1991

Retreat from the Melting Pot: Cultural Pluralism and Public Policy

Douglas O. Linder
University of Missouri - Kansas City, School of Law

RETREAT FROM THE MELTING POT?: CULTURAL PLURALISM AND PUBLIC POLICY

Douglas O. Linder*

Some ethnic groups have participated more fully in American life than have others. Assimilation is a complex and subtle process and is never complete. Most ethnic groups, however, have become largely integrated into the mainstream of American culture. Interestingly, many of these ethnic groups, including the Irish and Germans, were at one time believed to be "unassimilable."[1] Language barriers provide a nearly insurmountable obstacle to assimilation for immigrants, but succeeding generations, learning English in the schools, often enter the middle-class, move to the suburbs and marry outside their ethnic group.[2] Though second- or third-generation immigrants may retain "memory-tied and sentiment-bound" ethnic identities,[3] by most measures they are "assimilated."[4] There are obvious exceptions to the general trend. Blacks — especially *poor* blacks — remain disturbingly discrete and insular. Latinos also seem to be departing from the usual pattern of second-generation assimilation.[5] For reasons that are partly historical, partly political and partly cultural, Native Americans have also retained a large measure of their ethnic identity.[6] Finally, there are communities, such as the Amish, which have adopted isolation from modern life as a central religious tenet and for that reason have withstood for many generations the influence of assimilating forces.[7]

Some people view assimilation of ethnic groups as a goal; others view

---

* Professor of Law, University of Missouri-Kansas City, J.D., Stanford University (1978).

1. T. SOWELL, ETHNIC AMERICA 34-35, 57-58 (1981).

2. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 334 (1986).

3. D. BOORSTIN, THE AMERICANS: THE DEMOCRATIC EXPERIENCE 252 (1973).

4. There are many definitions of assimilation. Some commentators have distinguished between "cultural assimilation" (the abandonment of distinctive customs and native language) and "structural assimilation" (emphasizing social and occupational interaction, as well as intermarriage). M. GORDON, ASSIMILATION IN AMERICAN LIFE 60-81 (1964). Measures of assimilation that seem most commonly accepted include educational integration, intermarriage, primary language and occupational and residential dispersal. Thernstrom, *Ethnic Groups in American History*, in ETHNIC RELATIONS IN AMERICA 3, 9-12 (L. Liebman ed. 1982).

5. Karst, *supra* note 2, at 353-57.

6. E. SPICER, THE AMERICAN INDIANS 2 (1982). The case of Indians is different because hundreds of Indian cultures existed when the first European settlers arrived on American shores. They have also received special, and often prejudicial, treatment under American law. Note, *Constitutional Law: Congressional Plenary Power Over Indian Affairs — A Doctrine Rooted in Prejudice*, 10 AM. INDIAN L. REV. 117 (1982).

7. J. HOSTETLER, AMISH SOCIETY 77-79 (1980).

assimilation as a threat. Assimilationists contend that cultural diversity is limiting parochialism. Cultural pluralists denounce assimilationists as ethnic imperialists. Where an assimilationist sees a ghetto or ramshackle village, a cultural pluralist sees community. Where an assimilationist sees a threat to mainstream values, a cultural pluralist sees a provocative alternative lifestyle.

The principal concern of assimilationists is that ethnic loyalties will turn into ethnic group conflicts. The recent turmoil in Canada, leading to calls for sovereignty for French-speaking Quebec, provides a compelling example of how cultural pluralism can undermine national unity. Cultural identity based on memberships in occupational groups, geographic groups or leisure-activity groups poses a much less significant threat to political and social stability than does cultural identity based largely on race.[8]

Cultural pluralism, on the other hand, is an ideology that is explicitly anti-assimilationist. Its extreme manifestation has been seen in black and Indian nationalist movements and the militant ethnicism of organizations such as the Jewish Defense League. In its more moderate form, cultural pluralism celebrates, and seeks to reinforce, ethnic diversity. Cultural pluralists see ethnic id ntity as contributing to the sense of self-worth of racial and other minorities. A significant side benefit of strengthened ethnic identity, cultural pluralists are likely to point out, is the more lively and interesting public life that results as each ethnic group makes its unique contribution to debate, art, cuisine, architecture, music and language. Cultural pluralism — or "diversity" — has become a virtual obsession in American schools and universities, where efforts to hire teachers "of color" have reached unprecedented proportions. Federal agencies ranging from the National Endowment for the Arts to the Federal Communications Commission have also jumped on the "diversity" bandwagon by adopting programs to reinforce ethnic identity.[9]

Whether American law and policy reflects policy choices favoring assimilation or choices favoring cultural pluralism will have profound effects on American life. This is especially true because the bulk of American immigration over the past two decades has come from Asia and Latin America, places with cultures and values that depart in substantial respects from the American mainstream.[10]

---

8. *See generally* L. COSER, THE FUNCTIONS OF SOCIAL CONFLICT (1956).

9. The FCC has adopted policies designed to further "programming diversity" by increasing minority ownership of broadcast stations. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (May 1978). The "multicultural" bias of the National Endowment for the Arts is discussed in a recent article by Robert Brustein. Brustein, *The NEA Belly Up*, THE NEW REPUBLIC, June 18, 1990, at 32-34.

10. Daniel Moynihan remarked on the significance of this trend:

> [T]he United States is quietly but rapidly resuming its role as a nation of first- and second-generation immigrants . . . incomparably the largest, and for the first time in our history or any other, a nation drawn from the entire world. . . . Our immigrants in wholly unprecedented proportions come from Asia, South America, and the Caribbean. In fiscal year 1973 the ten top visa-issuing ports were Manila, Monterrey, Seoul, Tijuana, Santa Domingo, Mexico

CULTURAL PLURALISM AND THE LAW: FROM REPRESSION THROUGH TOLERANCE TO PROMOTION

For most of our history, the law has been decidedly pro-assimilationist. Some of the laws favoring assimilation were non-coercive and well-intentioned: English-language training, social services, adult education. Other laws reflected attempts to dominate or repress certain distinctive aspects of ethnic culture.

Coercive approaches to securing assimilation were never more popular than during the nativism movements that built up during World War I and peaked during the Red Scare of 1919-1920. During this period, laws banning the teaching of foreign languages in schools were enacted by fifteen states.[11] One of those states was Nebraska. Nebraska's law was found unconstitutional by the Supreme Court in 1923,[12] by which time nativism sentiments were beginning to wane. Nowhere did efforts to coerce conformity reach greater extremes than in Iowa, where a proclamation of the governor prohibited the use of foreign languages not only in the schools, but also in all church services, public places and even telephone conversations.[13]

Sometimes efforts to repress ethnic cultures were disguised as more principled battles. The Prohibition Movement of the 1850s, for example, is seen by many historians to have been based less on a principled belief in temperance than on hostility towards German and Irish immigrants and their use of pubs as ethnic gathering places.[14]

Indians have been a special target of coercive measures. "In 1921, Commissioner of Indian Affairs Charles Burke reminded his staff to punish any Indian engaged in 'any dance which involves . . . frequent or prolonged periods of celebration . . . or plainly excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.' "[15] In 1923, the Commissioner went further and prohibited Indians under the age of fifty from participating in dances of any kind.[16] Early orders of the Interior Department prohibited the wearing of

---

> City, Naples, Guadalajara, Toronto, Kingston. I would expect Bombay to make the top ten list before long. . . . In short, by the end of the century, the United States will be a multi-ethnic nation the like of which we have never imagined.

Fairlie, *Why I Love America*, NEW REPUBLIC, July 4, 1983, at 17.

11. Karst, *supra* note 2, at 314.

12. Meyer v. Nebraska, 262 U.S. 390 (1923). The Americanization movement and the language laws as a means of attaining cultural assimilation is discussed in Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293 (1989). *See also* Comment, *The Proposed English Language Amendment: Shield or Sword?*, 3 YALE L. & POL'Y REV. 519 (1985).

13. Karst, *supra* note 2, at 314.

14. R. BILLINGTON, THE PROTESTANT CRUSADE 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM 323 (1938).

15. Barsh, *The Illusion of Religious Freedom For Indigenous Americans*, 65 OR. L. REV. 363, 371 (1986).

16. *Id.*

traditional Indian dress and required the cutting of braids. The Department explained its coercive policies in assimilationist terms: " 'It was not that long hair, paint, blankets, etc., are objectionable in themselves — that is largely a question of taste — but that they are a badge of servitude to savage ways and traditions which are effectual barriers to the uplifting of the race.' "[17]

With respect to some ethnic groups, however, the law has reflected policies of exclusion and domination. Blacks are the most obvious victims of exclusionary policies. The Jim Crow laws of the South were a program designed to maintain black society as one entirely separate from white society, and for many decades, the program was successful. Segregation in schools, railroad cars, recreational facilities and public buildings made black society more cohesive, but, by undermining blacks' sense of self worth, it also promoted conformity to the norms of the dominant white society.[18] On balance, exclusionary policies directed at blacks probably have preserved, more than they have weakened, ethnic identity. Miscegenation laws made interracial marriages — a principal vehicle for assimilation — legally impossible in many states. Segregated schools and private sector discrimination made entry into the less ethnically-conscious middle-class virtually impossible for most blacks. Denied the more frequent contact with the institutions and culture of the dominant group that comes with economic success and residential and occupational integration, blacks have been slow to assimilate.

The shift from the principle of "separate but equal" to one of full equal citizenship for all ethnic minorities is the most important constitutional development of this century. The legal barriers to full participation in society have been removed. Miscegenation laws have been invalidated.[19] Schools have been ordered integrated.[20] Civil rights legislation has extended the guarantee of equal treatment into many areas of the private sector.[21] Entry into the middle-class and the assimilation which follows economic well-being is now a legal, if not a practical, opportunity for all ethnic groups.

Some ethnic groups, such as Asians, who were once the targets of exclusionary laws have responded enthusiastically to the opportunity. Other groups, most notably Latinos, Native Americans and blacks, have entered the middle-class in much smaller numbers. Nonetheless, objective measures of assimilation

---

17. *Id.* at 370 (quoting DEP'T OF INTERIOR, ANNUAL REPORT OF THE COMM'R OF INDIAN AFFAIRS, H.R. Doc. No. 5, 57th Cong., 2d Sess. 15-16 (1902)).

18. Karst, *supra* note 2, at 323-25.

19. Loving v. Virginia, 388 U.S. 1 (1967).

20. Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*). In Brown v. Board of Ecuc., 347 U.S. 483 (1954) (*Brown I*), the Court held the separate but equal doctrine unconstitutional. It, however, postponed, for subsequent argument, the question of appropriate relief. *Id.* at 495-96. In *Brown II*, the Court insisted that public school officials make a "prompt and reasonable start toward full compliance" placing upon the district courts the responsibility to see that the necessary transition out of unconstitutional segregation proceeded "with all deliberate speed." 349 U.S. at 300.

21. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a to 2000h-6 (1988)).

— language usage, educational integration, residential dispersal, occupational dispersal and intercultural marriage — suggest modest steps toward assimilation even for these groups. Interracial marriages involving blacks, while not as prevalent as other inter-ethnic marriages, almost doubled between 1970 and 1980.[22] Also, racial minorities are now found in much greater (though still disproportionately low) numbers in higher education and the professions than was the case a decade ago.[23]

The idea of a "color blind" Constitution, once viewed as progressive, has come to be seen by most academics and members of racial minorities as a conservative, if not a reactionary, idea. Proponents of group rights in the 1970s and 1980s began pushing racial preference schemes (or "affirmative action programs") as a means, some suggested, of assimilating racial minorities into the economic mainstream. "To shift from a system of group discrimination to a system of individual performance," one affirmative action advocate said, "is to perpetuate the effects of past discrimination into the present and the future."[24] Justice Blackmun put the argument succinctly: "In order to get beyond racism, we must first take account of race."[25]

Affirmative action programs have been instituted in most universities and colleges, many government agencies and a wide variety of employment contexts in the private sector. Whether these programs have promoted assimilation or cultural separation is a subject of intense debate. Kenneth Karst argues that most forms of affirmative action have promoted integration, not separatism.[26] On the other hand, Nathan Glazer contends that allocations by race or ethnicity stimulate ethnic politics, produce intercultural conflict and ultimately are anti-assimilationist in effect.[27] The growth of affirmative action programs in the sixties and seventies coincided with, and fueled growth in, political consciousness among cultural minorities. Under a "color blind" theory of constitutional rights, there would be no reason for ethnic groups to seek preferential treatment from legislatures. "Group rights" theories of equal protection law created both a reason and a need for groups to mobilize along ethnic lines.

It is possible, of course, that the effects of some affirmative action programs have beem assimilationist, while other affirmative action programs have

---

22. Collins, *The Family; A New Look at Intermarriage in the U.S.*, N.Y. Times, Feb. 11, 1985, at C13, col. 2. "The 1980 census showed there were 613,000 interracial married couples in the United States . . . . a sizeable increase from the 310,000 counted by the 1980 census." *Id.*

23. In 1979, when the American Bar Association passed a resolution encouraging affirmative action programs for law schools, minorities made up 8% of law school enrollment. They now make up over 13% of law students. *Minority Enrollment Efforts Show Gains at Law Schools*, N.Y. Times, Mar. 8, 1990, at A20, col. 4.

24. Thurow, *A Theory of Groups and Economic Redistribution*, 9 PHIL. & PUB. AFF. 25, 35-36 (1979).

25. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978).

26. Karst, *supra* note 2, at 344-46.

27. Glazer, *Politics of a Multiethnic Society*, in ETHNIC RELATIONS IN AMERICA, *supra* note 4, at 128, 132-42.

had the opposite effect. Where affirmative action programs have succeeded in bringing large numbers of minorities into the economic middle-class and where programs have caused minorities to identify strongly with the goals of occupational groups they have been permitted to enter, the overall effect of such programs may have been assimilationist. On the other hand, the assimilative effects of many affirmative action programs may have been outweighed either by "white backlash," which reinforces racial identity, or by the tendency of some minority group members to use their new positions to pursue an agenda in behalf of their own ethnic groups. Many black and hispanic law professors, for example, have promoted the idea of "racial distinctiveness" in their scholarship.[28]

Affirmative action programs succeeded in helping some ethnic minorities enter the assimilating waters of the American mainstream, but for many blacks, Native Americans and Latinos, cultural isolation remains a reality. Conditions in many of the ghettos, barrios and reservations of our country are tragic. Rejection of the values and culture of the American mainstream has become a point of ethnic pride, not embarrassment, in culturally isolated urban communities. The *New Republic* recently observed that rap music groups such as 2 Live Crew prove that "the idealization of the street . . . now lies at the heart of African American culture."[29] "The truth about the street," as the magazine noted, "is that it is the site of the greatest catastrophe to have befallen black America since slavery."[30] The statistical evidence supporting this conclusion is overwhelming.[31]

Although it is a fact not often appreciated by those now marching under its banner, there is *good* cultural pluralism and there is *bad* cultural pluralism. Good cultural pluralism is supported by nondiscriminatory immigration laws and a legal tradition stressing tolerance and individual rights. The laws which promote good cultural pluralism are those which reflect the nation's character — the mutability of its culture, its lack of rootedness in history, its faith in possibility and change. This essential *openness* combined with a landscape of overwhelming complexity is our guarantee of good pluralism: pluralism in which individual cultural identities are freely shaped and reshaped and in

---

28. For an excellent article critical of this trend, see Randall Kennedy's *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). Kennedy concludes that the scholarship of racial distinctiveness has tended "both to homogenize people of color and to segregate them from the main currents of American culture." *Id.* at 1816.

29. *Too Cruel, Live; 2 Live Crew Arrested*, THE NEW REPUBLIC, July 9, 1990, at 8, 9.

30. *Id.*

31. *See, e.g.*, Wilkerson, *Facing Grim Data on Young Males, Blacks Grope for Ways to End Blight*, N.Y. Times, July 17, 1990, at A14, col. 1. Some of the bleak statistics are as follows:

> Black men are several times more likely to be victims of homicide than any other demographic group, and they finish last in virtually every socioeconomic category, from the high school dropout rate to unemployment. A study in February found that more college-age black men — nearly one in four — are in prison or on parole than are in college.

Id.

which ethnic identity plays a relatively minor part, not a leading role. Bad cultural pluralism, on the other hand, tears at the social fabric rather than strengthens it. Cultural identities are derived almost exclusively from membership in distinct racial or economic or religious groups, and there is constant and divisive struggling between the groups for political advantage.

Several recent developments suggest that we are now on a path that threatens to lead us from good cultural pluralism to bad. Cultural preservation and pluralism have been equated with preferential treatment based on race, religion and national origin. Legislatures have responded to demands for ethnic group rights in unprincipled, but predictable, ways. Those ethnic groups with substantial political clout have often received preferential treatment; those without much clout have been ignored.

The appearance in the curricula of public and private universities of "black studies" and "Hispanic studies" programs is an example of the new cultural pluralism. "Eurocentrism" is under attack in academia.[32] It is viewed as an evil closely akin to sexism or racism when, in fact, the Western tradition is the source of most of America's goodness. George Will identified what is wrong with an "academic spoils system" designed to satisfy ethnic groups. He called it "an affront to the unifying theme of the West's rich tradition": the theme that "reason matters supremely, whereas individuals' accidental attributes, such as race, are irrelevant to the great enterprise of thoughtfulness."[33] Unless such programs are reconsidered, Will warned, the university will cease being a transmitter of culture and become, instead, a " 'demystifier' of culture and an advocate of the politically ascendent agendas of the moment."[34]

The federal government, in the form of the National Endowment for the Arts, has joined the attack on Eurocentrism. Grant-making procedures are biased toward affirmative action and cultural pluralism. Works are valued insofar as they are politically correct. Art, no less than education, has become a form of political consciousness raising aimed at strengthening the hand of those ethnic minorities that reject many of the values of the dominant culture. Robert Brustein lamented the politicization of the NEA in a recent article:

> The fact is that, for a brief moment, America did have an arts policy. It was

---

32. The National Association of Scholars, a private organization, has been highly critical of this trend:

> Efforts purportedly made to introduce "other points of view" and "pluralism" often seem in fact designed to restrict attention to a narrow set of issues, tendentiously defined. An examination of many women's studies and minority studies courses and programs discloses little study of other cultures and much excoriation of our society for its alleged oppression of women, blacks, and others. The banner of "cultural diversity" is apparently being raised by some whose paramount interest actually lies in attacking the West and its institutions.

THE NEW REPUBLIC, May 14, 1990, at 32 (paid advertisement purchased by National Association of Scholars).

33. Will, *Stanford's Regression*, Wash. Post, May 1, 1988, at C7.

34. *Id.*

> founded primarily on excellence, and administered by peer panels focused on artistic quality regardless (rather than because) of color, sex, ethnicity, or creed, whether "cutting edge" or establishment. For that reason, the arts in this country, for a brief moment, were once a genuinely pluralistic expression.[35]

In 1990, the Supreme Court considered another federal policy aimed at promoting cultural pluralism. The Federal Communications Commission, in an attempt to increase ethnic-oriented programming, adopted tax breaks and preference schemes based on race and ethnicity.[36] The programs succeeded in increasing minority ownership of broadcast stations from 1 percent in 1978 to 3.5 percent in 1990.[37] Justice Brennan's plurality opinion in *Metro Broadcasting, Inc. v. FCC*[38] found the government's interest in "safeguarding the public's right to receive a diversity of views and information over the airwaves"[39] to be sufficiently important and related to the programs to withstand constitutional scrutiny. Justice O'Connor's dissenting opinion criticized the FCC's classifications as endorsing "race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."[40] The effect of the Supreme Court's five-to-four decision in *Metro Broadcasting* is to further weaken our nation's commitment to merit-based choices and to subject governmental agencies to more tugging and pulling by various ethnic groups intent on securing political advantages.

An example of how color-conscious decisions may entangle the government in controversies over which groups are entitled to preferential treatment can be found in another Supreme Court decision, *United Jewish Organizations v. Carey*.[41] The case involved a challenge under section 5 of the Voting Rights Act of 1965, which the Attorney General interpreted as forbidding a New York state reapportionment plan that insufficiently protected black legislative representation. New York state officials revised their reapportionment plan in order to achieve the sixty-five percent non-white majority in an assembly district which the Attorney General indicated would enable the plan to satisfy section 5. A suit was brought by members of the Hasidic Jewish community that had been split between two districts in order to attain the Attorney General's sixty-five percent figure. The result of the redistricting was the loss of the sole Hasidic Jewish representative in the state assembly.

Whether or not the explicit assignment of voters on the basis of race approved in *United Jewish Organizations* actually served its intended beneficiaries is not clear. By concentrating sixty-five to seventy-five percent black

---

35. Brustein, *supra* note 9, at 32.

36. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (May 1978).

37. Greenhouse, *F.C.C. Tilt to Minorities Weighed by High Court*, N.Y. Times, Mar. 29, 1990, at A16, Col. 1.

38. 110 S. Ct. 2997 (1990).

39. *Id.* at 3001.

40. *Id.* at 3029 (O'Connor, J., dissenting).

41. 430 U.S. 144 (1977).

majorities in five districts, the plan was an attempt to gain black representatives, possibly at the expense of greater black political influence in more districts. The "bloc ethnic voting" assumption on which the plan was based hardly speaks well for the decision-making process of voters who, it is hoped, will look beyond a candidate's skin color to the policies he or she supports.

Justice Brennan, in his concurring opinion in *United Jewish Organizations*, recognized that "an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness"[42] and be "viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification."[43] Despite his recognition of "the potential for reinvigorating racial partisanship,"[44] Justice Brennan was willing to leave the problem of how best to protect the voting interests of racial groups in the hands of the Attorney General.[45]

Chief Justice Burger, in dissent, called the New York plan a "retreat from the ideal of the American 'melting pot.' "[46] The Chief Justice argued that use of mathematical formulas "tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious groups in enclaves."[47] Though New York's Hasidic Jews "certainly have no constitutional right to remain unified within a single political district," they do have, according to Burger, "the constitutional right not to be carved up so as to create a voting bloc composed of some other ethnic or racial group."[48]

RETREAT FROM THE MELTING POT?

Historian Daniel Boorstin observed that what has been most remarkable about the American experience is that while "[o]ther nations had dissolved peoples into one, . . . [t]his nation became one by finding ways of allowing people to remain several."[49] America is less the melting pot of popular myth than it is a quiltwork of many patches. Ethnic identification within a community tends to weaken over time, but it does not entirely dissipate. Rather, increased participation in the larger American culture causes a shift in self-identification from one based largely on ethnicity to one derived from memberships in a variety of communities — fraternal, religious, political, recreational. Despite some coercive attempts aimed at speeding assimilation within specific ethnic communities, the process has been mainly influenced by social and economic forces, not the law.

---

42. *Id.* at 173 (Brennan, J., concurring).
43. *Id.* at 174.
44. *Id.* at 176.
45. *Id.* at 177-78.
46. *Id.* at 187 (Burger, C.J., dissenting).
47. *Id.* at 186.
48. *Id.*
49. D. BOORSTIN, *supra* note 3, at 248.

In the latter half of the twentieth century, a number of forces have converged to dramatically lessen the cultural distinctiveness of various racial, religious and ethnic groups. It is now possible for an Inuit in Point Barrow, Alaska; a Sioux in Pine Ridge, South Dakota; a Hispanic in San Antonio, Texas; an Afro-American in Buloxi, Mississippi; and a Polish-American in Milwaukee, Wisconsin to watch the same television shows, drink the same brand of beer, play the same video games and wear the same Nike tennis shoes. The success of American capitalism, together with modern television and transportation, has affected even the poorest and most remote regions of our country. Cultural differences have been subverted by abundance.

The process by which ethnic identification is weakened by modernization has received the attention of scholars. One writes:

> Intrinsically, the ethnic group is a link with the past and a bulwark of stability. It depends on instinctive sympathies and ancestral loyalties of a wholly irrational kind. Modernization, on the other hand, demands rationality, calculation, progress and material incentives. It brings deracinating forces into the ethnic group and sets up an inner tension between "modern"techniques and . . . ethnic loyalty.[50]

The fragmentation of roles caused by the complexity of modern society has led to a fragmentation of norms. More than ever before, individuals are driven to multiple loyalties. The modern individual retains an ethnic identity: he sees himself as an "Italian-American" or "Hispanic". But he also thinks of himself as a "Royals fan" or a "Cardinals fan," as a "Harley owner" or a "Cadillac owner," as a "Golfer" or a "Trout-fisherman," as a "Republican" or as a "Democrat," as a "Pro-Choicer" or a "Pro-Lifer". Kenneth Karst finds the fragmentation of loyalties to be a stabilizing political force: "Because each individual finds different sets of 'allies' for different types of conflict, the society avoids the breakdown that would be threatened if its members saw themselves as divided into only two groups."[51]

For most non-immigrant Americans, ethnic identification has become a distinctly secondary part of their cultural identity. What was seen by some in the 1970s as an ethnic revitalization was not that at all. Having a "Honk if you're Swedish" bumper sticker on a car or wearing a "Kiss me, I'm Irish" button on St. Patrick's Day says little about the importance of ethnic identification in an individual's life. Ethnicity for many is fashion; it is a way of distinguishing oneself. The "symbolic ethnicity" of most Americans is a far cry from a return to traditional ethnic communities.[52] Rather, the trivialization of ethnicity in mainstream American culture is a confirmation of the assimilating powers of modern life.

The most cohesive, the most geographically or economically isolated and

---

50. Higham, *Introduction*, ETHNIC LEADERSHIP IN AMERICA 14 (J. Higham ed. 1979).

51. Karst, *supra* note 2, at 335.

52. *See* Gans, *Symbolic Ethnicity: The Future of Ethnic Groups and Cultures in America*, in ON THE MAKING OF AMERICANS 193 (H. Gans ed. 1979).

the most tied-to-the-land of ethnic communities are the least subject to assimilation. Spanish-speaking immigrants, because of the proximity of a foreign Spanish-speaking culture and the movement of people back and forth across the border, have been slow to assimilate. Inner-city blacks, attending largely segregated schools in poor, segregated neighborhoods, have tended to develop many characteristics of a distinct culture relating to dress, language, ritual, music and beliefs. Reservation Indians, because of their geographic isolation and spiritual relationship with the land, have remained culturally distinct. A handful of religious groups, such as the Amish or Hasidic Jews, both of which maintain as a central religious tenet a rejection of much of modern life, have managed to maintain a high degree of cultural integrity. But even these groups have not been *immune* to assimilating effects, only *resistant*. On many Indian reservations, for example, the issue of cultural preservation has reached a flashpoint. More traditional Native Americans are locked in emotional struggles with more "progress-minded" Native Americans over the role on the reservations of such culturally disruptive activities as large-scale mining operations and high stakes bingo. For some, survival as a distinct people requires the return to subsistence hunting, religious ceremonies, storytelling, tribal dances and other features of traditional culture. For others, a more urgent goal is joining the American middle-class and enjoying the fruits of our consumer-oriented economy.[53]

As the importance of ethnicity has declined, the belief has grown that American culture is becoming homogenized. This belief is based on an outdated and narrow definition of heterogeneity. Heterogeneity can have its source in causes, lifestyles and beliefs that have little or nothing to do with ethnicity. As ethnic identification has become less important for most Americans, other bases for cultural identity have become more important. "Survivalists," "gay activists," "New Agers" and "Guardian Angels" represent a few of the literally thousands of new cultural groups to have arrived on the American scene in the past three decades. Cultural pluralism is here to stay, even if one were to ignore the fact that America has recently experienced an unprecedented wave of Asian and developing-world immigration.

The weakening of ethnic identification, which has led to urgent demands for protection of ethnic communities, should be a cause for hopefulness, not concern. The seemingly insoluble political problems arising from the presence of bitterly opposed ethnic groups in countries such as Yugoslavia, Canada, Israel, Liberia, the Soviet Union, Sri Lanka and China (to mention only a few) provide support for assimilationist policies. America's traditions of democracy and tolerance make the possibility of explosive confrontations unlikely, at least on the scale of those in other countries. Nonetheless, there is ample evidence that racial and ethnic bigotry will continue to exist in this country as long as racial and ethnic communities retain their distinct cultural identities. The key

---

53. *See generally*, Vinje, *Cultural Values and Economic Development on Reservations*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY, 155-75 (1985).

conditions for preservation of a distinct ethnic culture — insularity, autonomy, cohesiveness —are also conditions that can spawn suspicion and hostility from those outside the culture.

Although Chief Justice Burger's "melting pot" may not be the best analogy to describe the American process of assimilation, he was right to question why the Court should retreat from that ideal in favor of a theory of "ethnic group rights" that seems certain to entangle the government in a series of messy, divisive fights for group advantage. The dangers inherent in selecting various groups for special treatment — the opportunities for prejudice, the resentment of groups not accorded special treatment — suggest that a heavy burden of proof should be on those advocating departure from the principle of governmental neutrality.

OFFICIAL TOLERANCE OF CULTURAL DIFFERENCES: A HEALTHY MIDDLE-GROUND

Not every form of special treatment for ethnic groups carries with it the heavy potential for division and discord. Laws which neither favor one ethnic group at the expense of another nor support efforts to undermine American culture might be justified as a reasonable accommodation for cultural differences. An example of such an accommodation is the American Religious Freedom Act (ARFA) of 1978, which states that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to . . . exercise the traditional religions . . ., including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."[54] In accord with ARFA, the federal government, despite a strong concern over drug use, exempts the religious use of peyote by the Native American Church from its listing of controlled drug uses.[55] Other federal agencies have also shown a solicitude for Indian religious practices. Justice O'Connor, while rejecting Indian free exercise claims in a case involving the construction of a road through a national forest area having religious significance, applauded the Forest Service's "comprehensive" and "sympathetic" study of the road's impact, as well as the many ameliorative measures taken in the road's construction.[56] The Department of Interior, under the leadership of Secretary Cecil Andrus, adopted in the late 1970s land and water allocation policies designed to preserve aspects of Indian culture.[57] Legislative concern for preservation of Indian religious culture is not limited to the federal government. Twenty-three states,

---

54. Pub. L. No. 95-341, 92 Stat. 469, 42 U.S.C. § 1996 (1978).

55. 21 C.F.R. § 1307.31 (1989) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration.").

56. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 454 (1988).

57. Kirschten, *Interior Seeks a Balance Between Environmentalist and Indian Claims*, 9 NAT'L J. 1841 (1971).

for example, have statutory or judicially-created exemptions in their criminal drug laws for the religious use of peyote.[58]

The principle of reasonable accommodation for cultural differences is also reflected in legislation governing the use of Alaska's natural resources by indigenous populations. The Alaska Native Claims Settlement Act (ANCSA) of 1971[59] was a clear example of assimilationist thinking.[60] The Act was designed to bring Alaska natives into the American corporate mainstream. By almost all accounts, the law was a failure.[61] Amendments to ANCSA introduced by Alaska's congressional delegation reflect a willingness to preserve the native way of life. The Alaska National Interest Lands Conservation Act of 1980[62] also demonstrates recent congressional interest in preserving cultural distinctiveness. Section 810 of the Act provides special protection for subsistence uses, exempting natives from many generally applicable fish and game laws.[63] The Marine Mammal Protection Act[64] similarly exempts subsistence takings from a general moratorium on the takings of marine mammals.[65]

Other groups with distinctive cultures, such as the Amish, have won reasonable accommodations for their distinctive cultural practices in courts and in legislative arenas. In its celebrated 1972 decision in *Wisconsin v. Yoder*,[66] the United States Supreme Court exempted the Amish from a state compulsory education law that was said to constitute a grave threat to the Amish religion and way of life. Cynics, who believe the *Yoder* case to be an aberration, suggest that the Amish were able to win their exemption while other religious groups were losing theirs because the Amish raise the type of kids Chief Justice Burger would like us all to raise. They may be right. In 1986, the Supreme Court rejected two free exercise claims where the government's interest in denying the claimed exemption seemed particularly weak.[67] It was the Court's 1990

---

58. Smith v. Employment Div., 307 Or. 68, 73 n.2, 763 P.2d 146, 148 n.2 (1988), *rev'd*, 110 S. Ct. 1595 (1990).

59. Pub. L. 92-203, 85 Stat. 688, 43 U.S.C. §§ 1601-1628 (1971).

60. The assimilationist thinking behind the Act is discussed and criticized in T. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION (1985). Berger contends that the Act undermined subsistence and traditional lifestyles by removing native control over traditionally common lands and removing the village as the center of the natives' way of life. Title to lands was transferred to thirteen newly-created native corporations. Each native received shares of stock in his or her corporation.

61. According to Thomas Berger, " 'The promise of ANCSA has not been fulfilled.' . . . 'It has become, instead, a symbol of failed expectations, the focus of every discontent.' " (quoted in Powledge, *Village Journey*, THE AMICUS JOURNAL 28 (Fall 1986)).

62. Pub. L. No. 96-487, 94 Stat. 2371, 16 U.S.C. §§ 3101-3233 (1980).

63. *Id.* § 3120.

64. 16 U.S.C. §§ 1361-1407 (1988).

65. *Id.* § 1371(b).

66. 406 U.S. 205 (1972).

67. One case involved a native American couple's religious objection to the government's insistence that they provide a social security number for their daughter, Little Bird of the Snow. Bowen v. Roy, 476 U.S. 693 (1986). In the other case, an orthodox Jew and commissioned Air

decision in an Oregon case,[68] however, which in the words of Justice Blackmun's dissent, "effectuates a wholesale overturning of settled law."[69] In rejecting a claimed exemption from state drug laws for the religious use of peyote, a five-member majority of the Supreme Court stated that the federal and state legislators, not judges, should be in the business of crafting exemptions for religious groups. The inquiry required to grant such exemptions is not, according to Justice Scalia's opinion for the Court, within "the judicial ken."[70] Religious claimants have been sent off to the legislative branch, even though the legislative process may place "at a relative disadvantage those religious practices that are not widely engaged in".[71] Justice Scalia expects that they will not always be disappointed by the results: "[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation . . . ."[72]

CONCLUSION

America has traditionally opened itself to the influences of diverse cultures, but efforts to legislatively protect faltering cultures from assimilationist forces run against the American grain. Preservationists recognize the need for community to serve as a source of values and self-definition. But America is the quintessential individualist nation. America was built on its openness to change, its classlessness, its lack of respect for history and tradition. Change is what is best about America; change is what is worst about America.

America's contribution to diversity — its uniqueness — lies not in its cultural pluralism as such, but in its peculiar form of cultural pluralism which rests less on ethnic distinctions than it does on cultural distinctions that are based on individual choices. American culture, unlike the culture of other countries, is the product of the natural competition, intermingling and evolution of many distinct cultures. Successful assimilation of most ethnic groups has produced a culturally-rich nation whose political stability is the envy of the world. Ethnic identification, the most emotionally charged and politically threatening of all forms of cultural identification, has been overwhelmed by other forms of cultural identification open to a free people in a nation with a tradition of tolerance.

It is important that a policy favoring assimilation not be abandoned for a policy that would intervene to prevent the competition, intermingling and evolving of distinct cultures. Tolerance of cultural distinctiveness carries with it the principle that there be respect for the decisions of distinctive cultural

---

Force operator unsuccessfully sought exemption from an Air Force dress regulation which effectively prohibited the wearing of yarmulkes. Goldman v. Weinberger, 475 U.S. 503 (1986).

68. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990).

69. *Id.* at 1616 (Blackmun, J., dissenting).

70. *Id.* at 1604 (citing Hernandez v. Commissioner, 109 S. Ct. 2136, 2149 (1989)).

71. *Id.* at 1606.

72. *Id.*

communities to reshape their cultures. If Eskimos choose to abandon handmade kayaks for motor boats, if Reservation Indians choose to abandon traditional lifestyles and become a community of blackjack dealers and souvenir shop operators or if the Amish take a liking to cable television, there is no room for a government policy that would stand in their way. It's their choice. Extreme preservationists, captured by a powerful nostalgia, would assign to members of minority cultures the role of museum pieces. In the name of cultural pluralism, they would have government assume the role of museum curator, shaping policy wherever possible to preserve the integrity of the collection. Ultimately, such a view must be rejected as inconsistent with the American principle of respect for individual dignity.

Cultural politics will always be with us, but we should adopt approaches which minimize the likelihood of emotionally-charged intergroup conflict. Affirmative action programs have a high potential for producing such conflict and should be employed sparingly, if at all. The case for affirmative action is strongest in the areas of education and employment, where the potential exists that the assimilative benefits of integration outweigh the costs to the political system and to disadvantaged individuals. In areas such as funding for the arts, broadcast programming and curriculum structuring, the costs of preferential treatment based on ethnicity clearly outweigh the benefits. At stake, ultimately, is a common American culture upon which our sense of national identity rests.