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Courts and Cultural Distinctiveness

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The claim that minority ethnic and religious groups are culturally distinct from the dominant society is often, either implicitly or explicitly, a key element of demands these groups make to courts and legislatures for accommodation of their needs. In such cases the decision maker's understanding of what constitutes "cultural distinctiveness" is crucial, for it can strongly influence the outcome of the accommodation question. In this brief Essay related to Peter Welsh's¹ and Joseph Carens's² papers and Dean Suagee's remarks delivered at the Preservation of Minority Cultures Symposium,³ I contrast these panelists' subtle and sophisticated understandings of cultural distinctiveness with the much more simplistic and less encompassing understanding commonly displayed by courts. I then suggest a few reasons why courts may be reluctant to adopt the broader conception represented by the panelists.

I. TYPICAL CLAIMS FOR ACCOMMODATION OF CULTURAL DIFFERENCE

To set the context for the subsequent discussion of conceptions of cultural distinctiveness, let me begin with a few illustrations of the kinds of claims that groups possessing distinctive cultural traits frequently make to judges and legislators when seeking protection against unintended threats to their cultural survival or integrity.

Political communities can unintentionally jeopardize the integrity or survival of culturally distinctive groups in a myriad of ways simply by codifying dominant cultural values

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1. Peter H. Welsh, *Repatriation and Cultural Preservation: Potent Objects, Potent Pasts*, 25 U. MICH. J.L. REF. 837 (1992).

2. Joseph H. Carens, *Democracy and Respect for Difference: The Case of Fiji*, 25 U. MICH. J.L. REF. 547 (1992).

3. Dean Suagee, Lecture at *University of Michigan Journal of Law Reform Symposium, Preservation of Minority Cultures* (Feb. 15, 1992) (audiotape on file with the *University of Michigan Journal of Law Reform*).

and by implementing their own dominant cultural values. They do so, for example, (1) by imposing on minority cultural groups political and social institutions that are incompatible with minority values and customs, (2) by enforcing against minority groups laws of general applicability which offend minority cultural norms, and (3) by disregarding minority cultural needs when allocating or developing publicly owned property.

In such instances, minority groups have responded with the following three types of claims. First, the minority group claims that it is entitled to its own political and social institutions, and is entitled to govern its members and other persons within its territorial boundaries. Indigenous peoples frequently assert this entitlement, and, with some important limitations, it has been granted in the United States to Native American tribes residing on Indian reservations.⁴ The second claim is that members of a minority culture must be released from laws of general applicability when compliance with those laws poses a threat to their cultures. A familiar example is the Amish's claim in *Wisconsin v. Yoder*⁵ that they should be exempt from laws requiring school attendance after the eighth grade.⁶ The third claim is that significant, and in some circumstances controlling, weight must be given to minority cultural needs in allocating and developing public property. An example of this claim is the demand of Native Americans that public lands which have spiritual importance to practitioners of tribal religions be managed in ways that will not destroy that importance.⁷

II. THE COMMON JUDICIAL UNDERSTANDING OF CULTURAL DISTINCTIVENESS

Judicial opinions which consider claims for accommodation of the special cultural needs of minority groups reveal that courts' decisions are often strongly influenced by judges' understanding of what it means for a group to be culturally

4. For a comprehensive overview of United States law concerning the sovereignty of Native American tribes, see FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1982).

5. 406 U.S. 205 (1972).

6. *Id.* at 234 (accepting the Amish's claim).

7. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (rejecting this claim).

distinct from the dominant society.⁸ Not surprisingly, the conceptions of cultural distinctiveness manifested by judicial opinions are not uniform. A common, seemingly predominant, notion of cultural distinctiveness is discernible, however. Reduced to capsule form, that conception is this: Cultural distinctiveness which might warrant accommodation exists only where members of the dominant culture find easily perceived manifestations of the minority culture both to be starkly different from their own and to be essentially unchanged from a time which the dominant culture associates with the "authentic" minority culture.⁹ Four examples of the operation of this common judicial conception follow.

This understanding of cultural distinctiveness led to protective treatment in *Wisconsin v. Yoder*. Crucial to Chief Justice Burger's opinion for the Court were his perceptions of Amish culture as both static and radically different from the dominant society in material and other easily perceived ways. Burger emphasized that the Court was dealing with a three hundred year old culture which, at least to the untrained eye of most outsiders,¹⁰ had not "altered in fundamentals for centuries."¹¹ The Amish remained distinct from the dominant culture by virtue of their separation from secular society, their agricultural occupations, their language, and their material culture, including their archaic dress and their rejection of telephones, automobiles, radios, and televisions.¹² Thus, the Court used the sharp and readily grasped differences between the Amish and dominant cultures and their adherence to an "authentically" Amish, traditional way of life to justify accommodation.

8. Cultural distinctiveness standing by itself is not, of course, a basis upon which an American court can order accommodation. The claimant minority group must rely upon a judicially enforceable constitutional, statutory, treaty, or other legal right. Almost all of the United States cases raising the cultural distinctiveness issue involve the constitutional right to free exercise of religion or the statutory, treaty, or inherent rights of Native American tribes. See, e.g., cases cited in this Essay.

9. This conception appears to be dominant, but not universal. One noteworthy example of sophisticated and sensitive judicial understanding of cultural distinctiveness is the district court's opinion in *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5 (D.N.M. 1975), *rev'd*, 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978).

10. For discussions of change in Amish culture, see JOHN A. HOSTETLER, *AMISH SOCIETY* (3d ed. 1980); DONALD B. KRAYBILL, *THE RIDDLE OF AMISH CULTURE* (1989).

11. 406 U.S. at 217.

12. *Id.* at 216-17.

More recently, this common judicial understanding of cultural distinctiveness supported an un-Solomonic splitting of the baby in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*.¹³ The issue in that case was whether the tribal government had zoning authority over lands which were located on the reservation but owned by non-Indians. In the controlling plurality opinion, Justice Stevens concluded that the tribal government possessed zoning powers over lands which were, in his view, authentically Indian in character, and consequently suitable for what he thought of as authentically Indian activities. Those lands were “pristine [and] wilderness-like”¹⁴ “place[s] where tribal members may camp, hunt, fish, and gather roots and berries.”¹⁵ At the same time, Justice Stevens concluded that the tribal government had no right to control the development of lands owned by non-Indians where those lands had lost “the character of a unique tribal asset”—where they were used in modern and thus presumptively un-Indian ways, such as for residential and commercial development.¹⁶ Observation of the change in appearance and use of these lands from “traditional” times was the beginning and end of Justice Stevens’s inquiry into whether the tribal government had any culturally based interest in controlling the development of these lands.

Finally, the commonly held judicial conception of cultural distinctiveness has persisted from the nineteenth century to contemporary times and has caused some courts to deny accommodation to Native American peoples who have selectively adopted some of the elements of the dominant culture—particularly material, occupational, and recreational elements. Two examples, separated by the passage of 140 years but united by this conception, follow.

In 1835, in *United States v. Cisna*,¹⁷ Justice McLean held that changes in the material culture, occupation, and property system of the Wyandotts had destroyed their

13. 492 U.S. 408 (1989).

14. *Id.* at 445 (quoting the trial court’s findings at 617 F. Supp. 750, 752 (E.D. Wash. 1985)).

15. *Id.* at 441 (quoting the Amended Zoning Regulations of the Yakima Indian Nation, Res. 1-98-72, §23 (1972)).

16. *Id.* at 447.

17. 25 F. Cas. 422 (C.C.D. Ohio 1835) (No. 14,795).

"Indian" status.¹⁸ In support of this conclusion, he cited the following facts: the Wyandotts had interacted daily with the surrounding white population and operated stores and taverns on the reservation which were frequented by whites. Justice McLean also noted that:

The Wyandotts have made rapid advances in the arts of civilization. Many of them are very intelligent; their farms are well improved, and they generally live in good houses. They own property of every kind, and enjoy the comforts of life in as high a degree as many of their white neighbors.¹⁹

Ergo, Justice McLean concluded, the Wyandotts were no longer truly Indian and thus no longer were entitled to distinctive treatment.²⁰ Almost a century and a half later, notwithstanding the subsequent birth and flourishing of anthropology during the interval, a Canadian court came to the same conclusion, on the same grounds, about the Cree Indians.

In *La Société de Développement de La Baie James c. Kanatewat*,²¹ Cree Indians sued to prevent the James Bay Development Corporation from building a mammoth hydro-electric project.²² The Cree argued that the construction of roads and airports and the diversion and damming of rivers which were required by the project would destroy their distinctive culture by making it very difficult or impossible to continue the subsistence hunting and fishing activities that were central to their identity as Cree Indians.²³

In support of their argument, the Cree presented the following evidence: the hunting, trapping, and fishing life had great cultural and emotional importance to them; the bulk of their diet consisted of subsistence foods such as caribou, moose, rabbit, geese, sturgeon, and trout; they far

18. More specifically, Justice McLean held that such cultural change effectively terminated federal authority under the Trade and Intercourse Act of 1802 (cited as Act of March 30, 1802, ch. 13, 2 Stat. 139) over crimes committed by non-Indians on the Wyandott Reservation. *Id.* at 424-25.

19. *Id.* at 424.

20. *Id.*

21. *La Société de Développement de La Baie James c. Kanatewat*, R.J.Q. 166 (Que. C.A. 1975).

22. *Id.* at 171.

23. See BOYCE RICHARDSON, *STRANGERS DEVOUR THE LAND* 20-25 (1991).

preferred these foods to so-called "white" foods; and they adhered to many traditional beliefs and practices regarding the proper treatment of game.²⁴

The Development Corporation disputed the existence of a distinctive Cree culture, principally on the ground that because Cree material culture had changed since contact with the dominant culture, Cree culture was now simply a rural Canadian one. How could the Cree be genuinely Indian, the Corporation argued, when some of them ate Kentucky Fried Chicken?²⁵

The Quebec Court of Appeals accepted the Corporation's argument that the Cree were no longer "Cree." Justice Turgeon's opinion illustrates the judicial fixation on material culture, stark contrast with the dominant culture, and "authenticity." Thus, his opinion is worth quoting at length:

At each settlement, snowmobiles have replaced the dogs of yesteryear. Modern houses provide shelter instead of tents and igloos. These houses are generally heated with oil and often with electricity. The Indians buy refrigerators, radios, and in certain places, they have telephones.

The autochthones eat like the residents of urban centers and their food is transported by boat or plane. They eat delicacies of all kinds, fresh fruits, packaged foods, frozen fresh meat, canned meat, eggs, bread, cake, and milk products like butter, milk and a little cheese.

The clothing of the past has disappeared, and the Indians and Inuits of northern Quebec wear the same clothes as whites which they purchase in stores.

In their houses, there are beds, furniture, utensils and dishes.

They go to the movies regularly, two or three times a week, they have recordplayers, guitars, transistors. They have pool halls at their disposal along with other amusement facilities. In the summer they devote themselves to ball games and other sports and in winter youths play hockey, ice-skate, and ride their snowmobiles. At Hudson's Bay, they have a fiber-glass canoe factory. It also should be noted that for transportation on lakes and rivers, they use canoes with gas motors, not paddles.

24. *Id.* at 34, 42-43, 88, 223-24, 245-46.

25. *Id.* at 244.

The autochthones buy a lot at the Hudson's Bay stores and also by mail from Eaton and Simpson. They do a lot of sport fishing and own modern fishing gear like whites do.

In sum, the Indians and Inuits have abandoned the way of life of their ancestors and have adopted that of the whites.²⁶

Blinded by changes in the Cree's material culture and in some of their recreational and occupational activities, the Quebec Court of Appeals could not perceive the persistence of a distinctive cultural identity—an identity constituted in important part by subsistence hunting and fishing.

III. ALTERNATIVE CONCEPTIONS OF CULTURAL DISTINCTIVENESS

In sharp opposition to the understanding of cultural distinctiveness that typifies much judicial thinking are the understandings offered by Peter Welsh,²⁷ Joseph Carens,²⁸ and Dean Suagee.²⁹ All three emphasize that culture is dynamic rather than static and consists of spiritual, social, and political elements in addition to material and other visible manifestations. Welsh and Suagee stress that cultural insiders often perceive meaningful distinctiveness and cultural persistence where outsiders see only assimilation, and that cultural insiders often assign a different hierarchy of values to elements of their cultures than do outsiders.³⁰

Peter Welsh exposes "cultural authenticity" as the "inauthentic" construct of the majority. Because it identifies authenticity with the majority's romantic notion of "traditional"

26. *Kanatewat*, R.J.Q. at 171 (author's translation).

27. Welsh, *supra* note 1; Peter H. Welsh, Lecture at *University of Michigan Journal of Law Reform* Symposium, *Preservation of Minority Cultures* (Feb. 15, 1992) (audiotape on file with the *University of Michigan Journal of Law Reform*).

28. Carens, *supra* note 2; Joseph H. Carens, Lecture at *University of Michigan Journal of Law Reform* Symposium, *Preservation of Minority Cultures* (Feb. 15, 1992) (audiotape on file with the *University of Michigan Journal of Law Reform*).

29. Dean Suagee, *Self-Determination for Indigenous Peoples at the Dawn of the Solar Age*, 25 U. MICH. J.L. REF. 671 (1992); Suagee, *supra* note 3.

30. Welsh, *supra* note 1, at 843-44; Suagee, *supra* note 3.

minority culture, the concept of cultural authenticity is unsatisfying even when applied to artifacts. When used to evaluate living cultures, Welsh explains, that concept is treacherous. As Welsh aptly warns, the “contexts in which people live today are seen as inauthentic” and the ability of minority cultures to exercise self-determination is undermined.³¹ This concept of cultural authenticity, as Welsh suggests, reveals far more about the majority culture than about the minority one—it reveals the majority’s nostalgic yearnings for mythical times and its reflexive veneration of “old things.”³²

Joseph Carens points out a critical element of cultural distinctiveness which courts generally overlook—a distinctively constituted identity—and explores the link between that identity and claims for cultural protection. In his discussion of potential justifications for continued Fijian control of land, Carens notes that many Fijians no longer want to live in traditional ways, and observes that as Fijians come to want the same things that other members of society want, the case for distinctive treatment weakens. However, because Fijians’ deep attachment to the land persists, Carens correctly indicates that the fact that most Fijians no longer use the land in traditional ways should not terminate the inquiry into whether Fijians might have a valid, culturally based entitlement to exclusive Fijian ownership.³³ So long as ownership of the land remains constitutive of Fijian identity, Carens argues, there is *some* culturally based justification for maintaining exclusive Fijian ownership. As Carens suggests, when evaluating a claim for protection of some aspect of minority culture, the connection between that aspect and the existence of a distinctively constituted group identity should be explored.

Dean Suagee’s remarks also focus our attention on Native American claims that *they* are the appropriate arbiters of what constitutes “authentic” Indian culture and that modern Native American cultures that selectively merge elements of tribal pasts and the multi-cultural present are “authentic” Indian cultures. Suagee also reminds us of the significance, both in moral terms and in terms of assessing cultural distinctiveness—of Indian peoples’ self-image as being culturally distinct from the non-Indian majority.³⁴

31. Welsh, *supra* note 1, at 843–44.

32. *Id.* at 842.

33. Carens, *supra* note 2, at 603–06.

34. Suagee, *supra* note 3.

IV. THE NEED FOR CHANGE IN JUDICIAL CONCEPTIONS
OF CULTURAL DISTINCTIVENESS

To recapitulate, the common judicial conception is that cultural distinctiveness which might warrant accommodation exists only where members of the dominant culture find easily perceived, usually material, manifestations of the minority culture both to be starkly different from their own and to be essentially unchanged from the culture at a time which the dominant culture associates as being "authentic." Considering this conception of cultural distinctiveness in light of the panelists' understandings reveals many of the serious errors inherent in this conception.

First, culture is reduced to its material and other easily perceived manifestations—such as occupations, foods, clothing, and tools. It is denied its spiritual, social, psychological, and identity components. Second, and correspondingly, the distinctiveness of a minority culture is judged by comparing only its material and other easily recognized manifestations to those of the dominant culture. Similarities between those aspects of the two cultures is considered proof of lost distinctiveness; important and persistent differences in values, identity construction, religious beliefs, social structures, and the like are given inadequate attention. Third, the judgment whether a culture is distinctive is based entirely on the perceptions of outsiders. The perceptions of their own distinctiveness possessed by members of the minority group are not taken into account. Fourth, "authentic" minority culture is what the majority understands to be the culture of the minority group at some fixed point in the past—usually a mythological, romantic past constructed by the majority. The minority group's understanding of what constitutes their "authentic" culture is not consulted. Finally, the majority views "authentic" culture as static, rather than dynamic. Consequently, contemporary minority cultures rarely will be deemed authentic.

Why has judicial thinking generally failed to transcend this simplistic conception of cultural distinctiveness? I doubt that any comprehensive answer could be given to this question; in any event, I have none to offer. I would like to suggest three partial explanations, however.

The sophisticated and inclusive understanding of cultural distinctiveness typified by Welsh, Carens, and Suagee is relatively new, even among anthropologists. It has not replaced, in the popular mind, the conception commonly employed by courts. Tenacious popular beliefs about culture may have prevented some judges from fully comprehending the sophisticated evidence of and arguments about cultural distinctiveness that have been presented in certain individual cases.

Another partial answer may be this: inherent in the concepts of dynamic culture and "authentic" contemporary minority cultures is the likelihood that the claims that minorities may make for cultural protection will change and increase over time. Thus, claims for cultural protection are not fully predictable, even by the minority group, at any given point.³⁵ Many judges legitimately may be troubled by the lack of predictability that would attend adoption of the principle that, because they are equally authentic, new cultural practices are equally deserving of protection as ancient ones. Within constitutional constraints, legislatures may apply this principle selectively—they may choose rather arbitrarily which practices to protect. Courts, however, may not apply this principle selectively. If courts adopt it, they must either apply it across the board or articulate some principled basis for refusing to do so. Judges may feel that courts are institutionally incapable of dealing adequately with the unpredictability problem. Judicial failure to recognize the dynamic nature of authentic culture effectively leaves protection of contemporary culture to legislatures.

Finally, concern about self-serving claims that are not externally verified may make judges resistant to arguments that they should accept the minority group's assessment of the distinctiveness and authenticity of the cultural practice for which protection is claimed. External verification in the form of anthropologists' expert testimony could be, and usually is, provided in cultural protection cases. But it must be recognized that in making such expert testimony central,

35. For example, in *United States v. Means*, Lakota Indians demanded special access to and control over a site in the Black Hills National Forest. 627 F. Supp. 247 (D.S.D. 1985), *rev'd*, 858 F.2d 404 (8th Cir. 1988). Although the Black Hills as a whole are considered traditionally sacred by the Lakota, the site at issue in *Means* held no particular significance in traditional times. Rather, its special religious significance had just recently been discovered by Lakota elders. 627 F. Supp. at 253.

outsiders again are given the power to decide whether a culture is distinctive, and whether the practice to be protected is authentic.

CONCLUSION

Thus, even as the kind of sophisticated understanding represented by Welsh, Carens, and Suagee becomes commonplace, courts may resist adopting it fully because of judicial manageability concerns. Moreover, courts may continue to rely heavily on the expert opinions of outsiders to provide external verification of minority groups' claims about the nature of their cultures and identities. The challenge for minority groups, and for the anthropologists and advocates of cultural preservation and self-determination who support them, will be to suggest both judicially workable solutions to the unpredictability problem and ways to make minority groups' own assessments of distinctiveness and authenticity central, while still satisfying the need for some external verification.

