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DEMOGRAPHY AND HUMAN RIGHTS

Demography, Human Rights, and Diversity Management, American-Style

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Abstract

This paper uses diversity management as a placeholder for human rights policy. By diversity management, I mean those policy techniques that a society can use to deal with diversity, which include not only decisions to make diversity a subject of active legal and governmental intervention, but also decisions to leave diversity to informal, unregulated choices by individuals or civil society institutions. My discussion proceeds with particular reference to the United States, in part because it has been relatively successful in managing its diversity in recent decades—relative, that is, both to its own past (especially the pre-1965 period) and to the record of other countries today. (Serious, long-standing problems in the integration of certain minorities in the U.S. remain, most notably with respect to three groups: Native-Americans, “underclass” black men, and unskilled, often undocumented, immigrants.)

An approach to diversity management “works,” in my view, if and to the extent that the country’s vulnerable minorities (a) enjoy some social mobility, (b) are integrated into the major institutions of society, (c) have access to political influence roughly proportional to their limited numbers, (d) are free to live according to their own group values and practices, and (e) do not feel deep alienation from the dominant cultural norms. By this definition, the American system works relatively well—with the qualifications and exceptions noted just above. The paper proceeds in three parts. Part I seeks to sharpen our understanding of diversity by analyzing several different ways of understanding and defining that idea, with a view to underscoring the significance of choosing one or another measure of it. Part II discusses two examples—multiracial individuals and anti-profiling laws—to illustrate the inevitable politicization of certain demographic categories when used for politically sensitive purposes. Part III presents some distinctive and, in some cases, unique features of the American approach to diversity management. Most of these features, I argue, effectively advance the cause of minority mobility and integration, whereas some tend to undermine these goals.

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This paper uses diversity management as a placeholder for human rights policy. By diversity management, I mean those policy techniques that a society can use to deal with diversity, which include not only decisions to make diversity a subject of active legal and governmental intervention, but also decisions to leave diversity to informal, unregulated choices by individuals or civil society institutions. My discussion proceeds with particular reference to the United States, in part because it has been relatively successful in managing its diversity in recent decades—relative, that is, both to its own past (especially the pre-1965 period) and to the record of other countries today. (Serious, long-standing problems in the integration of certain minorities in the U.S. remain, most notably with respect to three groups: Native-Americans, “underclass” black men, and unskilled, often undocumented, immigrants.)

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INTRODUCTION

Demography, as has often been noted, is destiny. This is usually taken to mean that the trends of a society's population over time—and more important, the changes with respect to the specific characteristics of that population—have a great deal to do with the nature of that society. This observation is almost tautological; after all, a society is defined, not just affected, by the specific attributes of those who inhabit it.

In saying that demography is destiny, we do not simply mean that it determines the number of the member in a given society. Numbers are crucial, of course, not only because they affect almost every other aspect of society but also, most fundamentally, because its numbers (along with its fertility rate) determine whether it can remain viable as a society in the future. (Russia is only the most obvious example of a nation that faces a genuine possibility of demographic extinction in the long run.)¹ In addition to numbers, a population's demographic characteristics help to shape its political behavior, cultural values, economic growth, structure and performance, fiscal resources, gender relationships, crime rates, social services, and military capacity—indeed, almost everything that matters to the well-being of its people.

But there is another more interesting, less obvious, but highly consequential meaning to the familiar notion that demography is destiny. Demography is neither self-defining nor pre-political. A society's demography is simply the ensemble of variables that demographers choose (or are instructed by their superiors) to select, define, identify, classify, measure, and publish. The choice of these variables—and the ways in which people may analyze, combine, manipulate, interpret, and otherwise use them—profoundly influences the society's self-understanding, its conception of its problems, human resources, trajectory, achievements, and failures. Grounded in

¹ See, e.g., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. IB/96-2, POPULATION TRENDS IN RUSSIA (1997).

social choices that often are as political and instrumental as they are technical, demography helps to mold the society's beliefs about itself and the world. In this way, these choices about how to think about demography shape its culture, politics, and public policies.

What does this have to do with the struggle for human rights? Human rights, of course, is a notoriously ill-defined concept. (Indeed, that has been one of its most important rhetorical and political advantages). The notion of rights is clear enough; they are entitlements to legal protection against certain denials of liberty. As Sir Isaiah Berlin famously explained, liberty can be conceived of in a number of different ways, of which two are most pertinent: negative liberty (freedom from obstacles or constraints) and positive liberty (the freedom to act in a context that enables one to advance one's life goals).² Human rights, as noted, are more difficult to define, beyond emphasizing their universality; they are rights to which individuals are entitled simply by virtue of their humanity.³ Their substantive content is governed by a growing body of international human rights law.⁴

In this paper, I focus on what I take to be the most fundamental aspect of any society's approach to human rights: how it thinks about and manages its own diversity, with diversity being understood both in demographic and non-demographic terms. By "diversity management," I mean the repertoire of policy techniques that a society can use to deal with diversity. By "dealing with diversity," I mean not only decisions to make diversity a subject of active legal and governmental intervention, but also decisions to leave diversity to informal, unregulated choices by individuals or civil society institutions. (Part I considers a range of these policy techniques.)

² Isaiah Berlin, *Two Concepts of Liberty in*, *FOUR ESSAYS ON LIBERTY* (I. Berlin ed., 1969).

³ "Rights are supposed to exist in all times and all places: the enslavement of the Spartan helots and apartheid are what we would call human rights violations." Gary J. Bass, *Everybody Everywhere*, *THE NEW REPUBLIC*, May 7, 2007, at 48 (review of LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2007)).

⁴ See, e.g., GERALD NEUMAN ET AL., *HUMAN RIGHTS* (1999).

What is the relationship between human rights (whatever their substantive content) and diversity management, such that I can plausibly use diversity management as a placeholder for human rights policy? In earlier work, I have analyzed how different political-social theories of human flourishing—liberalism, utilitarianism, communitarianism, and functionalism—conceive of and value (or disvalue) diversity.⁵ Of these, liberalism captures most clearly the connections between human rights (conventionally understood in largely liberal terms) and diversity. It is also the tradition with which I and most other Americans and (to a lesser but still considerable extent) members of other Western democracies identify.⁶

Competing versions of liberalism converge on the centrality of individual flourishing, the free and independent wills of all persons, and their rights. Most versions of liberalism regard diversity not as an independent or ultimate value but as a possible, or even a probable, consequence of individuals' autonomous exercise of their wills and rights. People who exercise this autonomy in order to advance their perceived interests are bound to make diverse choices and commitments, pursuing their ends with more or less success. In so doing, they constitute their social identities and ways of life. Liberal theorists disagree, of course, about the social, political, economic, and psychological conditions that must obtain before one can properly ascribe to individuals the genuine freedom of will that alone can legitimate their choices, and about the state's role in establishing, altering, and interfering with these conditions. Liberalism, then, finds diversity not only congenial but also definitional or constitutive. In order for diversity to flourish, a liberal society must cultivate and enforce a high degree of mutual respect and tolerance, of which the protection of human rights (properly understood) is a necessary

⁵ PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 55-72 (2003).

⁶ This is evidenced, among other indicia, by their constitutional jurisprudences, which increasingly protect individual rights against government deprivation.

element. So fundamental is this relationship that a country that fails to do so for its own inhabitants is most unlikely to respect the human rights of foreigners.

My discussion proceeds with particular reference to the United States, not only because it is the society that I have studied most closely and thus know the best, but also because it has by most accounts⁷ been *relatively* successful in managing its diversity in recent decades—*relative*, that is, both to its own past (especially the pre-1965 period) and to the record of other countries today. To be clear, I do not claim that the American way of diversity management has succeeded entirely. On the contrary, serious, long-standing problems in the integration of certain minorities in the U.S. remain, most notably with respect to three groups: Native-Americans, “underclass” black men,⁸ and unskilled, often undocumented, immigrants.⁹

Nevertheless, we can learn a great deal from the American experience about what works in managing diversity—and also what doesn’t work. An approach to diversity management “works,” in my view, if and to the extent that its vulnerable minorities—those whose members are most at risk of discrimination and powerlessness at the hands of majorities—are well integrated into the major institutions of society. Integration, in this sense, is measured by the extent to which society assures them, at a minimum, four protections. First, they must enjoy some social mobility. They (and their children) must

⁷ This includes my own. SCHUCK, *DIVERSITY IN AMERICA*, *supra* note 5, at 12-14.

⁸ The leading analyst of the differences in the integration of black men and black women in the U.S. is sociologist Orlando Patterson. See PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S ‘RACIAL’ CRISIS* ch. 1 (1997) and Patterson, *Black America*, in *UNDERSTANDING AMERICA: THE UNIQUE INSTITUTIONS AND DISTINCTIVE POLICIES THAT HELP SHAPE THE WORLD* (Peter H. Schuck & James Q. Wilson eds., forthcoming 2008).

⁹ Whether undocumented immigrants *should* be integrated into American society is a bitterly contested issue in the U.S. See, e.g., Peter H. Schuck, *Immigrants’ Political, Social, and Legal Incorporation in the United States after 9/11: Two Steps Forward, One Step Back*, in *IMMIGRANT POLITICAL INCORPORATION IN THE UNITED STATES AND EUROPE* (J. Hochschild & J. Mollenkopf eds., forthcoming).

perceive that hard work, responsible behavior, and playing by the rules will be rewarded by progress to a higher standard of living and well-being over a reasonable period of time. Second, they must have access to political opportunity and influence roughly proportional to their limited numbers, voting activity, and willingness to enter alliances with others. American blacks lacked this access until the implementation of the Voting Rights Act of 1965¹⁰ but have gained it since then. Third, they must be free to live according to their own group values and practices, except to the extent that those practices interfere with the equal rights of other groups. In the U.S., Indian tribes, Hasidic Jews, and (at least recently) gays and lesbians enjoy this cultural autonomy. Finally, they must not feel deep and chronic alienation from the dominant cultural norms, as distinguished from the kind of disappointments that minorities in a majoritarian democracy must often endure due to their smaller numbers.

Each of these conditions is necessary if vulnerable individuals and groups are to be capable of defending their interests in the public domain. If a society's diversity management policies secure these conditions, then those policies will have done their important work. But beyond that minimal set of opportunities, a group's success will depend on many other factors including the pull and haul of politics, its competitiveness with other groups, its members' economic performance, the quality of its leadership, and the vitality of its culture.

The paper proceeds in three parts. Part I seeks to sharpen our understanding of diversity by analyzing several different ways of understanding and defining that idea, with a view to underscoring the significance of choosing one or another measure of it. Part II discusses two examples—multiracial individuals and anti-profiling laws—to illustrate the inevitable politicization of certain demographic categories when used for politically-sensitive purposes. Part III

¹⁰ Voting Right of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§1971, 1973 to 1973bb-1 (2000)).

presents some distinctive and, in some cases, unique features of the American approach to diversity management. Most of these features, I shall argue, effectively advance the cause of minority mobility and integration, whereas some tend to undermine these goals.

I. DEMOGRAPHIC AND NON-DEMOGRAPHIC CONCEPTIONS OF DIVERSITY

Diversity, like most complex ideas, means different things to different people, so rendering the notion mutually intelligible is difficult. Much depends on the level of generality at which one discusses diversity and characterizes attributes and groups. But because diversity is context-sensitive, it can also mean different things even to the same person at a single point in time. Here, I explore a few different ways of understanding diversity by introducing certain analytical distinctions. Some of them relate to the idea of diversity itself, while others relate to particular attributes (e.g., race, ethnicity) that a society may use to recognize, characterize, or measure diversity.

Normative and descriptive diversity. We often think about diversity normatively, assigning some personal or social value to it. Although we likely harbor ambivalent or conflicting feelings about diversity, we will formulate a positive or negative “on balance” assessment (at least if we care to have a view, which we often do not). Officially, at least, Americans, Canadians, and Indians apparently value diversity more highly than the Japanese and French do—even if the former are not very clear about what they mean by it.

We also sometimes think about diversity descriptively, simply observing differences among things or people without necessarily or consciously attaching any particular appraisal either to those differences. Although I say we observe differences “simply,” our observations are anything but simple. As discussed below, we do not yet clearly understand the cognitive processes through which we come to perceive things or people as being different (and hence remarkable), rather than as the same (and thus unremarkable or even unnoticed).

As a psychological, cultural, or esthetic matter, moreover, we may be incapable of observing difference *simpliciter* without at the same time rendering some value judgment about it. Indeed, at a deeper epistemological level, we may say that differences among people do not really exist independently of the social meanings we impute to them.

Individual and group diversity. Individuals differ from one another in countless respects. They also constitute themselves, or are constituted by others, into groups that differ from one another; indeed, this differentiation is what defines them as groups in the first place. The number of such groups is vast, with the upper limit being the number of attributes individuals possess that they, or others, consider salient to their group identities or memberships.¹¹ When we speak of diversity, therefore, we must be clear about whether we are speaking about diversity at the individual level or among groups.

This clarity, however, may elude even the most scrupulous analysis. Group definitions and boundaries are highly contested. Even if group boundaries were well-defined, their memberships would overlap because individuals belong simultaneously to different groups, including ones they may not even recognize as such or wish to join. Even within a particular, well-defined group, differences among its members may be greater than those between its members and outsiders. This fact may (or may not) call into doubt the utility of defining the former as a group for certain purposes, or at all. In effect, then, some efforts to recognize or increase diversity among individuals may reduce group diversity, and vice-versa.

We, of course, do not view our own attributes or those we ascribe to others as an undifferentiated bundle. We imagine that some attributes are more central to our (and others) identities than other attributes are, that the former are more salient to how we think of

¹¹ I say upper limit because the costs of group formation and maintenance prevent some groups from forming or surviving despite the existence of common attributes that would otherwise suffice. The classic account is MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971).

ourselves (or others), and that without them we (or others) would be very different people—or so we think. The multiculturalism debate reveals much controversy on the empirical and normative issues surrounding individual and group identities both generally and in particular cases. Indeed, the debates intensity reflects the widespread recognition that our views about identity affect and are affected by public policies concerning education, affirmative action, citizenship, and other multicultural issues.

Individual and group-cultural identities interact in complex and dynamic ways. In the U.S., the nature and salience of group identities to putative group members ebbs and flows over time and differs among its subgroups. Intermarriage, for example, is a major cause of mixed and diluted ethnic identities. The cultural norms and practices associated with a group evolve, as do the particular aspects of a group's culture with which individual members identify. This is especially evident among second-and third-generation immigrants. These evolutions, however, are neither logical nor linear. K. Anthony Appiah suggests that the stridency of cultural identity claims may be *inversely* proportional to the robustness of their cultural content and their actual salience for the claimants; that this stridency is often greater for a group's rising and integrating middle class members than for their poorer, more isolated co-ethnics; and that these assertions of cultural identity are sometimes nostalgic exercises concealing the erosion of the social infrastructure that supported and invigorated the culture in the past. On this account, we must be careful to distinguish diversity of identity from diversity of culture. After all, identity claims may bear little resemblance to the cultures they invoke.¹²

Recognizing the complexity of identity (and hence of diversity), the economist Amartya Sen has made some conceptual distinctions that are useful in clarifying multiculturalism issues. He distinguishes among

¹² K. Anthony Appiah, *The Multiculturalist Misunderstanding*, 44 N.Y. REV. BOOKS, Oct. 9, 1997, at 30, 32-33 (reviewing MICHAEL WALZER, *TOLERATION* (1997) and NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* (4th prtg. 2003)).

three identity issues: with how many groups can one identify (“plural identity”); does one choose or discover identities (“identity choice”); and which other people whom one does not identify with, nevertheless have legitimate claims concerning one’s behavior (“beyond identity”). Within the realm of plural identity, Sen further distinguishes between competing and non-competing identities, focusing our attention on the extent of their compatibility. Concerning identity choice, he distinguishes between different levels of freedom and constraint in such a choice, between temporary and permanent identity choices, and between the different moral responsibilities entailed in defending chosen and discovered identities.

“Beyond identity” (or identity transcendence) has the greatest policy significance. Here, Sen distinguishes between a moral or political concern for others and a concern based on a common identity, and relatedly, between epistemic and ethical uses of identity in determining moral or political obligations. “There is an inescapable crudity,” he says, “in thinking that we cannot sympathize with the joys and the miseries, the predicaments and the achievements, of others without seeing them as some kind of an extension of ourselves.”¹³

Demographic and substantive diversity. Most diversity-talk, especially that which is descriptive in the above sense, refers to demographic diversity. This is the distribution within a population of individuals who are grouped (by themselves or by others) according to a more or less objective and measurable attribute (e.g., age, gender, race, religion, nationality, language, income) that they share with other members of the designated group. For example, one commonly describes an employer’s work force as diverse (or non-diverse) based on the extent to which members of various racial or gender groups (as demographers define them) are present in it. The law often relies on this demographic notion of diversity—counting, classifying, and regulating—and this reliance produces, as we shall see, a strong

¹³ Amartya Sen, *Beyond Identity: Other People*, THE NEW REPUBLIC, Dec. 18, 2000, at 23-30.

tendency to look to proportionality as the measure of the duties to diversify that the law may impose.¹⁴

Sometimes, however, we are interested in what I shall call substantive, rather than demographic, diversity. One can use the idea of substantive diversity either descriptively or normatively. When used descriptively, it refers to the distribution of some attribute that is not demographic in the sense just discussed. Teachers who speak of diversity in the classroom, for example, might be referring not only (or not at all) to the distribution of such demographic characteristics among students but also (or instead) to the differences in the students' viewpoints, experiences, methodologies, or academic training. The fact that so much diversity-talk disregards this distinction is exceedingly important. Most proponents of diversity (and some opponents as well) seem to assume that demographic and substantive diversity are the same, or at least that the former is a proxy for the latter. This assumption is often based on ignorance, laziness, or self-deception. Very occasionally, it is not an assumption at all but instead reflects a considered view that the proxy, while admittedly imperfect, is nonetheless good enough for the purpose at hand.

Official and unofficial diversity. Diversity, whether viewed normatively or descriptively, may be officially certified or sanctioned as such by some authority. The demographic categories employed in the decennial Census and in affirmative action programs are examples of official diversity. Throughout our history, the Census has employed an ever-changing list of officially-sanctioned categories for describing and enumerating the U.S. population.¹⁵ In recent decades, this list

¹⁴ Jim Chen, *Is Affirmative Action Fair? Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 825, 830 (1998).

¹⁵ See, e.g., CLARA E. RODRIGUEZ, *CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY IN THE UNITED STATES* (2000), see especially chs. 7-8; Stephan Thernstrom, *American Ethnic Statistics*, in *IMMIGRANTS IN TWO DEMOCRACIES: FRENCH AND AMERICAN EXPERIENCE* (Donald Horowitz & Gerard Noiriel eds., 1992); PETER SKERRY, *COUNTING ON THE CENSUS?: RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS* (2000).

has been caught up in partisan disputes, lawsuits, the administrative law of the modern welfare state, and the shibboleths of identity politics.¹⁶ (Part II discusses a few recent developments along these lines). Another example is the certification of Indian tribes by the federal government, which qualifies them for many economic and status benefits denied to groups lacking this designation.¹⁷ Indeed, the government goes so far as to delegate its race-certifying function to an undefined Indian “community” and to require, as a condition for Bureau of Indian Affairs hiring preferences, that the applicant produce a properly executed “Certificate of Indian Blood.” As Peter Skerry points out, the officially-designated tribes to whom the government has ceded this authenticating power thereby control access to federal funds and other economic spoils, including casino gambling.¹⁸

In contrast, the identities of groups that lack this authoritative status must find recognition, legitimacy, and sustenance in other ways. Even here, however, official categories often have a spillover effect in the private domain, where people may look to them for guidance or even adopt them outright. In this way, official group categories—for example, the “ethno-racial pentagon” (David Hollingers term¹⁹) used in affirmative action programs—may serve as focal points that reduce uncertainty, coordinate behavior among competitors, and perhaps decrease regulatory compliance burdens. But as I note in part III, official definition and certification of an identity or diversity tend to impair its authenticity, legitimacy, and diversity-value, to deform its meanings, and to skew peoples’ incentives for self-identifying in particular ways.²⁰ Is it coincidental, for example, that the number of

¹⁶ SKERRY, COUNTING ON THE CENSUS?, *supra* note 15

¹⁷ See, e.g., Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 712-727 (1989).

¹⁸ SKERRY, COUNTING ON THE CENSUS?, *supra* note 15, at 52, 149.

¹⁹ DAVID A. HOLLINGER, *POSTETHNIC AMERICA: BEYOND MULTICULTURALISM* (6th ed. 2007).

²⁰ Resnik, *Dependent Sovereigns*, *supra* note 17.

individuals who called themselves Indians more than tripled between 1960 and 1990, far greater than the population increase, or that the applicants to the University of California who declined to state their race more than doubled in 1998, the first year without affirmative action?²¹

Protecting, promoting, exploiting, and empowering diversity. A society favorably disposed to diversity—in the history of the world, few have been so disposed—may approach it, generally speaking, in four different ways. First, it may use the law to *protect* existing diversities or those that might arise in the future. Protection, in this sense, evokes Berlin’s notion of negative liberties, discussed earlier. Second, the state may decide to affirmatively *promote* diversity rather than merely protecting it. This term “promote” encompasses a number of different ways of using law affirmatively and programmatically to instantiate a particular conception or ideal of diversity. This distinction between protection and promotion is an important and principled one. Although neither is value-neutral—the government must choose among competing diversities when deciding which to protect, and protecting some particular diversity represents some commitment to an existing *nomos*²²—promotion involves government placing its heavy thumb on the normative scales to a much greater extent, with problematic effects on the preferred diversity discussed in part III.

Third, government may try to *exploit* the diversity that exists in order to advance its programmatic purposes. Some communities in the U.S. have attempted to draw on America’s enormous religious diversity and its faith-based organizations in order to deliver publicly-funded social services, including education, more effectively, attempts that raise special constitutional and other difficulties. Finally, government may *empower* diversity. In this mode, it helps people choose for themselves the kinds and levels of diversities that they prefer. It does

²¹ See Gregory Rodriguez, *The Race to End Race*, THE ECONOMIST, Dec. 1, 2001, at 31.

²² See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

so by distributing resources people can spend in ways that yield the kinds of diversity they desire—whether or not officials would have used those resources to pursue those particular diversities. The stakes in deciding whether government should protect, promote, exploit, or empower diversity could hardly be higher.

Inter-group and intra-group diversity. Diversity today is usually discussed in group terms; it is deemed greater or lesser depending on how many groups are represented in the relevant unit. (This is not to say that diversity is solely a quantitative phenomenon, only that the number of groups or attributes is one measure of it, along with others). Accordingly, the difference between groups is commonly taken as the most salient factor bearing on diversity. In an important sense, however, this way of thinking about diversity begs the more fundamental question of which attributes constitute a group in the first place. Indeed, the differences within conventionally-defined groups are often at least as significant as those that mark the inter-group boundaries. This is especially true when a gross demographic category like “Hispanics”²³ or “blacks” is used as if it consisted of a discrete, homogeneous group when in fact it encompasses individuals whose commonalities are small compared to their differences.

Enclave and larger-scale diversity. In discussing diversity, one should be clear about the unit of reference. Since almost any kind of diversity will be greater in some geographic units than in others, diversity-talks coherence depends upon the spatial and temporal²⁴

²³ The U.S. Census adopted this coinage as recently as 1980, although it made earlier efforts to classify this remarkably heterogeneous population, which descends from some two dozen nations, may be of any race, and is sharply differentiated between the U.S.-born and the foreign-born. See Betsy Gusmàn, *The Hispanic Population*, CENSUS BRIEF 2000 (May 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf> (last visited Jan. 27, 2008).

²⁴ Few, however, would go as far as the philosopher Leibniz, who defined reality to include the diversity of all existent things—past, present, and future—and found this diversity, including evil, to constitute God’s creation and thus the best of all possible worlds. See *generally* BENSON MATES, *THE PHILOSOPHY OF LEIBNIZ: METAPHYSICS AND LANGUAGE* 69-73 (1986).

domains being discussed. This is most obviously true of descriptive statements (“The U.S. is more linguistically diverse than Sweden”), but it is also true of normative ones. To pick a more complex example, saying that Firm X’s workforce should be more racially diverse makes little sense until one specifies the geographic area from which X can draw its workers and the racial composition of that area. In evaluating the moral implications of communities’ actions toward would-be immigrants, Michael Walzer has observed that achieving more diversity in the larger society may mean less diversity in particular neighborhoods within it because of people’s wish to live with others like them.²⁵ Whether Walzer is right or wrong about this, the distinction between the diversity in a given society (or trans-national or even global community) and that in some smaller area or enclave within it underscores the importance of spatial specifications in any discussion of diversity.

The size of the unit has another implication for diversity. Certain kinds of diversity cannot flourish or even exist unless the attribute is distributed on a sufficiently large scale. A language, for example, can only survive if enough people use it to communicate frequently and intensely enough to sustain it and transmit it to others. More generally, activities like computing and telephony whose value to people depends on the number of others engaging in them (thereby creating what economists call network externalities) require a certain scale to be robust. For this reason, enclave cultures may satisfy their members emotionally but nevertheless be too small to be economically unsustainable.²⁶

Hard choices between different sites of diversity are often inescapable. Under the Voting Rights Act, for example, legislatures and courts face the choice of increasing the racial diversity, demographically

²⁵ MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 38-9 (1983).

²⁶ See, e.g., GEORGE J. BORJAS, FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY 169-74 (1990).

speaking, either of representatives in the legislature or of voters in individual districts. If the former, concentrating voters of a given race into a relatively small number of districts may be necessary to assure legislative seats to representatives of that race (assuming racial bloc voting). If the latter, then racial de-concentration will be sought, but it will reduce the probability of a racially diverse legislature.

II. DEMOGRAPHY AND POLITICS: TWO EXAMPLES

Scientists have long discredited the notion of race, and the latest DNA research provides further evidence, were any needed, of its artificiality and incoherence. Science aside, centuries of immigration and miscegenation, and the recent rise in intermarriage rates by all groups render the conventional racial categories ever more arbitrary.²⁷ Yet powerful political interests cling to these categories with the tenacity of shipwreck victims grasping flotsam and jetsam.

Census categories. Indeed, so many Americans now consider themselves multiracial and wish to be identified as such (if they must be racially identified at all)—seven million in the 2000 Census, including nearly two million blacks (5% of the black population) and 37% of all Native Americans²⁸—that advocacy groups desperate to retain the demographic status quo—mounted a fierce political campaign to preempt a multiracial category.²⁹

Although these mono-racial groups did not decisively win that battle—the Census allowed people to indicate more than one race but did not include a multiracial category³⁰—they seem to be

²⁷ See also Chen, *supra* note 14, at 893-894.

²⁸ Russell Thornton, *What the Census Doesn't Count*, N.Y. TIMES, Mar. 23, 2001, at A19 (discussing Native Americans); Eric Schmitt, *Multiracial Identification Might Affect Programs*, N.Y. TIMES, Mar. 14, 2001, at A20; Eric Schmitt, *For 7 Million People in Census, One Race Category Isn't Enough*, N.Y. TIMES, Mar. 13, 2001, at A1.

²⁹ SKERRY, COUNTING ON THE CENSUS?, *supra* note 15, at 51-4.

³⁰ For a full explanation, see U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: OVERVIEW OF RACE AND HISPANIC ORIGIN (2001).

winning the war. In a grimly ironic aspect of the new demographic dispensation, the government adopted something like the one-drop rule that helped enslave so many mulattos and self-identifying whites before Emancipation. (As Malcolm X quipped, “That must be mighty powerful blood.”)³¹ In March 2000, the Office of Management and Budget in the Executive Office of the President (“OMB”) issued rules providing that for civil rights enforcement purposes,³² any response combining one minority race and the white race must be allocated to the minority race.³³ This, despite evidence that 25% of those in the United States who describe themselves as both black and white actually consider themselves white. Indeed, 48% of Hispanic respondents to the Census self-identified as white; another 42% said “some other race.”³⁴ In a survey by highly-trained Census enumerators of Hispanic households that had failed to respond to the mail questionnaire, 63% considered themselves white and 29% said “some other race.” Almost half of Asian-white people and more than 80% of Indian-white people self-identified as white.³⁵ (This is the racial equivalent of an enduring sociological reality: almost 95% of Americans, including many who are poor by standard “objective” measures, consider themselves solidly working or middle-class).³⁶ Just as class warriors prefer to

³¹ Quoted in AMITAI ETZIONI, *THE MONOCHROME SOCIETY* 30 (2001).

³² The census has issued different allocation rules for purposes of legislative districting and other government decisions using such demographic categories. Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899, 932 n.127 (2001) (brief discussion).

³³ Office of Management and Budget, *Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement*, BULL. NO. 00-02 rule 2 (Mar. 9, 2000). It is not clear whether the Bush administration will retain these rules.

³⁴ Eric Schmitt, *Census Data Show a Sharp Increase in Living Standard*, N.Y. TIMES, Aug. 6, 2001, at A1.

³⁵ Steven A. Holmes, *The Confusion over Who We Are*, N.Y. TIMES, June 3, 2001, at WK1 (discussing National Health Interview Survey data).

³⁶ Gallup Poll (Sept. 1, 2000), was available at <http://www.gallup.com/poll/fromthead/ed0009.asp>.

ignore this fact, administrators of affirmative action programs, who desperately need to race-and-ethnic-code in order to meet their targets or quotas, choose to ignore the “whitening” and “multiracializing” of those whom they insist on treating as minorities.³⁷

No allocation rule can be neutral, of course; OMB’s rule effectively maximizes the size of minority groups and minimizes that of the white group. But where multiracial individuals chose their own racial identities, the government’s allocation rules now decide this matter for them in order to preserve racial preferences. The new rules introduce other changes that will further complicate future race-coding by the government and hence by the many others who rely on these racial data for affirmative action and other purposes. By recognizing no fewer than 126 group combinations under the Census 2000 system, these rules encourage many other eager groups (Arab-Americans, for example) to demand their own specific listing in the Census form. The government will now find it harder to resist these demands than when the ethno-racial pentagon was its exclusive taxonomy. The new system, then, is inherently unstable.³⁸

The number of actual and self-designating multiracial individuals will surely grow rapidly in the future due both to intermarriage and to younger respondents’ greater propensity to intermarry and to self-identify as multiracial. Sociologist Amitai Etzioni predicts that even if current trends do not accelerate, 14% of the population will identify as multiracial by 2050.³⁹ Forcing them into the increasingly arbitrary categories to which traditional racial classifiers tenaciously cling will

³⁷ For an exploration of the implications of multiracialism, see RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 154-78 (2001).

³⁸ Kenneth Prewitt, *Demography, Diversity, and Democracy: The 2000 Census Story*, *BROOKINGS REV.* 6, 9 (Winter 2002). The color-coding in Brazil, which is proposing to create racial quotas for universities, civil service jobs, and other areas, is likely to be far more complex and perhaps unworkable. Larry Rohter, *Multiracial Brazil Planning Quotas for Blacks*, *N.Y. TIMES*, Oct. 2, 2001, at A3 (over 300 terms for different skin colors and more elastic racial categories).

³⁹ ETZIONI, *supra* note 31, at 26-7.

spur them to seek even more fundamental changes in the ethno-racial pentagon, including a separate multiracial category or perhaps even eliminating racial categories altogether, as a proposed initiative in California hopes to do. The government's insistent pigeonholing, which clashes with the robust and, for Americans, compelling rhetoric and ideology of freedom of choice, will further erode the already weak public support for preferences.

Some analysts wishfully think that the multiracial phenomenon does not threaten the viability of the traditional civil rights programs that rely on racial data, both because the cohort of self-reporting multiracials is (so far) relatively small and because OMB's allocation rules further reduce their numerical significance.⁴⁰ Although this may well be true for the immediate future, advocates of the ethno-racial pentagon have only a temporary reprieve. New demographics and identities mean that as time goes on, the government's use of the standard racial categories as a pivot of social policy will become ever harder to justify logically and sustain politically. These standard categories may once have been defensible as reflecting the oppressive reality of America's racist history, but the stubborn insistence by self-interested politicians and group leaders on maintaining them in the face of immense social changes that undermine the integrity of those categories is creating a growing obstacle to the nation's efforts to transcend that history.

Ethno-racial profiling. The effort to control ethno-racial profiling by the police through the gathering of race-coded identity information, while aimed at discrimination and not affirmative action, reveals an important irony about the latter as well.⁴¹ Just when the accuracy, coherence, and

⁴⁰ See, e.g., Persily, *supra* note 32. But see JOSHUA R. GOLDSTEIN & ANN J. MORNING, BACK IN THE BOX: THE DILEMMA OF USING MULTIPLE-RACE DATA FOR SINGLE-RACE LAWS (2001) (unpublished manuscript, on file with The Office of Population Research, Princeton University) (noting that allocation rule will disadvantage Asian-Americans and reassign many who traditionally self-identified as white).

⁴¹ On racial profiling, see Peter H. Schuck, *A Case for Profiling*, AM. LAWYER, Jan. 2002, at 59. Samuel R. Gross & Debra Livingston, *Racial Profiling under Attack*, 102 COLUM. L. REV. 1413 (2002).

social value of racial classification information are rapidly declining, the law is demanding more of it and using it more intrusively. State and city police departments must now collect data on the race, ethnicity, or national origin of all drivers or other individuals whom they stop. In order to do so, the officer must decide what the motorists' race, ethnicity, or national origin are and then record the data for the profiling monitor—without asking them, much less allowing them, to self-identify. To a lament by the president of the Los Angeles Board of Police Commissioners (himself multiracial) that “[w]ith all the racially mixed people in L.A., and Latinos coming in all shades, the data will be garbage in, garbage out,” a Harvard law professor responds that “[w]e’re not trying to get at truth, we’re trying to get at bias.”⁴² But the legitimacy of the search for bias has everything to do with what information the naturally confused police will record and how accurate it is.

Of the other techniques that may be used to obtain the racial data, the *least* chilling is already in place: New Jersey taxpayers paid for all 2700 state troopers to receive mandatory “instruction on how to classify a motorist’s race by judging ‘skin color’ and ‘facial characteristics.’”⁴³ These officers are being encouraged, indeed required by law, to color-code individuals on the basis of what surely are dubious definitions and methodologies at the very moment that American society is struggling to make progress toward its proclaimed goal of color-blindness. In the name of advancing racial justice, one supposes, every bad idea must be taken seriously and even subsidized, at least until the inevitable political backlash against this new policy erupts—perhaps in the form of a voter referendum that will ratchet up the political rhetoric, racial bitterness, and group alienation. In this way, we are told, America will somehow “get beyond racism”⁴⁴ and enhance racial equality.

⁴² Gregory Rodriguez, *When Perception is Reality*, N.Y. TIMES, June 3, 2001, at WK1 (quoting Margo J. Schlanger).

⁴³ *Id.*

⁴⁴ The phrase was popularized by Justice Blackmun. *Regents of University of California v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in judgment and dissenting in part).

These two American examples, which could readily be multiplied, suggest a number of lessons about the intersection of human rights discourse and demographic factors in liberal democracies, lessons that although varying in important ways from society to society likely have a common core across these societies. I say “likely” because all of these societies, whatever their differences, continue to experience sharp cultural conflicts between liberal, tolerant values and entrenched, inegalitarian, and often discriminatory social practices.

The first lesson is that the political salience of ethno-racial demographic categories today depends more on their historical valence and conventional character than on the categories’ current cultural or scientific coherence. There is no escape from the bitter histories that have divided dominant and subordinate groups in each country; these histories cast a dark shadow over most contemporary public controversies and understandings. Whether the issue is public education, health care, family structure and stability, crime, economic growth, taxes, capital punishment military service, profiling, or abortion, fairness concerns rooted in historic but continuing social inequalities are endemic to the debate.

Human rights discourse increasingly pervades these debates. Even in the U.S., which is exceptionally self-conscious about (and proud of) its exceptionalism, questions about how other countries address and resolve these issues are constantly raised. The U.S. Supreme Court, for example, is now engaged in a fascinating legal debate, joined by legal scholars and politicians, about whether and to what extent the Court should use, or even look to, foreign and international law sources in interpreting the U.S. Constitution. Both Congress and recent presidents of both parties have rejected, or interposed important reservations to, international agreements, including human rights treaties such as the Convention Against Torture⁴⁵ and the Convention on the Elimination

⁴⁵ Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

of All Forms of Discrimination Against Women.⁴⁶ Nevertheless, the political price being paid for going it alone on these issues is higher than ever before.

A second lesson is that we must broaden our thinking and debates about human rights in recognition of the breadth of human interests and values that the policies in question actually implicate. Current discourse tends to focus on individual rights to the exclusion of broader social interests which the individuals in question also share, perhaps even more intensely than society in general. It is clear, for example, that poor people and minorities in general are more likely to be victimized by most kinds of crime than are other, less vulnerable people. For this reason, they may prefer that the law strike a different balance between liberty and security than others might prefer. Thus, we should not be surprised to learn that in the U.S. many residents of crime-ridden public housing projects are willing (indeed eager) to waive their Fourth Amendment freedom from “unreasonable searches and seizures” by the police in order to allow (indeed encourage) the police to conduct searches of their buildings with a view to ferreting out vicious criminal activity there. This is a hard choice that more fortunate Americans need not face—or if they faced it, might make differently. Here, as in so many other areas, the problem is not to protect a human right but rather to find the appropriate balance among competing human interests which, when society decides to protect them, we then call human rights. A healthy respect for diversity will recognize that the balance may and should be different for people in different life circumstances. When we flourish the banner of human rights, then, we must be certain not only that these rights are well-defined but that they are properly defined universally rather than contextually (as in my low-income public housing project example). To the extent that we define them contextually, of course, they cease to be *human*—that is to say, *universal*—rights, and instead become

⁴⁶ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

contingent rights, dependent on particular factors. This is a dilemma that must be squarely faced, not swept under the rhetorical rug.

Finally, and of particular interest to scholars, any rational resolution of these conflicts between demographic factors and human rights goals will—or at least *should*—depend on empirical facts and normative judgments that are very difficult to establish with the accuracy that the importance of the subject warrants. How much diversity—of opinion, of socio-economic status, of other important variables—is there within the groups that law and demography often treat as monoliths? In the U.S., the demographic group “Hispanics” is a particularly meaningless aggregation of highly disparate sub-groups who have little in common besides their language of origin. As other demographic groups diversify, they too tend to have less in common. What are the real empirical tradeoffs among conflicting policy goals and norms, and how much do people actually value these conflicting goals and norms? Who is in the best position to speak for different groups or sub-groups? More specifically, with respect to profiling, how do minority group members actually feel about profiling that is designed to protect them from criminal activity but that disproportionately targets members of their group? Does the answer to this question depend on whether the purpose of the profiling—and the inevitable needle-in-a-haystack problem—is respectfully explained to members of the group rather than being administered peremptorily and without a concern for their dignity? Research on these and many other empirical questions is needed.

III. THE AMERICAN WAY OF DIVERSITY MANAGEMENT

In my book *Diversity in America*,⁴⁷ I studied how the issue of diversity in the U.S. has been understood and treated in a number of different public policy domains, particularly immigration, affirmative action, residential patterns, and religion (including so-called “charitable

⁴⁷ SCHUCK, *DIVERSITY IN AMERICA*, *supra* note 5.

choice” and “school choice”). I distilled this experience into four forms. First, certain factual *premises* should be the foundation for diversity management, American-style. They include the facts that the diversity ideal is a very recent cultural innovation confined largely to North America; that diversity is neither good nor bad in itself; that diversity is often a zero-sum game (i.e., a situation in which more diversity in one area or at one level means less diversity in another area or level); that current diversity management efforts are not ideologically pure, analytically crisp, and internally coherent but are instead decidedly messy and dissonant; that existing diversity management is largely a civil society function; and that diversity’s social value depends on its provenance. Second, certain normative *principles* should shape our diversity ideals. Third, certain prescriptive *policies* should guide diversity management. Finally, Americans should observe certain private *punctilios* as they interact in an increasingly diverse civil and political society. Here, I shall discuss only the normative principles and prescriptive policies.

A. PRINCIPLES AND POLICIES

Government should not try to create, certify, or cultivate specific diversities. I noted earlier that diversity generates many social values and disvalues, depending on the political and social norms people embrace. From an economic perspective, diversity is a collective or public good in the technical sense that many of its benefits and costs are externalized to the society as a whole. It follows from this view that voluntary actions alone cannot produce the “right” amount or kind of diversity; only government can do so by subsidizing good diversity and limiting bad diversity.

But this is what philosophers call a category mistake. Unlike other public goods whose value does not depend on who produces them or where they come from, diversity’s value depends on its provenance. Genuine diversity (hence diversity-value) is a far more fragile thing than lawmakers seem to suppose; the crude regulatory resources and

techniques at law's disposal are more likely to asphyxiate it than to invigorate it. For this reason, precisely how government conceives of and implements diversity management matters a great deal. Some efforts meant to increase diversity-value may indeed do so but others will debase or destroy it. The fact that diversity is a public good, then, does not imply that government should manage it. It is always an open question whether a particular form of public law increases or reduces diversity-value.

Let us distinguish among different ways in which government can and does approach diversity. Immigration laws literally import diversities that persist even as the process of assimilation transforms them in complex ways. Our immigration stream is now so diverse in terms of ethnicity, language, race, religion, and national origin that efforts to diversify it further cannot yield much additional diversity-value. The Religion Clauses of the First Amendment, taken together, protect an extraordinarily diverse *mélange* of religious groups, beliefs, and practices—even though I think that the Court could and should protect even more religious diversity than it does. By barring discrimination against minorities, the law also protects diversity. Political diversity receives strong legal protection. Indeed, the Supreme Court's fidelity to the protection of flag burning, hate speech, and other political deviance is praiseworthy.⁴⁸ It is also remarkable, given the statist values of most of the current justices.⁴⁹

⁴⁸ See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (hate speech); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incendiary speech). Hate-crime laws, however, are permitted to regulate hate speech when coupled with criminal behavior. See generally JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS* (1998); FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* (1999). The political pressure to expand the scope of hate-crime laws continues. See Christopher Marquis, *Man is Charged in Two Killings That U.S. Calls Hate Crime*, N.Y. TIMES, Apr. 11, 2002, at A27, (Senator Kennedy pressing administration to support bill covering sex, sexual orientation, and disability).

⁴⁹ See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (striking down federal statute restricting child pornography on the Internet).

Sometimes, however, government seeks not simply to protect an existing diversity but to create or promote a new one. These two enterprises are very different. In order to promote a particular diversity, government must define, measure, and certify it as one deserving special legal recognition and support. This requires it, in turn, to make determinations about provenance and authenticity that it is singularly ill-equipped to make. The Bureau of Indian Affairs, for example, decides which groups it will recognize as tribes for purposes of various federal benefits, with the most valuable benefit today being tribal eligibility to establish potentially lucrative gambling casinos. These incentives have embroiled the Bureau, tribes, and individuals in high-stakes disputes over who is and is not an Indian and which groups of Indians constitute tribes.⁵⁰ Perverse certification is also exemplified by the recent decennial Census, which (as discussed in part II) reveals how official definitions, measurements, and certifications of ethno-racial groups reify and (at least for a time) ossify anachronistic categories, distort behavioral incentives, and politicize identities that, I have argued, should be matters of private, unsubsidized choice. The Census's handling of the Indian, black, and Hispanic groupings is particularly problematic.⁵¹ (The fact that the Census was conducted with great professionalism only confirms that these distortions are systemic and inevitable). An equally troubling, if no less well-meaning, instance of official certification of diversity, noted in part II, is training state troopers to determine and then code each driver's race for purposes of anti-profiling statistics.

⁵⁰ See, e.g., David M. Herszenhorn, *Two Feuding Indian Tribes Are Recognized, but as One*, N.Y. TIMES, June 25, 2002, at B5; Timothy Egan, *Lawsuit in California Asks, Whose Tribe is it, Anyway?*, N.Y. TIMES, Apr. 10, 2002, at A24, (a woman and her two children claim to be tribe); Brent Staples, *The Seminole Tribe, Running from History*, N.Y. TIMES, Apr. 21, 2002, at WK12 (dispute over quantity of "Seminole blood"). See generally JEFF BENEDICT, *WITHOUT RESERVATION: THE MAKING OF AMERICA'S MOST POWERFUL INDIAN TRIBE AND FOXWOODS, THE WORLD'S LARGEST CASINO* (2000).

⁵¹ See generally SKERRY, *COUNTING ON THE CENSUS?*, *supra* note 15.

Having certified a certain kind of diversity as worthy of public promotion, government will then either subsidize or mandate it—particularly if it is a kind that the relevant community resists. *Diversity in America*'s analyses of mandatory ethno-racial preferences, court-ordered integration of residential neighborhoods across class lines, and required bilingual education for cultural maintenance, reveal the dismal failures of most of these efforts.⁵² That the government had plausible reasons and better remedial alternatives makes these failures all the sadder.

Why is it so much harder for government to promote new diversities than to protect old ones? I have already discussed one largely structural reason: the tight link between diversity's value and its provenance. We value diversity only if and to the extent that we think it arises from a legitimate source and perceive it as authentic, natural, and uncontrived. We care about where the diversity comes from and whether the process that produced it comports with deeply-held norms about moral desert and instrumental appropriateness. We value diversity that seems to reflect human spontaneity, personality, and achievement (e.g., performance-based selection of students and workers, or cultural maintenance managed by immigrant families) more highly than diversity that government designs, manufactures, certifies, and mandates (e.g., choosing students by skin color, or promoting Spanish for immigrant children whose parents want them to learn English quickly).

⁵² In brief, and with some over-simplification: The preferences have had often inconsistent and incoherent rationales, largely aided those who would have succeeded without them, undermined and confused the notion of merit, exacerbated inter-group conflicts, produced bureaucratic dissembling, and created suspicion about favored groups' achievements (SCHUCK, *DIVERSITY IN AMERICA*, *supra* note 5, at ch. 5). Court-ordered residential integration across racial and economic class lines have (in two of the three major case studies) led to little integration but endless litigation, frustration, and heightened inter-group hostility (ch. 6). Bilingual education has often retarded minority student English fluency (*id.* at ch. 4).

Although law has many strengths, the ability to create the values and experiences we associate with genuine diversity is not one of them. To contemporary Americans, law is not a mystical emanation from a majestic sovereign, but a technocratic, artifactual tool of social control that we assess according to the more mundane criteria of consent, efficiency, fairness, and effectiveness. Democratically-legitimated law carries moral force, to be sure, but its ubiquity has disenchanted and demystified it. We no longer stand in awe of it.⁵³

Law cannot easily extract diversity-value from processes that render the resulting diversity artificial in the eyes of people who believe in academic or occupational merit, class-based neighborhoods, immigrant assimilation and economic mobility, and other values. Coercive law has failed (though certainly not for want of trying) to legitimate ethno-racial preferences, integrate the suburbs, and educate limited-English-speaking children—even when wrapping itself in the mantle of constitutional principle. This inability to create diversity-value, as distinguished from protecting it from suppression, may be part of a larger limitation endemic to law. Robert Fogel suggests that while the law successfully redistributed material gains in the past, it has less purchase on the spiritual values that contemporary Americans increasingly seek.⁵⁴ Fogel's insight, I maintain, also applies to diversity-value.

These findings bespeak a paradox about diversity and law. The harder the law tries to create or promote diversity, the more it magnifies and highlights its own weaknesses, and the more it reveals the diversity it seeks to be inauthentic, illegitimate, and disvalued. This paradox is also evident, albeit far less dramatically, in other diversity-mandating efforts. In the hope of rescuing affirmative action from a reality of sharp differentials in group academic performance, the University of California has repeatedly resorted to new manipulations

⁵³ See Cover, *supra* note 22.

⁵⁴ ROBERT W. FOGEL, *THE FOURTH GREAT AWAKENING AND THE FUTURE OF EGALITARIANISM* 214 (2000).

and dissimulations that must sow cynicism about both law and the diversity ideal.⁵⁵ The same is true, *mutatis mutandis*, when—as has often happened with bilingual education in the U.S— government sacrifices immigrants’ assimilation and education in order to maintain a culture whose authenticity and hence actual value depend on a provenance of unregulated, unmediated efforts by motivated families and communities, not on government mandates.⁵⁶

Indeed, the paradox of an earnest government defeating its own best efforts is even crueler than this. In truth, government and law are natural enemies of diversity, especially when they are most eager to create it. The reasons have nothing to do with motives or incentives and everything to do with the nature of law, government, and diversity. Consider, for example, the categories that law uses to structure legal discourse, doctrine, and responsibility.⁵⁷ Ordinarily, we assess people and things according to the many dimensions along which they vary: size, strength, beauty, speed, intelligence, morality, humor, culpability, value, and the like. In contrast, law—especially regulatory law—typically seeks to govern social phenomena through simple binary, yes-or-no categories. It seldom uses the kind of continuous categories of more-or-less that refine our perceptions and discourse, and that render everyday life intelligible and nuanced. A citizen beholding law’s skeletal classifications often protests in the name of common sense: “The real world isn’t black and white; it is all a matter of degree.”

Law knows this, of course, but it pretends otherwise. Plausible arguments exist for using reductionist classifications in public law, and they usually carry the day. Such classifications, for example, allow us to make, apply, and comprehend law more cheaply and more predictably than if the rule traced the bewildering variety and semiotic complexity of social life. Public law’s hope is to use simplistic categories to

⁵⁵ See SCHUCK, DIVERSITY IN AMERICA, *supra* note 5, at 183-85.

⁵⁶ *Id.* at 109-23.

⁵⁷ The rest of this paragraph draws on PETER H. SCHUCK, THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE, ch. 13, esp. 427-32 (2000).

facilitate legislators' control of regulators and regulators' control of the rest of us. Certain legal techniques, of course, can temper rules' reductionism. Lawmakers, for example, can include more categories, replace bright-line tests with more flexible, contextual standards, and permit exceptions to be made. These techniques, however, have their own drawbacks. A nuanced law is more complex and costly to understand and apply. Moving from clear rules to vague standards delegates discretion to those who apply and enforce them, such as citizens, juries, or bureaucrats, thus reducing accountability and inviting arbitrariness and unpredictability. Exceptions may swallow, weaken, or de-legitimate the rules to which they apply.

Even at the most formal level, then, it is more problematic for public law to define, certify, and cultivate diversity than for it to protect (and in some cases, exploit) a diversity that civil society has already authenticated and valorized. Genuine diversity-value is a product of an opaque, complex, dynamic, mysterious realm of human meaning and identity that we call culture. When law seeks to create this culture of diversity, it exhibits a serious disability that cannot be overcome or accommodated. The best that we can hope to do is understand its sources and minimize its worst effects.

Government has an essential role in protecting diversity from discrimination and monopoly. Government, I have argued, should use its bully pulpit to praise diversity in general and even particular diversities, as President Bush did shortly after September 11 when he exhorted Americans to treat Muslims with respect.⁵⁸ But, as noted in part I, government should not try to create or promote any *particular* kind of diversity. I have explained why this is not a proper public function in a society committed to liberal and democratic values and why, in any event, law is a singularly poor instrument for performing that function.

⁵⁸ George Bush, Remarks at the Islamic Center Washington, D.C., soon after the Sept. 11, 2001, attacks, *available at* <http://usinfo.state.gov/products/pubs/muslimlife/bushword.htm> (last visited Jan. 24, 2008).

This does not mean, however, that government has no role to play in protecting diversity or indeed in promoting it as a social ideal. Far from it. Government is indispensable to protecting existing diversities and emerging ones from suppression, and it can clear the channels through which new diversities, some now impossible to discern, may yet be born.⁵⁹ Indeed, *only* government can protect groups whose beliefs and practices differ from those of a dominant group that wants to use the law to impose its own.⁶⁰ Almost all majority impositions are perfectly appropriate in a democracy, but when they regulate ethno-racial, religious, political, or associational diversities, the Constitution requires a higher-than-usual standard of justification.

Government's management of diversity should take three general forms. First, government should protect diversities against invidious discrimination. Second, it should challenge various forms of monopoly power, especially its own, in order to clear a path for the emergence of more diversities. Third, it should empower diversity by enhancing the role of individual and group choice. I shall discuss each of these in turn.

Anti-discrimination. In a society dedicated to genuine equal opportunity, the law must assure individuals that they will not be denied it on the basis of attributes used to stigmatize, subordinate, or otherwise disadvantage the group. This means creating anti-discrimination remedies like the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1991 and ensuring their accessibility and effectiveness.⁶¹ The goal of anti-discrimination law is justice,

⁵⁹ The analogy here is to JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980), which justifies the use of judicial power to open the channels of political change.

⁶⁰ The dominant group in one community may be a minority elsewhere—the Mormons in Utah, for example. For international examples *see* Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 *YALE L. J.* 1 (1998).

⁶¹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

conceived of as equal opportunity for individuals, not diversity. Anti-discrimination law may produce more demographic diversity than otherwise in a particular setting; this is beside its central point, which is justice. (By definition, as we saw earlier, the law *reduces* diversity in another sense when it prevents employers or others from using certain screening criteria).

In contrast, affirmative action—at least in its more robust, preferential forms—promotes many new injustices in the name of remedying an old one. It does so by favoring one racial or ethnic group over others either for historical reasons that do not really apply to many of its supposed beneficiaries (e.g., immigrants), or for diversity reasons that government can neither legitimately mandate nor sensibly design. These preferences do so, moreover, at a time when rapid demographic changes are making them increasingly difficult to justify or administer.

A society that truly values diversity must also limit the scope of the non-discrimination norm, precious as that norm is. Anti-discrimination law was originally intended to protect blacks and other minorities who are most vulnerable to majority oppression and whom the Equal Protection Clause of the Fourteenth Amendment was meant to protect from exclusion and subordination. More recently, anti-discrimination remedies have been extended to many groups—for example, the elderly, parents of children, and motorcyclists—that do not, and should not—receive the same level of constitutional protection from majority rule.⁶² Lesser protection for a group may be justified because it can adequately protect itself in the political process and the market (e.g., parents or women), or because forcing group members to transact with others (e.g., homosexuals, families with small children, Medicaid recipients, the obese) would violate the members' interests in freely choosing their own associations. Non-discrimination is a

⁶² For analysis of these and other examples, see David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MONT. L. REV. 83, 106-7 (2001).

compelling ideal, but so is the value of individuals joining with others in common fellowship and commitments defined by them and not by the state.

The Supreme Court has only begun to develop the contours of this right of “expressive association.” In a recent line of decisions, the Court has wrestled with the problem of reconciling two claims: a group’s desire to define and express its members’ values by associating with like-minded people and excluding others, and an excluded individual’s claim under anti-discrimination law to equal treatment and inclusion. In order for members to develop a group’s distinctive identity, they must often exclude others whom they believe, rightly or wrongly, will dilute or deform that identity. This may cause pain to some of the excluded and may also offend outsiders, as the Boy Scouts’ exclusion of avowed homosexuals has done,⁶³ generating a flood of negative publicity and resistance by local units. Reconciling these claims is unlikely to yield clear rules. Outcomes will likely depend on such factors as the particular trait on which the exclusion is based; the trait’s effect on the group’s values, coherence, and claimed identity; the clarity and consistency of this identity; the group’s “market power”; its opportunities for internal dissent and exit; and the nature of the evidence required to establish these facts. But a liberal state that truly values diversity must protect individuals’ freedom to form groups that have exclusive identities, embrace unpopular beliefs, and act on those beliefs within constitutional bounds. To those excluded by such groups, the state should say: “The law equally protects your right to form your own groups around your own identities and to contest the norms of those who exclude you. In a diverse civil society where the state must tread lightly in matters of autonomous group life, this is the only quality that the law guarantees.”

⁶³ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). For a very brief discussion of this case and this issue see Peter H. Schuck, *Diversity Demands Exclusivity*, AM. LAWYER, Sept. 2000, at 67.

In such a society, the breathing space for disparate identities will often produce private groups affirming norms that are less egalitarian than the norms enforced or proposed by the state. Protecting the right of groups to maintain these differences is one important way in which the law can counter the state's inevitable effort to monopolize norms that should instead be diverse. I now turn to two other ways: anti-monopoly and enhanced choice.

Anti-monopoly. No one doubts that the law should prevent public and private entities from exercising monopoly power over others, although precisely how this should be done is certainly debatable. In the economic domain, anti-trust law is a charter for economic diversity (or at least for efficient levels of it). In the political domain, the First Amendment bars the state from imposing its views on the citizenry, preferring some groups over others, or stifling speech and viewpoint diversity. Indeed, a robust First Amendment is the most powerful legal shield for protecting many other kinds of diversity. But a diversity-friendly government should do much more than refrain from violating the First Amendment. It should also use the law affirmatively to limit various kinds of non-economic monopolies. For example, government can diversify campaign finance by giving citizens more control over the allocation of campaign dollars.⁶⁴ When it speaks⁶⁵—for example, in sponsoring art or funding legal services⁶⁶—it can do so in ways that facilitate the expression of existing diversities. It can begin planning a phase-out (or at least an appropriate disclaimer) of ethno-racial statistics and categories whose growing artificiality, crudeness, inaccuracy, and capacity to mislead are already distorting public policy

⁶⁴ See BRUCE A. ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 12-24 (2002). The campaign reform law enacted in March 2002 will do none of this.

⁶⁵ See, e.g., MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983).

⁶⁶ See, e.g., *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (federally funded lawyers represent their clients' interests, not the government's).

discourse⁶⁷ and will do so even more in the future. Government can also nourish institutions, practices, and technologies in which diverse visions of the good can meet, compete, and interact—sometimes in the “public square,” sometimes in private ones. It can favor decentralized political and economic decision-making. Perhaps most important, it can support educational systems that prepare young people for the diverse ways of comprehending and living in a world far more dynamic than the one inhabited by their parents.

Choice. Free and informed choice is the principal legitimating provenance of diversity. It constitutes an exercise of individual freedom and autonomy, which in the liberal (and some other) conceptions of value is an, and perhaps *the*, ultimate good. In the public sphere, the exercise of choice also nourishes and exemplifies active citizenship and democratic participation. In civil society, it animates private associations, institutions, and markets that help to satisfy basic human needs. Moreover, such choice tends to legitimate its objects in the eyes of society. Precisely what preconditions must be satisfied in order for “free and informed choice” to exist is a fundamental and often controversial question, but its answer is highly context-dependent and that analysis need not detain us here.

The importance of both protecting and promoting choice is a particular principle of diversity management. In *Diversity in America*, I provide many applications of this principle in different public policy domains. Government should allow individuals to self-identify as they wish rather than imputing its own ethno- racial identifiers to them. Parents should have more say about the linguistic education of their children. “Diversity visas”⁶⁸ should be sold to qualifying

⁶⁷ The struggle over multiracial options in the 2000 Census suggests just how difficult it will be politically to move in this direction.

⁶⁸ Under U.S. immigration law, 50,000 visas per year are reserved for individuals selected on the basis of their supposed diversity value. It is also known as the Green Card Lottery. The lottery is administered on an annual basis by the Department of State. Section 131 of the Immigration Act of 1990, Pub. L. 101-649 amended § 203 of

worker-bidders. Like religious organizations, secular groups seeking a common identity within constitutional bounds should not be condemned by anti-discrimination laws. Housing integration should be promoted by giving target beneficiaries vouchers for rent, search, and other mobility services. Religious practices should be accommodated unless they violate a compelling public interest. Recipients of social service subsidies should have equal access to faith-based providers.

These proposals all have a common feature and goal—to increase people’s power over choices that government now preempts. Absent market failure (e.g., monopoly) or other overriding reasons for government choice, social welfare is maximized by having resource allocation decisions made by the affected individuals and firms, not government. In the liberal tradition, however, the normative value of choice transcends considerations of efficiency. Choice is how we exercise our freedom, and diversity is its inevitable product. Americans’ veneration of individual choice is evident in public debates over abortion, smoking, school vouchers, and a host of other issues. In each of these debates, competing interests jockey for the political advantage of using choice rhetoric to justify their causes. A less obvious point is that reliance on decentralized choice reduces political conflict. This is a social virtue going well beyond the efficiency and autonomy values enjoyed by those who exercise it. Muting this conflict is essential to the survival of a polity as diverse and competitive as 21st century America.⁶⁹

Many American institutions serve this purpose.⁷⁰ Federalism and a decentralized party system diffuse much political conflict by

the US Immigration and Nationality Act (INA) 8 U.S.C. (2000) providing a new class of immigrants “diversity immigrants or DV immigrants.” For a sharp critique of this program, *see* SCHUCK, *DIVERSITY IN AMERICA*, *supra* note 5, at 123-31.

⁶⁹ The variable scope of political conflict is the theme of E.E. SCHATTSCHEIDER, *THE SEMI-SOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* (1975).

⁷⁰ The rest of this paragraph draws on SCHUCK, *THE LIMITS OF LAW*, *supra* note 57, at ch. 3.

channeling it to the states and localities rather than elevating it to the level of higher-stakes national policymaking. Courts at all levels resolve litigation in a fragmented, low visibility fashion. Lay juries, seldom used outside the U.S., conceal and spread responsibility for what are often political decisions through their local and independent character, ad hoc form, Delphic opacity, and exercise of subjective judgment.⁷¹ The separation of powers also diffuses responsibility for political decisions (although it does encourage inter-branch conflicts). Many choices that in other countries require political decision are governed in the U.S. largely by contract law and markets rather than by public law and politics. The American private sector is also relatively decentralized. Small firms account for most economic activity, non-profit groups abound, religions are organizationally and often liturgically decentralized, and so forth.

This decentralization of choice to private individuals and groups and to lower-level governments is a vital element of America's approach to conflict reduction. When politicians cannot agree on a uniform rule to resolve a controversial issue, they often allow it to be decided by the concerned individuals or groups, using phrases like "freedom of choice" and "local option" to describe and dignify this deference. As American life becomes more diverse, complex, and competitive, such conflict-reducing techniques must be extended and new ones devised. For this reason, I have proposed a number of programmatic devices designed to empower diversity by moving the *loci* of choice from politicians, bureaucrats, and judges to individuals and private groups.⁷² For example, the law should allow expressive groups to limit their memberships to those whom they think will further their group identity; make cultural maintenance a responsibility of families, not government; use means-tested vouchers for housing, schools, bilingual education, and other publicly-funded benefits; accommodate deviant religious practices more broadly; and end mandatory race-

⁷¹ See generally GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978).

⁷² SCHUCK, *DIVERSITY IN AMERICA*, *supra* note 5, *passim*.

based affirmative action except in the narrow remedial usage now permitted by the United States Supreme Court.⁷³

Expanded choice can also be used to defuse other kinds of conflicts. Consider the controversies that rage in numerous communities over school curricula, particularly over whether to teach Darwinism, creationism, “intelligent design,” or some other (pseudo-)scientific creed.⁷⁴ Like most educational policy issues, this one is resolved by local school boards, which obviates the need for a national consensus, but of course engenders a large number of local conflicts. The ferocity of these struggles, however, is largely due to the monopolistic nature of the public school system in these communities. This monopoly raises the stakes by mandating a single, one-size-fits-all curriculum, which just happens to also be bureaucratically convenient. Yet a public school system is by no means limited to this monistic solution. It could allow its schools to teach different versions of science, a freedom that some publicly-sponsored charter schools now enjoy. By relaxing its monopoly over the curriculum and giving low-income families financially viable choices among schools offering different curricula and other controversial features, government could reduce many conflicts. Subsidized choice could have much the same effect on conflicts over public housing, public transportation, and many other public services that government now provides in relatively monolithic take-it-or-leave-it form to those who cannot afford to leave the public system.

I am not suggesting that enhanced choice is equally compelling in all of these different policy domains. Officials must always weigh the value of a national, uniform, or mandatory rule against the value of a decentralized, variable, or permissive rule—or of no rule at all, leaving the choice entirely to individual choice. The advantages of diversifying

⁷³ See *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738 (2007).

⁷⁴ See, e.g., Francis X. Clines, *Ohio Board Hears Debate on an Alternative to Darwinism*, N.Y. TIMES, Mar. 12, 2002, at A16.

school curricula, for example, must be balanced against the desire to equip all students for a common democratic American citizenship. Spillover effects, which are ubiquitous in complex, interdependent societies, can often be effectively regulated only through mandatory rules that preempt local or individual choices. In contrast, goods like low-income housing and social services are best provided in forms that respond to the different needs and desires of different individuals and groups. Even when government decides to regulate private conduct through a mandatory rule, as it often does, it should always authorize exceptions to the rule unless they would defeat the rule's underlying policy.⁷⁵ More generally, government should not demand uniformity and limit choice more than a suitably refined, targeted policy requires. This principle is neither anodyne nor tautological. Taken seriously, it would condemn or alter an immense body of public law.⁷⁶

In urging government to facilitate diversity by deferring more to private (and lower-level governmental) choices, I do not wish to fetishize either diversity or choice. Diversity is not always an unalloyed virtue; its costs may sometimes be severe. Choice, for its part, only merits its elevated normative status in the liberal tradition when it is sufficiently voluntary and informed. (I say "sufficiently" because choices are almost always constrained and based on imperfect knowledge, so voluntariness and information are inevitably matters of degree). And although more choice is generally desirable, there can be too much of a good thing. (Mae West famously retorted that "too much of a good thing is wonderful").⁷⁷ Too many choices, empirical evidence suggests, may increase anxiety and decision costs.⁷⁸ Moreover, some choices opened

⁷⁵ See generally Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy through an Exceptions Process*, 1984 DUKE L. J. 165 (1984).

⁷⁶ See, e.g., STEPHEN G. BREYER, *THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).

⁷⁷ U.S. movie actress (1892-1980).

⁷⁸ See, e.g., Hal R. Varian, *Economic Scene*, N.Y. TIMES, Feb. 14, 2002, at C1 (analyzing investor choices among 401(k) plans).

up by new technologies may create grave moral and political dilemmas, as the debates over cloning, late-term abortion, surrogate motherhood, and many other issues suggest. But while we should always bear these “dark sides” of more choice in mind, they have little relevance to the kinds of enhanced choice I have proposed here.

IV. CONCLUSION

My analysis should make plain why demographic issues like the ones discussed in part II (Census categories and ethno-racial profiling) and the way that governments may seek to address them, are often so fraught and difficult to resolve. The choice of Census classifications and methodologies is not simply a technocratic exercise. Instead, it raises highly contentious issues not only of individual and group identities but also of the appropriate role of government and law in defining, signaling, legitimating, and perhaps reinforcing those identities. Developing my analysis on the basis of liberal principles that underlie, or are congruent with, most conceptions of human rights, I have advocated a diversity management strategy that would accord greater recognition to individuals’ self-identities, including multi-ethnic and multiracial categories. I have also suggested that the government should seriously consider whether the political and historical reasons for employing the conventional ethno-racial categories have lost enough of their force to justify abandoning them. If that day has not yet arrived, it may not be too long before it does. By the same token, the conventional categories should have less and less value over time for government programs hoping to use them to detect instances of illegitimate ethno-racial profiling.

More generally, I have shown that the task of managing diversity in the interests of advancing human rights and of controlling conflict within and between groups requires a variety of principled and policy judgments. These judgments, in my view, should emphasize the liberal values of government neutrality, group competition, anti-discrimination, and free and informed choice.