected. He also oversaw the creation and adoption of Puerto Rico's constitution of 1952 in which Puerto Rico was declared a commonwealth, a political association, which the United Nations said "respects the individuality and the cultural characteristics of Puerto Rico, maintains the spiritual bonds between Puerto Rico and Latin America."[42] The constitution reads more like the constitution of a state than of a province: Congress cannot annul Puerto Rican laws; the island continues to belong to the US's tariff area, and the US retains a monopoly in foreign policy and military matters. The Resident Commissioner, however, remained a feature with a voice but no vote in the House of Representatives. In return, the island's residents pay no federal taxes. Finally, Puerto Ricans continue as citizens of the US but vote only in the presidential primary elections, and not in the final ones.

Under Spanish rule Puerto Rico had been a poor, neglected colony with little formal education in place. Under US rule improvements were made in schooling and in the economy, but the island was exploited by US mercantilists who were interested in monopolizing their trade and had little interest in learning either the native language or anything about the native culture. Almost immediately, Puerto Rico began to suffer from the kind of linguistic intolerance demonstrated by the White settlers' treatment of Native American languages on the US mainland discussed in Chapter 7. Puerto Rico's name was changed, for a thankfully short time, to *Porto Rico* in order to make it more pronounceable for the Americans. The island was declared bilingual by the military government, although almost none of its inhabitants spoke English and almost all public and private affairs were conducted in Spanish. Dr Victor Clark, President of the Insular Board of Education in 1899 wrote that:

> [an] important fact that must not be overlooked is that a majority of the people of this island do not speak pure Spanish – their language is a patois almost unintelligible to the natives of Barcelona and Madrid. It possesses no literature and little value as an intellectual medium. There is a bare possibility that it will be nearly as easy to educate the people out of their patois into English as it will be to educate then into the elegant tongue of Castile.[43]

Still, the military governor Guy Henry ordered all public school teachers to become proficient in English and instituted an English proficiency test for high school graduation. As with the treatment of Native Americans, the physical colonization of a people was the impetus for the attempted colonization of their language and culture in order to re-make it in the image of the conquerors. The force with which the Puerto Ricans would continue to hold on to their native language, and make attempts to replace it with English into a political issue, certainly could not have been foreseen.

Not surprisingly, the US's first official words concerning education in Puerto Rico stressed the need for teachers who could "teach the American or English language, commencing with the younger children. It is believed that those who can

speak English only can accomplish the purpose by object lessons."[44] The focus of the US government's Americanization efforts was the schools. The first US school laws in Puerto Rico had salutary elements: abolishing a fee system, providing for free text books and for a graded school system, and setting requirements for teachers and their salaries. The US, however, attempted to "[transplant] the American school system to Puerto Rico irrespective of conditions differing from those of the states."[45] In the meantime, "the emphasis in the schools was placed on the study of English and on patriotic exercises."[46] Since Puerto Rico had no cadre of English-proficient teachers to teach the children, US-born teachers were to be brought to the island to teach English. The first of these teachers were not generally successful as some were mere adventurers, not trained educators and others, sent to rural areas, got homesick shortly after arriving and left.

Meanwhile, the Commissioners of education kept changing English language instructional policies in the schools as often as they themselves changed, which was about every two years. One Commissioner was convinced that English needed to be the language of instruction in all subjects except Spanish; the next would institute a policy that the elementary grades would be taught bilingually but with an emphasis on English; still another insisted that all elementary grades would be taught in Spanish and that English would be taught as a subject beginning in the first grade, with increases in the time spent learning English in the seventh and eighth grades.[47] One Commissioner would be under presidential orders that the teaching of English in Puerto Rico proceed "with vigor, purposefulness and devotion, and with the understanding that English is the official language of our country."[48] Another Commissioner would believe that "the Spanish language will not and should not disappear from these schools. It will be a hindrance, not a help to deprive these people of an opportunity to acquire both languages."[49]

While the language policies came and went, the children (presumably for whom these policies were being created) were dropping out of school in droves; so many were gone by the fourth grade that English language instruction before that time was considered by some researchers to be a waste of time, since the students would never go on to use the language within the school system.[50] Yet, the curriculum in the elementary grades was so weighted toward learning English that many basic skills were simply not being taught.

Commentators from the Brookings Institution in Washington DC felt that Puerto Ricans wanted to learn English, although not at the expense of their native tongue. They wrote a report that stated, in part, that "[t]o tens of thousands of the disinherited in Puerto Rico a knowledge of [the English] ... language seems to promise –perhaps fallaciously – a better economic future. Popular willingness to make sacrifices for the schools is in some degree due to this pathetic faith."[51]

After more changes in commissioners and consequent changes in policies, the school law of 1969 was passed. That law provides that "[i]nstruction in Spanish and the intensification of the teaching of English as an additional language shall be unalterable standards." The University of Puerto Rico in Rio Piedras, founded as an English-only college, also gave way and switched entirely to Spanish.

The place of Spanish in the civic life of Puerto Rico is unassailable. Officially bilingual, all government documents are available in both English and Spanish – as are services at governmental offices. There is a decided bias towards Spanish and the lower, local courts operate only in Spanish. However, the federal district courts operate only in English, which has given rise to some problems that are discussed in Chapter 7 on jury service.

Nowhere else is language more clearly a potent symbol of nation and culture than in Puerto Rico. Part of this is undoubtedly explained by the heavy-handed approach to the Spanish language that the US has taken since it colonized the island. The increasing economic potency of English on the island has also contributed to a sense that the Puerto Ricans are a "culture under siege."[52] Many felt that:

> the intrusion of English [into Puerto Rico] had the potential for damaging Puerto Rico as a separate identity, and that English was actually destroying the Spanish language .... Supporters of this viewpoint held that Spanish language was also endangered by a number of societal factors: the desire of new members of the middle class to separate themselves from the poverty of their past, the influence of the mass media, the penetration of North American companies onto the island, and the need for a working knowledge of English as a prerequisite for employment.[53]

The continued status of Puerto Rico *vis-à-vis* the US has made the island's language policies into a political football. Those political parties that would like to see Puerto Rico ultimately become a state of the US realize that the island must embrace English more and that English must become a popular language. Those who oppose statehood use the Puerto Rican's love for their language and anxiety about overbearing US policies to garner votes for themselves. All of this came to a head in the 1990s when the Languages Act, which had been passed shortly after the US's takeover of Puerto Rico and which had declared the island bilingual, was changed in 1991 by a law recognizing Spanish as the official language of the island. This maneuver had been orchestrated by the Popular Democratic Party which supports continued commonwealth status.[54] The Statement of Purpose for the bill stated that:

> the dominance of our mother tongue must be first above any other consideration. The Puerto Rican people feel in their souls is that Spanish is their language.... the Spanish language is synonymous with our being. The affirmation of the common language of the people is an affirmation of national personality.[55]

Then in 1993, former Governor Pedro Rossello of the New Progressive Party signed a law making both English and Spanish official languages again. "Rossello regarded this action as a major step toward Puerto Rico becoming the fifty-first state."[56] There was strong opposition to Rossello's actions which was reflected in the November 1993 plebiscite: statehood was rejected by a slight margin: 46% voted for statehood, 48% for continued commonwealth status, and 4% for independence. The continued ambivalence of the Puerto Rican people towards the US was reflected

vividly in the plebiscite results of 1998. There, the fifth category, "none of the above" gained the absolute majority with 50.3% of the votes. Statehood came in second with 46.5% of the votes. Usually, there is a close to even split between the "commonwealth" status and statehood, with a small percentage voting for independence. In 1998, however, the commonwealth status had been denigrated to "territorial commonwealth" which the Popular Democratic Party, supporters of the continued commonwealth status, opposed and advocated against. The ploy was successful as it received only 0.1% of the vote and "none of the above" beat the statehood option. "None of the above" was certified as the winner of the status plebiscite.

A case that arose while Puerto Rico hurtled between official bilingualism and official Spanish was the kind that could only have arisen in Puerto Rico – an Anglo teacher dominant only in English sued for discrimination because she could not pass the Spanish-only test needed to obtain her permanent teaching license.[57] After deciding that the case should go to trial the Equal Protection claim, the matter was settled with Puerto Rico's Department of Education issuing Kathy Smothers a teaching license.[58]

In the meantime, *US English*, an organization devoted to working to make English the official language of the nation, was avidly working in Puerto Rico, where it has an office. Misrepresenting the historical and current status of state language laws, a US English spokesmen told Congress:

> we feel it would be badly misleading for the people of Puerto Rico to vote in the plebiscite thinking that any language, other than English, can be the official language of a state in the union. English is the common language of the people of the United States, and one day will be recognized as the official language of government in this country. At that time, we believe that Puerto Rico, as all other states, will follow the laws of the land and accept English as the official language of government.[59]

The language debate in Puerto Rico clearly has many undertones and implications. It brings into bold relief many of the issues that our US courts and policymakers only hint at when language is discussed on the mainland: the issues of hegemony, colonial power, economic status within the island and between the island and the mainland, nationalism, and language as an inseparable element of and a conveyor of culture. All of these stand out so boldly in Puerto Rico because it is such a small island, so economically besieged and overwhelmed by the presence of the US that it holds on to its language with a kind of tenaciousness that seems to border on the desperate. There is a reason for that: US language and culture so permeate the island that it is only a stubborn grasp of the native language that keeps the island from being another bastion of English-language dominance. In 2002, Spanish is still the language of the island, with approximately 20% of the population fluent in English and 98% fluent in Spanish.[60]

THE FOURTEENTH AMENDMENT AND ITS IMPORTANCE TO LANGUAGE RIGHTS CLAIMS

From the First Amendment to the Fourteenth Amendment, the Constitution has had a role in the development of language rights law. The Fourteenth Amendment, however, with its Equal Protection and Due Process Clauses is the constitutional linchpin on which language minorities have traditionally sought to have their rights realized. The Equal Protection Clause is particularly important because it prohibits racial and ethnic discrimination, and its interpretation has set the parameters under which many language rights claims are decided. The World War cases that follow relied upon either the Equal Protection or the Due Process Clauses or both to either validate or dismiss language rights claims. Before the cases are discussed, a brief primer on these two important Clauses follows.

The Fourteenth Amendment

Most language rights cases have primarily involved interpretations of the Fourteenth Amendment. The Equal Protection and Due Process clauses of the Fourteenth Amendment are the two most well-known clauses of a three-clause section which also includes the Privileges or Immunities Clause.

Section 1 of the Fourteenth Amendment states:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens if the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Enacted during Reconstruction and three years after the Thirteenth Amendment prohibiting slavery, the Fourteenth Amendment was clearly an attempt to put the newly freed slaves on as much of an equal footing as possible to White men and to protect them from state actors who would surely seek to undermine the spirit if not the letter of the Thirteenth Amendment. The Due Process and Equal Protection Clauses appear to be limited to functional purposes: the Due Process Clause, as a guarantee of fair procedure and the Equal Protection Clause as "a guarantee of evenhanded administration of the laws, i.e. of equal treatment by courts and law enforcement agencies."[61]

The Privileges or Immunities Clause, called "the forgotten clause" was supposed to be a mirror-image of Article IV §2 of the original Constitution.[62] As such it was arguably meant to protect citizens of the states from any infringement by the states of their rights as federal citizens of the United States. Like the Equal Protection and Due Process Clauses, the Privileges or Immunities Clause was to be an important tool in the struggle between state and federal powers and an attempt by the federal government to hold aberrant states accountable for their treatment of US citizens:

"The mischief to be remedied was not merely slavery and its consequences; but the spirit of the insubordination and disloyalty to the national government which had troubled the country of so many years in some of the states."[63]

Unfortunately in 1872 in the *Slaughterhouse Cases*, the US Supreme Court took a deadly swipe at the Privileges or Immunities Clause, essentially limiting its protections to just a few rights considered to be federal in scope, like the right to assemble or petition for redress of grievances.[64]

Because of the limited scope of the Privileges or Immunities Clause, advocates have had to rely upon the other two Clauses and wrench them from their previously functional purposes to take on the substantive aspects intended for the Privileges or Immunities Clause. This explains the strange life of the Due Process Clause, which while clearly intended to impact "processes," has been used with some success to guarantee substantive rights as in *Meyer v. Nebraska*.[65]

Extending the reach of the Equal Protection Clause

One important question over which there is still considerable controversy is what rights are civil rights; what rights does the Bill of Rights attempt to protect?

Some have ambiguously stated that Congress attempted to guarantee its citizens (or in the case of the Equal Protection and Due Process Clauses, its "persons") the natural rights of "freemen."[66] Chancellor Kent noted that the "inalienable rights" of citizens include the right to personal security, the right to personal liberty and the right to acquire and enjoy property.[67]

What exactly those substantial rights are is still a subject of dispute. The generous, ambiguous and fluid nature of the rights to be protected is important for language rights activists who are presenting a constituency that was only a minor player in the minds of the Original Framers and whose language-based issues the Original Framers were not attempting to address. A fluid understanding of "natural rights" is not only justified by constitutional history, but means that the Constitution is a living document, responsive to the changes in demography, technology, values, and mores.

With the virtual loss of the Privileges or Immunities Clause, the Equal Protection Clause grew to be understood as a "pledge of the protection of equal laws"[68] and not as simply an equal treatment under laws. The Equal Protection Clause is concerned with the "right to equal treatment which demands that every person have the same access to particular protected interests" (such as voting) as everyone else. There is also the right to "treatment as an equal" which "requires that government treat each individual with equal regard as a person" without reference to specific interests.[69] Essentially, the Equal Protection Clause prohibits governmental discrimination on the basis of an individual's race, ancestry, national origin, or ethnicity. Discrimination may be understood as "directed detrimental action, motivated by prejudice and not deserved by the victim"[70]

The growth of the Equal Protection Clause to protect groups and traits not only related to race is an important step for language minorities, but has not yet been