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COMMENT: CULTURAL PLURALISM, NATIONALISM, AND UNIVERSAL RIGHTS

*Suzanne Last Stone**

In the tradition that I grew up in, the purpose of commentary is to bring an ancient text up to date—to make it speak to the philosophical and practical issues of the day. The two texts I shall comment on, however, surely need no updating. They address head-on two pressing contemporary issues. Professor Kenneth Karst's work, *The Bonds of American Nationhood*,[1] focuses on the challenge cultural pluralism poses to creating bonds of solidarity between citizens that are necessary to maintain a nation. Professor Yash Ghai's work, *Universalism and Relativism: Human Rights as Framework for Negotiating Interethnic Claims*,[2] focuses on the tension between cultural pluralism and the idea of universal human rights. Both Professors Karst and Ghai pursue a common methodology. They eschew simply theorizing about these tensions and offer, instead, thick descriptions—case studies—of how such tensions are accommodated or managed in different multicultural political entities. Professor Karst's case study is the United States; Professor Ghai's case studies range across India, South Africa, Canada, and Fiji. Their conclusions also evince a shared optimism. Professor Karst describes an American "national community" beset by "partial polarizations," but which "by their very plurality . . . help to unify the national society."[3] Cultural pluralism, far from tearing the nation apart, serves to mobilize "egalitarian politics"—the aspiration toward universal equal citizenship rights. This common aspiration for equality is America's "cultural glue."[4] Professor Ghai concludes that "[t]he framework of rights" provides a flexible and successful way of "mediating competing ethnic and cultural claims."[5] Finally, both

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[1] Kenneth L. Karst, *The Bonds of American Nationhood*, 21 CARDOZO L. REV. 1141 (2000).

[2] Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095 (2000).

[3] Karst, *supra* note 1, at 1182.

[4] *Id.* at 1182.

[5] Ghai, *supra* note 2, at 1099.

Professors Karst and Ghai argue strongly that, in the debate over cultural pluralism and universal rights, insufficient attention has been paid to materialist concerns. As Karst starkly puts it, "[t]he cloud that hovers over American national unity is not a cloud of cultural pluralism" but, rather, it is "the growing gap between haves and have-nots."[6] Ghai makes a similar, subtle point. He argues that, in most cases, the advocates of cultural rights "were not necessarily concerned about the general welfare of their community's cultural traditions."[7] Rather, these advocates were concerned with access to economic resources that could be secured by "espousing those traditions."[8]

This last observation, that materialist concerns may underlie many claims of individual or group rights to perpetuate particularist cultural traditions, is an important addition to the debate. Nonetheless, I take as a given in this Comment that the struggle of a people to perpetuate its culture, in the face of an alien majority culture that threatens to overwhelm it, is an authentic drive of its own—as it has been throughout human history. This struggle raises profound questions of moral and political theory. Accordingly, I engage here in precisely the opposite strategy from that of a traditional commentary. Rather than updating the two focal texts, I wish to place their subject matter within the larger historical tradition of thinking about, as Joseph Raz has put it, "how to combine the truth of universalism with the truth in particularism."[9] In so doing, I shall also break ranks with Professors Karst and Ghai's methodology, which focuses on actual political accommodation, and reintroduce the theoretical difficulties inherent in reconciling cultural pluralism with both nationalism and the idea of universal rights. The purpose of reintroducing both the historical and intellectual roots of our current pluralist perspective is to put several of the important issues raised by both Professors Karst and Ghai in dialogue with one another.

I. MULTICULTURALISM IN HISTORICAL PERSPECTIVE

Cultural pluralism is a descriptive fact. But today, it is also the basis of a normative claim, as well as a politics, that is generally grouped under the rubric of "multiculturalism."[10] Multiculturalism

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6 Karst, *supra* note 1, at 1174.

7 Ghai, *supra* note 2, at 1136.

8 *Id.*

9 Joseph Raz, *Multiculturalism*, 11 RATIO JURIS 193, 194 (1998).

10 For an excellent introduction to the topic, see MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Guttman ed., 1994).

presents itself as a new idea: one of those "sea changes," or fundamental paradigm shifts, in the way one thinks of human potential, dignity, and identity-formation. But the fundamental claim of multiculturalism—the primacy of group cultural identity as a morally and politically significant category—is hardly new. Neither are culturally pluralistic political arrangements a modern invention. Nor is the question of how to respect cultural diversity and yet affirm the existence of a universal realm of obligation, common to all humans, a novel one.

Two historical examples suffice to provide a sense of how these issues were resolved in the past. In today's terminology, the Roman Empire was multicultural. It developed an intricate system of legal responses to accommodate the diversity of peoples subsumed under its rule. Although distinct ethnicities were semi-autonomous under imperial rule, and could pursue their own customs and laws within their own communities, the special law of nations, the *ius gentium*, governed intercultural transactions. The *ius gentium*, which differed from Rome's autochthonous civil law, was assumed to be an intercultural law known to all peoples, later portrayed as a universal law flowing from a natural reason common to all mankind. With respect to criminal jurisdiction, as well, individuals were tried under a law assumed to address universal offenses recognized by all human beings.[11]

The Bible, and later the rabbinic tradition, addresses the dialectical relationship of particularism and universalism by positing three different levels of collective identification and obligation: ethnic-religious-national (or peoplehood), territorial, and human. The particularist focus of Judaism implies that each people or nation has its own customs and conventions, and its own pathways to effectuate justice on earth or to achieve salvation. There are distinct categories of political and legal obligation owed to others which "render[] social life intelligible."[12] The thickest set of obligations is owed only to one's fellow Israelite. The bonds of social solidarity within the national community are reinforced by such obligations as interest-free loans or extraordinary forms of charity that cannot be reproduced on a universal scale. Nationhood is not a function of territorial jurisdiction, but rather a function of ethnicity and culture. The stranger who resides within

[11] For a discussion of the Roman Empire's solution to the problem of multiculturalism, see Otfried Hoffe, *Moral Reasons for an Intercultural Criminal Law: A Philosophical Attempt*, 11 RATIO JURIS 206, 209-11 (1998).

[12] Gordon Lafer, *Universalism and Particularism in Jewish Law: Making Sense of Political Loyalties*, *in* JEWISH IDENTITY 177, 195 (David Theo Goldberg & Michael Krausz eds., 1993).

one's polity, the alien, need not assimilate or convert. He is entitled to retain his ancestral identity and ancestral customs. At the same time, the stranger must be treated as an equal citizen, subject to the same law.[13] Equal citizenship rights are a function of ethical reciprocity. The stranger has tied his fate to that of the people and the land, just as the Israelites once did in Egypt. A thinner set of obligations is universal—the seven Noahide obligations, which include such prohibitions as murder, theft, and the like—and are incumbent on all polities and all members of the human collective. These obligations are the minimum requirements of justice. They mark the capacity for moral behavior and identify the bounds within which cultural diversity is acceptable, as well as the boundaries of permissible intercultural exchange.[14]

Both examples offer a synthesis of universalism and particularism by tolerating, or even positively valuing, cultural and religious pluralism while still insisting on a domain of universal standards that transcends diversity, and which allows for moral critique. Of course, the domain of the universal is developed from the perspective and resources of the particular tradition. It cannot be otherwise. The Roman model conceives of the domain of the universal as rooted in nature. The rabbinic tradition, which is far more suspicious of a universal human reason, and of the idea that morality is necessarily knowable, conceives of that domain as revealed.

These examples also serve as useful reminders that the model of individual rights is not the only framework within which cultural pluralism can be arbitrated. The imperial system of Rome, like the later Ottoman millet system, is organized around what we would now call group rights, while the biblical model is based on the premise of group duties. These models of corporate pluralism are not proposed as any idealized solution. The biblical model is more theoretical than real. Jews, for most of their history, were dependent on the political arrangements of other nations. The imperial model, on the other hand, was not based on principle or on deep recognition of the value of other cultures. It was an asymmetrical power relationship, designed to secure social coexistence.[15] Thus, in this sense, the contemporary multicultural

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[13] *See Leviticus* 19:34.

[14] For a fuller exploration of the universalist and particularist themes of Jewish law, see Suzanne Last Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157 (1991).

[15] *See* Moshe Halbertal, *Autonomy, Toleration, and Group Rights: A Response to Will Kymlicka*, *in* TOLERATION: AN ELUSIVE VIRTUE 106, 107-08 (David Heyd ed., 1996).

state, a political entity in which power is shared by diverse cultural groups, is a new creation. Finally, and most critically, these models accommodate different groups but not, of course, individuals. Individual members have no recourse against their own group, and everyone has to be a member.

In the West, liberalism and the rise of nationalism combine to reverse this equation. Among the now-familiar hallmarks of classical liberal thought that are in tension with multiculturalism, the foremost is the selection of the autonomous, freely-choosing individual whose primary allegiance is to a set of abstract, universal principles or contractual commitments, as the fundamental unit of moral and political life. From a political standpoint, classical liberalism implies that equal citizenship rights reside in the individual rather than in cultural, social, religious, or ethnic groups. The Western ideal of universal citizenship is intended to transcend particularity or group affiliation. The liberal valuation of individual autonomy and universal rights, of freedom and equality, is also at odds with any group claim that seeks to restrict the universal rights of individual group members.

The second challenge to multiculturalism is the emergence of the modern idea of a national identity conceived in political terms, especially as it developed in the West. There is a significant divide between the concepts of nationhood and statehood. The concept of the state revolves around the ideas of political unity and popular sovereignty.[16] The concept of the nation signifies not merely a political arrangement or institution, but rather, to use Benedict Anderson's felicitous phrase, an "imagined community,"[17] whose members share a collective cultural and political bond no less strong than the affective bonds of family and church. The bonds of nationhood can be cemented by a common ethnicity, the predominant model outside the West, or a common culture, such as religion, language, or law. Nation-building and nation-maintenance would seem to require the elevation of one dominant national culture, and the creation of conditions for cultural assimilation of individuals from minority cultures into the dominant national culture. Thus, particularist group allegiances are relegated to the private domain. Also crucial to the formation of national identity are the related ideas of a *lex patria*, "a common code of laws over and above local laws,"[18] and the legal equality of

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[16] On the elements of national identity and how these differ from the concept of the state, see ANTHONY D. SMITH, NATIONAL IDENTITY 8-15 (1991).

[17] BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1991).

[18] SMITH, *supra* note 16, at 10.

all members of the nation, all of whom are bound by the laws of the *patria*.[19]

Within this intellectual and political matrix, the recognition of group rights to cultural autonomy, of differential citizenship, or even of a legal right to maintain and transmit a particularist, separate cultural identity, is extremely troublesome. Indeed, the most succinct formulation of this dilemma is still that of Comte Stanislas de Clermont-Tonnerre, in defending the extension of full equal citizenship rights to Jews by the French Revolutionary Assembly. He said that "[o]ne must refuse everything to the Jews as a nation; but one must grant everything to them as individuals" and that "it should not be tolerated that the Jews become a separate political formation or class in the country."[20] In the public sphere, Jews were to be recognized only as equal, rights-bearing individuals.

The re-emergence of multiculturalism now is a complex reaction to the homogenizing force of universal citizenship. In one sense, as Charles Taylor elaborates, it is the logical extension of the modern ideal of authenticity.[21] For one cannot be a Jew at home and a citizen (the same as everyone else) in public if one wishes to be faithful to the ideal of authenticity. Therefore, multiculturalism today implies the demand for public recognition of difference, of the distinctiveness of the individual as a member of a specific cultural group, and with this, of the importance of the survival and transmission of the very culture that shapes the individual's identity. This leap from a demand for recognition of the worth of the individual as a member of a particularist culture to the demand for recognition of the worth of the culture itself is at the very heart of the issue we debate here.

The theoretical questions this latter demand raises are complex: Why are cultures worth preserving? Is there an individual right or duty to perpetuate one's culture? Is there a collectively held right of cultural perpetuation?[22] How would recognition of individual or group rights of cultural perpetuation affect the project of nationalism? How can such cultural rights be squared with the idea of universal human rights? The latter two questions are the specific focus of Professors Karst and Ghai's presentations, to which I now turn.

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[19] *Id.*

[20] ARTHUR HERTZBERG, THE FRENCH ENLIGHTENMENT AND THE JEWS 360 (1968).

[21] Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 28-37 (Amy Guttman ed., 1994).

[22] For an elegant exposition of these questions, see Diana Tietjens Meyers, *Cultural Diversity: Rights, Goals, and Competing Values*, *in* JEWISH IDENTITY 15 (David Theo Goldberg & Michael Krausz eds., 1993).

II. THE TENSION BETWEEN MULTICULURALISM, INDIVIDUAL RIGHTS, AND NATION-BUILDING

The common, important theme of Professor Karst and Professor Ghai's presentations is that cultural pluralism does not pose a significant challenge to the concepts of universal equal citizenship rights or universal human rights, properly conceived. Furthermore, according to Professor Karst, universal citizenship rights and multiculturalism reinforce each other in the United States in a manner that promotes the bonds of nationhood. The question remains however: How does rights discourse survive unscathed?

Professor Ghai rightly dismisses absolutist forms of cultural relativism as obstacles to the idea of universal human rights. The relativist claim drawn from the field of anthropology—a factual assertion that there may be no cross-cultural universals—is not relevant to our field, which is concerned with the articulation of norms.

A deeper objection to the concept of universal human rights is that we owe equal respect to all actually evolved cultures and therefore must accept them as they are. But the value of the idea of universal rights is precisely, as Professor Ghai puts it, to "interrogate culture," thus leaving room for moral critique.[23] The claim is sometimes made, however, especially by non-Western groups, that what is really taking place is the interrogation of one culture by another culture—specifically, by the Western liberal culture. In this view, the concept of universal human rights is merely a political expression of one specific kind of liberal culture that is a logical outgrowth of Christianity.[24] As Charles Taylor has put it, "the worrying thought is that the very idea of such a liberalism may be . . . a particularism masquerading as the universal."[25] This argument cannot be dismissed lightly, but it should never be a conversation stopper. Critique is only possible from within one's own tradition and, as Taylor puts it, "[l]iberalism is also a fighting creed."[26]

The force of this argument, however, should lead us to exercise caution in assuming that all cultures need the same set of rights. This is the problem of constitutional transplantation—the borrowing of a constitutional solution that is successful within an

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[23] Ghai, *supra* note 2, at 1100.

[24] On the Christian roots of liberalism, see Larry Siedentop, *Liberalism: The Christian Connection*, *in* TIMES LITERARY SUPPLEMENT, Mar. 24-30, 1989, at 308.

[25] Taylor, *supra* note 20, at 44. Taylor further notes that this was the argument made with some force in the Salmon Rushdie controversy. *See id.* at 62.

[26] *Id.* at 62.

indigenous political culture and yet may not be successful in a very different political culture. Thus, rights need not be understood, nor implemented, in the same way in all nations. As Professor Ghai states, "to accept universality does not mean that each culture has to understand a right in precisely the same way or accept the whole range of rights."[27] For example, freedom of religious worship, conceived in the United States as an individual right, is consonant with the political tradition of the United States and particularly suited to its particular cultural heritage of Protestantism. Yet it remains a difficult category in which to express the claims of those who are embedded in religious cultures that are not organized around faith or beliefs, but around law, custom, and a communal way of life. In countries in which such religious traditions dominate, or in which collective goals are part and parcel of the political tradition itself,[28] the articulation of group rights of religious autonomy will be a more congenial and politically successful way of addressing religious freedom. In the latter case, the fundamental right of religious freedom is recognized, but is not articulated as an individual right.[29]

Nevertheless, this reconciliation of universal rights with cultural fit will not satisfy those liberal theorists who insist that individual rights must always come first and take precedence over collective goals about the ends of life. The adoption by the State of Israel of a corporate model of religious autonomy, for example, or Canadian recognition of the collective goal of preserving language in Québec, will inevitably slight the rights of those individuals who disagree with the collective goal. In Israel, the collective political goal is to advance Jewish cultural survival. To that end, various incidents of personal status are remitted to religious jurisdiction. Group freedom to practice religion is guaranteed at the expense of certain individual rights to be free of religion. Similarly, in Québec, the goal is to police the borders of a culture by binding members of the community of French speakers

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[27] Ghai, *supra* note 2, at 1102.

[28] Zionism, for example, the historical and still dominant political ideology of the State of Israel, views the laws of society as reflections of the collective self and not simply as convergences of interest between individuals. The political tradition of Zionism shares the collective orientation of the dominant religious culture of the state, Judaism. In Judaism, the individual is not a distinct unit possessed of individual rights that separate him from other individuals or society itself. Covenantal obligations are imposed on the individual not as a singular human being, but rather as a member of the collectivity of Israel. *See* Eliezer Schweid, *"Beyond" All That—Modernism, Zionism, Judaism*, 1 ISRAEL STUD. 240 (1996).

[29] For a more complete discussion of this issue, see Suzanne Last Stone, *Religion and the State: A Comparative Perspective*, Proceedings of the Luso-American Forum on Comparative Jurisprudence and Constitutional Law (on file with author).

now and in the future. A society with strong collective goals can be liberal in the sense of respecting fundamental rights. Yet, this form of liberalism differs from the procedural liberalism associated with the political tradition of the United States, which stresses the neutrality of the state on questions of the good life and consistently favors individual autonomy over collective goals such as cultural survival. The liberality of political societies committed to the advancement of collective goals cannot be judged by standards of neutrality; such societies must be judged by how sensitively they treat those who do not share the public collective goal.[30]

The United States presents the reverse problem. In the United States, the difficulty is not how to accommodate cultural traditions, or collective national goals, with the new discourse of universal rights. Instead, the dilemma is how to make room for public recognition of distinct cultural groups that aspire to perpetuate their culture, a collective goal, in a political culture where constitutional rights, with a few notable exceptions, are expressed as uniform individual rights. Moreover, the individualist formulation of rights constitutes the very civic culture around which the nation is intended to coalesce.[31] Is it really possible to attend seriously to minority claims for cultural survival and still create bonds of solidarity between members of the "American nation?" This is the question Professor Karst addresses.

According to Professor Karst, American nationhood consists of a set of shared civic values—individual liberty, egalitarianism, democracy, nationalism, and tolerance.[32] Professor Karst implicitly rejects the view that a jurisprudence organized around individual rights is inherently incapable of creating a cohesive community.[33] Those who argue that the jurisprudence of individual rights is a barrier to the formation of genuine community point out that, on the symbolic level, the idea of rights implies that the individual

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[30] Compare Kymlicka's argument that group rights to cultural survival are defensible on liberal grounds providing that the rights of dissenting members of the group are protected. *See generally* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP (1995).

[31] For a discussion of individual versus group rights in American constitutional jurisprudence and an attempt to mediate between the two through the concept of "comprehensive pluralism," see Michel Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities*, 30 COLUM. HUM. RTS. L. REV. 249 (1999).

[32] Karst *supra* note 1, at 1144.

[33] For a powerful statement of this position, see Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1984) (contrasting paideic legal orders organized around "culture-specific designs of particularist meaning" with imperial legal orders organized around universal norms); *see also* Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993).

requires protection from the very government with which he or she is asked to identify. Rights are divisive, as individuals compete for them, and disagreements about the content of rights may run so deep that they divide the nation rather than holding it together. Moreover, the abstract and universal quality of rights sets the individual in a sea of anomie, destructive of the very notion of community upon which the idea of nationhood depends.

Professor Karst argues, instead, as he has consistently done in his seminal work, that constitutional law, although expressed in the language of individual rights, is really about the value of belonging to the nation. As he phrases it, "[g]oing to court to claim a right under the United States Constitution is an assertion of membership in the national community."[34] In the past, Professor Karst concedes, cultural allegiances and national attachment were at war. Immigrants were either despised or forced to be "Americanized" into loyal and conformist citizens who adhered to the dominant British Protestant cultural establishment. In reaction, they either withdrew into their own insular group in order to create an alternative community where they could experience belonging, or they assimilated, severing or diminishing attachments to their original cultural group. But with the rise of the civil rights movement, in the mid-twentieth century Karst suggests, cultural allegiance, primordial identity, and national attachment became reconciled with one another through the convergence of group identity and constitutional politics. If culture is, as Professor Karst writes, "the assignment of meaning to behavior,"[35] doing the law—engaging in constitutional adjudication—is the kind of meaningful behavior that begets a national culture. Thus, active participation in the identity politics of a cultural group is no longer destructive of national identity; it is constitutive of national identity. By appropriating for their own ends the abstract values of the civic culture—liberty, democracy, equality, etc.—cultural politics reinforce the civic culture and, with it, the bonds of nationhood.

This understanding of citizenship in the nation-state combines liberal tenets with multicultural themes. Citizenship is the legal expression of attachment to the state. But this is no longer the citizenship ideal of the Enlightenment and of Clermont Tonnere: the unmediated relationship of the individual with the polity. The citizen now relates to the polity clothed as a member of a group. Identification with the nation does not replace identification with other cultural groups; the former now incorporates the latter.

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[34] Karst, *supra* note 1, at 1160.

[35] *Id.* at 1147.

The question remains, however, whether this synthesis of liberalism and multiculturalism, achieved through constitutional adjudication over the meaning of equal citizenship, is more wishful than real. In this reconception, the jurisprudence of individual rights becomes a language game. Playing the language game of individual rights for the purpose of asserting what is essentially a group claim is simply a step toward becoming an insider. But, even if all group harms could in fact be reconceived as individual rights, such an approach does not actually respond to the moral and political demands implicit in multiculturalism: that there should be public recognition of group particularity and difference and public support for the perpetuation of existing cultures.

The second, related difficulty implicit in this vision is the distinction Professor Karst draws between forced cultural assimilation (a harm) and social and economic integration (a necessity).[36] But social and economic integration do the work of cultural assimilation over time—indeed, this is precisely the aim of many social and economic proposals. Even cultural separatists want entry into the middle class, Professor Karst points out.[37] Political participation by cultural groups that leads to material advancement for members of the group—that advances entry into the middle class—will lead to integration in the long run. Government affirmation of cultural pluralism, in Professor Karst's view, can never be at the cost of eventual integration of individuals into the national economy and society. This is one reason Professor Karst presents for not permitting government to "patrol the borders of a cultural group" by impeding the ability of individual members, even children, to opt out of the culture in the future.[38] Such policing might restrict individual members from integrating socially and economically.

How do we respond then to the claims of cultural groups desiring to repudiate the values of the dominant culture, including its materialist aspirations, and to take their children with them—the real issue in *Wisconsin v. Yoder*?[39] How do we respond to sophisticated participation at the political level for the very purpose of cultural separation, as was attempted by the Satmar Hasidic sect in the *Grumet* case.[40] How do we respond to collective cultural projects, such as the education of children, when the curricula conflict with values of the civic culture such as

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[36] *Id.* at 1161-68.
[37] *Id.* at 1175.
[38] *Id.* at 1172.
[39] 406 U.S. 205 (1972).
[40] Board of Educ. v. Grumet, 512 U.S. 687 (1994).

individual liberty, tolerance, and egalitarianism? The individualist model of liberalism, which Professor Karst identifies as at the core of the civic culture of the United States, will, by definition. be unable to accommodate what many members of distinct cultures really desire: not social and economic integration, but cultural preservation in the present and in the future through transmission of the culture to the next generation.

III. THE DILEMMA OF CULTURAL PERPETUATION

It seems, then, that we cannot escape directly confronting the moral and political question at the heart of the discourse of multiculturalism: Why are cultures worth preserving? Is there a right or duty, held individually or collectively, to cultural perpetuation to which governments should respond? Implicit in the presentations of both Professors Karst and Ghai is the assumption that cultural perpetuation in and of itself is morally accidental. Thus, both Professors Karst and Ghai are wary of governmental policing of cultural borders and of the need for government to concern itself directly with a subgroup's cultural preservation or purity. Two objections surface that must be carefully distinguished. First is the problem of the individual member of a cultural group who dissents from the tenets of the culture or wishes to opt out. That an individual member may have no moral duty to perpetuate a culture he or she finds repugnant or stultifying does not lead to the conclusion, however, that a group claim to cultural perpetuation is morally accidental. Moreover, dissenting members can be protected by conditioning group claims of cultural perpetuation on safeguarding the rights of dissenting members, such as limiting the use of coercion directed at dissenters.

The deeper objection held by both Professors Karst and Ghai is that cultures themselves are not airtight. They are always in flux, as a result of cultural interaction and the multiple identities that members of culture actually have.[41] Cultures come and go. Strong cultures, it can be argued, tend not to disappear altogether through cultural interaction; they change over time, eventually absorbing some of the host culture's values even as they are transformed to suit their own language and set of symbols. Governmental recognition of a right of cultural perpetuation, it is argued, would force cultural groups to "settle their boundaries, possibly preempting evolution in progress and freezing distinct groupings that might otherwise have been temporary into

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[41] *See* Ghai, *supra* note 2, at 1096-97; Karst, *supra* note 1, at 1144, 1162-65.

permanent independent units."[42]

From an historian's perspective, this view of culture is intuitively appealing. The historian's assessment of Judaism, for example, would point to the cultural transformations and adaptations Judaism underwent as it manifested itself in different parts of the world throughout its long history. But such a distanced, external, and anti-essentialist perspective on the process of cultural change ignores the reality of self-identity and the perceptions of real people who can only assess their situation at a particular moment in time. In short, it ignores the internal perspective of cultural adherents that adaptation so far has not occurred at all, and its occurrence in the future would be a tremendous harm. To be sure, this criticism does not, in and of itself, provide a moral or political grounding for cultural perpetuation. Such grounding may rest instead on the degree that cultural attachments contribute to objective individual well-being, or the degree of importance people subjectively attach to their way of life, evidenced by their willingness to endure great sacrifice to assure their culture's survival—or on a more abstract commitment to the truth of value pluralism.[43] That cultures inevitably do and will change is no more a reason to slight claims of cultural preservation than the fact that individuals inevitably will die is a reason to slight the right to life.

Moreover, such an anti-essentialist stance could be applied just as well to the national-cultural project of American constitutionalism. The anti-essentialist stance maintains that one can never know how a culture will develop or what visions will emerge. Similarly, one can never know what the American nation will become. This stance is antithetical, however, to the idea of law, especially constitutional law, not as a form of thick and particularist national cultural glue, but as a thinner, even static, political arrangement. Constitutional law is a stipulation of normative limits, some of which are frozen and tied to an agreement that takes place at a particular point in time, applicable within a bounded territory. From this perspective, constitutionalism is not about nation-building, but rather about limiting the varieties of American nationalist visions that may emerge.

This more modest conception of constitutional values as bounded in time and space is a useful perspective to bear in mind when adjudicating the competing claims of multiculturalism and universal rights in the international setting, as an issue of

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[42] Meyers, *supra* note 21, at 28.

[43] *See* JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 160-63 (1994).

intervention and condemnation. Multiculturalism is a needed corrective to the hubris of liberal universalism. Both perspectives are necessary, however. We need to be more conscious of the value of diverse ways of realizing a good and meaningful way of life and of the different stages of history in which cultures are embedded. Such diversity may take the form of making distinctions between people—a form of racism—or even perpetuating obligations of role—a form of sexism. Recognizing the diversity of cultural forms as they progress through history does not obviate the continued need for a universalist consciousness. For at some point, human suffering becomes so great that we are obligated to alleviate it.