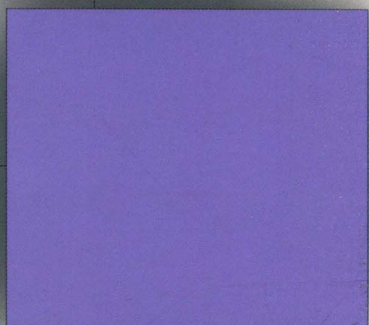
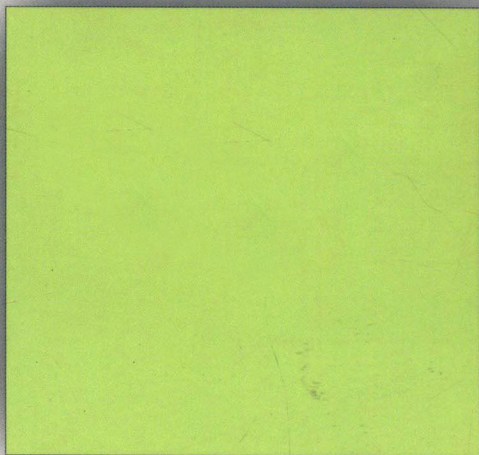


# DIVERSITY IN AMERICA



KEEPING  
GOVERNMENT  
AT A  
SAFE DISTANCE



PETER H. SCHUCK

# Diversity in America

*Keeping Government at a Safe Distance*

---

PETER H. SCHUCK

THE BELKNAP PRESS OF HARVARD UNIVERSITY PRESS

Cambridge, Massachusetts, and London, England | 2003

Copyright © 2003 by the President and Fellows of Harvard College

All rights reserved

Printed in the United States of America

*Library of Congress Cataloging-in-Publication Data*

Schuck, Peter H.

Diversity in America : keeping government at a safe distance / Peter H. Schuck.

p. cm.

Includes bibliographical references (p.) and index.

ISBN 0-674-01053-1 (alk. paper)

1. Pluralism (Social sciences)—United States. 2. Multiculturalism—United States. 3. United States—Ethnic relations. 4. United States—Race relations. 5. United States—Religion. 6. Minorities—United States. 7. Immigrants—United States. 8. Civil society—United States. I. Title.

E184.A1 S37 2003

305.8'00973—dc21 2002042684

# Diversity in America

## ACKNOWLEDGMENTS

---

Authors of serious books owe many debts. We may seem to entertain the conceit that we can repay these debts simply by acknowledging them, but we know better. In my case, I benefited enormously from the many individuals who generously commented on earlier drafts of parts of the manuscript. There are the readers, unknown to the author, whom publishers manage to dragoon into assessing the work. Then there are those whom the author recruits by ruthlessly exploiting friendships, playing the reciprocity card, staging academic workshops, and leaping on even the most casual or feigned expressions of interest. I plead guilty to all of these stratagems but am the richer for my shamelessness.

Among the individuals who read and commented on one or more chapters are Vicki Been, David Bernstein, Andy Beveridge, Derek Bok, Jon Butler, Jackson Carroll, Stephen Carter, David Del Tredici, Chris Eisgruber, Bob Ellickson, Nicole Stelle Garnett, Rick Garnett, Nathan Glazer, Kent Greenawalt, Philip Hamburger, Sam Issacharoff, John Jeffries, Rick Lempert, Jerrold Levy, Chip Lupu, Jerry Muller, John Noonan, Jr., Manuel Pastor, John Payne, Jonathan Rauch, W. Clark Roof, Jim Ryan, Mike Schill, Marcy Schuck, Steve Schuck, Dave Sheingold, Mark Silk, Peter Spiro, Stephen Sugarman, Harry Wellington, and Ari Zolberg. Special thanks go to Bruce Ackerman, who helped me think through this project when it was only a five-page outline; to John Skrentny, who commented on the entire manuscript; to my fine Yale Law School student research assistants Emil Kleinhaus, Jessica Sebeok, and Jacob Sullivan; to the participants in faculty workshops at Berkeley, Case Western Reserve, Columbia, Duke, Michigan, Notre Dame, NYU, Virginia, and Yale; and to the students in my Groups, Diversity, and Law seminar at Yale during the spring of 2002 who read a draft of most of these chapters. I was also privileged to present portions of the book as the Uri and Caroline Bauer Memorial Lecture at the Benjamin N. Cardozo Law School of Yeshiva University, the Alice Evangelides Lecture at Rutgers Uni-

versity, and the Harrington Lecture at Clark University. Earlier versions of Chapters 3, 5, and 6 were published in the *Cardozo Law Review*, the *Yale Law and Policy Review*, and the *Harvard Civil Rights–Civil Liberties Law Review*, respectively. I thank their staffs. I wrote much of Chapter 7 while doing hard labor as a resident of the Rockefeller Foundation’s magnificent study center at Bellagio, Italy, in July 2001, made even more pleasant by the Bellagio staff, led by the redoubtable Gianna Celli. I am also grateful to Michael Aronson, my editor at the Harvard University Press, for sharing my own enthusiasm for this project and helping me bring it to fruition, and to Richard Audet, my eagle-eyed copyeditor. Tracy Thompson prepared the index.

I wish to express my boundless gratitude to the faculty, students, and staff of Yale Law School, my intellectual funhouse for almost twenty-five years, and especially to its dean Tony Kronman, who epitomizes its values of broad inquiry, high ideals, rich imagination, unflagging generosity, and the pleasures of the mind. I have also had the immense good fortune in recent years to be welcomed into the “penumbral family” of NYU Law School. This phrase coined by John Sexton, the school’s visionary then-dean and now university president, aptly describes the network of personal affection and academic excellence that he, with his fine faculty and students, has fashioned there. I wrote much of this book in the library office that Dean Sexton kindly provided, and I drew upon the institutional resources he offered me. He and the school, which has become my intellectual second home, now led by the equally generous new dean, Ricky Revesz, have my heartfelt thanks.

I dedicate this book to my children, Chris and Julie, who are inheriting a far more diverse America than I did and will be the better for it, while enriching it further with their own love.

# Diversity in America

# CONTENTS

---

Acknowledgments *vii*

## I THINKING ABOUT DIVERSITY

1. First Thoughts 3
2. Taxonomies, Sources, and Legal Structures 19
3. A New Ideal and Why It Matters 40

## II MANAGING DIVERSITY

4. Immigration: Importing and Assimilating Diversity 75
5. Affirmative Action:  
Defining and Certifying Diversity 134
6. Residential Neighborhoods:  
Subsidizing and Mandating Diversity 203
7. Religion: Protecting and Exploiting Diversity 261
8. Concluding Thoughts:  
Premises, Principles, Policies, and Punctilios 309

Notes 339

Index 439



I

---

## THINKING ABOUT DIVERSITY



## First Thoughts

America is probably the most diverse society on earth—certainly the most diverse industrial one. This is true regardless of how one thinks about or measures diversity or which kind of diversity is under discussion—issues I take up in the next section and in Chapter 2. Ask a random group of Americans or foreign visitors to name the most distinctive aspects of American society, and diversity will be high on everyone's list.<sup>1</sup>

This diversity is *itself* remarkably diverse—and dynamic. Like a blastula of cells undergoing mitosis, American society constantly proliferates new divisions and differentiations. Some of this merely reconfigures the familiar, reshuffling old decks, but much of it creates unprecedented forms of social life. Technological innovation both spurs some new differentiations and preserves some old ones.<sup>2</sup> Much differentiation reflects the greater confluence of peoples and cultures. Even here, technology plays its vital part by radically reducing communication and transportation costs, thereby facilitating encounters between previously separate people, activities, or information.<sup>3</sup>

Remarkably, this diversification is occurring amid social developments that commentators usually consider homogenizing. The national mass media, advertising, and popular culture penetrate every nook and cranny of our lives. Latinos, Asians, and other groups increasingly intermarry with whites and with each other. The federal government deploys much of its political, fiscal, and regulatory power in a quest for national uniformity. A steadily aging population buttresses familiar demographic patterns. Some pundits, eager to debunk Arthur Schlesinger's claim that diversity is unraveling the social fabric,<sup>4</sup> even assert that "[w]hile ideologically 'all are different,' Americans in fact are remarkably 'all the same.'"<sup>5</sup>

Yet diversity grows apace despite these homogenizing factors, and sometimes because of them. While the number of daily newspapers has declined, the number and variety of other mass media outlets—cable, radio, satellite, the Internet, films—have vastly increased. Advertising is more highly differentiated in order to reach diverse audiences, specialized interests, and niche

markets.<sup>6</sup> More diverse immigrants, religious sectarianism, linguistic enclaves, and ideological shifts make ethnic identity—a term hardly used before the 1950s<sup>7</sup>—more salient. Women have entered and transformed previously all-male occupations.<sup>8</sup> Congress has permitted states, localities, and private actors to go their own separate ways in many policy domains. Economic and medical advances for the elderly have multiplied their lifestyle choices. Fringe groups, free to purify their political ideologies, can appeal to narrow, discontented voter blocs. Suburbs, long derided by urban elites as the triumph of bland uniformity over piquant diversity,<sup>9</sup> increasingly mimic the heterogeneous cities they surround.<sup>10</sup> Corporate culture, traditionally conformist, now deploys the theory, practice, and rhetoric of diversity.<sup>11</sup> Popular culture has become so transracial, according to one black commentator, that it spells “the end of white America.”<sup>12</sup>

The growing social acceptance of diversity is nowhere more striking than in the evolving views of openly gay relationships and lifestyles by a society that harshly repressed them—and to an extent still does.<sup>13</sup> The number and openness of gays have increased,<sup>14</sup> along with their status in popular and religious cultures,<sup>15</sup> social and governmental entities (including the military),<sup>16</sup> and elite businesses.<sup>17</sup> A national outcry against the homophobia that inspired the brutal murder of Matthew Shepard led to passage of many hate-crime laws<sup>18</sup> and the extension to gays of some civil rights protections.<sup>19</sup> Politicians of both parties avidly court gay voters.<sup>20</sup> Some national advertising of major products celebrates gay life.<sup>21</sup> At least one gay commentator perceives a pro-gay bias in the elite media,<sup>22</sup> and major TV networks air gay-friendly programming and are developing more.<sup>23</sup> Perhaps most remarkable, public and religious support for normalizing same-sex unions is growing.<sup>24</sup> (Less encouraging, only 59% of Americans say they would vote for a gay presidential candidate on their party’s ticket, compared with 95% who would vote for a black, 92% for a Jew, and 49% for an atheist.)<sup>25</sup>

This flowering of diversity—particularly the diversities of ethnicity, race, and religion with which this book is primarily concerned—does not mean that it flourishes equally in all areas of American life. (The artificiality and perniciousness of the idea of race are important themes in Chapters 2 and 5. But because race is the focus of most diversity talk, one simply cannot avoid using it and I shall not try.)<sup>26</sup> The important exceptions to this flowering, however, are few, narrowing, or debatable. Most Americans do live in demographically similar neighborhoods, but social class explains more of this than ethno-racial bias. (See Chapter 6; alas, the effects—racially identifiable neighborhoods and schools—are often the same.) Social scientists vigorously dispute the “bowling alone” claim that civic ties are fewer and less diverse, as to both the character and direction of change.<sup>27</sup> Independent bookstores have declined,

but superstores and on-line booksellers provide greater choice and convenience to browsers and purchasers alike. When diversity is in jeopardy, it seems, we come to value it all the more deeply, debate its instances and status more seriously, and search for new ways to sustain it.

America does more than tolerate diversity.<sup>28</sup> Today, it also views diversity as constitutive of the national mythos and underwrites this by welcoming close to one million legal immigrants each year. (Canada, a vast, thinly settled land seeking more people, accepted 250,000 immigrants in 2001, constituting a much larger share of its much smaller population.) According to sociologist (and immigrant) Orlando Patterson, America's embrace of diversity "finds no parallel in any other society or culture in the world today."<sup>29</sup> We shall see that this is no exaggeration.

American society has always been diverse. Historian Jill Lepore reports that "the percentage of non-native English speakers in the United States was actually *greater* in 1790 than in 1990."<sup>30</sup> America, however, has not always celebrated this diversity. Slaveholders, eugenicists, racists, homophobes, xenophobes, church establishmentarians, monolingual diehards, and many others opposed it on principle. Many more feared the social instability it might cause. Shrewd nation-builders like George Washington and Benjamin Franklin were of two minds about diversity, sometimes praising it and at other times expressing skepticism or alarm. Their descendants harbor ambivalent feelings about diversity today, lauding it as a national tradition but complaining about its mundane forms and worrying lest it go too far.

Americans' hostility to diversity often took the form of opposition to immigrants, especially to those who seemed different from the dominant native stock. John Higham's chronicle of nativism in postbellum America<sup>31</sup> and Rogers M. Smith's magisterial survey of opposition to full citizenship for women and minorities<sup>32</sup> have turned bright spotlights on a dark, often neglected aspect of our social and political history. They and others have exhumed an ensemble of ways in which social and political elites, often joined tactically by working-class allies, managed to exclude, subordinate, and stigmatize racial and religious minorities, assertive women, gays, political dissidents, and others. Diversity's advances, Smith shows, were episodic, hard-fought, hard-won, and sometimes reversed by backlash movements advocating new forms of social hierarchy.<sup>33</sup> I discuss this history in Chapters 3 and 4.

The traditional resistance to diversity should not surprise us. As Chapter 3 recounts, few thinkers and fewer political or religious leaders in world history have considered diversity to be anything but a threat that should be suppressed or contained. Even today, most societies would view the claim that diversity is a social virtue as subversive, if not suicidal, nonsense. For them, toleration is but a survival tactic, a temporary expedient. Even in more liberal

societies, toleration is a mild, though essential, sentiment. At best, E. M. Forster noted, it “is just a makeshift, suitable for an overcrowded and overheated planet. It comes on when love gives out, and love generally gives out as soon as we move away from our home and our friends.”<sup>34</sup> And *tolerating* diversity is not at all the same as *celebrating* and *promoting* it.

One can easily understand, then, why Crèvecoeur, Tocqueville, James Bryce, Dickens, and many other visitors to America have been perplexed as well as intrigued by our diversity. So far as one can tell from their writings, none of these close observers of American diversity ever endorsed it for their own societies. Even those who most admired it seriously doubted whether the United States could sustain a strong civil society and a democracy built with such disparate social materials. Tocqueville, who uncannily prophesied the long Russo-U.S. struggle, also predicted that America’s diversity would culminate in a race war. The notion that American democracy and civil society could coexist with a far greater diversity than they or anyone else could then imagine would have struck them as lunacy.

Yet this is precisely what happened in the decades following Appomattox. Despite (or perhaps because of) a succession of crises—industrialization, mass immigration, the Great Depression, wars, the McCarthy era, the civil rights and antiwar movements, new waves of even more diverse immigration, and now a war on terrorism waged in regions from which many Americans and new immigrants come—the American polity’s enduring stability and unity remain the envy of the world. At the dawn of the twenty-first century, every other polyglot nation—India, Indonesia, Russia, Nigeria, Turkey, South Africa, Sri Lanka, and even Canada—is at serious risk of fragmenting into ethnic shards.<sup>35</sup> (Australia and Switzerland stand, so far, as notable exceptions.) Indeed, even strong unitary states like the United Kingdom, Spain, France, and China, and religiously homogeneous states like Belgium, are being roiled by militant demands for devolution or even full independence.<sup>36</sup> In sharp contrast, the United States has maintained its social and political cohesion, even achieving a kind of cultural coherence (though this is more debatable). Moreover, it has done so without sacrificing its economic, social, and cultural dynamism.

How has this singular feat been accomplished? That question is among the most compelling and complex issues facing diverse societies like ours. This book analyzes an important part of the answer: the role of law. It examines the different ways and policy contexts in which we have used law to protect, import, define, certify, subsidize, mandate, exploit—in a word, *manage*—diversity. “Manage” is a serviceable term to characterize how government self-consciously approaches diversity—so long as one bears in mind that “manage” includes both decisions to make diversity a subject of active legal inter-

vention and decisions to leave diversity to informal, unregulated choices. This spectrum of diversity management options is central to both my analysis and my policy prescriptions. Although I focus on how law manages diversity, my analysis necessarily considers how nongovernmental processes handle it. Indeed, a central theme of this book is that law's management of diversity takes different forms and is often perverse. For now four examples, which are more fully explained in Part II, will suffice to illustrate the point. Immigration law creates ethno-racial diversity by importing it, while bilingual education law often fails to integrate immigrants' limited-English children (Chapter 4). Ethno-racial preferences designed to increase one kind of diversity reduce other kinds of diversity and even tarnish the diversity ideal (Chapter 5). Fair housing law helps protect minorities from biased sellers, while courts that mandate housing those minorities in recalcitrant neighborhoods have aroused fierce opposition (Chapter 6). Some rules of general applicability unnecessarily burden religious minorities (Chapter 7).

This introductory chapter sets the stage for my analysis. First, I define what I mean by diversity, and then develop a distinction, which recurs throughout the book, between diversity *in fact* and *as ideal*. (For the most analytically minded readers, Chapter 2 develops many other diversity-clarifying distinctions.) Second, I discuss how Americans view the diversity ideal today. My claim here, particularized in Part II, is that diversity's rhetorical power and prestige are at their height, and that this exalted status is unique in history and in the world—a claim I support by comparing it to diversity's status in other liberal, democratic nations. A third point is that diversity talk in America today is superficial and largely tactical. To Jonathan Rauch's statement that “[w]e are becoming so diverse that we are no longer sure what we mean by diversity,”<sup>37</sup> I would add that Americans seldom even ask the question. We can no longer afford the luxury of intellectual laziness but must think more deeply and systematically about what diversity means, how it should be managed, and how law and other social processes can best contribute to that endeavor—thinking that this book is meant to provoke. The chapter concludes by sketching the book's structure.

## THE CONCEPT OF DIVERSITY

It is time to say what diversity *is*. I define it as those differences in values, attributes, or activities among individuals or groups that a particular society deems salient to the social status or behavior of those individuals or groups. (Readers wanting a more extended discussion of diversity's conceptual taxonomies, sources, and abstract legal structures will find it in Chapter 2.)

Several features of this definition are noteworthy. It is empirical and social-

psychological in character. That is, the definition refers to the actual facts of how a particular society perceives differences and which of them it considers salient to people's status, and the definition also refers to how people think about their relations to others, the boundaries between them, and the nature of their interactions. For example, people seek to maintain different levels and kinds of "social distance" from those whose status they think is lower,<sup>38</sup> and these distances affect how they think about diversity. People who interact frequently and intensively with others are generally less likely to think of them as different, but some interactions may convince people of the contrary—that the other group indeed follows different norms, and perhaps that the difference is not worth trying to bridge.<sup>39</sup>

The diversity definition is also contextual, instrumental, and tactical. Sometimes, for example, we praise or condemn diversity in order to express our values to others, perhaps signaling them about the kind of person we are—or want them to think we are.<sup>40</sup> Those who invoke the diversity ideal may hope to associate themselves with a political mood or constituency, to convey their adherence to the letter and spirit of pro-diversity laws, to avoid having to defend past conduct, to change the subject, and so forth. A university defending its affirmative action policy on diversity grounds may hope to avoid having to prove that it did not discriminate in the past or having to acknowledge that it did. Business leaders may laud diversity in order to appeal to consumers and forestall litigation or bad publicity.<sup>41</sup>

The definition is inevitably bounded. Any particular understanding of diversity will necessarily delimit its contours, focusing attention on certain attributes while minimizing or excluding others. Most laws that regulate biodiversity, for example, are concerned with the diversity of species, not habitat. As I discuss in Chapter 5, most affirmative action programs define diversity in terms of the "ethno-racial pentagon" (David Hollinger's phrase);<sup>42</sup> they treat religious, political, and other viewpoint differences as irrelevant. These definitional boundaries, moreover, are fluid and dynamic, not static. In the jargon of postmodernism (and traditional sociology), they are socially constructed and contingent.<sup>43</sup> Perceptions of difference can and often do change over time. Historians of ethnicity, for example, show that Jews, Italians, the Irish, and other immigrant groups were widely perceived as distinct (and inferior) races during their early migrations to the United States. (Indeed, Italians did not then think of themselves as Italians at all but as Sicilians, Calabrese, Abruzzese, Romans, Venetians, and so forth; to some extent, they still do.) Over time, however, Americans came to view these groups as white, no longer differentiating their racial status from that of other whites.<sup>44</sup> Historians still disagree, however, about the meaning and significance of race, ethnicity, and the process of "whitening" during that period. One revisionist



claims that most pre-World War I immigration restrictionists targeted contract labor, not race, and indeed saw race not as immutable but rather as characterological and thus transformable in the American setting.<sup>45</sup>

As this book reveals, diversity is itself a highly diverse phenomenon with different meanings in different domains. For simplicity's sake, I shall usually refer to diversity rather than diversities because my point will usually apply to all kinds of diversity. In many instances the qualifiers "ethnic" or "ethno-racial" may serve my purposes reasonably well, and absent my use of another qualifier, these will be my referents. Ethnicity, of course, is a notoriously elusive concept, at once ambiguous, capacious, shifting, and capable of political mischief and abuse.<sup>46</sup> The authoritative *Harvard Encyclopedia of American Ethnic Groups* describes ethnicity as "an immensely complex phenomenon," and goes on to list no fewer than fourteen indicia, some of them compound ones.<sup>47</sup> After explaining many difficulties and indeterminacies of the concept, the editors sensibly conclude that no single definition will do.<sup>48</sup> When I refer to "ethnicity," I shall usually mean a group as to which there is both an internal (i.e., within the group) and an external (i.e., outside it) perception of group distinctiveness based on some putative physical, ancestral, or cultural feature common to the group. Greater refinement is unnecessary for my purposes here.

Some other preliminary clarifications are also in order. Diversity is a matter of degree, not an absolute. Japan, for example, is far more diverse than ever before in its long history as a nation-state but remains a singularly homogeneous society by American standards.<sup>49</sup> By the same token, the United States is more ethnically diverse today than it was a mere generation ago, and will almost certainly be even more so a generation from now.<sup>50</sup> The amount and kind of diversity in a community, of course, is to some extent a function of the level of abstraction used by the analyst. Viewed from a high enough altitude, even the most physically diverse communities look alike—absent special equipment permitting detailed scrutiny of what is on the ground. Whether one focuses on the 90% or more of DNA that is shared by all humans or instead on the small amount that differs determines whether one emphasizes our genetic similarity or diversity.

A society that is highly diverse in some domains may be relatively homogeneous in others. A striking feature of American society is that it is diverse in almost all of them. A possible exception is political ideology. America's two-party system seems more homogeneous both on its face and in its centripetal force than the systems in multiparty politics exhibiting and perhaps encouraging more ideological fragmentation. Although the party system in the United States has been shaped in part by the first-past-the-post and winner-take-all electoral rules, the reverse is also true. More to the point, those elec-