One Nation Indivisible, with Liberty and Justice for All: Lessons from the American Experience for New Democracies

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“ONE NATION INDIVISIBLE, WITH LIBERTY AND JUSTICE FOR ALL”: LESSONS FROM THE AMERICAN EXPERIENCE FOR NEW DEMOCRACIES*

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INTRODUCTION

THIS summer I had the privilege of traveling to Bulgaria as a member of a United States delegation monitoring that country’s first open election in forty-six years. In that small country, the tension between minority cultures clamoring for equality and pro-democratic forces calling for a unified front against Communist rule was electrifying. Indeed, within months of the overthrow of the Communist regime, historically persecuted Turks has formed their own party and in the June election they gained almost ten percent of the Assembly seats, thus producing a swing vote in Bulgaria’s future government. Under the Communists, the Turks had been forced to change their names, and were denied access to schools, forbidden circumcision rites and barred from their mosques. Even the Turkish language and native costumes were banned. In the year preceding the 1989 overthrow of the one-party Communist government, 330,000 Turks emigrated from Bulgaria. But even as the anti-Communist opposition in Bulgaria mobilized for the coming elections in the first half of 1990, some of its most enthusiastic democratic advocates still resisted full equality for the Turks.

In neighboring Romania (where my husband was an election monitor), the Hungarians in Transylvania were the unassimilated minority. In Czechoslovakia, deep-felt historical tensions between Czechs and Slovaks continued to endanger that country’s future as a united democratic republic. Although Bulgaria, Czechoslovakia and Romania do not have our active tradition of judicial or constitutional protection of individual rights, those countries are now preparing to write new constitutions for submission to their General Assemblies within the next two years. Those Assemblies will contain some representatives of minority cultures, who, promisingly, were allowed to vote relatively freely in the recent elections. Over the long term, however, as the new democracies springing up in Eastern Europe absorb historically oppressed minorities and establish independent judiciaries, those judiciaries will have to accommodate the abiding tension between national integrity and the rights of minorities to

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equal treatment and respect. It is in this global context, then, that we may reflect on the successes and failures of our own American experience in granting equality and liberty to all people in a nation that is one and indivisible.

Recent events to the north of us, in Canada, suggest that two or even three centuries of harmonizing cultural differences do not forever immunize a country from the threat of separatism. Canada's calm surface has cracked under social pressures, revealing a country deeply divided by geography, history and divergent languages and cultures. The head of its Liberal Party warns ominously that "[t]he world has known other serene communities that have come apart from internal tensions."

We ourselves are not yet home free. One columnist wrote recently "America, alone among the multi-ethnic countries of the world, has managed to assimilate its citizenry into a common nationality [but] we are now doing our best to squander this great achievement." As venerable an American institution as the jury—described once as "dependable neighbors who ... uphold the community canons"—may be threatened by racial divisiveness. Earlier this year there was a newspaper story about a D.C. juror in a more mundane criminal trial who reportedly announced that she would not send any young black man to jail for drugs whatever the evidence showed.

So we had best speak with humility as well as pride when we hold up as a model for others our record in melding "one nation indivisible, with liberty and justice for all." There is indeed a symbiotic link between these two phrases, so familiar to us all from recitations of the pledge of allegiance. America's unique civic culture is, in the words of Kenneth Karst, a "mixture of behavior and belief that infuses our law and our institutions, transcending race, religion, and ethnicity, allowing individual citizens to preserve their separate cultural identities and still identify themselves as Americans."

2. Krauthammer, The Tribalization of America, Washington Post, Aug. 6, 1990, at A11; see also Bernstein, The Arts Catch Up With a Society in Disarray, NY Times, Sept. 2, 1990, § 2, at 12 ("The contemporary ideal is not assimilation but ethnicity ... We used to say e pluribus unum. Now we glorify pluribus and belittle unum. The melting pot yields to the Tower of Babel."). (quoting A. Schlesinger, Jr.) (emphasis added). Bernstein notes that [T]he tendency now is for individuals, particularly members of minority groups, to identify primarily with their groups rather than with the common culture ... In academic circles ... the very idea of a common culture is under assault, seen merely as a tool used by what is called the white, male, heterosexual establishment to exercise its 'hegemony.'
3. K. Karst, Belonging to America 102 (1989). I am indebted to Professor Karst's fine book for setting me thinking on several of the themes in this Article.
But in fact, our nation has an unsettling history of uneasy intercultural relations; slavery and segregation of blacks is the most invidious but by no means the only example of our darker side. Jews were forbidden to vote in most states until the mid-nineteenth century, and Asians in the West were subjected to special taxes and forbidden from owning land or testifying against whites. During the infamous “Red Scare” following World War I, there were bans on foreign languages in private as well as public schools and criminal prosecutions for expression of anti-American sentiments. Iowa’s governor at one point threatened to forbid the use of foreign languages over the telephone.

Thus, by exercising its constitutional authority to decide claims by minorities denied liberty and justice, our federal judiciary has often occupied a definitive role in the unifying process. It has ruled directly on the political rights of religious, cultural, racial and ethnic groups to vote, organize and express themselves. Moreover, it has mediated the omnipresent tension between demands for constant and uniform national values and claims of citizens bonded to distinct ways of life formed by vastly different origins, creeds and religions. At times, our courts have facilitated the inclusion of these groups in a truly democratic society; at others, unfortunately, they have perpetuated their exclusion from equal citizenship.

Tonight I would like to examine how well the courts have performed their unique melding role in American life. This examination will perhaps enlighten the “dos” and “don’ts” for newly emerging democracies, which are beset with their own ethnic and tribal divisions.

I. One Nation, Indivisible

Following the American Revolution but prior to the Constitution’s ratification, the thirteen states were separate, sovereign nations united in a loose confederation. The central government was weak: it lacked the power to impose taxes, it could not enforce its laws against rebelling states, and it generally depended on the good will of the states for its operation. Our Constitution changed that. The peoples of the several states joined together to form one sovereign nation, the United States, declaring that its Constitution and laws would be the supreme law of the land and would override the laws of the separate states when necessary.

Several early Supreme Court decisions by Chief Justice John Marshall solidified the power of the national government in crucial ways, paving
the way for a national commercial economy and validating the institutional bases for a national polity. One of these cases was *Martin v. Hunter's Lessee,* a case featuring a conflict between a state court’s adjudication of the rights of local landowners and the provision of a national treaty settling land claims arising out of the Revolutionary War. Marshall’s Supreme Court ruled that under the Constitution, any state-court judgment on a question of federal law could be appealed for final decision to the United States Supreme Court. This ruling insured early on that the interpretation of federal law and treaties would be uniform throughout the United States, a vital component of a strong, unified nation that had to deal with foreign nations. Without it, differing state-court interpretations might have blunted the impact of federal laws.

The Marshall Court also decided *M'Culloch v. Maryland,* a case that expanded the scope and established the supremacy of the national government’s power. Congress, over opposition from the states, had incorporated a national bank. Maryland imposed a tax on paper issued by the bank, which M'Culloch, the cashier, declined to pay. The Supreme Court held that although the Constitution did not expressly authorize the national government to charter a bank, Congress’ power to enact all laws “necessary and proper” to execute expressly granted powers was broad enough to encompass the creation of a bank that handled the nation’s money. The state tax then, was a nullity because a “power to tax... [was] a power to destroy.” Thus, national institutions were immunized from predatory attacks by the states, which enabled them to carry on with national business.

The Marshall Court’s trilogy on national power was completed in *Gibbons v. Ogden.* The state of New York had granted Ogden a monopoly on steamboat traffic between New York and New Jersey. The Court invalidated the monopoly on the grounds that it was inconsistent with a federal statute governing water traffic. Even without positive action by the national Congress, the Constitution’s grant to Congress of power over interstate commerce implied that the individual states had limited power to interfere.

These three cases, which the Marshall Court decided over an eight-year period, played a vital role in defining the respective realms of state and national regulatory power and binding the economic interests of an assortment of quarreling states into one nation. Marshall possessed a vision of a great and powerful “one nation indivisible,” and his Court’s decisions were instrumental in transforming that vision into reality.

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10. *Id.* at 327.
II. With Liberty and Justice for All

The creation of an American nation, however, could not be accomplished merely by abolishing trade barriers between states or enhancing national powers. Americans were a remarkably diverse people. The vastness of the nation, its revolutionary birth and its immigrant heritage all militated against the development of a homogeneous culture, which could foster national bonding. Indeed, a tolerance of pluralism had been an American civic ideal from the very beginning. In breaking away from the control of class-ridden Britain, where citizens were accorded special privileges by right of birth, our forefathers declared in the Declaration of Independence that it was a self-evident truth that “all men are created equal.”

The paradoxical task our nation’s builders set for themselves was to create one nation indivisible not by suppressing the differences among our peoples but by treating them all equally in the political and legal arenas. It was a radical but correct notion, one still worthy of emulation 200 years later. Our nation’s experience in implementing it is another matter, however, worthy more of close study than blind imitation.

For almost two centuries, the ideal of equality had to coexist with practices antithetical to it. Thomas Jefferson, the author of our Declaration of Independence, owned slaves, and the Constitution contained several clauses protecting slavery from being outlawed or too closely regulated. Nor was it mere accident that the Declaration of Independence used the word “men” to describe those created equal; women designedly could not vote and for the most part were socially and economically subjected to the will of their male relatives. Wealth and land ownership restrictions limiting the right to vote were also widespread. Given the practices of the time, the Declaration of Independence might more accurately have read, “all white, propertied males are created equal, the rest are not.” A good portion of the activity of our federal judiciary in the 200 years since has been spent dealing with the tensions between our egalitarian ideals and our actual practices.

In the early years of the Republic, the Supreme Court’s record was not

12. The Declaration of Independence para. 2 (U.S. 1776).
14. See, e.g., U.S. Const. art. I, § 2, cl. 3 (slaves to count as three-fifth of a person when determining apportionment of representatives); id. at art. I, § 9, cl. 1 (Congress may not prohibit importation of slaves prior to 1808); id. at art. IV, § 2, cl. 3 (requiring return of fugitive slaves); id. at art. V (Constitution may not be amended to prohibit importation of slaves prior to 1808).
uplifting. While the original Constitution explicitly countenanced slavery, by the middle of the nineteenth century the issue of slavery had inflamed the nation. Striving for compromise, the political branches of the government agreed to ban the extension of slavery to United States territories that had not yet become states. The Court then abrogated that political compromise in its infamous Dred Scott decision, ruling that a black could not be a citizen of the United States. After the bloody Civil War that followed, our Constitution was amended to provide expressly that no state should deny to any person the "equal protection" of the laws. But even then, the Supreme Court was agonizingly slow to implement this egalitarian edict.

In Plessy v. Ferguson,18 the Court proclaimed that the fourteenth amendment had as its object "absolute equality of the two races before the law," but ruled that "in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce . . . a commingling of the two races upon terms unsatisfactory to either."19 "Separate but equal" facilities, Plessy held, were constitutionally sufficient.

Some fifty years later, in Korematsu v. United States,20 the Supreme Court again countenanced discrimination based solely on race. In the impassioned aftermath of Pearl Harbor, the Court, while giving formal obeisance to the ideal of equality enshrined in the Constitution, nonetheless held that the "pressing public necessity" created by the war empowered the government to intern, without evidence of any disloyalty, 70,000 Japanese-Americans for the conflict's duration.

Not until 1954, in Brown v. Board of Education,21 did the Supreme Court rule that state-mandated segregation of the races was anathema to the egalitarian ideal. And only in 1970, nearly two decades after it instructed local school authorities to desegregate "with all deliberate speed," did the Court finally order an immediate halt to segregation in the public schools.

Even then, the Court lagged in extending Brown's promise of racial equality to other areas of the law. Less than two years after Brown, the Court, in Naim v. Naim,22 evaded a ruling on the constitutionality of Virginia's ban on interracial marriages on grounds that the record was inadequate. It took ten years for the Court finally to conclude, in the 1967 case Loving v. Virginia,23 that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."24

18. 163 U.S. 537 (1896).
19. Id. at 544.
24. Id. at 12.
The pattern that emerges from Plessy to Korematsu and from Brown to Naim and Loving is that of a Supreme Court consistently proclaiming racial equality as an abstract constitutional ideal, but bowing to the perceived reality of a nation too timid or fearful or hostile to embrace it.25

This persistent tension between our nation's unifying ideal of equality and its countervailing social traditions is an important fact that constitution-builders in newly emerging democracies must recognize and accommodate. Even in a nation with an independent judiciary, imbued from its founding with the authority to invalidate acts of the executive or legislature, constitutional guarantees of equality are not self-enforcing. In their perceptions of what a noble ideal may require and how it may be achieved, our courts have historically been influenced by the pervasive legal cultures and traditions of their time.

Judges, even when insulated from politics or the fear of removal, still experience and respond to this antithetical tension between ideals and political reality. Their responses in cases like Dred Scott and Brown v. Board of Education, which expose deeply held, conflicting beliefs and practices, have the potential to undermine or reinforce national unity. Equality of treatment is fundamental to a nation composed of disparate peoples, but often it does not come without pain or disruption. Yet the perception of progress—or its lack—by those suffering the yoke of inequality also has much to do with a society's integrity and oneness. Thus, as the story of the D.C. jury suggests, we worry that urban blacks in America, restive at the pace of progress towards full equality, have begun to turn their backs on the institutions underlying our justice system.

In deciding and granting relief in cases of great import, courts thus have to calculate the dimensions of the constitutional injustice and the resistance of the popular culture to relief. Some commentators urge that the Supreme Court wait until political sentiment has settled before finding and enforcing new and often controversial rights in the Constitution; they say that would have been the wiser course with the abortion debate in the 1970s. Others criticize the Court for not moving swiftly enough to enforce basic rights even when political sentiment is lagging, which hindsight suggests as the proper course in Korematsu.

The Justices of our Supreme Court have not always been ready to translate constitutional ideals into reality; they have often preferred to articulate the ideal of equality but to leave its fulfillment to a later day. Like other citizens, judges live within the traditions that shape society. Like other citizens, they find it difficult to shake off society's mainstream traditions. When those traditions are strongly anti-egalitarian, as they certainly are in many parts of the world, even an express promise of equality enshrined in a nation's constitution may not easily be realized.

Thus, it is probably not wise for our foreign friends—if they look to us as a model—to expect that courts, even a truly independent judiciary, will solve deeply rooted conflicts between diverse subgroups within their societies quickly. The great strides in the 1960s towards realizing American egalitarian ideals came out of turbulent political struggle. Over the long term, our nation's courts have more frequently followed political actions than led them.

III. "Tradition, Tradition"

Yet that is not the whole story. Courts can play a mighty role in advancing the course of national unity by steadily reducing the tensions between traditional mores and constitutional ideals, and finally by translating those ideals into behavior. They do so not only by their ultimate—if belated—actions in enforcing constitutional mandates in profoundly divisive situations like Brown and Loving, but by their steady recognition of struggling minorities' rights in less high-profile cases. Discrete cultural groups are not always seeking affirmative rights—to vote or to marry: they often want simply to be left alone and to do their own thing, however different from their neighbors'. Tolerance, as much as political equality, is essential to a unified society. It is the Supreme Court that speaks for the nation's most basic values; its words carry a special imperative in creating and encouraging our sense of nationhood.

At critical junctures of history, it is the Court that must articulate the traditions and practices in American life that compose a civic culture to which all Americans can commit their loyalty and obedience. Many of these values are not expressly provided in the Constitution but must be drawn from its broad generalities. Though Korematsu stands out as a tragic exception, over our national lifetime many judicially proclaimed rights have promoted tolerance for cultural differences as an overriding civic ideal and have protected unpopular and religious minorities in times of political disfavor. Judicial proclamations of the rights of Jehovah's Witnesses not to salute the flag and of German-Americans after World War I to educate their children privately are two stirring examples.

Clearly, under our constitutional system, it is easier for judges than legislators to act as long-term guardians of the nation's lasting traditions because they are life-tenured and insulated from the need to seek reelection. It thus falls to them to sort out and define these core traditions. As we all know, the American judiciary must confront those who question its legitimacy and its authority to lay down the law in vital areas of private and national life. Oliver Wendell Holmes told us 100 years ago that the law is what the courts say it is. The adherents of critical legal studies now repeat his cry: law, they say, is only an expression of the will of the human powers that reign at any given point.

Yet I do not think that most of us—lawyers, law professors, judges—

really believe that. We believe that the overriding principles derived from our Constitution should, and in most cases do, express more than the personal preferences of the nine Justices who sit on our Supreme Court; they reflect the history, traditions and fundamental values of our society as it has grown and evolved over time.

Of course, different judges at different times will find different themes in our history and traditions or apply them differently to new situations. Their views will be shared by the rest of the citizenry to greater or lesser degrees at different times. Still, the courts have settled many once bitterly divisive issues for all time: the income tax, segregation, fair-labor standards, the right of workers to organize. Other constitutional controversies, over prayer in our public schools, for example, do not die so easily, but simmer for long periods. Some say that in those circumstances the Court itself acts as a kind of social safety valve: through Justices who possess diverse political and philosophic persuasions and are appointed for life by several Presidents, the Court provides an arena in which the schisms of the nation, its passions and frustrations, can be played out. Our nation has entrusted to the courts the role of deriving from the Constitution's generalities those unifying values and rights that are, as the Court has said, "deeply rooted in this Nation's history and tradition."  

Yet our history has shown that there are subtle dangers in this process of derivation. The use of tradition to identify core constitutional values can be divisive when applied to claims by individuals or groups that have never been in the nation's mainstream. Too literal a use of tradition as a benchmark may alienate and isolate minority cultures.

This tension has surfaced in such recent cases as Bowers v. Hardwick. Michael Hardwick was arrested for engaging in sexual relations with another man in his own bedroom. Although he was not in fact prosecuted, Hardwick's behavior was, in the state of Georgia, a crime punishable by a twenty-year prison term. He brought suit in federal court against the State Attorney General, asserting that Georgia's sodomy law violated the United States Constitution. The Supreme Court upheld the Georgia law.

Hardwick's claim that he had a constitutional right to choose a man as a sexual partner was arguably in line with earlier Supreme Court cases establishing a sphere of autonomy for intimate personal relations. A person's right to marry, to procreate or to use contraceptives to prevent

30. See Bowers, 478 U.S. at 195-96.
32. See id.
procreation, and a woman's right to an abortion in the first trimester, had all been recognized by the Supreme Court as fundamental, and thus beyond the power of the state to interfere. In ruling against Hardwick, the Court limited these rulings to the realm of "family, marriage, and procreation," rather than viewing them as specific aspects of an individual's general freedom to control intimate associations with others.

The Bowers Court relied heavily on its view that proscriptions against homosexuality were traditional in America and in those European nations from which America derived its traditions. The Court noted that the original thirteen states of the Union forbade homosexuality at the time they ratified the Bill of Rights, that all but five of the states did so in 1868 when the fourteenth amendment was ratified, and that all fifty states did so prior to 1961. Chief Justice Burger, concurring separately, commented that homosexual sodomy was a capital crime under Roman law and had been condemned by Blackstone. The long history of those proscriptions made it, according to the Court, "facetious" to claim in 1986 that Georgia's ban was invalid under the Constitution.

However one feels about the result in Bowers, the anomaly in according such extreme deference to historical tradition is that it might equally well be given to a variety of other commonplace, but now out-of-bounds traditions, such as discrimination against blacks, women, Jews, Asian-Americans or any other subgroup.

Similarly, a potential for tyranny by tradition arises out of constitutional claims by people who affirmatively choose to live differently from their neighbors. Michael H. v. Gerald D. concerned the relationships between four people: Michael, Carole, Gerald and Victoria. Carole and Gerald were married; Victoria was alleged to be the daughter of Carole and Michael, conceived during an extramarital affair that continued intermittently during the first three years of Victoria's life. Reconciled thereafter, Carole and Gerald sought to prevent Michael from contact with Victoria.

Michael brought suit, seeking a declaration that he was Victoria's father and entitled to visitation rights. Applying a state law that provided that a child born to a married couple living together was conclusively presumed to be their child, the California courts denied Michael's claim and the United States Supreme Court upheld that judgment. The Court's plurality opinion, while acknowledging that aspects of the parent-child relationship had been held beyond state interference, nonetheless refused to apply this principle of intrafamily deference to the relationship between an unwed father and his child when the mother of the child was married to another man. The Court noted that American traditions did not acknowledge the unwed natural father's parental rights

over the child, and traditions derived from earlier cultures positively denied any such rights. The court assumed that specific tradition overrode any larger traditions, such as those regarding the general rights of parents.

There is much unresolved tension in those cases between the Court's canvassing of traditions and its fair appraisal of the rights of those who live in nontraditional ways. Tradition can be a lifeless, as well as nourishing, spring for courts seeking to apply constitutional values, like tolerance or privacy, to specialized situations. In some cases, the Court has realized this. For many years, our much treasured freedom of expression has coexisted with laws making it illegal to burn or otherwise defile the flag of the United States. Indeed, a year ago, the United States and forty-eight states had statutes barring flag burning. Yet this tradition did not prevent the Supreme Court from ruling that the burning of a flag was constitutionally protected. In *Michael H.*, the Court could similarly have held that the larger tradition of protecting parental rights prevailed over the tradition of nonrecognition of unwed fathers' rights. In sum, our experience suggests that specific traditions must be carefully scanned to discern their conformity with larger ideals; the danger to an inclusive society of rigid adherence to past patterns of behavior, which excludes some people from important rights or intercedes too deeply in their private lives, is evident.

And, conversely, in any integrated society there must be limits on judicial protection of peoples' rights to be different. A nation may aspire to be a pluralistic society that values and encourages diversity, but if it is to remain one nation, it cannot allow every group within society to live entirely by its own values. Let me give you an example. Last year, in New York City, a man killed his wife with a hammer after she confessed that she was having an adulterous affair. He received a sentence of probation because the judge found he was a Chinese immigrant who had lived in America for less than three years. The judge admitted testimony that in China marriages are so sacrosanct that a husband, learning his wife was unfaithful, could reasonably be expected to become enraged and to act violently. This may be pluralism run amok. For persons adopting America as their homeland there has to be a point where a foreign birthright cannot provide a refuge from fundamental American values.

37. Three Justices of the Court have concurred in an opinion by Justice Scalia, expressly stating that "a constitutional theory must be wrong if its application contradicts a clear constitutional tradition." *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2749 n.2 (1990) (Scalia, J., dissenting) (tradition of patronage proves that patronage is not unconstitutional). Justice Scalia dismisses "the customary invocation of *Brown*" to refute this argument as "unsupported," on the grounds that the equal protection clause clearly forbids segregation, and that segregation does not have a tradition of unchallenged validity. *Id.* at 2748 n.1.
IV. THE INDIVIDUAL, THE GROUP AND THE NATION

And finally, of late, we have seen still another twist on the problems of multicultural diversity in a nation like ours: our courts face an ironic reverse discrimination problem arising from individual minority members claiming that their basic rights as full American citizens have been taken away by society's over-deference to the subculture in which they live. One such case involved the tension within Native American tribes between their desire to preserve their own culture, and the isolation, poverty and exploitation from which some of their members seek to escape.

Native Americans have cultural traditions that differ in important ways from those of other citizens, particularly with regard to rearing children. At least until quite recently the mainstream American tradition has been that of the nuclear family: parents raise their own children, maintaining close control over their activities. In some Native American tribes, by contrast, children are raised by extended families, with scores of relatives within the tribe sharing their oversight. It is common for the biological parents to leave children with relatives for extended periods.

In the past, state welfare workers often perceived these child-rearing practices of Native American parents as abandonment or neglect of their children. As a result, state authorities removed large numbers of Native American children from their families and placed them for adoption with middle-class white families, to the consternation of Native American tribe leaders. Eventually, Congress stepped in and enacted a federal statute providing that whenever a Native American child is placed for adoption, the tribe to which his parents belong has a preferential right to adopt the child.

But sometimes Native American parents, drawing away from tribal custom, want their child to be adopted by persons who are not members of the tribe. In a recent Supreme Court case, Mississippi Band of Choctaw Indians v. Holyfield, two Native American parents deliberately left their tribe so that their child would be born in another state, and arranged for its adoption by a nontribal couple.

The tribe sued to invalidate the adoption and won. The Supreme Court affirmed. Under the federal statute, the Court held, the tribe had an interest in the child that was separate from, and possibly superior to, the interest of the child's biological parents. Accordingly, the tribe's interest in the adoption was not extinguished simply because the parents wanted the child to be adopted out of the tribe.

The result is problematic. While Native Americans form a distinct subculture within American society, with traditions very different from...
those of the majority of Americans, Native Americans are also citizens of the United States. To what extent can the rights of the tribe override their members’ rights as individuals? Suppose, for instance, that it was the tribal custom for children to be raised communally as soon as the children were weaned. If a Native American mother wanted to raise her child untraditionally, as her own, could a congressional statute mandate that the child be raised by the tribe? I would expect that even a Supreme Court dedicated to recognizing and empowering the distinctive culture of Native American tribes would have difficulty in affirming that result.

_Holyfield_ is another illustration of the pivotal role our courts continue to play in mediating disputes between ethnic groups and a central government that presumably represents the entire nation. Group rights need to be respected, but when they conflict with the rights of a larger society, sharp edges must be planed down. No constitution can contemplate the infinite variety of such conflicts, and legislatures can deal only with some. Frequently, our courts end up as the final forum; their choices can unite or divide the total society. A final example makes the point.

Our constitution expressly protects the free exercise of religion, and our society has always been sanctuary to a multitude of religions. Protection of this diversity is bedrock constitutional doctrine. It sometimes happens, however, that a religious practice conflicts with a state law that regulates conduct generally. That was the case in _Employment Division v. Smith_, decided in April of this year. Certain Native American churches have as one of their sacraments the ingestion of peyote, a drug whose possession is generally proscribed under narcotics laws. While a number of states had resolved this conflict by providing that the religious use of peyote was exempt from the drug laws, the state of Oregon had not. When Alfred Smith and Galen Black lost their jobs because of their sacramental use of peyote, the state deemed them ineligible for employment benefits.

In prior cases of this sort, the Court had balanced the individual’s interest in free exercise of religion against the state’s interest in general prohibitions, and often ruled in favor of the individual. The Court had held that a state cannot deny unemployment benefits to someone who lost her job because she would not work on the Sabbath, and had protected the right of the Amish, on religious grounds, to claim exemption from compulsory education laws for children over sixteen. Yet in _Smith_, the Court stated flatly that it had “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” Future cases will determine whether _Smith_ represents a hard retreat from the Court’s previous sensitivity to the comparative needs of society and the individual,

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42. 490 U.S. 30 (1990).
45. _Smith_, 110 S. Ct. at 1600.
and accords the state an indisputable power to burden religion even where the state's need to do so is not strong. The Court's role in creating and preserving "one nation indivisible, with liberty and justice for all" is an enduring one; its work is by no means finished, its final marks are not yet complete.

V. THE JUDICIAL CHALLENGE

I close with these thoughts: as we head into the twenty-first century and democracy surges into new lands without long constitutional traditions, the structuring of a cohesive society that retains diversity and pluralism must surely be a paramount priority, for ourselves and for these new societies. Fresh waves of immigration bring new non-European subcultures into our nation; many of these do not want simply to be absorbed into our mainstream culture, they want to retain vital aspects of their own; others want full equality of treatment as citizens and a release from tribal or group control. Courts of the future will be challenged to mediate justly the often conflicting demands for equality, diversity and national integrity. To accomplish this, our judicial system must itself reflect an acceptance of the many cultures in our nation; there must be diversity in the make up of our courts and justice system, not as representatives of their cultures per se but as symbols of a common dedication to a unified vision of civic justice and equality. We can speculate whether Korematsu would have been decided as it was if an Asian-American had been on the Supreme Court and ponder the result in Plessy v. Ferguson if a black were among the Justices. Even with the best of will and the greatest intelligence, judicial sensitivities to the invasion of basic rights are at their lowest ebb when judges perceive the victims as markedly different from themselves. In articulating the core values of our nation, judges must often intuit and draw on textures, patterns and analogies, even on their own experiences, in ways that fall far from the analytical modes taught in law schools. When precedents point in opposing directions, reason alone does not tell a judge how to determine which route to follow. She needs something more—something that has been called a "contextual insight . . . a situational sense."

Our best judges have been creative with history and tradition—Marshall was certainly not a strict constructionist, nor was Holmes. Their principles emerged from an intuition of justice, a way of understanding a total situation not just analytically but in context, an empathy with the plight of the parties before them. I suspect that a preoccupation with judges who confine themselves to interpreting existing law or deriving original intent, whatever those code words mean, is not likely to produce a Marshall or Holmes or Warren or Harlan or Brennan. We have entrusted to our courts a large responsibility for ultimately protecting the cultural neighborhoods within our national community. For that task,

46. Karst, supra note 3, at 198.
we need a judiciary as broadly based as society so as to reflect the whole American experience, one that acknowledges the creativity and discretionary side of its mission rather than assuming the role of judicial sleuth looking for buried clues in sterile law books. The law, we are told, can never "be reduced to a set of tidy formulas applied mechanistically to the actual situations that arise in real people's lives;" it is rather "the whole process" by which norms to govern behavior are articulated, interpreted, modified, adopted and applied.  

If it were possible to impart any single instruction about constitutions, courts, diversity and indivisibility to our new democratic friends all over the world, I would choose this. The judges they select will contribute mightily to their nations' viability. They should be selected for intelligence and learning, of course, but also for compassion, empathy, tolerance, character and diversity of experience. In their rulings affecting the rights of many cultures and peoples fighting for an equality they have not heretofore known, they have it within their means to determine whether democracy will survive.

47. Karst, supra note 3, at 236.