

ARE LANGUAGE RIGHTS FUNDAMENTAL?*

BY LESLIE GREEN**

I. THE PUZZLE OF LANGUAGE RIGHTS

The rights of people to use their mother tongues are both central to the Canadian constitution and yet seemingly impossible. Their centrality is obvious. The rights of linguistic and religious minorities were the only ones entrenched in the *British North America Act* that left the usual civil liberties to the protection of common law and party politics. And even with the entrenchment of civil liberties in the *Charter*, language rights still receive pride of place as even the crudest content-analysis of the document reveals: they occupy sections 16-22 (official language rights), section 23 (minority language educational rights), and more peripherally section 14 (right to an interpreter in trials), and section 27 (preservation of multicultural heritage). This is all the more striking considering that the typical liberal-democratic freedoms of conscience, religion, opinion, expression, assembly and association are jostled together in the brief, telegraphic language of section 2. Language rights enjoy the highest level of constitutional entrenchment. They are exempt from the power of Parliament and the provincial legislatures in

* Copyright, 1987, Leslie Green. This paper is part of a larger project on language rights undertaken in co-operation with Denise Réaume. We gratefully acknowledge the financial support of the Human Rights Fund of the Department of Justice and the Connaught Programme in Legal Theory and Public Policy, University of Toronto. The opinions expressed here are solely those of the author.

** Associate Professor, Osgoode Hall Law School and Department of Philosophy, York University, Toronto.

section 33 to legislate notwithstanding the *Charter*. Their amendment requires either unanimous approval of Parliament and the provinces (section 41(c)) or, if the section applies to some but not all provinces, approval of Parliament and all affected provinces (section 43(b)). While some multilingual states, such as Switzerland, appear to flourish with only a minimal degree of constitutional entrenchment, Canada has joined the ranks of Belgium and India with what may seem to be the over-constitutionalizing of language.

Thus the historical and political centrality of language rights in the *Charter* is clear. Yet many puzzles remain. Despite the very rich sociological, historical, and even legal literature, there is not yet a general account of language rights which justifies them adequately. This stands in stark contrast to the more familiar liberal-democratic rights. Freedom of expression, for example, has been the subject of much discussion. The point is not, of course, that the issues have been resolved, but simply that the varying conceptions of free expression have been explored sufficiently for the main outlines of debate to be well-known (for example, should speaker's interest, audience interest, or general interest predominate? are the correlative duties merely negative, or positive? what is the relative weight of freedom of expression and privacy? etc.) We may not agree on the answers to these questions, but there is a fairly wide recognition that these are among the questions which any competent theory must address. In contrast, theoretical writing about language rights has been meagre, and rarely informed by general political theory. This is a disappointment considering the importance of the issues they raise: Are language rights legal rights only, justiciable in court but without deeper moral foundation? Or are they on a footing with the more familiar fundamental rights mentioned above? If so, how can this be? Are they perhaps derivatively related to other fundamental rights, for example, freedom of expression? Why should only two of Canada's many language groups enjoy this protection? How can we make sense of in-built limitations of "significant demand" (section 20) or restrictions of application to areas where numbers warrant? These questions invite answers which cast doubt upon the fundamental importance of language rights. Unless language rights can be shown to be grounded in moral considerations, then the centrality which the *Charter* accords them is illusory; a consequence of politics rather than principle.

Now, this is not meant as a *reductio ad absurdum*; there is a standing possibility that some of the deep constitutional values of any nation cannot be justified by sound political principles. But my aim here is to defend language rights against that sort of scepticism, to suggest that they do have a distinctive foundation in principle, to identify that principle, and to suggest how we might begin to think about some of the above questions.

II. INDEPENDENCE AND JUSTICE

Before beginning, we must address a popular objection, which if sound in the Canadian context, obviates our quest. It is often said, particularly by Québec nationalists, that the whole issue of minority language rights must be subordinated to a discussion of the general desirability of the present federal regime. Someone might argue as follows: The only serious question is whether or not Québec should leave confederation. If it did, it would become a normal francophone society, just as the United States is a normal anglophone society, without any need for a constitutional doctrine of language rights. Language use would then be governed by policy considerations which are sovereign in most other countries: whether the demand for minority language services makes it worth providing them considering the costs; whether there is an important interest in a uniform means of communication; and whether, as in Ireland or Israel, language has some important expressive function in nation-building. In normal conditions, language use is governed by the usual democratic rights such as freedom of expression and the requirements of natural justice and the rule of law. But there would be no need for distinctive rights protecting interests in using a particular language. Thus the nature of language rights is properly secondary to the question of federalism, and to discuss the appropriate policy for governing language conflict without exploring the full range of constitutional alternatives is simply to bias the discussion from the outset.

That such arguments should appeal in our political circumstances is not surprising, given the strong position the federal government has taken on the issues. They are, nonetheless, based on a mistake. The political argument in favour of independence

for minority language users, whether the Quèbécois, the Welsh, or the Basques, depends for its power on the central claim that the existing arrangements are unjust, and do not fairly secure important interests of the minority groups. Although naked appeals to self-interest and even xenophobia may be influential in nationalist politics, they cannot serve in a moral argument in favour of independence. But when a minority is culturally and linguistically distinctive, demands for fair treatment will encompass much more than the centrally important economic issues.¹

Such demands also include arrangements for cultural security. A powerful argument in favour of independence is that the present regime cannot guarantee fair treatment. The point is a perfectly general one: the argument for just treatment and the argument for independence are related. An appeal to justice is a demand that one's interests be respected within a certain scheme of co-operation. An appeal to independence or self-government is a demand not to be part of a certain scheme of co-operation. If one is already caught up in such a scheme, however, the options do not include whether or not to join, but only whether or not to leave. Clearly, a powerful argument in favour of leaving is that the scheme is unjust and that the possibilities for genuine reform are negligible. Thus, the argument about independence will in part turn on the fairness of existing arrangements. For example, if a certain regime of language rights satisfied the demands of justice, then that would, *pro tanto*, weaken the case for independence. So the relation of priority is in fact the reverse of that suggested by our objector. One cannot say that issues like language rights arise only for those who accept the fundamental legitimacy of the present constitutional system. Serious assessment of constitutional legitimacy presupposes as one element an account of language rights.

That reply is, I think, decisive. But we might also query the premises of the objector's view. First, is it really true that independence for minority-language regions would solve the problems of language conflict by producing smaller, normal states free of deep linguistic tensions? In most cases, and certainly in

¹ For some thoughts on why that might be so, see L. Green, "Rational Nationalists" (1982) 30 Pol. Stud. 236.

Canada, the notion is wildly unrealistic. While an independent Québec would be majority francophone, it would have a substantial anglophone minority. And in the rest of Canada, particularly in New Brunswick and Ontario, French minorities would remain. This is not peculiar to the Canadian context for, in sociolinguistic terms, the idea that a normal society is a unilingual one is quite simply a myth. The vast majority of the world's states are multilingual. Those nations which are the most unilingual in outward appearance — for example, the United Kingdom, France, or Japan — in fact achieve this status only imperfectly and as a result of a history of linguistic repression and continuing regulation of language. Linguistic demographers often predict that in Canada the official language minorities will shrink over time, leaving two unilingual regions. I do not propose to enter the complex technical debate about the accuracy of their projections, save to note one important assumption about their method. I have not seen any study in which government policy is treated as an endogenous variable, and which tries to estimate that policy's impact on language use. Yet it seems likely, or at least it is so assumed by both federal and provincial governments, that language law is among the determinants of language maintenance. It is difficult to estimate the potential effect of government intervention on the nature and rate of linguistic change. But the French in Manitoba did not shrink from a majority to minority status simply as a consequence of the arithmetic of demography, but as a planned consequence of immigration and settlement policies, buttressed by an astonishing century-long violation of language rights. Nor is the anglophone minority in Québec likely to vanish soon or quietly if left undisturbed by the province.

The objector's idea of linguistic normality is also defective in a second, more important, way. It contains the assumption that a normal society is one which may treat its minorities as the majority wishes. The fallacy here is obvious and requires little comment. It may be normal in the sense of usual for majorities to behave this way, but that is no justification for their action. If linguistic repression is the norm, then none of us should long for normality.

Thus we can dispense with the political objection that considerations of language rights are merely secondary to the question of the general desirability of federalism. Federalism's

capacity to secure linguistic justice in part determines whether federal constitutional arrangements are desirable, and even if the final verdict on federalism is unfavourable, the language issue will remain.

III. ARGUING ABOUT FUNDAMENTAL RIGHTS

Supposing then that we may discuss language rights without settling other constitutional options, should we regard language rights as politically fundamental? The fact that they are included in the *Charter* is far from decisive. Section 26 is clear that not all rights are found in the *Charter*. Moreover, it is possible that not everything in the *Charter* is grounded in fundamental rights. How, then, can we go about answering the question?

We might ask, to begin, whether the courts regard language rights as being on a par with those rights which are paradigmatically seen as fundamental. The only authority directly on the point suggests a negative conclusion. In *La Société des Acadiens du Nouveau-Brunswick Inc. et al. v. Association of Parents for Fairness in Education*,² the Supreme Court had to decide whether section 19(2) of the *Charter*³ entitles a party in a court of New Brunswick to be heard by a judge who is capable of understanding the proceedings, evidence, and arguments, regardless of the official language used by the parties. Writing for the majority, Beetz J. held that while natural justice (and section 13(1) of the *Official Languages Act of New Brunswick*) would entitle a party to be heard by a court which was able to understand the proceedings, section 19 does not do so. The court said that the section is a matter of language rights and not natural justice. Like section 133 of the *Constitution Act, 1867*,⁴ it secures the right to use either language

² [1986] 1 S.C.R. 549.

³ "Either English or French may be used by any person in, or in any pleading or process issuing from, any court of New Brunswick."

⁴ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

but not the right to be heard or understood in the language of one's choice. The important point made is that the nature of language rights is such as to mandate interpretive restraint:

Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle.... This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the court should approach them with more restraint than they would in construing legal rights.⁵

In several respects this judgment is puzzling. After its generous remarks in the *Manitoba Language Reference*⁶ one did not expect to see the Court tread so gingerly. Nor does the call for restraint sit easily with the kind of purposive interpretation which the Court normally favours for *Charter* rights.⁷ More important, however, is the distinction drawn between constitutional rights which are based on a political compromise and rights which are seminal. This is, I think, a distinction otherwise unknown in Canadian law and it is not as clearly expressed as one might wish. The essential difference to which the Court refers might be understood in various ways.

Is it, for example, simply history which taints language rights? Are they the illegitimate children of power politics? Most fundamental democratic rights, from Magna Carta to Declaration of the Rights of Man, from the Great Reform Act to the International Covenant, had seedy pasts. They were conceded reluctantly and only after protracted political battles and compromises in which ideology had greater power than political theory. Cynicism and scepticism about Canada's *Charter* is often bred of more attention to pedigree than to principle. Had Magna Carta been concluded under a system

⁵ *Supra*, note 2 at 578.

⁶ [1985] 1 S.C.R. 721.

⁷ *Hunter v. Southam*, [1984] 2 S.C.R. 145. Professor Magnet goes so far as to say that Beetz J.'s judgement "squarely contradicts all known canons of constitutional interpretation." See J.E. Magnet, "Canada's System of Official Bilingualism: Constitutional Guarantees for the Legislative Process" (1986) 18 Ottawa L.Rev. at 232, note 9.

of representative government, the glare of lights and the whir of video-recorders, we would no doubt regard it too as a mere political compromise. But the historical pedigree of some provision does not repudiate its justifications. The thought that it does is based on a fallacy: one cannot show that some law is not rooted in principle simply by establishing that other and less noble considerations moved its supporters. One must address the arguments directly.

Consider another interpretation of the essential difference between seminal rights and rights based on political compromise. Could it mean that those rights which are based on the terms of a constitutional accord are in some way less powerful than those which are based on human rights? Two objections immediately arise. First, certain rights may be given concrete form by such an accord and yet still answer to fundamental rights. It is obvious, for example, that the specific language of the equality rights provision in section 15(1) ("the right to the equal protection and equal benefit of the law") was the result of a political decision to forestall a narrow procedural reading of that section. But that does not show that equality rights are not seminal. Second, no one could deny that those provisions of the constitution which determine the division of powers or the status of denominational schools were based on a political compromise. However, that has not been taken to support the view that they are of secondary importance or require a narrow reading. Indeed, the fact that these compromises were foundational has generally been held to give them greater importance.

What, finally, are we to make of the inference that the courts should proceed with caution in interpreting language rights, adhering strictly to the terms of the bargain.⁸ This case, however, put precisely the question of what those terms provide. Suppose, contrary to the Court's actual view, that the association's arguments were best. If so, then the courts would not have been acting "as instruments of change with respect to language rights" in deciding in their favour. They would simply have been enforcing their rights.

⁸ *MacDonald v. City of Montréal*, [1986] 1 S.C.R. 460 at 496: "it is not open to the courts, under the guise of interpretation, to improve upon, supplement, or amend this constitutional compromise."

Since no class of rights, compromise or seminal, is self-interpreting, the argument for restraint has no independent power at all.

Perhaps these remarks simply confirm the obvious: we cannot look to the law alone to determine how law might be justified. The question whether language rights are fundamental can only be answered by an argument of political morality.

I shall say that *a legal right is a fundamental right if and only if it is at least partly justified by the fact that it protects a moral right*. This view contemplates that legal rights may have a variety of justifications, only some of which are themselves based on moral rights. For example, it is a feature of our present taxation policy that one may deduct certain charitable donations from income, and therefore one has a legal right not to be taxed on that amount. But desirable as this is, no one thinks that there is a fundamental moral right to income tax deductions, so that if the government should alter the arrangements it would have violated some particularly urgent interest. On the other hand, it is recognized that certain restrictions on freedom of expression or the right to vote would amount, not only to a violation of rights secured by the *Charter*, but also of moral rights which ground those provisions. A fundamental right is thus one which is capable of *grounding* a legal right.

This does not certify all fundamental rights as of equal, or even great, importance. Thus, one source of scepticism about language rights is immediately defused. To recognize them as fundamental is not to be committed to the view that they are of equal weight with the right to free association, or the right to vote. Nor does recognition prescribe what is to be done when such rights conflict. It is just to signal that language rights have moral rights among their justifications, and not merely considerations of general public policy or administrative convenience. The test is whether a legal right is capable of being *justified* by an appeal to a moral right, and not that this was the actual reason the law in question was adopted, or the way most people think of it. Whether a legal right is a fundamental right is therefore not an historical, sociological, or even legal question; it is a moral question.

The issue therefore immediately arises: How do we know when something should be considered as a moral right? Appeals to natural law or the mysteries of the Ancient Constitution are no longer liveable or believable. Those, like Jeremy Bentham, who

think that all rights are creatures of law, will regard the notion of fundamental rights as "nonsense on stilts". But again, this is an area where excessive expectations lead to disappointment. We need not seek timeless, transcendental proofs of the existence of fundamental rights, and it is just as well since we will not find them. But any moral theory which concedes the force of distributive as well as aggregative arguments, and which recognizes the intrinsic importance of certain urgent human interests, will have room for fundamental rights in the sense proposed here. In this view, *there is a moral right to X if and only if some person's interest is sufficient reason for holding others to be under a duty to provide or secure X.*⁹

Let us re-consider our earlier examples. We concede that officials have a duty to exempt certain amounts of income from taxation on the ground that it has been paid to registered charities. What could justify this? Doubtless the taxpayer has some interest in deciding how to spend her money, but the justifiability of income tax shows that this interest cannot in a general way ground the duty. Perhaps the idea is that, even within the area of legitimate redistributive taxation, there is a residual interest in autonomy, such that the individual should be entitled to decide where her tax dollar goes, to the blind or to build bombs. But again, general considerations of tax policy suggest that a single individual's interest in this could not justify restricting taxation to certain forms. The answer is simpler. There are powerful policy reasons connected with the creation of incentives for charitable donation and the intrinsic value of voluntary redistribution, which outweigh the need for absolute control over redistribution. But it is the interests of all taxpayers and all charities *taken together* which justifies the scheme. If economists discover that a readjustment of the rules would better serve these interests, then legislators have an adequate justification for that change. The rights created are thus not fundamental, but are derived from aggregate policy considerations. They answer not to the needs and interests of persons, but to considerations such as the general welfare, public virtue, or the common good. Contrast, however, the right not to be assaulted, or the right to vote. In these

⁹ Compare J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 165-92.

cases, the individual's interest, taken by itself, is powerful enough to warrant holding many other people to be under duties. It is no argument against the right not to be assaulted that the total pleasure of five attackers is greater than the pain caused to their one victim. In a case of fundamental rights, interests meet each other one by one, in a distributive way.

Just now I have been speaking of the interests of persons and assuming that these are identical with the interests of individuals. Certainly any distributive argument presupposes some agents among whom goods are to be distributed. However it would be rash to conclude that all persons must be individuals. We may also wish to recognize certain collective interests, including those of nations, corporations, and other social groups. Deciding what should count as a person is not a matter of cogitating about the meaning of the word "person" or appealing to the rules governing legal personality; it is a matter of considering the nature of the interests involved. Why do we give special protection to the individual interest in security from assault? We give protection because of the urgency of that need and the fact that security is intrinsically valuable. Thus, we may understand rights as protecting interests of a certain structure, rather than interests only of a certain source. If some collective interests have such a structure, then there are collective rights. These are quite distinct from aggregations of individual interests, for such interests have no inherent value. The majority as such has no rights: to talk of balancing the rights of persons and rights of the majority is both philosophically confused and politically pernicious. J.S. Mill saw this for the sham that it is: talk of social rights in this sense is merely the rejection of liberty. But it does not follow that no groups of individuals have rights: it may be that families, corporations, trade unions, and perhaps even language groups have intrinsically valuable interests of such urgency as to justify holding others to be under duties to protect them.

These remarks do not provide a complete theory of fundamental rights¹⁰ but perhaps they are sufficient to defuse or delay certain general kinds of scepticism. The theory which they

¹⁰ For some further considerations, see *ibid.* and D. Réaume, "Individuals, Groups and Rights to Public Goods" (1988) 38 U.T.L.J. 1.

suggest is a politically, but not metaphysically, ambitious one. It is not committed to the view that only individuals may have rights, nor to the view that a moral theory must be based solely on rights. But it does urge us to recognize that not only the common good, but also its distribution, is a matter of legitimate moral concern. When a person's share of the common good is itself a ground of others' duties, then that person has a right.

IV. TWO CONCEPTS OF LINGUISTIC INTERESTS

The question of whether language rights are fundamental thus turns on the nature of our interests in language. Do language rights warrant protection by the sort of duties which the *Charter* and other law imposes? This view seems plausible in the Canadian constitutional tradition. Both French and English speaking citizens are entitled, with certain restrictions, to use either language in the courts and Parliament, to demand certain government services in their mother tongue, and to have their children educated in their mother tongue. This is extraordinary considering that there is no obligation on the government to publish statutes in Braille, or to ensure that government services be conveniently located, or reasonably speedy. All these things are desirable, but they are not secured as rights. Why should language be treated differently? Does it deserve the extraordinary protection it in fact receives? There is no point in appealing to the peculiarities of Canadian history to show why language has been singled out; that may explain how this came to be, but it will justify nothing. The correct approach is to investigate the nature of our interests in language.

It is difficult to think clearly about our interest in language *as such*, that is, in speaking some language as opposed to none. Language use is not an incidental but a constitutive feature of being human. It is not possible to step back and ask in any useful way what its value is to us. For that reason, the Court's characterization of language interests in the following passage is unsatisfactory:

Section 23 of the *Manitoba Act, 1870* is a specific manifestation of the general right of Franco-Manitobans to use their own language. The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between

isolation and community, allowing human beings to delineate the rights and duties they hold in respect of one another, and thus to live in society.¹¹

The foundational importance attributed to language in this passage is obvious, but that cannot be what grounds language rights, and certainly not what grounds minority language rights. Language is not merely something that allows us to live together. It is a constitutive feature of our common life. As the Court rightly says, without language we could not delineate any rights and duties at all. In this general sense, language is the conceptual substructure of all rights and indeed all other moral concepts. It is not merely a desirable feature of human life; it is an essential one. We cannot therefore stand back from language and ask what our interest in using language amounts to, for without the substructure of language we would not be the kind of creatures we are. Fortunately, this conundrum is irrelevant to the political issue we are now considering. Constitutionally speaking, language rights are rights to speak a *particular* language, that is, one's mother tongue. This too may seem to be a constitutive feature of human personalities. In so far as such questions are intelligible, it may be true to say that if one's mother tongue had been Cree instead of English one would have been a different person and thus that language partly constitutes one's identity. But even if that is so, it does not deprive us of a standpoint from which to evaluate our interest in using and transmitting our mother tongues, whatever they may be. Minority language users face these choices almost continually. They must decide for themselves and for their children when, and at what cost, to use their own language. The peculiar intimacy we have with our mother tongues does not preclude the possibility or the necessity of at least roughly ordering it on a scale of value. However, where one places it will depend on how one conceives of the nature of linguistic interests. Below, I will consider two possible families of views on this matter, chosen for their apparent persuasive power.

First I wish to set aside one familiar and influential conception of language law. Sometimes it is regarded merely as a tool in the service of other political ends. When one asks which linguistic policies will best serve national unity, or the needs of the

¹¹ *Supra*, note 6 at 744.

economy, or which will best redistribute civil service jobs among ethnic groups, one is taking an instrumental approach to language. The duties which those policies mandate are thus justified by considerations grounding the policies, and not by interests in language. But if they are the only grounds of such policies, then any rights they accord are not fundamental ones in the sense under discussion. Indeed, efficient pursuit of such goals might even be incompatible with the protection of language rights, as the following rather ominous remark of Hubert Guindon suggests:

The federal state has ... followed a language policy that can only be described as a political irritation for English Canada which is entirely politically irrelevant to a modernizing Québec. There is a price to pay for a new political consensus in Canada. And certain groups will have to pay this price. Those two unfortunate groups are the French outside Québec and the English in Québec.¹²

This is not the language of rights but of national goals; the economic and political modernization of a province. That goal is assumed to have overriding importance and the linguistic minorities are not to be allowed to stand in its way. (This was also the position advocated by Lord Durham.) This attitude supposes that one does not have to justify one's policies to the minorities. Its main concern is with whether one has the power to enforce such policies against the unfortunate groups and not whether the policies can be justified under a plausible conception of fair treatment. It does not address their interests in the distributive way that a rights-based argument would. At best it merely informs minorities that their injuries have been outweighed by the greater social good and that they have paid the price for the benefits which others receive. At worst it expresses a retributive attitude, punishing a linguistic minority for the crimes of its ancestors. Obviously, such views are inimical to the idea of language rights.

¹² H. Guindon, "The Modernization of Québec and the Legitimacy of the Canadian State" in D. Glenday et al. eds, *Modernization and the Canadian State* (Toronto: Macmillan, 1978) at 244.

A. *Survival*

One possible foundation for language rights is the interest in the survival of language groups over time. This is the view of many of the francophone minorities outside Québec and, more recently, of some English Quebecers. It is also the implicit value assumption of nearly every linguistic demographer and sociolinguist who has written on the issue.¹³ Those who take this conception of language interests tend on the whole to regard the present constitutional regime of language rights as self-defeating. They argue that such rights do not in fact secure the survival of minority languages and may even undermine it. Those who see survival as the important value thus do not regard language rights as fundamental.

To understand the survivalist argument, it helps to consider the essential character of the Canadian linguistic regime. It vests language rights in people: citizens are entitled to certain benefits wherever they are, though subject to certain conditions. This Canadian regime stands in sharp contrast with arrangements in other countries, such as Belgium or Switzerland, which have adopted territorial language policies. Different regions have different official languages and individuals must accommodate themselves to that. Freedom of choice under a territorial regime is only indirect: one may choose where to live. On this view, citizens within one nation may be treated like migrants between nations: they must be prepared to learn and use the majority language of the region in which they settle. The territorial principle was rejected decisively by the Royal Commission on Bilingualism and Biculturalism. Both the *Official Languages Act, 1969* and the *Charter* embody that rejection. It has never been acceptable to federal governments. Even the "distinct society" clause of the constitutional amendments proposed

¹³ See, for example, R.P. Beaujot, "A Demographic View on Canadian Language Policy" (1979) 5 *Can. Pub. Pol'y* 16; C. Castonguay, "Why Hide the Facts? The Federalist Approach to the Language Crisis in Canada" (1979) 5 *Can. Pub. Pol'y* 4.

at Meech Lake rejects a territorial conception of language rights.¹⁴ But territoriality has its supporters, particularly within Québec where it found expression in the *Charter of the French Language* which sought to make Québec as French as the other provinces are English. The rhetorical structure of that statute does deploy the notion of rights; for example, it secures the right of everyone to use French. Its real purpose, however, has little to do with rights at all. It is fairly stated in the preamble: "d'assurer la qualité et le rayonnement de la langue française" and it attempts to achieve this by requiring the use of French and restricting the use of other languages. In part, this simply reflects a view of language as a tool of nation-building and as an instrument for redistributing power and privilege within Québec. At the same time it expresses a particular conception of the value of language, namely, that linguistic interests are primarily interests in ethnic survival.

According to this view, the federal linguistic regime is riddled with fallacies. It aims at equality of status between the two languages despite the social reality that French is in a minority position in North America and needs vigorous support in order to survive. The survivalist argument holds that there is an inherent territorial imperative in linguistic demography,¹⁵ and that survival requires the legislative protection of regional majority languages: French in Québec (and perhaps part of New Brunswick) and English elsewhere. The only long-term hope of French minorities is in Québec; elsewhere they are doomed by the arithmetic of demography. Official language rights, the argument continues, merely throw good money after bad and provoke a backlash. The linguistic realities, as they are called, suggest that survival of the French language in North America requires drastic action, ideally, a policy of bilingualism outside Québec and French

¹⁴ "2.(1) The Constitution of Canada shall be interpreted in a manner consistent with (a) The recognition that the existence of French-speaking Canadians, centred in Québec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Québec but also present in Québec, constitutes a fundamental characteristic of Canada; and (b) the recognition that Québec constitutes within Canada a distinct society."

¹⁵ See J. Laponce, *Langue et Territoire* (Québec: les Presses de l'Université Laval, 1984) [travaux du centre international de recherche sur le bilinguisme: A-19].

unilingualism inside. But even the most ardent survivalists are not so naive as to think that this is a realistic option:

What French Canada needs to survive (and to do more than simply survive) is unacceptable to the English-speaking population of Canada; ... what English Canada is offering French Canada, namely, extended bilingualism, is insufficient to guarantee the survival of French Canada.¹⁶

At risk of emphasizing the obvious, what is unacceptable about bilingualism outside Québec combined with unilingualism inside is simply that it would not be regarded as a fair compromise. No plausible theory of linguistic justice could require people to do just *whatever* is required to maximize the chances of survival of some language.

The theme of survival is an old one in Canadian mythology.¹⁷ It has special appeal to the demographer who counts and measures groups.¹⁸ But it is for all that a rather mysterious notion. Sometimes, it appears to be an abstract ideal, not essentially connected with human interests at all. Consider, for example, the following remarks of a sociologist writing about language loss:

Every language is an immensely valuable depository of human experiences, of joys, sorrows, and uniquely irreplaceable perceptions of the world. Those whose lives have been shaped by a language have a basic right to its possession and, if necessary, its defence.¹⁹

We can see what this somewhat romantic passage is driving at. There may have been something for everyone to mourn when Dolly Pentreath (the last native speaker of Cornish) died. But the interest at stake does not seem to be the sort which is capable of grounding

¹⁶ R. Jones, *Community in Crisis: French Canadian Nationalism in Perspective*, 2nd ed. (Toronto: McClelland & Stewart/ Canadian Library, 1972) at xv.

¹⁷ For a useful account see M. Brunet, *La Présence Anglaise et les Canadiens* (Montréal: Beauchemin, 1964) at 191-209.

¹⁸ Demographic data were central to the argument of the Government of Québec when defending the constitutionality of the restrictions which the *Charter of the French Language* placed on English language education: *Québec Association of Protestant School Boards v. A.G. Québec* (1982), 140 D.L.R. (3d) 33.

¹⁹ P. Berger, *Facing Up to Modernity* (Harmondsworth: Penguin, 1979) at 161.

rights. Our sadness at the extinction of a language does not itself seem to warrant the imposition of duties on others to keep that language alive, particularly if they are deliberately abandoning it in order to gain social prestige and economic power. The abstract interest in linguistic survival seems almost aesthetic; it evinces a concern for languages as things in themselves, rather than for their speakers. But like the extinction of other endangered species, the death of a language is either mediated by human interests or irrelevant to questions of human rights.

However, a more attractive interpretation of survival is available. It may be understood not as an abstract ideal but as a desire for cultural continuity. Many people hope that their children will retain at least some of the aspirations that they cherish. It has been said that, "we want our values to last because we know our bodies won't."²⁰ In the ethnic context, language is both the vehicle and the expression of these values. We must not over-state the claim. People may have a concern for ethnic survival which does not embody a demand for linguistic continuity. The point is simply that survival of one's mother tongue is a common and intelligible component of that concern. Ethnic survival does constitute a human interest, so it meets our objection to survival as an abstract ideal. Its concern is not with the endangerment of a linguistic species, but with the continued flourishing of a group of speakers whose desire to transmit their culture to future generations is an aspect of their well-being. Under this conception, the fact that a language might die out is of no moral concern apart from the interest its speakers take in it. There is therefore nothing wrong with people voluntarily abandoning their mother tongues. Normally, of course, this is not done voluntarily. People do take a substantial interest in cultural survival, and this might itself be thought sufficiently important to warrant holding others duty-bound to protect it. How plausible is this? Does this interest have the supposed urgency?

Linguistic survival is a future-oriented interest, of potentially indefinite extent; it may include the desire to see the use of one's language continue in perpetuity. The very distant future is unlikely to be of great moral concern for two reasons. First, the identity of

²⁰ R. Sennett, *Authority* (New York: Knopf, 1980).

languages becomes problematic over very long periods of time. Would Chaucer have cared about the language we now speak or, more absurdly still, would the author of *Beowulf*? And cultural change is even more rapid than linguistic. Long-term changes will naturally weaken the interest in new culture. Second, even less distant consequences may be discounted back to present value. The more remote effects of language policy cannot be known with any degree of certainty, and our concern for future generations tends to diminish with their distance from us.

Language maintenance is a result of many factors which include the power to use one's language in public, and to receive government services and education in it. But these are far from sufficient. Patterns of residence, rates of endogamy, fertility, immigration etc. are all very powerful determinants of survival. To control all of these in the interests of linguistic survival would be unjustifiable and the marginal increase in the chances of survival due to a stricter regime of language rights is too modest to warrant the constitutional imposition of those duties. The right to correspond with the head offices of Air Canada in French is not going to make much difference to the prospects for the survival of the French-language minorities, even in the medium term. Thus, it is difficult to root the main rights of a regime like Canada's in the interest in survival as defined here.

I wish to distinguish this argument from a quite different, unrelated one. Some political theorists take the view that the regulation of culture is not an appropriate area for government intervention at all. They would argue that the protections which minority languages can legitimately claim are solely those due to the freedom of expression, association, and so forth. I make no such supposition. I think that there are legitimate grounds on which governments can directly regulate culture. My argument is that under any attractive conception of linguistic survival, that value would not justify holding others to be duty-bound in the ways that our legal system now provides.

The first conclusion then, is that the interest in linguistic survival is not sufficient to ground language rights. A secondary conclusion is that the territorialist objection fails. They charge that the federal regime of language rights is self-defeating because it hastens the extinction of the minorities by refusing them sovereignty

within those regions in which they are majorities. I have said nothing which either supports or refutes the demographic claim. But I have tried to show why the regime of language rights cannot in any case be justified by a concern for survival, and so it is no embarrassment to say that such a policy is ill-suited to serve that goal. Language rights, I shall now argue, serve a different function.

B. *Security*

A better way to understand the interest in language is to think of it as a concern for *linguistic security*; the knowledge that one's language group may flourish and that one may use the language with dignity. Unlike the future-oriented value of survival, security is present-oriented and it encompasses both the individual and social aspects of language.

It is perhaps easiest to grasp the nature of linguistic security by considering the lot of those who lack it. The immigrant experience is one of surrender to a dominant culture combined with knowledge that one's language lacks status and that it is subject to heavy assimilative pressures which are likely to overtake one's children or grandchildren. In these circumstances, what should be a celebration of identity becomes a source of embarrassment. The security interest thus has two aspects. First, speaking a certain language should not be a ground of social liability; and second, one's language group should flourish. Note that the latter is not the future-oriented value of survival, but the present-oriented value of the human relations and interactions which a shared linguistic culture makes possible. These do extend across the generations, but not indefinitely into the future. Its horizon coincides for each person with the boundary set by the likely possibilities of direct communication. Temporally, that would extend only over about four generations, say to one's great-grandchildren. It is certainly intelligible that people would hope to be able to communicate in their mother tongues with any of their descendants whom they may live to meet and that the forms of social interaction which are available in such circumstances would have intrinsic value.

We may divide linguistic security very roughly into an *instrumental* and an *expressive* dimension. Most people speak no language apart from their mother tongue and those who do only

rarely achieve the degree of fluency and comfort with which they speak their first language. These obvious but decisive facts establish a powerful instrumental interest in language: it is an essential tool of communication. The better one is able to use this tool, the more easily one can live in a given society and the greater will be one's educational and occupational expectations. And, in a society like ours, this translates into a certain cash value. At the same time, however, most people feel an attachment to their mother tongue which cannot be reduced merely to its utility in communication: it is for them a marker of identity, a cultural inheritance and a concrete expression of community. De Tocqueville said that, "The tie of language is, perhaps, the strongest and most durable that can unite mankind."²¹ With increased modernization and secularization little else divides, for example, French and English Canadians, so that language becomes more and not less important as an expression of identity.

Because a rights-based argument is distributive in form, we must go a bit further and consider the ways in which the instrumental and expressive values of language might be parcelled out. The simplest view is that the value of language is an ordinary *private good*, of benefit to the individual and without any further effects on others. But while this is true, language is also deeply social. One learns it from others, uses it to communicate with others, and expresses one's affiliation to others through it. The social dimension of language takes two different forms. Some aspects of language are *public goods* in the economist's sense. They are non-rival in consumption and non-excludable in supply. The diffuse benefits of a system of minority language education, for example, and even the diffuse benefits of a language being spoken in a vicinity, are good for mother tongue speakers, even if they do not participate in the activities in question. (It may also have diffuse benefits for the population at large: hearing other languages spoken in the subway may make one more sensitive to the presence of minority groups, etc.). Of course, not all the social aspects of language use are public goods in this sense, for individuals may be

²¹ A. de Tocqueville, *Democracy in America*, trans. Reeve (New York: Vintage, 1945) vol. I at 29.

excluded from some of them. If no one will speak to you, or admit you to the school, then language is not a public good in the above sense. But it is nonetheless a good which is non-rival because its enjoyment by some does not leave any less for others. It has an essentially social aspect: one cannot enjoy it as an individual, but only in common with at least some others. I shall call this a *shared good*. Thus, language has instrumental and expressive value in private, public, and shared aspects. We may therefore think of it, not as a single good, but as a structurally complex cluster of goods. We must look to this cluster to discover whether language rights can be understood as fundamental.

V. THE REGIME OF LINGUISTIC TOLERANCE

Any society should wish to ensure that a mother tongue is not a ground of liability so that people are not discriminated against because of the language they speak; that they are entitled to use in private life whichever language they choose; to publish newspapers and support the electronic media; and to organize schools and services in any minority language at their own expense. That is to say, minority languages should always be tolerated. The duties which are thereby imposed on others are not onerous. They extend just barely beyond what civility already requires. Given the importance of just the instrumental value of security in its individual aspect, we would regard these rights as justified for exactly the same reasons as we would favour rights against discrimination based on colour or gender.

Heinz Kloss has distinguished between tolerance-oriented and promotion-oriented minority language rights²² along the lines that the former secure the cultivation of language in the private sphere, and the latter in the public sphere. But it is clear that the nerve of his distinction is really the difference between negative duties (to abstain from interference) and positive duties (to promote). Is it right to identify the regime of tolerance with negative duties only?

²² H. Kloss, *The American Bilingual Tradition* (Rowley, MA: Newbury House, 1977) at 21-22.

A regime of linguistic tolerance does not usually require language-specific legislation: these rights will be protected by ordinary guarantees of freedom of expression, freedom of association and various provisions for non-discrimination and equality. Occasionally, they are made explicit as in Article 27 of the *International Covenant on Civil and Political Rights* (1966) which provides that:

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

In Canada, section 14 of the *Charter* provides the right to an interpreter for those unable to understand proceedings. As this last example shows, however, a regime of tolerance is not restricted merely to negative rights. To secure some of its values may require positive action and in some cases even substantial public expenditure. So tolerance is not just a matter of negative rights. It is, however, substantially weaker than the sort of rights provided by Canada's federal regime. But tolerance is also more comprehensive, being owed to all, whether their language group is large, small, expanding or dying out, for in all these circumstances people can nonetheless be hurt by attacks on their language.

The general character of tolerance-based language rights can be discerned in the American case of *Lau v. Nichols*.²³ The Supreme Court held that the failure of the San Francisco school system to provide English language instruction for about 1800 unilingual Chinese-American students violated section 601 of the *Civil Rights Act, 1964* which bans discrimination on grounds of race or national origin in any programme receiving Federal financial assistance. Douglas J., writing for the court, said "It seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational programme — all earmarks of the discrimination banned

²³ 414 U.S. 563 (1974).

by the regulations."²⁴ This argument is fundamentally an integrationist one. It is not driven by the expressive value of participating in a language community, but by the instrumental one of ensuring that language does not stand in the way of receiving an effective education. The duties it imposes are substantial and positive, but they do not protect or promote the social life of the Chinese American community; they merely ensure that membership in that community is no obstacle to integration into the mainstream of American life. They ensure that language is not a ground of liability to the individual, but not that it is a source of value to the group.

VI. OFFICIAL LANGUAGES

The rights of linguistic tolerance are rooted in the value of security, but they do not exhaust it. They are still at some distance from the rights to services, participation in government, and education which the Canadian constitution guarantees. The most obvious departure from the regime of linguistic tolerance is that speakers of two languages enjoy a favoured position. Only they can demand government services and educational facilities in their mother tongues. This feature is so obvious that we tend to forget how extraordinary it is. Language rights in Canada simply *mean* minority official language rights.

There is, of course, nothing linguistically special about either the French or English languages which warrants special treatment. Indeed, there are no scientific grounds for thinking that any human language is better, either in general or for some special purposes, than any other. The vocabulary and conceptual resources of a given language are consequences, not causes, of its social status. Nor does either concept of linguistic interests itself require a regime of official languages. Consider survival. How could one show that the survival of the French and English minorities is of special value? Because they are founding peoples? That phrase simply silences the important questions: why should two colonial regimes get special

²⁴ *Ibid.* at 568.

status? All European settlers have weaker claim to be founding peoples than do any of the indigenous people of Canada. Nor is it true that they are founders in the sense that they made a uniquely valuable contribution to the creation of the country, since that too must be honestly conceded of many other ethnic groups. Indeed, the immigrants to the western provinces were as much the builders of a new society as either of the charter groups. Perhaps they most deserve to survive because they risk extinction? That is palpably false. They are better off than any other languages in Canada and, from the global perspective, neither is an endangered linguistic species. On that criterion we should favour the native languages or Scottish Gaelic or Yiddish. The same is true of the interest in linguistic security. Speakers of all languages have the same interest in not being discriminated against, or in having an environment which permits the flourishing of their culture.

A justification for official language rights must therefore have two distinct stages. It will need both an account of why the interest in linguistic security may carry us beyond the regime of tolerance and a separate account of which languages ought to enjoy these further protections.

It is not, I think, very difficult to see how we might construct an argument for the three main families of *Charter* rights: the right to services, to participation in government, and to educational facilities. These are the minimum requirements for a language to be effective in the public as well as private realm. If we wish to encourage the flourishing of a minority linguistic group, then it is essential that it be able to participate in public life in its language, and that it have at its disposal the basic means of cultural reproduction, not because we are duty-bound to ensure its survival, but because it needs these resources. The duties which this places on governments may make little difference to the long-term prospects of survival, but they will make an immediate and palpable difference to linguistic security. Such duties will provide part of the institutional infrastructure for group life and for the participation of individuals, as members of linguistic groups, in society.

The second stage of justification for official language rights requires a separately grounded argument showing which language groups should have these rights. That stage need not be rights-based even if the first is. One might, for example, offer an

argument based on the utility of a common means of communication in government, and between the government and its citizens. Like a system of weights and measures, or of legal tender, the designation of official languages may serve no values grander than social coordination. Or again, it may have expressive functions as a symbol of national unity. (That is not always a desirable thing as can be seen by the way in which California's new official language legislation provides an expression of anti-Hispanic sentiment.) Such considerations suggest that the official languages in a given country should be the most common languages. In Canada as a whole, no languages come close to the dominating positions of French and English. It is true that some languages, like Italian or Ukrainian or German, have regional pockets greater than some pockets of English and French minorities, but none of these are on a national scale. Reflecting on this fact, Pierre Trudeau wrote:

If there were six million people living in Canada whose mother tongue was Ukrainian, it is likely that this language would establish itself as forcefully as French. In terms of *realpolitik*, French and English are equal in Canada because each of these linguistic groups has the power to break the country. And this power cannot yet be claimed by the Iroquois, the Eskimos, or the Ukrainians.²⁵

This sounds like nothing more than the view that might makes right. But there is also moral significance to the size of the official language groups: each of them is a currently viable social group which has the capacity to sustain a rich cultural life for its members. Neither official language minority has merely folkloric status. An important feature of Canadian history is the fact that the French minority never had a real likelihood of being wholly assimilated, not even when English repression was at its apogee. This meant, not simply that it had to be accommodated, but that its interests came to be seen as legitimate. Moreover, by the time of Confederation, the view that the right of conquest gives unrestricted power to the victors became less acceptable in light of gradually spreading democratic ideals. Will, not force, was to be the basis of the democratic state. Much of this may have been cant, but it had an important consequence. The expectation of each language group

²⁵ P.E. Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan, 1968) at 31.

that it should continue to flourish was recognized as being legitimate. The threat advantage that each possessed, the power to destroy the union, may well have provided the motivation for the pact and determined its content. But the rights thereby created flow from the character of the linguistic interests and the fact of agreement, not directly from threat advantage. Thus we have an interpretation of the sense in which language rights are compromise rights. They are special rights created as a result of a constitutional bargain over interests which the parties rightly regard as legitimate.

The creation of a regime of official languages does mark those languages as special. Is this defensible in a democratic regime? I will suppose that it is if it can be shown that it leaves speakers of other languages no worse off than they would have been without an official language regime. If that were true, then the constitutional compromise would have the one very attractive feature that no one would wish that it had not been made. Here, our conclusions must be cautious. The *Charter* itself provides (section 22) that "Nothing in sections 16 to 20 [the Official Languages sections] abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French." More importantly, to the extent that the rights of linguistic tolerance are secured, the addition of official language rights does not much worsen the position of non-official language groups. At least, this is so measuring from the baseline of the position that those groups would be in but for the regime of official languages, for even without it French and English would still exercise massive *de facto* dominance in Canada. The baseline, then, is one in which non-official languages are always at some disadvantage. Initially, of course, the regime of tolerance was far from perfect and, although improvement is discernible, it is still true that we have some distance to go. Hence, the agreement is one whose validity may potentially firm up (or weaken) over time. The constitutional promise is one which official language groups must earn the power to make. Reinforcing this argument is the consideration (genuine, though not to be exaggerated) that later immigrants arriving in an official language regime will therefore adjust their expectations to a certain degree. In contrast, the earlier colonists arrived in a weak and very diverse customary linguistic order. It cannot be denied that

European conquest hastened the demise of many native languages, but the officialization of two European languages had little independent role in the cataclysmic social changes that were brought about by settlement.

That provides at least an outline of how the *realpolitik* of numbers is relevant to fundamental language rights. But the argument is a highly conditional one. It turns on the central requirement that the official language regime does not worsen the position of others and that the regime of linguistic tolerance is strictly observed. If that breaks down, then the significance of numbers is reduced to threat advantage, and the justification of official language rights can rest on nothing deeper than the aggregative arguments discussed above. It also shows the dynamic potential of the concept of official language rights. If other languages should displace or rival French and English in vitality and national standing, then they would have every claim to be made official as well or instead. The regime of official languages is thus not a barrier to, but a model for, future change.

VII. WHY NUMBERS WARRANT

I wish to conclude by considering one of the most problematic of the remaining obstacles to interpreting language rights as fundamental. Not only are numbers relevant to the determination of which languages should be official, but once secured, some of those rights have force only where the number of speakers warrants.²⁶ Intuitively, this has a certain plausibility. No one would think, for example, that a single minority language child would warrant construction of a school, and most would feel that the more children there are the more pressing is the concern.²⁷ But to regard

²⁶ Historically, this limitation descends from the ill-starred bilingual districts created by the *Official Languages Act*.

²⁷ Compare the concurring judgment of Blackmun J. in *Lau*:
Against the possibility that the Court's judgment may be interpreted too broadly, I too stress the fact that the children with whom we are concerned here number about 1,800.... When, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any

it in this natural way may quickly lead to the view that language rights are not fundamental. The importance of numbers, if interpreted as a demand constraint, suggests that the argument in favour of providing the services in question is not distributive but aggregative. Suppose, by analogy, that the *Charter* provided that we have the right to freedom of expression only where numbers warrant. Then very small groups could be silenced, or at least not provided with resources needed to secure the expression of their views, while larger ones could not. This would seem very strange indeed, for it makes the right appear to be a consequence of, rather than a constraint on, majority rule. Yet the very function of rights in a political argument permits one to secure them even when the majority would not favour it. One does not need rights when one has friends. It seems to follow, then, that either language rights are not fundamental, or the numbers limitation is unjustified.

This dilemma, however, is a false one, for there is an important third alternative. It is possible to interpret the restriction as something other than a crude test of consumer demand. Begin by noticing that the *Charter* does not limit all language rights in this way; the right to use either language in Parliament, or in the federal courts, is secured even for the sake of a single person. By itself this establishes nothing. It may be that no coherent sense can be made of the provisions taken as a whole. But let us consider the provisions of section 23(3) of the *Charter* in further detail. It says that minority language instruction is to be provided when the number of eligible children is sufficient to warrant provision out of public funds. This has two implications. First, the question of whether someone has the right does not itself turn on numbers. That is settled by the provisions of sections 23(1) and (2). It is not that they have the right only when they are sufficiently numerous, but that the right they have generates a duty for the state to fund instruction and provide facilities only at that point. Second, it is consistent with this view that, below that threshold, some normative

language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction.

Supra, note 23 at 572.

force remains to the right. Some scholars suggest²⁸ that the limitation is best understood as a sliding scale. It does not contemplate that there is a threshold of size which, when crossed, fully activates the rights in question, but rather that the sort of facilities to which a group is entitled may depend on its size. For example, just a few students might warrant a minority-language class in a majority-language school, while many would warrant not merely the school but the instruments of governance for it.

There is, I think, good sense in this view, but it leaves open the question of why the scale slides. Is it a demand response?

A pure demand constraint could be assessed by local school boards. Yet it has been held that the *Charter* does not devolve such discretion on the school boards and that rights to educational facilities transcend the territorial jurisdictions of those boards.²⁹

A fixed number activating all education rights would have to be so high as to offer minorities nothing until they reached a size at which they could be expected to make their demands felt through the ordinary political process. It would certainly be wrong of the courts to decide in an abstract way that twenty or fifty or two hundred students are needed. Even setting a certain proportion is too simplistic. A cohesive five per cent in a rural community may be more significant than a diffused ten per cent in a metropolitan one; it depends on social structures. The limitation does, I think, establish a threshold, although neither a numerical nor proportionate one. It asks the courts to determine whether minority group life in a given community creates special rights. It asks whether the minority language speakers satisfy, in the context of their community, the existence conditions for a social group. Whenever such a group exists, it is entitled to educational facilities for its members. Having crossed this threshold, the size of the group obviously bears on the sort of facilities to which it is entitled, but it is not raw numbers that are needed to cross the threshold in the first place.

²⁸ For example, J.E. Magnet, "Minority-Language Educational Rights," (1982) 4 Supreme Court L.R. 195; and P.W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 822.

²⁹ *Re Education Act (Ont.) and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 at 30, 33.

This does indeed give the court a difficult task, for it requires an assessment of the figures against a background of the nature and possibilities of group life in that community. But in two ways, at least, this is easier than measuring demand for public services. An index of demand must take into account, not only the number of people requesting some service, but also the intensity of their preferences. It is well known that there is no fully satisfactory measure of this, and that when the service in question is a public good, it is strategically rational to misrepresent one's preferences. Second, the demand approach must grapple with the problem of the commensurability of preferences among different people. It would, I think, be undesirable to charge the courts with assessing whether, for example, the interest of one group in minority language schools is stronger or weaker than the interest of some other group in opera houses. Interpreted as a rough test for the existence of a social group, the numbers provision avoids both of these difficulties.

Perhaps these considerations do not *prove* that the sort of language rights which are guaranteed by the Canadian constitution are fundamental. Nor do they show that, if fundamental, they are of great importance. The interest in language, genuine as it is, takes root and flourishes only late in the process of political development. It cannot be doubted that the familiar democratic rights and rights to welfare are higher on the scale of moral importance. But the fact that some other rights may win out in cases of conflict casts no doubt on the foundations of language rights themselves, nor does it support any special view about their force in cases where no such conflicts arise. Thus, even if language rights are, as the Supreme Court says, fundamentally rights of political compromise, they may for all that be compromise rights of a fundamental sort.

