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## ESSAY

# PATHS TO BELONGING: THE CONSTITUTION AND CULTURAL IDENTITY

KENNETH L. KARST†

*American history is the history of many peoples. In our multicultural society immigrants have followed two paths to satisfy their need to belong: they have turned inward to group solidarity and outward toward assimilation. Professor Karst explores these two paths to belonging and illustrates how our Constitution can aid outsiders in their search for a cultural identity.*

If there is any figure in our national history who lives in modern memory as a model of optimism, moderation, and common sense, it is Benjamin Franklin. It was Franklin who urged his countrymen to "hang together" at the outset of the Revolution.<sup>1</sup> But a quarter century earlier, he had sounded a divisive note concerning a growing foreign-born population in his home state:

Why should the Palatine boors be suffered to swarm into our settlements, and, by herding together, establish their language and manners, to the exclusion of ours? Why should Pennsylvania, founded by the English, become a colony of aliens, who will shortly be so numerous as to Germanize us, instead of our Anglifying them . . . ?<sup>2</sup>

Cultural differences are often seen as threatening deeply held values. Franklin's exasperation typifies the fear and resentment frequently expressed by "native" Americans<sup>3</sup> toward strangers at the gate. Throughout the nation's history, dif-

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1. Or, at any rate, so the story goes. For a caution about the story's authenticity, see BENJAMIN FRANKLIN'S AUTOBIOGRAPHICAL WRITINGS 418-19 (C. Van Doren ed. 1945).

2. Quoted in S. STEINBERG, THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA 11 (1981). In the same year (1751), Franklin also expressed a preference for excluding blacks from the country. 4 PAPERS OF BENJAMIN FRANKLIN 227, 234 (L. Labaree ed. 1959).

3. Throughout this Essay, references to America and Americans are short ways of designating the United States and its people. This usage reflects not chauvinism but economy; regrettably, we have no other short expression to distinguish ourselves from the other peoples of the Americas. (Even in Latin America "Americano," by itself, typically refers to someone from the United States.)

By "native," of course, I do not refer specifically to the members of American Indian tribes, but to all people born in the United States. For a discussion of the experience of Indian tribes in this country, see *infra* note 146.

ferences in race, language, religion, and ethnicity have produced waves of native hostility to the members of cultural minorities.

In the two decades since Congress repealed the national origins quota system,<sup>4</sup> most immigrants to the United States have come from Latin America and Asia,<sup>5</sup> settling in some cities in large numbers.<sup>6</sup> Like their predecessors, these

4. Immigration and Nationality Act of 1965, 79 Stat. 911 (codified at 8 U.S.C. §§ 1101-1525 (1982)).

5. Senator Moynihan has said:

In fiscal year 1973, the top ten visa-issuing ports were Manila, Monterrey, Seoul, Tijuana, Santo Domingo, Mexico City, Naples, Guadalajara, Toronto, Kingston. I would expect Bombay to make this 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 even we have never imagined.

Senator Daniel Patrick Moynihan, *quoted in* Fairlie, *Why I Love America*, NEW REPUBLIC, July 4, 1983, at 12, 17.

Between 1951 and 1960 lawful immigration to the United States from Europe, Asia, and Latin America averaged around 133,000, 15,000, and 100,000 per year, respectively. For 1979 lawful immigrants from the same three areas numbered around 64,000, 183,000, and 197,000, respectively. INFORMATION PLEASE ALMANAC 780 (1983). These numbers do not include persons who entered the country without lawful permission. According to the U.S. Census, persons of Mexican origin, who constituted 2.2% of the national population in 1970, constituted 3.9% in 1980. Bean, Stephen & Optiz, *The Mexican Origins Population in the United States: A Demographic Overview*, in THE MEXICAN AMERICAN EXPERIENCE: AN INTERDISCIPLINARY ANTHOLOGY, 57, 59 (R. de la Garcia, F. Bean, C. Bonjean, R. Romo & R. Alvarez eds. 1985) [hereinafter cited as THE MEXICAN AMERICAN EXPERIENCE].

From 1968 to 1977 some 35% of lawful immigrants to the United States were Spanish-speaking. Keeley, *Immigration and the American Future*, in ETHNIC RELATIONS IN AMERICA 28, 51 (L. Liebman ed. 1982); Midgley, *Comings and Goings in Immigration Policy*, in THE UNAVOIDABLE ISSUE: U.S. IMMIGRATION POLICY IN THE 1980s, at 41, 52 (D. Papademetriou & M. Miller eds. 1983) [hereinafter cited as THE UNAVOIDABLE ISSUE]. This figure is, of course, augmented by large numbers of immigrants from Mexico and Central America who have entered the country without permission. The number of expulsions of such entrants has recently been running close to one million per year. Weintraub, *Treating the Causes: Illegal Immigration and U.S. Foreign Economic Policy*, in THE UNAVOIDABLE ISSUE, *supra*, at 185, 188. The total number of entrants who are settled in the United States without permission is a matter of speculation. One authoritative conjecture places the figure between 7,970,000 and 9,990,000, of whom roughly 80% are from Latin America and the Caribbean, with about two-thirds of the total from Mexico. Corwin, *The Numbers Game: Estimates of Illegal Aliens in the United States, 1970-1981*, in U.S. IMMIGRATION POLICY 223, 248-50 (R. Hofstetter ed. 1984). A recent study concludes that the number ranges between two and four million; this conclusion, too, has been challenged. Shaw, *Number of Illegal Aliens in the U.S. May Be as Low as 2 Million*, *New Study Contends*, L.A. Times, June 25, 1985, § I, at 4, col. 1.

6. By the year 2000 a majority of California's population may be members of racial and ethnic minorities. A fairly conservative estimate by the Center for Continuing Study of the California Economy places the "nonHispanic white" population at about 55% of California's projected population in 2000. CENTER FOR CONTINUING STUDY OF THE CALIFORNIA ECONOMY, PROJECTIONS OF HISPANIC POPULATION FOR CALIFORNIA, 1985-2000, WITH PROJECTIONS OF NON HISPANIC WHITE, BLACK AND ASIAN & OTHER POPULATION GROUPS 23 (1982) (available from the UCLA School of Architecture and Urban Planning Library). Although the Center's estimates of minority populations are labeled "higher," in contrast to another "lower" projection, its assumptions about unlawful immigration seem quite conservative. *See id.* at 38-39, 50.

At Hollywood High School in Los Angeles the students speak some 35 different native languages. Braun, *Hollywood High: Many are Strangers in a Strange Land*, L.A. Times, Sept. 16, 1984, § IX, at 18, col. 3. Minority students constituted 44.7% of the freshman class that entered UCLA in the fall of 1983; the comparable figure at the University of California at Berkeley was 36.7%. Roark, *Minorities Soon Could Be Majority at UC and UCLA*, L.A. Times, Feb. 1, 1985, § I, at 1, col. 1.

The 1980 census reported 14,079,906 foreign-born people in the United States. . . . The latest available reckoning indicates there are 121 self-proclaimed "ancestry groups" living in the United States and speaking 385 languages and dialects. Last year, 204 foreign-language newspapers were published in America. God (or gods) is (or are) worshiped in the United States in approximately 250 different (denominational) ways.

*The Golden Door*, HARPER'S MAG., Mar. 1984, at 47.

immigrants have encountered new expressions of nativism. Their reception also raises new versions of some old questions about the constitutional order of our multicultural society. When can government properly treat membership in a racial or ethnic group as legally relevant? Do the members of a cultural minority have a constitutional stake in the preservation of their language and culture? When does governmental support for religion amount to impermissible official sponsorship? Should questions like these be left to cultural politics, or resolved as questions of constitutional law?

Beneath these issues lie larger questions. Is an individual's self-identification with a racial, religious, or ethnic group wholly consistent with that individual's identity as an American? If our constitutional law fosters the sense of belonging to particular cultural groups, will it undermine the unity of the Nation? What does it mean to belong to America? Who belongs?

In all times and places, cultural differences have bred suspicion and fear. In times of trouble, those fears tend to focus on particular groups of cultural outsiders as a source of danger. It becomes convenient to make scapegoats of "them"—the people who look different from "us" or whose language or behavior is foreign to our own. Cultural majorities have sought to force outsiders to conform to the prevailing cultural norms; alternatively, they have sought to dominate and suppress the outsiders, separating them from the public life of the community. These responses to fear of the outsider have served as spawning grounds for much of our present-day constitutional law. The United States Constitution, in the first amendment's religion clauses and in the guarantees of racial equality in the Civil War amendments, explicitly addresses issues arising out of our cultural differences. Other constitutional doctrines also reflect the influence of decisions arising out of attacks by cultural majorities on dissenting cultural groups. Imagine, for example, what the freedoms of speech and of the press might look like if all decisions involving foreign-born radicals, religious minorities, and civil rights demonstrators were erased from the United States Reports.<sup>7</sup>

From the calling of the Constitutional Convention in 1787 to the present day, the ideal of "one nation, indivisible" has occupied a central place in the theory and the practice of the American political order. When cultural divisions appear to threaten this ideal, one response is to bar people who seem different from entering the country. Every period of heavy immigration produces political agitation to close the gates.<sup>8</sup> Despite this recurrent impulse toward exclu-

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7. In his 1965 Ohio State Law Forum lectures, Harry Kalven, Jr., remarked that much of the modern doctrinal history of the first amendment could be written around cases involving communists, Jehovah's Witnesses, and black people. This comment is modified in the printed version, H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 6 (1965). Like the first amendment, the due process clause of the fourteenth amendment received its modern baptism of fire as a guarantee of procedural fairness in a series of state criminal cases involving members of racial and ethnic minorities, e.g., *Moore v. Dempsey*, 261 U.S. 86 (1923) (white mob's threats of violence forced jurors to render guilty verdict against blacks on trial for murder); cf. *Frank v. Mangum*, 237 U.S. 309 (1915) (a famous episode of anti-Semitism; Supreme Court denied a remedy in federal habeas corpus for an alleged due process violation closely similar to that in the *Moore* case).

8. On nativism and immigration, see M. JONES, *AMERICAN IMMIGRATION* 147-76, 247-77 (1960); J. HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*

sion, however, the persistent reality is that we remain a multicultural society, continually faced with the problem of building a nation.

The sense of belonging is a basic human need, vital to every individual's sense of self. This Essay begins by examining the role of group identity in the process of self-definition and finds in that process one of the main sources of intercultural conflict. After discussing the various types of nativist responses to cultural differences in America, the Essay explores two paths that cultural outsiders have followed to satisfy their need to belong: turning inward to group solidarity and cultural politics and turning outward toward assimilation into the larger society.

Next, the Essay considers the ways in which our constitutional law has recognized the importance of the values of connection—both connection to particular cultural groups and connection to the nation. Today's constitutional doctrine proclaims the values of tolerance and individual choice of cultural identity. The same doctrine makes two promises to members of racial, religious, and ethnic minorities. First, it promises them the opportunity to participate in our public life as equal citizens while maintaining such ties to the minority cultures as they may choose. Second, because those paths to participation are to be opened, members of minority groups are to have the opportunity to choose to identify with the cultural norms of the larger society.

Finally, the Essay discusses the unifying role of a civic culture universal to all Americans and central to the idea of American identity. Early in our history, the Constitution itself became a major symbol of our nationhood; it remains so today because it continues to be seen as a repository for the central substantive values of our civic culture: individualism, egalitarianism, and tolerance of diversity. Whatever cultural path an individual may choose, our constitutional law supports that person's right to belong to America by embracing the American civic culture.

## I. GROUP IDENTITY AND SELF-DEFINITION

In America, at least from its colonial beginnings, race, religion, and ethnicity have been major sources of self-identification and identification by others. Predictably, religious differences appeared early in colonial history, and in some colonies these differences were the source of conflicts that were not limited to religious doctrine.<sup>9</sup> The roots of these conflicts can be found in the fear of outsiders that is part of the process of personality formation in every human tribe.

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(2d ed. 1981); Seller, *Historical Perspectives on American Immigration Policy: Case Studies and Current Implications*, in U.S. IMMIGRATION POLICY, *supra* note 5, at 137, 140-55.

9. See generally S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE, 200-16 (1972) (discussing the historical significance of religious movements in the middle colonies of the United States). On the founding of Rhode Island following the expulsion from Massachusetts Bay of Roger Williams and Anne Hutchinson. See *id.* at 217-36. Some conflicts concerned land claims, which were, in turn, the foundation for political power. See, e.g., *id.* at 217-21.

A. *The Importance of Being Connected*

Members of cultural groups often regard themselves as the "true" people and regard outsiders as inferior.<sup>10</sup> The very names many peoples give to their own groups reflect this assumption: "Many tribes call themselves . . . 'we-are-men,' implying that all others are not."<sup>11</sup> Erik Erikson has called this phenomenon "pseudo-speciation," a false sense of being a member of a separate species. He traces the origins of this attitude to the process in which children are "familiarized by ritualization with a particular version of human existence,"<sup>12</sup> and thus instructed in what it takes to be a respected member of the community. The child, by this process of socialization, comes to "grasp the symbolic meaning of behavior";<sup>13</sup> the child comes to belong, to be a full participant in a particular culture. The assignment of meaning to behavior is one definition of culture.<sup>14</sup>

The individual's identification with cultural groups—ethnic, racial, religious, or language groups—plays a major part in the process of self-definition. In defining ourselves, we rely heavily on others' views of us, real or imagined, and on our connections with others.<sup>15</sup> Imagine right now that someone has asked you the question: "Who are you?" Perhaps the reader is a Walt Whitman, who would answer, "I am myself, unique in the universe, and I exult in my uniqueness."<sup>16</sup> Most of us, however, would likely respond in words premised on the ways in which we are related to others: "I am a mother"; "I am a law student"; "I am black"; "I am an old man"; "I am a Jew"; or "I am the child of Korean immigrants."

Although the list of identifying labels is potentially long, every feature you choose to describe yourself also will embrace a group of people. In the raw facts of existence, we are all Whitmans—unique, every single one of us. But as soon as we use generalized language to identify ourselves, the uniqueness of each individual comes down to this: no one of us bears precisely the same list of identifying characteristics as anyone else. Because the naming of each separate characteristic also identifies a group, it also is correct to speak of the uniqueness of

10. E.g., E. ERIKSON, *LIFE HISTORY AND THE HISTORICAL MOMENT* 176 (1975). "There was no word in old India to include both Aryans and non-Aryans together." H. ISAACS, *IDOLS OF THE TRIBE: GROUP IDENTITY AND POLITICAL CHANGE* 75 (1975).

11. A. MONTAGU, *MAN: HIS FIRST MILLION YEARS* 170 (1957).

12. E. ERIKSON, *TOYS AND REASONS* 79 (1977) (italics in original omitted). On the use of ritual in integrating the Amish community, see J. HOSTETLER, *AMISH SOCIETY* 207-30 (3d ed. 1980).

13. E. ERIKSON, *supra* note 12, at 81.

14. See E. HALL, *THE SILENT LANGUAGE* 20 (1973). Yet culture is more than a collection of mental states. "Behavior must be attended to . . . because it is through the flow of behavior—or, more precisely, social action—that cultural forms find articulation." C. GEERTZ, *THE INTERPRETATION OF CULTURES* 17 (1973).

15. See generally H. LYND, *ON SHAME AND THE SEARCH FOR IDENTITY* (1958) (discussing the relationship of guilt and shame to the development of a sense of identity). On "culture and identification," see E. HALL, *supra* note 14, at 23-40. The dependence of both personal identity and early learning on one's connections and emotional attachments to others is discussed in P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 100-01, 131-35 (1967).

16. See his poem, *Song of Myself*, in W. WHITMAN, *LEAVES OF GRASS* 24 (E. Holloway ed. 1926).

the individual in another way: you are unique in that no one else bears the same labels; no one else belongs to exactly the same combination of groups that you do.

The foregoing may make the reader want to cry out, "God is not a sociologist"—a proposition that seems self-evident. No label makes a person more or less of a person. Each of us, however, does go through a process of self-definition, and in this process our primary bonds to family, religion, and ethnic group play a crucial role.<sup>17</sup> These "primordial affinities"<sup>18</sup> not only provide a tie to other people, but also offer us our very selves. No wonder that we develop a bond "to the very tie itself."<sup>19</sup> Helen Lynd captured the idea in one simple but elegant sentence: "Some kind of answer to the question Where do I belong? is necessary for an answer to the question Who am I?"<sup>20</sup>

We do not find our identities solely through acculturation; we also *create* an important part of our identities out of a patchwork of labels. Primarily we adopt labels that are offered to us—or imposed on us—by other people, not only when we are children but throughout our lives. Most of us do not resist being labeled; indeed, from childhood we insist on our labels and could not do without them. There are those exceptional moments we all experience, when the wonder of our own sheer existence shines through, and each of us can be a Whitman for a few

17. These are not the only bonds that are used to define the self. Additional features that we share with others also play a part in self-definition. Examples are gender, sexual preference, occupation, and even political association.

18. J. GUSFIELD, *COMMUNITY: A CRITICAL RESPONSE* 27-29 (1975); Geertz, *The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States*, in *OLD SOCIETIES AND NEW STATES* 105, 109-19 (C. Geertz ed. 1963); Shils, *Primordial, Personal, Sacred and Civil Ties*, 8 *BRITISH J. OF SOC.* 139 (1957).

19. Geertz, *supra* note 18, at 109.

20. H. LYND, *supra* note 15, at 210. Although ethnicity is a term that is widely used and seldom defined with precision, see H. ISAACS, *supra* note 10, at 26-37, it implies a sense of attachment to a group, what Milton Gordon called the sense of "peoplehood." M. GORDON, *ASSIMILATION IN AMERICAN LIFE* 23 (1964); see also Novak, *Cultural Pluralism for Individuals: A Social Vision*, in *PLURALISM IN A DEMOCRATIC SOCIETY* 25, 29-34 (M. Tumin & W. Plotkin eds. 1977) (on definitions of ethnicity). Thus, I use the terms "ethnicity" and "ethnic identity" interchangeably to refer to one's connection with a group defined by the sharing of one or more of a number of overlapping traits such as ancestral origins, race, religion, language, and culture. Social scientists disagree about the degree to which ethnicity is a matter of individual choice. Some see ethnicity as a "strategic" choice and others see it as acquired at birth. See generally Eisinger, *Ethnicity as a Strategic Option: An Emerging View* (Book Review), 38 *PUB. AD. REV.* 89 (1978) (analysis of these two viewpoints in review of four books on ethnicity in America). It takes no training in social science to see that there must be at least some validity to both of these perspectives. Like other manifestations of the "nature versus nurture" question, see, e.g., E. MACCOBY & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* (1974), the issue of the sources of ethnicity must end with the recognition of wide variation among individuals. The intensity of ethnic attachment and its effects on behavior also vary greatly from one person to another. Micaela di Leonardo makes this point with great sensitivity in her aptly named study, *THE VARIETIES OF ETHNIC EXPERIENCE: KINSHIP, CLASS, AND GENDER AMONG CALIFORNIA ITALIAN-AMERICANS* (1984). See also McCready, *The Persistence of Ethnic Variation in American Families*, in *ETHNICITY IN THE UNITED STATES: A PRELIMINARY RECONNAISSANCE* 157 (A. Greely ed. 1974) (discussing the influence of ethnic heritage on contemporary American familial relationships).

An ethnic group, of course, is always in flux. Its changing membership results not merely from births and deaths, but also from the infusion of immigrants and the erosion of ethnic attachment as the generations pass. See *infra* text accompanying notes 176-80. Indeed, there is some exaggeration in speaking of membership in an ethnic group, for the boundaries of any such group are necessarily indistinct.

seconds. But imagine what it would be like to have that feeling all the time. It might be beautiful, but without question it would be terrifying. We need group identities in order to go on living our lives.<sup>21</sup> Not only do the labels protect us from being paralyzed by awe; they also designate our places in society and thus reinforce our sense of self-definition.

### B. *Difference and Distrust*

If my group identity tells me where I belong—and *that* I belong—it also tells me that you, who do not wear the same identifying labels, do not belong. We can trust the members of our own cultural group because we know the meanings of their behavior and know what to expect of them.<sup>22</sup> Conversely, distrust of the members of a different cultural group flows from fear, not just of the unknown but the fear that outsiders threaten our own acculturated views of the natural order of society.

To grow up in a culture is to learn that some ways of acting or talking or thinking are right and other ways are wrong. The very sense of one's identity is connected intimately with this learning; a young girl, in order to appreciate the idea of correct behavior, must understand the possibility of behaving incorrectly and recognize that possibility in herself. Thus, each of us carries around inside the image of what Erikson calls a "negative identity,"<sup>23</sup> which must be repressed if we are to live up to the expectations of our cultural groups. Outsiders—those who belong to other groups with other ways of behaving—make us uncomfortable partly because our own acculturation has not prepared us to understand their behavior<sup>24</sup> and partly because they serve so handily as screens on which we can project our own negative identities.<sup>25</sup> Our psychic response is predictable: we want to repress the outsiders' incorrect, foreign ways.

Much of American history can be seen as a series of re-enactments on the pattern of this "dramatic template."<sup>26</sup> Behind the bland term "intercultural re-

21. An existentialist might retort that it is only label-shredding, the pursuit of "being in itself," that enables a person truly to live. See, e.g., J. SARTRE, *BEING AND NOTHINGNESS* 3-30 (H. Barnes trans. 1966). I conclude from my limited reading, however, that existentialists appear not to mind the label "existentialist."

22. See E. HALL, *supra* note 14, at 35; R. WIEBE, *THE SEGMENTED SOCIETY: AN INTRODUCTION TO THE MEANING OF AMERICA* 172, 174-75 (1975).

23. E. ERIKSON, *supra* note 12, at 20.

24. E. HALL, *BEYOND CULTURE* 57-69 (1977).

25. E. ERIKSON, *supra* note 12, at 83; see also P. BERGER & T. LUCKMANN, *supra* note 15, at 170-71 (discussing how socialization can cause individuals to become "traitors to themselves" by adopting the normal values of a given social group). Erikson applies this notion specifically to "images of . . . the ethnic outgroup, and the exploited minority," in E. ERIKSON, *IDENTITY AND THE LIFE CYCLE* 29-30 (2d ed. 1980). These images, of course, do not arise spontaneously. Parents and others teach them to children by precept and example; adults in a particular culture reinforce the images for each other. See Pettigrew, *Prejudice*, in T. PETTIGREW, G. FREDRICKSON, D. KNOBEL, N. GLAZER & R. UEDA, *PREJUDICE*, at 1, 14-20 (1982). See generally G. ALLPORT, *THE NATURE OF PREJUDICE* (1954) (discussing the roots of ethnic prejudice in an individual's physical, cultural, ideological, and religious background). Furthermore, discriminatory behavior reinforces prejudice in the minds of the people who are practicing discrimination. Pettigrew, *supra*, at 29.

26. The term is R.D. Laing's. See R. LAING, *THE POLITICS OF THE FAMILY* 16 (1976). Such a template is not innate, but is itself a cultural artifact. Cultural patterns provide "a blueprint for the organizations of social and psychological processes . . ." C. GEERTZ, *supra* note 14, at 216.



lations" lies the menace of violence.<sup>27</sup> When two cultural groups with conflicting values contend in the political arena, each seeking to use the power of the state to impose its values on the other, distrust can ripen into hostility and even cause the rupture of the social fabric. No doubt it was this perception that led vice-presidential candidate Edmund Muskie, speaking specifically about "people of different races and national origins," to say in 1968, "the great issue in America is whether or not . . . Americans can trust each other . . . ."<sup>28</sup>

Distrust and fear of persons with different cultural backgrounds usually find expression in language emphasizing a conflict of values. In American history, however, an expressed concern for values has often provided the excuse and the emotional fuel for hostile action aimed at preserving interests that are mainly economic.<sup>29</sup> Typically, people who are themselves on the margin of the society and economy feel most threatened by cultural outsiders and are the most likely to resort to intercultural violence. When a Massachusetts mob burned an Ursuline convent in 1834, the act expressed not only anti-Catholic feeling but also resentment against Irish workers who were taking over jobs as bricklayers.<sup>30</sup> When Irish mobs committed their own violence against blacks in the New York draft riots of 1863, two of the root causes were fear of the competition of black labor and resentment over the use of blacks as strikebreakers.<sup>31</sup> Chinese workers in nineteenth century California received their harshest treatment at the hands of white labor union members.<sup>32</sup> And poor southern whites enthusiastically embraced the subordination of blacks when the racial caste system called Jim Crow had its sinister flowering around the turn of the century.<sup>33</sup> When a

27. R. BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM* (1975); U.S. COMM'N ON CIVIL RIGHTS, *INTIMIDATION AND VIOLENCE: RACIAL AND RELIGIOUS BIGOTRY IN AMERICA* (Clearinghouse Publication No. 77, 1983). A long series of episodes of violence motivated by racial, ethnic, and religious differences is summarized in *AMERICAN VIOLENCE: A DOCUMENTARY HISTORY* 87-338 (R. Hofstadter & M. Wallace eds. 1971).

28. T. WHITE, *AMERICA IN SEARCH OF ITSELF* 430 (1982).

29. This is one of the main themes of S. STEINBERG, *supra* note 2. Assertions of conflict over values are also frequently masks for racism. See D. WELLMAN, *PORTRAITS OF WHITE RACISM* (1977) (case studies of how the cultural backgrounds of five whites affect their feelings toward minority groups).

30. M. JONES, *supra* note 8, at 149.

31. *Id.* at 173, 174.

32. *Id.* at 264; A. SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1971) (describing the white majority's attempts to rationalize its treatment of Chinese immigrants on the West Coast). The attacks on Slavic workers in the Pennsylvania coal fields in the late nineteenth century were similarly motivated. M. JONES, *supra* note 8, at 256-57. Important political support for the exclusion of Japanese Americans from the West Coast during the Second World War came from associations of growers and farmers and from certain labor unions. F. BIDDLE, *IN BRIEF AUTHORITY* 217 (1962); M. GRODZINS, *AMERICANS BETRAYED* 19-91 (1949). California's 1913 law forbidding ownership of land by aliens ineligible for citizenship (*i.e.*, Asians) also was economically inspired. See M. JONES, *supra* note 8, at 253-54, 264. During the Civil War, General U.S. Grant expelled Jews from the Department of Tennessee, making them the scapegoats for all illicit cotton trading through the Union lines. *Id.* at 174.

33. See *THE ORIGINS OF SEGREGATION* (J. Williamson ed. 1968); see also C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974) (tracing the development of Jim Crow laws and other segregation statutes from before the Civil War through the 1960s). Woodward makes clear how the Southern patrician establishment encouraged this development by using racism as a way to maintain its political dominance in the face of a rising populist movement among poorer whites. *Id.* at 67-109. The final part of Stephen Steinberg's book, *supra* note 2, at 167-262, is devoted to demonstrating "the class character of racial and ethnic conflict." For an excellent short statement of the

cultural group is made into scapegoats, it is well to ask, "*Cui bono?*"; whose interests are advanced by the scapegoating?

In its most severe forms, intercultural conflict can imperil nationhood itself. Today's world contains a depressingly large number of illustrations.<sup>34</sup> In America hostility among cultural groups is only part of the persistent problem of achieving national unity, but it is properly seen as a threat to that unity even when it does not reach the level of tribal warfare. Those who react to cultural differences with fear or anger generally espouse nativist policies designed to repress the differences by excluding the "others" from the country, by forcing them to conform to the norms of the dominant culture, or by relegating them to a subordinate status in society.

## II. NATIVISM IN AMERICA

American nativism has taken three main forms: religious, political, and racial.<sup>35</sup> Late in the nineteenth century, racism broadened into Anglo-Saxonism, which extended its hostility and its assumptions of superiority beyond race to ethnicity.<sup>36</sup> In 1924 Congress responded to this "tribal mood"<sup>37</sup> by radically restricting immigration and imposing "national origins" quotas on immigrants, based on the composition of the population as it had been in 1890, before the great influx of "new immigrants" from southern and eastern Europe.<sup>38</sup> The 1924 law had a dramatic effect on immigration,<sup>39</sup> but was not a sharp break with the American past. Nativism's main techniques—exclusion, forced conformity, and domination—were known and used in the colonial era.<sup>40</sup>

### A. Nativism as Forced Conformity

The "melting pot" did not become part of the national vocabulary until the production of Israel Zangwill's play of that name in 1908, but the idea was as

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political uses of scapegoating, see Kenneth Burke's 1939 review of Adolf Hitler's *MEIN KAMPF*, *The Rhetoric of Hitler's "Battle,"* in K. BURKE, *TERMS FOR ORDER* 95-119 (S. Hyman ed. 1964).

34. "One attempt to count the 'ethnic/cultural fatalities' in such clashes between 1945 and 1967 listed thirty-four 'major' bloodlettings and hundreds of lesser collisions and came up with an estimated total of 7,480,000 deaths." H. ISAACS, *supra* note 10, at 3. Donald Horowitz's recent study of ethnic conflict combines careful analysis with richness of example. D. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (1985). The study centers on Asia and Africa, with some discussion of the Middle East and the Caribbean. See especially *id.* at 141-84, on "group comparison and the sources of conflict."

35. J. HIGHAM, *supra* note 8, at 3-11.

36. On the role of the eugenics movement in this process, see *id.* at 150-51; D. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HEREDITY* (1985); Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1420-35 (1981). On the social science milieu of the Progressive era and the rise of "intelligence" testing during this period, see Delgado, Bradley, Burkenroad, Chavez, Doering, Lardiere, Reeves, Smith & Windhausen, *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research*, 31 UCLA L. REV. 128, 132-36 (1983).

37. J. HIGHAM, *supra* note 8, at 323.

38. Immigration Act of 1924, ch. 190, §§ 11-12, 43 Stat. 153, 159-61. Regarding the political context of immigration quotas, see J. HIGHAM, *supra* note 8, at 300-30.

39. See M. JONES, *supra* note 8, at 278-307.

40. See *id.* at 6-63; R. WIEBE, *supra* note 22, at 14-18, 49-50; see, e.g., S. AHLSTROM, *supra* note 9, at 341.

old as the Nation itself. In 1782 an immigrant from Normandy, Hector St. John de Crèvecoeur, published his *Letters from an American Farmer*, a series of commentaries on life in the new nation. On the subject of assimilation he was rhapsodic:

What then is the American, this new man? . . . I could point out to you a family whose grandfather was an Englishman, whose wife was Dutch, whose son married a French woman, and whose present four sons have now four wives of different nations. . . . Here individuals of all nations are melted into a new race of men . . . .<sup>41</sup>

How did one acquire the status of an American? Crèvecoeur's answer makes two points that have found repeated expression in our prevailing national ideology:

He is an American, who, leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds. He becomes an American by being received in the broad lap of our great Alma Mater.<sup>42</sup>

In other words, there are two cultural requisites for belonging: participation in the Nation's political culture with the "new rank" of citizen and rejection of Old World ways of thinking and behaving in favor of the culture of the "new race." Later we shall consider the relation between American identity and the American civic culture.<sup>43</sup> For now our focus is the assumption that a cultural outsider can become a member of the American community only by relinquishing his or her native culture and embracing the prevailing American cultural norms.

The metaphor of "melting," popular from the early nineteenth century up to the 1930s, implied that both the "old stock" and more recent immigrants would contribute to a new American character and culture. The term, however, often served as an integrationist cloak for public and private programs aimed at forcing new Americans and their children to conform to the attitudes and behavior of their British-American predecessors.<sup>44</sup> This "Anglo conformity" came to dominate the idea of assimilation and thus to redefine the qualifications for being received in our Alma Mater's lap. To call a group "unassimilable"<sup>45</sup> implied that its people were not sufficiently similar to the old stock to adapt themselves to a society defined by the old stock's world view, and, therefore, that they should be excluded from the American community. Congress implemented this policy of exclusion by denying members of various racial or cultural groups

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41. H. DE CRÉVECOEUR, *LETTERS FROM AN AMERICAN FARMER* 69-70 (Penguin American Library ed. 1981) (1st ed. 1782).

42. *Id.* at 70 (italics in original omitted).

43. See *infra* text accompanying notes 369-468.

44. See, e.g., M. GORDON, *supra* note 20, at 84-114; Buenker, *Mainstream America and the Immigrant Experience*, in *THE DEVELOPMENT OF AN AMERICAN CULTURE* 312, 313-14 (S. Coben & L. Ratner 2d ed. 1983); Gleason, *American Identity and Americanization*, in W. PETERSON, M. NOVAK & P. GLEASON, *CONCEPTS OF ETHNICITY* 57, 80-96 (1982). See generally J. HIGHAM, *supra* note 8 (examining American nativism from 1825-1860).

45. Most immigrant groups have been tagged with this label or similar ones. See M. JONES, *supra* note 8, at 248 (concerning the Chinese); A. SAXTON, *supra* note 32 (concerning the Chinese); see also T. SOWELL, *ETHNIC AMERICA* 34-35, 57-58 (1981) (concerning the Irish and the Germans).

entry into the country<sup>46</sup> and by denying the benefits of citizenship both to certain classes of aliens<sup>47</sup> and to Americans who were black or Indian.<sup>48</sup> The irony is that the universalism expressed by Crèvecoeur—that all who embraced the nation's ideals would be admitted to full membership in America—was twisted so easily into racist nativism. It is no wonder that the members of some ethnic groups today bristle at the very word “assimilation” and take it as an affront.

The campaign for “Americanization” of foreigners, which gained intensity during the First World War and culminated in the mania of the Red Scare of 1919 to 1920, was the most determined national effort to coerce conformity to the values and behavior of the dominant culture. Government officials joined with private organizations in a zealous effort to press foreign-born Europeans to become citizens, to abandon their native languages for English, to suppress any expression of “anti-American” sympathies, and generally to demonstrate a “[c]onformist loyalty intolerant of any values not functional to it.”<sup>49</sup> The message was simple: to belong, you must conform.

Americanization mixed well-intentioned good works with nativist coercion. Many who took an interest in bringing the foreign-born into American society's mainstream offered vital social services, from adult education to housing assist-

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46. The Supreme Court consistently has treated congressionally mandated exclusions of aliens from the country with extreme deference, even upholding exclusions that are candidly racist. The leading early decision was the Chinese Exclusion Case, 130 U.S. 581 (1889). To say the very least, such decisions are in tension with the Court's modern treatment of other legislative classifications based on race, e.g., *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (racial classifications bear a “very heavy burden of justification”). Yet no recent decision has suggested that the Court is about to change its deferential position toward congressional control over admission of aliens to the country. Nonetheless, the modern constitutional climate seems to have contributed to the abandonment by Congress in 1965 of the “national origins quota” system of admission of aliens for permanent residence. See Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911, 911-12. Since 1965, immigration from Europe has been outpaced by immigration from Latin America and Asia. See *supra* note 5. Because of the 1965 amendments, the Supreme Court has been relieved of the necessity to reconsider the constitutionality of racially based statutory exclusions of aliens.

One permissible inference from the broad power of Congress to exclude aliens is that due process protections of the right to remain in the country grow progressively stronger as an alien lives, works, and establishes ties here. *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1324-34 (1983). For a short summary of congressional policy toward immigration, see Bernard, *A History of U.S. Immigration Policy*, in R. EASTERLIN, D. WARD, W. BERNARD & R. UEDA, IMMIGRATION 75 (1982) [hereinafter cited as IMMIGRATION].

47. As early as 1790 Congress limited naturalization to “free white” persons. Act of March 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795). During Reconstruction, Congress made persons of African descent eligible for naturalization. Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256. In 1922 the Supreme Court faced the question whether aliens of Japanese ancestry were eligible for citizenship. The Court's answer: No, Japanese are not African, and “white,” in the statute, means Caucasian. *Ozawa v. United States*, 260 U.S. 178 (1922). During and just after the Second World War Congress repealed these racial restrictions on naturalization. Act of December 17, 1943, ch. 344, § 1, 57 Stat. 600, 600-01 (codified at 8 U.S.C. § 263 (1982)) (Chinese); Act of July 2, 1946, ch. 534, § 1, 60 Stat. 416, 416 (codified at 8 U.S.C. § 703 (1982)) (Indian and Filipino); Immigration and Naturalization Act of 1952, ch. 477, § 311, 66 Stat. 163, 239 (codified at 8 U.S.C. § 1422 (1982)) (total repeal of the exclusion, principally affecting Japanese). Under modern constitutional doctrine a racial restriction on naturalization of persons otherwise qualified for citizenship almost certainly would be invalid. The history of American policy toward citizenship is briefly summarized in Ueda, *Naturalization and Citizenship* in IMMIGRATION, *supra* note 46, at 106.

48. Even the abolitionists did not argue for full integration. See J. HIGHAM, *SEND THESE TO ME: IMMIGRANTS IN URBAN AMERICA* 179 (1984).

49. J. HIGHAM, *supra* note 8, at 247.

ance to protection against fraud.<sup>50</sup> The coercive face of Americanization had its private aspects,<sup>51</sup> but also enlisted government officials at all levels. In 1918 Congress doubled the income tax on "non-resident aliens";<sup>52</sup> although it was not clear who would be considered non-resident, thousands of aliens promptly declared their intention to become citizens.<sup>53</sup> Other measures were proposed and even introduced in Congress, but failed to pass: deportation of aliens who failed to apply for citizenship or who failed to learn English within a specified period; and, short of deportation, "suppression of the foreign-language press, mass internments, and the denial of industrial employment to aliens."<sup>54</sup>

State and local governments joined the Americanization crusade with gusto. Fifteen states banned teaching foreign languages in public schools; some states required public school teachers to be citizens; and Oregon required all elementary school children to attend public rather than private schools. A few years later the United States Supreme Court held both the ban on teaching foreign languages and the ban on private elementary schools unconstitutional.<sup>55</sup> The Governor of Iowa was not to be outdone; he issued a proclamation forbidding the use of foreign languages in public and private schools, in church services, and even in conversations in public places or over the telephone.<sup>56</sup> In an action eventually upheld by the Supreme Court, Cincinnati prohibited aliens from operating poolrooms, to prevent foreigners from gathering in places where they would be away from Americanizing influences.<sup>57</sup> Most of these measures and proposals plainly violate today's constitutional norms.<sup>58</sup> In the frenzy of 1915 to 1920, however, if the foreign-born were to have Americanization imposed upon them, the courts were only rarely disposed to intervene.

Forced conformity, like other forms of cultural domination, is not just a means of securing power or material advantage for members of the dominant culture. The coercion of a cultural minority to conform also reassures the majority that its own group identities are secure. For example, the question of liquor prohibition, which arose in the mid-nineteenth century, always repre-

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50. *Id.* at 235-50.

51. Employers, for example, pressed their alien employees to become citizens and otherwise encouraged the abandonment of Old World dress and manners. *Id.* at 235-48.

52. Revenue Act of 1918, ch. 18, § 210, 40 Stat. 1057, 1062 (1919).

53. J. HIGHAM, *supra* note 8, at 248.

54. *Id.* at 249-50. The National Americanization Committee further recommended congressional legislation requiring semiannual registration of the whole population and internment of those who had "anti-American" sympathy. *Id.* at 249.

55. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (elementary schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (foreign language). The modern Court, however, has upheld a state law forbidding aliens to teach in public schools. See *infra* note 96 and accompanying text.

56. J. HIGHAM, *supra* note 8, at 247 n.30.

57. *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927). The Court previously had upheld a 1915 New York law preferring citizens over aliens as laborers in projects under public works contracts. *Crane v. New York*, 239 U.S. 195 (1915); *Heim v. McCall*, 239 U.S. 175 (1915).

58. The exceptions, in addition to the ban on alien school teachers, likely would be found in the proposals for deportation of aliens and the discriminatory income tax. Cf. *Mathews v. Diaz*, 426 U.S. 67 (1976) (unanimously upholding conditions that denied Medicare benefits to some aliens and articulating very permissive standard of judicial review for congressional regulation of aliens). Given the Supreme Court's recent decisions, it is not possible to be confident that a congressional ban on employment of aliens in industrial plants would be held invalid.

sented more than a dispute about the use of legal sanctions to prevent alcohol abuse. The issue symbolized the question whether Anglo-Protestant morality could maintain its dominance over the cultural norms that Irish and German immigrants had brought with them.<sup>59</sup> It was no accident that the prohibition amendment to the Constitution was proposed and ratified at the height of the Americanization furor; the temperance movement and nativism had always gone hand in hand. The effort of evangelical Protestants to enact their norms into law polarized the opposing forces and accentuated the symbolic import of the movement. Now that the issues had been joined, defeat or victory was a clear-cut statement of public dominance.<sup>60</sup> The old saw, "The wets have their liquor and the drys have their law," spoke not only to hypocrisy but also to nativism.

Intercultural domination, however, always rests on shaky foundations, for it is based on fear. The dominant group seeks to impose its norms precisely because it sees those norms threatened by the others' very presence. On both sides of the prohibition issue, cultural identifications were strengthened, because both sides felt that their cultural values were under attack. Attempts at domination are not always successful. In 1932, with the strong support of the Irish voters in northeastern cities, the Democratic Party captured the Presidency and the Congress. The repeal of the eighteenth amendment was accomplished the following year.<sup>61</sup>

Not all forms of domination are so readily reversed through the practice of cultural politics. Particularly when cultural hostility is aggravated by wartime anxiety, distrust of a cultural minority is apt to ripen into suspicions of disloyalty and suppression of dissent.

## B. Nationalism and Negative Identity

In principle, allegiance to the United States is not inherited but is chosen by each citizen. A century-old act of Congress embodies the right of expatriation.<sup>62</sup> Thus, citizens who are cultural outsiders may be suspected of disloyalty, especially if they express their dissent from prevailing political norms. This sort of suspicion is merely a special case illustrating the more general tendency to project one's own "negative identity" onto outsiders.<sup>63</sup> The insiders' suspicions are

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59. One commentator has noted:

Advocates of prohibition [in the 1850s] . . . found their progress threatened by "a noisy, drinking and brawling rabble" of Irish and Germans. "They bring the grog shops like the frogs of Egypt upon us," one writer complained, and the temperance societies warned that the success of their cause depended upon a check of immigration.

R. BILLINGTON, *THE PROTESTANT CRUSADE 1800-1860: A STUDY OF THE ORIGINS OF AMERICAN NATIVISM* 323 nn.2-3 (1938).

60. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOC. PROBS. 175, 184 (1967). See generally J. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (1963) (detailing how political conflicts over the temperance movement symbolized the ascent and descent of status groups).

61. The twenty-first amendment, repealing the eighteenth amendment, was ratified in 1933.

62. Act of July 27, 1868, ch. 249, 15 Stat. 223.

63. See *supra* text accompanying note 23.

heightened by their own awareness of the ways in which they have subordinated the outsiders, denying them membership in the community and a sense of belonging: "Of course they can't be loyal; look at the way we have treated them."

Ever since the colonial era, suspicions of disloyalty have surrounded various minorities: Catholics, who were thought loyal to a foreign Pope;<sup>64</sup> Germans, who were required to sign a loyalty oath in Pennsylvania in 1727<sup>65</sup> and who remained suspect during the First World War;<sup>66</sup> persons of Japanese ancestry, who were interned during the Second World War;<sup>67</sup> and Chinese, who were called "subversive" in California late in the nineteenth century.<sup>68</sup> In a nation of immigrants, it could hardly be otherwise. Most of the foreign-born do retain ties to their home countries, and their descendants often seek to influence the Nation's policy toward foreign causes in foreign lands. This allegiance of immigrants to their homeland often has been viewed by members of the dominant culture as disloyalty to America.

The American Revolution itself required people to choose sides between allegiances to their ancestral homelands and their new nation. Both the old stock of English ancestry and other ethnic groups were divided in their attitudes toward the Revolution—"a triumph of environment over heredity."<sup>69</sup> Two institutional questions concerning the loyalty of the foreign-born surfaced at the Constitutional Convention of 1787 and persisted past the turn of the century. First, how long should aliens be required to wait before they became eligible for citizenship? Second, should the foreign-born be eligible to hold public office? The Convention left to Congress the issue of the residence period for naturalization,<sup>70</sup> but did set qualifications for election to Congress and the presidency. The President must be a "natural born" citizen, with fourteen years of residence in the United States.<sup>71</sup> Despite George Mason's reluctance "to be governed by foreigners and adventurers,"<sup>72</sup> the Convention required only relatively short periods of citizenship for senators and representatives.<sup>73</sup> The First Congress set the waiting period for naturalization at two years.<sup>74</sup>

Soon, however, as a direct result of the influx of political refugees, the cli-

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64. R. BILLINGTON, *supra* note 59 (Anti-Catholic sentiments of American colonists stemmed from English bitterness toward Catholics and from perceived threats from various Catholic groups.); J. HIGHAM, *supra* note 8, at 5-7, 28-31, 77-87, 291-94.

65. M. JONES, *supra* note 8, at 47-48.

66. See *supra* text accompanying note 49.

67. See *supra* note 32; *infra* notes 101, 122.

68. M. JONES, *supra* note 8, at 248-49.

69. *Id.* at 63; cf. F. LEYBURN, *THE SCOTCH-IRISH: A SOCIAL HISTORY* 253-54, 305-09 (1962) (most Scotch-Irish enthusiastically supported American independence; exception was in North Carolina where Presbyterian ministers led support for the Crown).

70. U.S. CONST. art. I, § 8, cl. 4.

71. *Id.* art. II, § 1, cl. 4. Alternatively, the President might be a United States citizen at the time the Constitution was adopted. *Id.*

72. M. JONES, *supra* note 8, at 81.

73. The terms were seven years for the House of Representatives and nine years for the Senate. U.S. CONST. art. I, § 2, cl. 2 (House of Representatives); *id.* § 3, cl. 3 (Senate).

74. Naturalization Act of 1790, ch. 3, 1 Stat. 103, *repealed by* Naturalization Act of 1795, ch. 20, § 1, 1 Stat. 414, 414; see M. JONES, *supra* note 8, at 81-82.

mate changed.<sup>75</sup> By 1795 the waiting period had been extended to five years,<sup>76</sup> and three years later, under the threat of war with revolutionary France, a Federalist Congress extended the period for naturalization to fourteen years in a legislative package that included the infamous Alien and Sedition Acts.<sup>77</sup> The Federalists expressed fear that aliens were engaging in "treasonable or secret machinations against the government."<sup>78</sup> The Alien Enemies Act gave the President discretion to seize and deport an alien summarily, without accusation or hearing.<sup>79</sup> The war with France failed to materialize; the Alien Friends Act expired in 1800, and the Alien Enemies Act went unenforced.<sup>80</sup> Yet these laws had their intended intimidating effect; in 1798 several boatloads of French citizens left the United States.<sup>81</sup> The Sedition Act, which essentially made strong criticism of government officials a crime, was logically connected with the Alien Acts: "those who corrupt our opinions . . . are the most dangerous of all enemies."<sup>82</sup> Unlike the Alien Acts, however, this law was enforced, chiefly against foreign-born critics of the government.<sup>83</sup>

Upon the Republicans' accession to national political power in the 1800 elections,<sup>84</sup> Jefferson pardoned the victims of the Sedition Act.<sup>85</sup> In 1802 the waiting period for naturalization was again set at five years, where it has remained ever since.<sup>86</sup> The Alien and Sedition Acts were discredited. The legislatures of Kentucky and Virginia reflected more than a local opinion when they complained that Congress had exceeded its enumerated powers, and that the Acts, by giving legislative and judicial powers to the President, had "subverted the general principles of free government."<sup>87</sup> In the twentieth century, the United States Supreme Court has made use of this history to support its develop-

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75. Federalists feared the Irish, Jacobins who had fled from France, and exiled British radicals. Republicans feared French royalists who had been expelled from France and Santo Domingo. M. JONES, *supra* note 8, at 82-83.

76. Naturalization Act of 1795, ch. 20, § 1, 1 Stat. 414, 414, *repealed by* Naturalization Act of 1802, ch. 28, § 1, 2 Stat. 153. The Act also required applicants for naturalization to renounce foreign titles and foreign loyalties.

77. Naturalization Act of 1798, ch. 54, § 1, 1 Stat. 566, 566-67, *repealed by* Naturalization Act of 1802, ch. 28, § 1, 2 Stat. 153, 153-54. Because the royalists had gone back to France, Republicans decried the Acts. The French and Irish had become Republican supporters—a factor that was not irrelevant to the Federalists' enthusiasm for these laws.

78. J. CAREY, *DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE* 37 (1931).

79. *Id.* at 37-38; M. JONES, *supra* note 8, at 86.

80. President Woodrow Wilson, however, used the Alien Enemies Act during the First World War. J. HIGHAM, *supra* note 8, at 210.

81. M. JONES, *supra* note 8, at 87-88.

82. W. PRESTON, *ALIENS AND DISSENTERS* 22 (1963). The Federalists' anti-Jacobin rhetoric linked atheism with sedition. L. LEVY, *THE EMERGENCE OF A FREE PRESS* 288-89 (1985).

83. M. JONES, *supra* note 8, at 88.

84. The Republicans captured both Congress and the Presidency. Thomas Jefferson was elected President with crucial support of French- and Irish-born citizens in New York City.

85. See Justice Brennan's discussion of this history in *New York Times Co. v. Sullivan*, 376 U.S. 254, 273-77 (1964).

86. Naturalization Act of 1802, ch. 28, § 1, 2 Stat. 153, 153-54; M. JONES, *supra* note 8, at 9.

87. J. CAREY, *supra* note 78, at 38-39 (quoting Madison's speech before the Virginia Assembly, Dec. 21, 1798). On the emergence of a libertarian theory of the freedom of the press out of the Republican reaction to the Sedition Act, see L. LEVY, *supra* note 82, at 282-349.



ment of strongly libertarian first amendment doctrine.<sup>88</sup> Yet the Alien and Sedition Acts left another legacy that is anything but libertarian. They set a pattern for the institutionalization of nativist exclusion as an appropriate response to fear of foreign people and foreign ideas. The Hartford Convention in 1814 called for a constitutional amendment to forbid a naturalized citizen from holding federal office.<sup>89</sup> In the 1850s the Know-Nothing Party renewed this demand and called for extending the residence requirement for naturalization to twenty-one years.<sup>90</sup> None of these proposals was enacted, although Massachusetts, under the influence of the Know-Nothings, briefly amended its state constitution to prohibit immigrants from voting until two years after their naturalization.<sup>91</sup> More significantly, the exclusion and expulsion of aliens on political grounds has reappeared periodically in the twentieth century,<sup>92</sup> along with the use of governmental power to suppress both radical and moderate dissent by members of cultural minorities.<sup>93</sup>

The assumed connection between alienage and disloyalty appears to be deeply rooted in the role that "negative identity" plays in self-definition.<sup>94</sup> No one should be surprised when a legislature translates this antipathy to foreigners into laws limiting a wide variety of state jobs to citizens; the legislature, after all, represents voters, not one of whom is an alien.<sup>95</sup> It is surprising, however, that recent majorities of the Supreme Court have turned a blind eye to such bursts of nativism as laws forbidding aliens to be public school teachers or probation officers.<sup>96</sup> When the Court upheld these laws using language about preserving our "political community,"<sup>97</sup> its words were more than a little reminiscent of the

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88. Justice Holmes made this point in his influential dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919), which he wrote during the great postwar Red Scare. The case involved the prosecution of alien supporters of the Russian Revolution. In fact, most recent immigrants had been politically inactive. *M. JONES, supra* note 8, at 237. Holmes appears to have been wrong about his history. L. LEVY, *supra* note 82, at 281. Justice Brennan got it right in *New York Times Co. v. Sullivan*, 376 U.S. 254, 273-77 (1964).

89. *M. JONES, supra* note 8, at 89.

90. *Id.* at 156-57.

91. *Id.* at 157-58.

92. For a discussion of the "Soviet Ark," a boatload of leftist aliens deported to Russia in 1919 during the Red Scare, see *M. JONES, supra* note 8, at 274. A 1903 law forbade anarchists from entering the country. *Id.* at 262. During the 1950s there were some deportations of aliens for political reasons, and the exclusion of radical aliens was common. *Kleindienst v. Mandel*, 408 U.S. 753 (1972), sustained a provision of the Immigration and Naturalization Act of 1952, ch. 66 Stat. 477, § 212 (a)(28)(D), 163, 185 (codified at 8 U.S.C. § 1182 (a)(28)(D) (1982)), that made alien communists ineligible to receive entry visas.

93. On the "Palmer Raids" of 1919 to 1920, a massive roundup of radicals, see W. PRESTON, *supra* note 82, at 208-29. Black radicals were a particular target for both federal and state officials. See *Herndon v. Lowry*, 301 U.S. 242 (1937); *Herndon v. Georgia*, 295 U.S. 441 (1935); *FEDERAL SURVEILLANCE OF AFRO-AMERICANS 1917-25: THE FIRST WORLD WAR, THE RED SCARE, AND THE GARVEY MOVEMENT* (T. Kornweibel ed. microfilm 1985).

94. See *supra* text accompanying note 23.

95. Once I heard Judge James Garfield Stewart of the Ohio Supreme Court tell this story: He was running for reelection as mayor of Cincinnati during one of the periodic crises in Cyprus pitting Greeks against Turks. In the judge's words: "I spoke one night to a Greek-American organization. You know, there aren't many Turks in Cincinnati, . . . [pause] . . . and I just gave the Turks hell."

96. *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (probation officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (public school teachers).

97. *Cabell v. Chavez-Salido*, 454 U.S. 432, 438-41 (1982); *Ambach v. Norwick*, 441 U.S. 68, 74-75 (1979).

Federalist rhetoric of 1798 about "those who corrupt our opinions."<sup>98</sup> Who knows what heresy may be propagated when a French citizen, teaching a French language class, helps students to pronounce words such as *liberté*, *égalité*, and *fraternité*?<sup>99</sup>

Wartime combines anxiety with patriotic fervor, weakening the restraints that ordinarily inhibit acts of hostility against cultural outsiders—as the French who left New York in 1798 well understood. The wave of nativism that swept the country in the mid-nineteenth century was similarly exaggerated by anxieties over an internal conflict that eventually would lead to war—anxieties over the state of a Union that seemed to be coming apart.<sup>100</sup> By the mid-twentieth century, two world wars had produced two virulent nativist movements: the harsh treatment of both Germans and foreign-born radicals during and after the First World War, and the assault on Japanese Americans during the Second World War.<sup>101</sup> During the Vietnam War blacks who opposed the war risked being charged with radicalism, or disloyalty, or both.<sup>102</sup> It bears emphasis that the question of disloyalty was typically posed not for individuals but for groups. General John L. DeWitt, who presided over the "relocation" of Japanese Americans in the Second World War, illustrated this phenomenon in his shameful remark, "A Jap's a Jap."<sup>103</sup>

Religious, racial, and ethnic ties also have caused various cultural groups to seek to influence American public policy concerning issues in "the home country." The catalogue is as long as the list of ethnic groups in America—and that is a long list, indeed.<sup>104</sup> Today an American Jew can support Israel and an

98. See *supra* note 82 and accompanying text.

99. In *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982), the official job description was "Deputy Probation Officers, Spanish-speaking." *Id.* at 443 (Blackmun, J., dissenting). For a discussion of some recent cases in this area, see Note, *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1576 (1979).

100. See, e.g., R. BILLINGTON, *supra* note 59, at 386 ("The Know-Nothing Party was really a no-Popery party . . . . This fact alone accounts for its unity, for on more material matters the Know-Nothings were as divided as other organizations in that area of sectional strife").

101. See F. BIDDLE, *supra* note 32, at 212-26; M. GRODZINS, *supra* note 32, at 231-52; P. IRONS, *JUSTICE AT WAR* (1983); U.S. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* (1982). State and local governments joined in the hunt. Peter Irons reports that, before the relocation program began, the county manager of Los Angeles County fired all Japanese Americans from county employment and that Idaho's Attorney General advocated "concentration camps" because, as he put it, "We want to keep this a white man's country." P. IRONS, *supra*, at 40-41, 72. Jeanne Wakatsuki Houston and James D. Houston have written an affecting memoir of one family's experience in a desert camp, titled *FAREWELL TO MANZANAR* (1973).

102. Dr. Martin Luther King, Jr., was the subject of surveillance and harassment by the Federal Bureau of Investigation, in part because of his opposition to American involvement in the Vietnam War. For a detailed account of the FBI's surveillance of Dr. King, see D. GARROW, *THE FBI AND MARTIN LUTHER KING, JR.: FROM "SOLO" TO MEMPHIS* (1981). See also *Bond v. Floyd*, 385 U.S. 116 (1966) (Georgia legislature's effort to refuse to seat a black legislator for his statement of sympathy for draft resisters).

103. M. GRODZINS, *supra* note 32, at 297.

104. People of Irish descent generally have favored Catholic emancipation in Ireland, Irish independence, and the unification of Ireland. Germans after 1848 opposed the German monarchy and favored revolutionary democratic movements. Before both world wars, many Germans favored American neutrality. Catholics generally have been more receptive than Protestants to American diplomatic representation in the Vatican. Most Jews have been solicitous of the interests of Israel—as President Harry Truman no doubt recognized when he quickly granted American recognition to

American of Arab ancestry can support the Arab states, without being accused of disloyalty. But when the home country and the United States are sorely at odds, attitudes harden among members of the dominant culture.<sup>105</sup>

Yet these expressions of support for the homeland<sup>106</sup> serve mainly as a source of self-respect for people who above all want to find a secure place within American society—people who need reassurance about their identities precisely because they see themselves as cultural outsiders.<sup>107</sup> If there be irony in this perception that the path to inclusion lies through separate identity,<sup>108</sup> it is an irony with lineage that runs back at least to the Germans in eighteenth century Pennsylvania.<sup>109</sup> Inclusion, it seems, is what nearly everyone wants, whatever his or her sense of ethnic or religious identity. Despite the fears that have plagued intercultural relations in America, the disloyalty of the foreign-born and their children has turned out to be, with remarkably few exceptions, a figment of nativist imagination.

### C. *Separation and Stigma*

The peoples brought to this country by force from Africa were culturally diverse. On the plantations of the American South, however, their common bondage in slavery welded them into one people.<sup>110</sup> A considerable measure of what we call cultural identity begins in the common experience of a number of people who share a group label imposed from the outside, along with the ill treatment associated with that label. Stephen Steinberg exaggerated only mildly when he said, "Ethnic pluralism in America has its origins in conquest, slavery, and exploitation of foreign labor."<sup>111</sup>

Jim Crow illustrates the main technique of nativist domination: the enforced separation of members of the subordinate cultural group from a wide range of public and private institutions that, in the aggregate, constitute "society." Racial segregation in the American South was the successor to slavery and

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the new state in 1948—while an increasing (and increasingly vocal) American Arab population has taken a different view of the Nation's Middle East policies. Armenians take intense interest in American policy toward Turkey. Blacks have always opposed white supremacy in South Africa and other African colonies and states. Recent American policy in Central America has drawn fire from a number of people of Mexican and Central American ancestry.

105. Consider, for example, the hostility to Iranians in America during the hostage crisis of 1979-81, a hostility that extended to Iranians of any and all political affiliations.

106. In this expression I include even the pan-African homeland constructed by American blacks.

107. See, e.g., T. BROWN, *IRISH-AMERICAN NATIONALISM, 1870-1890* (1966); J. DOLGIN, *JEWISH IDENTITY AND THE JDL* (1977); Harrington, *Loyalties: Dual and Divided*, in M. WALZER, E. KANTOWICZ, J. HIGHAM & M. HARRINGTON, *THE POLITICS OF ETHNICITY* 93, 99-102 (1982).

108. The irony lies in the eyes of others; for the people who are asserting their identity, there is no irony at all.

109. M. JONES, *supra* note 8, at 27-30.

110. J. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* (rev. ed. 1979); S. ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* 81-139 (1976); L. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 502-56 (1981); Berlin, *Time Space, and the Evolution of Afro-American Society on British Mainland North America*, 85 AM. HIST. REV. 66 (1980).

111. S. STEINBERG, *supra* note 2, at 5. On the exclusion and subordination of American Indians, see *infra* note 146.

the Black Codes, both of which had been decisively made unlawful by congressional legislation and the Civil War amendments. In this historical context it is easy to see Jim Crow for what it was: a thoroughgoing program designed to maintain blacks as a group in the position of a subordinate racial caste by means of a systematic denial of belonging.<sup>112</sup> Jim Crow laws extended from disenfranchisement to prohibitions on interracial marriage and imposed racial segregation everywhere: schools, courtrooms, buses, restaurants—indeed, all places where people of both races otherwise might interact in public. Private racial discrimination also played an important role in maintaining the caste system, producing segregation in housing, employment, and public accommodations, and leaving a legacy that, even today, remains only partially remedied. Lynching was the system's ultimate weapon, and it was by no means a wholly private enterprise.<sup>113</sup>

Discrimination against other ethnic groups typically has not reached the level of intensity that discrimination against blacks reached in the South. Yet the history of intercultural relations in America provides parallels to nearly all the features of Jim Crow. Here, too, the law played its role. Jews were forbidden to vote in some states until the mid-nineteenth century; New Hampshire did not repeal this limitation on the franchise until 1877.<sup>114</sup> School segregation affected not only blacks<sup>115</sup> but Asians,<sup>116</sup> Mexican Americans,<sup>117</sup> and, for a time,

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112. I refer to caste in the sense of a rigid social stratification (which, for blacks, has meant relegation to a lower stratum), essentially inherited, with the sort of staying power that gives it the look of permanence. In this usage I follow Gunnar Myrdal, who treats the idea of racial caste as an extreme form of social class division. See G. MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 675 (1944). For a purist's insistence on a different use of words, see Dumont, *Caste, Racism and "Stratification": Reflections of a Social Anthropologist*, in *SOCIAL INEQUALITY* 337 (A. Beteille ed. 1969).

113. The Supreme Court has had its share of experience with cases involving lynchings and other racially motivated murders. See, e.g., *United States v. Price*, 383 U.S. 787 (1966) (three black men released from prison in middle of the night were intercepted and killed by a lynch mob including three Mississippi law enforcement officers); *Screws v. United States*, 325 U.S. 91 (1945) (three Georgia law enforcement officers arrested and beat to death a young black man suspected of stealing a tire); *Moore v. Dempsey*, 261 U.S. 86 (1923) (group of white men attacked and fired upon black congregation attending church). On lynching, see R. GINSBURG, *ONE HUNDRED YEARS OF LYNCHINGS* (1969); G. MYRDAL, *supra* note 112, at 560-64.

It is no accident that the period of the Americanization movement was the low point for blacks in America during the century that followed the Civil War. See generally *BLACK WORKERS IN THE ERA OF THE GREAT MIGRATION, 1916-1929* (J. Grossman ed. microfilm 1985) (discussing the migration of blacks from the rural South to Northern cities). On the Supreme Court's role in this period, see A. BICKEL & B. SCHMIDT, *9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-21* (1984).

114. L. DINNERSTEIN & D. REIMERS, *ETHNIC AMERICANS: A HISTORY OF IMMIGRATION AND ASSIMILATION* 41 (1977). In the 1850s the Know Nothing movement proposed excluding all foreign-born people from public office. M. JONES, *supra* note 8, at 157.

115. School segregation extended to Northern blacks. See *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849). On *Roberts*, see L. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 316-41 (1972).

116. The California law requiring segregation of children of "Chinese, Japanese and Mongolian" parentage is discussed in *Westminster School Dist. v. Mendez*, 161 F.2d 774, 780 (9th Cir. 1947); see also *Gong Lum v. Rice*, 275 U.S. 78 (1927) (Mississippi law classified children of Chinese ancestry as "colored" and assigned them to black schools.).

117. In *Westminster School Dist. v. Mendez*, 161 F.2d 774, 780 (9th Cir. 1947), the court held that the school board's segregation of such children was unauthorized by California law. A more violent kind of exclusion took place in 1917 when almost 1900 striking Mexican-American miners

Italians, who were directed to all-black schools in some southern communities.<sup>118</sup> Miscegenation laws forbade intermarriage of whites with persons of any other race.<sup>119</sup> In the West, Asians were subjected to special taxes<sup>120</sup> and prohibited from owning land;<sup>121</sup> a California law even prohibited Chinese people from testifying in court against whites.<sup>122</sup>

Private discrimination, too, victimized a great many cultural minorities, notably Catholics, Jews, the foreign-born, and persons of Irish and Italian descent. Violence against Chinese residents in California<sup>123</sup> was matched by anti-Semitic violence, including the lynching of Leo Frank in Georgia.<sup>124</sup> In the same year that New Hampshire repealed its restrictions on voting by Jews, New York's bar association rejected an applicant because he was Jewish.<sup>125</sup> Although some labor unions (notably the International Workers of the World) actively courted foreign-born members, the American Federation of Labor excluded Japanese people from membership.<sup>126</sup> Even in Hawaii Japanese workers faced wage discrimination.<sup>127</sup> The ethnic neighborhood, sometimes seen today through a haze

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were arrested in and around Bisbee, Arizona and forcibly transported to Columbus, New Mexico. When the Columbus authorities would not take charge of them, they were taken into the desert and left to find their way out. The young Felix Frankfurter wrote a scathing report on the incident for the Wilson administration. See C. McWILLIAMS, *NORTH FROM MEXICO* 197 (1949). The Bisbee deportation left its victims in the United States. Two other episodes resulted in mass forcible deportation from the country. In the early 1930s about half a million people of Mexican descent were rounded up and expelled, and more than two million suffered the same fate from 1953 to 1955. These people included United States citizens as well as aliens. See J. SAMORA & P. SIMON, *A HISTORY OF THE MEXICAN-AMERICAN PEOPLE* 1981 (1977); J. SAMORA, *LOS MOJADOS: THE WETBACK STORY* 33-57 (1971); López, *Undocumented Mexican Migration: In Search of Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 632-33 (1981). In 1954 "Operation Wetback" alone accounted for expulsion of more than one million persons; during the 1950s, "perhaps as much as one-sixth of the total Mexican-origin population living in this country was deported." Cárdenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66, 81 (1975); see also Cortes, *Mexicans*, in *HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS* 697, 703 (S. Thernstrom ed. 1980) (3.8 million Mexicans expelled between 1950 and 1955).

118. L. DINNERSTEIN & D. REIMERS, *supra* note 114, at 40.

119. The statute challenged in *Loving v. Virginia*, 388 U.S. 1 (1967), which focused on preserving the purity of the white race, was typical. See VA. CODE § 20-54 (1960) (repealed 1968).

120. T. SOWELL, *supra* note 45, at 139 (taxes on the kinds of activities engaged in only by Chinese).

121. See, e.g., *Oyama v. California*, 332 U.S. 633 (1948). In *Oyama* a California statute forbade land ownership by aliens ineligible for citizenship. Under federal law, that category included Japanese aliens. The Supreme Court set the stage for invalidating the law, and the state courts finished the job. See *Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952); *Namba v. McCourt*, 185 Or. 579, 204 P.2d 569 (1949); see also *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (invalidating California law denying commercial fishing licenses to aliens).

122. T. SOWELL, *supra* note 45, at 137. Laws that were formally race-neutral were also adopted for the purpose of disadvantaging Asians. On ordinances aimed at Chinese laundries in San Francisco, see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); T. SOWELL, *supra* note 45, at 139. For the history of discrimination against the Japanese in the American West, see R. DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* (1962); J. TENBROEK, E. BARNHART & F. MATSON, *PREJUDICE, WAR AND THE CONSTITUTION* 11-67 (1954).

123. See, e.g., A. SAXTON, *supra* note 32, at 205-13.

124. See *Frank v. Mangum*, 237 U.S. 309 (1915); L. DINNERSTEIN, *THE LEO FRANK CASE* (1968).

125. See L. DINNERSTEIN & D. REIMERS, *supra* note 114, at 42.

126. W. PETERSEN, *JAPANESE AMERICANS* 33 (1971). On the role of labor unions in West Coast anti-Asian activity, see R. DANIELS, *supra* note 122, at 16-30; A. SAXTON, *supra* note 32.

127. T. SOWELL, *supra* note 45, at 162.

of romantic nostalgia, was founded on more than affinity. Ethnic discrimination ranged over the whole housing market, and racial segregation remains the pattern in today's urban neighborhoods.<sup>128</sup> Today's "white flight" had antecedents in the nineteenth century, when middle-class families in eastern cities fled from neighborhoods that were becoming populated with Irish residents.<sup>129</sup> And if overt ethnic-group exclusion by resorts, hotels, and universities is now largely behind us, such discrimination in private schools and "businessmen's" clubs<sup>130</sup> is, sadly, very much a part of today's urban life.<sup>131</sup>

Like Jim Crow, discrimination against the ethnic outsider is a form of exclusion—not physical exclusion from the country, but exclusion from belonging as a respected and responsible participant in "the public life of the community."<sup>132</sup> The types of material and spiritual harm thus inflicted on persons who are denied full citizenship are innumerable, and each harm aggravates the others. Jim Crow was not just a collection of particular prohibitions on blacks but a system;<sup>133</sup> the sign in the shop window that said "No Irish need apply" bespoke more than job discrimination.<sup>134</sup>

Racial segregation not only stigmatizes its victims; it also excludes them from full participation as members of society, treating them as members of a subordinate caste. An earlier generation of Supreme Court Justices left the matter of segregation to majoritarian politics,<sup>135</sup> which meant, given the disenfranchisement of blacks, the reinforcement of a system of racial subordination in all phases of life. After holding Jim Crow unconstitutional,<sup>136</sup> the Supreme

128. See B. EPSTEIN & A. FORSTER, *SOME OF MY BEST FRIENDS . . .* 79-139, 251-56 (1962) (Jews). Racially restrictive covenants of the kind held unenforceable by the Supreme Court typically limited residential occupancy to Caucasians. See *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948). For a chilling quotation of a "Get out of Hollywood" leaflet circulated by one anti-Japanese group, see R. DANIELS, *supra* note 122, at 97. On today's patterns of residential segregation, see G. STERNLIEB & J. HUGHES, *CURRENT POPULATION TRENDS IN THE UNITED STATES* 74-75 (1978); Farley, *Residential Segregation and Its Implications for School Integration*, in *THE COURTS, SOCIAL SCIENCES, AND SCHOOL DESEGREGATION* 164, 167 (B. Levin & W. Hawley eds. 1977); Sternlieb & Hughes, *The Changing Demography of the Central City*, 243 *SCI. AM.*, Aug. 1980, at 48, 53.

129. J. FURNAS, *THE AMERICANS* 698-99 (1969). Another commentator notes that "[t]he first blacks in Harlem were fleeing from the tough Irish neighborhoods in mid-Manhattan, and avoided going north of 145th Street, for fear of encountering more Irish there." T. SOWELL, *supra* note 45, at 277.

130. I use the term advisedly; many of these clubs still exclude women from membership.

131. On anti-Semitism in clubs, see B. EPSTEIN & A. FORSTER, *supra* note 128, at 18-24.

132. Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 *HARV. L. REV.* 69, 101 (1967).

133. See *supra* text accompanying note 112.

134. See O. HANDLIN, *THE UPROOTED* 239 (2d enlarged ed. 1973). On the Irish generally, see N. GLAZER & D. MOYNIHAN, *BEYOND THE MELTING POT* 219-87 (2d ed. 1970); T. SOWELL, *supra* note 45, at 17-42; C. WITKE, *THE IRISH IN AMERICA* (1970).

135. Private segregation was insulated from federal constitutional attack in *The Civil Rights Cases*, 109 U.S. 3 (1883). The Court upheld official segregation in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

136. The Court achieved this result *sub silentio* in a series of cases following *Brown v. Board of Educ.*, 347 U.S. 483 (1954): *Turner v. City of Memphis*, 369 U.S. 350 (1962) (municipal airport restaurant); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (parks); *Gayle v. Brownder*, 352 U.S. 903 (1956) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches).

Court pronounced the demise of "caste legislation"<sup>137</sup> in America. The attack on caste employed the rhetoric of individualism:<sup>138</sup> henceforth, an individual was not to be treated as less than an equal citizen because of his or her membership in a racial—or, by extension, ethnic or religious—group. This "anti-discrimination principle"<sup>139</sup> is individualistic in outlook: treat each person as an individual, not on the basis of group membership.

Yet stigma, like caste, is a group experience. A characteristic like race, unorthodox religion, or ethnicity is identified as deserving of stigma, and the stigma is imposed on the whole group of people who share the characteristic. When we invent a "stigma-theory"<sup>140</sup> to justify the stigma, we incorporate our assumptions about the whole group rather than picking on the particular characteristics of this or that individual.<sup>141</sup>

Furthermore, when the Supreme Court declares that racial classifications generally are "suspect,"<sup>142</sup> it is implicitly recognizing that racial discrimination has historically operated to victimize groups of people. Racism, after all, focuses on race. Separatist movements arise among the victims of domination<sup>143</sup> precisely because domination is a group experience for both the dominating and the dominated. Terms like "race relations" or "intercultural relations" suggest relations among groups, even though all human interactions, including group relations, are composed of the acts and responses of individuals toward each other. In short, if the continued existence of cultural groups is certain—and it is—then group identifications will continue to be important to the ways in which individuals treat each other. And if much remains for America to do to end racial domination and its harmful effects in this country—and it does—then it is hard to see how that task will be made easier if government is constitutionally required to ignore that a black person is black.<sup>144</sup>

Just as forced conformity is the nativist path to assimilation, the nativist prescription for pluralism is the subordination of racial, ethnic, and religious minorities. These two forms of cultural suppression reinforce each other. The

137. *Plyler v. Doe*, 457 U.S. 202, 213, 215, 217 n.14 (1982).

138. At oral argument on the remedial aspects of the cases decided under the name of *Brown v. Board of Educ.*, 349 U.S. 294 (1955), Thurgood Marshall, as counsel for the children in the Virginia and South Carolina cases, encapsulated this individualistic attitude in arguing for a race-neutral standard: "What we want is the striking down of race . . . . It is no problem to put dumb colored children with dumb white children and smart colored children with smart white children." Arguments Before the Court, 23 U.S.L.W. 3257 (U.S. Apr. 19, 1955), quoted in Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 Nw. U.L. Rev. 157, 173-74 (1963).

139. See Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976).

140. See E. GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 5 (1963).

141. See generally E. GOFFMAN, *supra* note 140 (examining situation of individuals disqualified from full social acceptance and noting difference between their "virtual and actual social identity"). Ralph Ellison's black man is not unseen by whites; he is invisible as an individual because he is seen only as a member of a racial group. R. ELLISON, *INVISIBLE MAN* (1952).

142. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

143. See *infra* notes 152-55 and accompanying text.

144. Cf. *infra* text accompanying note 234.

pressure to conform carries with it an implication that members of the unorthodox cultural group are inferior. Correspondingly, the subordination of a cultural group, even while it intensifies the group's cohesion, undermines confidence in the group's values and perspectives, with the long-term effect of impairing the perceived worth of the group's ethnic identity<sup>145</sup> and thus of promoting conformity to the dominant cultural norms.

Virtually every cultural minority in America has had to face exclusion, forced conformity, and subordination. All these patterns of nativism are variations on the same theme: those who are different cannot belong as full members of the community. The victims of cultural domination, therefore, face a serious problem: they must necessarily live their lives within the larger society, and in order to define themselves they must satisfy their basic needs for connection. They may choose to turn inward to the solidarity of the excluded group, banding together to confront the larger society. Alternatively, individual members of the cultural minority may, as to some aspects of their lives and in varying degrees, be assimilated into the culture of the larger society. These two paths to belonging start out by heading in different directions; as we shall see, however, they lead most people to the same destination.

### III. THE SEARCH FOR CONNECTION

#### A. *Cultural Politics: From Solidarity to Integration*

Although most people have their cultural identities ascribed to them at birth and some, such as religious converts, choose theirs, a great many people find their cultural identities thrust upon them. One principal source of cultural identity in America has always been the perceived need to band together in defense against domination or hostility. Indeed, the outside world plays an important part in the very definition of a group's cultural identity. The immigrants from a single European country typically came from different regions with marked cultural distinctions, but in America the people from a given village or region generally were few in number; naturally, they sought association with others of the same religion or from the same country. Natural affinities, of course, did exist: a common language, or a common religion, or both. However, much of the sense of community felt by the members of an American ethnic group today originated in the ways in which the members' ancestors were labeled—for example, as "Italians" or as "Jews"—and, by those labels, set apart as outsiders.<sup>146</sup>

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145. See I. LIGHT, *ETHNIC ENTERPRISE IN AMERICA* 189 (1972).

146. The case of the Indian nations is different, and it is tragic. Hundreds of native cultures were present when the first European settlers arrived in America. Except for an early period of uneasy dealings on a basis of equality, the history of white-Indian relations in this country is a story of virtually unrelieved dispossession and even extermination of the Indian peoples justified by racist assumptions. See generally W. HAGAN, *AMERICAN INDIANS* (rev. ed. 1979) (Indians suffered repeated setbacks from encounters with new American settlers in colonial times until the New Deal era); Note, *Constitutional Law: Congressional Plenary Power over Indian Affairs—A Doctrine Rooted in Prejudice*, 10 AM. INDIAN L. REV. 117 (1982) (Congress' traditionally unrestrained rule over Indians based on perceived need for strong control over "inferior" race). For a century-old Indian statement, still unsurpassed for its painful dignity, see the 1879 lament of Chief Joseph, *reprinted in*



"Defensive" identification with an ethnic or religious group has always been a major source of cultural pluralism in America; the victims of domination become bound together in a community, a "fraternity of battle."<sup>147</sup> Yet when the members of cultural minorities have intensified their group attachments by living in ethnic neighborhoods,<sup>148</sup> or focusing their economic dealings within the ethnic communities,<sup>149</sup> or founding ethnic social or political organizations,<sup>150</sup> the outside world has been ready to call them "clannish" and unassimilable.<sup>151</sup> Like many another process involving social subordination, this one is circular. The exclusion of members of a cultural minority from full participation in the larger society causes them to focus their need to belong on the cultural group itself; and this very solidarity stimulates further outside suspicion and hostility.

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L. DINNERSTEIN & F. JAHNER, *THE ALIENS: A HISTORY OF ETHNIC MINORITIES IN AMERICA* 181 (1970). For capsule histories of national policy toward the Indian peoples, see V. DELORIA & C. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 1-24 (1983) [hereinafter cited as *AMERICAN INDIANS, AMERICAN JUSTICE*] and E. SPICER, *THE AMERICAN INDIANS* 176-203 (1982).

In the face of this onslaught, it is remarkable that so much remains of the separate Indian cultures. Tribal cultures may have much in common, see, e.g., V. DELORIA, *GOD IS RED* (1973), but they remain separate. Nothing in the Indian experience to date resembles the cultural assimilation of Germans from different regions and religions into a national ethnic group. On the history of political divisions among the various tribes, see Metcalf, *Who Should Rule At Home? Native American Politics and Indian-White Relations*, 61 J. AM. HIST. 651 (1974). On the relation of Indian reservations to Native American autonomy, see Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979 (1981). A more far-reaching call for a sovereign Indian nation embracing all tribal groups is made in V. DELORIA & C. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* (1984). For a sympathetic but skeptical reception of this proposal, see Washburn, *Toward Indian Nationhood* (Book Review), NAT. HIST., Jan. 1985, at 76. On Pan-Indianism generally, see H. HERTZBERG, *THE SEARCH FOR AN AMERICAN INDIAN IDENTITY: MODERN PAN-INDIAN MOVEMENTS* (1971). On the continuation of wide cultural diversity among Indian peoples today, see E. SPICER, *supra*, at 2.

147. W. MCWILLIAMS, *THE IDEA OF FRATERNITY IN AMERICA* 542 (1974). Correspondingly, as the need for defense declines, group attachment weakens. Church attendance among Catholics has declined 23% since 1958. HARPER'S MAG., Mar. 1985, at 19. Enrollment in Catholic parochial schools has declined from about 5.6 million students in 1965 to about 2.9 million in 1985. Chandler, *Parochial School Enrollment Dwindling*, L.A. Times, May 20, 1985, § I, at 19, col. 1. See generally McNamara, *American Catholicism in the Mid-Eighties: Pluralism and Conflict in a Changing Church*, 480 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 63 (1985) (authority of Catholic church leadership has declined because of its inability to accommodate diverse viewpoints on issues such as birth control, premarital sex, and remarriage after divorce).

148. See, e.g., R. BAYOR, *NEIGHBORS IN CONFLICT: THE IRISH, JEWS, AND ITALIANS OF NEW YORK CITY, 1929-1941* (1978); M. JONES, *supra* note 8, at 134, 162; T. SOWELL, *supra* note 45. The major ethnic concentrations in American cities developed late in the nineteenth century. Thernstrom, *Ethnic Groups in American History*, in *ETHNIC RELATIONS IN AMERICA* 11 (L. Liebman ed. 1982).

149. Personalism and nepotism have been seen as ways of surviving in a hostile environment. Some forms of economic activity are suited for this kind of defensive response to adversity, for they are "located within a particular kind of social network: close quarters, daily routines, local connections, personal service, familial cooperation." M. WALZER, *SPHERES OF JUSTICE* 161 (1983); see also I. LIGHT, *supra* note 145, at 7-10 (inability to find nonmenial employment due to discriminatory opportunity structure contributed to such developments as Chinese owning laundries and restaurants and Japanese owning hotels and grocery stores).

150. On ethnic militia units, see M. JONES, *supra* note 8, at 155-56, 158-59. On ethnic politics, see *ETHNIC LEADERSHIP IN AMERICA* (J. Higham ed. 1979); N. GLAZER & D. MOYNIHAN, *supra* note 134; M. WALZER, E. KANTOWICZ, J. HIGHAM & M. HARRINGTON, *THE POLITICS OF ETHNICITY* (1982) [hereinafter cited as *THE POLITICS OF ETHNICITY*]; and *infra* text accompanying notes 269-98.

151. M. JONES, *supra* note 8, at 155-56.

Racial, religious, and ethnic domination has often led to defensive separatism. The most important impetus to the early growth of the Catholic school system was the use of public schools in eastern cities to indoctrinate children in the tenets of Protestantism, complete with the distribution to children of the King James version of the Bible.<sup>152</sup> Black separatist movements, from the explicit black nationalism of Marcus Garvey<sup>153</sup> to the more ambiguous "Black Power" and "community control" movements of recent years,<sup>154</sup> have had similar origins: seeking to replace the skepticism, frustration, and resentment produced by domination with a revitalized sense of pride.<sup>155</sup>

The hostility of the outside world is by no means the only factor that has contributed to ethnic solidarity in America. The very openness of American society, for all its assimilative power,<sup>156</sup> also can impel some people to seek the solidarity of a group defined by cultural indicia. An ethnic or religious group can offer shelter from the insecurity that stems from a sense of isolation in a crowd of strangers, even when the strangers are not hostile but indifferent. Yet, when an individual feels fenced out of the larger society or mistreated by it, the religious or ethnic community may serve "as a solace for exclusion, a retreat from slights and prejudice."<sup>157</sup> In these circumstances, the cultural group serves

152. R. BILLINGTON, *supra* note 59, at 142-58, 220-34 (1963); M. JONES, *supra* note 8, at 139, 150.

153. Garvey started The Universal Negro Improvement Association, a movement founded on the need to instill black pride and dignity. Garvey denounced assimilation and urged blacks to "return" to Africa. He scorned the existing black leadership and found his main support among the blacks who were the poorest of all. After impressive early successes, the movement collapsed in the 1920s. For a capsule history, see G. MYRDAL, *supra* note 112, at 746-49. A thorough scholarly record of the Garvey movement is presently being compiled and analyzed by Robert Hill. The first four volumes of a projected ten-volume series have been published under Professor Hill's editorship; the work is entitled *MARCUS GARVEY AND UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION PAPERS* (R. Hill ed. 1983). On Garvey's objections to interracial marriage, see J. WILLIAMSON, *NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES* 159-61 (1984).

One of Garvey's main opponents was W.E.B. DuBois. DuBois understood that a separatist community is rarely a community of choice; rather, it is a community of despair. See W.E.B. DuBois, *DUSK OF DAWN* 182, 185-88 (1940).

154. See S. CARMICHAEL & R. HAMILTON, *BLACK POWER* (1967); Kirp, *Community Control, Public Policy, and the Limits of Law*, 68 MICH. L. REV. 1355 (1970).

155. Elijah Muhammed, one of Garvey's workers in Detroit, later founded the Nation of Islam. On this more recent black separatist movement, see J. BALDWIN, *THE FIRE NEXT TIME* 67-113 (1963); K. CLARK, KING, MALCOLM, BALDWIN: *THREE INTERVIEWS* 34, 45 (rev. ed. 1985) (quoting Malcolm X in 1963 as favoring "complete separation" and as saying, "My father was a Garveyite"). Malcolm X saw integration as a hoax, a sophisticated form of domination. MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 275-81 (1966).

Some blacks who do not opt for separatism have expressed skepticism about integration. James Baldwin asked, "Do I really *want* to be integrated into a burning house?" and remarked, "Why—especially knowing the family as I do—I should *want* to marry your sister is a great mystery to me." J. BALDWIN, *supra*, at 108, 111 (1963). Yet in the same breath Baldwin added, "[W]e, the black and the white, deeply need each other here if we are really to become a nation—if we are really, that is, to achieve our identity, our maturity, as men and women." *Id.* at 111. Other blacks have registered skepticism about the willingness of whites to carry out the process of integration unless they are made to see integration as advantageous to themselves. See, e.g., Bell, *A Hurdle Too High: Class-based Roadblocks to Racial Remediation*, 33 BUFFALO L. REV. 1 (1984); Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

156. See *infra* text accompanying note 193.

157. W. McWILLIAMS, *supra* note 147, at 102; see also *id.* at 492 (ethnic organizations provided a "defensive fraternity" for immigrants).

as a defense against a world that "measure[s] acceptability by appearances—skin color, dress, deportment—and by customs—language, family governance, religious ritual—according to broad racial and nationality stereotypes."<sup>158</sup>

Facing either hostility or indifference, the members of a cultural minority may conclude that they will fare better if they act as a group, particularly when their aims can be satisfied only by participation in the larger community. The pursuit of political goals by people identified by race, ethnicity, or religion has been a fixture of American politics since the colonial era and must be seen as a permanent feature of the politics of a multicultural society. Often, when an issue becomes prominent in cultural politics, it takes on an importance that transcends any immediate effects of the issue's resolution on people's day-to-day lives. The obvious explanation is that the issue has become a symbol of cultural identity and ultimately of individual worth.<sup>159</sup> With the stakes so high, it is no wonder feelings are intense.

A quarter-century ago, in a study of black leaders in Chicago, James Q. Wilson distinguished between status goals and welfare goals.<sup>160</sup> By welfare goals Wilson meant tangible improvements such as better schools, new public housing, and better access to health services. Status goals focused on the principle of equality and on the integration of blacks into the general community: school integration, open occupancy in housing, and equal treatment of blacks in the allocation of public offices and honors.<sup>161</sup> With respect to many immediate welfare goals, little distinguishes a cultural group from any other interest group. An ethnic neighborhood has the same interest in getting the city to repair street lights as any other neighborhood would have.<sup>162</sup> A cultural group's status goals, however, differ from the goals of many other interest groups that seek to influence government. The cultural minority seeks to replace discrimination and domination with acceptance, recognition, and equal citizenship.<sup>163</sup> The concern for status arises out of basic psychological needs; the individual not only needs to belong, but needs to be respected for his or her own self. The cultural outsider wants the freedom to shape his or her own identity, to be allowed to keep a "primordial" identity and also to be accepted as one who belongs to the larger society.

Correspondingly, however, members of the dominant cultural group may see themselves as having an interest in maintaining existing "pecking orders"<sup>164</sup>

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158. R. WIEBE, *supra* note 22, at 32.

159. See *supra* text accompanying note 20.

160. J. WILSON, *NEGRO POLITICS: THE SEARCH FOR LEADERSHIP* 185-213 (1960).

161. *Id.* at 185.

162. Depending on the composition of the city government, a minority racial or ethnic neighborhood may have more trouble than would another neighborhood. See *Hawkins v. Town of Shaw*, 461 F.2d 1171 (5th Cir. 1972) (court sustained challenge to racially discriminatory provision of neighborhood public services upon a showing that over 90% of homes without sewers or paved streets were in black neighborhoods), *aff'd* 437 F.2d 1286 (5th Cir. 1971), *rev'd* 303 F. Supp. 1162 (N.D. Miss. 1969).

Some welfare goals of minority groups, such as compensation for past harms, are distinctive. See *infra* note 260 and accompanying text.

163. See Higham, *Leadership*, in *THE POLITICS OF ETHNICITY*, *supra* note 150, at 69, 83-88.

164. See H. ISAACS, *supra* note 10, at 44, 208-14.

associated with race, ethnicity, and religion.<sup>165</sup> In other words, dominance itself—preventing cultural outsiders from belonging—may be someone else's status goal.

Just as the racial caste system of Jim Crow employed a mixture of formal legal disabilities and informal social and economic sanctions, it will take more than the elimination of formal legal inequalities to end the "status harm"<sup>166</sup> that is the main evil of racial caste. As a status goal, equal citizenship includes both a measure of substantive equality and formal equality before the law. Although the distinction between status and welfare goals has its uses in analyzing day-to-day political strategies, eventually these two types of goals converge. In the long run, a cultural minority's status goals will be secured only when large numbers of its members have advanced into the middle class. The best evidence of an end to the harmful effects of racial discrimination against blacks would be evidence that blacks and whites were distributed along the socio-economic scale in the same proportions.<sup>167</sup>

Even in the short term, the distinction between welfare and status goals can be blurred. Poverty that is degrading, for example, may deprive its victims of effective participation as equal members of society.<sup>168</sup> To be unemployed is to be deprived of more than wages.<sup>169</sup> Thus, a series of antidiscrimination measures focused on welfare goals may, in the aggregate, work important changes in the status of a previously dominated group.<sup>170</sup> However, the distinction between status and welfare goals retains utility, at least in the short run. Some immediate issues are centered on material well-being and others are centered on the need for belonging and the dignity of equal citizenship.

The "emotionally charged" quality of American cultural politics, today as in the nineteenth century,<sup>171</sup> arises out of conflicts over status, with one group's anger matched against another group's fear. The cultural issues that recently

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165. See generally R. BILLINGTON, *supra* note 59 (enactment of temperance legislation as a reaction against Irish and German immigration); R. DANIELS & H. KITANO, *AMERICAN RACISM: EXPLORATION OF THE NATURE OF PREJUDICE* 96-105 (1970) (discussing the effectiveness of the white majority's attempts to remain separate from minority groups); J. HIGHAM, *supra* note 8 (discussing the political pressures related to nationalism and ethnic prejudice); C. WOODWARD, *supra* note 33 (discussing southern segregation laws from Reconstruction to mid-1960s).

166. Fiss, *supra* note 139, at 157.

167. See generally Thurow, *A Theory of Groups and Economic Redistribution*, 9 PHIL. & PUB. AFF. 25, 27-29 (1979) (because individual discrimination cannot be quantified, group analysis is required to determine the existence of equal opportunity).

168. See Matza, *The Disreputable Poor*, in *SOCIAL STRUCTURE AND MOBILITY IN ECONOMIC DEVELOPMENT* 310-19 (N. Smelser & S. Lipset eds. 1966); Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 983-91 (1973); Plamenatz, *Diversity of Rights and Kinds of Equality*, in *NOMOS IX: EQUALITY* 79, 91-92 (J. Pennock & J. Champman eds. 1967).

169. On the destructive quality of unemployment and marginal employment, see E. LIEBOW, *TALLY'S CORNER* 29-71 (1967).

170. For example, laws forbidding racial discrimination in hotels, restaurants, and other public accommodations, which on the face of things are aimed at access to the world of commerce, have their most important long-run effects in the area of status goals.

171. See R. WIEBE, *supra* note 22, at 32-33.

have aroused the most fervor—abortion,<sup>172</sup> immigration, religion in the schools, affirmative action, and bilingualism—are all status issues, touching the heart because they touch the sense of self. When members of a cultural group join in taking a stand on an issue of United States foreign relations, typically one of their main concerns is the recognition of their own cultural identity and even of their status as citizens, whose voices count for something in the councils of the Nation.<sup>173</sup> Ethnic politics is a historically validated avenue to recognition and acceptance for members of minority cultures<sup>174</sup> and especially for their leaders.<sup>175</sup>

A constant concern of ethnic leadership is group solidarity. Indeed, ethnic groups are, in some sense, "the creation of their leaders";<sup>176</sup> no clear boundaries define the groups, and the openness of American society is a continuing invitation for marginal members to define themselves outside the group. The leaders themselves are apt to be people whose successes in the larger society make them acceptable in that society, and, in the same degree, marginal to the group.<sup>177</sup> The life of the ethnic leader is a life of tension and frustration. Each success for the group in the politics of the wider community, each material advance, integrates more and more members of the group into the institutions and processes of the dominant culture.<sup>178</sup>

If the story of ethnic leadership in modern America is one of "a certain decline,"<sup>179</sup> the main reason is that cultural assimilation follows modernization and advances in a market economy.<sup>180</sup> Solidarity politics, "organizing around

172. On abortion as a status issue, see K. LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984).

173. See *infra* text accompanying note 296.

174. See J. HIGHAM, *supra* note 48, at 11-12; Kantowicz, *Voting and Parties*, in *THE POLITICS OF ETHNICITY*, *supra* note 150, at 29, 44.

175. T. SOWELL, *supra* note 45, at 30-35; *ETHNIC LEADERSHIP IN AMERICA*, *supra* note 150; Higham, *Leadership*, in *THE POLITICS OF ETHNICITY*, *supra* note 150.

176. Higham, *Preface to ETHNIC LEADERSHIP IN AMERICA*, *supra* note 150, at ix. Indeed, political leaders may even play a distinctive role in the construction of ethnicity itself. See, e.g., Padilla, *On the Nature of Latino Ethnicity*, in *THE MEXICAN AMERICAN EXPERIENCE*, *supra* note 5, at 332.

177. K. LEWIN, *RESOLVING SOCIAL CONFLICTS: SELECTED PAPERS ON GROUP DYNAMICS* 195-96 (1948).

178. Consciousness of ethnicity, which is shared widely at all socio-economic levels, decreases as a factor influencing behavior for people in the middle class. D. SCHNEIDER & R. SMITH, *CLASS DIFFERENCES AND SEX ROLES IN AMERICAN KINSHIP AND FAMILY STRUCTURES* 35-36 (1973). On cultural politics and assimilation, see R. DAHL, *WHO GOVERNS?* 32-51 (1961), and *infra* text accompanying note 188. A prominent Mississippi lawyer has commented that "[t]he principal points of interaction" between persons of different races are politics and government. Shipp, *The Races in Mississippi: Old Order and New*, N.Y. Times, Apr. 2, 1985, at A1, col. 2, at B7, col. 1. In Mississippi today, some 450 of the state's 5000 elected officials are black. *Id.* at A1, col. 2.

179. Higham, *Introduction: The Forms of Ethnic Leadership*, in *ETHNIC LEADERSHIP IN AMERICA*, *supra* note 150, at 1, 11.

180. One scholar has commented on the influence of modernization on the stability of ethnic groups:

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 nonrational 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.

in-group concerns and encouraging a bloc vote,"<sup>181</sup> is likely to be seen as a practical necessity for a group that is just emerging from severe conditions of domination.<sup>182</sup> This quest for internal cohesion, however, will limit the group to local successes. To carry its influence outside ethnic enclaves—a step necessary for the achievement of many status goals and virtually all welfare goals—the group must form coalitions with other interests.<sup>183</sup> Irony attends this "broker politics."<sup>184</sup> The ethnic leaders become integrated into larger organizations and thus are drawn even further toward the margins of the group.<sup>185</sup> The achievement of the group's goals opens progressively more opportunities for members of the group in the larger society, with the inevitable result that the group declines as a separate political force.

Observers of ethnic politics have been struck by a development that is, at first glance, curious: as ethnic bloc voting has increased, ethnic identification has decreased.<sup>186</sup> In the middle years of the nineteenth century, Edward Beecher spoke in the direst terms about the antagonism between Catholicism and American democracy: "The systems are diametrically opposed: one must and will exterminate the other."<sup>187</sup> In 1960 American voters, sensing that the Catholics' assimilation into American life was an accomplished fact, elected John F. Kennedy as the Nation's first Catholic President. In the century that had intervened between those two events, the Irish had been the Nation's foremost practitioners of cultural politics.

A cultural group's active participation in politics is a step along the path to assimilation.<sup>188</sup> The personalism, even nepotism, that has characterized politics among immigrant groups throughout the Nation's history<sup>189</sup> may look like no

*Id.* at 14.

181. Kantowicz, *supra* note 174, at 54.

182. A cultural group's very insularity may, in fact, enable it to act as a cohesive body and thus to carry more weight in the political process than would an equally large group that is dispersed and largely invisible. For discussion of this point, see Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 722-28 (1985).

183. On "balanced tickets" in New York City, see N. GLAZER & D. MOYNIHAN, *supra* note 134, at 305 (noting the strong custom of representing prominent ethnic groups on mayoral tickets). On the ways in which economic and political interests can prevail over ethnic prejudices, see R. BAYOR, *supra* note 148, at 164-67. Unfortunately, for the same reasons a divergence of class interests can drive old ethnic allies apart. For one view of New York City's ethnic politics today, see Kramer, *Blacks and Jews: How Wide the Rift?*, NEW YORK, Feb. 4, 1985, at 26. On black-Asian rivalry in Los Angeles, see McMillan, *Anti-Asian Bigotry: An 'Alarming' Rise as Refugees Pour In*, L.A. TIMES, Feb. 4, 1985, § II, at 1, col. 5.

184. The notion of cultural "broker politics" is an old one in this country. On the nineteenth century version of ethnic politics, see R. WIEBE, *supra* note 22, at 139-40.

185. Higham, *supra* note 175, at 88. Irish leaders were especially successful in broker politics. See Cross, *The Irish*, in ETHNIC LEADERSHIP IN AMERICA, *supra* note 150, at 179-81. Polish and black leaders historically have tended to focus on solidarity politics. See Kantowicz, *supra* note 174, at 54, 65. On "projective" leaders, individuals who win recognition outside their ethnic groups and then serve as role models for assimilation, see Higham, *supra* note 175, at 88-90.

186. ETHNIC LEADERSHIP IN AMERICA, *supra* note 150, at 11-12; S. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 20-21 (1981).

187. Quoted in R. WIEBE, *supra* note 22, at 68.

188. The same participation produces changes in the dominant culture. Undeniably, various ethnic styles have influenced both the form and the substance of American politics, from party conventions to the pluralist concerns of any good campaign manager.

189. On immigrants and machine politics, see M. JONES, *supra* note 8, at 230-36.

more than a reinforcement of intragroup solidarity, but it also constitutes a first step in the process leading to a sense of belonging to the Nation. Political party activity makes people feel like insiders.<sup>190</sup> The parties themselves both connect different groups and serve as "carriers of certain basic values that large numbers of citizens [can] accept as common American beliefs."<sup>191</sup> Local ethnic power produces the belief that "the system works for us," further strengthening national allegiance.<sup>192</sup> Cultural politics thus begins in the defensive solidarity of the cultural group, but ends in integration.

### B. *Participation and Assimilation*

The assimilation of white immigrants' descendants into the cultural mainstream of American life is an undeniable fact, verified by the immediate experience of all of us. Assimilation means change—specifically, a change in cultural norms. These changes are most visible in behaviors such as the adoption of a language or a style of dress.<sup>193</sup> Assimilation, however, also implies change in self-identification, which is not so much a behavior pattern as it is a state of mind. Some such changes can be seen in first generation Americans, but the typical adult immigrant is not inclined to undertake the wrenching transformation involved in adopting the ways of a new culture. Indeed, the change that we call assimilation does not take place primarily within any individual. Mostly, it is visible as a group phenomenon, a change from one generation to another.

Like ethnicity itself,<sup>194</sup> the process of assimilation is both subtle and complex. Even from generation to generation there is no linear movement from "community" to "society,"<sup>195</sup> from "primordial" association to contractual association, from ethnic identity to occupational identity. Rather, these types of association and identity exist side by side in the same individual; there is an "interaction . . . of communal and noncommunal ways in the lives of us all."<sup>196</sup> It would seem odd, for example, to say that fourth-generation Americans are assimilated. Rather, they are what they are; because they have grown up under certain circumstances, they lack the characteristics that once set their immigrant great-grandparents apart from the American cultural mainstream. For the individual, "assimilation," or its absence, is just a label that we attach to the product of myriad decisions made by that individual and by others, including ancestors and acquaintances and government officials.

The assimilation of a group, too, is a complex, ongoing process. It is said,

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190. Kantowicz, *supra* note 174, at 45.

191. R. WIEBE, *supra* note 22, at 140. On local politics in the early twentieth century as a "substitute for community," see *id.* at 69.

192. J. HIGHAM, *supra* note 48, at 185. Correspondingly, when members of a cultural minority see little benefit from political participation, they are not apt to participate, even by voting. See *infra* text accompanying note 297.

193. On the relation of America's "democracy of clothing" to the newcomer's transformation "into one who belong[s]," see D. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 91-100 (1973).

194. See *supra* note 20.

195. See F. TONNIES, *COMMUNITY AND SOCIETY* (C. Loomis trans. 1963).

196. T. BENDER, *COMMUNITY AND SOCIAL CHANGE IN AMERICA* 43 (1978).

for example, that the French Huguenots and the Dutch had become largely assimilated by 1820.<sup>197</sup> Yet any such statement is only a shorthand way to describe the statistical distribution of someone's abstract characterizations of a variety of states of mind and types of behavior. In 1820 the descendants of the old Dutch settlers almost all spoke English and otherwise behaved as their neighbors did, but surely they gave little thought to the question whether they were assimilated. In any case, the assimilation of a group can never be said to be complete: "every one of the racial and national groupings that was created in America has stubbornly persisted."<sup>198</sup>

Although an exact definition of assimilation appears to be impossible, there are some measures of assimilation on which observers can agree: language usage, educational integration, occupational dispersal, residential dispersal, and intercultural marriage.<sup>199</sup> By these tests, it is plain that a common pattern prevails for nearly all the ethnic groups in American history: eventually they become largely integrated into the American cultural mainstream.<sup>200</sup>

What causes assimilation to take place? The details of the mechanism are not well documented, but three generalizations seem true, even in the absence of hard evidence. First, the commonly assumed assimilating effects of occupational mobility in an open society illustrate a larger truth: assimilation is advanced when the members of a cultural minority take part in the institutions and activities of the larger society. It is often said that assimilation is promoted by such behavior as speaking English, attending the public schools, listening to the national broadcast media, entering the job market, joining a union,<sup>201</sup> moving

197. J. HIGHAM, *supra* note 48, at 178.

198. *Id.* In the case of the Indian tribes, "stubbornly" is the proper word. On the national government's efforts to force Indians to be assimilated into the larger society, see AMERICAN INDIANS, AMERICAN JUSTICE, *supra* note 146, at 8-12, 15-21; W. HAGAN, *supra* note 146, at 121-50, 161-66.

199. Thernstrom, *supra* note 148, at 9-12. Milton Gordon distinguishes between "cultural" assimilation, involving the abandonment of the mother tongue and distinctive customs, and "structural" assimilation, involving extensive social interaction and intermarriage. As of the time he wrote (the early 1960s), Gordon discerned a fundamental pattern for ethnic groups in the United States, combining cultural assimilation with structural pluralism. M. GORDON, *supra* note 20, at 60-83.

To an immigrant, some degree of assimilation might be indicated by activities that others would see differently.

The peasant who had become a Polish Falcon or a Son of Italy, in his own view, was acting as an American; this was not a step he could have taken at home. To subscribe to a newspaper was the act of a citizen of the New World, not of the Old, even if the journal was [written in his native language].

O. HANDLIN, *THE UPROOTED* 250-51 (2d ed. 1973).

200. Until recently, the one obvious exception to this general trend has been found among black people. The overwhelming majority of black Americans still live in separate communities and send their children to predominantly black schools, a situation that is euphemistically called "racial isolation." See, e.g., 1 U.S. CIVIL RIGHTS COMM'N, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 109-14 (1967) (concluding that all racial isolation, regardless of origin, harms black students). The intermarriage of blacks and whites is still uncommon. See *infra* note 204. Because the black community suffers today from disastrously high rates of unemployment, most blacks have little hope for moving out of the ghetto. In short, race has long been a great divide in American society, and there is no reason to assume that it will lose its significance in the near future. The separation of at least some blacks from some whites, however, has been reduced in a number of important ways since mid-century. There also is no reason to expect this trend to be reversed.

201. On the assimilating role of unions, see M. JONES, *supra* note 8, at 270-73; Bukowczyk, *The*



away from the ethnic neighborhood, and voting in public elections.<sup>202</sup> But a person who engages in a significant number of these kinds of behavior *is* assimilated. No bright line differentiates the measures of assimilation from the mechanisms that produce assimilation. The various forms of behavior that indicate assimilation tend to reinforce each other, accelerating assimilation. The reinforcement takes place in people's minds. It is circular: the more a person engages in "mainstream" behavior, the more that person is apt to perceive himself or herself as part of the wider American culture and to be disposed to participate in it still further.

Because participation and mobility are important to the process of assimilation, the ability to make choices about ethnic identification is, to a marked degree, dependent on the material resources available to an individual or to a family. If assimilation tends to follow entry into the middle class, the reason is plain. In a market, resources mean opportunities, including opportunities to interact with widening circles of people in a variety of ways, provided, for example, by neighborhoods, schools, and social activities. The point has validity even for cultural groups defined by race. No one chooses to be black, or Asian, or American Indian; yet, for people in all these groups, middle class status permits a great many choices about participation in the wider society, choices that are unavailable to poor people.

Thus, the second generalization about assimilation is that it is closely associated with economic class. Most immigrants, whatever their class, remain largely unassimilated. In succeeding generations, however, middle-class families tend to live in the suburbs<sup>203</sup> and to send their children to college. Higher education not only provides access to elite occupations, but also erodes social barriers to the point that ethnic intermarriage is now common among young people of the middle class.<sup>204</sup> Furthermore, the openness of American society tends to

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*Decline and Fall of a Detroit Neighborhood: Poletown vs. G.M. and the City of Detroit*, 41 WASH. & LEE L. REV. 49, 55-57 (1984).

202. See generally M. GORDON, *supra* note 20 (discussing the nature of group life in a large industrialized nation with a heterogeneous population). The conventional wisdom, which I accept, needs a few qualifications. For example, occupational mobility in an economic market is properly seen as an integrating mechanism, eroding ethnic attachments and promoting the language of the market and the wider society's behavioral norms. Yet the openness of American society can seem threatening in ways that send some individuals running for the protective cover of their "primordial" associations with kin and kindred. See *supra* text accompanying note 22. The public schools have, indeed, been agents of assimilation. But this statement ignores the racial segregation of public schools, which by no means was limited to the South. See *supra* notes 115-18 and accompanying text. Furthermore, in a number of communities in the nineteenth century the public schools carried on their instruction in languages other than English. J. HIGHAM, *supra* note 48, at 180. Correspondingly, various institutions that appeared most likely to cement ethnic attachments, such as ethnic group schools and the foreign language press, turned out to facilitate participation in the wider society—and thus to facilitate assimilation. See Fishman & Nahirny, *The Ethnic Group School and Mother Tongue Maintenance*, in LANGUAGE LOYALTY IN THE UNITED STATES 92 (J. Fishman ed. 1966). On the Americanization of the foreign language press, see M. JONES, *supra* note 8, at 228-29; Fishman, Hayden & Warshauer, *The Non-English and the Ethnic Group Press, 1910-1960*, in LANGUAGE LOYALTY IN THE UNITED STATES, *supra*, at 51, 73 (referring to the "de-ethnicized ethnicity" of the ethnic press).

203. The residential dispersal of ethnic groups in America began with the Huguenots. See M. JONES, *supra* note 8, at 52.

204. According to the 1980 census, 8% of persons of Italian descent born before 1920 were of

distribute the members of a cultural group over a range of levels of income and status, with the inevitable effect of weakening that group's internal cohesion.<sup>205</sup>

The third engine driving assimilation is the complexity of our modern society, which presses nearly everyone into a fragmentation of roles and thus of norms. This fragmentation makes it virtually impossible for an individual to focus either loyalties or identity single-mindedly on an ethnic or religious group.<sup>206</sup> Our "primordial affinities," after all, are not our only attachments to groups. We also identify with those who share our occupations, our economic classes, the causes or institutions we support, the places where we live, and even our leisure activities. Each of us interacts with others in relation to different sets of expectations, one to govern each sub-part of society in which we see ourselves as members. 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.<sup>207</sup> One of the most pernicious features of the system of Jim Crow was that it fed on itself, polarizing Southern society and inhibiting the diversification of identities and attachments. Conversely, to foster that diversified sharing and those multiple loyalties is to nourish the growth of tolerance.

Tolerance and assimilation thus go hand in hand. When the enforced separation of a cultural minority ends and its members come to participate in the activities and institutions of the wider society, that participation itself promotes assimilation. At the same time, the need to seek refuge in a "defensive" cultural identity decreases. Correspondingly, as a cultural minority becomes more as-

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mixed ancestry; 70% of those born after 1920 were of ethnically mixed parentage. Some 72% of all married persons of Asian ancestry were married to other Asians—which means that about 28% are married to non-Asians. Herbert J. Gans, a sociologist, has commented that these and other census data illustrate that "among economically secure middle-class whites, ethnic background is no longer the source of conflict that it once was." Quoted in Collins, *A New Look at Intermarriage in the U.S.*, N.Y. Times, Feb. 11, 1985, at C13, col. 2. On attitudes toward ethnic intermarriage, see S. STEINBERG, *supra* note 2, at 68-71. See generally Heer, *Intermarriage*, in HARVARD ENCYCLOPEDIA OF AMERICAN ETHNIC GROUPS, *supra* note 117, at 513-21 (discussing the determinants and consequences of intermarriage).

Black-white marriages are not common. The 1980 census showed that only 1.3% of married couples in the United States were interracial couples. Here, however, as with other ethnic groups, there has been a significant generational shift. Of black married men born before 1920, 0.8% were in interracial marriages, mostly to whites; for black married men born after 1950, 6% were interracial marriages—almost an eightfold increase. Collins, *supra*. There are, however, many children of racially mixed parentage whose parents were not married. See J. WILLIAMSON, *supra* note 153 (tracing miscegenation between blacks and whites in the United States from the 1800s to the present).

Religious intermarriage also has increased with successive generations. Of Jews who have married in the last ten years 40% have married non-Jews. Collins, *supra*. On the acceptance by Jews of this rising tide of intermarriage, see A. GOREN, *THE AMERICAN JEWS* 107 (1982); C. WAXMAN, *AMERICA'S JEWS IN TRANSITION* 173-78 (1983). In large urban dioceses, about one-third of marriages by Catholics involve non-Catholic partners. Collins, *supra*.

205. This factor is related to education, which, as Bernard Bailyn remarked of education before the Revolution, tends "to propel [the individual] away from the simple acceptance of a predetermined social role." B. BAILYN, *EDUCATION IN THE FORMING OF AMERICAN SOCIETY* 49 (1960).

206. The effects of modern liberal individualism in eroding traditional forms of community are the subject of a large volume of literature. For a capsule statement and a one-foot shelf of citations, see Karst, *Equality and Community: Lessons from the Civil Rights Era*, 56 NOTRE DAME LAW. 183, 186-89 (1980).

207. See generally L. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* 121-49 (1956) (on the unifying function of conflict).

simulated, its members find more tolerance among the majority for the cultural differences that may remain.

Unquestionably such differences will remain. A great many Americans will continue to identify themselves in significant ways as members of cultural groups and, indeed, to reject parts of the majority culture, such as family patterns that seem isolating and uncaring. The survival of these cultural groups in some form is entirely consistent with the process of assimilation, and it is unlikely that any ethnic group now visible in America soon will disappear. What seems more likely is that the process of assimilation will go on as it has proceeded in the past, with each newly assimilated cultural group not only maintaining a measure of internal cohesion but also contributing to the enrichment of the cultural mainstream.

If many largely assimilated Americans cling to some aspects of their "primordial affinities," perhaps they understand that genuine individuality is not to be found by participating in a vast social or political market. Rather, both individuality and community are attainable only within a particular group of people who share cultural traditions. "Most often, when individual men and women insist on 'being themselves,' they are in fact defending a self they share with others."<sup>208</sup>

One bulwark of the defense of self is the Constitution. Today's constitutional doctrines of equal citizenship, freedom of religion, and freedom of expression mediate cultural conflict by opening our public life to the participation of cultural minorities. By defending against cultural subordination and the coercion of cultural conformity, the same doctrines also promote tolerance for cultural difference. Together, these guarantees promise individuals broad freedom to choose for themselves among "the varieties of ethnic experience."<sup>209</sup>

#### IV. BELONGING: A CONSTITUTIONAL PERSPECTIVE

Until late in the nineteenth century the price of national unity in a "segmented society" was local autonomy of a kind that frequently permitted the imposition of local orthodoxy as a condition on belonging.<sup>210</sup> The required conformity might govern religious observance, political expression, or other forms of behavior ranging from trivialities such as public sobriety to the cruelties of slavery and Jim Crow. To all these varieties of local orthodoxy, the Constitution was seen as having little to say. By the mid-twentieth century, however, the Supreme Court not only had laid the doctrinal foundations for effective protection of unorthodox political and religious expression, but also had confronted the local "custom" of racial subordination.<sup>211</sup> The Court had inaugurated an

208. Walzer, *Pluralism in Political Perspective*, in *THE POLITICS OF ETHNICITY*, *supra* note 150, at 14. As Micaela di Leonardo shows convincingly, a range of choices about the quality and intensity of ethnic identification are available to people who think of themselves as fully assimilated to the mainstream culture. M. DI LEONARDO, *supra* note 20.

209. See *supra* note 20.

210. R. WIEBE, *supra* note 22.

211. An earlier Court had upheld racial segregation as an accommodation to local custom. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (confirming the constitutionality of "separate but equal"

era in which equal citizenship and tolerance for cultural difference would emerge as major themes in constitutional law. If the new constitutional doctrine could be made a reality, local autonomy, when it meant the exclusion of a cultural minority, would have to give way.

The Court's decisions protecting the constitutional values of equal citizenship centered on the equal protection clause of the fourteenth amendment,<sup>212</sup> but were not confined to that doctrinal area. For example, the Court invoked the establishment clause to forbid various forms of state sponsorship of religion that effectively treated members of religious minorities as outsiders.<sup>213</sup> In addition, the Court expanded the scope of the freedoms of speech and of the press in the course of protecting the rights of protesters against racial discrimination.<sup>214</sup> Although the Court's interpretations of substantive constitutional guarantees and civil rights laws have been expressed in the language of individual rights, in the aggregate they nourish a vision of American society that emphasizes tolerance and the value of belonging.

#### A. *The Constitution and the Choice of Cultural Identity*

The most important constitutional development of the twentieth century, the emergence of the principle of equal citizenship, has promoted the freedom of individual choice about cultural identification. When the promise of equal citizenship is fulfilled, the paths to belonging are opened in two directions for members of cultural minorities. As full members of the larger society, they have the option to participate to whatever degree they choose. They also may look inward, seeking solidarity within their cultural groups, without being penalized for that choice.

Any effective prohibition against racial discrimination, for example, weakens a racial caste system, widening the range of choice for individual members of racial minorities concerning participation in activities previously closed to them. The right to enter an interracial marriage<sup>215</sup> is a moving example of the role the law has played in removing obstacles to individual choices leading toward assimilation, but the entire body of antidiscrimination law has the same tendency. If equal legal rights can be made into a practical reality,<sup>216</sup> opportunities will be increased for the members of racial and other cultural minorities to participate

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railroad cars). Some Reconstruction civil rights laws referred to such "custom" as the effective equivalent of law. See, e.g., Act of March 4, 1909, ch. 321, § 20, 35 Stat. 1092, 1092 (current version codified at 18 U.S.C. § 242 (1982)); Act of April 20, 1871, ch. 20, § 1, 17 Stat. 13, 13 (current version codified at 42 U.S.C. § 1983 (1982)).

212. And the decisions also centered on the corresponding guarantee of equal protection that the Court found in the fifth amendment in *Bolling v. Sharpe*, 347 U.S. 497 (1954).

213. See *infra* note 348 and accompanying text.

214. See H. KALVEN, *supra* note 7.

215. *Loving v. Virginia*, 388 U.S. 1 (1967) (miscegenation law invalid).

216. This process is far from complete. The critical legislative beginnings in the modern era were the enactment of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a to 2000h-6 (1982)), and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971-1973 (1982)), along with the Supreme Court's broadened interpretation of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified at 42 U.S.C. § 1982 (1982)), in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

in the institutions of our public life and in private markets, including the employment market. These doctrinal developments are properly seen as egalitarian; yet they also are grounded in the idea that a person has a right to be treated as an individual and to not be excluded from any significant aspect of "the public life of the community"<sup>217</sup> because of race, religion, or ethnicity.

The paramount constitutional value recognized in these cases is dignity, or respect. In negative terms, the principle of equal citizenship protects against stigma, the imposition of badges of inferiority based on a person's race or membership in an ethnic or religious group. When stigma attaches to a subordinated cultural group, that denial of respect not only inhibits the integration of the group's members into the larger society but also undermines the value of belonging to the group. Putting an end to the various forms of domination based on race, religion, or ethnicity is thus a constitutional imperative if we are to foster satisfaction of the basic human need for connection. But, given a history of subordination of racial and other cultural groups, a society that prizes the value of belonging will solve only part of its problem by ending those practices of domination that have been embodied in law. The social vision nourished by the constitutional principle of equal citizenship not only tolerates but encourages a broad range of efforts to promote the integration of American society.<sup>218</sup>

If the subordination of a group is a constitutional wrong, there is nothing unorthodox in the suggestion that group remedies may be appropriate. On the whole, however, the United States Supreme Court in the last decade has been reluctant to recognize explicitly the relevance of racial groups to constitutional claims. For example, the Court has refused to treat a governmental action as unconstitutional racial discrimination even when the action's effect is to disfavor blacks as a group and the officials who engage in the action know of that effect. To establish racial discrimination, a plaintiff has the burden of proving that the government deliberately adopted a program in order to achieve a racially disparate result.<sup>219</sup> Typically it is difficult to prove either that the governmental action was improperly motivated<sup>220</sup> or that any individual black was disadvantaged by the action because of race.<sup>221</sup> The usual result, then, is to leave the matter to majoritarian politics, as an earlier majority of the Court did with the group wrong of segregation. Yet when majoritarian politics produces an affirmative action program, the inevitable argument against the program's constitutionality is that it abandons individual treatment in favor of group rights. Black people can be pardoned for perceiving this argument—which the Supreme Court has not accepted—as a variation on the theme: "Heads, we win;

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217. Black, *supra* note 132, at 101.

218. See *infra* text accompanying notes 234-37.

219. *E.g.*, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

220. *E.g.*, *Jefferson v. Hackney*, 406 U.S. 535 (1972) (statistical showing of racially disparate results is insufficient).

221. *E.g.*, *Warth v. Seldin*, 422 U.S. 490 (1975) (lack of standing). For a general discussion, see Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

tails, you lose."<sup>222</sup>

Beyond the domain of antidiscrimination law, the Supreme Court's constitutional decisions of the past forty years have both acknowledged and reinforced a national commitment to a broad freedom for individuals to make their own choices about cultural identification, particularly the choice of looking inward to a cultural group. The constitutional right to control one's children's education extends to questions of language and religion.<sup>223</sup> An expanding freedom of association protects not only marriage and family relationships and other similar forms of intimate association<sup>224</sup> but also association in groups that aim to promote racial or ethnic identification.<sup>225</sup> The core of the free exercise of religion, of course, is the freedom to organize and maintain a church or other religious group.

Some constitutional recognition is also given to a cultural group's right to exclude outsiders in order to maintain its own integrity. Thus, one's home has a preferred constitutional status that protects it against various kinds of official intrusion that might erode the family autonomy that is one foundation for cultural identification.<sup>226</sup> Even intrusions to protect so important a value as racial equality have their constitutional limits.<sup>227</sup> Churches, too, are protected in their right to exclude dissenters.<sup>228</sup> Thus far private clubs, successfully claiming associational freedom, have secured legislative exemptions from civil rights legislation, which exemptions allow them to maintain exclusive membership policies based on race or religion.<sup>229</sup>

222. On the place of groups in our thinking about constitutional rights, see Fiss, *supra* note 139; Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983). On affirmative action and race, see *infra* text accompanying note 234.

223. See *supra* text accompanying note 55 (language); *infra* text accompanying note 330 (religion).

224. In *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3250 (1984), the Supreme Court referred approvingly to a "freedom of intimate association." See Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

225. In fact, the leading decision identifying what the Court has recently called the "freedom of expressive association," *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3250 (1984), involved just such a group. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (the NAACP). On the freedom of association as a matrix for both communal life and a "normative universe," see Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

226. The fourth amendment is an explicit recognition of this preferred status for the home. See also *Stanley v. Georgia*, 394 U.S. 557 (1969) (possession of obscenity in the home protected by the first amendment); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (marital privacy guaranteed within the penumbra of the Bill of Rights).

227. See *Runyon v. McCrary*, 427 U.S. 160, 187-89 (1976) (Powell, J., concurring) (associational rights as bearing on the hiring of people to work in one's home).

228. The issue typically arises in the context of a church property dispute arising out of doctrinal schism. See *Jones v. Wolf*, 443 U.S. 595 (1979) (allowing state courts to apply state property law "neutrally" to such disputes).

229. The public accommodations title of the Civil Rights Act of 1964 exempts a "private club . . . not in fact open to the public." 42 U.S.C. § 2000a(e) (1982). The fair housing title of the Civil Rights Act of 1968 exempts rooms in dwellings occupied by their owners. 42 U.S.C. § 3603(b)(2) (1982).

Outside the contexts mentioned in the text, the constitutional protections of cultural exclusiveness weaken. Private schools and universities, whatever their cultural orientation, have no constitutional immunity from the application of civil rights legislation against their racially exclusive policies. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 172-73 (1976); see also *Bob Jones Univ. v.*

Our constitutional law thus offers a considerable measure of individual freedom to satisfy the need for connection by looking to the solidarity of a particular cultural group. Historically, however, most Americans have regarded this resolution of the search for belonging as no better than a consolation prize, a defensive identification in response to exclusion. Both the Nation's need for unity and the individual's need for connection will be best served when our constitutional law makes it possible for everyone, whatever his or her cultural identity, to participate as a full member of the larger American community, knowing that he or she belongs to America.

B. *The Cultural Outsider and the Paths to Belonging:  
Four Constitutional Problems*

For much of the Nation's history, cultural politics and constitutional law went their separate ways; even after the adoption of the Civil War amendments this pattern continued largely unchanged for some eight decades.<sup>230</sup> The mid-twentieth century emergence of the constitutional principle of equal citizenship coincided with the emergence of a new political consciousness among black people and other cultural minorities, and each of those developments gave strength to the other. Perhaps because constitutional litigation sometimes seems to be a continuation of cultural politics by other means, it is possible to overlook the difference between the two. Nathan Glazer has asked, rhetorically, "[I]s it more helpful to get a decision from a court that one is right, or an outcome to a negotiation in which one gets something—a new housing project or school, a nomination for an assembly seat, a promise of a job as an assistant district attorney?"<sup>231</sup> Often Glazer's implicit answer is correct.<sup>232</sup> But when the fundamental question is whether one is to be recognized as an equal citizen—whether one belongs as a respected participant in the society—it is not only helpful but essential to get a decision from a court that one is right—on principle.<sup>233</sup> Cultural politics transgresses its constitutional limits when it becomes the means for cultural domination.

The rhetoric of rights is vital to a cultural minority in defending the values of belonging, whether the concern be for group solidarity or for integration into the larger society. The rhetoric of rights, however, can also mislead, by suggesting that the concerns of constitutional law are focused narrowly on guaranteeing individual zones of noninterference. Even in protecting individual rights

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United States, 461 U.S. 574 (1983) (religious institution denied tax exempt status because of racially discriminatory policy). Yet it is by no means clear that civil rights laws have had any appreciable impact on the actual racial composition of private schools, as distinguished from the symbolism of those schools' exclusive policies. Black children have not rushed to apply for admission to "segregation academies."

230. See, e.g., A. BICKEL & B. SCHMIDT, *supra* note 113.

231. Glazer, *Politics of a Multiethnic Society*, in *ETHNIC RELATIONS IN AMERICA* 128, 142 (L. Liebman ed. 1982).

232. His argument becomes more persuasive as more and more members of an ethnic minority become integrated into American society. As integration progresses, the minority has less need for symbolic reaffirmations of equal membership in the national community.

233. See Karst, *supra* note 206, at 205-11.

to liberty and equality, the constitutional law of our multicultural society performs an organizing, constitutive function of the sort envisioned by the Framers. In developing a body of constitutional law that realizes the ideals of the American civic culture, our courts make it possible for the members of all cultural groups to belong to America. Judges engaged in that essential endeavor can truly say, "It is a *Nation* we are constituting."

### 1. Affirmative Action and Integration

The constitutional validation of affirmative action has been criticized as a development that will accentuate racial and ethnic divisions, promoting the fragmentation of the Nation into a society of groups. The theoretical side of this argument is that legitimizing affirmative action implies adopting a theory of group rights, a form of ethnic corporatism.<sup>234</sup> The argument's factual component is a prediction: affirmative action in the sense of "allocation among people by race"<sup>235</sup> or ethnicity will stimulate ethnic politics and intercultural conflict,<sup>236</sup> threatening the Country's solidarity.<sup>237</sup>

These concerns should trouble anyone who cares about the unity of our multicultural Nation. Yet what we know about assimilation and cultural pluralism suggests an alternative view of the likely results of affirmative action. In this perspective, affirmative action can be seen as a means to promote not separatism but integration—and, indeed, as an instrument in the long-term service of individualism.

We can begin by recapitulating four propositions already developed. First, the main cause contributing to cultural separatism in America has been the subordination of minorities.<sup>238</sup> Second, the most important technique of subordination has been the exclusion of cultural groups from jobs and from the public life of the community—that is, the exclusion of individuals on the basis of their membership in racial, ethnic, or religious groups.<sup>239</sup> To speak of caste is to speak of the subordination of a group.<sup>240</sup> Third, to identify the economic effects of systematic racial discrimination, it is necessary to look at the incomes of racial groups, and, in particular, at the serious disparities between the incomes of blacks and whites.<sup>241</sup> Fourth, assimilation means participation.<sup>242</sup> In the racial

234. This appears to be Nathan Glazer's view. See Glazer, *supra* note 231, at 128-32.

235. Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 777 (1979).

236. *Id.* at 809.

237. *Id.* at 778 n.10. In this Essay I focus on cultural identity and the sense of belonging. The discussion of affirmative action here is similarly focused and touches only tangentially the larger questions of substantive justice involved in these issues. Elsewhere I have argued for affirmative action as a means to promote the substantive values of equal citizenship. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 48-53 (1977).

238. See *supra* text accompanying notes 110-11.

239. See *supra* text accompanying note 112.

240. See Fiss, *supra* note 139, at 147-70; Marshall, *A Comment on the Nondiscrimination Principle in a "Nation of Minorities,"* 93 YALE L.J. 1006 (1984).

241. See Thurow, *supra* note 167, at 27-29; Jencks, *Discrimination and Thomas Sowell* (Book Review), N.Y. REV. OF BOOKS, March 3, 1983, 33-36 (discussing nonwhite incomes as percentages



context, generally we speak of integration rather than assimilation, but the two concepts are not different in substance. Whichever term be used, the process is fluid enough to permit a range of different choices about cultural identification and about participation in the life of the wider community.

Any such wider participation, however, ultimately requires the larger society's acceptance of the group that is being integrated. A group that has been subordinated in the past is unlikely to find that acceptance until individual members of the group have moved into the middle class in large numbers. At present, the avenues into the middle class are blocked for a great many blacks, who—given the Nation's history of racial subordination—simply do not have any effective choices about the nature and degree of their integration into the wider society.

Complex processes maintain the separation of the races today. Thomas Schelling has discussed a variety of mechanisms of individual choice that might produce racial "sorting and mixing" in residential neighborhoods, even though a generation has passed since the end of segregation imposed by law.<sup>243</sup> An examination of the origins of individual preferences for integration or separation reveals that one major contributing factor is the question of economic class, whether the issue is the integration of neighborhoods or of schools.<sup>244</sup> Nor is the problem of caste solved by ending the exclusion of middle class blacks from

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of white incomes). In 1983 the Current Population Survey gave these figures on median incomes for racial and ethnic groups:

Whites	\$24,603
Blacks	\$13,599
Spanish Origin	\$16,228

BUREAU OF CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1985, Table 742, at 477 (1984). Unemployment figures for 1983 were:

Whites	8.4%
Blacks	19.5%
Mexican-Americans	17.4%
Puerto Ricans	18.0%
Other Spanish Origin	13.2%

*Id.* Table 658, at 394; Table 666, at 396.

In the 1980s racial disparities in income and unemployment have widened. "In a recent Gallup poll, one-fifth of the U.S. population claimed that there were times during the preceding 12 months when they did not have enough money to buy the food, clothing, or medical supplies their families needed. Among blacks, close to half reported these conditions." Gallup, *Religion in America*, 480 ANNALS OF THE AMER. ACAD. OF POL. & SOC. SCI. 167, 174 (1985). These estimates are confirmed by recent figures on poverty among children. In 1984, 21.3% of children under 18 lived in families below the federal government's "poverty line." Among black children, the figure was 51.5%, the highest ever recorded. Houston, *1.8 Million Escape Poverty as '84 Rate Drops Sharply*, L.A. Times, Aug. 28, 1985, pt. I, at 1, col 5. For an exploration of the grim human realities that lie beneath figures like these, see K. AULETTA, *THE UNDERCLASS* (1982). On the implications of these facts for the condition of black Americans—all black Americans, see Bell, *The Supreme Court, 1984 Term—Foreword, The Civil Rights Chronicles*, 99 HARV L. REV. 4 (1985); Bell, *An American Fairy Tale: The Income-Related Neutralization of Race Law Precedent*, 18 SUFFOLK U.L. REV. 331 (1984).

242. See *supra* text accompanying note 193.

243. T. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 137-66 (1978).

244. Integration is better received by whites when the blacks in question are of the middle class rather than the working class. See S. STEINBERG, *supra* note 2, at 167-221; see, e.g., N. GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* 120-21 (paperback ed. 1978) (on failure of school integration when lower class blacks are integrated with middle class whites); *id.* at 147-48 (on opposition in middle class white neighborhoods to introduction of low-income housing for blacks). On the historic connection between class and neighborhood, see Kel-

middle class neighborhoods and institutions. The identification of blacks as a subordinate caste attaches to race itself and will last until the group's subordination ends. The stigma of caste thus differs fundamentally from the stigma attached to individual poverty.

In this perspective it is evident that a cultural group's economic disadvantage *as a group* contributes to the continued separation of the group's individual members from the larger society and, inevitably, to continued intercultural conflict.<sup>245</sup> Correspondingly, a subordinate cultural group's economic advancement *as a group* promotes both the group's integration and the Nation's intercultural harmony.

Given the lasting demoralizing effects of the racial caste system, integration in this sense appears impossible to achieve within the lifetime of anyone now living if we limit ourselves to the remedy of simply lowering formal racial barriers to entry into the wider society's institutions:

An individualistic ethic is acceptable if society has never violated this individualistic ethic in the past, but it is unacceptable if society has not in fact lived up to its individualist ethic in the past. To shift from a system of group discrimination to a system of individual performance is to perpetuate the effects of past discrimination into the present and the future.<sup>246</sup>

In other words, for a very long time, large numbers of blacks and of other subordinated minorities<sup>247</sup> will have no significant chances for individual advancement and no significant individual choices to make about belonging to the larger society—unless we are prepared to employ group remedies now. To put

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logg, *Neighborhood Segregation by Race and Class: An American Tradition*, in *ETHNICITY, LAW AND THE SOCIAL GOOD* 119 (W. Van Horne ed. 1983).

Alexander Bickel once expressed concern that the Supreme Court's school desegregation decisions, by failing to take account of these connections between race and class, would jeopardize the public schools' performance of their historic nationalizing and assimilating missions. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 121-51 (1970). On middle class "white flight" in Boston and other cities, see T. WHITE, *supra* note 28, at 121-22, 132 n.\*. But see Cunningham & Husk, *White Flight: A Closer Look at the Assumptions*, 7 *READINGS ON EQUAL EDUCATION* 371 (M. Barnett & C. Harrington eds. 1984), on the need to evaluate the influence of variables other than desegregation of public schools. On the relation of class to white attitudes toward race, see D. WELLMAN, *PORTRAITS OF WHITE RACISM* (1977).

For a class-centered analysis of discrimination against Chicanos, see M. BARRERA, *RACE AND CLASS IN THE SOUTHWEST* 174-219 (1979). On race and class generally, see R. POLENBERG, *ONE NATION, DIVISIBLE: CLASS, RACE, AND ETHNICITY IN THE UNITED STATES SINCE 1938* (1980).

245. "If there is an iron law of ethnicity, it is that when ethnic groups are found in a hierarchy of power, wealth, and status, then conflict is inevitable." S. STEINBERG, *supra* note 2, at 170. To put the same point differently, it is the middle class black person who has a stake in the system and who is most likely to find common ground with whites in loyalty to the Nation. In a famous passage, W.E.B. DuBois depicted the question of a black person's identification with the Nation as an internal conflict: "One ever feels his two-ness—an American, a Negro; two souls, two thoughts, two unreconciled strivings . . ." W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 3 (1953). This cultural dualism itself, however, represents an achievement of no little consequence; it is the middle class black who has the opportunity to make the choices implicit in those "unreconciled strivings."

246. Thurow, *supra* note 167, at 35-36; see also Smelser & Lipset, *Social Structure, Mobility, and Development*, in *SOCIAL STRUCTURE AND MOBILITY IN ECONOMIC DEVELOPMENT*, *supra* note 168, at 1, 6-17 (comparing "structural" and "individual" mobility).

247. On the relevance of caste to other minority groups, see *infra* text accompanying notes 261-62.

the matter more succinctly, "In order to get beyond racism, we must first take account of race. There is no other way."<sup>248</sup>

One eloquent critic rejoins: "Rather, one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race."<sup>249</sup> As a factual proposition, this response focuses on one aspect of the educative force of legal principle.<sup>250</sup> To defend affirmative action as integration is to emphasize a different and equally important aspect of law, namely the educative force of behavior in establishing norms. This latter view draws support from our experience with the desegregation of public accommodations under the Civil Rights Act of 1964.<sup>251</sup> Now, two decades after the adoption of the Act, the sight of black people in hotels and restaurants in Southern cities is unremarkable—a fact that surely owes more to the normative force of day-to-day behavior than it owes to any continuing aura of the law's enactment.

The quoted criticism, however, expresses more than a factual disagreement about the probable effectiveness of alternative ways to "get beyond racism"; it also expresses a strong moral conviction that racial distinctions have no legitimate place in our law. This position equates the status goal of equal citizenship<sup>252</sup> with the achievement of equality before the law. In contrast, the view of affirmative action as integration rests on the premise that the status of equal citizenship requires more than formal equality—that the racial caste system cannot be uprooted by trimming away those features of the system that have been written into law.<sup>253</sup>

If affirmative action programs were to settle in institutional concrete—for example, by establishing racial quotas in permanent legislation—there might be some reason to worry about a drift into cultural corporatism. Nothing in our recent experience justifies any such anxiety. Justice Powell's "diversity" approach to affirmative action in higher education<sup>254</sup> does not freeze admissions in racial or ethnic quotas; furthermore, the approach minimizes the occasions for white resentment.<sup>255</sup> Appropriations bills, including the one approved by the Supreme Court, setting aside a portion of certain public works funds for minority contractors,<sup>256</sup> have only temporary influence. When courts impose hiring quotas in employment discrimination cases, generally they limit the quotas' du-

248. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J.).

249. Van Alstyne, *supra* note 235, at 809.

250. Cf. Graglia, *Racially Discriminatory Admission to Public Institutions of Higher Education*, 9 Sw. U.L. REV. 583, 590 (1977) (asserting that the law should compel equal educational standards regardless of race, thus ultimately creating a system in which no racial differences exist).

251. 42 U.S.C. §§ 2000a to 2000a-6 (1982).

252. See *supra* text accompanying note 161.

253. See *supra* text accompanying note 166.

254. Justice Powell's view of the "constitutionally permissible" goal of attaining a diverse student body is enunciated in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-19 (1978).

255. See Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 13-15 (1979).

256. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

ration.<sup>257</sup> With the historically justified exception of the Indian tribal governments, no racial or ethnic group wields governmental power granted by legislation or judicial decree.<sup>258</sup> The chief results of affirmative action are not corporatist but individualistic, freeing individuals from being locked into subordinate status because of their group membership. As Michael Walzer has remarked, these programs offer "opportunities to individuals, not a voice to groups."<sup>259</sup> The spectre of ethnic corporatism, like other ghosts, has the capacity to frighten but lacks substance.

Affirmative action programs are often justified as compensation for past harm, and the continuing harms produced by a system of caste bring such a justification within the bounds of reasonable argument.<sup>260</sup> The alternative perspective offered here—viewing affirmative action as a means to integrate American society—helps to explain why a number of affirmative action programs extend beyond black beneficiaries to other disadvantaged racial and ethnic minorities.<sup>261</sup> In some cases, it would be hard to justify affirmative action as compensation for societal discrimination in generations past. For example, immigrants, immediately on arrival, normally are neither the direct victims of past discrimination in the United States nor the descendants of such victims. Even recent immigrants, however, will be plagued by the problem of caste once they join communities that are presently subordinated.<sup>262</sup>

No matter what justification is offered for affirmative action, it seems inevi-

257. On the importance of tailoring an affirmative action program to its remedial purpose—including limits on the program's duration—see *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979); *Kromnick v. School Dist.*, 739 F.2d 894, 907-08, 911-12 (3d Cir. 1984).

258. The delegation of governmental power to a religious group, of course, would present serious problems under the establishment clause. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (delegation to church of power to permit or deny liquor sales in nearby taverns is unconstitutional).

259. Walzer, *supra* note 208, at 22.

260. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980), *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 324, 362-79 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.); see also B. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973) (legal analysis of the validity of claims for compensation for former servitude); Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979) (exploring the effects of racial remedies on minorities). For an analysis of affirmative action in the employment context, combining a theory of remedy for past discrimination with a sensitive appreciation of the importance of integrating the work force, see Spiegelman, *Court-Ordered Hiring Quotas after Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.-C.L. L. REV. 339 (1985).

261. The statute upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), was typical in offering its benefits to "minority group members," defined to include citizens who were "Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." See Public Works Employment Act of 1977, Pub. L. No. 95-28, § 103(f)(2), 91 Stat. 116, 117 (amending 42 U.S.C. § 6705 (1982)).

262. The problem of defining membership in the groups thus disadvantaged remains a thorny one. See Van Alstyne, *supra* note 235, at 804-08; *Fullilove v. Klutznick*, 448 U.S. 448, 532, 534 n.5 (1980) (Stevens, J., dissenting). Mostly, the administrators of affirmative action programs resolve these difficulties by "muddling through," and no one suggests that the process is tidy. In Lester Thurow's words, "we have a dilemma. Individuals have to be judged on the basis of group data, yet all systems of grouping will result in the unfair treatment of some individuals." Thurow, *supra* note 167, at 31. Integration assigns a high value to the elimination of racial and ethnic caste, a value great enough to justify using racial and ethnic criteria even though the correlation between minority group membership and economic or educational disadvantage is—fortunately—not perfect. As that correlation decreases, the justification for continuing race-based affirmative action programs will similarly decrease. I concede that it may be politically difficult to repeal such a program once it is in place.

table that new claimant groups will emerge. At least some members of virtually all cultural groups except British Americans can claim that their predecessors experienced discrimination in this country. Furthermore, it should not surprise anyone if members of today's subordinated minorities think of such programs as "getting our share." The prediction that affirmative action will stimulate ethnic politics<sup>263</sup> is sound; indeed, the prediction seems already borne out by the ethnic revival of the 1970s.<sup>264</sup> What does not seem justified, however, is the assumption that a resurgence of ethnic politics will lead to a new fragmentation of American society. The history of ethnic politics suggests quite the reverse.<sup>265</sup> Even if an ethnic group were disposed to characterize its political objective as a share in "racial spoils,"<sup>266</sup> that group must necessarily turn outward to the wider society. As the leaders of today's cultural minorities turn from "solidarity politics" to "broker politics,"<sup>267</sup> no doubt they and their constituents, like the Irish in the nineteenth century, will find that participation means integration.

In offering a view of affirmative action as integration, I do not want to contribute to the illusion that such programs, by themselves, will integrate American society. Ultimately integration will depend on factors no one can foresee, most notably the ability of our economy to produce an abundance in which all can share.<sup>268</sup> Yet, although the new mobility of significant numbers of members of racial and ethnic minorities may not be a sufficient condition for integration, it appears to be a necessary condition if integration is to be accomplished before the Nation celebrates its tricentennial.

## 2. Voting and Cultural Politics

A proposition submitted to the California voters in 1984 called for the Governor to inform Congress that the state wished to be free of its obligation under federal law<sup>269</sup> to provide ballots in languages other than English. If you set out to construct a ballot measure that would be a symbol and nothing more, you might come up with that proposition. The proposition won, with more than

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263. See *supra* text accompanying note 236.

264. See Gleason, *supra* note 44, at 127-30. On white ethnic politics, see R. KRICKUS, PURSUING THE AMERICAN DREAM: WHITE ETHNICITY AND THE NEW POPULISM 139-97 (1976). On the "new ethnic politics" among Chicanos, see J. MOORE & H. PACHON, MEXICAN AMERICANS 155-58 (2d ed. 1976); see also J. DUNNE, DELANO: THE STORY OF THE CALIFORNIA GRAPE STRIKE (1967) (discussing how Cesar Chávez organized California grape pickers). For historical background to the modern political mobilization of Chicanos, see J. SAMORA & P. SIMON, *supra* note 117, at 161-202.

It is plain that these political developments are closely connected to a heightened sense of ethnic identity founded on self-respect. For a discussion of the need to develop this type of identity among young Americans of Chinese ancestry, see S. STEINER, FUSANG: THE CHINESE WHO BUILT AMERICA 218-36 (1979).

265. See *supra* text accompanying note 176.

266. Van Alstyne, *supra* note 235, at 809.

267. See *supra* note 184 and accompanying text.

268. The civil rights era, from the mid-1950s to the late 1960s, was a period of accelerated economic growth. A fund of resources is always easier to share when it is expanding than when it is contracting.

269. The 1975 Voting Rights Act Amendments, Pub. L. No. 98-110, § 203, 89 Stat. 400, 402 (codified as amended at 42 U.S.C. § 1973aa-1a (1982)).

seventy percent of the vote.<sup>270</sup> What was the substance behind the symbol? For some voters, surely the ballot issue symbolized dominance itself: "foreigners" were not to be allowed to "take over." Others no doubt thought that for a citizen to participate fully in the life of the larger community, an ability to speak English was essential. In other words, the attitudes of the California majority probably reflected the same range of feelings that had fed the Americanization movement around the turn of the century.

Difficult questions of fact and policy attend the issue of governmental support for languages other than English; but at least one thing is clear: any of the majority voters in California who thought they were voting for assimilation were mistaken. If the bilingual ballots have any effect at all, presumably that effect is to facilitate voting by persons whose native languages are not English. And the surest path to assimilation is participation in the larger society's activities and institutions. Voting is not just an expression of political preferences; it is an assertion of belonging to a political community.<sup>271</sup>

At last, official restrictions on voting by members of cultural minorities are behind us: religious tests, long waiting periods for citizenship, racial discrimination, and English literacy tests have been repealed or otherwise rendered invalid.<sup>272</sup> Yet the danger of faction, identified by James Madison,<sup>273</sup> remains. One group may capture the legislature and use that power to perpetuate its own dominance. The Supreme Court's initial reapportionment opinions<sup>274</sup> saw the issue of legislative districting mainly as a problem of the systematic overrepresentation of rural areas and of the political parties favored in those areas. Now, two decades later, to speak of the urban-rural or urban-suburban rivalry is often a genteel way of speaking about race and ethnicity.<sup>275</sup> Many of the Supreme Court's recent voting rights cases have arisen out of efforts by state legislatures to define—and sometimes to dilute—the voting strength of racial and ethnic groups.<sup>276</sup>

For many years the Supreme Court had avoided the subject of reapportionment, recognizing that the drawing of boundaries for legislative districts was

270. L.A. Times, Nov. 8, 1984, § I, at 19, col. 4.

271. This statement is true even where cultural politics are highly polarized. On the experience in one such community—Crystal City, Texas—see J. SCHOCKLEY, *CHICANO REVOLT IN A TEXAS TOWN* (1974). On voting and community membership, see Karst, *supra* note 237, at 27-29.

272. English literacy has been required for naturalization since 1906. Earlier, some courts read such a requirement into the general statutory language demanding attachment to the principles of the Constitution. Liebowitz, *The Official Character of Language in the United States: Literacy Requirements for Immigration, Citizenship, and Entrance Into American Life*, 15 *AZTLÁN: INT'L J. OF CHICANO STUD.* 25, 34 (1985). However, since 1970 Congress has forbidden the states to condition voting on passing a literacy test. This prohibition is a response to the use of literacy tests as a means of racial discrimination.

273. *THE FEDERALIST* No. 51 (J. Madison).

274. *Baker v. Carr*, 369 U.S. 186 (1962) (reapportionment presents a justiciable controversy); *Reynolds v. Sims*, 377 U.S. 533 (1964) (and companion cases) (districting must follow principle of one person, one vote).

275. On the political import of the changing racial and ethnic composition of the largest American cities, see T. WHITE, *supra* note 28, at 350.

276. *White v. Regester*, 412 U.S. 755, 765-71 (1973) equates racial and ethnic groups in this context.

inescapably bound up with politics.<sup>277</sup> Until very recently, the Court has been reluctant to confront the general problem of gerrymandering, presumably because the Justices have been unable to discern any principle that will separate permissible political choices from impermissible ones.<sup>278</sup> When the issue is racial or ethnic gerrymandering, however, the Court has long been prepared, at least in some cases, to intervene.<sup>279</sup> Evidently the reasons for this unwonted willingness to enter the "political thicket"<sup>280</sup> lie in the Nation's unhappy history of nativist restrictions on the franchise and in the belief that the minimum demands of the Nation's commitments to equality and national unity today include fair legislative representation for the members of racial, religious, and ethnic minorities.

Equality in the electoral process, in other words, is a central feature of equal citizenship. Furthermore, the legislators who draw the boundaries of electoral districts are keenly conscious of patterns of ethnic voting—of the behavior of cultural groups as groups. Legislative districting thus presents the strongest case for the courts to discard the premises underlying their refusal to find racial discrimination in the absence of particularized proof of discriminatory motive.<sup>281</sup> Any sensible view of the vote dilution problem would focus on the highly visible effects of districting on racial and other cultural groups.<sup>282</sup>

Some legislators and commentators continue to express concern that the "effects" approach may amount to a principle of "ethnic entitlements" in legisla-

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277. *E.g.*, *Colegrove v. Green*, 328 U.S. 549 (1946).

278. *Gaffney v. Cummings*, 412 U.S. 735 (1973), made clear the Court's determination not to enter the field of political gerrymandering. In an action that may portend a change of heart on this subject, the Court has granted review in a "pure" political gerrymandering case. This case, *Davis v. Bandemer*, *prob. juris. noted*, 53 U.S.L.W. 3687 (U.S. Mar. 18, 1985) (No. 84-1244), will probably be decided during the current Term. It is noteworthy that the Mexican-American Legal Defense and Educational Fund (MALDEF) has filed an amicus curiae brief in *Davis*, arguing against a test for the fairness of apportionment that focuses on the number of votes cast for a political party as compared with the number of legislative seats captured by that party. MALDEF shows beyond dispute that such a test, if applied nationally, would minimize the legislative representation of Mexican-American communities, which include younger-than-average populations and which, for reasons at least partly tied to past discrimination, tend to have low voter turn-outs. Jonathan Steinberg and Daniel Lowenstein have shown the impossibility of devising a politically neutral standard for drawing district lines. Steinberg & Lowenstein, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. Rev. 1 (1985).

279. See *White v. Regester*, 412 U.S. 755 (1973); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

280. Justice Frankfurter used this term in his plurality opinion in *Colegrove v. Green*, 328 U.S. 549, 556 (1946). See Lucas, *Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 SUP. CT. REV. 194.

281. See *supra* text accompanying note 219.

282. In *Mobile v. Bolden*, 446 U.S. 55 (1980), the Court held fast to the requirement of proof of intentional discrimination, but *Rogers v. Lodge*, 458 U.S. 613 (1982), in which the Court approved a lower court's finding of intentional discrimination based largely on circumstantial evidence of the racially disparate effects of districting legislation, blurred the borders between the tests of "intention" and "effects." In both these cases Justice Stevens registered his doubts that the Court was capable of fashioning a principle that would permit judicial intervention in cases involving racial gerrymanders but not in other situations. *Rogers*, 458 U.S. at 650-53 (Stevens, J., dissenting); *Mobile*, 446 U.S. at 88-92 (Stevens, J., concurring in judgment). The 1982 amendments to the Voting Rights Act of 1965, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973b (1982)), state that racially disparate "results" may be considered in determining racial discrimination in districting laws. This provision may supply a distinction that will satisfy Justice Stevens's colleagues.

tive districting.<sup>283</sup> The recent jurisprudence of voting rights does not amount to such a principle. It is the country's two centuries of experience with nativist restrictions on participation in elections that suggests the appropriateness of an "effects" test for determining constitutional<sup>284</sup> and statutory<sup>285</sup> violations in cases of racial or ethnic gerrymandering or vote dilution. Such a test does not imply a flat constitutional requirement of proportional representation for racial, ethnic, or religious groups.<sup>286</sup> It allows for judicial relief on the basis of effects only if such a group also shows that its members have suffered past discrimination, contributing to the group's present weakness in influencing governmental action.<sup>287</sup> It is possible to conceive of a case in which such an inquiry would call for subtle judgments,<sup>288</sup> but no subtlety is required in considering the representation of blacks in the Mobile, Alabama city commission in the 1970s.<sup>289</sup>

Even when the mechanisms of voting are not constructed in ways that mini-

283. The 1982 amendments to the Voting Rights Act of 1965, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(b) (1982)), included a proviso that the newly established "results" factor should not be taken to establish a right to proportionate representation. See also Glazer, *supra* note 231, at 136-41 (discussing redistricting in New York City).

284. Justice Marshall has argued that, whatever requirements of proof may be exacted under the fourteenth amendment, a principle looking to racially disparate effects is appropriate under the fifteenth amendment. *Mobile v. Bolden*, 446 U.S. 55, 125-35 (1980) (Marshall, J., dissenting).

285. The 1982 amendments to the Voting Rights Act of 1965, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(b) (1982)), seem to have resolved this issue, but it appears that much still depends on the weight that lower courts give to the racially disparate "results" of the districting laws.

286. Justice Stewart, writing for a plurality in *Mobile v. Bolden*, 446 U.S. 55, 75-80 (1980), so characterized Justice Marshall's opinion in that case. Robert Barnes has offered an interesting analysis of the problem of reconciling the 1982 amendments' statement that racially disparate "results" can be taken into account with the proviso that proportionate representation is not to be required. Note, *Voting Dilution, Discriminatory Results and Proportional Representation: What is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203 (1985).

If residential neighborhoods were integrated perfectly, districting systems and at-large systems would, assuming racial bloc voting, produce essentially the same results. Given the reality of racial bloc voting, an at-large system means that a racial minority will elect no representatives, and a system of districting means that they will elect some.

287. See *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 138-49 (1980).

288. *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977), was such a case. The Supreme Court upheld an application of the Voting Rights Act in an apparent trade-off between blacks and Hasidic Jews. One perspective on the case is that cultural politics had produced contrary results at the local and national levels. Under the supremacy clause, the national standard—which was applied to favor blacks—prevailed. Ultimately, however, one of the new districts elected a Jewish representative. See Glazer, *supra* note 231, at 137.

289. On the Supreme Court's "historical stance" in *Mobile v. Bolden*, 446 U.S. 55 (1980), see Soifer, *Complacency and Constitutional Law*, 42 OHIO ST. L.J. 383, 393-400 (1981) (criticizing the Court's historical analysis of past governmental acts in determining present discrimination). On remand, the district court in *Bolden* found the required evidence of racially discriminatory intent. *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1054-68, 1073-77 (S.D. Ala. 1982).

The at-large system has worked most effectively in minimizing black representation in small towns and rural areas. Shipp, *Across the Rural South, Segregation as Usual*, N.Y. Times, Apr. 27, 1985, at A1, col. 3. The cities, however, are changing. In 1983, Greensboro, North Carolina, elected two blacks to its city council as a result of a new districting system that was installed to head off a threatened federal lawsuit. Schmidt, *Jim Crow is Gone, But White Resistance Remains*, N.Y. Times, Apr. 6, 1985, at A1, col. 4. The rigging of electoral systems to minimize the voting strength of racial and ethnic minorities is by no means limited to the South. For a careful judge's sensitive and detailed account of the way in which the New York state legislature restructured New York City primary elections to diminish the chances of minority candidates, see Butts v. City of New York, 614 F. Supp. 1527 (S.D.N.Y. 1985).



mize the representation of racial or ethnic minorities, many of those groups are at a disadvantage in raising money to conduct political campaigns. The rise of the political action committee—an ironic result of post-Watergate “reform” legislation<sup>290</sup>—has made the translation of power from the economic marketplace to the political marketplace even easier than it was before, extending the arena in which poor people have difficulty in competing with people who are better off. Ethnic caucuses in legislatures, however, can and do engage in interest-group bargaining, particularly in the area of welfare goals. The congressional “set-aside” of a share of public works funds for minority businesses, upheld by the Supreme Court,<sup>291</sup> presumably resulted from such bargaining. Despite the concerns expressed by Justice Stevens,<sup>292</sup> the notion of an “ethnic payoff” has been a familiar part of American politics for many generations,<sup>293</sup> taking its place alongside such hallowed practices as crop subsidies that benefit the districts of influential members of Congress and the building of bridges and military bases in the home districts of members of the appropriations committees.

The most serious harm of ethnic gerrymandering, of course, is that it results in a legislative body that has no ethnic caucus. For cultural politics to work, there must be legislators who represent cultural minorities. When legislative districts are defined in ways that exclude the possibility of significant minority representation, potential minority voters see that their votes are not worth casting. Yet electoral mobilization is vital, not just to the achievement of a cultural group's legislative goals,<sup>294</sup> but to the group members' perceptions that they belong to the community.

The ability of ethnic leadership to mobilize voters has derived from two main sources. First, some leaders have created a voting clientele based on personal loyalties, built on a combination of material assistance and personal favors—the system of the old style urban machine.<sup>295</sup> Second, some issues—chiefly domestic issues concerning group status and foreign affairs issues concerning the ancestral homeland—bring out the voters by tapping strong feelings of cultural identity.<sup>296</sup>

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290. As fate would have it, the reform has favored candidates who are running for re-election. In the 1984 elections, political action committees gave 72% of their contributions to incumbents. Irwin, *PACs Donated Record Sum in '84, FEC Says*, L.A. Times, May 19, 1985, § 1, at 5, col. 3.

291. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); see *supra* note 256 and accompanying text.

292. See *Fullilove v. Klutznick*, 448 U.S. 448, 541-42 (Stevens, J., dissenting) (discussing the role of the congressional Black Caucus in the legislation that led to the *Fullilove* case).

293. See, e.g., R. WIEBE, *supra* note 22, at 144-45.

294. An additional effect of cultural politics is the creation of executive agencies with particular cultural constituencies. Barber, *Some Consequences of Pluralization in Government*, in *THE FUTURE OF THE UNITED STATES GOVERNMENT: TOWARD THE YEAR 2000*, at 242 (H. Perloff ed. 1972).

Beyond the immediate effects of a cultural group's electoral mobilization lies a general shift in public attitudes toward the justice of the group's claims. It is not accidental that the civil rights era began shortly after it became apparent that blacks had gained new political power in northern and western cities.

295. See N. GLAZER & D. MOYNIHAN, *supra* note 134 (on ethnic politics in New York City); M. JONES, *supra* note 8, at 229-46; R. WIEBE, *supra* note 22, at 139-46.

296. Issues of group status have provided the impetus for an impressive increase in the registration of black voters from 4.4 million in 1966 to more than 9 million in 1984. White, *New Powers, New Politics*, N.Y. Times, Feb. 5, 1984, § 6 (Magazine), at 22.

The existence of domination would seem at first glance to be an additional inducement for members of cultural minorities to vote. Yet this is one area in which a racial or ethnic group's dominated status appears to feed on itself. If people are to be persuaded to vote, they must believe that they can change their condition by influencing the government.<sup>297</sup> The process is thus circular: to participate in the public life of the community, the members of a cultural minority must have the sense that they count for something, and it is precisely that participation that is necessary to give them the sense that they belong. When a legislative majority accomplishes gerrymandering to the disadvantage of a cultural group, the history of American intergroup relations tells us that a serious "status harm"<sup>298</sup> has been inflicted and that a constitutional right needs vindication.

### 3. The Languages of Belonging

A recently proposed constitutional amendment would declare English the official language of the United States.<sup>299</sup> This proposal, like the California referendum on bilingual ballots, is little more than a nativist symbol. It is not needed for the conduct of the public's business, for that business is already conducted largely in English.<sup>300</sup> Nor does the proposal advance the cohesion of a multicultural nation any more than did the Governor of Iowa's attempt seventy years ago to prohibit telephone conversations in foreign languages.<sup>301</sup> The proposed amendment is an insult to the twenty million people in this country who speak a mother tongue that is not English, and a gratuitous insult at that.

The adoption of English as a primary language is itself one measure of assimilation into the larger American society.<sup>302</sup> There is still a lively debate over the effects of language on an individual's definition of reality,<sup>303</sup> but no one can doubt that language is one of the "symbol spheres"<sup>304</sup> that define social

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297. Recent incidents of low voter turnout among Latino groups may be explainable on this basis. See Kantowicz, *supra* note 174, at 66. Conceivably, in the case of immigrants who are citizens, low turnout is related to attitudes formed in the home country about the limits of what can be expected from government. In some cases low voter turnout has yet to be given any satisfactory explanation. Why, for example, do blacks in Mississippi and South Carolina now vote at significantly higher rates than do blacks in New York and Massachusetts? See Glazer, *supra* note 231, at 138-44.

298. Fiss, *supra* note 139, at 157.

299. In 1981 a resolution proposing the amendment was first introduced by Senator S.I. Hayakawa of California. Since his retirement, Senator Hayakawa has served as Honorary Chairman of a group called U.S.-English, which is promoting a newly introduced amendment. See Houston, *English Pushed as Official U.S. Language*, L.A. Times, June 13, 1984, § I, at 5, col. 1.

300. The United States Court of Appeals for the Second Circuit has rejected a claim that the Social Security system has a constitutional obligation to provide Spanish-language forms for the use of Spanish-speaking applicants. *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1713 (1984).

301. See *supra* text accompanying note 56.

302. LANGUAGE LOYALTY IN THE UNITED STATES, *supra* note 202 (collection of essays examining the retention of native languages and the conversion to English in America); Thernstrom, *supra* note 148, at 10.

303. For short summaries of the debate, see M. COLE & S. SCRIBNER, *CULTURE AND THOUGHT: A PSYCHOLOGICAL INTRODUCTION* 39-60 (1974); H. ISAACS, *supra* note 10, at 93-102.

304. H. GERTH & C. MILLS, *CHARACTER AND SOCIAL STRUCTURE: THE PSYCHOLOGY OF SOCIAL INSTITUTIONS* 274-305 (1970). On language as one of the "foundations of knowledge in

groups<sup>305</sup> and provide justification for social structures.<sup>306</sup> A distinctive language sets a cultural group off from others, with one consistent unhappy consequence throughout American history: discrimination against members of the cultural minority. Language differences provide both a way to rationalize subordination and a ready means for accomplishing it.<sup>307</sup>

Part of the reason participation in a market economy is a strong assimilating force is that the market has its own "language of how much, how many, how far."<sup>308</sup> One of the striking features of foreign language television is the assimilating impact of commerce. Some of the programming is focused on those culture-specific symbols that nourish the "instinctive sympathies and ancestral loyalties"<sup>309</sup> that hold a cultural minority together. The commercial messages, however, are straight from Madison Avenue, appealing to the same values as network advertising and even using the same vocabulary in literal translation.<sup>310</sup> Indeed, a considerable number of the commercial messages on foreign language stations are in English.

There is no mystery in the desire of immigrant parents in America to have their children learn English.<sup>311</sup> The children's opportunities, not just to find satisfying employment<sup>312</sup> but to make effective choices about a wide range of activities affecting their well-being, will be much improved if they are fluent in the dominant language. The strongest retention of the mother tongue has always been associated with people of the most marginal economic and social status.<sup>313</sup> These incentives are powerful; in the past they have inexorably led to the adoption of English and, for the most part, to the exclusive use of English by the third or fourth generation.<sup>314</sup>

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everyday life," see P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 34-46 (1967).

305. H. ISAACS, *supra* note 10, at 94. "The individuals of a group share patterns that enable them to see the same thing and this holds them together." E. HALL, *supra* note 14, at 125. One of those patterns, of course, is language.

Religion is another such pattern. The role of "ethnic parishes" in American history has been assimilationist. See, e.g., M. JONES, *supra* note 8, at 317-19. At least 30% of American Catholics are of Latino background; by the year 2000 the figure is expected to reach 40%; in Los Angeles today it is 70%. Chandler, *Catholic Church Absorbs a Growing Latino Flock*, L.A. Times, May 20, 1985, § I, at 1, col. 1.

306. H. GERTH & C. MILLS, *supra* note 304, at 278-87.

307. The unhappy history of the use of literacy tests in America provides ample evidence. See M. JONES, *supra* note 8, at 259-62; Liebowitz, *supra* note 272; Liebowitz, *English Literacy: Legal Sanction for Discrimination*, 45 NOTRE DAME LAW. 7 (1969).

308. R. WIEBE, *supra* note 22, at 41.

309. ETHNIC LEADERSHIP IN AMERICA, *supra* note 150, at 14.

310. On the matter of vocabulary, I can speak confidently only of commercial messages in Spanish. But the values appealed to by similar messages in Korean or Japanese is evident even to one who does not speak those languages.

311. See, e.g., Peñalosa, *Chicano Bilingualism and the World System*, in *THEORY IN BILINGUAL EDUCATION* 3, 8-11 (R. Padilla ed. 1980); Weimer, *Factors Affecting Native Language Maintenance*, in *THEORY IN BILINGUAL EDUCATION*, *supra*, at 35, 36-37.

312. U.S. DEP'T OF LABOR MANPOWER RESEARCH, MONOGRAPH NO. 31, IMMIGRANTS AND THE AMERICAN LABOR MARKET 42 (1974).

313. Fishman, *Language Maintenance in a Supra-Ethnic Age: Summary and Conclusions*, in *LANGUAGE LOYALTY IN THE UNITED STATES*, *supra* note 202, at 392, 396-97.

314. U.S. DEPT. OF LABOR MANPOWER RESEARCH, *supra* note 312, at 41. On the relatively rapid shift of Hispanic Americans to English, see Grenier, *Shifts to English as Usual Language by*

Some characteristics of the Spanish-speaking populations in the United States suggest the possibility of a departure from this historic pattern. Many families retain ties in Mexico, Central America, or Puerto Rico, and move back and forth between their present and former communities. This "revolving door" phenomenon,<sup>315</sup> along with the high probability of a continued flow of immigrants over the southern border,<sup>316</sup> means that large Spanish-speaking communities will continue to exist in the United States for the indefinite future.<sup>317</sup> This fact, however, is consistent with various kinds of assimilation of large numbers of individuals into the larger economy and society. Probably the process of assimilation will be slowed somewhat in these communities. But the recent experience of economic advance from one generation to another among the Latino populations<sup>318</sup> and the large proportion of marriages between Latino and non-Latino spouses<sup>319</sup> indicate that for a great many individuals and families, assimilation

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*Americans of Spanish Mother Tongue*, in *THE MEXICAN AMERICAN EXPERIENCE*, *supra* note 5, at 346.

315. See Cafferty, *The Language Question: The Dilemma of Bilingual Education for Hispanics in America*, in *ETHNIC RELATIONS IN AMERICA*, *supra* note 231, at 113-15.

316. Demographers who make projections for the future are always careful not to assume any particular levels of influx. They do, however, include very large numbers of immigrants in their models. See, e.g., Corwin, *supra* note 5; Kraly, *Immigration Debate and Demographic Policy*, in *THE UNAVOIDABLE ISSUE*, *supra* note 5, at 123. The conventional "push-pull" theory of Mexican immigration is trenchantly criticized in López, *supra* note 117. Whatever the causes of this immigration, it is clear that population growth in other countries has always been a necessary condition for large-scale immigration to the United States. Hofstetter, *Economic Underdevelopment and the Population Explosion: Implications for U.S. Immigration Policy*, in *U.S. IMMIGRATION POLICY*, *supra* note 5, at 55. The population of Mexico in 1980 was estimated at 70,000,000. WORLD BANK, *WORLD DEVELOPMENT REPORT* 111 (1980), and is estimated to increase to 116,000,000 by the year 2000—an eight-fold increase during the twentieth century. *Id.* at 143.

317. "Although estimates of the target population [for bilingual education programs] range from 934,000 to 3.6 million, there is general agreement that this population will continue to expand. . . . The number of Hispanic children may, by some projections, double by the year 2000." H.R. REP. NO. 748, 98th Cong., 2d Sess. 5, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4036, 4040. The same report adds: "In 1981, 30 percent of Hispanic 18 and 19-year-olds were not high school graduates. . . ." *Id.* On "the dropout problem" and its relation to bilingual education, see Ortego, *The Education of Mexican Americans*, in *THE CHICANOS: MEXICAN AMERICAN VOICES* 157, 165-69 (E. Ludwig & J. Santibañez eds. 1971).

Comparative studies of language shift and language retention reveal that members of subordinated groups are most resistant to language shift when the subordinate group is spatially isolated and indigenous rather than migrant. See R. SCHERMERHORN, *COMPARATIVE ETHNIC RELATIONS: A FRAMEWORK FOR THEORY AND RESEARCH* 122-58 (1970); Lieberman, Dalto & Johnston, *The Course of Mother Tongue Diversity in Nations*, 81 AM. J. SOC. 34, 53-59 (1975).

318. Thernstrom, *supra* note 148, at 24. It is by no means clear that Latinos have advanced economically in the years since 1980. "2.3 million Latino children lived in poverty in 1984, up from 2.2 million the year before." May, *38.7% of Latino Children in U.S. Lived in Poverty in '84, Congressional Study Finds*, L.A. Times, Sept. 15, 1985, pt. I., at 4, col. 1. Thernstrom's comments were addressed to the long-term question of intergenerational advance. On the rapid growth of Latino enterprise, see Sahagún, *Latino Entrepreneurs Move Into Mainstream*, L.A. Times, July 1, 1984, § V, at 1, col. 2. On doubts among the "Chicano generation" about the likely continuation of this pattern of intergenerational advance, see Alvarez, *The Psycho-Historical and Socioeconomic Development of the Chicano Community in the United States*, in *THE MEXICAN AMERICAN EXPERIENCE*, *supra* note 5, at 33, 49.

319. Thernstrom, *supra* note 148, at 23. Among married persons who identified themselves as "Hispanic" in the 1980 census, 71% had married other Hispanics. Collins, *supra* note 204. Assuming that the 71% were married to each other, this figure means that about 45% of the marriages involving Hispanics were to non-Hispanics. (Among 1000 married Hispanics, the 71% would account for 355 marriages—710 people—and the 29% for 290 marriages.) For similar figures see R. GRISWOLD DEL CASTILLO, *LA FAMILIA: CHICANO FAMILIES IN THE URBAN SOUTHWEST*, 1848

lation is following its usual course, even as the communities retain their strong Latino identification.

The expectation that large Spanish-speaking communities will persist for many years is one factor contributing to a call for national support for bilingual education of children in those communities' public schools.<sup>320</sup> Bilingual education can take a number of forms and in those varying forms can serve a number of purposes. In the 1960s such programs were proposed to facilitate the learning of English and to avoid disadvantaging children whose English was deficient in their studies of other subjects. More recently, bilingual education has been seen by a number of its advocates as a means to maintain the children's native languages and cultures.<sup>321</sup> The issue is important for people with a variety of political agendas, from separatism at one pole to absorption at the other. Even the professional literature evaluating bilingual education bears the marks of this polarization. The evaluations to date are inconclusive.<sup>322</sup>

The issue of bilingual education has nonetheless served to unite the leadership of the Nation's Latino communities, even though those communities vary in a number of important respects, including race and national origin.<sup>323</sup> The issue's emotional appeal is grounded in concerns about status that are directly

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TO PRESENT 120-22 (1984). One study suggests a significant increase in the rate of intermarriage of Mexican Americans since 1970. Cazares, Murguia & Frisbie, *Mexican American Intermarriage in a Nonmetropolitan Context*, in *THE MEXICAN AMERICAN EXPERIENCE*, *supra* note 5, at 392.

320. "One million of the 4 million students in California's public schools are Hispanic, and one-third of those students speak limited English, at best." McConahay, *Bilingualism: Is It a Mixed Blessing?*, S.F. Sunday Examiner & Chron., Jan. 8, 1984, Magazine, at 10.

321. For a short summary of the various types of bilingual education, see González, *Coming of Age in Bilingual/Bicultural Education: A Historical Perspective*, 19 *INEQUALITY IN EDUC.* 5 (1975). On the disagreements among experts concerning the objectives and methods of bilingual education, see the series of articles by William Trombley in the Los Angeles Times: *Can Bilingual Education Do Its Job?*, Sept. 4, 1980, § I, at 1, col. 1; *Bilingual Education: Even Experts Are Confused*, Sept. 5, 1980, § I, at 1, col. 5; *Instruction Methods Vary in the Bilingual Classroom*, Sept. 6, 1980, § I, at 1, col. 5. Congress in 1984 made its view clear: "The purpose of a bilingual program is to help children enter an all-English class as soon as possible." H.R. REP. NO. 748, *supra* note 317, at 5, 1984 U.S. CODE CONG. & AD. NEWS at 4039. Although bilingual programs primarily serve children from Spanish-speaking homes, in 1983 they also served children who spoke more than 80 native languages. *Id.* at 5, 1984 U.S. CODE CONG. & AD. NEWS at 4040.

On the difficulties of language maintenance in a society characterized by social mobility, see Glazer, *The Process and Problems of Language-Maintenance: An Integrative Review*, in *LANGUAGE LOYALTY IN THE UNITED STATES*, *supra* note 202, at 358. For a defense of language maintenance, see Fishman, *Planned Reinforcement of Language Maintenance in the United States: Suggestions for the Conservation of a Neglected National Resource*, in *LANGUAGE LOYALTY IN THE UNITED STATES*, *supra* note 202, at 369.

322. The history of bilingual education is outlined and the literature critically surveyed in Rotberg, *Some Legal and Research Considerations in Establishing Federal Policy in Bilingual Education*, 52 *HARV. EDUC. REV.* 149 (1982). A sharply critical analysis is found in N. EPSTEIN, *LANGUAGE, ETHNICITY, AND THE SCHOOLS: POLICY ALTERNATIVES FOR BILINGUAL-BICULTURAL EDUCATION* (1977). For a thoughtful response, see Otheguy, *Thinking About Bilingual Education: A Critical Appraisal*, 52 *HARV. EDUC. REV.* 301 (1982). Raymond Padilla has edited a series of volumes under the general title of *Ethnoperspectives in Bilingual Education*. They are: Volume I: *BILINGUAL EDUCATION AND PUBLIC POLICY IN THE UNITED STATES* (1979); Volume II: *THEORY IN BILINGUAL EDUCATION* (1980); Volume III: *BILINGUAL EDUCATION TECHNOLOGY* (1981). Each of the volumes contains a broad range of essays.

323. This political development appears to be part of a modern phenomenon comparable to the "first assimilations" that united Lutherans and Catholics into a community called "Germans" and Germans and East Europeans into a community called "Jews."

traceable to the Nation's history of discrimination against people of Hispanic background. Like the demands for "Black Power," the demand for Spanish language maintenance in the schools is an assertion of the worth of a people and a culture; it, too, should be seen as a demand not for separation but for inclusion.<sup>324</sup>

Cultural politics has already produced its own results in the bilingual education area. Since 1968, Congress has conditioned the grant of school funds on the adoption of bilingual programs for children of "limited English proficiency."<sup>325</sup> Some state legislatures have ordered school districts to make bilingual education available, subject to parental consent.<sup>326</sup> Local school boards have considerable practical control over the content of these programs.<sup>327</sup> Thus, it is natural to find heavy emphasis on maintenance of the Spanish language and Latino culture in a city like Miami, and in other school districts with very large proportions of Latino students.<sup>328</sup>

Against this background, some have proposed to remove the issue from cultural politics, through recognition of a constitutional right to government support for bilingual education, or even the maintenance of foreign languages among cultural minorities.<sup>329</sup> Unquestionably our existing constitutional doc-

324. UCLA houses a journal, now in its sixteenth year, called *AZTLÁN: INTERNATIONAL JOURNAL OF CHICANO STUDIES RESEARCH*. Most of the journal's contents are in English, but at the front of each issue, just under the copyright notice, are these words: "Printed in El Pueblo de Nuestra Señora la Reina de Los Angeles de Porciúncula. U.S.A." Both parts of that statement are significant. The United States is not just a collection of cultures, but a multicultural nation.

325. The provision is currently embodied in Title VII of the Educational Amendments Act of 1984, Pub. L. No. 98-511, 98th Cong., 2d Sess., 98 Stat. 2370 (codified at 20 U.S.C.A. §§ 3221-3262 (West Supp. 1985)). The quoted phrase is from 20 U.S.C.A. § 3222 (a)(1).

326. California's program is embodied in CAL. EDUC. CODE §§ 52160-52179 (West 1978 & Supp. 1985). The parental consent provisions appear in *id.* §§ 52161, 52173. The parallel parental consent provision in the federal law is in the 1984 Educational Amendments Act, Pub. L. No. 98-511, § 721(d)(1)(D), 98 Stat. 2366, 2376-77 (codified at 20 U.S.C.A. § 3231(d)(1)(D) (West Supp. 1985)).

327. Federal government enforcement of the administrative guidelines issued in the wake of the Supreme Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974) (upholding governmental guidelines requiring education that addressed the needs of children with English language deficiency), was lax until late in the Carter Administration. See Pifer, *Bilingual Education and the Hispanic Challenge*, in 7 READINGS ON EQUAL EDUCATION 12 (M. Barnett & C. Harrington eds. 1984). Federal law contemplates wide local variation in these programs, setting out seven different types of bilingual education that are eligible for federal support. See H.R. REP. NO. 748, *supra* note 317, at 6-8, 1984 U.S. CODE, CONG. & AD. NEWS at 4039-43.

328. On Miami, see Henry, *Against a Confusion of Tongues*, TIME, June 13, 1983, at 30. Whatever may result in the short term from cultural maintenance programs, the fact that so many Cubans in Miami are middle-class suggests the strong likelihood that their children will be assimilated rapidly. See *supra* text accompanying note 203.

Some critics have been disturbed that there are professional and other careers associated with bilingual education. See, e.g., N. EPSTEIN, *supra* note 322, at 38. But the history of ethnic politics in America is replete with examples of careers in politics and elsewhere that have been built on one or another feature of ethnic solidarity. See, e.g., M. WALZER, *supra* note 149, at 148. Even strong supporters of bilingual education concede that much of the instruction in these programs has been inadequate. They argue, however, that many of the teachers specially recruited for the programs are given inadequate training for their tasks. See, e.g., N. EPSTEIN, *supra* note 322, at 71, 75 (the response of José Cárdenas).

329. See, e.g., Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52 (1974); U.S. COMM'N ON CIVIL RIGHTS, A BETTER CHANCE TO LEARN: BILINGUAL-CULTURAL EDUCATION 142-70 (Clearinghouse Publication No. 51, 1975) (constitutional right to equal access to education, which may require judicial remedies including one

trine supports a wide measure of individual choice concerning behavior bearing on assimilation and the maintenance of cultural identity. When we are speaking of the education of children, necessarily the effective choice must rest with parents. *Meyer v. Nebraska*<sup>330</sup> and its companion cases<sup>331</sup> protected the rights of individual parents to send their children to private religious schools that offered instruction in German.<sup>332</sup> Yet neither those decisions nor any others by the Supreme Court suggest that the public schools have a constitutional obligation to provide instruction in students' native languages.<sup>333</sup> Recognition of such a claim would require a major expansion of equal protection doctrine.

Undoubtedly the issue of bilingual education touches the sense of belonging, and undoubtedly that sense is vital to every person's identity and self-esteem. However, in this multicultural society the paths to belonging are as numerous as the "varieties of ethnic experience."<sup>334</sup> It is for parents and local communities to make their choices about the paths they will follow, including how much cultural maintenance they want for their children. Cultural politics can translate those choices into community action, as it has done in Congress, in the state legislatures, and in hundreds of local communities.<sup>335</sup> In the present state of understanding about the effects of bilingual education on learning, however, it would be unwise to constitutionalize the outcome of these issues.<sup>336</sup>

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or another form of bilingual education). Reymundo Gamboa appears to support the recognition of a constitutional right to cultural maintenance in his essay *Cultures, Communities, Courts and Educational Change*, in *THEORY IN BILINGUAL EDUCATION*, *supra* note 322, at 234.

330. 262 U.S. 390 (1923); see *supra* note 55 and accompanying text.

331. The three companion cases were reported under the name of *Bartels v. Iowa*, 262 U.S. 404 (1923).

332. The opinions also expressed concern for the due process rights of teachers to pursue their callings.

333. In *United States v. Texas*, 342 F. Supp. 24 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972), and in *Serna v. Portales Mun. Schools*, 351 F. Supp. 1279 (D.N.M. 1972), *aff'd*, 499 F.2d 1147 (10th Cir. 1974), the courts included orders for the institution of bilingual education programs as part of the remedies in school desegregation cases. A consent decree in *Aspira of New York, Inc. v. Board of Educ.*, No. 72 Civ. 4002 (S.D.N.Y. 1974), included some provisions calling for cultural maintenance. See Thernstrom, *E Pluribus Plura—Congress and Bilingual Education*, 60 PUB. INTEREST 3, 20-21 (1980). In the Supreme Court's one venture into the field, *Lau v. Nichols*, 414 U.S. 563 (1974), it upheld the validity of administrative regulations under Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 602, 78 Stat. 241, 252-53 (codified at 42 U.S.C. § 2000d-1 (1982)), requiring a school board to take affirmative steps to remedy language deficiencies that had the effect of excluding "national origin minority group children from effective participation" in the board's educational program.

For an argument for a "right of cultural pluralism," derived from the equal protection clause, see Note, *Cultural Pluralism*, 13 HARV. C.R.-C.L. L. REV. 133, 143-46 (1978).

334. See *supra* note 20.

335. To affect school affairs, of course, parents must vote and the electoral system must not be rigged against them. The town of Whittier, a suburb of Los Angeles with a significant Chicano population, has continued to elect an all-Anglo school board in at-large voting. A challenge to this electoral system based on state law has thus far failed. See *Carrillo v. Whittier Union High School Dist.*, No. 67858, (Cal. Ct. App., 2d Dist. Civ. 1984). In 1985 the California Supreme Court ordered the opinion of the Court of Appeals "depublished." Conversation with John E. Huerta, of Mexican-American Legal Defense and Educational Fund (June 6, 1985). Suits challenging at-large election systems are being considered in about 25 California communities. See, Brennan, *Texas Voting Rights Group Sues Pomona*, L.A. Times, May 22, 1985, § I, at 22, col. 4.

336. See, e.g., L. ZEPPERT & B. CRUZ, *BILINGUAL EDUCATION: AN APPRAISAL OF EMPIRICAL RESEARCH* (Berkeley Unified School Dist. 1977); Rotberg, *supra* note 322, at 165. For a cautious statement outlining the potential benefits of bilingual education offered under ideal conditions, see

Whatever course our cultural politics and constitutional law may take concerning bilingual education, our long national experience with assimilation and cultural pluralism suggests that the forms in which the various Latino cultures survive will depend, in the long run, on the choices of millions of individual members of those cultures, not on any nationally enforced political norm.

#### 4. The Religious Outsider

The religion clauses of the first amendment<sup>337</sup> recognize the primacy of individual choice concerning religious identity. Only the free exercise clause speaks explicitly to the individual's religious liberty. One purpose of the establishment clause, however, was to assure that religious affiliation would be voluntary. That clause's institutional concerns—for separating church and state and for keeping the national government from trenching on the domain of the states<sup>338</sup>—ultimately are concerns for the prevention of tyranny. Thus, at the substantive core of both the establishment clause and the free exercise clause lies the individual's religious liberty. In the context of this Essay, that liberty includes the freedom to develop, maintain, or modify a religious identity.<sup>339</sup>

Congress has never threatened to establish a national religion. Beyond the explicit prohibition of the first amendment lies another insurmountable obstacle to a national religion: the Nation has never approached the religious consensus that such an establishment would require. On the eve of independence, Congregationalists predominated in New England and Anglicans in Virginia, but in all the other colonies these two sects were in the minority. In most of the colonies no majority religion existed. "Accordingly, religious liberty became a practical necessity no matter what the letter of the law proclaimed."<sup>340</sup> Local orthodoxy, however, was the rule rather than the exception. Within colonial towns and villages, the standard was homogeneity. Dissenters generally chose to create new communities of their own.<sup>341</sup> In one sense "the consent of the governed"<sup>342</sup> meant that local communities were permitted to impose their own conformities,

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Troike, *Research Evidence for the Effectiveness of Bilingual Education*, in 7 READINGS ON EQUAL EDUCATION, *supra* note 327, at 183. If it were demonstrated that a particular form of bilingual education would make the difference between effectively excluding the children of a linguistic minority from a public educational program and providing those children effective access to the program, that fact would be a powerful argument for a constitutional right to that form of bilingual education. In the parlous state of research on the value of the many different forms of bilingual education, the courts have no basis for drawing such a factual conclusion.

A serious concern raised by any program that labels some school children as "different" is the danger of stigmatizing those children. Martha Minow sensitively analyzes the problem in her article, Minow, *Learning to Live With the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS., Spring 1985, at 157.

337. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ." U.S. CONST. amend. I.

338. See Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 772-79.

339. See Note, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468, 1472-75 (1984).

340. M. JONES, *supra* note 8, at 37.

341. R. WIEBE, *supra* note 22, at 18, 49, 169.

342. The Declaration of Independence para. 2 (U.S. 1776).



including religious conformities, by both formal and informal means.<sup>343</sup>

Today's constitutional doctrine rests on quite a different premise. Our separate peoples have become a nation, and religious liberty is not to be conditioned on the individual's forfeiture of the status of equal citizenship. The Constitution guarantees "the equality of believers and non-believers, saints and worldlings, the saved and the damned: all are equally citizens; . . ."<sup>344</sup> Justice O'Connor recently addressed one aspect of this wider principle when she wrote, "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community."<sup>345</sup> The Constitution forbids various kinds of religious discrimination<sup>346</sup> and protects the status of religious outsiders as equal citizens by forbidding governmental sponsorship of religion.<sup>347</sup>

In the perspective of concerns about equal citizenship and religious domination, the Supreme Court's decisions on schoolhouse religion<sup>348</sup> are understood easily. The problem of officially sponsored school prayer—even watered-down "nondenominational" prayer<sup>349</sup>—is not just that it lends some perfunctory government support to Christianity, to Judaic-Christian monotheism, or to religion in general. The most serious harm of this form of government support is that it tells schoolchildren who do not share the dominant religious faiths represented by the prayer that they are outsiders, that they do not belong as full members of the community.<sup>350</sup> For our generation's religious politics, school prayer has be-

343. See D. POTTER, *Social Cohesion and the Crisis of Law*, in *HISTORY AND AMERICAN SOCIETY* 390, 409-10 (D. Fehrenbacher ed. 1973); see also R. WIEBE, *supra* note 22, at 35-36 (successful administration of the colonies required adaptation to local conditions).

344. M. WALZER, *supra* note 149, at 245-46.

345. *Lynch v. Donnelly*, 104 S. Ct. 1355, 1366 (1984) (O'Connor, J., concurring).

346. *E.g.*, *Larson v. Valente*, 456 U.S. 228, 255 (1982) (rule amounting to a denominational preference violates the first amendment); *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (religious test for public office is unconstitutional). Article VI of the United States Constitution prohibits the use of any religious test for appointment to federal office. The first amendment's guarantee of freedom of speech also is used to protect individuals from discrimination based on religious expression. *E.g.*, *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (state university that allows use of facilities by student groups excluded a student religious group).

347. *E.g.*, *Stone v. Graham*, 449 U.S. 39, 42 (1980) (*per curiam*) (posting of Ten Commandments in classrooms violates establishment clause); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (official school prayer violates establishment clause). "The 'establishment of religion' clause of the First Amendment means at least this: Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (*dictum*).

The "civil religion" christened by Robert Bellah in 1967, Bellah, *Civil Religion in America*, in *AMERICAN CIVIL RELIGION* 21 (R. Richey & D. Jones eds. 1974), is so watered down as to include vague notions of "national self-transcendence" that have little connection to the God of our Fathers. See Marty, *Two Kinds of Two Kinds of Civil Religion*, in *AMERICAN CIVIL RELIGION*, *supra*, at 139, 144.

348. *E.g.*, *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (official state prayer recited in public schools); *McCullum v. Board of Educ.*, 333 U.S. 203 (1948) (released time religious instruction in schoolhouse).

349. See *Engel v. Vitale*, 370 U.S. 421, 422, 430 (1962). Vern Countryman's unpublished mock opinion, "signed" by Justice Douglas, included such a prayer: "To Whom it may concern: We appreciate it. Amen."

350. "[I]t is not only positive values that sacred symbols dramatize, but negative ones as well. They point not only toward the existence of good but also of evil, and toward the conflict between them." C. GEERTZ, *supra* note 14, at 130. The religious outsider is thus dramatized as a moral

come the same kind of symbol of political domination that Prohibition was during the century of intercultural strife that ended in 1933.<sup>351</sup> The school board's message to the religious outsider is clear: "This is our town."

Two decades ago Ernest Brown criticized the Supreme Court for failing to appreciate the difficulty of the question of standing to sue in the school prayer and Bible reading cases.<sup>352</sup> He argued that the standing of a child or parent should turn on a showing, to the satisfaction of a jury,<sup>353</sup> that the child had been coerced to join in religious exercises or to be present while they were going on. The Court, on the other hand, concluded that coercion was irrelevant.<sup>354</sup> In the prayer case the Court did not discuss standing at all; in the Bible reading case the Court said only that the plaintiffs, schoolchildren and their parents, were "directly affected" by the laws and practices challenged.<sup>355</sup>

The Court was right in concluding that the children and parents had standing, and it was right in refusing to leave the constitutional claims of religious outsiders to local juries. The institution of trial by jury has long served the ideal of local orthodoxy; from an early time in America, jurors were seen as "dependable neighbors who would uphold the community canons,"<sup>356</sup> and nothing in our recent experience suggests that things have changed. As for the question of standing to sue, much depends on the way the harm is characterized. The Justices who decided the prayer and Bible reading cases obviously understood that, coercion or no coercion, children were being told by public officials that they did not really belong to the community. That is a particularly painful harm,<sup>357</sup> one that deserves explicit constitutional recognition.<sup>358</sup> The remedy for that harm should not be left to ethnic politics for two reasons. First, the religious out-

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outsider. "[S]chool prayer violates a fundamental assumption of American life . . . : that one ought to be able to retain one's humanity without being made to feel a pariah in one's own country." Rosenblatt, *Whose Country Is It, Anyway?*, TIME, March 19, 1984, at 94.

351. See *supra* text accompanying note 59.

352. Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1.

353. These were suits for injunctive relief, which normally would not call for jury trial. Perhaps Professor Brown had in mind the impaneling of an advisory jury.

354. *Abington School Dist. v. Schempp*, 374 U.S. 203, 224-25 (1963); *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962).

355. *Abington School Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963).

356. R. WIEBE, *supra* note 22, at 152. Compare Judge Learned Hand's 1920 letter to Zechariah Chafee, expressing concern about the Supreme Court's free speech "rule" of "tendency plus a purpose to produce the evil," because of its reliance on jury factfinding. "I think it is precisely at those times when alone the freedom of speech becomes important as an institution, that the protection of a jury on such an issue is illusory." Gunther, *Learned Hand and the Origins of First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 766 (1975) (quoting Learned Hand's letter).

357. See *supra* text accompanying note 145.

358. Professor Brown, rejecting this harm as unworthy of constitutional protection, quotes Justice Jackson's expressions of doubt in *McCullum v. Board of Educ.*, 333 U.S. 203, 232-33 (1948) (Jackson, J., concurring):

The complaint is that when others join in and [the dissenting child] does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress.

Justice Jackson misses two crucial points. It is the government that is imposing the status harm in

sider's right to equal citizenship is not a matter for negotiation. Second, local ethnic and religious majorities can be expected, especially when they feel threatened, to exercise their political dominance by creating symbolic exclusions designed to reduce cultural outsiders to a subordinate status.

Unhappily, the Supreme Court, in giving its recent constitutional benediction to the City of Pawtucket's official Christmas display of a Nativity scene, showed little concern for this kind of symbolic exclusion of religious outsiders.<sup>359</sup> Indeed, Chief Justice Burger's majority opinion positively reveled in reciting incidents from our national history in which religious groups have succeeded in getting governmental endorsement and politicians have reached out for divine coattails.<sup>360</sup> As for Pawtucket's official sponsorship of a portrayal of the divinity of Christ, the Court asserted that "the religious nature of the crèche" did not detract from the display's secular purpose, which was merely to "[take] note of a significant historical religious event long celebrated in the Western World."<sup>361</sup> The Court found insufficient evidence that the display of the crèche was an "effort to express some kind of subtle governmental advocacy of a particular religious message."<sup>362</sup> The Chief Justice's repetition of this extraordinary assertion of secular content in the city's celebration of the divine Nativity recalls the style of argument of the Bellman in *The Hunting of the Snark*: "What I tell you three times is true."<sup>363</sup>

Americans who are not Christian no doubt will agree that the message of the Nativity scene was not subtle. The City of Pawtucket said to them: You outsiders do not belong. In today's America, the addressees of such messages number in the millions: Jews, Buddhists, Moslems, Hindus, observers of Native American religions—the list goes on and on, extending to hundreds of religions that are not Christian.<sup>364</sup> The Supreme Court's unwillingness to understand this

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question, and there is a considerable difference between nonconformity of dress and nonparticipation in an officially sponsored religious exercise.

Standing in some cases challenging the government's conduct is based on the plaintiff's status as a taxpayer. *E.g.*, *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984). The most important interest at stake in a case like *Lynch*, however, is not some taxpayer's concern about the spending of trivial amounts of money, but the religious dissenter's concern for the status of equal citizenship.

359. *Lynch v. Donnelly*, 104 S. Ct. 1355, 1365 (1984).

360. William Van Alstyne's devastating analysis of the *Lynch* opinion, *supra* note 338, should be required reading for the Justices who formed the majority in *Lynch*.

361. *Lynch v. Donnelly*, 104 S. Ct. 1355, 1365 (1984). Religious outsiders can understand more easily why government closes schools and public offices on Christmas, a day when a huge majority of the population would be unlikely to carry on business as usual. To equate that practice with Pawtucket's sponsorship of the crèche is to ignore altogether the differences in the way the two kinds of governmental action impinge on the religious outsiders' sense of belonging.

362. *Id.* Justice David Brewer, in a 1904 lecture series, took a more forthright stance, calling the United States "a Christian nation." D. BREWER, *THE UNITED STATES A CHRISTIAN NATION* (1905). For evidence that Brewer was accurately summarizing a long history of official support for Christianity, see Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 YALE L.J. 659, 660-66 (1930).

363. L. CARROLL, *THE ANNOTATED SNARK* 38 (M. Gardner ed. 1962). In *Burelle v. City of Nashua*, 599 F. Supp. 792, 795-97 (D.N.H. 1984), Chief Judge Devine focused on narrow factual differences to distinguish *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984).

364. For a listing and brief description of such religions, which do number in the hundreds, see 2 J. MELTON, *THE ENCYCLOPEDIA OF AMERICAN RELIGIONS* 23-482 (1978). Eight out of ten Americans say they are Christians, according to one recent Gallup poll. Gallup, *supra* note 241, at 168.

particular symbolism of domination is no less perverse than was an earlier Court's refusal to understand that the racial segregation of railroad cars symbolized the subordination of black people.<sup>365</sup>

It is no trivial matter for the Supreme Court to countenance governmental conduct that tells some Americans that their differences from the dominant religion exclude them from full membership in the community. Often those religious differences are associated with other cultural differences; most Buddhists in America, for example, are of Japanese ancestry.<sup>366</sup> Given the recent increase in immigration to this country from non-Christian countries in Asia and the Middle East, it would not be surprising if government officials were pressed into further public sponsorship of the symbols of Christianity, precisely to assert the dominance of today's augmented family of "old stock" Americans. There is ample historical precedent in the nativist movements that greeted the arrival of earlier immigrants deemed to be unassimilable.<sup>367</sup> Today we recall with no little sadness how the Supreme Court, by upholding the constitutionality of segregated railroad cars, gave impetus to the laws and private behavior that became the pervasive, ugly system of Jim Crow.<sup>368</sup> Let us hope that the Court's recent blessing of an official governmental symbol of the divinity of Christ will not contribute to a new vicious circle of domination and defensive separatism. Cultural politics has its place in the American civic culture; cultural domination has no legitimate place at all.

## V. AMERICAN IDENTITY AND THE AMERICAN CIVIC CULTURE

When our constitutional law promotes the freedom to choose cultural identity, it nourishes the sense of belonging in two different ways. It protects the choice to turn inward to the cultural group, and it offers members of cultural minorities the choice to participate fully in the institutions of the wider society. The principle of equal citizenship allows an individual to maintain a strong connection to a particular cultural group and still belong to America. Given the impulses toward distrust and domination that result from the process of identity

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The remaining 20% of the population numbers about 44 million. Even more conservative estimates conclude that the number of non-Christian Americans is very large. Jews comprise about two to three percent of the population; members of non-Judeo-Christian faiths amount to a larger number; and from seven to nine percent say they are not adherents of any religion. See Cohen & Fain, *From Integration to Survival: American Jewish Anxieties in Transition*, 480 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 75, 80 (1985); Roof & McKinney, *Denominational America and the New Religious Pluralism*, 480 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 24, 25-28 (1984).

365. In *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), the Court said:

[W]e consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced segregation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

For two brief, poignant accounts of the reactions of religious outsiders to the promotion of religion in public schools, see Arnow, *The Year We Hid Our Religion*, LIBERTY, May/June 1985, at 3; Barlow, *We Were the Different Ones*, LIBERTY, May/June 1985, at 4.

366. See 2 J. MELTON, *supra* note 364, at 400-02.

367. The label "unassimilable" has been applied to the Irish, Italians, and Germans—to speak only of a few European groups. See *supra* note 45 and accompanying text.

368. See C. WOODWARD, *supra* note 33, at 67-109.

formation,<sup>369</sup> it may seem remarkable that our constitutional doctrine should have come to be so protective of intercultural tolerance. Yet the survival of the American Nation has never been seriously threatened by our cultural diversity. When the United States did break apart in civil war, the rupture did not follow the seams of ethnic or religious division. It was true then and is still true that American nationhood rests on a base that is not just contractual but is also cultural.

The assumption that there is such a thing as "the American character" has appeared in literature at least since Independence.<sup>370</sup> The earliest writers on the subject omitted mention of the slave and the American Indian, thus providing still another illustration of the intimate relationship between domination and separatism: Indians and slaves were implicitly set apart as not belonging to American society.<sup>371</sup> For those who did belong, however, there was truth in the idea that they shared a common culture. There is even more truth in that idea today. For all our diversity, undoubtedly our strong sense of national identity<sup>372</sup> rests on a common American culture, widely shared among our people.

Assimilation, of course, has played an important part in the formation of a national culture. In the years since the Second World War, the process has been accelerated by an increase in affluence that has dramatically expanded the American middle class and by the development of a national communications system that spreads the mainstream culture to every corner of the country. Yet assimilation cannot completely explain the existence of a national culture. First, contrary to the assumptions of the proponents of the Americanization movement,<sup>373</sup> assimilation does not imply a thorough conformity with the cultural mainstream. Rather, assimilation is consistent with a great many "varieties of ethnic experience."<sup>374</sup> What the Framers of the Constitution called the problem of faction has always had its cultural dimensions.<sup>375</sup> Second, the mainstream culture itself is constantly being changed by the contributions of newly assimilated groups: language and literature, music and art, dress and foods, and leisure activities. The mixture resulting from all this diversity and ferment is anything but a recipe for cultural stability. It would be unimaginably difficult to found a nation of continental dimension on a cultural base that is both radically

369. See *supra* text accompanying note 10.

370. E.g., H. DE CRÉVECOEUR, *supra* note 41; A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (H. Reeve trans., P. Bradley ed. 1945). The notion of an "American character" is meaningless if it is taken to refer to the character of a nation. That would, indeed, be "a variant of the fallacy of composition." Morris, *Interpretive and Noninterpretive Constitutional Theory*, 94 ETHICS 501, 514 (1984). Most writers, when they refer to an American character, have in mind some notion of attitudes and behavior typically found in our culture.

371. Tocqueville, who wrote in the 1830s, discussed with prescience both these aspects of race relations. A. DE TOCQUEVILLE, *supra* note 370, vol. I, ch. XVIII.

372. See generally P. DEVINE, *THE POLITICAL CULTURE OF THE UNITED STATES* 79-95 (1972) (explaining the concept of national identity and tracing the development of the sense of national identity in the United States).

373. See *supra* text accompanying note 49.

374. See *supra* note 20.

375. See THE FEDERALIST No. 51 (J. Madison).

heterogeneous and continually in flux. More is required to account for the common culture that sustains our nationhood.

We have tended to see ourselves as practical, open to change, future-oriented, optimistic, righteous innocents in a world full of guile. These characteristics, real or imagined, do reflect features of the American culture, but they are hardly the makings of a social bond. Nor can loyalty or the sense of belonging be founded on a Constitution that is no more than a contract.<sup>376</sup> Lacking common ancestral origins, religion, ethnic traditions—in short, lacking many of the usual forms of cultural glue—Americans have been required to found a Nation on something else.

What is "the Nation" that commands our loyalty? For a long time, the answer eluded clear definition. Perhaps for this very reason, nineteenth century America indulged in patriotic rhetoric of an intensity unmatched in our history either before or since.<sup>377</sup> Woodrow Wilson, who was anything but a model of tolerance toward members of racial and ethnic groups that were not his own,<sup>378</sup> implicitly recognized how difficult it was to define the Nation. Speaking in 1915 to some newly naturalized citizens, Wilson said:

You have just taken an oath of allegiance to the United States. Of allegiance to whom? Of allegiance to no one unless it be to God. . . .

You have taken an oath of allegiance to a great ideal, to a great body of principles, to a great hope of the human race.<sup>379</sup>

New citizens, like officers of government who swear to defend the Constitution, are not merely making a contract. By their rituals they are accepting and reinforcing a set of norms that give meaning to conduct.<sup>380</sup> They are embracing the American civic culture—a mixture of behavior and belief that infuses our law and our institutions, transcending race, religion, and ethnicity, allowing individual citizens to preserve their separate cultural identities and still identify themselves as Americans.

The essential meaning of American identity is adherence to the ideology of the American civic culture and behavior in accordance with that culture's norms.<sup>381</sup> When Wilson so defined the Nation, he merely repeated a view that had prevailed in the early days of the Republic: "To be or to become an American, a person did not have to be of any particular national, linguistic, religious, or ethnic background. All he had to do was to commit himself to the political ideology centered on the abstract ideals of liberty, equality, and republicanism."<sup>382</sup>

376. Karst, *supra* note 206, explores these issues.

377. See J. HIGHAM, note 8, at 68-105.

378. W.E.B. DuBois put it mildly when he said, "On the whole, we do not believe that Woodrow Wilson admires Negroes." W.E.B. DuBois, *THE CRISIS WRITINGS* 190 (D. Walden ed. 1972). On Wilson's attitudes toward immigrants from Eastern and Southern Europe, see J. HIGHAM, *supra* note 8, at 199; M. JONES, *supra* note 8, at 239. Wilson did, however, veto a congressional bill requiring a literacy test for immigrants. W. PRESTON, *supra* note 82, at 80-81.

379. Quoted in Harrington, *supra* note 107, at 678.

380. See *supra* text accompanying notes 12-13.

381. See S. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 13-30 (1981).

382. Gleason, *supra* note 44, at 62.

The sources of our sense of nationhood are older than the Nation itself. In the colonies it was widely believed that America had special origins and a special destiny—even a divine mission.<sup>383</sup> The colonists borrowed this belief from the Puritan ideal of an errand into the wilderness.<sup>384</sup> Protestant traditions of “institutional decentralization and ideological uniformity”<sup>385</sup> also were established well before independence. But the era of the Revolution left its own nationalist legacy. Republicanism not only embedded in the civic culture the central idea of equal citizenship—that “one should consider himself as good a man as another”<sup>386</sup>—but also served as a unifying ideology in its own right.<sup>387</sup> New institutions were established, nudging the states toward union. Although the Constitutional Convention was called to remedy defects in the Confederation, many of the Constitution’s Framers aimed to do more: they sought a secure base on which to found a nation.<sup>388</sup>

In the early years of the republic, however, strong national loyalty was not to be taken for granted. The notion of an American identity, although it had begun to appear in print,<sup>389</sup> was strained by the “triumphant particularism” that characterized both belief and action in a “segmented society.”<sup>390</sup> What contributed most to an American identity in the nineteenth century was the emergence of a national ideology, a “large, loose faith”<sup>391</sup> roughly comprehending the values of today’s American civic culture: individualism, egalitarianism, nationalism, and tolerance of diversity.<sup>392</sup>

With more than a little moral arrogance, we have assumed a national mission to be a “city on a hill,” an example for the rest of the world to see and emulate.<sup>393</sup> The idea that America is something special came to full flower in

383. R. GABRIEL, *THE COURSE OF AMERICAN DEMOCRATIC THOUGHT* 22-25 (1940); Higham, *Hanging Together: Divergent Unities in American History*, 61 J. AM. HIST. 5, 13-15 (1974).

384. Bercovitch, *New England’s Errand Reappraised*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY* 85 (J. Higham & P. Conkin eds. 1979).

385. Higham, *supra* note 383, at 11.

386. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 73 (1972).

387. Higham, *supra* note 383, at 15-18.

388. G. WOOD, *supra* note 386, at 519-64.

389. See H. DE CRÉVECOEUR, *supra* note 41. On the notion of Americans as a “new people,” see G. WOOD, *supra* note 386, at 46-48.

390. R. WIEBE, *supra* note 22, at 36. This particularism not only dispersed political power, but also separated culturally disparate communities from each other. *Id.* at 30-36, 49-54, 65-70, 90-94; J. HIGHAM, *supra* note 48, at 181-86. This “mutual avoidance” variation on the social contract, *id.* at 185-86, naturally inhibited ethnic intermarriage and other kinds of interaction that promote assimilation. The effects of the dispersal of population on ethnic solidarity, however, were ambiguous. Each community tended toward cultural homogeneity, yet dispersal meant, for example, that “Germans” in different localities followed different patterns of community development and did not form attachments to national ethnic groups. *Id.* at 184-85. Localism, in other words, did not imply ethnic pluralism.

391. Higham, *supra* note 383, at 16.

392. Professor Higham’s list of the elements of nineteenth century ideology includes the ideas of the mission of America, the doctrine of individual liberty, the dispersal of power, and the doctrine of equal rights (including opposition to artificial inequalities of status). *Id.* Thomas Bender’s list is similar, but takes note of two additional notions that no longer hold sway as national orthodoxies: Protestantism and white supremacy. T. BENDER, *supra* note 196, at 88.

393. The phrase, “city on a hill,” was used by John Winthrop in a sermon preached on board the ship *Arabella* while it was bound from the Isle of Wight to Massachusetts Bay in 1630. On notions

the mid-nineteenth century.<sup>394</sup> When we look closely at what is supposed to be special, it turns out to be an ideology, one of "those explicit systems of general beliefs that give large bodies of people a common identity and purpose, a common program of action, and a standard for self-criticism."<sup>395</sup> To be special, Americans must try to live by the ideology that gives them their identity as Americans. Belief in the ideological aspect of the American civic culture, then, must be complemented by behavior in order to establish one's American cultural identity. Here as in any process of acculturation it is the ritualization of correct behavior that supplies the symbolic meanings underlying the sense of belonging. "Society's forms are culture's substance."<sup>396</sup>

### A. *Ideology and Identity*

The connections between culture and identity<sup>397</sup> pose an obvious problem in a society of many cultures, each one shaping a separate identity around its own normative claims. A minimum requirement of nationhood is a set of universal norms. "Apparently, a decent multiethnic society must rest on a unifying ideology, faith, or myth."<sup>398</sup> The American civic culture, as I use the term here, embraces not only citizen allegiances and participation but also a widely shared "unifying ideology," a creed that is both manifested in constitutional doctrine and shaped by it.<sup>399</sup> Like other creeds, this one is untidy and sometimes self-contradictory. It resists any effort to reduce it to systematic intellectual order. It lends itself as readily to hypocrisy as to genuine observance.<sup>400</sup> Yet if any single feature of our society is central to the definition of an American identity, it is this ideological component of the civic culture. "It has been our fate as a nation not to have ideologies but to be one."<sup>401</sup>

The ideological component of the American civic culture performs its uni-

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of American superiority in the nineteenth century, see T. BENDER, *supra* note 196, at 88. On the idea of American exceptionalism, see Harrington, *supra* note 107, at 678.

394. See Higham, *supra* note 383, at 12-18.

395. *Id.* at 10.

396. C. GEERTZ, *supra* note 14, at 28. The American civic culture is centered on the conception of the United States as a polity, but "political culture" seems too narrow a term. More than 20 years ago, Gabriel Almond and Sidney Verba used the term "civic culture" to describe a particular orientation of citizens to public affairs: loyal participation in the national polity, concurrent with the maintenance of "parochial" allegiances and a healthy dose of self-interest. G. ALMOND & S. VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* (1963). As the text makes clear, I use the same term to describe an amalgam of ideology and behavior centered on the values of individualism, egalitarianism, nationalism, and tolerance of diversity.

397. See *supra* text accompanying notes 10-15.

398. J. HIGHAM, *supra* note 48, at 232. On the interrelationship of ideology, group solidarity, and individual identity, see Apter, *Introduction: Ideology and Discontent*, in *IDEOLOGY AND DISCONTENT* 15, 18-21 (D. Apter ed. 1964).

399. On the "American Creed," see S. HUNTINGTON, *supra* note 381, at 13-30; G. MYRDAL, *supra* note 112, at xlv-xlvii. Both Myrdal and Huntington make clear throughout their books how frequently Americans fail to live up to the ideals of their creed. On the relation of behavior to ideology, see *infra* text accompanying note 423.

400. No doubt it is these very ambiguities that permit the creed to be held so widely. See Murphy, *The Place of Beliefs in Modern Culture*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY*, *supra* note 384, at 151, 163.

401. H. KOHN, *AMERICAN NATIONALISM: AN INTERPRETIVE ESSAY* 13 (1957) (quoting Richard Hofstadter); see S. HUNTINGTON, *supra* note 381, at 23-30; Gleason, *supra* note 44, at 58-68.



fying function in the way that myth and religion unify, providing the focus for individual self-identification in a system of belief that is founded more on feeling than on logic.<sup>402</sup> This culturally specific American ideology has found widespread agreement, and even emotional attachment, in part because of the diffuse quality of its principal values. It simultaneously proclaims our commitment both to individualism and to egalitarianism, both to the virtues of diversity and to the unity of the Nation.

Whatever argument one may have with those historians who emphasize consensus and continuities in American history,<sup>403</sup> no one denies that a strong current of individualism has been running in this country ever since colonial times. The theme of individualism has been traced to a great many sources: the natural-rights liberalism of John Locke<sup>404</sup> and the European Enlightenment,<sup>405</sup> Protestant traditions of the free individual conscience and of congregationalism in church governance,<sup>406</sup> the claims of republicanism,<sup>407</sup> and an orientation of economic affairs toward capitalism that was well under way by the time of Independence.<sup>408</sup> The Revolution's slogans about liberty, which culminated in the assertion of rights to self-government and independence from the British crown, had their beginnings in the colonists' claims to the rights of Englishmen.<sup>409</sup>

After Independence, it was a short step to the formal adoption, in the constitutions of the new states, of limits on government aimed at preserving a considerable range of individual freedoms.<sup>410</sup> By the time the Constitution was adopted, the "rights" mentality had ripened into a conception of liberty that went beyond the people's right to govern themselves. "The liberty that was now emphasized was personal or private, the protection of individual rights against all governmental encroachments . . ."<sup>411</sup> By mid-nineteenth century the "liberty" theme in the American civic culture had come to embrace what Ralph Gabriel later called the doctrine of "the free individual."<sup>412</sup> The individual's right to "self-development and self-regulation" became central to American ide-

402. See E. CASSIRER, *AN ESSAY ON MAN* 81-82 (1944).

403. See D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* (1958); D. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* (1973); D. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* (1965); R. GABRIEL, *supra* note 383; L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955); E. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763-1789* (1956). For a summary of newer historical scholarship emphasizing variation and particularistic analysis, see J. HIGHAM, *HISTORY: PROFESSIONAL SCHOLARSHIP IN AMERICA* 233-62 (1983).

404. L. HARTZ, *supra* note 403; E. MORGAN, *supra* note 403, at 73-75.

405. H. MAY, *THE ENLIGHTENMENT IN AMERICA* (1976).

406. These traditions are outlined in Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 252-54 (1983). "The United States is the only country in the world in which a majority of the population has belonged to dissenting Protestant sects." S. HUNTINGTON, *supra* note 381, at 15.

407. G. WOOD, *supra* note 386, at 46-90. In 1839 Michel Chevalier wrote that "protestantism, republicanism, and individuality are all one." M. CHEVALIER, *SOCIETY, MANNERS, AND POLITICS IN THE UNITED STATES* 368 (T. Bradford trans. 1839).

408. See, e.g., D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 105-10 (1958) (on "planter capitalism" in Virginia).

409. This was the claim of the Continental Congress' 1774 declaration. See E. MORGAN, *supra* note 403, at 64-65.

410. *Id.* at 88-94.

411. G. WOOD, *supra* note 386, at 609.

412. R. GABRIEL, *supra* note 383.

ology.<sup>413</sup> The enduring power of the theme of individualism in America can be seen in its constant repetition in today's political rhetoric, from party conventions to newspaper editorials.

American notions of liberty early became associated with the principle of limited government. Not only was governmental power to be dispersed, but the individual also had legal rights against government, rights that could be vindicated in court. This association of constitutionalism with individualism is heightened in our own time; Americans who are not legal professionals mainly associate the Constitution with the protection of the rights of individuals. Nativist domination itself, as practiced by the government, is now seen as inconsistent with the fundamentals of our constitutional order.

Like individualism, "[t]he avowal of 'equality,' and often its practice as well, has been a persistent theme through most of American history."<sup>414</sup> The roots of both our avowal and our sometime practice of egalitarianism run deep.<sup>415</sup> Both Calvinist doctrines and the organization of New England's colonial churches reflected a belief in the equality of individuals in the sight of God. The idea of universally applicable laws also took hold in the colonies, inhibiting the establishment of legal privileges based on personal status. In the revolutionary era, freedom meant freedom for everyone. Republican notions of self-government implied widespread participation in the election of officials.<sup>416</sup> Constitutionalism had its own egalitarian strain: not only the people but also their governors must obey the law. Individualism implied equality of opportunity in open markets, careers open to talents. By the era of Andrew Jackson, these kinds of egalitarianism were well established in the ideological part of the American civic culture. So they remain today, reinforced by the extraordinary outpouring of literature, legislation, and judicial opinions that has accompanied the civil rights movement and the resurgence of feminism.

Tolerance was not an invention of the Warren Court; it has always been a necessary feature of the American experiment, a value that makes the American Nation possible. Religious tolerance was already a political necessity by the time the Constitution was adopted.<sup>417</sup> Indeed, the dispersal of power that had characterized both religion and government in the colonies was, for the Framers of the Constitution, not just an institutional habit but an essential defense against tyranny.<sup>418</sup> Diversity itself was an important tenet of the national ideal-

413. Ward, *Jacksonian Democratic Thought: "A Natural Charter of Privilege,"* in *THE DEVELOPMENT OF AN AMERICAN CULTURE* 58, 73 (S. Coben & L. Ratner 2d ed. 1983). In this conception, "the solitary, self-reliant individual stands at the center of the social order." *Id.* at 77.

414. R. WILLIAMS, *AMERICAN SOCIETY: A SOCIOLOGICAL INTERPRETATION* 472 (1954).

415. This paragraph is a capsule version of a fuller discussion in Karst, *supra* note 206, at 183-99.

416. These notions did not prevent limitation of the franchise to white male owners of property.

417. See *THE FEDERALIST* No. 51 (J. Madison); E. MORGAN, *supra* note 403, at 128-43; G. WOOD, *supra* note 386, at 127-61, 524-32, 547-53.

418. Higham, *supra* note 383, at 16. The protection of local autonomy was also seen as a defense of one sort of community. See T. BENDER, *supra* note 196, at 83-84.

Even Horace Kallen, who coined the term "cultural pluralism" to denote an ideology that was explicitly anti-assimilationist, recognized that in his "democracy of nationalities" the various cultural groups would have to cooperate through the "common institutions" of the Nation. The "polit-

ogy that burgeoned in the nineteenth century. "Variety became fundamental to the dominant American ideal of unity: *E Pluribus Unum*."<sup>419</sup>

Although the diverse peoples of a "segmented society" believed in avoiding conflict by minimizing interaction with each other, today's ideology of tolerance draws its main nourishment from the other values of the civic culture: individualism and egalitarianism. In fact, belief in those values seems an indispensable antithesis to the urge to domination that so often grows out of the process that forms cultural identity.<sup>420</sup> "[S]ocieties have a need to find ways of checking their own tendencies. In these polarities there may be something of a clue to social systems."<sup>421</sup> To take seriously the ideals of individualism and egalitarianism is to reject domination in favor of the principle of tolerance. It is to believe that every person, whatever his or her ethnicity, race, or religion, is entitled to respected participation in the community's public life. Indeed, cultural diversity is widely idealized as a positive feature of that public life, as everyone who has heard the corporal call the squad roll in a 1940s war movie knows: "Anderson, Chen, Giordanno, Goldstein, López, . . . ."

Tolerance serves more than the need to avoid conflict between cultural groups; it is an essential ingredient of the American civic culture, serving our need to identify with the national community in order to identify ourselves as Americans. The cultural base for American identity depends on the sharing of values and of some vision of what we are as a nation. The only vision of America capable of being shared by all of us is a vision in which all of us belong.

The ideological component of our civic culture is thus a major part of the cultural cement that holds American society together. Ideology alone, however, is not enough to make any value a durable part of the civic culture. A necessary ingredient of that durability is the behavior of large numbers of people, from one generation to the next, in accordance with the culture's norms. Leonard Levy

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ical and economic life of the commonwealth," he said, was "a single unit" that would provide the foundation for each cultural group's separate realization of its destiny. These quotations of Kallen are taken from Gleason, *supra* note 44, at 97. Kallen's major work, *CULTURE AND DEMOCRACY*, was published in 1924. He had set out the main ideas in his article, *Democracy versus the Melting Pot*, *NATION*, Feb. 18, 1915, at 190. See Higham, *supra* note 48, at 205-10, 215. Kallen never addressed the obvious difficulties implicit in his notion that ethnic groups could participate fully in an integrated American polity and yet resist assimilation. See Gleason, *supra* note 44, at 106.

A hard-edged, corporatist version of cultural pluralism, devolving important political functions to religious or ethnic groups, is beyond the range of the possible in the United States today. For ethnic corporatism to work, we should have to define the boundaries of each ethnic group, identifying its members and the characteristics that entitle them to membership. Because of assimilation, ethnic status does not inevitably pass from one generation to the next. The overwhelming majority of Americans are the product of ethnic interbreeding. Collins, *supra* note 204. Whatever conclusion one may draw in the debate over the "primordial" or "optional" character of ethnicity, see *supra* note 20, for some individuals ethnic identity plainly is a matter open for decision: "Individuals move freely across the vaguely and informally drawn line between ethnic or religious identification and non-identification; the line is in no way policed; the movements are not even recorded." M. WALZER, *supra* note 149, at 150. For the state even to attempt to police the line, of course, would violate the American Constitution.

419. Higham, *supra* note 383, at 16.

420. See *supra* text accompanying note 10.

421. Hofstadter, *Commentary: Have There Been Discernible Shifts in American Values During the Past Generation?*, in *THE AMERICAN STYLE: ESSAYS IN VALUE AND PERFORMANCE* 353, 357 (E. Morrison ed. 1958).

has recently shown that the freedom of the press emerged in America during the revolutionary generation, primarily through the day-to-day exercise by newspaper editors of the freedom they claimed, not through the adoption of the first amendment.<sup>422</sup> So it is with any important societal value or any constitutional right: use it or lose it.

### B. *Behavior and Belonging*

Culture is not merely the assignment of meaning to behavior;<sup>423</sup> it is also behavior itself, behavior that follows cultural norms and reinforces them as well. Most of us make little effort to examine the interconnection between our normative beliefs and our behavior; generally we allow those connections to lie below the level of conscious articulation. Indeed, at least for the present, there seems to be an irreducible element of mystery in the precise mechanisms that lead from awareness to behavior.<sup>424</sup> No wonder the mechanisms of cultural assimilation are difficult to isolate and to describe.<sup>425</sup>

Despite these difficulties of analysis at the level of microcosm, it does seem clear that a society can maintain its "unifying ideology"<sup>426</sup> only when large numbers of individuals act in accordance with the ideal. With ideology as with myth, "ritual is prior to dogma."<sup>427</sup> Shared behavior not only establishes and reinforces the culture's norms; it also establishes the individual's cultural identity. An American demonstrates that he or she belongs to America primarily by acting out the civic culture's ideals. In so doing, the individual contributes to the shared emotion that is essential to the sense of community.<sup>428</sup> The society's central myths may seem to be in tension with each other or sometimes even contradictory; yet "[t]he real substratum of myth is not a substratum of thought but of feeling. . . . [Its] coherence depends much more upon unity of feeling than upon logical rules."<sup>429</sup>

All the same, that unity will collapse unless the society's system of beliefs is largely validated in most people's minds by their own experience.<sup>430</sup> A belief system finds its utility not just in satisfying individual needs for security and the sense of identity and moral worth but also in providing the basis on which actions may be planned and executed. When a belief system no longer explains experience or serves to guide behavior, it gives way to another system that

422. L. LEVY, *supra* note 82.

423. See *supra* text accompanying note 14.

424. See Skinner, *Why is a Reinforcer Reinforcing?*, in MOTIVATION 201 (D. Bindra & J. Stewart 2d ed. 1971).

425. See *supra* text accompanying note 194.

426. See *supra* note 398 and accompanying text.

427. E. CASSIRER, *supra* note 402, at 79. Durkheim makes a similar point in E. DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 419 (1912).

428. On the relation of shared values and feelings to community, see Karst, *supra* note 206, at 183-86, and the writings there cited.

429. E. CASSIRER, *supra* note 402, at 81.

430. See Murphey, *supra* note 400, at 153-54.

will.<sup>431</sup> If the ideals of the American civic culture are to hold a multicultural nation together, they must find reinforcement in American behavior.

When the Framers of the Constitution sought to make a nation, they knew that the centralization of governmental power was only a beginning. Nationhood would demand the widespread sharing of a national identity. Yet the Framers explicitly rejected two institutional means that had been used to rally the needed emotional support for nationhood in the countries of Europe: a monarchy<sup>432</sup> and an established church.<sup>433</sup> Low levels of immigration from the beginning of the Revolution to the end of the War of 1812 permitted the definitive consolidation of English as the national language.<sup>434</sup> And early, if halting, successes of the national government helped persuade most Americans that the Nation served their interests.<sup>435</sup> The Revolution itself had produced nationalizing and unifying effects. It provided the liberal and egalitarian ideology of republicanism and also put those values into practice by establishing a new order of status equality both for individuals and for cultural (mainly religious) groups.<sup>436</sup> An individual's identification with the new Nation was closely tied to a sense that the Nation was making good on its professed individualistic and egalitarian ideals.<sup>437</sup>

From that time to this time, a strong congruence between belief and behavior has always characterized the thread of individualism in our civic culture, a congruence shaped by the demands of market capitalism and the opportunities of a continent rich in resources.<sup>438</sup> The same degree of congruence, however, is not evident between our profession of egalitarian ideals and our willingness to live up to those ideals. The main examples of the Nation's failure to practice what it preaches about equality have always been found in the subordination of minorities defined by race, religion, or ethnicity. From the earliest times, some people were included as full participants in the society's public life while others were not.

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431. *Id.* at 154-55. On ideology as a "symbolic template" for political behavior, see C. GEERTZ, *Ideology as a Cultural System*, in *IDEOLOGY AND DISCONTENT*, *supra* note 398, at 47, 60-65.

432. George Washington did, in fact, serve as an early symbol of nationhood. P. DEVINE, *supra* note 372, at 112-13, 127-28; R. GABRIEL, *supra* note 383, at 91-94. But the President's political role makes this sort of symbolism difficult. *Id.* at 93.

433. Religious fragmentation made a nationally established church impossible. See *supra* text accompanying note 340.

434. M. JONES, *supra* note 8, at 64-65, 75-76.

435. The organization of the government itself was no little achievement. And there was wide support for Washington's policy of neutrality in the early years of the Napoleonic wars. The War of 1812 was not a success story, but it did demonstrate the need for national unity as against outside foes. See generally S. LIPSET, *THE FIRST NEW NATION* (1963) (equality and achievement, although not always compatible with one another, have molded the development of America).

436. *Id.* at 74-79.

437. *Id.* at 61-98.

438. On the drive for individual achievement and "the American character," see *id.* at 101-39. On individualism as a primary value in American society, see R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985); J. DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM* (1984). Both the rhetoric and the behavior of American individualism often evidence a suspicious attitude toward government, which is consistent with loyalty to the Nation.

Americans came early to accept the inevitable presence of outsiders, aliens somewhere in their land. Citizenship and membership, a relatively simple equation in France, formed the components of an exceedingly complex problem in America. Although every citizen could claim a basic set of legal rights, some of these citizens would almost certainly remain outsiders. Actual membership was determined by additional tests of religion, perhaps, or race or language or behavior, tests that varied considerably among segments and over time. Each generation passed to the next an open question of who really belonged to American society.<sup>439</sup>

Among those who did belong, however, the very existence of outsider groups promoted both egalitarian ideals and equality in concrete social relations.<sup>440</sup> John Blum has highlighted the way in which this "burden of American equality"<sup>441</sup> has been carried in different places and at different times by Indians, blacks, and successive groups of immigrants. Thus the ideal of equality has managed to gain strength even as a genuine equality of status has been denied to a series of cultural outsiders. As various cultural groups have moved toward full membership, the day-to-day treatment of the groups' members has moved toward congruence with that ideal. The most important issue concerning equality in America has always been one of belonging: should Catholics, or freed slaves, or immigrants from Poland or Mexico be treated as respected, responsible participants in American society? The egalitarian strand in our civic culture centers on the idea of equal citizenship.

These attitudes and practices add up to an equality well suited to a polity in which the value of individualism is an important premise. The equality embraced in the American civic culture has historically been individualistic in two senses. First, although the denial of equal citizenship has historically been accomplished by excluding groups of people from full participation in the society's public life, the claim to equality generally has been seen as the claim of an individual, not of a group. Second, American egalitarianism generally has not looked to communal values, nor to an equality of condition, but to an equality of individual opportunity. The egalitarianism of the American civic culture, in other words, has been focused on the elimination of caste, not class.<sup>442</sup>

It was therefore to be expected that the Supreme Court's revival of the principle of equal citizenship should follow this individualistic pattern. In the years since the Second World War, American ideals have come to embrace a

439. R. WIEBE, *supra* note 22, at 95.

440. See J. BLUM, *THE BURDEN OF AMERICAN EQUALITY* 3-4 (1978); W. JORDAN, *WHITE OVER BLACK* 134 (1968); J. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 25 (1978); R. WILLIAMS, *supra* note 414, at 413-14.

441. J. BLUM, *supra* note 440.

442. See generally S. VERBA & G. ORRAN, *EQUALITY IN AMERICA: THE VIEW FROM THE TOP* 253-66 (1985) (on leadership views of economic equality). In Jennifer Hochschild's study of attitudes toward distributive justice, the "[r]espondents usually start from a principle of equality, and use mainly egalitarian norms, when they address the socializing and political domains; they usually start from a principle of differentiation, and use mainly differentiating norms, when they address the economic domain." J. HOCHSCHILD, *WHAT'S FAIR? AMERICAN BELIEFS ABOUT DISTRIBUTIVE JUSTICE* 82 (1981).

pronounced widening of the circle of full citizenship. It is not much of an exaggeration to say that today, in theory, every citizen belongs, as a full member of the society.<sup>443</sup> This development is not just a matter of rhetorical style. Hypocrisy may be the tribute that vice pays to virtue, but virtue has a way of collecting its accounts. Pieties, repeated often enough, come to be believed and ultimately affect behavior. One major success of the civil rights movement was that it contributed to the development of the American civic culture, providing both a theoretical foundation and a behavioral model for other egalitarian movements. In today's prevailing ideology, we have settled the question, "Equality for whom?" by answering, "For everyone."

Yet no one can live on ideology alone. The threat of a permanent underclass associated with race is serious enough to make us refine the question: "Who belongs to America?" In these circumstances the distinction between class and caste loses much of its utility. The historic association between assimilation and economic advancement suggests the wisdom of public policies aimed at breaking the hold of a racially based system of class that has the look of permanence. I do not argue here that the Constitution compels such policies,<sup>444</sup> but merely that, given the high correlation between racial class and caste, nothing in the individualism or egalitarianism of our civic culture stands in the way of the policies' adoption.

Individualism and egalitarianism bear on cultural assimilation in many of the same ways. When a system of racial or religious or ethnic domination is ended, some of the pressures that induce members of the dominated group to opt for separatist solutions is relieved. At the same time, the importance of an individual's connection with a group is reduced in the consciousness of members of that group and of others. When Catholics are treated equally with Protestants, the status of "being a Catholic" loses much of its previous social and political importance, religious intermarriage rises in frequency, and a Catholic can be elected President. Yet the civic culture's norm of equal treatment, irrespective of an individual's group membership, also protects a cultural group against governmental sanctions that might threaten its existence. Furthermore, the civic culture expects equal treatment of the groups themselves.

Inevitably, however, group loyalties are translated into intergroup conflict. The Framers recognized that problems were associated with the Nation's cultural diversity,<sup>445</sup> and today's expression, "intergroup relations," reminds us of our own divisions based on race, ethnicity, and religion. No one should expect

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443. Even aliens "belong" in some ways. Our constitutional law reflects the dominant ideology when it recognizes that, for some purposes, aliens are entitled to equal treatment along with citizens. The most dramatic example of this recognition in recent years is *Plyler v. Doe*, 457 U.S. 202 (1982) (states cannot deny public school instruction to the children of undocumented aliens). Despite this decision, undocumented aliens are far from being accepted as full members of the community, either in law or in the mind of the general public. See López, *supra* note 316.

444. I have argued elsewhere that some kinds of poverty are sufficiently dehumanizing and demoralizing to require governmental action to restore the equal citizenship of their victims. Karst, *supra* note 237, at 59-64; *supra* note 168 and accompanying text. For commentary linking racism and social class with the ideology of equality of opportunity, see Lawrence, "Justice" or "Just Us": *Racism and the Role of Ideology* (Book Review), 35 STAN. L. REV. 831 (1983).

445. See THE FEDERALIST No. 51, at 357-59 (J. Madison) (B. Wright ed. 1961).

those divisions or their attendant conflicts to disappear. Cultural politics may sometimes trouble our hearts, but it is here to stay. One result, in a society that is complex, multicultural, and increasingly national in scope, is that the Nation has come to be seen as the one institution capable of coordinating the society's fragmented interactions and of resolving intergroup differences.<sup>446</sup> In performing these functions, the Nation itself is reinforced in the minds of its citizens as a source of basic group identity, an object of basic loyalty.<sup>447</sup> When we behave in ways that reinforce the civic culture's ideals of individualism and egalitarianism, we strengthen the restraints on our impulses to cultural domination. In so doing, we promote not only tolerance for diversity but also the sense of belonging to America—and so complete the circle back to nationalism.

In our society, one of the most prominent bridges between ideology and behavior is the law, particularly constitutional law. It is fair to say that the Constitution today is our pre-eminent symbol of nationhood<sup>448</sup> and that the doctrine of judicial review is a major practical support for both the attitudinal and the behavioral elements of the American civic culture. It is true that disputes over the meaning of the Constitution have frequently been the foci for bitter division among Americans.<sup>449</sup> Yet the very passion of these disputes suggests that the contending parties have understood that they were fighting over a symbol that mattered. When a constitutional struggle did split the Nation, the important conflict over interpretation went to issues such as the power of the Congress over the extension of slavery. In other words, disagreement centered on the structure of government, not on the underlying values of the civic culture. Indeed, both sides appealed to the ideals of freedom and equality. The Confederacy registered its appreciation of the Constitution's value as a symbol by casting its own constitution in words closely resembling those of the Constitution of the United States. From one perspective the entire episode can be seen as a demonstration of the way conflict can play a unifying function by making clear to the contesting parties that they agree on the value of the prize.<sup>450</sup>

Constitutional litigation itself performs a similar unifying function, for it is a process in which ideology is reinforced by the behavior of litigants and of legal professionals, including judges. Litigants express their belonging to the national community by appealing to the civic culture's basic norms. When judges enforce the Constitution's protections of cultural minorities against various forms of domination, that judicial behavior not only helps to preserve the integrity of

446. Madison remarked that the proposed Constitution contained an important safeguard against local tyrannies. *See id.* One faction might control a majority in a single state, but, "[i]n the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces," *id.* at 359, coalitions would have to rest on principles of the general good, not on the good of a powerful faction. The tyranny of local majorities might be resisted by concentrating power in the national government, the composition of which would be determined with the participation of all the Nation's sects and factions. The application of civil rights legislation to end the sway of Jim Crow in the southern states is a modern illustration of such a use of national power.

447. *See* H. ISAACS, *supra* note 10, at 171-204.

448. *See* P. DEVINE, *supra* note 372, at 116-19, 141-43; R. GABRIEL, *supra* note 383, at 397-405; Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1294-1305, 1315-1319 (1937).

449. *See, e.g.,* Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123.

450. *See* L. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* 121-28 (1956).



cultural groups but also reinforces the individualism and egalitarianism that are central to the American group identity. When the ideology of the civic culture is embodied in positive law, it is not just the enactment of the law that serves to unify the society but the enforcement of the law in actual cases.<sup>451</sup> Law is ideology, all right, but the application of law is the ritual behavior that keeps the ideology alive. When our constitutional law infuses the spirit of tolerance into the decision of cases, those rituals provide regular, day-to-day renewal of the idea that we are one nation.

Beyond the unification of society, the civic culture has its effects on the lives of individuals. For example, of all the norms of American culture, the norms of the civic culture find the quickest acceptance by immigrants and the widest diffusion among cultural minorities. The reason is that those norms are centered on the public life of the community, where cultural interaction is a necessity for survival. The adoption of the beliefs and behavioral norms of the civic culture plainly is assimilationist in tendency, and for the most part this form of assimilation has been avidly sought and easily achieved.<sup>452</sup>

By protecting a wide freedom of individual belief and behavior associated with cultural identity, the Constitution matches the individualistic expectations generated by the civic culture. It reinforces those expectations as well, with the result that the process of assimilation is advanced. Whatever else was accomplished by the civil rights movement, it seems clear that Americans of the cultural mainstream are more receptive today to claims of equal citizenship by persons of different religions, races, and ethnic backgrounds than they were before the Second World War.<sup>453</sup> This change in attitude is reflected in behaviors, from voting<sup>454</sup> to intermarriage.<sup>455</sup> If official tolerance of cultural minorities is no longer a controversial policy, one explanation may be that the policy no longer seems to threaten expectations about the minorities' ultimate assimilation.

Still, no one can be at once wholly embedded in both a minority culture and the culture of the larger society. For most of us, American identity comes easily, even automatically. For many members of cultural minorities, however, identification with America is a choice that entails costs.<sup>456</sup> Their willingness to iden-

451. See generally Bredemeier, *Law as an Integrative Mechanism*, in *LAW AND SOCIOLOGY* 73 (W. Evan ed. 1962) (on the legal system's contributions to societal integration through the resolution of conflicts).

452. See Bunker, *supra* note 44, at 318-29 (on assimilation of the Irish, blacks, and ethnic minorities into the American culture).

453. See Pettigrew, *supra* note 25, at 26-27.

454. At this writing, the Governors of California and New York are of Armenian and Italian descent, respectively. Catholic candidates for the Presidency are taken seriously. Blacks have been elected as mayors of a number of major cities, often with the necessary support of white voters.

455. See *supra* note 204.

456. In this context, as Irving Howe has remarked, "All changes bring losses . . ." Howe, *Toward An Open Culture*, *NEW REPUBLIC*, March 5, 1984, at 25, 27. For a theoretical discussion, see A. WALLACE, *CULTURE AND PERSONALITY* 199-206 (2d ed. 1970). See also S. STEINER, *LA RAZA: THE MEXICAN AMERICANS* 230-44 (1970) (presenting a range of views on the question of Chicano identity, including views from the streets of the barrio concerning those who leave). The point is made with poignancy in several recent autobiographies. See, e.g., E. GALARZA, *BARRIO BOY* (1971) (acculturation of Mexican immigrant to California); E. RIVERA, *FAMILY INSTALL-*

tify themselves as Americans will vary in proportion to their perception that the ideals of the civic culture have been made a reality in their own lives. One major influence on their sense of belonging will be the development of our constitutional law.

Justice Black once chided Justice Frankfurter for limiting his search for guidance in constitutional interpretation to the traditions of the "English-speaking peoples,"<sup>457</sup> but in fact American constitutional law, like the rest of the American civic culture, is predominantly an outgrowth of British-American traditions of liberalism.<sup>458</sup> Although our constitutional law began as the artifact of a particular culture, it is also capable of embracing the attitudes and behaviors of other cultures. This openness to accommodation is the product of our civic culture's values of individual liberty and equality. Immigrants to America generally are receptive to the civic culture; however, some of the expectations of that culture—its egalitarian norms in particular—may be troubling to some newcomers. For example, there is a sizeable population of immigrants from Vietnam in southern California. American norms concerning equality between the sexes are putting a strain on some marriages,<sup>459</sup> and other egalitarian norms are complicating life for some Vietnamese workers and their employers<sup>460</sup>—just as similar norms have troubled many of their native-born American contemporaries.

This recent experience illustrates a larger principle: there are norms of the American civic culture to which the Nation can legitimately demand conformance in the interest of protecting the principle of equal citizenship, the right to belong. In particular, it is proper for us to insist on observance of the civic culture's norms of social equality, even when those norms require the abandonment of another culture's norms of dominance and subordination. A major problem for our constitutional doctrine over the next generation will be to sort out these justified exactions of cultural conformity from the cases in which requiring people to conform is, as the Kentucky and Virginia Resolutions said of the conformity demanded by the Alien and Sedition Acts of 1798, a threat to

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MENTS: MEMORIES OF GROWING UP HISPANIC (1982) (Puerto Rican in New York); R. RODRIGUEZ, HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ (1982) (California-born Chicano moving away from his family).

The personal stories connected with acculturation make fine reading. See, e.g., AMERICAN MOSAIC (J. Morrison & C. Zabusky eds. 1980) (collection of stories of the immigrant experience in the words of those who lived it); CHILDREN OF THE UPROOTED (D. Handlin ed. 1966).

457. *Rochin v. California*, 342 U.S. 165, 176 (1952) (Black, J., concurring).

458. See L. HARTZ, *supra* note 403; S. HUNTINGTON, *supra* note 381, at 20. James Q. Wilson, reviewing more than two dozen analyses of the political culture of Americans, noted general agreement about five widely shared values: liberty, individualism, equal opportunity, the rule of law, and civic duty. J. WILSON, AMERICAN GOVERNMENT 79 (1980). S. HUNTINGTON, *supra* note 381, at 15, lists the following values as central to the American creed: "constitutionalism, individualism, liberalism, democracy, and egalitarianism."

459. Day & Holley, *Vietnamese Create Their Own Saigon*, L.A. Times, Sept. 30, 1984, § I, at 3, col. 1. Furthermore, when Vietnamese children in school learn "to ask why and to express opinions," at home they may be less apt to follow the cultural norm of the homeland or to "do what they are told." *Id.*

460. "Taking orders or direction from someone who held a lesser job in Vietnam can be a serious obstacle for some workers. . . . Even worse are problems with some women supervisors. 'Vietnamese men [do not] respond well to female direction,' said [one company official]." *Id.*

"the general principles of free government."<sup>461</sup> In other words, nationalism, in the sense of acceptance of the civic culture, does not require the complete abandonment of distinctive cultural identities.

One unexpected product of the civil rights movement was the white "ethnic revival" of the early 1970s.<sup>462</sup> Some cultural groups actively sought to prevent assimilation. Janet Dolgin describes the Jewish Defense League as "a project to enact ethnicity,"<sup>463</sup> and goes on to show how the JDL consistently demonstrated its acceptance of the ideological forms of American politics.<sup>464</sup> The recent ethnic revival signaled neither a return to traditional ethnic communities nor the foundation of new communities of refuge. Rather, buttons that say "Kiss me, I'm Irish" and T-shirts advertising "Green Power" appear to represent a transformation of ethnic identity, an effort by assimilated Americans to distinguish themselves with an overlay of expressive ethnic solidarity or "symbolic ethnicity."<sup>465</sup> "Being Irish in Boston today . . . bears no resemblance to being Irish in Boston in 1851."<sup>466</sup>

That ethnicity has become a matter of choice for scores of millions of Americans is a triumph for the ideology of tolerance and an illustration of the staying power of the values of individualism and egalitarianism. The broad range of "varieties of ethnic experience"<sup>467</sup> available to a great many people in this country is founded solidly on the civic culture that infuses our constitutional law.

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461. J. CAREY, *supra* note 78, at 38-39 (quoting Madison's speech before the Virginia Assembly, Dec. 21, 1798); see *supra* note 87 and accompanying text. Our constitutional law has made some accommodations to the values and perceptions of groups outside the cultural "mainstream." The Amish, for example, see separation from the world in a redemptive community as a Biblical command. J. HOSTETLER, *supra* note 12, at 77-79. They avoid, to the extent feasible, participation in the larger society's system of law and government (although they do vote in elections), and they seek to withdraw their children from consolidated public high schools. *Id.* at 251-69. The Supreme Court, confronted with claims of religious liberty arising out of Amish separatism, has struck a rough balance, accepting the claim against a compulsory school law, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), but denying the claim in the context of Social Security taxation, *United States v. Lee*, 455 U.S. 252 (1982). These decisions are appropriate to the civic culture's value of tolerance. The tax poses no serious threat to the taxpayer's cultural identity; compulsory attendance at high school is another matter, assuming the children agree with their parents' religious views. Similarly, decisions on jury discrimination focus on the goal of drawing jurors from a fair cross-section of the community, with particular reference to such juror characteristics as race and ethnicity. *E.g.*, *Castaneda v. Partida*, 430 U.S. 482 (1977). Such characteristics are relevant not only because of the danger of racial or ethnic prejudice but also because of the differences in "perspective[s] on human events" associated with race or ethnicity. *Peters v. Kiff*, 407 U.S. 493, 504 (1972) (plurality opinion of Marshall, J.).

462. See, e.g., R. KRICKUS, *PURSuing THE AMERICAN DREAM: WHITE ETHNICS AND THE NEW POPULISM* (1976); M. NOVAK, *THE RISE OF THE UNMELTABLE ETHNICS* (1971). But see S. STEINBERG, *THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA* 50-51, 73-74 (1982) (advancing thesis that the ethnic revival was not a genuine "revitalization" of ethnicity, but an illustration of the general decline of ethnic communities).

463. J. DOLGIN, *supra* note 107, at 15.

464. J. DOLGIN, *supra* note 107.

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

466. Thernstrom, *supra* note 148, at 20.

467. See *supra* note 20.

American history is the history of many peoples and of one people. That there *is* an American people has always been a subject for discussion in this country; surely no other people in human history has felt a greater compulsion to keep on verifying its own existence, year after year. When we look into the mirror, however, what we see is nothing tangible, but an abstraction: a civic culture that provides us with our identity as a people and a nation. Indeed, it is our need for national self-definition that has given the American civic culture such a prominent role in the life of our society. Because American identity *is* the civic culture, it enters into every individual American's life as an important part of the sense of self.

The civic culture thus plays an important stabilizing role, both for the society and for each one of us; yet it is not static. In the modern era its growth has been nourished by one of the very processes it has made possible: the integration into American society of cultural groups previously treated as marginal. Thus, one admirable feature of today's American civic culture, in comparison with yesterday's, is its relative openness. On the whole, Americans now profess the belief that people of any and all cultures deserve to belong as members of the national community so long as they embrace the civic culture itself. In promoting tolerance and the sense of belonging, the American civic culture and American constitutional law have come a long way in the seven decades since the heyday of the Americanization movement. Generally, those changes have made our country more civilized and more humane.

Even so, the work of maintaining a society characterized by tolerance and "the spirit of moderation"<sup>468</sup> never ends. In a nation of many cultures, we shall never be able to put the impulse to nativist domination wholly behind us; the case of the Nativity scene is a sobering reminder. Yet every such incident is an occasion for resolving to live up to the ideals we profess. Because the Nation's identity and the identity of each one of us as an American are to be found in the American civic culture, all of us have a stake in the tolerance and the freedom of cultural choice that make it possible for many peoples to be a nation.

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468. See L. HAND, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT*



## OBSERVATION

*With this issue the North Carolina Law Review announces the beginning of a new series of articles entitled Observations. Observations are short works by noted legal and political scholars expressing their opinions and judgments on current legal and political issues and events. Although editorial in nature, the opinions expressed in Observations are based on sound legal research. Of course, the opinions expressed in Observations are not necessarily those of the North Carolina Law Review. Submissions of Observations for future issues of the North Carolina Law Review are currently being accepted. Submissions should be addressed to: Articles Editor, North Carolina Law Review; Attention: Observations.*

