

## Cultural Rights in the United States: A Conflict of Values

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## Introduction

There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.<sup>1</sup>

*The Harvard Encyclopedia of American Ethnic Groups* identifies more than 100 minorities and 170 surviving Indian tribes in the United States.<sup>2</sup> The social, economic, political, and legal interactions of these immigrant and nonimmigrant ethnic groups have helped to shape the history, values, and legitimacy of the United States.

The question of how a political system accommodates various ethnic and racial groups constitutes a principal concern of political and legal philosophy. Two basic models exist: assimilation and cultural pluralism.<sup>3</sup> The United States' approach to minority accommodation is basically assimilationist. The United States' juridical tradition which emphasizes individual rights, equality of opportunity, and protection against discrimination promotes and supports the assimilationist process.

The alternative route, and one that prevails in many other nations, is to implement a system of cultural pluralism. While the extent of cultural pluralism can vary widely, such arrangements do, at a minimum, recognize minority groups as having an identifiable status with their own legal claims to special powers and rights. But cultural pluralism is an anathema in the melting pot,

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1. *Wisconsin v. Yoder*, 406 U.S. 205, 223-24 (1972).

2. *Harvard Encyclopedia of American Ethnic Groups* vi (1980). More than 20,000 immigrants from 110 countries live in the Elmhurst section of Queens, New York. *Minorities, Community and Identity* 248 (C. Fried ed. 1983) [hereinafter *Fried*]. By the year 1990, it is estimated that 56% of California public school children in grades K-12 will be Black, Hispanic, or Asian. Ronald Takaki, *Reflections on Racial Patterns in America: An Historical Perspective*, in 1 *Ethnicity and Public Policy* 1 (Winston A. Van Horne ed. 1982).

There is virtually no state in the world without minorities. Among the more homogeneous nations are Ireland, Korea, Denmark, Japan, and Germany. It is estimated that in 1967, 892 ethnic groups were living within the borders of the more than 160 nations. George P. Murdoch, *Ethnographic Atlas* 7 (1967). See also Jay A. Sigler, *Minority Rights: A Comparative Analysis* 205-13 (1983).

3. Milton Gordon has defined cultural pluralism within the United States as "[t]he preservation of the communal life and significant portions of the culture of the later immigrant groups within the context of American citizenship and political and economic integration into American society." Milton Gordon, *Assimilation in American Life* 85 (1964). According to Thomas Hoult, cultural pluralism is the "doctrine that a society benefits when it is made up of a number of interdependent ethnic groups each of which maintains a degree of autonomy." Thomas Ford Hoult, *Dictionary of Modern Sociology* 239 (1969).

virtually an insult to the United States's rich immigrant heritage and an assault on a concept of justice valuing individual equality.

United States history is not solely a history of immigration. It is also a history of expansion and conquest. The Indian, the Hawaiian, and the Mexican-American,<sup>4</sup> did not immigrate. They gave no "consent of the governed."<sup>5</sup> Rather, they were dispossessed, without their consent, of their lands and resources.<sup>6</sup> By and large, these groups have not assimilated. Indians, Hawaiians, and Chicanos cling tenaciously to their identities and their cultures. Seeking to maintain their group identity and cultural rights, these nonimmigrant groups fear the death of their cultural identity in a system that recognizes only the individual and enforces only nondiscrimination.

This article considers the extent to which the United States exhibits characteristics of a pluralistic state despite its general assimilationist stance. That is, to what extent has the federal (and state) government recognized, and how has it protected, the cultural rights of these nonimmigrant groups? *Section I* gives a gen-

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4. The term "Chicano," derived from "mejicano," was first used as a nickname for the refugees of the Mexican Revolution after 1910. The term re-emerged in the 1960s used by militants such as Rudolfo "Corky" Gonzales to "announce a distinct people, once suppressed but now reclaiming their integrity." Womack, *The Chicanos*, N.Y. Review of Books, Aug. 31, 1972, at 12, 14.

The term Chicano will be used interchangeably with Mexican American. The term "Hispanic" generally refers to a wide category of Spanish-speaking groups, including Cubans, Puerto Ricans, and other Latin Americans, as well as Chicanos.

The Chicano population is obviously a mixture of people descended from the large region conquered from Mexico and individuals who have immigrated from Mexico, especially since the turn of the century.

The American Indian, Native Hawaiian, and Chicano are not the only nonimmigrant people who have come under United States jurisdiction. The United States conquered the Puerto Ricans and the Chamorros of Guam during the Spanish American War. The Virgin Islands were purchased from Denmark in 1917. American Samoan native leaders ceded their sovereignty to the United States at the turn of the century. In addition, the United States has recently negotiated four separate status agreements with the people of the Trust Territories of the Pacific to define their legal relationship with the United States. Arnold Leibowitz, *Colonial Emancipation in the Pacific and Caribbean: A Legal and Political Analysis* 77-104 (1976); A. John Armstrong, *The Emergence of the Micronesians into the International Community: A Study of the Creation of a New International Entity*, 5 Brooklyn J. Int'l L. 207 (1979).

5. See *infra* note 21 and accompanying text.

6. Interestingly, the United States did employ various concepts of group identity to legitimize the exclusion of some of these nonimmigrant groups from the benefits and rights of the political system. The Indians belonged to alien tribes and lay outside the federal system. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Elk v. Wilkins*, 112 U.S. 94 (1884). For the first ten years after Puerto Rico's annexation to the United States, the islanders had their own identity as "the people of Puerto Rico." *Foraker Act*, ch. 191, § 7, 31 Stat. 77 (1900) (codified as amended 48 U.S.C. §§ 731-916 (1982)). Even in the case of Blacks, slaves were characterized as property and therefore legally excluded from the system. See *infra* note 78.

eral overview of cultural pluralism, including a discussion of the historical development of pluralistic societies. The section reports on minority rights under international law, outlines the status of cultural rights recognition and implementation in other nations, and reviews twentieth century scholarship related to pluralistic thought. *Sections II, III, and IV* examine the historical backgrounds of the American Indian, the Native Hawaiian, and the Chicano, respectively, and analyze how successful they have been in protecting their cultural heritage using existing constitutional provisions.

## I. Historical Development of Minority Rights

Cultural freedom is no less a spiritual possession of civilized mankind than religious freedom. This principle shall be acknowledged as an ethical tenet for the relations between peoples.<sup>7</sup>

The term *ethnic* derives from *ethnos*, the Greek word for nation.<sup>8</sup> Implied is a notion both of unity among all members and of separateness from others. Ethnic, frequently referred to as minority, groups are commonly distinguished by language, territory, common cultural values or symbols, and religions.<sup>9</sup> Ethnic tensions are powerful realities, as Woodrow Wilson recognized by his

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7. Jacob Robinson, Oscar Karvach, Max Laserson, Neremiah Robinson & Marc Vichniak, *Were the Minorities Treaties a Failure?* 255 (1st ed. 1943) (citing the First Congress of European Nationalities in 1925, describing the importance of cultural protection) [hereinafter *Minorities*].

8. Otto Klinberg, *The Study of Multinational Societies*, in *The Multinational Society: Papers of the Ljubljana Seminar 12* (William F. Mackey & Albert Verdoodt eds. 1975) [hereinafter Mackey & Verdoodt]. Milton Gordon defines ethnicity simply as "a sense of peoplehood." Philip Gleason, *American Identity and Americanization*, in *Dimensions of Ethnicity* 137 (Stephen Thernstrom ed. 1982).

For a number of definitions of ethnic or minority group, see F. Heckman, *Towards the Development of a Typology of Minorities*, in Fried, *supra* note 2, at 10-11; Sigler, *supra* note 2, at 4-10; Chester L. Hunt & Lewis Walker, *Ethnic Dynamics: Patterns of Intergroup Relations in Various Societies* 3 (1974).

9. The United Nations, as of yet, has no official definition of the term "minority group." Special Rapporteur Francesco Capotorti of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed the following working definition of "minority" to apply to Article 27 of the International Covenant on Civil and Political Rights:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities at 96, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78.XIV.1 (1979) [hereinafter *Capotorti Study*].

comment that "[n]othing, I venture to say, is more likely to disturb the peace of the world than the treatment . . . meted out to minorities."<sup>10</sup> Ethnic tensions have precipitated innumerable local and regional wars, and contributed to two world wars.

As more and more states become independent, and as populations shift, minority problems have multiplied. Today, the Basques, Tamils, Sikhs, Kurds, Ibos, Turks of Cyprus, Corsicans, Nagas, and Bulgarians of Turkey, to name only a few, seek recognition and protection of their rights as a people.<sup>11</sup> Solutions to minority problems have taken many forms—including Hitler's ultimate solution. Other policies include genocide,<sup>12</sup> expulsion,<sup>13</sup> subjugation,<sup>14</sup> partition,<sup>15</sup> toleration,<sup>16</sup> assimilation,<sup>17</sup> and cultural pluralism.<sup>18</sup> The latter has been the policy of most nations.

### *Historical Examples of Pluralistic Arrangements*

Pluralistic political arrangements are as ancient and varied as society itself. The Roman Empire, with its city-state form of gov-

10. 5 A History of the Peace Conference of Paris 130 (H.M.V. Temperley ed. 1969) (quoting Wilson's speech delivered at the League of Nations, May 31, 1919).

11. The Minority Rights Group, based in London, England, is dedicated to the promotion of minority rights worldwide and has issued numerous short reports on various groups, including a general survey of the problem. See 1-2 World Minorities (Georgina Ashworth ed. 1977-78).

12. For a history of the use of genocide, see Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (1981).

13. Examples of forced expulsion abound: Arabs from Israel; East Indians from several nations of Africa, such as Uganda, following their independence in the early 1970s; and more recently alien workers from Ghana. See generally Michael Twaddle, *Expulsion of a Minority: Essay on Ugandan Asians* (1975).

14. Any conquest of one people over another could be considered subjugation, including the Nigerian state over the Ibos in their unsuccessful fight for independence, the Soviet annexation of Estonia, Latvia, and Lithuania, and the entire colonial system of the western world from the late 1800s to the 1960s and 1970s. See generally William Tomingas, *The Soviet Colonization of Estonia* (1973).

15. Pakistan's separation from India and Bangladesh's independence from Pakistan are examples of partition. See generally Thomas Walter Wallbank, *The Partition of India: Causes and Responsibilities* (1966).

16. For the most part, guest workers from Turkey, Yugoslavia, and northern Africa are tolerated in Western Europe. See generally Ray C. Rist, *Guestworkers in Germany: The Prospects for Pluralism* (1978).

17. The United States and Australia are considered to be the most assimilationist-oriented nations in the world. See generally Milton Gordon, *Assimilation in American Life: The Role of Race, Religion and National Origins* (1964).

18. For a definition of cultural pluralism, see *supra* note 3. Certainly not all pluralistic arrangements have been successful. Politicians have yet to devise successful arrangements for the war-torn nations of Lebanon, Cyprus, and Northern Ireland. It is clear, however, that some form of pluralistic system will have to be implemented in these nations. The South African bantustan policies and corporatism represent perversions of group theory rights. For a discussion of corporatism, see Sigler, *supra* note 2, at 22-23.

ernment, was a prime example of a pluralistic society. Recognizing that the Empire's stability required only a minimum of enforced conversion to Roman ways, the Romans permitted their conquered areas to retain their own forms of government, religion, language, and tradition, especially in the far-flung regions.<sup>19</sup> In the mid-1400s, the Ottoman Turks instituted a similar arrangement, known as the millet (meaning nation) system.<sup>20</sup> It allowed for autonomous self-government by the various religious groups—Jewish, Christian, and Greek Orthodox—under the control of the Sultan. Each millet was left free to establish its own educational, religious, judicial, and social institutions.<sup>21</sup>

Though different in political and social structure, the European medieval world also recognized the primacy of groups—the church, the monarchs, the guilds, the nobles, and the military, among others. An individual's membership in various groups gave that individual status and identity in society. Individuals owed certain obligations to each of their groups and from each group they derived certain privileges.<sup>22</sup>

The European Enlightenment advocated an end to this corporate pluralistic system by reshaping its concept of society from one of interaction between well-defined groups to one defined by the individual's relationship to the state.<sup>23</sup> Contract theorists rationalized this relationship in terms of individuals entering into a social contract, eventually to form states, which derived their authority from popular consent. Philosophers such as Hobbes, Locke and Rousseau predicated their theories on a society that was legally and politically homogeneous.<sup>24</sup> The state needed to destroy the power of such groups as the nobility, the clergy, and the guilds in order to free and equalize the status of persons within society.<sup>25</sup>

Ironically, the Enlightenment concept that political sover-

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19. See Heinz Kahler, *The Art of Rome and Her Empire* 13 (1962).

20. See Stanford Shaw, *History of the Ottoman Empire and Modern Turkey* 151 (1976), cited in Sigler, *supra* note 2, at 70-71; J.A. LaPonce, *The Protection of Minorities* 84-85 (1960).

21. LaPonce, *supra* note 20, at 84-85 (1960).

22. See generally Otto van Gierke, *Associations and Law* (1977); John Neville Figgis, *Churches in the Modern State* (2d ed. 1914).

23. See Paul Hazard, *European Thought in the Eighteenth Century* 172-88, 325-34 (1963). See also Ernst Cassirer, *The Philosophy of the Enlightenment* 234-74 (1955).

24. See generally Thomas Hobbes, *Leviathan* (1974); John Locke, *Two Treatises of Government* (1960); Jean Jacques Rousseau, *The Social Contract* (1947).

25. See Sigler, *supra* note 2, at 36. The Preamble to the French Constitution of 1791 illustrates the basis of the new order:

The National Assembly . . . abolishes irrevocably the institutions which were injurious to liberty and equality of rights . . .

Neither privileges nor exception to the law common to all

eighty emanated from the people sowed the seeds of what later became nationalism and a burgeoning of newfound cultural pride and identity distinguishable from the medieval corporate pluralism. By the early nineteenth century, theorists such as the German philosopher Gottfried von Herder were writing passionately of the importance of one's native language and culture in human development,<sup>26</sup> thus fueling the demand by linguistic, cultural and religious groups for a recognition of their rights by the dominant society.

### *International Protection of Group Rights*

As the philosophy of the Enlightenment sought to dissolve the role and importance of internal national groups, nations negotiated instruments on the international level to recognize the rights of such groups.<sup>27</sup> The 1648 Treaty of Westphalia aimed to resolve conflicts in the German states by guaranteeing certain rights to religious minorities.<sup>28</sup> Subsequent bilateral and multilat-

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Frenchmen any longer exists for any part of the nation or for any individual.

Neither *jurandes* nor corporations of professions, arts, and crafts any longer exist.

[Fr. Const.] Preamble (French 1791), *quoted in* Sigler, *supra* note 2, at 36.

John Stuart Mill, one of the leading proponents of this view, wrote in his major work:

Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist.

John Stuart Mill, *Considerations on Representative Government* 230 (Currin V. Shields ed. 1958), *quoted in* Sigler, *supra* note 2, at 21.

26. See Sir Isaiah Berlin, Vico and Herder 206-16 (1976).

27. The protection of minority rights under international law has generated considerable literature. See, e.g., Pablo de Azca'rate y. Florez, *League of Nations and National Minorities: An Empowerment* (1945); Pablo de Azca'rate y. Florez, *Protection of National Minorities* (1967); Macartney, *League of Nations' Protection of Minorities*, in *The International Protection of Human Rights* (Luard ed. 1967); Inis L. Claude Jr., *National Minorities* (1955); Green, *The Protection of Minorities in the League of Nations and the United Nations*, Canadian Institute of International Affairs (1970); Joseph B. Kelly, *National Minorities in International Law*, 3 *Den. J. Int'l L. & Pol.* 253-73 (1973).

28. According to the terms of the Treaty, Catholics and Protestants living in one state predominantly comprised of the opposite faith were granted the right to freely practice their religion, to educate their children in conformity with their faith, and to freely emigrate. Peace of Westphalia: Treaty of Peace Between Sweden and the (Holy Roman) Empire, and Treaty of Peace Between France and the (Holy Roman) Empire, Oct. 14-Oct. 24, 1648, 1 *Parry's T.S. No.* 119, 271. See Adolphus W. Ward, *The Peace of Westphalia*, 4 *Cambridge Modern History* 411-412 (1911); Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 *Am. J. Int'l L.* 20 (1948).

Even earlier examples of internationally guaranteed minority religious rights may be found in the 1250 promise by St. Louis of France to the Maronite community pledging to protect them as if they were French subjects. Patrick Thornberry,

eral treaties, including those negotiated at the Congress of Vienna in 1815<sup>29</sup> and the Congress of Berlin in 1878,<sup>30</sup> extended protection to ethnic as well as religious minorities.

Protecting minority rights assumed major importance after World War I. Despite the formation of new European states, the restructuring of national boundaries, and the relocation of mass populations, some twenty million people fell into the category of minorities within their homelands.<sup>31</sup> Fearful that old hostilities might be renewed by irredentist and separatist movements, the Allied powers established a minority system under the supervision of the League of Nations. Sixteen states, either through unilateral declarations or by multilateral treaties, guaranteed minorities an equitable share of public funds to maintain their own schools and religious and social institutions.<sup>32</sup> These states also committed

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*Is There a Phoenix in the Ashes?—International Law and Minority Rights*, 15 Tex. Int'l L.J. 421, 426 n.19 (1981).

29. The Final Act of the Congress of Vienna offered special protections for the Belgians, Savoyards, and Poles. By acceding to the desires of some national minorities, but not others, however, the Congress of Vienna was important both for its role in promoting minority rights and in sowing the seeds of ethnic dissent for the next two hundred years. See J. A. Laponce, *The Protection of Minorities* 25-28 (1960); McCartney, *supra* note 27, at 160; Thornberry, *supra* note 28, at 426.

As Walker Conner points out in *The Political Significance of Ethnonationalism Within Western Europe*, in *Ethnicity in an International Context* 110-33 (Abdul Said & Luiz Simmons eds. 1976) [hereinafter Said & Simmons], ethnonationalism has been one of the most important political forces in Europe since the Vienna Congress of 1815.

30. See generally William N. Medlicott, *The Congress of Berlin and After* (1963).

31. Estimates indicate that the minority population problem was cut in half, from 50 to 20 million, by the redrawing of national boundaries. Thornberry, *supra* note 28, at 431.

32. According to the Permanent Court of International Justice, the function of the Minority Treaties was to:

secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peacefully alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.

In order to attain this objective, two things were regarded as particularly necessary . . . .

The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.

The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.



themselves to such positive steps as establishing separate minority language schools and court systems, and providing funds to preserve minority cultural activities. Furthermore, states authorized the League to review and investigate petitions from individuals who alleged violations of their rights as minority members.<sup>33</sup> Unfortunately, the minority system was not properly designed to ensure its success, nor was it ever given adequate support.<sup>34</sup>

Twenty-five years later, in the aftermath of the Holocaust and World War II, the world community again created an international organization to promote peace and cooperation. The United Nations Charter specifies as one of its four primary goals the protection of human rights and fundamental freedoms without regard to race, sex, language, or religion.<sup>35</sup> Neither the Charter nor the United Nations Declaration of Human Rights,<sup>36</sup> which specifies the basic rights and freedoms alluded to in the Charter, contains specific mention of minority groups' rights.<sup>37</sup>

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Minority Schools in Albania, (Alb. v. Greece), 1935 P.C.I.J. (ser. A/B), No. 64, (Apr. 6) at 484, 496 (Hudson, 3 World Court Reports 496).

33. Inis L. Claude, Jr., *National Minorities* 23-24 (1955). The League received 585 petitions, admitted 338, and examined 298. See *Minorities*, *supra* note 7, at 128, for a table of the petitions. The cases covered a wide spectrum of issues including suppression of private schools, use of biased historical textbooks, restrictions on minority languages, discriminatory policies in job placements, denial of citizenship, and acts of violence and repression. Thornberry, *supra* note 28, at 435.

For a discussion of the petition procedure, see *Minorities*, *supra* note 7, at 85-109; Capotorti Study, *supra* note 9, at 20-22.

34. Only weaker states were obligated to recognize and protect minority rights, a fact that, to them, smacked of imperialistic intervention in their internal affairs by the great powers. Perhaps the system would have prevailed if Woodrow Wilson had succeeded in inserting the following article in the Covenant of the League of Nations to protect the rights of minorities in all new states:

The League of Nations shall require all new States to bind themselves as a condition precedent to their recognition as independent or autonomous States, to accord to all racial or national minorities within their several jurisdictions exactly the same treatment and security, both in law and in fact, that is accorded the racial or national majority of their people.

Wilson's Second Draft or First Paris Draft, January 10, 1919, with Comments and Suggestions by D.H.M., in 2 David Hunter Miller, *The Drafting of the Covenant* 65, 91 (1928).

In addition, there were moves by some States, notably Germany, to gain or regain territory by stirring up agitation and dissent among minority groups in neighboring states. Ultimately, the minority system failed because the League failed—a failure caused in part by: (1) the refusal of the United States to participate, (2) the provisions of the Versailles treaty, and (3) the interactions of the European states. Claude, *supra* note 33, at 31-50.

35. U.N. Charter preamble, art. 1, para. 3.

36. *Declaration of Human Rights*, 3 Y.B. Int'l Comm'n 535-37, U.N. Sales No. 1950.I.11 (1949).

37. A number of post-war bilateral treaties deal with the issue of minority protection, including Section XII of the Potsdam Protocol, 1946 Agreement between Austria and Italy, 1950 Agreement Between India and Pakistan, London Memorandum

The United States was largely responsible for this shift from group to individual rights guarantees. An early draft of the UN Declaration on Human Rights, prepared by the Division on Human Rights, included a strong recognition and guarantee of minority rights.<sup>38</sup> The Soviet Union supported this draft, portraying itself as the leading proponent of minority rights protection, while the United States strongly fought it.<sup>39</sup> After considerable debate, all special provisions favoring minorities were rejected by a vote of ten to six.<sup>40</sup> The same ideological conflict plagued the work of the

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dum of 1959, Final Settlement of the Problem of Cyprus, 1957 Agreement Between the United Kingdom and Singapore, the London Treaty of 1954 Concerning Trieste and 1955 Declaration of Denmark and the Federal Republic of Germany. *See* Protection of Minorities 48, U.N. Doc. E/CN.4/Sub.2/221/Rev. 1, U.N. Sales No. 67.xiv.3 (1967) [hereinafter Protection of Minorities].

38. In countries inhabited by an appreciable number of individuals belonging to a race, language, or religion other than that of the majority of the inhabitants, individuals belonging to these ethnic, linguistic, or religious minorities shall have the right . . . to establish and maintain their schools and religious and cultural institutions out of an equitable proportion of any public funds available for the purpose, as well as the use of their language in the courts and other state institutions, as well as the press and in public assemblies.

UN Doc. E/CN.4/AC.1/3/Add. 1 at 409, *cited in* Mackey & Verdoodt, *supra* note 8, at 3-4.

39. Claude, *supra* note 33, at 158-59. Although it was President Woodrow Wilson who first championed the notion of self-determination for minorities, the United States has had a longstanding official international policy of non-acceptance of minority rights. In 1938, the United States voted in favor of resolution XXVII at the Pan-American conference in Lima which declared that the League's system of minority protection was not applicable to the Western Hemisphere. Heinz Kloss, *The American Bilingual Tradition* 297 (1977) [hereinafter *Kloss*]. Four years later, U.S. Undersecretary of State Sumner Welles explained the United States expectation for the UN human rights policy:

Finally, in the kind of world for which we fight, there must cease to exist any need for that accursed term, "racial or religious minority." If the peoples of the earth are fighting and dying to preserve and to secure the liberty of the individual under law, is it conceivable that the peoples of the UN can consent to the reestablishment of any system where human beings will still be regarded as belonging to such minorities.

Sumner Welles, American Under Secretary of State, 31 May 1943, *cited in* Claude, *supra* note 33, at 75. In 1952, United Nations Representative Eleanor Roosevelt demanded that the concept of self-determination not be extended to minorities. The United States also succeeded in maintaining the vagueness of Articles Two and Five concerning minority rights of the UNESCO Convention Against Discrimination in Education. Kloss, *supra*, at 58.

40. U.N. Doc. E/CN.4/SR.62. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide is the only United Nations document from the formative years that approaches a concern for minority groups protection. Under Article Two of this convention genocide is defined as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." 3 Y.B. Int'l L. Comm'n 959-60, U.N. Sales No. 1950.I.11 (1949).

The original Genocide Convention draft contained a provision outlawing cultural genocide:

[G]enocide also means any deliberate act committed with the intent to

Subcommission on the Prevention of Discrimination and the Protection of Minorities, established under the Human Rights Commission. Although the Subcommission was originally authorized as two bodies, the United States successfully lobbied for its establishment as one body with two concerns. Until recently, the Subcommission has ignored minorities and has directed its primary attention to the problem of discrimination.<sup>41</sup>

The United Nation's orientation toward minority rights began to change in the mid-1960s.<sup>42</sup> In 1965, the UN Secretary-General

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destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members such as:

1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group.
2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

7 U.N. ESCOR Supp. (No. 6) at 6, U.N. Doc. E1794 (1948).

The western powers successfully defeated this provision as well. Kuper, *supra* note 12, at 30-31. For a discussion of the decision not to include this article, see also *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, 31 U.N. ESCOR (Agenda Item 17) at 121-28, U.N. Doc. E/CN.4/Sub.2/416 (1978). See also Leo Kuper, *International Action Against Genocide* (Minority Rights Group Report No. 53, 1982).

41. The United Nations Study on the Main Causes and Types of Discrimination explained the differences in methods and objectives for protecting against discrimination versus minorities protection:

Discrimination implies any act or conduct which denies to certain individuals equality of treatment with other individuals because they belong to particular social groups . . . The aim is to *prevent* any act which might imply inequality of treatment on grounds of race, color, social origin, property, birth or other status. Thus the prevention of discrimination means the *suppression* or *prevention* of any conduct which denies or restricts a person's right to equality.

The protection of minorities, on the other hand, similarly inspired by the principle of equality of treatment of all peoples, requires positive action: concrete *service* is rendered to the minority group, such as the establishment of schools in which education is given in the native tongue of the members of the group . . .

Thus it may be seen that the ultimate goal of the protection of the minorities differs from that of the prevention of discrimination. For this reason, the two questions must be dealt with in different ways . . . One requires the elimination of any distinction imposed, and the other requires safeguards to preserve certain distinctions voluntarily maintained.

U.N. Doc. E/CN.4/Sub.1/384/Rev.1 (1979). See John P. Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 Am. J. Int'l L. 869 (1968).

42. In 1948, the General Assembly adopted a resolution to conduct a study of the problems of minorities. See Capotorti Study, *supra* note 9, at 139. Two years later, the Subcommission on the Prevention of Discrimination and the Protection of Minorities [hereinafter Subcommission] submitted a study on the definition and classification of minorities and measures for their protection. The full commission rejected the report and canceled the Subcommission's 1951 meeting. Mackey &

agreed to sponsor a Seminar on Minority Societies in Ljubljana, Yugoslavia. In 1966, UNESCO introduced for adoption two conventions containing articles promoting minority rights: the Convention Against Discrimination in Education and the Declaration of the Principles of International Cultural Cooperation.<sup>43</sup> During the same year, the General Assembly approved for ratification two legally binding international human rights instruments containing minority provisions: the Covenant for the International Protection of Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>44</sup> Article 27 of the International Covenant on Civil and Political Rights articulates the strongest United Nations guarantee of minority rights to date.

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>45</sup>

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Verdoot, *supra* note 8, at 6. The following year the General Assembly adopted Resolution 532B (VI), "the prevention of discrimination and the protection of minorities are two of the most important tasks of the UN." Capotorti Study, *supra* note 9, at 138.

In 1959, the Subcommission succeeded in having two of its studies on minorities published. Protection of Minorities, *supra* note 37. Mackey & Verdoot, *supra* note 8, at 6-7.

43. U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1979), at 34.

44. Part One, Article I(4) of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination states the need for "special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups." Basic Documents in International Law 305-06 (Ian Brownlie ed. 1983).

45. International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp., (No. 16) at 52, UN Doc. A/6316 (1966), reprinted in Human Rights: A Compilation of International Instruments 8, U.N. Doc. ST/HR/1/Rev.1, U.N. Sales No. E.78.XIV.2 (1978) [hereinafter Human Rights Instruments].

Since the promulgation of Article 27 of the International Government on Civil and Political Rights, the UN has commissioned a number of studies pertaining to minority rights. In 1974, the Commission on Human Rights approved a resolution for a study on the application of Article 27. Mackey & Verdoot, *supra* note 8, at 7. This study was followed by a number of others, including a study initiated in 1969 on the protection of minorities, see Capotorti Study, *supra* note 9, at annex 1, and a study commissioned in 1971 on the protection of indigenous populations. In 1978, Yugoslavia presented a draft of the Declaration of the General Assembly of the United Nations on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities. Article 3 of the draft stated:

For the purpose of realizing the conditions of full equality and complete development, of minorities as collectivities and of their individual members, it is essential to take measures which will enable them freely to express their characteristics, to develop their culture, education, language, traditions and customs and to participate on an equitable basis in the cultural, social, economic and political life of the country in which they live.

The issue of minority rights has also received renewed attention from within the European communities,<sup>46</sup> and has been the major subject of the Helsinki Accords, a document signed by the United States, the Soviet Union, and thirty-three other nations.<sup>47</sup>

### *Leading National Examples of Group Rights Protection*

Modern Western constitutional efforts to protect minority rights first appeared approximately 200 years ago, making national efforts a more recent phenomenon than the previously discussed international attempts.<sup>48</sup> Today, examples of pluralistic systems are increasing as states devise processes and methods to accommodate the needs and demands of all segments of their societies.<sup>49</sup>

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U.N. Doc. CN.4/L.1367/Rev. 1 (1978).

46. Outside of the UN system, Article 14 of the European Convention on the Protection of Fundamental Freedoms guarantees "that the enjoyment of the rights and freedoms . . . shall be secured without discrimination on any ground such as . . . association with national minority." Brownlie, *supra* note 44, at 326.

Groups, including national or linguistic minorities, are recognized to have standing before the European Human Rights Court. In two cases thus far, the European Court has dealt with linguistic minorities in Belgium and the Roman Catholic minority in Northern Ireland.

In October 1977, the Parliamentary Assembly of the Council of Europe adopted a number of recommendations on modern languages in Europe. Included in the recommendations were the following:

2. Being of the opinion that cultural diversity is an irreplaceable asset, and that this justifies the active maintenance of language minorities in Europe; and . . .

9. Recommends that the Committee of Ministers:

a) Call on the governments of the member states of the Council of Europe to develop the teaching of modern languages, taking account of:

. . .

(iii) the cultural advantages of maintaining language minorities in Europe.

The Future of Cultural Minorities 98-99 (Anthony E. Alcock, Brian K. Taylor & John M. Welton eds. 1979) [hereinafter Alcock, Taylor, & Welton].

47. The Helsinki Accords, signed in 1975, are the first major declaration of support for minority populations acceded to by both the United States and the Soviet Union. According to Basket One:

The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

Helsinki Accords, August 1, 1975, Basket One, a, Clause VII. Conference on Security and Cooperation in Europe, Final Act, *cited in* 14 International Legal Materials 1292, 1295 (Sept. 1975).

48. In 1815 the "Principles of the Constitution of the Polish Kingdom" became the first modern Western political document to recognize and guarantee minority population rights. See Sigler, *supra* note 2, at 69.

49. As Sigler concluded in his recent book, "it can be said that recognition of minority rights claims in constitutions is a growing and significant trend that shows

Pluralistic arrangements include group recognition<sup>50</sup> in granting language<sup>51</sup> and education rights,<sup>52</sup> special land and/or resource protections,<sup>53</sup> and proportional political representation<sup>54</sup> and quotas in civil service. Switzerland, Belgium, and Yugoslavia are among the most successful pluralistic nations in implementing these systems.<sup>55</sup>

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a reversal of 'the tendency of classical democracy to affirm the individual but to deny the group.' " Sigler, *supra* note 2, at 175.

50. Nations such as Czechoslovakia, Malaysia, Singapore, Yugoslavia, Switzerland, and Belgium accord official recognition to ethnic groups. Fiji, New Zealand, and Panama, among others, recognize racial ethnic groups as possessing specific rights. Sigler, *supra* note 2, at 194.

One maneuver used by states to avoid dealing with minority problems is to declare that minorities do not exist. Several Latin American nations, for example, maintain that minorities and minority problems do not exist on the South American continent. See Draft Universal Declaration of Human Rights: A Report of the Third Committee, 3(1) UN GAOR (180th-183rd plen. mtgs.) at 852-934, UN Doc. A/777 (1948), statements by Mexico, (181st plen. mtg.) at 885-86, statements by Paraguay, (182nd plen. mtg.) at 901-02, statements by Cuba, (181st plen. mtg.) at 876-77, statements by Ecuador, (183rd plen. mtg.) at 918-21, statements by Bolivia, (182nd plen. mtg.) at 900-01. The first clause of Article 27 of the International Covenant on Civil and Political Rights reflects this national attitude: "[i]n those States in which ethnic, religious or linguistic minorities exist . . ." *Report of the Ninth Session of the Commission on Human Rights: Proposals and Amendments Relating to the Draft Covenant on Civil and Political Rights and Voting Thereon*, 16 UN ESCOR Supp. (No. 8, Annex III A) 55, para. 16, U.N. Doc. E/2447 (April 16, 1953). E/CN.4/689 (June 6, 1953) (made at the suggestion of the Chilean delegate).

Brazil, voicing the opinion of all Latin American nations, declared that, as an immigrant nation it possessed no minorities within its society. 16 UN GAOR, Third Comm. 213-14 (1961).

In 1971, Turkey declared that it was ethnically homogeneous: "We accept no other nation as living in Turkey, only the Turks. As we see it, there is only one nation in Turkey: the Turkish nation. All citizens living in different parts of the country are content to be Turkish." Robert Wirsing, *Protection of Ethnic Minorities: Comparative Perspectives* 6 (1981).

51. Several states have extended either official or national language recognition to minority languages. In 1975, Spain recognized that "the regional languages are a cultural heritage of the Spanish nation and all are regarded as national languages. Their knowledge and use will be assisted and protected by the action of the state and other public bodies." Alcock, Taylor & Welton, *supra* note 46, at 36. The Welsh Language Act of 1967 similarly advocates its use in the "conduct of other official or public business." *Id.* at 34.

52. See Vernon Van Dyke, *The Individual, the State and Ethnic Communities in Political Theory*, 29 World Politics 343, 352 (1977) [hereinafter *Van Dyke, World Politics*].

53. Only the Swedish-speaking inhabitants of the Finnish Aaland islands may own property. In Fiji, a Native Land Trust Board administers five-sixths of the land for the Fijian population. *Id.* at 353.

54. Proportional representation is used in Belgium, the Netherlands, and Mauritius. In Fiji, where the population is comprised of approximately 50% Indian, 42% Fijian, and 8% European and others, voters register according to race with each racial group apportioned a quota of seats in the two legislative houses. New Zealand sets aside four seats for the Maoris, Zimbabwe reserves seats for whites, and India provides 15% for scheduled tribes and castes. *Id.*

55. Canada can also be said to have devised a pluralistic system for its two

The experiences of such pluralist countries refute the criticism that cultural pluralism is outdated, represents a step backward to romantic nationalism, threatens national unity and stability, and is too expensive for many of the poorer and newly independent states.<sup>56</sup> Supporters of the assimilationist model frequently point to the political difficulties experienced by Belgium, Yugoslavia, and Canada as prime examples of the problems inherent in a pluralistic system.<sup>57</sup> What critics overlook, however, is that these states have been quite viable through time. As Walker Conner, one of the growing number of twentieth-century scholars examining the issues of ethnicity and group rights, has emphasized, accommodation of ethnicity is one of the "ultimate standards of political legitimacy."<sup>58</sup> Pluralistic states are more likely to win rather than alienate ethnic loyalties.

### *Twentieth-Century Pluralist Thought*

The twentieth century has witnessed a burgeoning of literature concerning various forms of political, social, and economic pluralism, and the related topics of nationalism, national integration, and race relations. A number of prominent English thinkers, such as F.W. Maitland,<sup>59</sup> John Figgis,<sup>60</sup> Harold Laski,<sup>61</sup> G.D.H. Cole,<sup>62</sup> and Bertrand Russell,<sup>63</sup> along with the German Otto Gierke,<sup>64</sup> influenced the perception of minority rights early in this

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founding nations—the English and the French. The Soviet Union, operating under the slogan, "national in form, socialist in content," recognizes over 110 nationalities and nations. Thirty-five of these have political representation in federal or autonomous republics. See Ernst Rossi & Barbara McCrea, *The European Political Dictionary* 318 (1985).

56. See UNESCO, Final Report of the Intergovernmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policies: Venice, Aug. 24-Sept. 2, 1970, at 11-13, U.N. Doc. SHC/MD/13 (1970).

57. See Nikolaos A. Stavrou, *Ethnicity in Yugoslavia: Roots and Impact*, in Said & Simmons, *supra* note 29, at 134-49.

58. Conner, *supra* note 29, at 112.

59. See generally Frederick W. Maitland, *Collected Papers* (1914).

60. See generally John N. Figgis, *Churches in the Modern State* (1914).

61. See generally Harold Laski, *Authority in the Modern State* (1919); Harold Laski, *The Pluralist State*, 28 *The Philosophical Review* 571 (1919); Harold Laski, *Studies in the Problem of Sovereignty* (1917); Harold Laski, *A Grammar of Politics* (1925); Harold Laski, *Introduction to Contemporary Politics* (1939).

62. See generally George Douglas Ward Cole, *Labour in the Commonwealth* (1918); George Douglas Ward Cole, *Social Theory* (1920); George Douglas Ward Cole, *Chaos and Order in Industry* (1920); George Douglas Ward Cole, *Guild Socialism Re-Stated* (1920); George Douglas Ward Cole, *Self-Government in Industry* (1919).

63. See generally Bertrand Russell, *Democracy and Direct Action* (1919); Bertrand Russell, *Political Ideals* (1917); Bertrand Russell, *Principles of Social Reconstruction* (1916).

64. See generally Otto Gierke, *The Development of Political Theory* (Bernard

century.<sup>65</sup> Figgis, for example, defined a state as composed of groups rather than individuals.<sup>66</sup> The state's role was primarily to regulate and provide for the orderly interaction of the comprising groups.<sup>67</sup>

Building upon the insights and theories of these writers, a number of recent legal scholars and political scientists—Arend Lijphart, Owen Fiss, Vernon Van Dyke, Albert Blaustein,<sup>68</sup> and Yoram Dinstein,<sup>69</sup> among others—have begun to re-examine the rights and proper means of accommodating minority groups. Lijphart talks of consociational democracy—conscious cooperation among leaders of different communities to avert destabilizing ethnic competition.<sup>70</sup> In the mid-1970s, Vernon Van Dyke wrote a number of influential articles which raised the question of human rights for cultural groups.<sup>71</sup> Owen Fiss has argued that the equal

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Freyd trans. 1939); Otto Gierke, *Natural Law and the Theory of Society*, 1500 to 1800 (Ernest Barker trans. 1934); Otto Gierke, *Political Theories of the Middle Age* (Frederic W. Maitland trans. 1900); Otto Gierke, *Associations and Law: The Classical and Early Christian Stages* (George Heiman trans. 1977).

65. According to David Nicholls, pluralist theorists predicate their theories on three basic concepts: "a denial of state sovereignty, a belief that liberty is best preserved by a dispersion of power," and a belief that groups possess an identifiable personality with just claims. David Nicholls, *The Pluralist State* 75 (1975).

Many of these writers were influenced by the philosophy of Hegel who believed that society was composed of groups which bound individuals together into a society. Hegel emphasized that "dissimilarity in culture and manners," is a necessary product condition of the stability of modern states. *Id.* at 77.

66. See Figgis, *supra* note 60, at 70.

67. Pluralist thought permeated a number of the social science fields. The social theorists are represented by such scholars as John Sydenham Furnivall, Michael Garfield Smith, Leo Kuper, and P.L. van den Berghe. John Sydenham Furnivall, an economist and colonial administrator, is credited with describing a form of economic pluralism which exists in colonial societies. A plural society, according to Furnivall, was comprised of "two or more elements or social orders which live side by side, yet without mingling, in one political unit." John Sydenham Furnivall, *Netherlands' India* 446 (1939). Smith, Kuper, and van den Berghe, as sociologists, focus on the cultural cleavages in pluralist nations. Cultural pluralism exists, according to Smith, when two or more different cultural traditions exist in a nation, each possessing their own distinct institutions such as marriage, family life, religion, and property, among others. Michael Garfield Smith, *The Plural Society in the British West Indies* xii-xiii (1965).

68. Albert Blaustein, *The New Nationalism*, 30 Am. J. Comp. L. 377 (1982 Supp.); Albert Blaustein, *The Growing Significance of Group Rights*, Bull. Int'l A. Jewish Law. & Jurists (1980). See also *infra* notes 70, 71 & 72.

69. Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 Int'l & Comp. L.Q. (1976); Yoram Dinstein, *Models of Autonomy* (1981).

70. See Arend Lijphart, *Democracy in Plural Societies* (1977). See also Consociational Democracy: Political Accommodation in Segmented Societies (Kenneth McRae ed. 1974).

71. Vernon Van Dyke, *The Cultural Rights of Peoples*, 1 Universal Hum. Rts. (1980); Vernon Van Dyke, *World Politics*, *supra* note 52; Vernon Van Dyke, *Justice as Fairness: for Groups?* 67 Am. Pol. Sci. Rev. 607 (1975); Vernon Van Dyke, *Human Rights and the Rights of Groups*, 18 Am. J. Pol. Sci. 725 (1974); Vernon Van



protection clause of the United States Constitution could and should be interpreted to include groups as well as individuals.<sup>72</sup>

*The United States and the Rights of Minorities*

America is God's Crucible, the great Melting Pot where all the races of Europe are melting and reforming! . . . [H]ere you stand in your fifty groups with your fifty languages and histories, and your fifty blood hatreds and rivalries, but you won't be long like that . . . God is making the American.<sup>73</sup>

The notion that the intense and unprecedented mixture of ethnic and religious groups in American life was soon to blend into a homogeneous end product has outlived its usefulness, and also its credibility.<sup>74</sup>

United States society has strong roots in the Enlightenment.<sup>75</sup> In theory, individualism exists as the foundation of the United States ethic. Accordingly, government exists to protect the exercise of individual rights,<sup>76</sup> which include, among others, freedom of religion, speech, and association, equal representation, fair trial, and protection of property. Individuals should be equally protected in their access to these rights without distinction as to race, color, sex, religion, or national origin.

The United States prides itself on the development of a philosophical foundation which preaches equality for all; yet United States history is replete with testimony of institutionalized prejudice against Catholics, Jews, Italians, and Irish, exclusion of Orientals,<sup>77</sup> enslavement of Blacks,<sup>78</sup> near extermination of the

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Dyke, *One Man One Vote and Majority Rule as Human Rights*, 3 Hum. Rts. 447 (1973).

72. Owen Fiss, in a much cited article, argues that Blacks are a disadvantaged group and that "[w]hat the Equal Protection Clause protects is specially disadvantaged groups, not just blacks." Owen Fiss, *Groups and the Equal Protection Clause*, in *Philosophy and Public Affairs* 107, 155 (1976).

73. Nathan Glazer & Daniel Patrick Moynihan, *Beyond the Melting Pot* 289 (1963) (quoting Israel Sangwill, *The Melting Pot* 37-38 (1909)). The term "melting pot" was first used in Sangwill's play, *The Melting Pot*. See *id.*

74. See Israel Sangwill, *The Melting Pot* 37-38 (1909).

75. See Louis Hartz, *Liberal Tradition in America* 7 (1955).

76. "The protection of [the faculties of men from which the rights of property originate] is the first object of Government." *The Federalist* No. 10, James Madison, *The Federalist Papers* 54 (Jacob Coulee ed. 1961)

77. By 1880, the importation of Chinese laborers into the United States had increased fifteen-fold, to 105,465, in 30 short years. Demands by California to limit the influx of Oriental laborers, which constituted 25% of the labor force, resulted in the passage of the 1882 Chinese Exclusion Act, which prohibited the further immigration of Chinese into the United States. Takaki, *supra* note 2, at 5. As one advocate of the legislation testified before Congress, "they can never assimilate with us; . . . they are a perpetual, unchanging, and unchangeable alien element that can never become homogeneous; . . . their civilization is demoralizing and degrading to our people; . . . they degrade and dishonor labor; . . . they can never become citi-

American Indian, and conquest of the Chicano, Hawaiian,<sup>79</sup> and Puerto Rican,<sup>80</sup> among others.

This contradiction between philosophy and practice is a product of the initial orientation of the primary immigrant nation, the English. The English considered themselves founders, not immigrants.<sup>81</sup> Their willingness to share their new land favored those immigrants from the Protestant countries of western Europe. The

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zens." Leonard Dinnerstein & David Reimers, *Ethnic Americans: A History of Immigration and Assimilation* 57-58 (1975).

By the turn of the century, the anti-Chinese sentiments had widened to include the Japanese, an immigrant group noted for its economic success. In 1906, the San Francisco Board of Education ordered the segregation of all Oriental students. Japan protested, leading to federal pressure on the school board to rescind the order. In return, Japan, in the Gentleman's Agreement of 1907, agreed to restrict exit visas for laborers bound to the United States. States such as California, Washington, Arizona, Oregon, Idaho, Nebraska, Texas, Kansas, Louisiana, Montana, New Mexico, Minnesota, and Missouri excluded Asian immigrants from owning property. Takaki, *supra* note 2, at 6.

This racial discrimination against Asians continued until after World War II. Approximately 120,000 Japanese people, 70,000 born in the United States, were subjected to forced relocation and internment. Neither the Italian-Americans nor German-Americans faced similar treatment. See *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

78. When the Declaration of Independence was written, Black slaves numbered more than 500,000, or 20% of the population. James S. Olson, *The Ethnic Dimension in American History* 44 (1979).

In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the Supreme Court considered the question whether a "negro whose ancestors were imported into this country and sold as slaves [can become] a member of the political community formed and brought into existence by the Constitution of the United States." *Id.* at 403.

[T]he legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people . . . .

[A] negro of the African race was regarded by them as an article of property . . . .

The only two provisions which point to them and include them, treat them as property, and make it a duty of the government to protect it; no other power, in relation to this race, is to be found in the Constitution . . . .

*Id.* at 403.

In discussing the Declaration, Justice Taney wrote: "But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration . . . ." *Id.* at 410.

79. See *infra* notes 236-358 and accompanying text.

80. The United States obtained Guam, Puerto Rico, the Philippines, and Cuba as spoils of the Spanish-American War. Basis for Establishment of Peace Treaty Between the United States and Spain, August 12, 1898, T.S. No. 343 1/2, 30 Stat. 1742. See also *supra* note 4.

81. "Providence [had] been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government,

other immigrants who were different in language, religion, or skin color, frequently experienced prejudice and discrimination.

The Germans were among the first immigrants to evoke hostilities, especially regarding the retention of their language.<sup>82</sup> The intolerance they met, however, was minor compared to the direct hostilities suffered by the Irish Catholic immigrants of the 1840s.<sup>83</sup> This intolerance found political expression in the creation of the American or "Know-Nothing" Party in the 1850s.<sup>84</sup> By advocating the exclusion of Catholics from immigration and extending the naturalization period to twenty-one years, this party achieved moderate political success.<sup>85</sup>

The arrival of Italian and eastern European immigrants after 1890 further plunged the United States into an era of increasing exclusivism. In 1894, the Immigration Restriction League was founded to work against the admittance of all but those of Anglo-Saxon heritage.<sup>86</sup> A 1910 U.S. Immigration Commission Study essentially asserted that immigrants entering the United States were inferior and unassimilable.<sup>87</sup> Eventually, however, each new group

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very similar in their manners and customs. . . ." John Jay, *The Federalist* No. 2, *The Federalist Papers* 38 (Jacob Cooke ed. 1961).

Some 46 million people have emigrated to the United States since the establishment of the settlement at Plymouth Rock. Dinnerstein & Reimers, *supra* note 77, at xiii.

82. In 1751, Benjamin Franklin remarked:

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 . . . ?

Stephen Steinberg, *The Ethnic Myth: Race, Ethnicity and Class in America* 11 (1981).

Early in the nation's history, the government refused to accommodate groups who wished to organize ethnic enclaves. In 1818, the federal government denied the Irish societies of New York and Philadelphia a request to purchase acreage in the west for the relocation of their charity cases. Nathan Glazer, *Affirmative Discrimination* 24-25 (1978). In 1874 Congress similarly refused a request from 40,000 to 50,000 Russian Mennonites that they be allowed to settle in compact areas in the prairie states. After the bill's failure, the group immigrated to Canada where the government was more amenable to their plight. Kloss, *supra* note 39, at 33.

83. In 1790, the Catholic population numbered only 30,000. By 1830, their numbers had increased ten-fold; by 1860 Catholics had reached 3.1 million. Gleason, *supra* note 8, at 69. Anti-Catholicism led to the burning of a convent in Massachusetts in 1834 and riots and church burnings in Philadelphia in 1844, leaving a dozen dead.

84. Stephan Thernstrom, *Ethnic Groups in American History*, in *Ethnic Relations in America* 7-8 (Lance Liebman ed. 1982) [hereinafter Liebman].

85. Dinnerstein & Reimers, *supra* note 77 at 32. The "Know-Nothing" Party controlled six states in 1855 and had sent 75 representatives to Congress. Gleason, *supra* note 8, at 71.

86. Liebman, *supra* note 84, at 14.

87. Oscar Handlin, *Race and Nationality in American Life* 97 (1957). *See also*

of European immigrants successfully assimilated into the melting pot, fulfilling the everyday image of the motto "*E pluribus unum*." Many families take great pride in their ancestors' adventurism and abilities to overcome prejudice and make their place in United States society.

Non-white minorities<sup>88</sup>—Blacks, American Indians, Orientals, Native Hawaiians, and Mexican-Americans—endured the fiercest discrimination and prejudice. The struggle for equality of treatment and opportunity by these groups has been long and arduous. It is a struggle that has forced United States society to examine its philosophy, commitments and prejudices. In response to this examination, the nation has implemented a series of anti-discrimination laws and has promoted equal access to benefits.

Several of the more beleaguered groups, the American Indian, the Native Hawaiian, and the Chicano have won major battles against racial discrimination. Other objectives, such as the maintenance of their identity and cultural heritage, remain unattained. Given America's long history of racism and its prevailing ideology of assimilation, there is intense resistance on the part of the United States populace to grant these groups a right to be different.<sup>89</sup>

Conversely, those non-immigrant groups who did not willingly consent to be members of the United States polity, find it equally difficult to accept the United States' refusal to recognize and to protect their cultural rights and heritage. In the final analysis, the problem arises from conflicting definitions of equality and human rights.

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John Highan, *Toward Racism: The History of an Idea*, in Majority and Minority 207-22 (Norman Yetman & C. Hoy Steele eds. 1975); Dinnerstein & Reimers, *supra* note 77, at 56-72, (a historical discussion of United States racism and xenophobia).

88. The Naturalization Law of 1790 defined only "free white" immigrants as eligible for naturalized citizenship. Naturalization Act, ch. 3, 1 Stat. 103 (1790) (repealed 1795). A racial determination of United States citizenship remained in place for 162 years until the passage of the 1952 Walter-McCarran Act. This Act provided that "the right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race." Immigration and Nationality (Walter-McCarran) Act, ch. 477, 66 Stat. 163, 239 (1952).

89. Discrimination on the basis of race and a recognition of positive legal rights on the basis of culture are two very different, and frequently confused, issues. Race may be one of many variable characteristics which differentiate groups. As one author has pointed out, ethnic differences frequently remain after racial differences have disappeared. See Takaki, *supra* note 2, at 1-20, for a discussion of the frequent confusion and inability of government officials and academics to separate the question of race from ethnicity. See also *supra* notes 369-415 and accompanying text.

*Available Constitutional Mechanisms*

United States jurisprudence does not, for the most part, recognize group rights or confer positive benefits to ensure distinctiveness. Despite these limitations, non-immigrant groups have tried, with varying degrees of success, to protect their cultural rights through traditional United States constitutional doctrines. These doctrines include first amendment guarantees to freedom of religion, equal protection (including equal representation) and the right of parents to educate and raise their children.

Three well-known cases involving educational and parental rights illustrate how the individualistic-oriented United States Constitution can be construed to implicitly protect cultural rights. In *Meyer v. Nebraska*,<sup>90</sup> the Supreme Court overturned the conviction of a school teacher who violated a state law prohibiting the teaching of any modern language other than English to students who had not passed the eighth grade. The Court ruled that this state statute interfered with the constitutional rights of the teacher to teach and that the rights of the parents to provide for their children's education. "The protection of the Constitution," the Court emphasized, "extends to all, to those who speak other languages as well as to those born with English on the tongue."<sup>91</sup> In *Pierce v. Society of Sisters*,<sup>92</sup> the Court declared that the state statute requiring parents to send their children to a public school, as opposed to a private school of their choice, violated the liberty of parents and guardians to direct the upbringing and education of children under their control. In *Wisconsin v. Yoder*,<sup>93</sup> the Supreme Court overturned the conviction of three Amish parents found to be in violation of Wisconsin's compulsory school attendance law. The parents argued that the Amish religion was based on a fundamental belief that "salvation requires life in a church community separate and apart from the world and worldly influence."<sup>94</sup> Upholding the parents' argument that the statute violated their first and fourteenth amendment rights, the Court ruled that to compel an Amish child to attend school until age sixteen might ultimately result in the extinction of the Old Order Amish Church

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90. 262 U.S. 390 (1923).

91. *Id.* at 401.

92. 268 U.S. 510 (1925). For the legal history of *Pierce* see Oregon School Cases: Complete Record (1925).

93. 406 U.S. 205 (1972).

94. *Id.* at 210. "Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society." *Id.* at 211.

community as it exists today.<sup>95</sup>

A comparison between *Yoder* and the related *Deerfield Hutterian Association v. Ipswich Board of Education*<sup>96</sup> case brings into sharp focus the distinction between the legal system's deeply held willingness to protect against interference in the exercise of individual rights (in this instance religious rights) and its unwillingness to actively promote diversity and to protect the capacity of a group to exercise its rights.

The courts have long held that while the right to believe is absolutely protected,<sup>97</sup> the right of practice may be circumscribed, especially in the face of overriding state interests.<sup>98</sup> In the *Yoder* case, the Court agreed that the Amish way of life was fully integrated and indistinguishable from religious doctrine.<sup>99</sup> To compel an Amish child to attend school until age sixteen, the Supreme Court ruled, "carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."<sup>100</sup> In dicta, the Court noted the necessity to protect those who are different: "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."<sup>101</sup>

Like the Amish, the Hutterites believe that educating their children beyond the eighth grade exposes them to worldly values, attitudes, and practices that are dangerous to their religious ten-

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95. *Id.* at 223-24.

96. 468 F. Supp. 1219 (D. S.D. 1979).

97. "Man's relation to his God was made no concern of the State. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views." *United States v. Ballard*, 322 U.S. 78, 87 (1944).

98. "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

99. "Old Order Amish religion . . . pervades and determines virtually their entire way of life." *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

[T]he Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others.

*Id.* at 235.

100. *Id.* at 218. The Court further held that an otherwise neutral regulation may be unconstitutional if "it unduly burdens the free exercise of religion." *Id.* at 220 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)).

101. *Id.* at 223-24.

ets.<sup>102</sup> To protect their religious values, the Hutterites requested the local school board to construct an educational facility in their community to prevent their children from being bussed to a public school where they would come into contact with "worldly values" rejected by the Hutterite people. The school board refused, offering instead to bus the children to a public school where they would be provided with a special bilingual educational program. The Hutterite colony charged the board of education with "perpetrating religious and national origin discrimination"<sup>103</sup> against the plaintiffs. The Hutterites supported their claims on the Court's ruling in *Wisconsin v. Yoder*.<sup>104</sup>

Although recognizing the similarities between the two communities,<sup>105</sup> the court rejected the Hutterites' request. The *Yoder* case, according to the court, involved protection from an impermissible state intervention which interfered with the free exercise of their religion. The problem was resolved by exempting the Amish from the state compulsory school law. "The *Yoder* case does not stand for the proposition that if a religious group feels strongly about its religious tenets and wishes its children segregated from the world, it can force the state to set up and pay for a separate school for the children."<sup>106</sup>

According to the court,

*The Hutterites are not being forced to violate their religious beliefs. They can, if they wish, educate their children at the colony at their own expense . . . . The state may not discriminate against any group or individual on an arbitrary or unreasonable basis . . . . The state does not [however] have an obligation to educate every group or individual according to the whims or desires of that individual or group, even if the desires are based on religious beliefs.*<sup>107</sup>

It has proved difficult, especially for nonimmigrant minorities, to protect a life and culture that are different in a society oriented only towards the protection of individual rights. The Hutterite case points out the inadequacy of relying on statutes against discrimination to effect a positive right, especially for non-racial groups. Unless a fundamental right or suspect class is in-

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102. *Deerfield Hutterian Ass'n v. Ipswich Bd. of Educ.*, 468 F. Supp. 1219 (D. S.D. 1979).

103. *Id.* at 1221.

104. *Id.* at 1223.

105. The religious practices and culture of the Amish are very similar to the Hutterites. Both societies attempt to insulate their children from worldly attitudes, practices, and values. Both societies are highly concerned with impermissible influences affecting their children. *Id.* at 1228.

106. *Id.* (emphasis in original).

107. *Id.* at 1229 (emphasis in original).

volved, the courts apply a rational basis test in analyzing equal protection cases. This test is a particularly difficult one with which to prove discrimination since it begins with the assumption that the statute or practice represents a legitimate state interest. In this instance, the court found that the legitimate state interest was based on allowing maximum discretion to locally autonomous governmental boards—a process for local control or populism. The problem for culturally diverse groups is that populism is synonymous with the interests and values of the dominant population.

## II. American Indians<sup>108</sup>

In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserved a greater value than ancient tradition when we protected the rights of the Indians using peyote in religious ceremonies one night at a meeting in a desert hogan near Needles, California.<sup>109</sup>

### *Historical Background and Assimilation Efforts*

When the tribes of North America discovered the strange white people on their shores and in their forests, Indian people were estimated to number more than one and a half million.<sup>110</sup> By 1850 their numbers in the United States had decreased to 250,000.<sup>111</sup> But for several decades in the 1600s and 1700s, the tribes successfully wielded military and political power over their territory.<sup>112</sup> Unable to conquer the tribes, the early colonists negotiated with the Indians and bargained for land, peace, and military alliances through treaties.<sup>113</sup>

The United States, as the colonists' successor state, adopted

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108. For the purposes of this article, Native American and American Indian will be used interchangeably. The term Native Americans more correctly refers to all indigenous Indians in the Americas, including Hawaiians and Aleuts.

109. *People v. Woody*, 61 Cal. 2d 716, 727, 40 Cal. Rptr. 69, 78, 394 P.2d 813, 821 (1964).

110. Arrell Morgan Gibson, *The American Indian* 62 (1980).

111. *Id.* at 515.

112. For a review of Indian history during the early years of colonization, see Francis Paul Prucha, *American Indian Policy in the Formative Years* (1962). For an overview of Indian history, see Gibson, *supra* note 110; Angie Debo, *A History of the Indians of the United States* (1970).

113. Great Britain concluded more than 500 treaties with the tribes. For a list of treaties between various Indian nations and Great Britain, see Henry DePuy, *A Bibliography of the English Colonial Treaties with the American Indians, Including a Synopsis of Each Treaty* (1917).



the practice of treaty-making with the Indian nations,<sup>114</sup> concluding its first treaty with the Delaware Nation in 1776.<sup>115</sup> In all, the United States ratified more than 370 treaties that remain in force today.<sup>116</sup>

Before the War of 1812, the Indian nations played a pivotal political and military role in the competition between the European nations and the United States for domination of the continent.<sup>117</sup> Their importance as a power broker was a tribute to their political and military sophistication, not to their numbers. Ultimately, the sheer numbers of their enemies began to overwhelm the Indian nations and to threaten their existence. By the 1820s, the eastern region of the country had filled with settlers. Andrew Jackson, who ran for President on a platform to remove all eastern tribes to lands west of the Mississippi River, lobbied the 1830 Removal Bill<sup>118</sup> through Congress with one vote to spare. Over the next eight years, the United States Army forcibly removed thousands of Indians to Kansas, Oklahoma, and other areas. These tribes left behind their farms, schools, council chambers, sacred sites, and ancestors' graves. One-fourth of the Cherokee died along the way to relocation.<sup>119</sup> In return for removal, the 1830 Removal Bill promised that "the United States will forever secure and guaranty to them, their heirs or successors, the country so exchanged with them . . . ."<sup>120</sup>

Congress passed the Removal Bill despite a series of Supreme Court cases which, although diminishing the tribes' status and title to their lands, had also emphasized Indians' powers and rights. The first of these decisions was *Johnson v. McIntosh*.<sup>121</sup> In *Johnson*, Chief Justice John Marshall wrote that although the United States held title to Indian lands by virtue of discovery and effective

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114. In one of his first acts as President of the United States, George Washington requested that the Senate advise him as to the proper procedure for handling Indian relations. After studying the question, the Senate responded that relations should be handled through the treaty process. "This practice has been adopted by the United States respecting their treaties with European powers, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians." The Debate and Proceedings in the Congress of the United States 83 (1790).

115. Treaty with Delaware Nation, 7 Stat. 13, Sept. 17, 1778.

116. The original copies of all United States/Indian treaties are retained by the Department of State and filed by date of ratification with other foreign treaties signed by the United States. For a listing of American Indian treaties, see Charles Kappler, *Indian Affairs: Laws and Treaties*, Vols. 1-5 (n.d.).

117. Wilcomb Washburn, *The Indian in America* 146-50 (1975).

118. Act of May 28, 1830, ch. 148, 4 Stat. 411.

119. Debo, *supra* note 112, at 124.

120. Act of May 28, 1830, ch. 148, 4 Stat. 411.

121. 21 U.S. (8 Wheat.) 543 (1823).

occupation, the tribes retained a right to use and occupy the land.<sup>122</sup> In two later decisions, Justice Marshall emphasized that this right to occupy the land was "as sacred as the fee simple of the whites"<sup>123</sup> and could not be taken away without the Indians' consent.<sup>124</sup>

Marshall's decisions notwithstanding, Congress quickly sought ways to circumvent the tribes' independence and to acquire title to Indian lands. The growing nation's desire for land was insatiable. Each new mile of the transcontinental railroad encouraged further migration westward.<sup>125</sup> Within twenty-five years, Congress had forgotten the Removal Bill's guarantees. The promise of a large "Unorganized Indian Territory" was never realized, and tribes were forced to cede their lands and to retreat to reservations.<sup>126</sup> The tribes, especially those of the Plains—the Lakota, Kiowa, Cheyenne, Comanche, and Apache—fought fiercely to protect their lands and way of life.<sup>127</sup>

In 1867, Congress authorized a Peace Commission<sup>128</sup> to investigate the causes and to propose solutions to the open warfare in the West. The Commission discovered, not surprisingly, that the hostilities stemmed directly from the government's refusal to honor previous treaty commitments and its perpetual demands on tribes for further land cessions.<sup>129</sup> The government's reaction was pragmatic in the extreme. If treaties were the problem, then the

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122. *Id.* at 586.

123. *Mitchell v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835).

124. "[T]he Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government . . . ." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Marshall's brilliance in creating a new form of property right in *Johnson v. McIntosh* (use and occupancy) was repeated in *Cherokee Nation* and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 556 (1832) which established a new legal status for tribes. In *Cherokee Nation*, Marshall concluded that tribes were not foreign nations within the context of the Constitution but rather "domestic dependent nations." 30 U.S. (5 Pet.) at 16. In *Worcester*, Marshall elaborated by explaining that tribes were "distinct political communities, having territorial boundaries within which their authority is exclusive and having a right to all the lands within their boundaries." 31 U.S. (6 Pet.) at 557. Marshall further emphasized that the terms "treaty" and "nation" were applied to Indian nations as they were to all other nations. *Id.* at 559-60. The protection received by the tribes "was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting to the laws of a master." *Id.* at 542.

125. Delos Sacket Otis, *The Dawes Act and the Allotment of Indian Lands* 13 (1973).

126. S. Lyman Tyler, *A History of Indian Policy* 70-75 (1973).

127. See Gibson, *supra* note 110, at 407-23.

128. Act of March 3, 1865, 13 Stat. 572.

129. Arthur Mattingly, *The Great Plains Peace Commission of 1867*, at 23, 34 (1976).

government would dispense with their use and resort to other measures to obtain Indian lands.

The new land acquisition technique was assimilation.<sup>130</sup> Indians were to be "urged," at times ruthlessly, to cooperate in the government's efforts to assimilate them. The government first negated the treaty process<sup>131</sup> by legislating that "hereafter no Indian nation . . . shall be acknowledged or recognized as an independent nation . . . with whom the United States may contract by treaty . . . ." <sup>132</sup> In the future, Indian affairs would be handled through legislation, not treaties.

Assimilationist legislation followed rapidly. In 1874, Congress passed a bill requiring tribal members to perform "useful labor" in return for their annuities (annuities which represented payment for ceded lands).<sup>133</sup> Four years later, Congress instituted the rudiments of an Indian education system by establishing the Carlisle Indian School. The school's director testified before Congress as to the school's ultimate goal: "[W]e accept the watchword. There is no good Indian but a dead Indian. Let us by education and patient effort kill the Indian in him and save the man."<sup>134</sup> The churches and their mission schools played a prominent role in this education process and an even more pivotal one in the attempted destruction of traditional religions, the basis of tribal cultures.<sup>135</sup> The federal government assisted in this objective by outlawing the practice of Indian religions.<sup>136</sup> The Seven Major Crimes Act of 1885<sup>137</sup> gave the federal courts jurisdiction over major crimes on the reserva-

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130. Congressional testimony urging the end of treaty-making illustrates the pervasive view among many United States whites concerning the preservation of tribal identity.

We see nothing about Indian nationality or Indian civilization which should make its preservation a matter of so much anxiety to the Congress or the people of the United States . . . . If the Indian cannot learn to forego such of his habits as are peculiar to savage life, and such of his political opinions and sentiments as are not in harmony with the general policy of our Government, then he cannot, beyond a limited period, exist among us, either as a nation or as an individual.

S. Rep. No. 336, 41st Cong., 3rd Sess. 10-11 (1871).

131. The treaty process was an obvious barrier to assimilation given its recognition of tribal nations as groups with legal personalities and rights.

132. Act of March 3, 1871, 16 Stat. 544, 566 § 2079, (codified at 25 U.S.C. § 71, (1871)).

133. Act of June 22, 1874, ch. 389, 18 Stat. 146, 176.

134. Quoted in Edward Ward, *Minority Rights and American Indians*, 51 N.D.L. Rev. 157, 164 (1974).

135. See Gibson, *supra* note 110, at 434-36.

136. Until 1921 it was against federal regulations for Indians to practice their traditional rituals and ceremonies. Violators faced jail terms, fines, and/or loss of rations. See K. Philip, Collier's Crusade for Indian Reform 1920-1954, at 56-57 (1977), cited in Felix Cohen, *Handbook of Federal Indian Law* 141 (1982).

137. Act of March 3, 1885, 23 Stat. 385 (1885) (codified at 39 U.S.C. § 128 (1885)).

tion, thereby undermining traditional tribal judicial systems. The establishment of the Indian police forces and Indian Courts of Appeals,<sup>138</sup> administered by the Bureau of Indian Affairs (BIA), further destroyed the tribes' governing systems.

Tribes, particularly the Plains, had little choice but to submit to these assimilationist policies given their desperate situation. The government had implemented an official policy of exterminating the buffalo, thereby starving Indian tribes into submission.<sup>139</sup> Within thirty years, fifteen million buffalo were killed.<sup>140</sup> During many of these years the Plains area was a sea of stinking unused carcasses. The strategy was effective. After some years of near starvation, tribes were more malleable. The Lakota reluctantly ceded more than half of their reservation lands.<sup>141</sup>

In 1887, Congress passed the Dawes Act,<sup>142</sup> the most destructive and assimilationist piece of legislation to date. Heralded by President Theodore Roosevelt as "a mighty pulverizing engine to break up the tribal mass,"<sup>143</sup> the Dawes Act directed that communal reservation lands be allotted to tribal members individually, with each member receiving up to 160 acres. Land remaining after the allotment process was deemed surplus on most reservations and sold to white settlers. The Dawes Act was rhetorically justified as a program to make farmers out of hunters. In reality, the Indians were given little if any agricultural instruction, equipment or seeds. Additionally, due to soil and climatic conditions, almost all allotted lands were grossly unsuited to agriculture.<sup>144</sup>

In the Merriam Report, a 1928 study of Indian administration and conditions commissioned by Congress, the Government Research Institute (today the Brookings Institution) revealed that living conditions among Indians were filled with poverty, disease, suffering, and despair.<sup>145</sup> Between 1887 and 1934, reservation land holdings had decreased from 138 million to 47 million acres as a result of the allotment process.<sup>146</sup> The general mortality rate

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138. See Report of the NAICJA Long Range Planning Project, *Indian Courts of the Future* 8-10 (1978).

139. Gibson, *supra* note 110, at 415.

140. Debo, *supra* note 112, at 213-14.

141. Alvin M. Josephy, Jr., *Concise History of United States-Sioux Relations*, in *The Great Sioux Nation* 19-28 (Roxanne Dunbar Ortiz, ed. 1977).

142. General Allotment (Dawes) Act of 1887, 25 U.S.C. § 331 (1887).

143. XV Messages and Papers of the President, 6672 (1901).

144. See Debo, *supra* note 112, at 299-331.

145. See generally Brookings Institution, *The Problem of Indian Administration* (Johnson Reprint 1971) [hereinafter *Indian Administration*].

146. Debo, *supra* note 112, at 331.

among Indians was 26 per 1000, twice the Anglo-American rate.<sup>147</sup> The median per capita income for Indians in the late 1920s was approximately \$100,<sup>148</sup> compared to a national average of \$1,350.<sup>149</sup>

In response to the Merriam Report, Congress passed the Indian Reorganization Act in 1934.<sup>150</sup> Praised by many and scorned by others, the Act attempted to return power to the tribes by reestablishing and strengthening tribal governments. The tribal governments envisioned by the Act, however, were not the traditional ones, but newly constructed governments modeled after the American system.<sup>151</sup>

By the 1950s, the federal government had decided on a new solution to the Indian problem: abolish the tribes by nullifying the federal government's recognition and protection of their sovereignty and resources. Hence began the termination era in federal-Indian affairs. House Resolution 108 paved the way for the termination of 109 tribes and bands in the late 1950s and 1960s.<sup>152</sup> In addition, Congress passed Public Law No. 280 which allowed various states to assume jurisdiction over certain criminal and civil matters occurring on reservations.<sup>153</sup>

By the late 1960s, the federal government had to concede that termination was a dismal failure.<sup>154</sup> Acknowledging a "strong expression of the Indian people for self-determination"<sup>155</sup> and admitting that the "federal domination of Indian service programs had served to retard rather than enhance the progress of Indian peo-

147. Gibson, *supra* note 110, at 536. The Indian infant mortality rate was 191 per 1000 compared to 71 per 1000 for white infants. *Id.*

148. Indian Administration, *supra* note 145, at chart on 447.

149. Gibson, *supra* note 110, at 536.

150. Indian Reorganization Act, Pub. L. No. 383, 48 Stat. 984 (codified at 25 U.S.C. § 461 (1934)).

151. Tribes did not draft their own constitutions, but were provided with "boilerplate" constitutions drafted by the BIA. Tribes were allowed to vote *against* the Indian Reorganization Act (IRA). Tribes not holding elections (often from lack of interest) automatically came under the terms of the IRA. Cohen, *supra* note 136, at 84.

On the Hopi reservation, the traditionalists, who composed the majority of tribal members, were vehemently opposed to the proposed forms of government. Arguing that voting violated their religious beliefs, they boycotted the election. Although very few people voted, the Bureau refused to recognize the mass abstentions and declared a victory. In all, 70% of all tribal members (not tribes) voted against the Act. David Getches, Daniel Rosenfelt & Charles Wilkinson, *Federal Indian Law, Cases and Materials* 83-86 (1979) [hereinafter *Federal Indian Law*].

152. 99 Cong. Rec. 9968 (1953).

153. 18 U.S.C. § 1162; 28 U.S.C. § 1360 (1985).

154. See Charles Wilkinson & Eric Biggs, *The Evolution of the Termination Policy*, 5 Am. Indian L. Rev. 139 (1977).

155. Indian Self-Determination and Educational Assistance Act, Pub. L. No. 93-638, § 3(a), 88 Stat. 2203, 2204 (1975).

ple,"<sup>156</sup> Congress passed the Indian Self-Determination and Educational Assistance Act in 1975.<sup>157</sup> The Act provides all tribes with an opportunity to assume a portion of services formerly provided by the BIA, such as housing, education, community development, and law enforcement. Once the BIA approved the tribe's plans for the assumption of these services, the BIA provided technical support and advice.

### *Cultural Protection*

The Bureau of Indian Affairs currently recognizes more than 500 Indian tribes.<sup>158</sup> Congress acknowledges that these tribes possess an inherent authority to structure and administer their own governments, define their own membership, administer their own justice systems, levy taxes, provide social services, and manage their own property and resources.<sup>159</sup>

Government recognition of inherent tribal sovereignty is indispensable if a tribe is to protect its tribal cultural practices, especially in such areas as marriage, child custody, and tribal membership. In *Kobogum v. Jackson Iron Co.*,<sup>160</sup> the Supreme Court of Michigan in 1889 considered the validity of a Chippewa man's marriage to two women according to tribal custom. In affirming the legality of the polygamous marriage the court wrote:

We must either hold that there can be no valid Indian marriages, or we must hold that all marriages are valid which by Indian usage are so regarded. [The tribes] did not occupy their territory by our grace and permission, but by a right beyond our control. They were placed by the constitution of the United States beyond our jurisdiction, and we had no more right to control their domestic usages than those of Turkey or India . . . [I]t is a principle of universal law that marriages valid by the law governing both parties when made must be treated as valid everywhere.<sup>161</sup>

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156. *Id.* at § 2(a)(1), 88 Stat. at 2203 (1975).

157. *Id.*

158. Federal Indian Law, *supra* note 151, at 5. For a brief description of the various reservations, see U.S. Dept. of Commerce, Federal and State Indian Reservations and Trust Areas (1974).

159. Federal Indian Law, *supra* note 151, at 253-54. As the Supreme Court has pointed out several times, this is a political and not a racial relationship. See *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974).

160. 76 Mich. 498, 43 N.W. 602 (1889).

161. *Id.* at 508, 43 N.W. at 605. Congress has never passed legislation concerning Indian marriages. Compare *Kobogum* with the Supreme Court's ruling in *Reynolds v. United States*, 98 U.S. 145 (1878), which ruled that the first amendment freedom of religion clause did not invalidate a law prohibiting polygamous marriages among the Mormons:

Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties

The courts have long acknowledged the principle that parents have a right to educate and raise their children in accordance with the parents' religious and cultural beliefs.<sup>162</sup> A 1977 report studying the placement of Indian children by state welfare agencies found that the government had failed to apply this principle to Indian parents and tribes. According to the report, state agencies had removed approximately one-third of all Indian children from their families, tribes, and culture and placed them in white foster and adoptive homes.<sup>163</sup> Subsequent tribal efforts to improve this situation have been generally successful. In 1978 Congress passed the Indian Child Welfare Act (ICWA)<sup>164</sup> which gives tribes exclusive jurisdiction over custody proceedings involving children residing within the reservation and provides for the transfer of state proceedings to tribal courts.<sup>165</sup>

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or subversive of good order . . . Polygamy has always been treated as an offence against society . . . In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life . . . Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.

*Id.* at 164-66. See also *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *Carney v. Chapman*, 247 U.S. 102 (1918); *Red Fox v. Red Fox*, 23 Or. App. 393, 398, 542 P.2d 918, 920 (1975).

"[T]he quasi-sovereign nature of the tribe does suggest that judgements rendered by tribal courts are entitled to the same deference shown decisions of foreign nations as a matter of comity." *Reynolds v. United States*, 98 U.S. 145, 149 (1878).

162. "[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) (referring to *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232-33 (Douglas, J., dissenting).

The Court in *Pierce* wrote: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, 268 U.S. at 535.

163. Task Force Report on Federal, State and Tribal Jurisdiction, Final Report to the American Indian Policy Review Commission (1976). See e.g., *In re Adoption of Doe*, 89 N.M. 606, 55 P.2d 906 (1976), where the court, while recognizing that Navajo custom and tradition conferred custody of grandchildren to the grandparents, nonetheless awarded custody of the child to a non-white off-reservation couple who had been given custody of the child by an off-reservation adoption agency.

164. Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1982)).

165. The Indian Child Welfare Act (ICWA) ensured that tribal child custody rights would be respected. (The Act also appropriated funds to assist tribes in the establishment of child care facilities.) Before the passage of the ICWA, the Supreme Court affirmed: "The exclusive jurisdiction of the Tribal Court (over child custody proceedings) does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law."

The federal government has also affirmed tribes' rights to determine their own membership based on cultural practices, even when these practices clearly conflict with the equal protection clause of the fourteenth amendment. In *Santa Clara Pueblo v. Martinez*,<sup>166</sup> respondent Julia Martinez, argued that a "tribal ordinance denying membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe," violated the fourteenth amendment.<sup>167</sup> Justice Thurgood Marshall wrote,

"Tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments . . . [E]fforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."<sup>168</sup>

### *Freedom of Religion*

Indian religion lies at the heart of Indian culture. A more accurate measure of the government's willingness to protect Indian culture is therefore revealed by the federal commitment to protect Indian religion through statutory and case law. In 1978, recognizing that "the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their cul-

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Fisher v. District Court, 424 U.S. 382, 390 (1976). A Maryland court emphasized that "[I]f tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity." Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228, 236 (Ct. App. 1975) (citing Wisconsin Potowatomies, Etc. v. Houston, 393 F. Supp. 719, 730 (W.D. Mich., 1973)).

166. 436 U.S. 49 (1978).

167. *Id.* at 51.

168. *Id.* at 71-72. The Court also cited "with approval" the findings of the lower court:

[M]embership rules were no more or less than a mechanism of social . . . self-definition, and as such were basic to the tribe's survival as a cultural and economic entity . . . [T]he equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore be preserved . . . Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important . . . To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it.

*Id.* at 54 (citing *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 18-19 (1975)). See also *Roff v. Burney*, 165 U.S. 218 (1897); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906).



ture, tradition and heritage . . . (and) are indispensable and irreplaceable . . . ", Congress passed the Indian Religious Freedom Act.<sup>169</sup> The Act commits the federal government "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions."<sup>170</sup> Specifically, the Act directs federal agencies to evaluate policies and procedures that deprive Indians of access to sacred sites on federal lands or that prevent the performance of traditional ceremonies and the possession of sacred objects.<sup>171</sup> A review of Indian religious freedom cases reveals that tribes have had mixed success, both before and after the Act, in protecting their religious freedom rights.

In 1964, the Supreme Court of California in *People v. Woody*<sup>172</sup> considered the convictions of Native American Church members for illegal possession of peyote. The defendants argued that laws prohibiting the use of peyote violated their first amendment rights to the free exercise of religion.<sup>173</sup> In reaching its decision, the *Woody* court employed the two-step test devised by the United States Supreme Court in the 1962 *Sherbert v. Verner* case: whether the state statute imposes a burden upon the free exercise of the defendant's religion; and whether the infringement on religious rights is backed by a compelling state interest.<sup>174</sup> Regarding the first step, the *Woody* court ruled that by prohibiting peyote use the state "seriously infringes upon the observance of the religion."<sup>175</sup> As the court noted, peyote was central to the practice of the Native American Church and was in itself an object of worship and viewed as a "teacher" and "protector."<sup>176</sup> In applying the sec-

169. Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1978)). See *infra* note 136 and accompanying text.

170. 42 U.S.C. § 1996 (1978).

171. The Indian Religious Freedom Act is an important statement of the government's position and commitment to refrain from interfering with Indian religious practices. The Act, however, is little more than a declaration. It only directs federal agencies to review their policies for possible interference with Indian religious practices. The Act does not mandate that these policies be altered if found to be obstructionist; it contains no enforcement section, and most importantly, the Act has no application to states. See Sharon O'Brien, *Federal Indian Policies and the International Protection of Human Rights*, in *American Indian Policy in the Twentieth Century* 55 (Vine Deloria, Jr. ed. 1985).

172. 394 P.2d 813, 40 Cal. Rptr. 69, 61 Cal. 2d 716 (1964).

173. The first amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. Const. amend. I.

174. *Sherbert v. Verner*, 374 U.S. 398 (1962). The *Sherbert* case is discussed in somewhat greater detail at the end of this section.

175. 394 P.2d at 816, 40 Cal. Rptr. at 72, 61 Cal. 2d at 720.

176. "To forbid the use of peyote is to remove the theological heart of Peyotism." *Id.* at 818, 40 Cal. Rptr. at 74, 61 Cal. 2d at 722. For a discussion of the Native

ond step—whether the infringement is backed by a compelling state interest—the court rejected the state's arguments that the prohibition of all peyote use was necessary.<sup>177</sup> In what is perhaps the most elegant and insightful affirmation of cultural rights, the court declared:

In a society that presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. We preserve a value greater than an ancient tradition when we protect the rights of the Indians who simply practiced an old religion one night in a desert hogan near Needles, California.<sup>178</sup>

In 1983 a New York federal district court affirmed the *Woody* ruling. In *Peyote Way Church of God, Inc. v. Smith*,<sup>179</sup> the court held that to exempt only Native American Church members from state drug laws but not others who also profess a belief in peyote as a central sacrament did not violate the rights of a non-profit religious organization.<sup>180</sup> The court, citing the American Indian Religious Freedom Act,<sup>181</sup> distinguished between the two situations: "[R]eligion is an integral part of the Indian culture and . . . the use of such items as peyote are necessary to the survival of Indian religion and culture."<sup>182</sup> In addressing the argument that such special treatment constituted individual racial discrimination, the *Peyote* court emphasized that the United States government maintains a special political relationship with the tribes,<sup>183</sup> and that Congress has a "power or duty . . . to . . . people who have a distinctive culture . . . Congress has the power or duty to preserve our Native American Indians (also our Eskimo & Aleuts) as a cohesive culture until such time, if ever, all of them are assimilated

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American Church, see Hazel Hertzberg, *The Search for an American Identity: Modern Pan-Indian Movements* 259-84 (1971).

177. "We know of no doctrine that the state, in its asserted conscience, should undertake to deny to defendants the observance of their religion in order to free them from the suppositious 'shackles' of their 'unenlightened' and 'primitive condition.'" *Woody*, 394 P. 2d at 818, 40 Cal. Rptr. at 74, 61 Cal. 2d at 723 (1964). The state had based much of its case on the Supreme Court's decision in *Reynolds v. United States*, 98 U.S. 145 (1878). The court distinguished the *Reynolds* decision on two points. The use of peyote is central to the practice of Peyotism; polygamy was not essential to the practice of Mormonism. Furthermore, the degree of danger presented by polygamy "far exceeded that in the instant case." *Woody*, 394 P.2d at 820, 40 Cal. Rptr. at 76, 61 Cal. 2d at 724-25.

178. *Woody*, 394 P.2d at 821-22, 40 Cal. Rptr. at 77-78, 61 Cal. 2d at 728-29.

179. 556 F. Supp. 632 (S.D.N.Y. 1983).

180. *But see* *Native American Church of New York v. United States*, 468 F. Supp. 1247 (S.D.N.Y. 1979), finding that the use of peyote for sacramental purposes was not restricted solely to the Native American Church, a religious organization of Indians.

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

182. *Peyote Way Church of God*, 556 F. Supp. at 637.

183. *Morton v. Mancari*, 417 U.S. 535 (1973).

in the main stream of American culture."<sup>184</sup>

The government's obligation to protect tribal culture was also specifically stated in *Frank v. Alaska*.<sup>185</sup> In *Frank*, the Supreme Court of Alaska overturned the conviction of Carlos Frank for unlawfully transporting a moose killed out of season. Frank, an Athabascan Indian, argued that state game regulations violated his freedom of religion. Applying the *Sherbert* test, the court reasoned that a protected religious belief was involved. The plaintiff had served the moose at a funeral potlatch, a ceremony conceded by the lower court to be an "integral part of the cultural religious belief of the central Alaska Athabascan Indian" and the "most important institution in Athabascan life . . . [T]he funeral potlatch is distinguished by its fundamentally sacred aspect . . . with food as the cornerstone of the ritual."<sup>186</sup> Citing an expert witness, the lower court had characterized moose meat as the "sacramental equivalent to the wine and wafer in Christianity . . . and is the equivalent of sacred symbols in other religions."<sup>187</sup>

In analyzing the competing state interest, the Supreme Court first noted that "subsistence hunting is at the core of the cultural tradition of many (Athabascans)."<sup>188</sup> The state's contention that a ruling for the defendant would produce a "downward spiral into anarchy" accompanied by "poaching and creek robbing" was unpersuasive.<sup>189</sup> In response to the argument that granting an exemption would contravene the establishment clause of the first amendment, the court replied that "[t]he purpose of such an accommodation is merely to permit the observation of the ancient traditions of the Athabascans."<sup>190</sup> The court stated that "as such, the exemption reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions. . . ."<sup>191</sup>

The courts have also protected Indian religious rights by rec-

184. *Peyote Way Church of God*, 556 F. Supp. at 639.

185. 604 P.2d 1068 (Alaska 1979).

186. *Id.* at 1069-71.

187. *Id.* at 1072-73.

188. *Id.* at 1073.

189. *Id.* at 1074.

190. *Id.* at 1075 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 234 n.22 (1972)).

191. *Id.* at 1075. The court further referred to both 16 U.S.C.A. § 668a (West Supp. 1979) which authorizes the Secretary of the Interior to allow eagles to be taken "for the religious purposes of Indian tribes. . ." and a Wisconsin statute (Wis. Stat. Ann. § 29.106 (West Supp. 1978-1979)) permitting the taking of deer by Winnebago Indians for religious ceremonies as examples of religious accommodations by governments.

The Eighth Circuit has recently upheld the treaty rights of Yankton Sioux to

ognizing the importance of culture in the administration of justice. In two cases, the federal courts ruled that prison regulations requiring short hair<sup>192</sup> and prohibiting the wearing of headbands<sup>193</sup> violated the rights of Indian inmates to freely practice their religion. In another case, *Native American Council of Tribes v. Solem*,<sup>194</sup> the court held that prison regulations prohibiting families of Indian inmates to attend traditional religious services, while allowing families of Christian inmates to attend Christian services, violated the inmates' freedom of religion.

In at least one instance, the courts have also recognized the importance of culture as a necessary component in determining a fair jury trial. The Alaska State Supreme Court in *Alvarado v. State*<sup>195</sup> ruled that the state had deprived an Aleut Indian of a fair trial because the choice of jurors, drawn from a fifteen mile radius of Anchorage, had precluded the participation of residents from native villages. The court concluded that the profound cultural differences between native village life and urban life meant that the defendant had not been judged by a jury of his peers.<sup>196</sup>

In freedom of religion cases, courts generally have stressed the impermissibility of assessing the accuracy of the religious view in question. In *United States v. Ballard*,<sup>197</sup> for example, the Supreme Court wrote: "The Fathers of the Constitution . . . fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views."<sup>198</sup>

Beyond *Ballard*, the relationship between religious beliefs and religious practices presents difficulties. In a number of controversial cases the courts have ruled against constitutional protection of certain Indian practices issuing from beliefs. In *New Rider v. Board of Education*,<sup>199</sup> Pawnee parents and their children chal-

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hunt eagles for traditional use on their reservation. See *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985).

192. *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975).

193. *Reinert v. Haas*, 585 F. Supp. 477 (S.D. Iowa 1984).

194. 691 F.2d 382 (8th Cir. 1982).

195. 486 P.2d 891 (Alaska 1971).

196. *Id.* at 899. See *infra* notes 401-05 and accompanying text for a comparison of the Court's ruling in this particular instance with the law regarding minority representation on juries of minority defendants.

197. 322 U.S. 78 (1944).

198. *Id.* at 87. "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

199. 480 F.2d 693 (10th Cir. 1973), *cert. denied*, 414 U.S. 1097 (1973).

lenged a school policy requiring short hair as violating their sons' right to wear their hair in long braids according to Pawnee tradition. The court held that the hair length regulation did not infringe upon their free exercise of religion. In apparent self-contradiction, the court first acknowledged that "[t]he Pawnees are near-panteists, their every act having religious significance in their basic desire to live in harmony with the Universe,"<sup>200</sup> but then proceeded to find that "[h]air styles . . . have traditional but variable significance . . . Their [the Pawnees'] present contention of religious oppression rises no higher under this record than a desire to express pride in their heritage . . . Their desire so to do is understandable but not a constitutionally protected right."<sup>201</sup>

The Sixth Circuit made a similar distinction between cultural practices and religious beliefs in *Sequoyah v. TVA*.<sup>202</sup> In 1980, two years after the passage of the American Indian Religious Freedom Act, two bands of the Cherokee Nation sought an injunction against the completion of the Tellico Dam in Tennessee. The reservoir created by the dam would flood forever the site of Chota, the tribes' sacred birthplace and ancestral burial grounds. The court ruled that the Cherokees had failed to demonstrate "that worship at the particular geographic location in question is inseparable from their way of life (*Yoder*), the cornerstone of their religious observance (*Frank*), or plays a central role in their religious ceremonies and practices (*Woody*)."<sup>203</sup>

The court instead characterized the plaintiffs as expressing a "personal preference."<sup>204</sup> Although the importance of Chota as the birthplace of the Cherokees is not unlike the importance Bethlehem holds for Christians as the birthplace of Jesus, the *Sequoyah* court stated that the plaintiffs' concern was with the "historical beginnings of the Cherokees and their cultural development [rather than religious practices]. It is damage to tribal and family folklore and traditions more than particular religious observances which appears to be at stake."<sup>205</sup> The court concluded: "Though cultural history and traditions are vitally important to any group of people, these are not interests protected by the Free Exercise Clause of the First Amendment."<sup>206</sup>

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200. *Id.* at 700.

201. *Id.* at 700-01 (Lewis, J., concurring). *But see* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975).

202. 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

203. *Id.* at 1164.

204. *Id.*

205. *Id.*

206. *Id.* at 1165.

In *Baldoni v. Higginson*,<sup>207</sup> decided the same year, Navajo religious leaders sued government officials charging that federal management of the Rainbow Bridge National Monument and Glen Canyon Dam and Reservoir violated their first amendment free exercise rights. The plaintiffs argued that the newly formed Lake Powell desecrated the area's sacred nature and denied the religious leaders and their followers access to the holy site. The plaintiffs believed that if the earth is altered, their "prayers [would] not be heard by the gods and their ceremonies [would] be ineffective to prevent evil and disease."<sup>208</sup> As remedies, the plaintiffs sought a prohibition on drinking at the Monument and asked that the Monument be closed periodically to visitors so that sacred ceremonies could be conducted in private.

While acknowledging that Rainbow Bridge was of "central importance to the Navajo people living in that area,"<sup>209</sup> the court ruled that a successful free exercise claim required a showing that the disputed actions "compel citizens to violate tenets of their religion."<sup>210</sup> Although "mindful of the difficulties facing plaintiffs in performing solemn religious ceremonies in an area frequented by tourists,"<sup>211</sup> the court further ruled that the plaintiffs' request to exclude tourists for short periods and to control their behavior would violate the first amendment establishment clause.<sup>212</sup> "Exercise of First Amendment freedom may not be asserted to deprive the public of its normal use of the area."<sup>213</sup> Citing Justice Learned Hand, the court stated: "We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life."<sup>214</sup> Plaintiffs' reliance on the American Indian Religious Freedom Act was dismissed with the statement that "we do not have before us the constitutionality of those laws or regula-

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207. 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

208. *Id.* at 177.

209. *Id.* These shrines are regarded as the incarnate forms of Navajo gods, providing protection and rain-giving functions. Generations of Navajo singers have performed ceremonies near the Bridge. *Id.*

210. *Id.* at 178.

211. *Id.*

212. That the lands the tribes were seeking to effect policy changes upon did not belong to them but to the federal government, was not a determining factor in the case. *Id.* at 176.

213. *Id.* at 179.

214. *Id.* (citing *Otten v. Baltimore & O.R. Co.*, 205 F. 2d 58, 61 (2d Cir. 1933) (Learned Hand, J.)). Justice Learned Hand's quote in this instance is ironic given it would easily support the argument that the majority must compromise to preserve the religious freedoms of the minority. Secular idiosyncrasies such as a tourist's right to drink beer at all times could certainly be found to give way to religious practices in our communal life.

tions . . . ."<sup>215</sup>

Religious leaders from the Lakota and Tsistsistas Nations were equally unsuccessful in their attempt to halt the development of additional tourist facilities at Bear Butte in the Black Hills.<sup>216</sup> The court acknowledged the plaintiffs' contention that Bear Butte was the "most powerful ceremonial site for the religious practices of the Lakota and Tsistsistas people,"<sup>217</sup> but again found that the plaintiffs' arguments failed to meet the free exercise test that governmental actions forced the tribal members to violate their religious tenets.<sup>218</sup> Furthermore, the court held that restricting public access and development of the site would violate the establishment clause of the first amendment.<sup>219</sup>

Navajo and Hopi religious leaders fared no better in their attempt to stop the expansion of a ski area on the San Francisco Peaks, their sacred mountains.<sup>220</sup> As the religious leaders explained in their suit, commercial development of the Peaks was "a profane act and an affront to the deities and . . . (one that will cause the Peaks,) to lose their healing powers."<sup>221</sup> Moreover, the development would inhibit their ability to gather sacred plants and animals necessary for religious ceremonies. Once again the court sided with the government and ruled the development to be in the public interest. The court acknowledged that the development "would cause the plaintiffs' spiritual disquiet,"<sup>222</sup> but found it would not interfere with the plaintiffs' freedom to believe. In response to the directives of the American Indian Religious Freedom Act, the court stated that it was not the government's intention "to provide Indian religions with a more favorable status than other religions, only to insure that the U.S. Government treats them equally."<sup>223</sup>

The only successful land usage case to date and one now

215. *Id.* at 180.

216. *Crow v. Gillet*, 541 F. Supp. 783, 785 (D. Kan. 1982).

217. *Id.* at 787.

218. *Id.* at 791. The plaintiffs argued that the construction of roads desecrated the sacred area and that the tourists disrupted and interfered with religious ceremonies.

219. *Id.*

220. *Navajo Medicinemen's Ass'n & Hopi Tribe v. Block*, 708 F.2d 735 (D.C. Cir. 1983).

221. *Id.* at 740.

222. *Id.* at 742.

223. *Id.* at 746. *See also* *The Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982). The Inupiat unsuccessfully argued that the development of an off-shore area of land would interfere with their religiously centered hunting and fishing practices. Although the development of the oil in this area threatened to severely reduce the animal life in the region, the court ruled that the development would not "create a serious obstacle to the plaintiff's reli-

pending before the Supreme Court is *Northwest Indian Cemetery v. Peterson*.<sup>224</sup> In *Peterson*, members of the Yurok, Karok, and Tolowa tribes sought to halt road construction and logging in a sacred area used for religious rites and for the training of medicinal and spiritual practitioners.

Ruling in the tribes' favor, the court accepted that the necessity to conduct ceremonies without interference was vital to the tribes exercise of their religious rights. Furthermore, the court stressed such an accommodation did not violate the establishment clause. "The Constitution encourages accommodation, not merely tolerance, of all religions and forbids hostility toward any."<sup>225</sup>

In these cases the courts have misconceived what constitutes Indian religious belief and practices and their integral role in Indian culture and have given higher priority to other values. The courts quite willingly rule in favor of tribes when presented with an issue that fits within or can be analogized to their own conception of religion. In the *Woody* case, the court analogizes "a beautifully beaded pouch containing one large peyote button"<sup>226</sup> with a Catholic carrying a medallion. The *Reinert* court compared the headband, a symbol of the sacred tribal circle, to a Christian cross.<sup>227</sup> The courts obviously find it much more difficult to conceive of sacred natural sites as analogous to a Christian church or Jewish synagogue.<sup>228</sup>

As the above cases exemplify, the courts have applied a rigid interpretation of the *Sherbert* test.<sup>229</sup> *Sherbert* involved the re-

gion." *Id.* at 188. The court also stated that the government's interest in developing the energy of the region outweighed the protection of religious rights. *Id.* at 189.

224. 552 F. Supp. 951 (N.D. Cal. 1982). 795 F.2d 688 (9th Cir. 1986), cert. granted sub nom, *Lyng v. Northwest Indian Cemetery*, 107 S. Ct. 1971 (No. 86-1013, May 4, 1987).

225. *Id.* at 694

226. *People v. Woody*, 394 P.2d 813, 818, 40 Cal. Rptr. 69, 74, 61 Cal. 2d 716, 723 (1979).

227. *Reinert v. Haas*, 585 F. Supp. 477, 481 (S.D. Iowa 1984).

228. The Indian concept of nature and the individual's place within it determines the basis of all aspects of tribal existence. Nature is viewed as God's gift and as the physical manifestation of God. There exists within all things, animate and inanimate, a spirituality and a purpose. Nature is balanced and comprised of interdependent parts which form a whole. Each element is an integral part, none above the other. Human beings are part of this wholeness; indivisible from nature. Humbled by the knowledge of man's total dependence upon nature, no prey is ever killed, no plant ever eaten, without a prayer of thanksgiving. Not to give thanks for nature's bounty through appropriate ceremonies or to desecrate nature is to condemn the tribe to extinction. For a discussion of Indian culture and spirituality, see Vine Deloria, *The Metaphysics of Modern Existence* (1979). See also Mercia Eliade, *The Sacred and the Profane* (1959).

229. See *Sherbert v. Verner*, 374 U.S. 398 (1963). See also *supra* note 174 and accompanying text.



fusal of the South Carolina Unemployment Office to pay unemployment compensation to a Seventh Day Adventist who was unable to find work because of her refusal to work on Saturdays, the Seventh Day Adventist Sabbath. The Court first examined whether the denial of benefits imposed a burden on the free exercise of religion.<sup>230</sup> In ruling that such a burden existed, the Court stated: "If the purpose or effect of a law is to *impede* the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being *only indirect*."<sup>231</sup> In a number of the cases discussed in this section, the courts acknowledged that the public and private activities tribal leaders were seeking to end "created difficulty and disquiet," i.e., conditions that *impeded* the tribes' ability to conduct their religious ceremonies. The courts, however, required tribal religious leaders to demonstrate that the government's actions forced them to forgo their religious tenets, a far stricter test than that of the *Sherbert* case.<sup>232</sup>

The second part of the *Sherbert* test stated that "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation"<sup>233</sup> by state action. It is not clear how requests to reroute roads or to prevent tourists from drinking and interfering with religious ceremonies endanger the public's "paramount interests."<sup>234</sup> The issue presented in all of the preceding Indian religious land use cases seems clearly to fall within Justice Douglas' discussion in *Sherbert* of the government's violation of the establishment clause: like *Sherbert*, these are cases "resolva-

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230. See *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961). As Justice Douglas pointed out in the concurring opinion in *Sherbert*, "many people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of 'police' or 'health' regulations reflecting the majority's views." 374 U.S. at 411.

231. *Id.* at 404 (citing *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)) (emphasis added).

232. Justice Stewart warned in his concurring opinion in *Sherbert* that unless the Court faced up to the dilemma posed by the conflict between the Free Exercise and the Establishment Clause, "the guarantee of true religious freedom in our pluralistic society [will] be uncertain and insecure." *Id.* at 417. The rulings in all of the Indian religious land use cases would seem to bear out Justice Stewart's prediction.

233. *Id.* at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

234. Justice Stewart, in his concurring opinion, echoed Douglas's view:

And I think that the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief . . . . [O]ur Constitution commands the positive protection by government of religious freedom—not only for the majority, however large . . . but for each of us.

*Id.* at 415-16.

ble not in terms of what an individual can demand of the government, but solely in terms of what government may not do to an individual in violation of his religious scruples."<sup>235</sup>

In sum, the government, to a degree, has recognized and protected Indian cultural rights. If cultural rights fall within an aspect of inherent tribal sovereignty, the courts have tended to uphold tribal authority, thereby indirectly protecting the cultural practice. This is not the case in those instances where a protection of Indian cultural rights is sought without the protective backdrop of tribal sovereignty, as in the religious practice cases.

### III. Native Hawaiians

[A]s in the survival of biological species, variety rather than sameness enhances the possibilities for survival . . . [A] culturally diversified society is a source of strength for a nation.<sup>236</sup>

#### *Historical Background*<sup>237</sup>

The Hawaiian Kingdom was created in 1810 when Kamehameha I united the eight islands of the Hawaiian chain by conquest and negotiations.<sup>238</sup> Ten years later New England missionaries emigrated to the islands.<sup>239</sup> Within a few decades, several missionaries had gained considerable influence as advisers to the Hawaiian monarchy. The missionaries and their families' influence increased with the development of lucrative sugar plantations.<sup>240</sup> By the mid-nineteenth century, these families had assumed virtual domination of the Hawaiian economy.<sup>241</sup>

The traditional Hawaiian system of property did not allow for fee simple ownership, a fact of great inconvenience to the planta-

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235. *Sherbert*, 374 U.S. 398, 412 (1962).

236. Delegate Adelaide De Soto, speaking in favor of the adoption of Article 12 of the 1978 Hawaiian Constitution. 2 Committee of the Whole on Hawaiian Affairs, Proceedings of the Constitutional Convention of 1978, at 425 (September 2, 1978).

237. For a general overview of Hawaiian history, see Ralph Kuykendall, *The Hawaiian Kingdom I, 1778-1854* (1938) [hereinafter I Kuykendall]; Ralph Kuykendall, *The Hawaiian Kingdom II, 1854-1874* (1953) [hereinafter II Kuykendall]; Ralph Kuykendall, *The Hawaiian Kingdom III, 1874-1893* (1967) [hereinafter III Kuykendall]; Lawrence Fuchs, *Hawaii Pono: A Social History* (1961) [hereinafter Fuchs]; Noel Kent, *Hawaii: Islands Under the Influence* (1983).

238. For a history of this period, see I Kuykendall, *supra* note 237, at 29-51.

239. Europeans first became aware of the Hawaiian Islands' existence in 1778 when Capt. James Cook landed on the Islands and named them the Sandwich Islands, in honor of his benefactor, the Earl of Sandwich. Kent, *supra* note 237, at 11.

240. Recognizing Hawaii's rich resources, English traders immediately initiated a rich trade in sandalwood to China. *Id.* at 17. By 1830, the sandalwood trees had been depleted and traders had turned their attention to whaling. *Id.* at 17, 21.

241. *Id.* at 37.

tion owners. Under the traditional land tenure system, the *ali'inui* (high chief) possessed divine and absolute power to manage the land and the resources as the living trustee for the gods. The land was divided into administrative districts known as *ahupua'a*, which stretched from the mountains to the sea.<sup>242</sup> The *ali'inui* distributed the land as he pleased to the *ali'i* and *konohiki*, the greater and lesser chiefs. These nobles then distributed their share of the land to the commoners or *makaainana*. The commoners worked their own plots and possessed fishing and gathering rights to the *ahupua'a* uncultivated areas.

Possession of the land reverted to the high chief upon the death of a lower chief, and was his to reallocate as he chose. The commoners usually stayed with the land, despite a change in *ali'i*. Commoners who worked their own plots and also their chief's land, were free to move if they wished. This led to a far greater degree of interdependence than existed in the European feudal system.

In 1825, the Hawaiian government began to transform the traditional system into a western fee simple system of land tenure. The missionaries and non-Hawaiian entrepreneurs convinced the monarch to adopt the western system of inheritance, allowing the *konohikis* to keep their lands once the monarch died.<sup>243</sup> Eight years later this powerful group of plantation owners, known in Hawaiian history as the "Big Five," persuaded the Hawaiian king to complete the land tenure transformation to a fee simple system.<sup>244</sup> The Great Mahele, or land reform legislation,<sup>245</sup> apportioned the monarch's land as follows: approximately 1,000,000 acres were reserved as Crown lands for the monarch's private use; and 1,500,000 acres were given by the king to the "government and the people."<sup>246</sup> The remaining 1,500,000 acres were set aside for the 245

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242. By dividing the land, or *ahupua'a*, from mountain to sea, the people were assured of access to all the land and water provided. For a discussion of the ancient Hawaiian land system, see Jon Chinen, *The Great Mahele: Hawaii's Land Division of 1848* (1958); Jean Hobbs, *Hawaii Pageant of the Soil* (1935); Andrew Lind, *An Island Community* 24-39 (1938).

243. Karen Blondin, *A Case for Reparations for Native Hawaiians*, 16 *Haw. B.J.* 13 (1981).

244. *Id.* at 24.

245. In 1840 King Kamehameha III, under the guidance of his white advisers, proclaimed a constitutional monarchy. A representative body elected by the people was established and a supreme court created. This proved to be the first of four constitutions promulgated by the Hawaiian monarchy, each further diminishing the traditional rights of the monarch and native peoples. I Kuykendall, *supra* note 237, at 167.

246. Neil Levy, *Native Hawaiian Land Rights*, 63 *Calif. L. Rev.* 848, 855 (1975) [hereinafter Levy]; I Kuykendall, *supra* note 237, at 288-89.

chiefs "reserving the rights of the people."<sup>247</sup>

Two years later the Kuleana Act allowed the commoners to apply for title to their own *kuleana*.<sup>248</sup> Due to a variety of restrictions,<sup>249</sup> fewer than 30,000 acres were allotted to less than 27% of the adult male population.<sup>250</sup> As with the Dawes Act relative to American Indian land ownership, the Great Mahele proved to be a system that divested individual Hawaiians of their lands and insured white access to a secure land base.<sup>251</sup> Within less than forty years foreigners owned three-fourths of all these lands.<sup>252</sup>

Dispossessed of their lands, the native inhabitants were forced to work on their former lands for pittance.<sup>253</sup> By 1850, disease and the effects of cultural dislocation had reduced the Hawaiian population from a pre-contact population of 300,000 to 82,035.<sup>254</sup> So great was the depopulation that the sugar companies had to import foreign laborers from China, Japan, and the Philippines to harvest the increasingly large yields of sugar cane and pineapples.<sup>255</sup>

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247. Levy, *supra* note 246, at 855; 1 Native Hawaiian Study Commission 262 (June 23, 1983).

248. The land could be taken from either the Crown, the Government, or the remaining 1.5 million acres of the kingdom. Native Hawaiian Study Commission, Vol. I, *supra* note 247, at 256. In addition, the Kuleana Act withdrew the rights of commoners to grow crops and pasture on unoccupied lands, leaving them with only gathering rights. Act of August 6, 1850, § 7 (1850) (Hawaii Laws 203, in Revised Laws 1925 at 2142), cited in Levy, *supra* note 246, at 857.

249. "The new system required personal applications for land deeds, proof of occupancy and having 'really cultivated' the land . . . and a relatively sizeable cash fee for surveying and registering the land title." Kent, *supra* note 237, at 32.

250. 1 Native Hawaiian Study Comm'n, *supra* note 247, at 256.

251. Between 1845-1850, legislation attempted to give native fee simple title to land. By 1852, however, foreigners had the right of ownership to thousands of acres. Levy, *supra* note 246, at 856-57.

252. Theon Wright, *The Disenchanted Isles* xiii (1972).

253. *Id.* at 39.

254. At the time of Hawaii's 1850 census, the total population was 84,165. The remaining 2,130 people were primarily adventurers and entrepreneurs from Europe and America, and laborers from Asia. Andrew Lind, *Hawaii's People* 6 (2nd ed. 1980).

255. The consequences of the importation of Asian laborers during this time was to have a great impact on the Islands in the 20th century. For many decades after their importation, Orientals were subjected to the same discrimination and prejudices that existed on the mainland. The Organic Act annexing the Islands excluded all Orientals from citizenship. *Id.* at 98. Furthermore, the existence of a large number of Asians delayed Hawaii's admission to statehood for a number of years. *Id.* at 8. Hawaii's territorial legislature attempted at least 17 times to secure Hawaii's admission to the Union, making Hawaii's case the most studied in the history of the Union. S. Rep. No. 80, 86th Cong., 1st Sess. 5, (1959) 2 U.S. Code Cong. and Admin. News 1350.

The Asian population, which in 1972 comprised approximately 47% of the population, has taken a leading role in the political and economic development of the state. See Wright, *supra* note 252. See also U.S. Census, General Social and Eco-

With land and labor assured on the Islands, the growers turned their attention to developing secure markets for their products. The end of the Civil War and the resumption of sugar cane production in the southern United States had markedly reduced the demand for large quantities of Hawaiian sugar, plunging the islands into an economic depression. To stabilize sugar markets, the plantation oligarchy worked for passage of the Treaty of Reciprocity<sup>256</sup> between the United States and the Hawaiian Kingdom providing for the free importation of sugar to the mainland.<sup>257</sup>

In the mind of the powerful oligarchy, total economic and political control could only be assured by the Islands' annexation to the United States.<sup>258</sup> The passage of the McKinley Tariff Act in 1891 disrupted the economy of the islands by imposing a tariff on the importation of Hawaiian sugar to the United States. This action further convinced Hawaiian business interests of the need to annex the islands to the United States. In 1892, the islands' busi-

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nomic Characteristics, Hawaii Table 97: "Labor Force Status in 1979 and Income Characteristics in 1979 by Detailed Race: 1980," 13-68 (June 1983).

256. Treaty with Hawaii on Commercial Reciprocity, Jan. 30, 1875, United States-Hawaii, 19 Stat. 625, T.S. No. 161. The first treaty signed between the Hawaiian Kingdom and the United States in 1826 was never ratified by Congress. Treaty with Hawaii on Commerce, Dec. 23, 1826, United States-Hawaii, 3 Treaties and Other International Acts of the United States of America 1776-1949 at 269 (Miller ed. 1933).

The first official treaty between the two nations was signed in 1849. Treaty with Hawaii on Friendship, Commerce and Navigation, Dec. 20, 1849, United States-Hawaii, 9 Stat. 977, T.S. No. 160. In addition, the Hawaiian Nation acceded to the Convention of July 22, 1854 between the U.S. and Russia, guaranteeing the rights of neutrals at sea. Declaration of Accession to the Principles of the Convention with Russia of July 22, 1854, March 26, 1855, United States - Russia, 7 Treaties and International Acts of the United States of America 1776-1949 at 121 (Miller ed. 1956) (not subject to ratification).

257. Faced with Senate resistance to renewing the treaty, in 1883 the oligarchy skillfully ensured its passage by lobbying the Hawaiian government to grant an attractive concession as a trade-off: giving the United States exclusive entry rights to the bay at Pearl River. Treaty with Hawaii on Commercial Reciprocity, December 6, 1884. United States - Hawaii, art. II, 25 Stat. 1399, T.S. No. 163. Whereas previous U.S. interests in Hawaii had been limited to those few U.S. citizens reaping large fortunes from Hawaiian lands, the Islands' fate was now securely tied to U.S. military interests. This fact became increasingly obvious with the outbreak of the Spanish-American War and Hawaii's convenience as fueling port for U.S. military vessels going to Guam and the Philippines. Kent, *supra* note 237, at 67. It was through this harbor some dozen years earlier that United States and British marines had stormed under the pretext of protecting lives of U.S. citizens and property threatened by internal rioting. The abortive revolt had been sparked by the oligarchy's outrageous and successful support, through "bribery, threats, and cajoling," for the selection of its monarchal candidate, Kalakaua. *Id.* at 45. The riot was crushed immediately by U.S. and British intervention.

258. During the late 1800s, Hawaii was economically dependent upon the United States with more than 90% of its trade tied to the United States. Kent, *supra* note 237, at 59.

ness interests secretly organized the Annexation Club to achieve this long sought objective.<sup>259</sup> Their objectives coincided with that of many American political leaders who had aired proposals since the 1840s to annex Hawaii.<sup>260</sup>

While lobbying Washington for annexation, the "Club" continued to solidify its hold on the Hawaiian government. In 1887 the oligarchy forced King Kalakaua to accept the "Bayonet Constitution."<sup>261</sup> This constitution considerably diluted the monarch's authority and allowed U.S. citizens to vote in elections while disenfranchising three out of four natives by strict property ownership requirements.<sup>262</sup>

Four years later, Queen Liliuokalani ascended the throne and promptly moved to revise the previous Hawaiian constitution, restoring popular suffrage and the monarchy's traditional powers. Under the proposed revisions, all foreigners were to be barred from voting unless married to an Hawaiian.<sup>263</sup> In January, 1893, shortly before the new constitution was to take effect, the United States Marines overthrew the monarchy.<sup>264</sup> Queen Liliuokalani was tried for treason before a military court, found guilty, and forced to abdicate.<sup>265</sup> The oligarchy proclaimed the Hawaiian Re-

259. Lorrin A. Thurston, *Memoirs of the Hawaiian Revolution* 249-50 (1936), cited in 1 Native Hawaiian Study Comm'n, *supra* note 247, at 54.

260. Secretary of State James Blaine, openly supportive of the annexation of Hawaii, referred to the Islands as the "outlying district of the State of California." *Id.*; 2 Native Hawaiian Study Comm'n 55 (June 23, 1983).

261. Evidently King Kalakaua was forced into signing the constitution by threat of disclosure of certain business dealings with the local oligarchy. Wright, *supra* note 252, at 7.

262. The constitution required that voters hold \$3,000 worth of land or possess a \$600 annual income, a very large sum for a native population still able primarily to live off the land. *Id.* at 23.

263. *Id.* at 23-24.

264. *Id.* at 11-12. See 2 Native Hawaiian Study Comm'n, *supra* note 259, at 54-69 for a detailed chronology of events leading to the overthrow of the Kingdom.

Upon assuming office, President Grover Cleveland sent Col. John Blount to Hawaii to investigate the overthrow of the monarchy. After reviewing Blount's report, Cleveland stated in a message to Congress:

Thus it appears that Hawaii was taken possession of by the United States forces without the consent or wish of the Government of the Islands, or of anybody else as far as is shown, except by the United States Minister [Stevens] . . . [At the time of recognition, the provisional government of Hawaii] was neither a government *de facto* or *de jure*.

Wright, *supra* note 252, at 17.

265. In her abdication announcement, Liliuokalani wrote:

I, Liliuokalani, by the grace of God and under the constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional government . . . That I yield to the superior force of the United States of America, whose minister plenipotentiary, his excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared

public and drafted a new constitution which opened Crown lands (those lands belonging to the monarchy) for sale, denied suffrage to all except those literate in English and possessing \$200 in property,<sup>266</sup> and precluded trial by jury.<sup>267</sup>

For the next five years, the Islands existed in a state of limbo as annexation supporters failed to muster the required two-thirds Senate majority for passage of the annexation treaty.<sup>268</sup> Finally, annexation supporters introduced a joint resolution in both houses of Congress. The required simple majority was attained and on August 25, 1898, in the heat of the Spanish-American War,<sup>269</sup> Hawaii was officially annexed to the United States.<sup>270</sup> Two years

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that he would support the provisional government . . . I do, under protest and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representative reinstate me and the authority which I claim as the constitutional sovereign of the Hawaiian Islands.

*Cited in Liliuokalani v. United States*, 45 Ct. Cl. 418, 435 (1910).

266. This meant that only one out of 16 native Hawaiians met the necessary voting requirements to vote for both Nobles and Representatives, the two houses of the legislature. Patrick Hanifin, *Hawaiian Reparations: Nothing Lost, Nothing Owed*, 17 Haw. B.J. 107, 119 (1982) [hereinafter *Hawaiian Reparations*]. Kent, *supra* note 237, at 64. Out of a total population of approximately 90,000 people, less than 5,000 owned land. Robert Horwitz, *Public Law Policy in Hawaii: Major Landowners*, Legislative Reference Bureau, Rept. No. 3, at 4 (1967).

267. In 1893, caucasians owned more than 80% of all privately held land. *Hawaiian Reparations*, *supra* note 266, at 109 n. 20 (citing Gauan Daws, *Shoal of Time* 128 (1968)).

268. The annexation of Hawaii was opposed by many as a serious step toward imperialism. As Senator Stephen M. White of California, stated, "The annexation of Hawaii will constitute the entering wedge for an imperialistic policy." Thomas Osborne, *Empire Can Wait: American Opposition to Hawaiian Annexation 1893-1898* at 34 (1981).

The annexation instrument was not ratified by the Hawaiian electorate as occurred when Texas was admitted to the Union. Only one native Hawaiian signed the annexation documents. During the debates on annexation, Congress received a petition from native Hawaiians expressing their opposition to annexation. Annexation, providing for popular suffrage, resulted in the election of a large number of native Hawaiians and home rulers to the territorial legislature. Both of these groups opposed annexation and protested by delaying bills. 1 Native Hawaiian Study Comm'n, *supra* note 247, at 307-08.

269. For a discussion of the impact of the military on the annexation of Hawaii, see Allen Hamilton, *Military Strategists and the Annexation of Hawaii*, 15 J. West 81 (1976).

270. Newlands Resolution, 30 Stat. 750. Native Hawaiians attempted to restore the monarchy in 1895, but were arrested and charged with participating in a rebellion. William A. Russ, *The Hawaiian Republic (1894-1898)* 26-34 (1961) as cited in 2 Native Hawaiian Study Comm'n, *supra* note 259, at 85. Two years later, native Hawaiians petitioned Congress for a plebiscite on annexation as had occurred prior to the annexation of Texas. *Id.*; 31 Cong. Rec. 6702 (1898).

For a history of this period, see Osborne, *supra* note 268; III Kuykendall, *supra* note 237, at 523-650. For a compilation of documents associated with Hawaii's annexation, see generally Lerria A. Thurston, *A Handbook of the Annexation of Hawaii* (n.d.).

later, Congress passed an Organic Act establishing a territorial government for the islands.<sup>271</sup> In 1959, after Congress had considered the issue at least seventeen times,<sup>272</sup> Hawaii was admitted as the forty-ninth state of the Union.<sup>273</sup>

### *Cultural Protection*

The Hawaiian Kingdom and American Indian nations were initially recognized and dealt with by the United States through treaty relations as sovereign independent nations.<sup>274</sup> Whereas Congress continues to allow for tribal sovereignty and an obligatory trust responsibility to tribes,<sup>275</sup> the existence of a fiduciary relationship between Hawaiian natives and the federal government remains in dispute.<sup>276</sup>

The strongest argument in favor of a trust relationship is based on Congress' passage of the Hawaiian Homes Commission Act.<sup>277</sup> The purpose of this Act is to ensure the perpetuation of a secure land base for native Hawaiians. In this sense, Congress has

271. 48 U.S.C. § 491-2 (1952). Act of April 30, 1900, ch. 339, 31 Stat. 41.

272. In twenty four years, a House Committee had only once opposed Statehood. Roger Bell, *Last Among Equals: Hawaiian Statehood and American Politics* 272 (1984).

273. 48 U.S.C. prec. § 491 (1986 Supp.) Act of March 18, 1959 (73 Stat. 4). For a history of Hawaiian statehood, see Wright, *supra* note 252; Roger Bell, *supra* note 272 (1984).

274. See *supra* notes 114-116 and accompanying text.

275. See *e.g.*, *United States v. Wheeler*, 435 U.S. 313 (1978); *Santa Clara v. Martinez*, 436 U.S. 49 (1978); *United States v. Mazurie*, 419 U.S. 544 (1975); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

276. The Hawaiian courts and a number of experts have argued that Congress possesses a trust responsibility with both Hawaiian natives and Indian tribes. See, Linda Parker, *Federal Management of Native Hawaiians*, 15 J. West 92 (1976), for a discussion of the federal government's relationship with native Hawaiians. For an interesting discussion of the moral obligation owed to Hawaiian natives by the United States, see Ramon Lopez-Reyes, *The Demise of the Hawaiian Kingdom: A Psycho-cultural Analysis and Moral Legacy (Something Lost, Something Owed)*, 18 Haw. B.J. 3 (1983). For a dissenting minority report, see 2 Native Hawaiian Study Comm'n, *supra* note 259, at 84-86.

As pointed out in the update of Felix Cohen's book on Federal Indian Law, no court has considered whether Hawaiians are considered statutorily within the term "Indian." The courts have held that the term "Indian" includes other aborigines such as Eskimos. Felix Cohen, *Federal Indian Law*, Ch. 14, § C2a at note 49 (2d ed.). See, *e.g.*, *Pence v. Kleppe*, 529 F.2d 135, 138 n.5 (9th Cir. 1976); *United States v. Native Village of Unalakleet*, 411 F.2d 1255, 1256 (Ct. Cl. 1969).

Although the Interior Department does not deal directly with native Hawaiians, Secretary of Interior James Watt established a Federal-State Task Force on the Hawaiian Homes Commission Act. See 1 Native Hawaiian Study Comm'n, *supra* note 247, at 317-417. The Task Force issued its final report in August 1983.

1 Native Hawaiian Study Comm'n, *supra* note 247, at 26-27 found that the United States possessed no legal debts to native Hawaiians.

277. Hawaiian Homes Comm'n Act, Publ. L. No. 34, 6201, 42 Stat. 108.



committed itself to a protection of Hawaiian (and tribal) culture, for it is around land that the traditional Hawaiian political system, religion, social customs, and hence culture is centered.<sup>278</sup>

*Protection of the Land Base*

"To be as one with the land [is] at the very heart of [the] culture."<sup>279</sup> The very word for land expressed the people's dependence upon it for their survival. Land, *'aina*, "is derived from the words *'ai*, to eat or feed, and *na*, the act of." The people's interrelationship with the land is illustrated by the *Kumulipo* creation chants that describe the union of mother earth and father sky. Respect for the land and its bounty was traditionally observed through "a yearly four-month long *Makahiki* Festival in honor of *Lono*, god of agriculture."<sup>280</sup>

Today native Hawaiians comprise approximately 19% of the islands' population.<sup>281</sup> They are economically among the poorest people in the state.<sup>282</sup> Land is the most precious commodity on the islands and the subject of greatest controversy within the native Hawaiian community.<sup>283</sup> For the last sixty years, native Hawaiians have struggled to attain access to lands set aside for their use, to protect sacred lands held by the federal government, and to obtain a fair share of revenues generated by private and public lands set aside for their benefit.

In 1920, Congress specifically assumed trust responsibility<sup>284</sup>

278. As one native Hawaiian emphasized, "When you take the land away from them, you've cut them away from who they are." Lopez-Reyes, *supra* note 276, at 11.

279. Office of Hawaiian Affairs, OHA Culture Plan 3 (1982).

280. *Id.*

281. 1 Native Hawaiian Study Comm'n, *supra* note 247, at 23.

282. Approximately 30% of all native Hawaiian families live below the poverty level. 2 Native Hawaiian Study Comm'n, *supra* note 259, at 151. Native Hawaiians have the lowest life expectancy in the state, 67 years compared to 74 years, and the highest infant mortality rate, 14 per 1,000 live births compared to 10 for the state-wide average. *Id.* at 149.

283. As indicated by a study conducted by the University of Hawaii, individual private land ownership remains elusive in Hawaii. The state currently is the largest landowner, possessing almost 39% of the land. The federal government owns another 10%. Seventy-two private landowners own another 47% of the state's land. The remaining private landowners possess less than 5% of the state's land. Horwitz, *supra* note 266, at 12. *But see* Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) (state took measures to reduce the disparity of private land ownership).

284. Congress has passed a number of other pieces of legislation designed to improve the lives of native Hawaiians. The Native Hawaiian Education Study, 20 U.S.C. § 1221 (Supp. 1986) established a seven-member Advisory Council to recommend to the Secretary of Education how the Department can better serve native Hawaiians.

Kalaupapa National Historical Park, 16 U.S.C. § 410jj (Supp. 1986), established

for native Hawaiians with the passage of the Hawaiian Homes Commission Act.<sup>285</sup> The Act established a Hawaiian Homes Commission to distribute 200,000 acres of land to homeless native Hawaiians. According to the terms of the Act, ninety-nine year leases were to be granted to natives of at least one-half Hawaiian blood.<sup>286</sup>

Upon Hawaii's admission to the Union,<sup>287</sup> Congress transferred federal title and administrative powers over the Hawaiian Homes Commission lands to the state. Inherent within this transfer was a trust obligation to administer the lands for the benefit of the beneficiaries.<sup>288</sup> The Department of Hawaiian Home Lands, as

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a national park at Kalaupapa on Molokai. An eleven-member Advisory Commission, one of whom must be a native Hawaiian, oversees the park's operation. 16 U.S.C. § 410jj (7)(2) (Supp. 1986). The law also states that employment preference and training positions at the park are to be given to native Hawaiians and former patients. 16 U.S.C. § 410jj(6) (Supp. 1986).

The Hawaiian Homes Commission Act established a nine-member board to prepare a report on the "culture, needs, and concerns of the Native Hawaiians."

Congress has also included native Hawaiians in a number of general laws designed to improve the indigenous population of the United States: The Native American Programs Act of 1974 which provided funding "to promote the goal of economic and social self-sufficiency for American Indians, Hawaiian Natives and Alaskan Natives." 42 U.S.C. § 2991(a) (Supp. 1986); The Drug Abuse Prevention, Treatment and Rehabilitation Act, 21 U.S.C. § 1177(d) (Supp. 1983); and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act, 42 U.S.C. § 4577(c)(4) (Supp. 1986) specifically target native Hawaiians and other indigenous peoples of the United States.

Also of considerable potential importance, especially in the protection of traditional Hawaiian religious practices, is the American Indian Religious Freedom Act, *supra* note 169.

285. Fuchs, *supra* note 237, at 71.

286. Portrayed as liberal legislation to assist homeless native Hawaiians, the bill was in reality an act to allow continued access to cheap lands by large plantation owners. Involved were public lands which had been leased to large plantations and whose leaseholds were expiring. Clauses inserted in the legislation allowed these lands to be leased for indefinite periods, provided that no land under sugarcane production could be leased, and also withdrew the previous limit of 1000 acres which could be leased for production. Kent, *supra* note 237, at 76; Fuchs, *supra* note 237, at 256-57. Ultimately, more than half the land was leased to corporations and a fraction turned over to native peoples. Fuchs, *supra* note 237, at 258.

287. 48 U.S.C. § 491 (Supp. 1986).

288. Any statutory amendment to the program that reduces native rights requires congressional consent, thereby leaving the United States with a residual trust obligation. See 2 Native Hawaiian Study Commission, *supra* note 259, at 88.

*But see* Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n, 588 F.2d 1216 (9th Cir. 1978), *cert. denied*, 444 U.S. 826 (1979). The United States acknowledged its fiduciary responsibilities in its *amicus curiae* brief filed in *Keaukaha-Panaewa Federal Practice and Procedure III*. This case and the brief are discussed in Edmund Scott, *Implying Private Rights of Action in Areas of Individual Rights*, 10 Golden Gate L. Rev. 223, 238-49 (1980).

The Hawaii Supreme Court clearly upheld the Department's obligation to administer the homelands solely on behalf of native Hawaiians. *Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982). After reviewing the his-

it is now called within the state bureaucracy, is responsible for administering approximately 200,000 acres.<sup>289</sup> The Hawaiian Homes Commission is comprised of seven members,<sup>290</sup> at least three of whom shall be descendants of "not less than one-half part of the blood of the races inhabiting the Hawaiian islands previous to 1778."<sup>291</sup>

By 1984, the Department had leased out (in ninety-nine year leases) approximately 2,857 residential lots and 475 ranch and farm lots. Homesteads and commercial lots could be obtained either through inheritance or application.<sup>292</sup> Currently the number of applicants is twice that of the number of available homestead lots.<sup>293</sup> For this reason several reports have soundly criticized the program as unsuccessful.<sup>294</sup> In the mid-1970s, for example, the

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tory of the Hawaiian Homes Commission Act, the court concluded that the Act represented a fulfillment of the federal government's trust responsibility to the indigenous population of Hawaii. Congress delegated this trust responsibility to the state of Hawaii at the time of its admission to the Union; the state was therefore required to "adhere to high fiduciary duties normally owed by a trustee to its beneficiaries." 64 Haw. at 339, 640 P.2d at 1168.

The court further emphasized that the federal and state trust obligations toward the native Hawaiians were analogous to the obligations toward American Indian and native Alaskan on the mainland.

In our opinion, the extent or nature of the trust obligations of the appellant [Department of Hawaiian Home Lands] toward beneficiaries such as the appellee may be determined by examining well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native Americans, i.e., American Indians, Eskimos, and Alaskan Natives.

64 Haw. at 339, 640 P.2d at 1168-1169. In *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), the circuit court recognized that the word "Indian" is commonly used to mean "the aborigines of America." 529 F.2d at 138-39 n.5; see also 42 C.J.S. Indians sec. 1 (1944). Congress recently passed a Religious Freedom Act which specifically includes native Hawaiians among American Indians. "Essentially we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans." *Ahuna*, 64 Haw. at 339, 640 P.2d at 1168-69 (1982) (citations omitted).

289. For a discussion of the Hawaiian Home Lands see Levy, *supra* note 246, at 876-80.

290. Hawaiian Homes Comm'n Act of 1920, 48 U.S.C. § 491 (Supp. 1986).

291. *Id.*

292. Hawaii Homes Comm'n Act, Haw. Rev. Stat. § 207 (1982). To be eligible for a homestead, an individual must meet the economic guidelines and be one-half native Hawaiian. 7,050 people were on the waiting list for residential lots and 1,453 people were on the waiting list for farming or ranching lots. Department of Hawaiian Home Lands, 'Aina Hoopulapula, 1982-1983 Annual Report at 17-19.

293. Forty thousand people were estimated as eligible for the program in 1920. In the sixty years of the program's existence, the Department has allotted only 3500 awards. 2 Native Hawaiian Study Comm'n, *supra* note 259, at 15.

294. See Levy, *supra* note 246 at 877. As reported in 2 Native Hawaiian Study Comm'n, *supra* note 259, at 127-28, only 188,000 acres were actually set aside for homesteading as opposed to the mandated 203,500. Another 30,000 acres were taken without compensation by territorial governors' proclamations and executive

Commission had leased only 20% of the land to native Hawaiians,<sup>295</sup> with the remainder either leased to non-Hawaiians or in disuse. The situation was due, in part, to an insufficiency of funds to construct the required infrastructure of drainage, roads, and water and sewer supplies. The money available for the land's maintenance was partially generated by the Department's leasing of its other lands to the highest bidder, usually non-Hawaiians. To obtain the high return needed for maintenance, the best land is frequently leased out and hence not available, leaving the Department in a difficult and unpopular Catch-22 situation.<sup>296</sup>

Two other land-related circumstances play an important role in the maintenance of Hawaiian culture. First, at the time of Hawaii's statehood, the United States transferred all remaining public lands to state control (with the exception of federally held lands)<sup>297</sup> with the proviso that they be held under a public trust.<sup>298</sup> The public trust was limited to five purposes, including the "bet-

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orders. See *id.* at 126-132, for a description of various violations in the management of this trust responsibility. It was not until 1973 that the state or territory contributed funds of any significance to the Commission. Between 1977 and 1983, the state provided \$42 million in funds in addition to those monies generated by the Commission. In spite of the recent increase in funding, it is estimated that it will take more than \$600 million and 50 years to meet the needs of the current applicants. Levy, *supra* note 246, at 377-78. For a discussion of the Hawaiian Homes Commission Programs see *id.* at 371-417.

295. 2 Native Hawaiian Study Comm'n, *supra* note 259 at 131.

296. In 1887, Congress passed the Dawes Act or Indian Allotment Act. Indian Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887). Reservation lands were divided into individual allotments, which could be sold by individuals after a 25-year period. By 1934, more than two-thirds of all reservation lands had been lost as a result of the allotment process. See Debo, *supra* note 112 and accompanying text.

As with Indian allotments, most kuleana were lost after the Great Mahele. See Kalipi, *infra* note 310. Those that are still owned by private families possess the same problem of fractionated ownership as current day Indian allotments. In both cases, the land is frequently underutilized. As with Indian allotments, underutilization can lead to loss through tax forfeiture, adverse possession, or sale. See Levy, *supra* note 246, at 867-70.

297. The United States still owns approximately 459,000 acres of land in Hawaii. Of this, 228,000 acres are administered as national parks, 60,000 acres comprise military installations, and approximately 171,000 acres are controlled by the Defense Department. State of Hawaii Legislative Research Bureau, Report No. 3 Public Land Policy in Hawaii: Major Landowners 96-111 (1967).

298. As is pointed out in Comment, *Hawaii's Ceded Lands*, 3 U. Haw. L.Rev. 101 (1981) [hereinafter *Hawaii's Ceded Lands*], the federal government handled the public lands of Hawaii in a very different manner from the public lands of previously admitted states. The Hawaiian Organic Act [an Act to provide a government for the Territory of Hawaii, Hawaiian Homes Commission Act, 1920, § 2] limited the benefits of the public lands (which were then held in trust by the federal government) to the inhabitants of Hawaii, whereas the public lands of other states are to benefit the nation as a whole. *Id.* at 121. A 1979 audit of the Department of Land and Natural Resources revealed that the Department had failed to properly dispose of the revenue from these lands. See 2 Native Hawaiian Study Comm'n, *supra* note 259, at 119.

terment" of persons of more than 50% native Hawaiian blood.<sup>299</sup> Currently 20% of the public trust proceeds is earmarked to administer the Office of Hawaiian Affairs.<sup>300</sup> Second, Native Hawaiians have received benefits from the proceeds of several large charitable estates left by members of the Hawaiian royal family whose wills stipulated that the lands and their proceeds be used for the benefit of "Hawaiians of pure or part aboriginal blood."<sup>301</sup> The trustees of these estates have not directly provided lands to native Hawaiians but have generally opted to develop the lands and direct the proceeds of development to various charitable activities.<sup>302</sup> The Bishop Estate, the largest, runs the Kamehameha Schools educating 2,600 part-Hawaiian students in academic and vocational subjects.<sup>303</sup> The Liliuokalani Trust provides for native children services such as foster care, day care, and community development programs.<sup>304</sup> The Lunalilo Trust provides health care for the elderly.<sup>305</sup>

Another land issue of considerable importance to native Hawaiians involves the military's ownership and use of Kaho'olawe Island, the smallest of the eight major Hawaiian islands. The island is listed on the National Register of Historical Places and is filled with sacred meaning and history to many native Hawaiians.<sup>306</sup> Despite this, Kaho'olawe is used as a bombing

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299. . . . as a public trust for the support of the public school and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible . . . for the making of public improvements, and for the provision of lands for public use.

Admissions Act of March 18, 1959, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, § 5(f).

As in the case of the Hawaiian Homes Commission, the United States also retained the authority to sue the state of Hawaii for breach of trust concerning the management of these lands and their proceeds. As is pointed out in the above article, no federal guidelines were issued as to the priority given to the four stated uses. *Hawaii's Ceded Lands*, *supra* note 298, at 145.

300. In 1978-79, the state received approximately \$5.4 million from these public lands. From this amount, approximately \$122,000 was given to the Hawaiian Homes administration fund. *Hawaii's Ceded Lands*, *supra* note 298, at 141. As is discussed in text accompanying *infra* note 335, the 1978 constitution reserves a pro rata share of the public trust fund for the Office of Hawaiian Affairs.

301. *In re Bishop Estate*, 53 Haw. 604, 609-10, 499 P.2d 670, 674 (1972).

302. See Fuchs, *supra* note 237 at 17, 445.

303. In the case of the Bishop Estate, a board of trustees selected by the Hawaii Supreme Court directs the management of these lands. Considerable controversy has arisen in the past because of the supreme court's appointment of non-Hawaiians to the position of trustee. See Fuchs, *supra* note 237, at XV; Wright, *supra* note 252, at 257-60.

304. Fuchs, *supra* note 237, at 245.

305. See III Kuykendall, *supra* note 237, at 262.

306. As one author analogized, the bombing of Kaho'olawe is like bombing Stonehenge. Lopez-Reyes, *supra* note 276, at 12. At a state hearing several

site by the federal government and by other nations at the federal government's invitation.<sup>307</sup> To date, protests and demonstrations by native Hawaiians have not yielded results, either for a return of the island to native control or for a cessation of military maneuvers in deference to the island's religious significance.<sup>308</sup>

### *Recognition of Native Hawaiian Customary Law*

The significance of traditional Hawaiian culture is reflected in the importance placed upon customary law by the Hawaiian courts and constitution.<sup>309</sup> Traditional native gathering and access rights are among the most important of these traditional property rights. In *Kalipi v. Hawaiian Trust Co.*,<sup>310</sup> the Supreme Court of Hawaii upheld the right of native Hawaiians to collect specified plants on fee simple undeveloped land belonging to others. As the court noted, when the Hawaiian monarch instituted the Great Mahele<sup>311</sup> and altered Hawaiian property rights from a form of tenancy in common to individual fee simple, the King had insisted upon the codification of the traditional right of access and gathering on undeveloped lands.<sup>312</sup>

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"kupunas . . . testified that the island was designed as a depository of the Hawaiian chain . . ." that in ancient times the island was divided "so that every other major island in the chain had a central deposit point on Kaho'olawe . . . [I]n other words, Kaho'olawe performed a sacred function . . ." Hawaii Legislative Committee on Kaho'olawe, Kaho'olawi, Aloho No: A Legislative Study of the Island of Kaho'olawe 246 (1978) as cited in Lopez-Reyes, *supra* note 276, at 12.

307. As Lopez-Reyes ironically points out, it is probably the only listing on the National Register of Historical Places that is used as a bombing site. As one witness stated: "It comes down to a question of priorities: The cost of more expensive training versus destruction of the remaining remnants of a culture." Lopez - Reyes, *supra* note 276, at 1a. The island has been the site of sit-ins and demonstrations by young and old Hawaiians alike, but to no avail. See Michael Haas, Politics and Prejudice in Contemporary Hawaii 169 (1976).

308. See *United States v. Mowat*, 582 F.2d 1194 (9th Cir. 1978), *cert. denied*, 439 U.S. 967 (1978); *Aluli v. Brown*, 437 F. Supp. 602 (D. Haw. 1977), *rev'd*, 602 F. 2d 876 (9th Cir. 1979).

309. See Michael Anthony Town & William Wai Lim Yuen, Public Access to Beaches in Hawaii: A Social Necessity? (1973) [hereinafter Public Access to Beaches in Hawaii].

In *In re Ashford*, the court ruled that Hawaii's land laws are based on ancient (Hawaiian) tradition, custom, practice, and usage. 50 Haw. 314, 315, 440 P.2d 76, 77 (1968). It was not until November 25, 1892 that the common law of England was adopted as the common law of Hawaii. Haw. Rev. Stat. § 1-1 (1968).

310. 66 Haw. 1, 656 P.2d 745 (1982).

311. "In 1948 the ancient order was formally dissolved when, by what has become known as The Great Mahele, the lands of the Kingdom were divided between the chiefs and King." *Id.* at 7, 656 P.2d at 749.

312. After the Great Mahele, the 1859 Civil Code enacted a statute to protect the rights of the native tenants:

Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be de-

The court conceded that this traditional right to enter another's land conflicted with the modern conception of fee simple protection of the land against trespass.<sup>313</sup> The court declared that inconsistency with the modern land tenure system was insufficient to extinguish traditional rights. Furthermore, the court pointed out, the protection of traditional rights was a part of the Hawaii State Constitution.<sup>314</sup> The State "shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."<sup>315</sup>

In *Palama v. Sheehan*,<sup>316</sup> the Hawaiian Supreme Court similarly upheld the traditional right-of-way of kuleana owners across fee simple land. As the court noted, Hawaiian lands, the *ahupua'a*s, were historically divided from the sea to the mountain. "Such a division enabled a chief and his people to obtain fish and seaweed from the ocean, and fuel, canoe timber and mountain birds, and the right of way to obtain these things."<sup>317</sup> The court emphasized that the Hawaiian legal system had long recognized this custom as the common law of the state and had codified aspects of the traditional Hawaiian common law.<sup>318</sup> Relying on state statute and judicial precedent, the court found that the custom

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prived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads, shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and water courses, which individuals have made for their own use.

Haw. Rev. Stat. § 7-1 (1976).

313. *Kalipi*, 66 Haw. at 4, 656 P.2d at 748.

314. Although the court upheld the traditional right of access and gathering, the court ruled that the non-resident plaintiff was required to live within the *ahupua'a*. *Kalipi*, 66 Haw. at 8, 656 P.2d at 749.

315. Haw. Const. art. XII, § 7, on "Traditional and Customary Rights."

316. 50 Haw. 298, 440 P.2d 95 (1968).

317. *Palama*, 50 Haw. at 300, 440 P.2d at 97 (citing *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879)).

318. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

Haw. Rev. Stat. § 1-1 (1985). See also *In re Ashford*, 50 Haw. 314, 440 P.2d 76 (1968). Statutory law overrules inconsistent customary law. See *Haalelea v. Montgomery*, 2 Haw. 62, 65 (1858)), but custom can be employed to clarify ambiguous statutes. See,

still held and that the defendants had a right of ingress and egress over plaintiffs' land.<sup>319</sup>

Customary Hawaiian law has also played an extremely important role in determining state water rights, boundaries, and property rights. In *McBryde Sugar Co. v. Robinson*,<sup>320</sup> the Supreme Court of Hawaii, relying on traditional Hawaiian law, ruled that the state held the right to all running water in trust for the Hawaiian public.<sup>321</sup> Hence, no private party could acquire the right to "surplus" water.<sup>322</sup>

In *In re Ashford*,<sup>323</sup> the Hawaiian Supreme Court ruled that the lower court had erred in using U.S. Geological Survey information to determine the location of a boundary line dividing private lands from public beaches. The boundary should be determined using the expert testimony of Kamaaina witnesses<sup>324</sup> knowledgeable about traditional Hawaiian custom and usage. Traditional Hawaiian law held that the line between public and private property rights was "the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris."<sup>325</sup> The influence of traditional Hawaiian law in this instance has ensured a larger beach area to the public than in other states that follow

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e.g., *In re Estate of Nakuapa*, 3 Haw. 342, 347-58 (1872); *O'Brien v. Walker*, 35 Haw. 104 (1939), *aff'd* 115 F.2d 956 (9th Cir. 1940), *cert. denied*, 312 U.S. 707 (1941).

In *Rex v. Tin Ah Chin*, 3 Haw. 90 (1869), a case in which a murder indictment was challenged, the court stated, "our practice has leaned in favor of the common law of England, where the same does not conflict with the laws and customs of this Kingdom." *Id.* at 95.

319. 50 Haw. at 298, 440 P.2d. at 95.

320. 504 P.2d 1330, *aff'd on reh'g*, 517 P.2d 26 (Haw. 1973), *appeal dismissed sub nom.*, *McBryde Sugar Co. v. Hawaii*, 417 U.S. 962, *cert. denied*, 417 U.S. 976 (1974).

321. The court stated "that the right to water is one of the most important usufruct of lands, and . . . was specifically and definitely reserved for the people of Hawaii for the common good in all of the land grants." 504 P.2d at 1338.

322. *McBryde Sugar* has been termed one of the "most significant decisions handed down in Hawaii on the question of natural resource allocation." Public Access to Beaches in Hawaii, *supra* note 309, at 15. See also Michael D. Tom, *Hawaiian Beach Access, A Customary Right*, 26 Hastings L.J. 823, 823-826 (1975).

323. 50 Haw. 314, 440 P.2d 76 (1968). For a discussion of this case, see Public Access to Beaches in Hawaii, *supra* note 309.

324. As the court noted, Kamaaina witness were individuals "specially taught and made repositories of this knowledge." *In re Ashford*, 50 Haw. at 316, 440 P.2d at 77. For a further clarification of the Kamaaina witness rule, see *State v. Zimring*, 52 Haw. 472, 479 P.2d 202 (1970); *Palama v. Sheehan*, 50 Haw. 298, 301, 440 P.2d 95, 97 (1968).

325. Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage. *Keelikolani v. Robinson*, 2 Haw. 514, 519 P.2d 20 (1862).

It is not solely a question for a modern-day surveyor to determine boundaries in a manner completely oblivious to the knowledge and intention of the king and old-time kamaainas who knew the history and names of various lands and the monuments thereof.

50 Haw. at 315-316, 440 P.2d at 77.



the "mean high water mark" rule.<sup>326</sup>

The state courts also continue to recognize and affirm traditional Hawaiian law concerning adoption<sup>327</sup> and domestic relations. In *Leong v. Takasaki*<sup>328</sup> for example, the supreme court, noting the importance of customary adoption within Hawaiian society and culture, ruled that the lack of a blood relationship between a young boy and his adoptive grandmother did not foreclose the child's recovery for damages when his grandmother had been struck and killed by an automobile.<sup>329</sup>

### *Office of Hawaiian Affairs*

Article 12 of the 1978 Hawaii Constitution specifically guarantees traditional native rights.<sup>330</sup> To protect these guaranteed rights, the 1978 constitution established the Office of Hawaiian Affairs (OHA).<sup>331</sup> Legislative history indicates that the OHA's ultimate purpose is to "provide Hawaiians the right to determine priorities which [would] effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and that it [would] unite the Hawaiians as a people."<sup>332</sup> Comparing the history of native Hawaiians' status and

326. See *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935).

327. See *Peoples and Cultures of Hawaii* 12-13 (John F. McDermott, Jr., Wen-Shing Tseng, & Thomas W. Maretzki, eds., 1980) for a discussion of the importance of extended families and customs of adoptions.

328. 55 Haw. 398, 520 P.2d 758 (1974).

329. *Id.* at 404, 520 P.2d at 766. See also *O'Brien v. Walker*, 35 Haw. 104, 128-30 (1939) wherein an adopted child, under Hawaiian custom and usage, was considered lawful issue of adopting parent and thus was entitled to its share in a trust estate.

330. Haw. Const. art. XII.

331. Jon Van Dyke, in his article *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. Haw. L.Rev. 63 (1985), discusses the constitutionality under the equal protection clause of a state agency staffed by and established for the benefit of native Hawaiians. The issue has been raised in two recent cases (see *Hooihuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984), *remanded*, 631 F. Supp. 1153 (D. Haw. 1984). *Trustees of the Office of Hawaiian Affairs v. Hong*, Civ. No. 79260 (Haw. 1st Cir., Sept. 28, 1983)) and in regard to the constitutionality of a proposed bill to establish a "live-in" park at Sand Island. The issue was also raised by one of the judges in *In Re Estate of Bishop*, 53 Haw. 604, 499 P.2d 670 (1972). As Van Dyke points out, although the state attorney general has concluded that OHA does not violate the United States or Hawaii Constitution (Haw. Op. Att'y Gen. 80-8 (July 8, 1980), as cited in Van Dyke at 64), the implications of such a question are considerable. If the OHA is found to be unconstitutional, the Hawaiian Homes Commission Act and a number of federal programs serving native Hawaiians would also be called into question.

See rebuttal to Van Dyke's analysis by James Dannenberg, *The Office of Hawaiian Affairs and the Issue of Sovereign Immunity*, 7 U. Haw. L.Rev. 95 (1985).

332. Comm. of the Whole Rep. No. 13, 1 Proceedings of the Const. Convention of Hawaii of 1978 at 1018 (1980) [hereinafter Proceedings] cited in Van Dyke, *supra* note 331, at 68.

Lopez-Reyes, *supra* note 276, points out that prior to the overthrow, native

rights with those of the American Indian nations on the mainland, the delegates also emphasized that a primary objective of the Office was to further "the cause of Hawaiian self-government."<sup>333</sup>

The OHA serves as a clearinghouse and coordinating agency within the state government for native Hawaiian needs and is governed by a nine member board of trustees elected by native Hawaiians of at least 50% Hawaiian ancestry.<sup>334</sup> The OHA is funded by 20% of all funds derived from the public lands "trust" established in the Admissions Act.<sup>335</sup>

Among OHA's primary responsibilities are the "restoration, rehabilitation, preservation, and perpetuation of the Hawaiian culture."<sup>336</sup> Recently, OHA issued a CULTURE PLAN,<sup>337</sup> which

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Hawaiians enjoyed a social and economic status higher than that of Asians. Today Hawaiians, as an ethnic group, find themselves at the lowest end of the spectrum. For a summary of the economic, educational, and employment levels of native Hawaiians, see Levy, *supra* note 246, at 11-15.

333. Proceedings, *supra* note 332, at 1019. The purposes of OHA include 1) The betterment of conditions of native Hawaiians; . . . (2) The betterment of conditions of Hawaiians; (3) Serving as the principal public agency in [the] State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; except that the Hawaiian Homes Commission Act, 1920, as amended, shall be administered by the Hawaiian Homes Commission; (4) Assessing the policies and practices of other agencies impacting on native Hawaiians [50 percent blood quantum] and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians; (5) Applying for, receiving, and disbursing grants and donations from all sources for native Hawaiian and Hawaiian programs and services and (6) Serving as a receptacle for reparations.

*Id.*

334. For the purposes of the OHA (and the HHCA), a "native Hawaiian" is defined as:

any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

Haw. Rev. Stat. § 10-2 (1984). See Van Dyke, *supra* note 331, at 70.

Support for the OHA is evidenced in the voter turnout in the 1980 election. More than 80% of the registered eligible native Hawaiian voters voted to elect the nine-member board of trustees of OHA from a slate of more than 100. 1 Native Hawaiian Study Comm'n, *supra* note 247, at 66.

The constitutional delegates, citing the "unique legal status of Hawaiians," clearly dismissed the notion that the arrangement was discriminatory, but rather was based on a valid political system of "the governed in the governing agency." *Id.*

In *Kahalekai v. Doi*, 60 Haw. 324, 590 P.2d 543 (1979), the Supreme Court of Hawaii ruled Article XII defining "Hawaiian" was "not properly presented to the public for its consideration . . . and was, therefore, not validly ratified." *Id.* at 555.

335. Admissions Act of March 18, 1959, *supra* note 299.

336. OHA Culture Plan, *supra* note 279, at 5.

337. *Id.*

specifically listed a number of important objectives in the preservation of Hawaiian culture<sup>338</sup> and proposed policies to attain these objectives. Included are policies designed to maximize and preserve traditional land use;<sup>339</sup> preserve historic and culturally significant Hawaiian sites;<sup>340</sup> promote, finance and manage Hawaiian arts;<sup>341</sup> promote and preserve Hawaiian language and literature in the community and public school systems;<sup>342</sup> promote and support traditional Hawaiian celebrations and sporting events;<sup>343</sup> preserve and support research into traditional Hawaiian healing practices;<sup>344</sup> and advocate and support a better understanding of traditional Hawaiian religious practices and rights.<sup>345</sup>

As indicated above, one of the basic goals of OHA is preserving and promoting the Hawaiian language.<sup>346</sup> Hawaii is currently the only state with an official bilingual language policy:<sup>347</sup> "English and Hawaiian shall be the official languages of Hawaii . . ."<sup>348</sup> Article X further mandates the state to "promote the study of Ha-

338. The Plan defined culture as:

that which a given society knows or believes in order to function in a manner acceptable to its members. Culture is the summation of a society's learning and knowledge, structured in an organized manner, together with the processes and patterns that are created by the interaction of people and ideas.

*Id.*

339. *Id.* at 6.

340. *Id.* at 9-11. For a discussion of the federal and state laws in existence enacted to preserve sites of historic and cultural importance within Hawaiian culture, see 1 Native Hawaiian Study Comm'n, *supra* note 247, at 203-13. As the Study points out, the State Historic Preservation Plan has not been implemented into law. Very frequently, an area of cultural or religious significance to native Hawaiians does not meet the more exacting requirements of state and federal programs. *Id.* at 212-13.

341. OHA Culture Plan, *supra* note 279 at 12-14.

342. *Id.* at 15.

343. *Id.* at 17.

344. *Id.* at 19.

345. *Id.* at 20. "The Hawaiian religion was the first aspect of our culture to be suppressed. It is today the least understood dimension of the culture. As we shed light on religious and ceremonial practices, we will choose more freely how we live our lives." *Id.* at 21. For a discussion of native Hawaiian religion, see Levy, *supra* note 246, at 225-49.

346. For a discussion of the importance of the Hawaiian language to the survival of the Hawaiian culture, see 1 Native Hawaiian Study Comm'n, *supra* note 247, at 173-91.

347. The Organic Act incorporating Hawaii into the Union as a Territory made English the official language and banned the use of Hawaiian in the schools and administration of government. As Wright reports, *supra* note 252 at 24, this created considerable confusion in the operation of the government. The appointed governor spoke no Hawaiian and most of the elected Home Rulers (those against annexation to the United States) were native speakers who showed their displeasure at annexation by refusing to communicate or pass laws in English.

348. Haw. Const. art. XV, § 4. Official notices and transactions are not required to be published in Hawaiian "except as . . . provided by law."

waiian culture, history and language . . . [and] shall provide for a Hawaiian education program consisting of language, culture and history in the public schools."<sup>349</sup> Pursuant to this mandate, the state established the Hawaiian Studies Program designed to teach the language, history, culture, and values of the traditional Hawaiian culture.<sup>350</sup>

OHA was also created to serve as a repository for an anticipated, but subsequently denied, federal reparation award.<sup>351</sup> On June 27, 1974, a bill was introduced into the House of Representatives "to provide for the settlement of historic claims of the Hawai-

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349. Haw. Const. art. X, § 4. "The use of community expertise shall be encouraged as a suitable and essential means in furtherance of the Hawaiian education program." *Id.* The state has elaborated upon this trust obligation by passing special legislation for compensatory education programs "directed primarily to the educational improvement of the children of lessees." 1 1965 Haw. Sess. Laws, at 6, 8 (amending Haw. Const., Hawaii Homes Comm'n Act, § 213(b)(7)) 1 Haw. Rev. Stat. (1920).

350. Approximately 30% of the program's efforts have been directed at teaching elementary school children the Hawaiian language. Teachers are hired among the native-speaking elders (*kupuna*). According to the findings of 1 Native Hawaiian Study Comm'n, *supra* note 247, at 128, the program has remained stagnant due to underfunding.

In addition to the Hawaiian Homes Commission and the OHA, the state administers a number of special programs for native Hawaiians in the areas of health, education, housing, employment, among others. See *id.* at part I.

351. Queen Liliuokalani attempted unsuccessfully to obtain redress in the Court of Claims in 1910. See *Liliuokalani v. United States*, 45 Ct. Cl. 418 (1910).

ALOHA (Aboriginal Lands for Hawaiian Ancestry), founded to fight for the passage of an Hawaiian reparations bill, achieved the introduction of the Hawaiian Native Claims Settlement Act, H.R. 15666, 93rd Cong., 2d Sess. (1974). The original bill proposed that an Hawaiian Native Fund of \$1 billion, administered by the Secretary of Interior, be established. An Hawaiian Native Corporation elected by all full and part-blood Hawaiians would oversee the distribution of funds. Such funds could be used for the purchase of additional lands for rural and urban homestead use, community development projects, to finance construction of homes on Hawaiian Home Lands, and to resolve the fractionated kuleana problem. The Office of Hawaiian Affairs has argued that Hawaiians are entitled to the present value of the former Crown and Government lands of the Hawaiian monarchy—over 1.75 million acres. Hawaiian Reparations, *supra* note 266, at 1.

Lopez-Reyes, *supra* note 276, at 3, points out that the admission of wrong is an extremely important aspect within Hawaiian culture, i.e., the practice of *hooponopono*, which means "to make right, to correct, restore, and maintain good relationships among the family." *Id.* at 19. Until the admission of a wrong, harmony within the community and the soul cannot be restored. Considered within a cultural context, the admission of wrong is of great importance in restoring to native Hawaiians the dignity and respect of their cultural heritage. (Unfortunately, the United States frequently finds it easier to make monetary payments with no admission of guilt.)

The Office of Hawaiian Affairs, in its study "Towards Reparations/Restitutions", lists as its first priority: "The first step towards reparation should be a clear acknowledgement of the United States' responsibility for the overthrow of the Hawaiian native government in 1893." *Id.*

ian Natives."<sup>352</sup> Following a number of hearings, Congress created a Native Hawaiian Study Commission in 1980 with the mandate to "conduct a study of the culture, needs, and concerns of the Native Hawaiians; the nature of the wrong committed against, and the extent of injuries to, the Native Hawaiians by reason of the actions set forth in the findings of this bill; and various means to remedy such wrong . . . ." <sup>353</sup> The Final Report, issued twenty-one months later, concluded that the United States possessed no legal or moral responsibility for the actions of United States officials in the overthrow of the Hawaiian Kingdom and that native Hawaiians had no legal rights to reparations.<sup>354</sup>

Congress' failure to provide reparations for native Hawaiians represents a considerable set-back to the native Hawaiian people in their struggle to preserve their culture, identity, and lands. Reparations funds would have provided increased monies for land purchases, educational and social service programs, and economic development. Perhaps more importantly, an admission of wrong, whether of a moral or legal nature, would prove of immeasurable psychological benefit, infusing Hawaiian natives with a new sense of spirit and hope.

Despite similarities in their historical relationship with the United States, native Hawaiians and American Indians currently have vastly different legal positions and rights. Congressional recognition of inherent tribal sovereignty and rights of self-government provide American Indians with a solid legal foundation from which to demand protection of their cultural heritage. Native Hawaiians, on the other hand, are not recognized by Congress as possessing vestiges of nationhood, a defined federal relationship, or legal claims beyond land protection.<sup>355</sup>

Native Hawaiians have therefore been forced to rely on the

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352. Hawaiian Native Claims Settlement Act, H.R. 15666, 93rd Cong., 2d Sess. (1974). Currently no law exists by which Hawaiians may sue the federal government for damages. The court of claims is limited to hearing claims against the federal government when a "petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (1970). Hence, native Hawaiians, like native Alaskans, would require special legislation passed through Congress. As is the case with Alaska, the Hawaiian Organic Act left open the question of future land claim settlements. Citing Robert Jones, "A History of the Alaskan Native Claims," April 20, 1973 at 31 (unpublished study for Congressional Reference Service, in Library of Congress), reported in A Joint Resolution Establishing the Hawaiian Aboriginal Claims Settlement Study Commission, and for Other Purposes, Hearings on S. 155 Before the Senate Comm. on Interior and Insular Affairs, 94th Cong., 2nd Sess. (1976).

353. Pub. L. No. 96-565, Title III, § 303(c) (1980). Hawaiian Reparations, *supra* note 266, at 108.

354. 1 Native Hawaiian Study Comm'n, *supra* note 247.

355. See Lopez-Reyes, *supra* note 276, at 3.

Hawaiian state government to guarantee their rights. Contrary to the plight of American Indians, whose greatest threats lie at the state level,<sup>356</sup> the state of Hawaii has evinced a willingness to implement programs for the protection of native culture and language (with less success in the area of land rights). The Hawaii Constitution is the only state constitution recognizing aboriginal rights<sup>357</sup> and a language other than English as an official language.<sup>358</sup>

#### IV. Chicanos<sup>359</sup>

[T]he worst violence has been the unrelenting discrimination against the cultural heritage—the language and customs—of the Mexican American, coupled with the economic exploitation of the entire group.<sup>360</sup>

##### *Historical Background and the Fight Against Discrimination*

A generation before the Pilgrims landed in New England, the first Spanish settlers immigrated to what is now the United States.<sup>361</sup> Intermarriage with the local Indian population produced an amalgamation of the two cultures—European in language and religion, but more Indian in family relations.<sup>362</sup>

In 1819, Mexico granted U.S. citizens permission to immigrate to what is now the state of Texas—a move which culminated in Texas' rebellion and independence from Mexico in 1836. Ten years later, the United States declared war on Mexico.<sup>363</sup> The

356. As the courts have recognized, states present the greatest threat to tribes as they seek to gain control over tribal resources and jurisdiction.

357. Haw. Const. art. XII, § 7.

358. Haw. Const. art. XV, § 4. See *Williams v. Lee*, 358 U.S. 217, 219 (1959).

359. See *supra* note 3.

360. Stephen Steinberg, *The Ethnic Myth: Race, Ethnicity, and Class in America* 24 (1981).

361. For almost 20 years before the establishment of Jamestown, Santa Fe had been the capital of "Nuevo Santander," or New Mexico. For an overview of Chicano history, see Rudolfo Acuna, *Occupied America: The Chicanos' Struggle Toward Liberation* (1972); Howard R. Lamar, *The Far Southwest: A Territory History* (1966); Armando B. Rendon, *Chicano Manifesto* (1971); Robert Rosenbaum, *Mexican Resistance in the Southwest* (1981); Mario Barrera, *Race and Class in the Southwest* (1979).

362. Government officials and the courts (and Chicanos themselves) have variously characterized Chicanos as a "race" and a "culture." Although anthropologists estimate Chicanos to possess approximately 80% Indian blood, they have never been classified as Indian—testimony to the distinguishing nature of Chicano culture.

363. Rendon, *supra* note 361, at 21-23; Samuel Eliot, Henry Steele Commanger, & William E. Leuchtenburg, 1 *A Concise History of the American Republic*, to 1877, 237-43 (1983).

United States easily won the war, conquering a region composed of California, New Mexico, and parts of Colorado, Arizona, and Nevada.<sup>364</sup> In the 1848 Treaty of Guadalupe Hidalgo,<sup>365</sup> Mexico ceded about one half its total land mass to the United States, an area the size of Germany and France combined. In Articles VIII and IX of the treaty, the United States guaranteed the property<sup>366</sup> and religious<sup>367</sup> rights of the approximately 80,000 inhabitants living in the

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364. Steinberg, *supra* note 360. Of the total Spanish speaking population, those of Mexican origin total 6.3 million and comprise 16% of the population of California, 18% in Texas, 40% in New Mexico, 19% in Arizona, and 13% in Colorado. Dinermanstein & Reimers, *supra* note 77, at 94. As revealed by the 1980 census, people of Hispanic origins are expected to surpass the Black population and become the largest minority before the end of the century. N.Y. Times, May 26, 1982, § III, 4, col. 3. In many areas of the nation, Hispanics will form the majority population. Los Angeles, with a current population of more than one million Hispanics, is the largest Mexican ancestry population in the world after Mexico City. *Id.*

365. Treaty of Guadalupe Hidalgo, T.S. 207, 9 Stat. 922. See also William Malloy, Treaties, Conventions, International Acts, Protocols and Agreements 1107-1120 (1910).

366. In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.

Treaty of Guadalupe Hidalgo, T.S. 207, 9 Stat. 922, Article VIII; Malloy, *supra* at 1112.

The United States suppressed the tenth article of the Treaty of Guadalupe Hidalgo (which dealt with the land rights of Mexican citizens). In a Statement of Protocol signed after the Treaty, the United States emphasized that it:

did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants . . . preserve the legal value which they may possess and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.

Conformable to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories, or those which were legitimate titles under the Mexican law of California and New Mexico up to the 13th of May, 1846, and in Texas up to the 2nd of March, 1836.

Anthony Dworkin & Rosalind Dworkin, The Minority Rights Report 170 (1976).

367. Article IX guaranteed to Mexican citizens choosing to remain in the ceded lands "the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction." Malloy, *supra* note 365, at 1112.

In 1969, a class action suit was brought on behalf of Mexican-Americans and the poor against the state and city boards of education for the reapportionment of the boards of education and for the teaching of all subjects in both English and Spanish in public schools. The suit argued that Articles VIII and IX and the Protocol of the Treaty of Guadalupe Hidalgo had guaranteed the teaching of Spanish. The court ruled that the plaintiffs had failed to define a proper class and that the plaintiffs' reliance on the Treaty was misplaced. *Tijerina v. Henry*, 48 F.R.D. 274 (D.N.M. 1969), *dismissed*, 398 U.S. 922 (1970) (*but see* dissenting opinion by Justice Douglas). Numerous authors, however, have contended that the Treaty of Guadalupe Hidalgo guaranteed the cultural autonomy of Chicanos. "In the compe-

newly acquired area.<sup>368</sup>

Articles VIII and IX notwithstanding, the Chicanos were soon dispossessed of their lands<sup>369</sup> and subjected to varying degrees of discrimination, bigotry, harassment, and, in many instances, violence.<sup>370</sup> Chicanos experienced the least discrimination in New Mexico. In many local communities of New Mexico, they continued their long-standing involvement in political affairs. Until the 1920s, Spanish and English were recognized as co-official languages of this state, with all state documents printed in Spanish. The United States, however, did not admit either New Mexico or Arizona to statehood until the Anglos had attained a majority. In Colorado and Arizona, the Mexican community was tolerated although it remained separate from the white community. In Texas and California, toleration turned to discrimination, bigotry, and repression. Chicanos fought back, sprinkling the history of the west with bloody protests and rebellions.<sup>371</sup>

Beginning in the 1940's and increasing dramatically in the 1960's and 1970's, Chicanos switched their battles from the streets

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tition for land and for control over other resources, the guarantees of cultural autonomy and property rights of the Spanish-speaking inhabitants contained in the Treaty of Guadalupe Hidalgo were forgotten." Derrick Bell, *Race, Racism and American Law* 78 (1973). "Lynn Perigo in *The American Southwest*, summarizes the guarantees of Articles VIII and IX, writing, 'In other words, beside the right and duties of American citizenship, they [the Mexicans] would have some special privileges derived from their previous customs in language, law, and religion.'" Acuna, *supra* note 361, at 176. See also Lance Liebman, *Ethnic Relations in America* 111 (1982).

368. Article VIII of the Treaty provided a one-year grace period for those wishing to return to Mexico. (Most elected to stay.) These same articles were incorporated five years later in the Gadsden Treaty which provided for the United States' purchase of some 45,532 square miles (falling mainly within the present states of Arizona and New Mexico) of disputed boundary lands resulting from the use of faulty maps under the Treaty of Guadalupe Hidalgo. Gadsden Treaty, T.S. No. 208, 10 Stat. 1031. See P.N. Garber, *The Gadsden Treaty* (1923); Malloy, *supra* note 365, at 1121-25.

369. See, e.g., *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984) (opinion dismissing claims for compensation). See also Rosenbaum, *supra* note 361, who argues that the dispossession of Mexican lands in the southwest was a primary cause of the violence and hostilities between Anglos and Mexicans in the late 1800s and early 1900s.

370. See, e.g., Rendon, *supra* note 361, at 71; Rosenbaum, *supra* note 361; James Stuart Olson, *The Ethnic Dimensions in American History* 313-27 (1981); *A Documentary History of the Mexican Americans* (Wayne Moquin ed. 1971).

371. See Rosenbaum, *supra* note 361, for an account of these hostilities. Serious discrimination continued into the 20th century. In June 1943, mobs roamed the Mexican community of Los Angeles, savagely beating and stabbing Mexicans and some Blacks. The police never intervened except to take part in the rampage which lasted for a week. See Stanley Coben, *The Failure of the Melting Pot*, in *The Great Fear: Race in the Mind of America* 144, 153 (Gary Nash & Richard Weiss eds. 1970).



to the courtrooms like the Blacks who preceded them. Blacks had at their disposal significant legislation including the thirteenth, fourteenth, and fifteenth amendments and the 1866 Civil Rights Act<sup>372</sup>—passed specifically for emancipation from slavery and for protection against discrimination.<sup>373</sup> Later the Civil Rights Act of 1957,<sup>374</sup> 1960,<sup>375</sup> and 1964,<sup>376</sup> the Voting Rights Act of 1965,<sup>377</sup> and amendments of 1970,<sup>378</sup> 1975,<sup>379</sup> and 1982,<sup>380</sup> the Fair Housing Act of 1968,<sup>381</sup> and Title VIII of the higher education amendments of 1972<sup>382</sup> were passed by Congress to ensure fair treatment for all minorities.

In the early days of Chicano legal activism it was unclear which of these laws, especially those passed in the 1800s, were applicable to Chicanos. There were two major obstacles to the successful use of these avenues of legal redress. First, there was the manner in which the courts variously characterized Chicanos—as a racial group, white<sup>383</sup> or non-white,<sup>384</sup> or as a separate identifiable group<sup>385</sup>—and how the particular designation would dictate the

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372. Act of April 9, 1866, ch. 31, 14 Stat. 27.

373. See Bell, *supra* note 367, for a discussion of the Blacks' use of the legal system to overcome discrimination.

374. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified at 42 U.S.C. §§ 1964, 1971, 1975(d) (1970)).

375. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified at 42 U.S.C. §§ 1971, 1974 note, 1975 (1960)).

376. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 1971, 1975, 2000 (1964)).

377. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 446 (codified as amended at 42 U.S.C. §§ 1971-1974(e) (1982)).

378. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314-19 (codified as amended at 42 U.S.C. § 1973 (1982)).

379. Voting Rights Act Amendment of 1975, Pub. L. No. 94-73, 89 Stat. 400-406 (codified as amended at 42 U.S.C. § 1973 (1982)).

380. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131-35 (codified as amended at 42 U.S.C. § 1973 (1982)).

381. Fair Housing Act of 1968, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. §§ 3601, 3606 (1970)).

382. Title VIII of the Education Amendment Act of 1972, Pub. L. No. 92-318, 86 Stat. 371 (codified at 20 U.S.C. § 1651 (1972), §§ 1651-1656 (Supp. 1973)).

383. *Mendez v. Westminster School District*, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947); *Ross v. Eckels*, Civil No. 10444 (S.D. Tex. May 24, 1971).

384. It was not until 1930 that the Bureau of the Census first officially recognized Hispanics as a distinct group. They, however, were listed as non-white along with Negro, Indian, Chinese, Japanese, Filipino, and all others. Fifteenth Census of the United States: 1930, Population Vol. II, at 32, 58-59 (1933). The 1960 census retroactively revised the 1930 census, classifying Mexican under white. 2 U.S. Summary: Characteristics of Populations 35 (1980).

385. See, e.g., *Cisneros v. Corpus Christi Ind. School Dist.*, 330 F. Supp. 1377 (S.D. Tex. 1971); *Tasby v. Estes*, 517 F.2d 92 (5th Cir. 1975), *cert. denied*, 423 U.S. 939 (1975); *Keyes v. School Dist.*, 455 F.2d 990 (10th Cir. 1971), *cert. granted*, 404 U.S. 1036 (1972); *Alvarado v. El Paso School Dist.*, 593 F.2d 577 (5th Cir. 1979); *United*

statutes and doctrines available to them. A review of court cases since 1940 reveals that the courts have variously defined Chicanos in both racial and "ancestry" or "national origin" terms.<sup>386</sup> Second, Chicanos had not by and large been subject to "official" discrimination. Mindful of relations with Mexico, few southwestern states had passed outright *de jure* discriminatory laws. *De facto* segregation, inferior schooling,<sup>387</sup> and discrimination in the administration of justice<sup>388</sup> and employment,<sup>389</sup> were nonetheless a fact of life in a number of southwestern states.

Chicanos sought first to improve the quality of their children's education. The first Chicano desegregation case came twenty-four years before the *Brown*<sup>390</sup> ruling. In *Independent School District v. Salvatierra*,<sup>391</sup> a Texas appellate court ruled that the section of the 1876 Texas constitution mandating separate schools for white and Black children<sup>392</sup> did not authorize segregation of Mexican Americans. Seven years before *Brown*, in *Westminster School District of Orange County v. Mendez*,<sup>393</sup> the California Supreme Court found the state guilty of violating the due process and equal protection clauses of the fourteenth amendment by "enforcing the segregation of school children of Mexican descent against their will and contrary to the laws of California."<sup>394</sup> The court did not rule that segregation of Chicanos was

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States v. Texas, 680 F.2d 356 (5th Cir. 1982); Soria v. Oxnard School Dist., 386 F. Supp. 539 (C.D. Cal. 1974).

386. See *supra* notes 383-85 and accompanying text.

387. See Jorge C. Rangel & Carlos M. Alcalá, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 Harv. C.R.-C.L. L. Rev. 307 (1972); U.S. Commission on Civil Rights, *Toward Quality Education for Mexican Americans*, Report VI: Mexican American Education Study (February 1974).

388. See Lorenzo Arizedondo & Donato Tapia, *El Chicano Y the Constitution: The Legacy of Hernandez v. Texas: Grand Jury Discrimination*, 6 U.S.F.L. Rev. 129 (1971); U.S. Comm'n on Civil Rights, *Mexican Americans and the Administration of Justice in the Southwest* (March 1970); *The Mexican American and the Law* (Carlos Cortes ed. 1974).

389. See generally Mexican American Leg. Def. and Educ. Fund, *The Forgotten Minority* (1971).

390. *Brown v. Board of Educ.*, 349 U.S. 298 (1954).

391. 33 S.W.2d 790 (Tex. Civ. App. 1930), *cert. denied*, 284 U.S. 580 (1931). The ruling struck down only the practice of segregating Chicano children, but sanctioned separate schools where language barriers precluded a uniform curriculum. The ruling therefore had little effect and it was another 18 years before a federal district court order, *Delgado v. Bastrop Indep. School Dist.*, Civ. No. 388 (W.D. Tex., June 15, 1948), forced the state to repudiate the segregation of Mexican-American children as official state policy. See discussion of cases in Rangel & Alcalá, *supra* note 387, at 311-12.

392. Tex. Const. art. 7, § 7 (1876).

393. 161 F.2d 774 (9th Cir. 1947).

394. *Id.* at 781. As the court noted, California was not legally barred from passing legislation to segregate Mexican-Americans. The legislature had passed, however, only laws segregating Indians and Orientals. *Id.* at 780.

unconstitutional per se, only that California had not legislated a segregationist policy for Chicanos.<sup>395</sup>

In the Mexican-American desegregation cases preceding *Brown*, Chicanos were successful because state laws provided only for the segregation of Blacks and whites and Chicanos were characterized as "white." In *Brown* the Court ruled that "racial discrimination in public education is unconstitutional."<sup>396</sup> To apply the *Brown* decision to Chicanos, courts would either have had to characterize Chicanos as a separate race or to extend the equal protection clause to include culturally distinct minorities.<sup>397</sup>

Due to this confusion—whether to regard Chicanos as a race, white or non-white, or as a separate class based on culture and ancestry—it was another sixteen years before the *Brown* ruling was specifically applied to Chicanos. Citing the distinctive physical, cultural, linguistic, religious, and Spanish-surname characteristics of Mexican-Americans, the federal district court in *Cisneros v. Corpus Christi Independent School District*<sup>398</sup> ruled that "Mexican-American students were an identifiable, ethnic-minority class sufficient to bring them within the protection of *Brown*."<sup>399</sup> Other successful school desegregation decisions followed.<sup>400</sup>

Discriminatory treatment of Chicanos in the administration

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395. "Therefore, conceding for the argument that California could legally enact a law authorizing the segregation as practiced, the fact stands out unchallengeable that California has not done so . . . ." *Id.* at 781.

396. 349 U.S. 298, 299 (1954) (emphasis added). Racial discrimination was subjected to the "strictest scrutiny," the most stringent test possible, with burdens placed on the defendants to disprove discriminatory actions. *See, e.g.*, *Hunter v. Erickson*, 393 U.S. 385 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 397 U.S. 184 (1964); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

397. In *Hernandez v. Brown*, 347 U.S. 475 (1953), the Court appeared to regard Mexican-Americans as a separate group based on ancestry. In deciding the case, the Court considered the segregation of Chicanos in school as evidence of their existence as an identifiable minority group in regard to jury selection. *Id.* at 481. For further discussion of the case see *infra* notes 402-403 and accompanying text.

398. 324 F. Supp. 599, 604 (S.D. Tex. 1970), *modified*, 467 F.2d 142 (5th Cir. 1972), *aff'd*, 330 F. Supp. 1377 (S.D. Tex. 1971) *cert. denied*, 413 U.S. 920 (1973). *Chapa v. Odem Indep. School Dist.*, Civil No. 66-C-92 (S.D. Tex. July 29, 1967) was the first post-*Brown* finding of de jure segregation of Chicanos.

399. *Cisneros*, 324 F. Supp. at 606 (S.D. Tex. 1970). The court first reasoned that *Brown* meant public education should be available to all students despite their "being of a particular race, color, national origin, or some readily identifiable, ethnic-minority group, or class . . . ." *Id.* at 604.

The court pointed to the distinctive language, religion, and culture of Mexican-Americans, and appeared to regard Mexican-Americans as a cultural rather than racial minority. *Id.* at 606-07 n.30.

400. *See, e.g.*, *United States v. Austin Ind. School Dist.*, Civil No. A-70-CA-80 (W.D. Tex. June 28, 1971); *Tasby v. Estes*, 517 F.2d 92 (5th Cir. 1975), *cert. denied*, 423 U.S. 939 (1975); *Alvarado v. El Paso School Dist.*, 593 F.2d 577 (5th Cir. 1979); *United States v. Texas*, 680 F.2d 356 (5th Cir. 1982); *Soria v. Oxnard School Dist.* 386 F. Supp. 539 (C.D. Cal. 1974).

of justice was also rampant in many parts of the southwest. Chicanos were tried by juries lacking minority representation, were subjected to excessive force by law enforcement personnel, received stiffer sentences than other groups, and suffered inadequate police protection.<sup>401</sup> In *Hernandez v. Texas*,<sup>402</sup> the Supreme Court categorically rejected the argument that the fourteenth amendment applied only to "Whites and Negroes" and overturned the murder conviction of a Mexican-American on the grounds that persons of similar ancestry had been systematically excluded from service as jury commissioners.<sup>403</sup> The Court stopped short, however, of specifically referring to Mexican-Americans as a separate identifiable class. Finally, in a similar case,<sup>404</sup> the Supreme Court emphasized that it was no longer open to dispute that Mexican-Americans were a clearly identifiable class,<sup>405</sup> and overturned the conviction of a Mexican-American defendant on the grounds of discrimination in the grand jury selection.

Confusion concerning the proper characterization of Chicanos—as a race, national origin, or separate class—is most evident in employment discrimination cases. Also of importance to Chicano employment rights is the relationship between language and national origin discrimination. Employment discrimination suits can be based on sections 1981 and 1982 of the 1866 Civil Rights Act and/or Title VII of the 1964 Civil Rights Act. Sections 1981<sup>406</sup> and

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401. See Mexican Americans and the Administration of Justice in the Southwest, *supra* note 388.

402. 347 U.S. 475 (1953). *Hernandez* was the first Mexican-American case heard by the Supreme Court.

403. *Id.* at 478. In *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1885), the Supreme Court held that the Fourteenth Amendment was not confined to citizens, but applied to all "without regard to any differences of race, of color, or of nationality." See also *Wong Wing v. United States*, 163 U.S. 228, 242 (1895); *United States v. Wong Kim Ark*, 169 U.S. 649, 695 (1898); *Traux v. Raich*, 239 U.S. 33 (1915).

404. *Castaneda v. Partida*, 430 U.S. 482 (1977). As the Supreme Court stated in *Akins v. Texas*, 325 U.S. 398, 400, 413 (1944), the fourteenth amendment forbids any discrimination against a race in the selection of a grand jury, but does not entitle defendants to a proportional representation of their race on a jury. As the Court reaffirmed in *Cassell v. State of Texas*, 339 U.S. 282 (1950), "[a]n accused is entitled to . . . a jury in the selection of which there has been neither inclusion nor exclusion because of race." *Id.* at 287. See also *Batson v. Kentucky*, 476 U.S. 79 (1986). But see *Alvarado v. Alaska*, 486 P.2d 891 (Alaska 1971).

405. *Castaneda v. Partida*, 430 U.S. 482, 496 (1977).

406. 42 U.S.C. § 1981 (1976) provides:

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exaction of every kind and no other.

(emphasis added).

1982<sup>407</sup> of the 1866 Civil Rights Act guarantee that all citizens shall have the same rights as are "*enjoyed by white citizens.*" The success of Chicanos in suing under sections 1981 and 1982 of the 1866 Civil Rights Act has been mixed.<sup>408</sup> Some courts have held that the 1866 Act must be construed as applying only to racial groups.<sup>409</sup> In several of these decisions, the judges have ruled that Hispanics are white<sup>410</sup> and therefore not covered by the Act. Other courts have considered Chicanos to constitute a racial group<sup>411</sup> and hence to be protected by the terms of the Act. A third group of decisions has held that the line between race and national origin is difficult to determine and that the Act applies to identifiable or national origin groups as well as racial groups.<sup>412</sup>

Title VII of the 1964 Civil Rights Act prohibits employment discrimination on the basis of race, color, religion or national origin.<sup>413</sup> Whereas the courts have held firmly that they will not al-

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407. 42 U.S.C. § 1982 (1976) provides: "All citizens of the United States shall have the same right in every State and Territory, as is *enjoyed by white citizens* thereof to inherit, purchase, lease, sell, hold and convey real and personal property." (emphasis added).

408. In 1968, the Court held that section 1982 prohibited private racial discrimination with regards to the actions listed in the statute. *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968). Seven years later, the Court extended the *Jones* reasoning to section 1981, thereby providing a remedy against racial discrimination in private employment. *Johnson v. R. Express Agency*, 421 U.S. 454 (1975). Both of these decisions considerably strengthened the protections available to racial minorities against discrimination, primarily in the area of business relations and the administration of justice. One commentator points out that sections 1981 and 1982 are broader in coverage and relief, provide longer statutes of limitations, and less stringent exhaustion of remedies than Title II and Title VII of the Civil Rights Act of 1964. Patricia Servati, *Mexican-Americans: Are They Protected by the Civil Rights Act of 1866?* 20 Santa Clara L. Rev. 889 n.10 (1980).

409. The Supreme Court in dicta has characterized the scope of section 1981 and 1982 protections in terms of "racial" equality. See, e.g., *Johnson v. R. Express Agency*, 421 U.S. 454, 459-60 (1975); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287; *Georgia v. Rachel*, 384 U.S. 780, 791 (1966).

410. See, e.g., *Vera v. Bethlehem Steel Corp.*, 448 F. Supp. 610 (M.D. Pa. 1978); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1 (E.D. Pa. 1975).

411. See, e.g., *Gonzalez v. Stanford Applied Eng'g Inc.*, 597 F.2d 1298 (9th Cir. 1979).

For a discussion of Chicanos as properly fitting the intent of the 1866 Civil Rights Act, see Gary A. Greenfield & Don Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 Calif. L. Rev. 662 (1975) and Servati, *supra* note 408.

412. See, e.g., *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970-72 (10th Cir. 1979); *Budinsky v. Corning Glass Works*, 425 F. Supp. 786, 788 (W.D. Pa. 1977). For a discussion and listing of cases following these three approaches, see *Ortiz v. Bank of America*, 547 F. Supp. 550, 559-565 (E.D. Cal. 1982).

413. In *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) the Court held that an employer's refusal to hire an applicant because of her lack of United States citizenship did not fall within the prohibitions of Title VII of the 1964 Civil Rights Act against employment discrimination on the basis of national origin, 42 U.S.C. § 2000-2(a)(1)(1970). "National origin," according to the Court, "refers to the country

low employment discrimination on the basis of national origin or ancestry,<sup>414</sup> they have been less firm in protecting against discrimination on the basis of language.

The courts have created two tests to assist in a determination of national origin discrimination. In *Griggs v. Duke Power Co.*,<sup>415</sup> the Supreme Court formulated the "disparate impact" test. Previously, it had been necessary to prove discriminatory intent. Under the *Griggs* test, a plaintiff needed only to show that certain practices had an adverse impact upon a protected class.<sup>416</sup> The employer's primary defense lies in proving that the practice in question is a bona fide occupational qualification (BFOQ) or is job related.

The second test is referred to as the "immutable/mutable characteristics" rule.<sup>417</sup> Immutable characteristics are accidents of birth that cannot be altered such as race, sex, and national origin. Mutable characteristics are considered alterable characteristics, such as hair length (as opposed to sex) and citizenship (as opposed to national origin).<sup>418</sup>

The courts' application of disparate impact and immutable/mutable characteristics tests in employment based language discrimination cases attests to the legal system's high regard for English as the unofficial language of the United States and the courts' inability or refusal to equate language discrimination with national origin discrimination.<sup>419</sup> In general, the courts have found discrimination on the basis of language only in the most blatant instances.

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where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza*, 414 U.S. at 88. See also *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974).

414. See, e.g., *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974).

415. 401 U.S. 424 (1971).

416. 401 U.S. at 427. See *United States v. Inspiration Consol. Copper Co.*, 6 Fair Empl. Prac. Cas. (BNA) 939 (D. Ariz. 1973) (required high school diploma requirement and general aptitude test suspended because of unjustified discriminatory impact on Mexican-Americans and Indians).

417. This test was first defined by the courts in *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975). See John Wm. Aniol, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. Marshall L. Rev. 667 (1982); Manuel del Valle, *Hispanic Language Rights and Due Process*, N.Y.L.J., July 30, 1981, at 1, col. 1.

418. Stephen Cutler argues in *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 Yale L.J. 1164 (1985), that the courts' current manner of interpreting national origin discrimination cases allows employers to reject less assimilated members of a particular national origin and hire the more assimilated member and not be guilty of discrimination. As the author aptly points out, this is discrimination on the basis of national origin and is a subtle method of requiring assimilation still protected against a finding of discrimination.

419. *New Rider v. Board of Educ.*, 480 F.2d 693 (10th Cir. 1973), cert. denied, 414 U.S. 1097 (1973).

For example, the courts have ruled that an employer does not have the right to require employees to speak English during work breaks.<sup>420</sup> In most other cases, the courts have ruled in favor of the employer, finding the English-only rule to be in line with "business requirements." In *Vasquez v. McAllen Bag & Supply Co.*,<sup>421</sup> the Fifth Circuit denied the appeal of a Spanish-speaking truck driver charging national origin discrimination on the basis of language. Vasquez was denied re-hiring after the company instituted an English-speaking requirement. The court ruled that the defendant had to prove both discriminatory impact and intent. Although 85% of the region's inhabitants were of Mexican-American origin and 60% spoke only Spanish, the court ruled that the English requirement was in line with the requirements of the business.<sup>422</sup>

In *Garcia v. Gloor*,<sup>423</sup> a federal appellate court upheld the dismissal of a Spanish-speaking employee for answering another Spanish-speaking employee in Spanish on company time. As in the *Vasquez* case, Mexican-Americans constituted 75% of the local population.<sup>424</sup> Although an expert witness testified that the Spanish language "is the most important aspect of ethnic identification for Mexican-Americans, and it is to them what skin color is to others,"<sup>425</sup> the court refused to find that language was in essence an immutable characteristic. "National origin," the court wrote, "must not be confused with ethnic or sociocultural traits . . . ." <sup>426</sup>

The courts' predisposition toward finding language discrimination legal is further evidenced in *Soberal-Perez v. Heckler*.<sup>427</sup> Spanish-speaking plaintiffs charged that they had been denied social security benefits because the Secretary of Welfare failed to provide notices and instructions in Spanish. The court, again refusing to equate language with national origin, ruled that while His-

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420. EEOC Dec. 71-446, 2 Fair Empl. Prac. Cas. (BNA) 1127 (Nov. 5, 1970).

421. 660 F.2d 686 (5th Cir. 1981).

422. *Id.* at 671. In *Hernandez v. Erlenbusch*, 368 F. Supp. 752 (D. Ore. 1973), the federal district court ruled that a tavern's English-only policy had violated the civil rights of the Mexican-American patrons under 42 U.S.C. §§ 1981 and 1982. "[I]t is obvious that [the policy against the speaking of foreign languages at the bar] amounts to patent racial discrimination against Mexican-Americans who constitute about one-fourth of the tavern's trade . . . ." *Id.* at 755. For a discussion of "English Literacy as a Condition of Business Activity," see Arnold Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 45 Notre Dame Law. 7, 38-41 (1969).

423. 609 F.2d 156 (5th Cir. 1980), *withdrawn and aff'd*, 618 F.2d 264 (5th Cir. 1980).

424. 618 F.2d at 267.

425. *Id.*

426. *Id.* at 269.

427. 717 F.2d 36 (2d Cir. 1983).

panics were a suspect class, non-English speaking individuals were not.<sup>428</sup> "Language, by itself, does not identify members of a suspect class."<sup>429</sup> Furthermore, the court stated, the Secretary's use of English was rational given "the role of English in our national affairs."<sup>430</sup>

The language cases, perhaps more than any others, illustrate the proclivity of the legal system to operate from an assimilationist model. English is viewed as the norm. Non-English speakers are therefore an aberration. As long as the courts view language as a mutable characteristic and refuse to recognize it as an element of national origin, it will be extremely difficult to prove illegal discrimination on the basis of language. From the perspective of most Chicanos, the preceding rulings indicate a profound misunderstanding of the importance of language within Hispanic culture. As discussed in the next section, bilingual/bicultural education is a central component of the Chicanos' sense of cultural protection.

### *Cultural Protection*

Cultural groups, including most Chicanos, define freedom from discrimination not only as equality of individual treatment but as equality of treatment for their heritage and culture. As the opening quotation of this section asserted, "[t]he worst violence has been the unrelenting discrimination against the cultural heritage—the language and customs—of the Mexican American . . . ."<sup>431</sup>

Two fundamental elements of pluralistically-structured societies are 1) apportioned electoral power among groups and 2) language and educational rights. For several decades, Chicanos have been striving within the confines of the United States juridical system to achieve these two goals.

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428. *Id.* at 41.

429. *Id.* (citing *Frontera v. Sindell*, 522 F. 2d 1215, 1219-20 (6th Cir. 1975) and *Carmana v. Scheffield*, 475 F. 2d 738, 739 (9th Cir. 1973)).

430. *Id.* at 42. In *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975), an Hispanic carpenter charged that he had failed to pass the city test for a carpentry position because the test was administered in English. Balancing the plaintiff's rights with that of the city's, the court ruled that *Frontera's* rights were not violated.

A similar problem exists regarding the administration of justice. The availability of court interpreters varies from state to state. California, for example, has translators on call. Rhode Island requires a court order to obtain the services of a translator. William O. Beeman, *Lack of Bilingual Policy, Unenforced Laws Threaten 'Melting Pot'*, L.A. Daily J., October 15, 1984, at 4, col. 3. See also Leibowitz, *Notre Dame Lawyer*, *supra* note 422, at 41.

431. Steinberg, *supra* note 360, at 24.



*Political Representation*

Political representation is a strongly valued right within United States society. How to define and ensure equal political representation, however, has generated considerable disagreement. Political representation involves two aspects: access to the ballot and apportionment. There is, in addition, a question of governmental responsibility not only to allow, but also to ensure individual and group access to the ballot and political representation.

Minority challenges to voting requirements began in the 1920s and increased dramatically following the passage of the Voting Rights Act of 1965<sup>432</sup> and the amendments of 1970,<sup>433</sup> 1975<sup>434</sup> and 1982.<sup>435</sup> Bit by bit, the courts have found to be unconstitutional such discriminatory voting obstacles as grandfather clauses,<sup>436</sup> all white primary elections,<sup>437</sup> poll taxes,<sup>438</sup> racial designation of candidate on ballots,<sup>439</sup> certain registration procedures,<sup>440</sup> and literacy tests.

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432. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437-446 (codified as amended at 42 U.S.C. §§ 1971-1974(e) (1982)). The Supreme Court upheld the constitutionality of the contested sections of the Voting Rights Act of 1965 in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). For a discussion of "English Literacy as a Condition of Voting" prior to 1969, see Leibowitz, *Notre Dame Lawyer*, *supra* note 422, at 25-38.

433. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314-19 (codified as amended at 42 U.S.C. § 1973 (1982)).

434. Voting Rights Act Amendment of 1975, Pub. L. No. 94-73, 89 Stat. 400-06 (codified as amended 42 U.S.C. § 1973 (1982)).

435. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131-35, (codified as amended 42 U.S.C. § 1973 (1982)).

436. See, e.g., *Guinn v. United States*, 238 U.S. 347 (1914) (Oklahoma's grandfather clause amendment to the constitution held unconstitutional because it violated the 15th Amendment); *Myers v. Anderson*, 238 U.S. 368 (1914).

437. See, e.g., *Nixon v. Herndon*, 273 U.S. 536 (1924) (outlawing a Texas statute forbidding the participation of Blacks in primary elections). See also *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944) (exclusion of Negroes from voting in Texas Democratic Primary violated 15th amendment); *Terry v. Adams*, 345 U.S. 461 (1953) (Blacks could not be deprived of the right to vote on account of race or color).

438. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (Virginia poll tax violated Equal Protection Clause).

439. See, e.g., *Anderson v. Martin*, 375 U.S. 399 (1964) (Louisiana's compulsory designation of candidate's race on ballot violated equal protection); *Hamm v. Virginia Bd. of Elections*, 230 F. Supp. 156 (E.D. Va. 1964) (Virginia provisions requiring racially segregated lists for poll tax, registration and residence certificates unconstitutional).

440. See, e.g., *Beare v. Smith*, 321 F. Supp. 1100 (S.D. Tex. 1971), *aff'd sub nom.* *Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974); *Garza v. Smith*, 320 F. Supp. 131 (W.D. Tex. 1970) (provisions requiring voter-registration between October 1 and January 31 denied equal protection); *Alabama v. United States*, 371 U.S. 37 (1962); *Louisiana v. United States*, 380 U.S. 145 (1965) (requiring registrant to give reasonable interpretation of any clause of state or federal constitution held unconstitutional).

For a number of years, the courts upheld the validity of English literacy tests, finding that they had a proper relationship to the states' interests in promoting "intelligent use of the ballot."<sup>441</sup> Although they ruled literacy tests on their face were "neutral on race, creed, color, and sex" and therefore non-discriminatory,<sup>442</sup> the tests would be unconstitutional if applied discriminatorily.<sup>443</sup>

Faced with the reality that literacy tests were being used to disenfranchise minorities, Congress passed the Voting Rights Act of 1965.<sup>444</sup> The Act empowered the Attorney General to suspend "any voting test or device used by a state or political subdivision in which less than fifty percent of the voting age population was registered on November 1, 1964, or in which less than fifty percent of the voting age population voted in the 1964 presidential election."<sup>445</sup> The Voting Rights Amendment of 1970<sup>446</sup> extended the

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441. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959) (state interest in encouraging non-English speaking people to learn the English language has also been argued). See *Katzenbach v. Morgan*, 384 U.S. 641, 662-664 (1966) (Harlan, J., dissenting).

As Garcia points out, the state interest in maintaining a single language system of English may be at odds with the Court's ruling in *Meyer v. Nebraska*, 262 U.S. 390 (1923). See Franco Garcia, Jr., *Language Barriers to Voting: Literacy Tests and the Bilingual Ballot*, 6 Colum. Hum. Rts. L. Rev. 83, 99 (1974). In *Meyer*, the Court emphasized that certain fundamental rights are guaranteed to all individuals regardless of what language they speak:

The protection of the constitution extends to all, to those who speak other languages as well as to those born with English on their tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

262 U.S. at 401 (1923). See also *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959).

442. Garcia, *supra* note 441, at 86.

443. See, e.g., *Louisiana v. United States*, 380 U.S. 145, 150 (1965) (test requiring registrant to interpret any clause of Louisiana or the U.S. Constitutions chosen by registrar without objective standards discriminated against Negroes).

444. Pub. L. No. 89-110, 79 Stat. 437-446 (codified as amended at 42 U.S.C. § 1971-1974(e) (1982)).

445. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437-446 (codified as amended at 42 U.S.C. § 1971-1974(e) (1982)). The Act also provided that no person who had successfully completed the sixth primary grade in a United States school in which the predominant language was other than English could be disqualified from voting under any literacy test. This section was designed to overcome the problem of the large number of disenfranchised Puerto Rican voters in New York. See *Katzenbach v. Morgan*, 384 U.S. 641 (1965). See also *Cardona v. Power*, 384 U.S. 672 (1966) (case remanded for reconsideration since § 4(e) enacted after original suit). In *Puerto Rican Org. for Political Action v. Kusper*, 350 F. Supp. 606 (N.D. Ill. 1972), the court ordered the city of Chicago to provide bilingual assistance for Spanish speaking voters.

446. Pub. L. No. 91-285, § 201, 84 Stat. 315, upheld in *Oregon v. Mitchell*, 400 U.S. 112 (1970).

ban on the use of literacy tests to the entire country.<sup>447</sup>

The issue was settled; states could not *prohibit* ballot access. The question still remained as to the government's responsibility to *ensure* access through positive means.<sup>448</sup> In 1970, the California Supreme Court heard a case that illustrated the difficulty in defining the extent of the government's responsibility to ensure access to the ballot. In *Castro v. State*,<sup>449</sup> the court ruled that the provision of the state constitution and election code requiring voters to be able to read the Constitution in English violated the equal protection clause for citizens literate only in Spanish.<sup>450</sup> Noting the existence of twenty-eight Spanish language newspapers and magazines in California, the court reasoned that Spanish-speaking citizens could adequately inform themselves of election issues.<sup>451</sup> While the court ruled the literacy test unconstitutional,<sup>452</sup> it did not find that California had a responsibility to institute a bilingual electoral system.<sup>453</sup>

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447. The Voting Rights Act: Unfulfilled Goals, A Report of the United States Commission on Civil Rights, (September 1981).

448. "And so our equal protection question is whether intelligent use of the ballot should not be as much presumed where one is versatile in the Spanish language as it is where English is the medium." *Cardona v. Power*, 384 U.S. 672, 676 (1965) (Douglas, J., dissenting).

449. 466 P.2d 244, 85 Cal. Rptr. 20, 2 Cal.3d 223 (1970).

450. Exclusion of all who cannot read English is obviously *necessary* to accomplish the goal of creating an electorate which can read all materials of political significance printed in English. While that may be a desirable state policy it is hardly so compelling that it justifies denying the vote to a group of United States citizens who already face similar problems of discrimination and exclusion in other areas and need a political voice if they are to have any realistic hope of ameliorating the conditions in which they live.

466 P.2d at 256, 85 Cal. Rptr. at 32, 2 Cal. 3d at 240. In summary, the court noted that it "[w]ould indeed be ironic that petitioners, who are the heirs of a great and gracious culture, identified with the birth of California and contributing in no small measure to its growth, should be disenfranchised in their ancestral land, despite their capacity to cast an informed vote." 466 P.2d at 259, 85 Cal. Rptr. at 35, 2 Cal. 3d at 243.

451. 466 P. 2d at 254-55, 85 Cal. Rptr. at 30-31, 2 Cal. 3d at 238-239.

452. 466 P.2d at 258, 85 Cal. Rptr. at 34, 2 Cal. 3d at 242. *But see* Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D.N.Y. 1970), *aff'd*, 400 U.S. 806 (1970) (Court declined to rule the literacy requirement unconstitutional since Voting Rights Act of 1965 already made it impermissible); Mexican-Am. Fed'n—Washington State v. Naff, 299 F. Supp. 587 (E.D. Wash. 1969) (district court held literacy/fluency requirement a valid exercise of state power), *vacated sub nom.*; Jimenez v. Naff, 400 U.S. 986 (1971). For a criticism of *Naff*, see Note, *Constitutional Law—Voting Rights—State English Literacy Requirements Upheld*, 45 Wash. L. Rev. 401 (1970).

453. 466 P.2d at 244, 85 Cal. Rptr. at 20, 2 Cal. 3d at 223. In Texas, a state law prohibiting assistance of illiterates in marking and preparing ballots, yet allowing assistance to the physically handicapped, was found to violate the equal protection clause of the fourteenth amendment. *Garza v. Smith*, 320 F. Supp. 131 (W.D. Tex. 1970).

In 1975, in extending the 1965 Voting Rights Act, Congress found, "[t]hat, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process."<sup>454</sup> To overcome this discrimination, Congress determined that remedial measures were needed, i.e., bilingual voting information and ballots.<sup>455</sup> The 1982 extension of the Voting Rights Act mandated the continued use of bilingual ballots for certain areas of the country until 1992.<sup>456</sup>

The 1975 and 1982 voting rights amendments can be viewed as expanding the government's traditional role of protecting against discrimination in voting access to that of promoting minor-

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454. Pub. L. No. 94-73, § 203(a), 89 Stat. 402 (codified as amended at 42 U.S.C. § 1973aa-1a (1982)).

455. According to the terms of the Act, bilingual information had to be provided if "more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority . . ." and "the illiteracy rate of such persons as a group is higher than the national illiteracy rate . . ." Pub. L. No. 94-73, § 203(b), 89 Stat. 403 (codified as amended at 42 U.S.C. § 1973aa-1b (1982)). If the minority language is unwritten, the law mandates oral assistance to voters. Pub. L. No. 94-73, § 203c, 89 Stat. 403 (codified as amended at 42 U.S.C. § 1973aa-1e (1982)). According to section e, the term "language minorities" means American Indians, Asian American, Alaskan Natives, or people of Spanish heritage.

456. Pub. L. No. 97-205, § 4, 96 Stat. 134 (codified as amended 42 U.S.C. §§ 1973aa-1b (1982)). The Act changed the standards for determining the necessity for bilingual ballots from a minority population measure to a measure of the number of people who actually have difficulty with English. The effect of the new requirements, for example, decreased the need for Spanish language ballot material in California from 38 to 10 counties. See *Congress Unlikely to Change Law Requiring Bilingual Ballots, Materials*, L.A. Daily J., Nov. 23, 1984, at 3, col. 4.

The provision of bilingual ballots in areas with large foreign language populations has prompted a grassroots attempt to have that section of the law repealed. In November 1984, Californians passed Proposition 38 by a margin of 71% to 29%. See L.A. Daily J., Nov. 23, 1984, at 3, col. 4. The first section of the proposition stated that the people of California "do hereby find and declare" that the "United States Government should foster similarities that unite our people, the most important of which is the use of the English language." *Id.* Of an advisory nature only, the proposition required the California Governor to send a letter to the U.S. Attorney General and all congressional members stating the voters' concern. The proposition was initiated by U.S. English, an organization founded in 1983 by former Senator S.I. Hayakawa. The organization successfully won the abolishment of local bilingual ballots in San Francisco in 1983. See L.A. Daily J., Oct. 23, 1984, at 1, col. 2.

Senator Hayakawa also introduced a constitutional amendment in 1981 making English the nation's official language. See N.Y. Times, April 16, 1981, at 6, col. 1. In 1982, the Senate adopted 78-21 an amendment declaring congressional opinion to be that English is the official language of the United States. See N.Y. Times, Aug. 18, 1982, at A1, col. 2.

In 1980, Dade County, Florida, a county in which 42% of the inhabitants speak Spanish, passed an ordinance prohibiting the use of any language other than English on official business. South Bend Tribune, Oct. 7, 1984, at 5, col. 1. This mandate extends to civil marriages which must be performed in English. Couples who wish to be married in Spanish or Creole (spoken by the large Haitian population) must bring their own interpreters. Chi. Trib., Aug. 2, 1985, § 1, at 4, col. 1.

ity access. Similar progress, however, has not occurred in the area of political apportionment.

Majorities have frequently used gerrymandered districts<sup>457</sup> and multi-member districts to decrease minority voting strength whether the minority is a racial or ethnic group or an opposing political party. It was not until 1962 in *Baker v. Carr*<sup>458</sup> that the Supreme Court discarded the political question doctrine<sup>459</sup> in state legislative apportionment cases.<sup>460</sup> As the Court did not specify the definition of and standards for determining equal representation, courts following *Baker* had two options: to apportion representation on the basis of each individual vote or to allocate electoral strength among groups.

Citing precedent in *Reynolds v. Sims*,<sup>461</sup> the Court stated that the fundamental principle of representative government "is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."<sup>462</sup> Later, in *United Jewish Organizations v. Carey*,<sup>463</sup> the Court underscored its determination to steer clear of group demands for representation. The reapportionment plan under attack by petitioners divided a Hasidic Jewish community between two districts, thereby reducing their previous voting strength. The Court did not acknowledge the cultural identity and group demands of the Hasidic petitioners but regarded them solely as members of the white majority. Working from this view, the Court

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457. Gerrymandered districts—concentrating minority voters in one district or diluting minority voters throughout several districts—have long been used as a means to preclude minorities from exercising their proportional voting strength. See *infra* notes 458-64 and accompanying text.

458. 369 U.S. 186 (1962). The Court did not rule on the merits of the case but remanded the case to the lower court.

459. Under the political doctrine question the Court has held that certain issues, e.g., areas under the exclusive authority of the executive (foreign affairs) or the legislative branch, cannot be resolved by the judiciary. See, e.g., *Colegrove v. Green*, 328 U.S. 549 (1946); *South v. Peters*, 339 U.S. 276 (1950); *Radford v. Gary*, 145 F. Supp. 541 (W.D. Okla. 1956), *aff'd. per curiam*, 352 U.S. 991 (1957).

460. Four years previously in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Supreme Court had held that the validity of a districting plan in Tuskegee, Alabama could be challenged. "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the fifteenth amendment." *Id.* at 346.

*Gomillion* foreshadowed *Baker* in its finding that voting, as a fundamental right, was subject to the strictest scrutiny, rather than to the limited judicial scrutiny previously employed as a standard of review for most state legislation. See, e.g., *Colegrove v. Green*, 328 U.S. 549 (1946). In *Reynolds v. Sims*, the Supreme Court stated that "[a]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." 377 U.S. 533, 562 (1964).

461. 377 U.S. 533 (1964).

462. *Id.* at 560-61 (citing *Wesberry v. Sanders*, 376 U.S. 1 (1964)).

463. 430 U.S. 144 (1977).

found that the apportionment plan fell within the guidelines of the 1965 Voting Rights Act.<sup>464</sup>

The courts have dealt with the question of multi-member districts in a similar manner. Multi-member districts do not violate the equal protection clause *per se*<sup>465</sup> unless operated "to minimize or cancel out the voting strength of racial or political elements of the voting population."<sup>466</sup> To prove that a district is "operated" to dilute voting strength, challengers must prove discriminatory intent, not simply the effect of diluted minority voting power.<sup>467</sup>

In one of the few instances where the Supreme Court has found discriminatory intent, Chicanos successfully proved that the multi-member districts in Dallas County, Texas, were designed to reduce Chicano voting strength.<sup>468</sup> The district court found that "[t]he continued and continuing discriminations against Mexican-Americans . . . effectively [remove them] from the political processes . . . ."<sup>469</sup> The Court affirmed the district court's institution of single member districts "to bring the community into the full stream of political life . . . ."<sup>470</sup>

The Supreme Court's rulings in the preceding apportionment cases indicate a steadfast attachment to the traditional orientation of individualism.<sup>471</sup> Relying on doctrines associated with race-neutral procedural fairness, the Court has consistently found districting plans that discriminate against minorities on the basis of one-person one-vote to be unconstitutional, thereby rectifying minority underrepresentation.<sup>472</sup> The courts, however, have stopped

464. *Id.* at 148.

465. *See, e.g.,* Burns v. Richardson, 384 U.S. 73 (1966); Kilgarlin v. Hill, 386 U.S. 120 (1967); Mann v. Davis, 245 F. Supp. 241 (E.D. Va. 1965); Burnette v. Davis, 382 U.S. 42 (1965); Harrison v. Schaeffer, 383 U.S. 269 (1966).

466. Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

467. Whitcomb v. Chavis, 403 U.S. 124, 149-53 (1971). Justice Douglas forcefully implied in his dissent that a test of intent rather than effect does not adequately protect voting rights under the fifteenth amendment. *See id.* at 171-81 (Douglas, J., dissenting in part and concurring in part).

468. White v. Regester, 412 U.S. 755 (1973).

469. Graves v. Barnes, 343 F. Supp. 704, 733 (W.D. Tex. 1972), *aff'd in part, rev'd in part*, 412 U.S. 755 (1973).

470. Gaffney v. Cummings, 412 U.S. 735 (1972); White v. Regester, 412 U.S. 755, 769 (1973). This issue has become increasingly important to American politics. *See, e.g., Indians in West Turning to Voting Rights Tool That Aided Blacks in South*, N. Y. Times, June 27, 1986, at I12, col. 6; *Los Angeles Council Wrestles with Redistricting*, N. Y. Times, July 24, 1986, at A10, col. 1.

471. *See* Samuel I. Rosenberg, *Reapportionment and Minority Politics*, 6 Colum. Hum. Rts. L. Rev. 107 (1974); Note, *Group Representation and Race-Conscious Apportionment: The Roles of States and the Federal Courts*, 91 Harv. L. Rev. 1847 (1978); *United Jewish Organization v. Carey and the Need to Recognize Aggregate Voting Rights*, 87 Yale L. J. 571 (1978) [hereinafter *United Jewish Organization*].

472. Under this formula, minorities have successfully challenged numerous dis-

short of employing any doctrines which would ensure racial or ethnic representation.<sup>473</sup> "Effective participation does not mean the right to have members of one's race, sex, or group elected to political office."<sup>474</sup> Furthermore, the courts have not declared that minorities have a constitutional *right* to a minimal or proportional level of representation.<sup>475</sup>

### *Language Toleration and Promotion*

To destroy a language is to destroy a culture.<sup>476</sup> The United States has historically fluctuated regarding language promotion and toleration.<sup>477</sup> In the early years, German, French and Span-

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tricting plans designed to dilute their voting strength. See e.g., *Swann v. Adams*, 385 U.S. 440 (1967); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Gaffney v. Cummings*, 412 U.S. 735 (1973) (The Supreme Court eventually reversed the district court because a prima facie case was not made out).

473. "The decisive factor in every case is whether a minority group is allowed 'effective participation in the political process.'" *Seamon v. Upham*, 536 F. Supp. 931, 946 (E.D. Tex. 1982), *vacated*, 456 U.S. 37 (1982) (emphasis in original) (citing *Whitcomb v. Chavis*, 403 U.S. 124 (1971), citing *Reynolds v. Sims*, 377 U.S. at 533).

474. *Lodge v. Buxton*, 639 F.2d 1358, 1374 n. 22 (5th Cir. 1981).

475. See *United Jewish Organization*, *supra* note 471 at 588-94, which argues that the fifteenth amendment provides the basis for such a right.

476. The linguist George Steiner has written:

Language is both the container and the shaping spirit of the ways in which we experience the world. Every single language embodies and gives expression to a particular way of organizing, perceiving, understanding reality. . . . [T]he mental picture of the world which makes up that complex living framework of social existence which we call a culture varies immensely . . . . And it is of this variety that language is the pre-eminent medium and preserver.

George Steiner, *The Tongues of Men*, 2 *The Listener* 534, 536 April 28, 1977; Alcock, Taylor & Welton, *supra* note 46, at 82. See also Benjamin Whorf, *Language, Thought, and Reality* (John Carrol, ed. 1956). Paul Kroskrity describes the importance of the Tewa language to the maintenance of the culture. An important Tewa saying is: *Na-im-bi hi;o na-im-bi wowa:ci na-mu*—"Our language is our history." Or, in the singular, "My language is our history." "These sayings reflect a strong belief that the Tewa language and its use reflect the history of the Arizona Tewa speech community and, at the individual level, that a person's speech reflects his or her biography." Paul Kroskrity, *Ethnolinguistics and American Indian Education: Native American Languages and Cultures as a Means of Teaching*, unpublished paper, available on file with Law and Inequality at 16-17 (1985).

477. According to the 1980 census, 26 million people, nearly 11% of the population, speak a language other than English at home. More than twelve and a half million people speak Spanish, making the United States the seventh largest Spanish speaking country in the world. Arlen J. Large, *War of Words: Proliferation of Spanish in U.S. Inspires Action Against Bilingualism*, *Wall St. J.*, July 22, 1985, at 1, col. 1.

As Kloss points out in *The American Bilingual Tradition*, language rights may be either promotion-oriented (state authorities promote a minority language by sanctioning and encouraging its use in public institutions, e.g., legislative, administrative and educational) or toleration or tolerance-oriented (state authorities do not actively interfere with minority efforts to use language in the private domain). Kloss argues that the United States possesses a far richer and more tolerant history

ish were frequently tolerated and occasionally promoted. During the War of Independence, the Continental Congress printed German translations of many of its proclamations.<sup>478</sup> Pennsylvania employed a German State Printer.<sup>479</sup> Louisiana, home to French Acadians, was a fully bilingual state under its 1845 constitution.<sup>480</sup> In New Mexico, Spanish remained the language of official use well into the twentieth century.<sup>481</sup>

In many instances, recognizing that the adoption of English was an effective tool of assimilation,<sup>482</sup> the government instituted measures prohibiting the use of native languages, especially among such groups as American Indians, Puerto Ricans, and Chicanos.<sup>483</sup> The early 1900s were a particularly intolerant era in United States, exacerbated by the outbreak of World War I.<sup>484</sup> During the mid to late 1800s a number of minority communities ran their own private schools with the language of instruction in the mother tongue of the community. In the late 1800s groups such as the American

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of bilingualism than is generally known. Kloss, *supra* note 39, at 2-3. For a discussion of the United States' orientation toward English language uses, see Leibowitz, *supra* note 422.

478. Kloss, *supra* note 39, at 26. In 1862, Congress voted to have the Report on Agriculture for 1861 printed in German. The resolution, however, was reversed the following day. *Id.* at 31.

479. *Id.* at 144. In 1776, the First Constitutional Convention of Pennsylvania decided to publish its records in German as well as English. *Id.* at 143.

480. *Id.* at 114. In Louisiana, the school law of 1847 dealt with the relationship between French and English schools. There was no question of whether French Schools would be permitted. *Id.* at 121.

481. A school law passed in 1884 in New Mexico stated: "Each county shall be and constitute a school district in which shall be taught . . . reading, writing . . . in either English or Spanish or both, as the directors may determine." Arnold Leibowitz, Educational Policy and Political Acceptance: The Imposition of English as the Language of Instruction in American Schools 51-52 (1971).

482. Joshua Fishman's study, *Language Loyalty in the United States* 42 (1966), indicates an almost complete breakdown among immigrant groups in the transmission of non-English languages between the second and third generations.

483. Students, until well into the 1960s, were punished under Texas law for speaking Spanish on the playground. *See United States v. Texas*, 506 F. Supp. 405, 412 (E.D. Tex. 1981), *rev'd* 680 F. 2d 356 (5th Cir. 1982). *See also* Leibowitz, *supra* note 481, at 44-62. Indian children, many of whom were literally kidnapped and sent to boarding schools far from home, were forbidden and severely punished for speaking their native languages. *Id.* at 63-80. It was not until Puerto Rico was granted the authority to elect its own governor in 1947 that the island was able to reinstitute Spanish as the language of instruction in the schools. *See* Raymond Carr, *Puerto Rico: A Colonial Experiment* 284 (1984). *See also* Leibowitz, *supra* note 481, at 81-104.

484. The Governor of Iowa issued a proclamation prohibiting public use of all languages except English. Findlay, Ohio went a step further, levying fines of \$25 for using German in the town's streets. Kloss, *supra* note 39, at 52. On October 6, 1917, a federal law went into effect forbidding all non-English press from publishing articles about the war and foreign policy without first submitting their English translation to the nearest post office. *Id.* at 60-61. *See also* Leibowitz, *supra* note 481, at 6-21.



Protective Society lobbied for laws forbidding foreign language instruction in public schools.<sup>485</sup> In Nebraska, such a statute was used to convict a public school teacher for teaching German to a child of ten.<sup>486</sup>

In reviewing the statute, the Supreme Court acknowledged that the "desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate."<sup>487</sup> The statute, however, interfered with the constitutional rights of the teacher to teach and the parents to provide for their children's education. Furthermore, the Court admonished:

The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution - - a desirable end cannot be promoted by prohibited means.<sup>488</sup>

Today Hispanic parents, as well as other parents of non-English speaking children, seek educational programs that will provide their children with equal and quality education without promoting their total assimilation. Specifically, these parents request comprehensive bilingual-bicultural educational programs that provide instruction in both English and the child's native tongue as well as teach respect for the cultural heritage and history of the minority student.<sup>489</sup>

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485. See Gary Nash & Richard Weiss, *The Great Fear* (1970); Leonard Dinnerstein & David Reimers, *Ethnic Americans* 61-62 (1975).

486. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

487. *Id.* at 402. In upholding the conviction, the Nebraska Supreme Court stated that the "legislature had seen the baneful effects of permitting foreigners who had taken residence in this country, to rear and educate their children in the language of their native land." *Meyer v. Nebraska*, 107 Neb. 657, 661, 187 N.W. 100, 104 (1922), *rev'd*, 262 U.S. 390 (1923). To allow this, the court wrote, was "inimical to our own safety . . . . It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country." *Meyer*, 107 Neb. 657, 662, 187 N.W. 100, 102 (1922).

The Nebraska Supreme Court echoed the views of Rousseau who wrote in his 1772 thesis, *On Considerations on the Government of Poland* 176 (1953), "It is education that must give souls a national formation, and direct their opinions and tastes in such a way that they will be patriotic by inclination, by passion, by necessity."

488. 262 U.S. at 401. In *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), the Court described *Meyer* as having protected "children's rights to receive teaching in languages other than the nation's common tongue . . . ."

489. Scholars have written a number of informative law review articles on various aspects of the bilingual education dilemma. See Jonathan D. Haft, *Assuring Equal Educational Opportunity for Language-Minority Students: Bilingual Education and the Equal Educational Opportunity Act of 1974*, 18 Colum. J.L. & Soc.

The right to bilingual education rests on case law, federal guidelines, and statutory law including: *Lau v. Nichols*,<sup>490</sup> Title VI of the 1964 Civil Rights Act<sup>491</sup>; and the Equal Educational Opportunity Act.<sup>492</sup> In *Lau v. Nichols*, non-English speaking Chinese students in San Francisco argued that the public school's failure to educate non-English speaking students in a language they could understand constituted discrimination in violation of Title VI of the Civil Rights Act of 1964 and the equal protection clause of the fourteenth amendment. Based on the Court's interpretation of the 1964 Civil Rights Act, and the then-Health, Education and Welfare (HEW) Department guidelines issued pursuant to Title VI of the Civil Rights Act,<sup>493</sup> Justice Douglas wrote, "there is no equality of

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Probs. 209 (1983); Peter Roos, *Bilingual Education: The Hispanic Response to Unequal Educational Opportunity*, 42 Law & Contemp. Probs. 111 (1978); Anthony J. Plastino, *The Legal Status of Bilingual Education in America's Public Schools: Testing Ground for a Statutory and Constitutional Interpretation of Equal Protection*, 17 Duq. L. Rev. 473 (1978-1979); Joaquin G. Avila, *Equal Educational Opportunities For Language Minority Children*, 55 U. Colo. L. Rev. 559 (1984); Leibowitz, *supra* note 422, at 41-50.

Educators and administrators in the Southwest recognized as early as 1946 that English language deficiencies were a primary obstacle to the educational achievement of Mexican-American students. U.S. Comm'n on Civil Rights, *A Better Chance to Learn: Bilingual-Bicultural Education* 14-17 (1975).

490. 414 U.S. 563 (1974).

491. Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000(d) (1982) which states that: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Courts initially relied on Title VI as the primary basis of the right to bilingual education. See *Serna v. Portales Mun. Schools*, 499 F.2d 1147 (10th Cir. 1974); *Rios v. Read*, 480 F. Supp. 14 (E.D.N.Y. 1978); *Cintron v. Brentwood Union Free School Dist.*, 455 F. Supp. 57 (E.D.N.Y. 1978). A reliance on Title VI was replaced in later cases with a reliance on the EEOA. See *United States v. Texas*, 680 F.2d 356 (5th Cir. 1982); *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981); *Guadalupe Org. v. Tempe Elem. School Dist.*, 587 F.2d 1022 (9th Cir. 1978).

In addition, some ten states have passed legislation making bilingual education mandatory for limited English proficient students in their states. Another sixteen states provide some measure of state-funded bilingual education programs. Avila, *supra* note 489, at 559.

492. The EEOA, which was passed in response to *Lau*, guarantees:

No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex or national origin, by-

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

Equal Educational Opportunity Act of 1974, Pub. L. No. 93-380, 20 U.S.C. § 1703(f) (1976).

493. In addition to examining the specific language of Title VI, the Court relied on the guidelines and regulations enacted by the former Department of HEW (now the Department of Health and Human Services) to enforce the Act:

Where inability to speak and understand the English language ex-

treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."<sup>494</sup> Remaining silent on the constitutional issue, the Court also declined to specify a single remedy: "Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others."<sup>495</sup>

*Lau*, although proceeding on statutory grounds, represented a considerable extension of the equal educational doctrine enunciated in *Brown v. Board of Education*.<sup>496</sup> Whereas *Brown* emphasized the inequality of physical separation on the basis of race,<sup>497</sup> *Lau* recognized the inequality of different treatment stemming from cultural variables such as language.<sup>498</sup>

The *Lau* decision left numerous issues unclear, including: the basis on which the right to bilingual education rested; the standards by which to judge the appropriateness of local bilingual programs, i.e., what is meant by "appropriate action";<sup>499</sup> the exact responsibility of local educational agencies to remedy the language problem of English deficient students (EDS); how an "English deficient student" is defined; and the number of students required to establish a bilingual education program.<sup>500</sup>

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cludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

*Lau*, 414 U.S. at 568 (citing 35 Fed. Reg. 11,595 (1970)).

494. *Id.* at 566. The Bilingual Education Act of 1974, section 703(a)(1)(A)-(B), 20 U.S.C. §§ 880b-1(a)(1)(A)-(B) (1976), defines children with a limited ability to speak and understand English as: "(a) individuals who were not born in the United States or whose native language is language other than English, and (b) individuals who come from environments where a language other than English is dominant. . . , and by reason thereof, have difficulty speaking and understanding the English language."

495. 414 U.S. at 565.

496. 347 U.S. 483 (1954).

497. *Id.* at 493.

498. *Lau v. Nichols*, 414 U.S. 568.

499. The EEOA is currently the primary source for bilingual rights litigation. Section 1703(f), combined with Section 1706, allows private suits against local educational agencies for failure to take "appropriate action to overcome language barriers" experienced by students. "Appropriate action" is not defined, nor does the legislative history offer guidance, thereby allowing courts wide latitude in determining the "appropriateness" of each program. See *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981); *Guadalupe Org. v. Tempe Elem. School Dist.*, 587 F.2d 1022 (9th Cir. 1978); *United States v. Texas*, 506 F. Supp. 405 (E.D. Tex. 1981), *rev'd*, 680 F.2d 356 (5th Cir. 1982).

500. Most state laws have established twenty as the number of students required before a statutory obligation arises. Roos, *supra* note 489, at 123. As a number of authors have pointed out, the legislative history and wording of the several acts

Schools currently use two basic types of bilingual education.<sup>501</sup> The first, commonly called "English as a Second Language" (ESL) program, places students in regular classroom study during part of the day, with the remainder of the day spent in special English classes. The emphasis in ESL programs is on correcting a child's deficiency in English and is obviously assimilationist in design. No attempt is made to impart knowledge of, or respect for, the child's cultural heritage. The second program, known as "bilingual-bicultural" education, is far more comprehensive. Students receive special English language instruction and are taught in both English and in their native tongue in all subject areas. A further component of the program is instruction on their native history and culture.

The courts have generally split in their findings as to whether the ESL program properly satisfies the statutory requirements for bilingual education.<sup>502</sup> In *Serna v. Portales Municipal Schools*,<sup>503</sup> the Tenth Circuit, noting the psychological trauma<sup>504</sup>

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would suggest that *every child* is entitled to special language assistance if he or she can show a language "impediment" resulting in "[i]neffective" or "[u]nequal" participation in the school district's educational program. See, e.g., Roos, *supra* note 489, at 119. Title VI, for example, states, "[n]o person . . . shall, on the ground of . . . national origin . . . be subjected to discrimination." Roos, *supra* note 489, at 122 (citing language from 42 U.S.C. § 2000(d) (1976)). See *Aspira of New York, Inc. v. Bd. of Educ.*, 394 F. Supp. 1161 (S.D.N.Y. 1975); *Otera v. Mesa County Valley School Dist. No. 51*, 408 F. Supp. 162 (D. Colo. 1975), *vacated on other grounds*, 568 F.2d 1312 (10th Cir. 1977).

501. Estimates indicate that approximately 3.6 million students are rated as LEP (limited English proficiency), 80% of whom are Hispanics. Of the total, only 1.3 million students, speaking 80 different languages, are currently enrolled in bilingual education programs. Ezra Bowen, *For Learning or Ethnic Pride?* Time, July 8, 1985, at 80. In 1984, \$139 million was distributed to 581 school districts. Edward Fiske, *One Language or Two?* N. Y. Times, Nov. 10, 1985, § 12, at 1.

Funds for pilot projects in bilingual education were first provided in 1968 when Title VII of the Elementary and Secondary Education Act of 1965 was passed. Bilingual Education Act, Pub. L. No. 90-247, § 701-702, 81 Stat. 816 (1968) (current version at 20 U.S.C. § 3221 (West Supp. 1986)) [hereinafter Bilingual Education Act].

502. As Roos argues in his article, despite the findings of several courts that English as Second Language (ESL) programs are adequate to fit the "appropriate action" standard, a strong case can be made that the legislative history of various federal and state laws mandates a bilingual-bicultural program. Roos, *supra* note 489, at 125-28.

503. 499 F.2d 1147 (10th Cir. 1974). See also *Aspira of New York, Inc. v. Bd. of Educ.*, 394 F. Supp. 1161 (S.D.N.Y. 1975).

504. Expert witnesses explained what effect the Portales school system had on Spanish surnamed students. Dr. Zintz testified that when Spanish surnamed children come to school and find that their language and culture are totally rejected and that only English is acceptable, feelings of inadequacy and lowered self esteem develop. Henry Pascual, Director of the Communicative Arts Division of the New Mexico Department of Education, stated that a child who goes to a school where he finds no evidence of his language and culture and ethnic group represented becomes withdrawn and nonparticipating. The

borne by non-English speaking students who are taught in English, ordered the school district to institute a bilingual-bicultural program. In two cases decided in 1978, *Rios v. Read*<sup>505</sup> and *Cintron v. Brentwood Union Free School Dist.*<sup>506</sup>, the courts interpreted the Equal Opportunities Act of 1974, Title VI of the Civil Rights Act of 1964, and *Lau* as requiring the school district to establish a bilingual-bicultural program for its ESL students.<sup>507</sup>

Success has not been universal. In *Guadalupe Org., Inc. v. Tempe Elementary School Dist.*,<sup>508</sup> Mexican-Americans and Yaqui Indians argued that the district's ESL program did not meet the standards required by the EEOA. The plaintiffs asked for the implementation of a full scale bilingual education program which included the historical contribution of the minority children's ancestors. The court denied the request, ruling that the remedial English program was sufficient to meet the criteria of "appropriate action" as required by the EEOA.<sup>509</sup>

The Tenth Circuit in *Keyes v. School District No. 1 Denver, Colo.*,<sup>510</sup> overturned a lower court mandate to implement a comprehensive bilingual-bicultural education program. The *Keyes* case, although primarily a desegregation case, also illustrates the dilemma that can arise when minority issues are thought of solely in terms of overcoming racial discrimination. Hispanics had intervened in *Keyes* to protect bilingual education programs. The peti-

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child often lacks a positive mental attitude. Maria Gutierrez Spencer, a longtime teacher in New Mexico, testified that until a child developed a good self image not even teaching English as a second language would be successful.

*Serna*, 499 F.2d at 1150.

505. 73 F.R.D. 589 (E.D.N.Y. 1977). In ruling on plaintiffs' preliminary motion, the court rejected the argument that any affirmative action satisfied the Court's ruling in *Lau*: "An inadequate program is as harmful to a child who does not speak English as no program at all." *Id.* at 595. In later deciding the case, the court emphasized that "[t]he school district is not obligated to offer a program of indefinite duration for instruction in Spanish art and culture . . . . The purpose of (bilingual education) is not to establish a bilingual society." *Rios v. Read*, 480 F. Supp. 14, 23 (E.D.N.Y. 1978). See also, Herbert Teitelbaum & Richard Hiller, *Bilingual Education: The Legal Mandate*, 47 Harv. Educ. Rev. 138, 149-50 (1977).

506. 455 F. Supp. 57 (E.D.N.Y. 1978).

507. See also *Castaneda v. Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981), where the court developed a three-prong analysis to determine whether the school's program violated section 1703(f) of the Equal Employment Opportunities Act.

508. 587 F.2d 1022 (9th Cir. 1978).

509. *Id.* at 1026-27; "There exists no constitutional duty imposed by the Equal Protection Clause to provide bilingual-bicultural education such as the appellants request. The decision of the appellees to offer the educational program attacked by appellants bears a rational relationship to legitimate state interests." A similar ruling was reached in *United States v. Texas*, 506 F. Supp. 405 (E.D. Tex. 1981), *rev'd*, 680 F.2d 356 (5th Cir. 1982).

510. 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

tion requested the court not sacrifice bilingual education programs for the sake of a desegregation order that would scatter their children among schools, thereby negating the need for such programs. The district court had agreed. The Tenth Circuit reversed this part of the district court's order, concluding: "Bilingual education . . . is not a substitute for desegregation. Although bilingual instruction may be required to prevent the isolation of minority students in a predominantly Anglo school system such instruction must be subordinate to a plan of school desegregation."<sup>511</sup>

Bilingual education has been a highly controversial subject, becoming even more so in recent years. Although, as discussed above, victories have been won in several districts, an analysis of recent rulings suggests no future progress. In *San Antonio Indep. School Dist. v. Rodriguez*,<sup>512</sup> the Supreme Court refused to find a fundamental right to education,<sup>513</sup> thereby foreclosing strict scrutiny analysis in cases claiming a right to bilingual education. A federal district court has also refused to find that bilingual education is constitutionally mandated by the equal protection clause.<sup>514</sup> In addition, the *Bakke* ruling requiring a showing of discriminatory intent, as opposed to effect, has emasculated the usefulness of Title VI as a basis for suit in most bilingual education cases.<sup>515</sup> Fi-

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511. *Id.* at 480. Desegregation need not conflict with bilingual education programs if properly designed. In *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir. 1976), *cert. denied*, 426 U.S. 935 (1976), and U.S. v. Board of Educ. of Waterbury, 560 F.2d 1103 (2nd Cir. 1977), the courts ordered the schools to assign Hispanic students in such a way as to meet the state mandated bilingual program.

512. 411 U.S. 1 (1973).

513. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution, (citations omitted). Education, of course, was not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.

*Id.* at 33-35.

514. In *Martin Luther King Junior Elementary School Children v. Mich. Bd. of Educ.*, 451 F. Supp. 1324 (E.D. Mich. 1978), the court ruled that there is no constitutional right to special educational programs to overcome unsatisfactory academic performances based on cultural, social, or economic background.

515. *California Regents v. Bakke*, 438 U.S. 265, 350-55 (1978) (Brennan, J., concurring and dissenting). In *Bakke*, the Court adopted the stricter standard of proving discriminatory intent under Title VI. Title VI has proven to be of limited use in bilingual education cases. In *Lau*, the petitioners were required only to show evidence of discriminatory effect. *Lau*, 414 U.S. at 568. *Cf. Mobile v. Bolden*, 446 U.S. 55 (1980). See Note, *Supplemental Language Instruction for Students with Limited English-Speaking Ability: The Relationship Between the Right and the Remedy*, 61 Wash. U.L.Q. 415 (1983).

nally, the willingness of courts to find ESL programs sufficient to fulfill the mandate of bilingual education is unacceptable to those minorities who want their children to learn the positive value and beauty of their own native language and heritage while also becoming proficient in English.

As in all minority issues, the executive branch's record in actively litigating cases, and supporting funding for key programs, is a prime indicator of the nation's commitment to minority rights.<sup>516</sup> President Reagan voiced his support for the assimilationist model early in his administration, stating, "it is absolutely wrong and against [the] American concept to preserve native language and culture in school programs."<sup>517</sup> Secretary of Education William Bennett echoed this view: "As fellow citizens, we need a common language . . . . In the United States that language is English."<sup>518</sup> Secretary Bennett also announced his intention to use his department's regulatory powers to assist local schools in pursuing flexible instruction systems and to request Congress to allow increased funding for teaching methods emphasizing English.<sup>519</sup>

As the preceding analysis indicates, Chicanos have met with varied success in obtaining recognition and protection of their cultural rights. The courts have maintained the traditional Lockean view of government as a social contract among individuals. Political representation is based on one person-one vote. Districts are drawn to ensure racial neutrality not group representation.

Regarding language toleration and promotion, it is clear that English is the unofficial language of the United States. Protection against discrimination on the basis of language in the workplace barely exists. Language is not considered an integral aspect of national origin and thereby protected. It is further clear that the government no longer supports bilingual-bicultural programs, but is promoting the adoption of the assimilationist-oriented ESL programs. Only in the area of bilingual ballot requirements is there evidence of the government recognizing and promoting language rights. These measures, however, are clearly demarked as reme-

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516. Bilingual education funding has decreased from an approximate high of \$175 million in 1982 to \$139 million in 1984. In 1982 the Department of Education estimated that "'only about a third' of the estimated 2.4 million limited English proficient children in the nation [were] being served." Fiske, *supra* note 501, at 45.

517. Washington Post, March 4, 1981, at 5 (cited in Richard Ruiz, *Ethnic Group Interests and the Social Good: Law and Language in Education*, 1 Ethnicity, Law and the Social Good 56 (Winston Van Horne & Thomas Toneson, ed. 1983) [hereinafter Ruiz]).

518. *A Failed Path*, Time, Oct. 7, 1985, at 55.

519. *Id.*

dial and of limited applicability, to be phased out in a timely fashion.

### Conclusion

This article has focused on three general issues: the legal right to the protection of culture; the most successful constitutional bases for protecting cultural rights; and the main societal and legal obstacles within American society and jurisprudence to a greater protection of culture. As a vehicle for examining and understanding these issues, this article has examined the success of three nonimmigrant groups, the American Indian, the native Hawaiian, and the Chicano, in obtaining a recognition and protection of their cultural rights.

The protection of cultural rights is an issue rarely acknowledged, much less squarely dealt with by the United States legal system. The courts have never defined culture and in several instances have offered conflicting conclusions as to the relevance of religion<sup>520</sup> or language to culture.<sup>521</sup> More importantly, the courts have not interpreted the Constitution to include a protection of cultural rights, as they have a protection of privacy.<sup>522</sup>

Despite the courts' refusal to directly sanction cultural protection, minorities have achieved some victories by relying on traditional constitutional guarantees of religion, equal protection, and the right of parents to educate and raise their children. Of the three, the most successful have been the freedom of religion and the right of parents to educate and raise their children.<sup>523</sup>

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520. See *supra* notes 169-235 and accompanying text.

521. In *Lau v. Nichols*, 414 U.S. 563 (1974), for example, the Supreme Court clearly stated that children could not be discriminated against in education on the basis of language. Language would appear to be a central element of culture. In *Martin Luther King Junior Elementary School Children v. Michigan Board of Education*, 451 F. Supp. 1324, 1327 (E.D. Mich. 1978) however, the court stated: "No law or clause of the Constitution of the United States, explicitly secures the right of plaintiffs to special education services to overcome unsatisfactory academic performance based on cultural, social, or economic background."

522. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

In *Sequoyah v. T.V.A.*, the court stated that: "Though cultural history and traditions are vitally important to any group of people, these are not interests protected by the Free Exercise clause of the First Amendment." *Sequoyah v. T.V.A.* 620 F.2d 1159, 1165 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

In only two cases, *Frank v. State*, 604 P.2d 1068 (Alaska 1979) and *Peyote Way Church of God, Inc. v. Smith*, 556 F. Supp. 632 (S.D.N.Y. 1983), *modified*, 742 F.2d 193 (5th Cir. 1984), did the court clearly state that the federal government possessed an obligation to protect Indian culture.

523. As the Court emphasized in *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), the history and culture of Western civilization "reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the



In attaining recognition and protection of their cultural rights, American Indian tribes have been the most successful of the three groups. The courts and the federal government have acknowledged the importance of tribal cultures in the *Frank*,<sup>524</sup> *Woody*,<sup>525</sup> and *Martinez*<sup>526</sup> cases as well as the Indian Religious Freedom<sup>527</sup> and Indian Child Welfare Acts.<sup>528</sup> When viewed in totality, however, it is clear that the federal government's willingness to acknowledge tribal cultural rights stems more from the tribes' political status and jurisdictional rights than from either a moral recognition or constitutional basis. Tribes have proven most successful in protecting a cultural right or practice when they can prove jurisdictional control as in the case of domestic relations. Cultural questions, with no jurisdictional basis, are far more tenuous as is indicated by the Indian religious land cases.

Given the courts' inadequate understanding, or lack of treatment of culture, it is not surprising that the courts have frequently shown a serious misunderstanding of Indian cultures. The courts accept the centrality of traditional religious practices, if the practices resemble some feature of Christianity. When the issue at stake involves the use of sacred lands, the courts have uniformly used the most stringent freedom of exercise test to preclude the exercise of tribal rights.

The status and cultural rights of native Hawaiians are best characterized as evolving. Native Hawaiians have only recently demanded a definition and protection of their rights. The state of Hawaii has gone to considerable lengths, compared to other states, in recognizing and protecting the cultural rights of its indigenous inhabitants. Language, traditional law, and preservation of traditional practices is mandated by state law. The practical means to support this mandate are derived from the lands and revenues set aside for native use.

The federal government's commitment to the protection of Hawaiian culture remains unclear considering its inaction on a Hawaiian reparations bill. The passage of such a bill would not only acknowledge the moral and legal debt owed to native Hawaiians, but would indirectly affirm and further the cultural and political rights of native Hawaiians. Reparation funds would considerably

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parents in the upbringing of their children is now established beyond debate as an enduring American tradition."

524. *Frank v. State*, 604 P.2d 1068 (Alaska 1979).

525. *People v. Woody*, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964).

526. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

527. 25 U.S.C. § 1966 (1982).

528. Pub. L. No. 45-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1982)).

strengthen the native Hawaiians' existing means to promote programs and fight legal battles to protect their lands, identity and cultural heritage.

Chicanos have fared the worst of all three groups in the protection of their culture. Backlash against Hispanic immigration is no doubt the most important societal factor working against Chicanos. In addition to the previously described obstacles, Chicanos face an added burden of possessing no official legal status as is possessed by Indian tribes and native Hawaiians, no matter how undefined.

A more subtle, yet critical factor militating against the courts' willingness to extend cultural protection to any group, especially Chicanos, is the legal system's emphasis on the eradication of racial discrimination. This emphasis on race becomes a complicating factor due to the tendency of courts either to confuse, or to use interchangeably the terms race and ancestry or national origin.<sup>529</sup> The confusion of race with national origin is important because of the nation's concern with eradicating racial discrimination. Culture is closely tied to the notion of national origin or ancestry. Race is not necessarily linked with culture. Racial characteristics may disappear long before cultural practices. If the courts continue to confuse race and ancestry, it will be very difficult to promote a system of positive rights based on national origin designed to enhance and maintain cultural heritages.

Of related difficulty and of fundamental importance is the manner in which the courts have chosen to define and apply the term "equal protection." The guarantees of equal protection accrue to the individual, not groups.<sup>530</sup> Furthermore, the courts have defined equal protection as equality of opportunity, not

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529. In *Hirabayashi v. United States*, 320 U.S. 81, 100 (1942), for example, the Supreme Court stated that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious . . . . For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."

In *Oregon v. Mitchell*, the majority of the Supreme Court Justices discussed the literacy test ban as a protection against racial discrimination. Chief Justice Burger, Justices Black, Brennan, Stewart, and Blackmun validated the literacy test ban on the grounds of protecting against racial discrimination. See 400 U.S. 112 at 131-34, 216-17, 231-36, 282, 284 (1970). Only Justice Douglas states the ban to be illegal because of its use against minority groups. *Id.* at 144-47. Literacy tests were not only used to disenfranchise southern Blacks, but were also employed in the Southwest and West to disenfranchise Spanish and other non-English speakers.

530. There is one case in which the courts have accorded the rights under the 1866 Civil Rights Act as accruing to groups. In *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970 (10th Cir. 1979), the court pointed out that the protections afforded in the 1866 Act are measured in terms of groups: "The measure is group to group, and plaintiff has alleged that the 'group' to which he belongs—those he de-

equality of outcome. To ensure that individuals are guaranteed equality of access to a right requires protections against the interference of one's rights to exercise that right. Equal protection defined as equality of outcome involves the establishment of programs to ensure that individuals and groups have the capacity to exercise their rights.

The former approach to equal protection<sup>531</sup> virtually precludes a system whereby cultural minorities are guaranteed an equal share (i.e., equality of results or outcome) through the bestowal of positive benefits.<sup>532</sup> In the final analysis, programs such as bilingual education, bilingual ballots, and affirmative action do not deviate from a traditional orientation to equal protection. These programs are of a remedial,<sup>533</sup> transitory nature,<sup>534</sup> designed

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scribes as of Mexican American descent—is to be measured against the Anglos as the standard." See Fiss, *supra* note 72.

531. Among the most widely discussed works that wrestle with the concept of rights, equality, and the proper procedures for ensuring a just society are: John Rawls, *A Theory of Justice* (1971); Ronald Dworkin, *Taking Rights Seriously* (1977); and Robert Nozick, *Anarchy, State and Utopia* (1974). Professors Rawls and Dworkin support programs such as affirmative action as a proper procedure for achieving equality of opportunity. Professor Nozick argues for what he terms a "minimal state," a state which remains clear of attempting to ensure equality of opportunity. While these two positions are viewed as competing schools of thought, neither recognizes nor discusses the necessity for conceptualizing rights as belonging to groups as opposed to individuals. See Vernon Van Dyke's criticism of Rawls in *Justice as Fairness: For Groups?* 69 *Am. Pol. Sci. Rev.* 607 (1975).

532. The Supreme Court in the University of Cal. Regents v. Bakke, 438 U.S. 265 (1978), specifically excluded native groups from the application of the court's analysis. *Id.* at 304, n.42. Furthermore, the Supreme Court has held in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), that *legislative bodies* could legally use racial and ethnic criteria to design "a narrowly tailored" program "to accomplish the objective of remedying the present effects of past discrimination." *Id.* at 480. The Court distinguished the holding in *Fullilove* from *Bakke* by pointing out that unlike *Fullilove*, no governmental body had found the existence of illegal discrimination. In *Bakke* there had been "no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts." 438 U.S. at 305 (1978) (Powell, J.).

This orientation was implicit in the Hasidic representation case, *United Jewish Org. of Williamsburgh, Inc., v. Carey*, 430 U.S. 144 (1977), and directly stated in *Lodge v. Buxton*, 639 F.2d 1358, 1368, n.22 (5th Cir. 1981).

533. Language deficiency was originally conceived as closely associated with poverty. Title VII as originally written in 1967 specified that a child had to possess a non-English primary language and be from a family with an annual income of \$3000 to qualify for bilingual programs. Ruiz, *supra* note 517, at 54.

534. According to Ruiz, The Massachusetts Transitional Bilingual Education Act of 1972 clearly states that "[t]he General Court believes that a compensatory program of transitional bilingual education can meet the needs of [limited English-speaking] children and facilitate their integration into the regular public school curriculum." *Id.* at 55. Wisconsin's Bilingual-Bicultural Education Act (1975), listed in the Wisconsin code as a subchapter under a section on handicapped children, states: "It is the policy of this state that a limited-English speaking pupil participate in a bilingual-bicultural education program only until such time as the pupil is able to perform ordinary classwork in English." *Id.*

to ensure that all individuals *despite* their membership in a cultural group have an equal chance of access to the benefits of the polity. They remain assimilationist,<sup>535</sup> not pluralistic in design. Few people, outside of the minorities themselves, perceive bilingual education as a method to preserve a rich language heritage while learning the dominant language.

The United States prides itself on its deeply held values of freedom and equality. A large number of people define freedom as the right to maintain their culture and ask that their cultures be given equal treatment and respect with others. United States society has made great strides in extending true equality to all individuals. Can it not now consider the extension of equality to all groups—especially those non-immigrant groups with a strong moral and legal claim to the land and its riches?

Perhaps an even more subtle yet important question is what makes the United States society so fearful of cultural diversity? We are no longer a nation searching for an identity and striving to develop. Cultures are the window through which a people views, interprets, and understands the complexities of the world. Each culture brings with it the accumulated years of wisdom, values, and understanding of a people. To destroy a culture is to destroy the "social gene pool," thus limiting humanity's ability to adapt to the environment.

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535. As Ruiz so aptly observed: "[A]dding a foreign language to English is associated with erudition, social and economic status and, perhaps, even patriotism . . . ; but *maintaining* a non-English language implies disadvantage, poverty, low achievement and disloyalty . . . ." Ruiz, *supra* note 517, at 55 (emphasis in original).

As Gerald Johnson has written, "no polyglot empire of the world has dared to be as ruthless in imposing a single language upon its whole population as was the liberal republic 'dedicated to the proposition that all men are created equal.'" Gerald Johnson, *Our English Heritage* 118-19 (1949).