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Unprotected Identities: Recognizing Cultural Ethnic Divergence In Interpreting Title VII’s ‘National Origin’ Classification

Eugenio Abellera Cruz*

Life is what happens while you’re making other plans.1

It shall be an unlawful employment practice for an employer—(a) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.2

INTRODUCTION

Karl Marx wrote in 1848 that a specter was haunting Europe—“the specter of Communism.”3 With the end of the Cold War,4 this threat to

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1. RENATO ROSALDO, CULTURE & TRUTH: THE REMAKING OF SOCIAL ANALYSIS 91 (1989). Perhaps this quote summarizes the constricted, static and ultimately underprotective paradigm which Title VII of the 1964 Civil Rights Act affords to cultural discrimination. Through its overtly narrow focus on geographic origins, federal anti-discrimination law makes rigid, narrow statutory “plans” which can neither address nor protect the fluid ever-changing nature of cultural “life.”


3. KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY (1848), reprinted in THE MARX-ENGELS READER 469, 473 (Robert C. Tucker ed., 1978). One example of the Marxist belief in the overwhelming predominance of class solidarity over ethnic affinities is exemplified by the 1986 program of the Communist Party of the Soviet Union. It states, “the nationalities question inherited from the past has been successfully
global political structures may have been superseded, at least for now, by another “specter”—ethnic nationalism. Stemming from cultural allegiances often stronger than class consciousness, ethnic group conflicts touch upon every continent of the world. Ethnicity is proving to be surprisingly potent in tearing asunder once seemingly invincible and unquestionable geopolitical lines.

Most ethnic separatism arises from the maldistribution of political and economic capital, uneven economic standing, and the suppression of


4. For a global overview of ethnic separatism embodied by secessionist trends in the former Czechoslovakia, Moldova, South Ossetia, Indonesia and the former Yugoslavia see George J. Church, *Splitter, Splitter*, Little State, TIME, July 6, 1992, at 36 (noting the global trend towards “splitting up existing states into smaller ethnic nations, some of which then go on to divide amoeba-like into ever small pieces. . . . All over the world, ethnic movements are demanding and frequently getting their own turf.”).


No sooner had the idea of the nation-state achieved worldwide currency, than a new type of polity founded upon ethnicity, tribalism, and kinship appeared to be struggling to be born. The bloody events in the former Yugoslavia, the genocide in Rwanda and the virtual disintegration of other African states; the reappearance of a virulent anti-Semitism in Russia . . . and the fierce demand for the recognition of their identities by hitherto quiescent minorities in certain old established nation-states; all these indicate that the race is on between ethnicism and state nationalism for the future and the soul of the world. . . . Just as the dynastic state gave way to the nation-state, are we seeing the birth pangs of a new world order structured less upon nationalism than upon ethnicity? Id.

6. Examples of recent ethnic-based insurgencies span the globe. In Sri Lanka, secessionist elements of the predominantly Hindu Tamil minority continue to wage a bloody 15 year armed secessionist struggle against the mostly Buddhist Sinhalese majority. See Donald Smith, *Tamil Tigers Turn Sri Lanka Into State of Terror*, L.A. TIMES, April 24, 1994, at A4. In Russia, among a panoply of ethnic groups agitating for partial or full autonomy, Chechnya’s armed attempt at secession exacted a particularly bloody toll on both Russians and Chechens. See generally Ira Rifkin, *Faith is Factor in Driving Chechens*, THE SAN DIEGO UNION-TRIBUNE, January 20, 1996, at A1. (“Two factors keep them fighting, according to expatriate Chechens and others familiar with their motivations. The first is a burning desire to be free of Moscow’s domination, which Chechens have fought for more than two centuries. . . . The second factor sustains the first and is deeply rooted in the Chechen religious soul.”). In Burma, the central government was at war with various ethnic groups, including the Shan, Karen and Karenii—each ethnic group clamoring for their own independent states. See UPI, *Burma Rebels Oppose Refugee Repatriation*, UPI BC Cycle Press Release, June 15, 1995.

7. From French Quebec to Abkhazia and South Ossetia in Georgia to the Tuareges in Mali and Niger, ethnic minorities seek either autonomy or complete secession. See Robin Wright, *The New Tribalism All Over the World*, SACRAMENTO BEE, June 13, 1993, at F01.

8. “Japanese efforts to oust Sukarno, Papangano-speaking [sic] peasants’ effort] to overthrow the Philippine government [and] Portuguese and African efforts to unseat the Indian majority in Guyana” exemplify ethnic attempts to employ military mobilization to gain a political voice. See Margaret E. Galey, *Effects of Ethnic Conflict on National Development: A Commentary*, in *Ethnicity and Nation-Building: Comparative, Inter-
cultural identity. Increasingly, the discourse of “nationhood” has shifted focus from political boundaries and hegemony to ethnic boundaries and cultural delineation. This phenomenon is readily apparent in America’s changing ethnic and racial composition. Given the global power and significance of ethnicity, it is imperative that we take into consideration the significance of ethnicity in scrutinizing one of America’s anti-discrimination laws—Title VII of the 1964 Civil Rights Act.

NATIONAL AND HISTORICAL PERSPECTIVES 269, 276 (Wendell Bell & Walter E. Freeman eds., 1974). Similarly, the ongoing Sikh military and political agitation for an autonomous Sikh state of “Khalistan” derives in part from “the general economic demands of the Jat Sikh peasantry for political action to relieve their economic problems.” See Paul R. Brass, Socio-Economic Aspects of the Punjab Crisis, in ECONOMIC DIMENSIONS OF ETHNIC CONFLICT 224, 233 (S.W.R. de A. Samaraneghe & Reed Coughlan eds., 1991).

9. Since ethnic groups often occupy differing layers in a nation-state’s economy, economic changes often exacerbate tensions and conflict based on cultural differences. One example of this dynamic between economic development and ethnic separatism occurred in Czechoslovakia. While the Czechs stood to gain the most from radical market reforms due to their general skill levels and economic activities, market reform did not benefit Slovaks similarly. The Slovaks suffered from market reforms because their economy revolved around military and heavy industries incompatible with free market conditions or greater foreign markets. This ill-fitting economic arrangement contributed significantly to the break up of Czechoslovakia into the Czech Republic and Slovakia. See supra note 7. More recently, the current downturn in Indonesia’s economy prompted riots and other acts of violence by the Moslem Indonesian majority against the ethnic Chinese minority who figure prominently in Indonesia’s business sector. See Derwin Pereira, The Day a Town Was Torched, THE STRAITS TIMES WORLD FOCUS, Mar. 30, 1998, at 32.

10. A dramatic example of armed ethnic hostility fueled by cultural suppression is exemplified by historic Turkish policies regarding its Kurdish minority. See Aryeh Neier, Watching Rights, THE NATION, Sept. 17, 1990, at 263 (“In Turkey the increased repression of the Kurds after the 1980 military coup, including a strict prohibition on their use of the Kurdish language and even on their right to identify themselves as Kurds, spurred Kurdish separatists to guerrilla warfare in 1984.”). A typical example of armed ethnic hostility fueled by cultural suppression is exemplified by historic Turkish policies regarding its Kurdish minority. See Aryeh Neier, Watching Rights, THE NATION, Sept. 17, 1990, at 263 (“In Turkey the increased repression of the Kurds after the 1980 military coup, including a strict prohibition on their use of the Kurdish language and even on their right to identify themselves as Kurds, spurred Kurdish separatists to guerrilla warfare in 1984.”).

11. While the state seeks to incorporate ethnic identities within it through shared experiences (e.g., a common legal system, common foreign enemies, and common economy) this imposed commonality often proves inadequate compared to the weight and attraction of ethnic identity. Ethnic identity provides a sense of family and historic identity that the nation-state often cannot produce. While the state can provide common legal and political structures, ethnicity offers often stronger bases for group affinity stemming from a distinctive common religion, historical experience, and, usually, ancestral language. See Porter, supra note 5, at 108 (noting how the shared English-Irish experience of World War I could not counter ethnic Irish separatist aspirations which culminated in the Easter Rebellion and Irish independence).

12. For example, analysts estimate that by the year 2050, non-Latino whites will comprise fifty-three percent of the U.S. population. This ongoing demographic shift will only heighten differing communities’ exposure to employment discrimination. See Steven A. Holmes, Census Sees a Profound Ethnic Shift in the U.S., N.Y. TIMES, March 14, 1996, at A16 (Census analysts predict that Hispanics will comprise 24.5 percent of the population, Blacks, 13.6 percent and Asians with 8.2 percent).

13. The use of “America” in this text refers to the United States. The author acknowledges that the use of this term, though common, is erroneous.

Title VII does little to remedy discrimination based on intraethnic and intracultural differences. Current interpretation of Title VII accords protection under the rubric of “national origin,” (the nation of one’s birth or ancestry). Strictly speaking, “national origin,” under both the “plain meaning” of the statute and broader interpretation, focuses on geographic ancestry or place of birth. However, to interpret national origin on a solely geographic basis is to ignore the reality of ethnicity—which can encompass race, religion, language, culture and other characteristics in formation of personal and group identity. Protecting an individual’s cultural and ethnic identity has less to do with protecting their ties to specific geographic spaces than with protecting their position within a specific cultural space. The current definition of “national origin” thus falls short in situations in which both job applicants, or both applicants and employer come from the same geographic space and ethnicity but do not share the same cultural space.

The weakness in Title VII’s current “national origin” approach is that its strictly geographic orientation produces an implicit conception of culture as something that is static and monolithic. Yet it is unrealistic to assume that any two people coming from the same country, geographic area, ancestry, or even ethnicity will share the same culture. To do so is to ignore the fact that even the most seemingly homogeneous ethnic grouping contains cultural subgroups. This current approach ignores culture’s heterogeneous and fluid nature. Thus, Title VII does not recognize that these intraethnic cultural distinctions often result in prejudice, discrimination, ethnic segregation and even attempts at ethnocide.

One recent proposal argues that Title VII’s term “national origin” is a shallow, if not meaningless, construct and should be expanded to include the more specific term “ethnic traits.” This argument posits that “national origin” discrimination is borne less by an antipathy against one’s place of birth but against one’s ethnicity through one’s ethnic traits. Indeed, “national origin” merely relates to a quality that is not readily perceptible—one cannot tell the place of an individual’s birth or ancestry by sight. The reality of prejudice, however, is that most discrimination af-

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15. The term “national origin” on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came. Espinoza v. Farah Manufacturing Co., 414 U.S. 86, 88 (1973).
16. “Such a perspective ignores the manner in which culture is relational and fluid—namely, that we do not live in ‘hermetically sealed cultures’ that travel with us from cradle to grave.” Leti Volpp, Talking “Culture”: Gender, Race, Nation and the Politics of Multiculturalism, 96 COLUM. L. REV. 1573, 1589 (1996), citing ROSALDO, supra note 1, at 44.
17. See infra notes 76-79 and accompanying text (discussing the evolution of Luba and Sierra Leone Creole ethnic identity in reaction to European colonialism).
19. “Most of the discrimination faced by ethnic minorities is based on their perceptible
fixes on perceptible differences or ethnic traits. Thus, "the 'national origin' term does not, and cannot, correctly encompass the protection of traits or ethnicity . . . [nor is it] helpful in describing accurately or recognizing the kind of discrimination that should be prohibited under Title VII." Accordingly, "Congress should add terms protecting against discrimination based on 'ancestry' and 'ethnic traits.'"

Building on the foregoing critique, this Note posits that the current "national origin" protective scheme likewise fails to protect against intra-ethnic cultural discrimination because it is theoretically oblivious to the inherently dynamic, ever changing and ultimately political, nature of ethnicity. The current scheme's inadequacy stems from two distinct but interrelated bases: a strictly geographic orientation in determining "ancestry" and "nation" and an assumptive "one ethnicity-one culture" model. Part I discusses the definition of culture, its interplay with ethnicity, and the definitional problem of ethnicity as a contested site of political, social, economic and "primordial" discourses. Part II explores the current national origin standard Title VII employs and analyzes its twin theoretical stances—a geography-based analysis and a monocultural orientation of ethnicity. Part III discusses the limitations a geographic and monocultural approach suffers in attempting to protect against cultural discrimination. Finally, part IV proposes a revised interpretive guideline derived from existing case law analyses. This final section also discusses the policy rationales arguing for a revised interpretive standard.

I. "CULTURE," "ETHNICITY" AND INTRACULTURAL DIVERGENCE

A. Defining "Culture" and "Ethnicity"

Culture permeates all aspects of human expressive and emotional life ranging from the construal of the "Self" to the perception and labeling of traits, and not on place of birth. Title VII's focus on 'national origin,' therefore, is not adequate to address the problem of discrimination because of ethnic traits." Id. See also Stephen M. Cutler, Note: A Trait-Based Approach to National Origin Claims Under Title VII, 94 YALE L. J. 1164, 1165 (1985) ("Differences in dress, language, accent, and custom associated with a non-American origin are more likely to elicit prejudicial attitudes than the fact of the origin itself.").

20. See Perea, supra note 18, at 839, citing JOE R. FEAGIN, RACIAL AND ETHNIC RELATIONS 8 (3rd ed. 1989) ("Since the distinctive physical characteristics of subordinate racial groups are assumed to be linked to intellectual or cultural characteristics, dominant groups regularly mix their racial definitions with notions about intelligence and cultural distinctiveness.").

21. See Perea, supra note 18, at 839.

22. Id. at 860 (in addition, "ethnic traits" is to be defined in 42 USC § 2000(e)(o) as including, but not limited to "language, accent, surname, and ethnic appearance.").


24. See David Matsumoto, Emotion, in PEOPLE, supra note 23, at 117, 125, citing E-
of emotion\textsuperscript{25} to the expression\textsuperscript{26} of and reaction to abnormal psychology.\textsuperscript{27} Similarly, skill development\textsuperscript{28} and even the definition of “intelligence”\textsuperscript{29} varies from culture to culture. As defined by noted anthropologist Alfred Kroeber, “culture” includes:

[S]peech, knowledge, beliefs, customs, arts and technologies, ideals and rules. That, in short, is what we learn from other men, from our elders or the past, plus what we may add to it . . . . Culture might be defined as all the activities and non-physiological products of human personalities that are not automatically reflex or instinctive.\textsuperscript{30}

\textbf{25.} See Matsumoto, \textit{supra} note 24, at 125. Cultures generally agree on which emotions are being displayed in a facial expression, but there is some variability in the level of agreement. For example, even though most of the subjects in Indonesia, Japan, France, Brazil, and the U.S. may agree that a face expresses a certain emotion . . . there will be some differences across the cultures in how many subjects in each culture agree that expression \textit{depicts} the particular emotion. \textit{Ibid.}

\textbf{26.} See David Matsumoto & Dawn Terrell, \textit{Abnormal Psychology}, in \textit{PEOPLE}, \textit{supra} note 23, at 135, 139. Symptom manifestation often recapitulates cultural emphasis on particular values. For example, schizophrenic patients in the U.S. were less likely to display lack of insight and auditory hallucinations than were Danish or Nigerian patients. Perhaps this is due to the fact that insight and self-awareness are highly regarded values in the U.S. as opposed to other countries.

\textbf{27.} See \textit{id.} at 136-38. For instance, behavior which one culture may interpret as schizophrenia or psychosis may be interpreted in another culture as speaking in tongues or spiritual channeling.

\textbf{28.} Noted psychologist Jean Piaget assigned age ranges in which certain learning stages occur. While the learning stages are quite universal—the ascribed age ranges differ. See David Matsumoto & Philip Hull, \textit{Cognitive Development and Intelligence}, in \textit{PEOPLE}, \textit{supra} note 23, at 101, 102-05, citing P.R. Dasen, \textit{Concrete Operational Development in Three Cultures}, \textit{J. CROSS-CULTURAL PSYCHOL.} 6, 156-72 (1975). These differences are due to differing levels of cultural values placed on particular skills—while nomads are good in learning spatial skills, settled tribal societies are good with liquid displacement due to task of fetching water. Thus, “[t]he skills that these children use in their everyday lives seem to have affected the order in which they were able to solve Piagetian tasks within the concrete operations stage.” \textit{Ibid.}

\textbf{29.} Many languages possess no word that corresponds to Western ideas of intelligence. See Matsumoto & Hull, \textit{supra} note 28, at 109. Even with cultures that do have definitions for intelligence—there is a difference. The closest Mandarin equivalent, for example, is a Chinese character that means “good brain” and “talented.” Chinese people often associate this with traits such as imitation, effort, and social responsibility. Such traits do not constitute important elements of intelligence for most mainstream Americans—who tend to focus more on creativity. Moreover, “[h]ow any one culture may define what is intelligent may not be the same as how another culture defines intelligence. For this reason, the signs or behaviors that one can typically use to measure intelligence will differ among cultures.” \textit{Ibid.}

\textbf{30.} \textit{ALFRED KROEBER, ANTHROPOLOGY: RACE, LANGUAGE, CULTURE, PSYCHOLOGY, PREHISTORY} 253 (rev. ed. 1948).
Thus, culture can be framed as a sociopsychological construct—a sharing across people of psychological phenomena such as values, attitudes, beliefs and behaviors. Members of the same culture share these psychological phenomena. Members of different cultures may not. Hence, culture can be viewed as the combination of both the "mental products" of a discrete group of people and their attitudes and interpersonal relations or a "total way of life." As Thompson, Ellis and Wildavsky posit, it is possible to look at a total cultural "way of life" as a combination of cultural bias and social relations. While cultural bias refers to shared values and beliefs, the term social relations involves a particular population group's patterns of interpersonal relations and attitudes.

Nevertheless, culture is not static or stereotypic among people occupying the same geographic location/or same "ethnicity." In this sense, as psychologist David Matsumoto argues,

[c]ulture is as much an individual, psychological construct as it is a macro, social construct. . . . That is, to some extent, culture exists in each and every one of us individually as much as it exists as a global, social construct. Individual differences in culture can be observed among people in the degree to which they adopt and engage in the attitudes, values, beliefs, and behaviors that, by consensus, constitute their culture. If you act in accordance with certain shared values or behaviors, then that culture resides in you; if you do not share those values or behaviors, then you do not share that culture.

Culture gains meaning from the presence of different ways of life co-existing within a seemingly uniform social space—it is always changing and subject to contesting views within its corpus. Societies may be

31. See Matsumoto, supra note 23, at 32. See also ROSALDO, supra note 1, at 26 ("Culture lends significance to human experience by selecting from and organizing it. It refers broadly to the forms through which people make sense of their lives. . . . From the pirouettes of classical ballet to the most brute of brute facts, all human conduct is culturally mediated. Culture encompasses the everyday and the esoteric, the mundane and the elevated, the ridiculous and the sublime. . . . [C]ulture is all-pervasive.").
32. See Matsumoto, supra note 23, at 4.
33. For a general discussion on this dichotomy see THOMPSON ET AL., CULTURAL THEORY (1990).
34. Id.
35. See id. at 4.
36. There is ample and growing evidence to suggest that a small but substantial portion of the population of many different countries do not "match" the dominant cultural stereotype of their country. See Matsumoto, supra note 23, at 4.
37. Id.
38. See Leti Volpp, (Mis)Identifying Culture: Asian Women and The "Cultural Defense" 17 HARV. WOMEN'S L.J. 57, 72 (1994), citing Stuart Hall, Cultural Identity and Diaspora, in IDENTITY, COMMUNITY CULTURE, DIFFERENCE 222, 225 (Jonathan Rutherford ed., 1990) (noting that culture is a dialectical construct—susceptible and responsive to both external
constituted so as to countenance certain ways of life and to discourage others. Ways of life which distinguish one population group from another are possible only if other internally competing alternative ways of life are left in a contested state. Hence, culture is a relative construction which gains its meaning from the internal dialectics of other alternative ways of life present within a seemingly unitary culture. These internal dialectics often result in new cultural formations or fissures depending on external factors affecting a particular group's dominant way of life. This interplay between internal cultural perception and external influences fuels the dynamics of ethnic identity.

B. Ethnicity and Culture: "Primordial" Identity as Historical and Political Vehicle

Ethnicity can be generally defined in one of two ways: as a product of a "primordial" identity or as a form of social organization that functions as a vehicle for furthering a particular group's common interests.

The "primordial" view of ethnicity posits that ethnicity is a bond derived from a cultural interpretation of both genealogical and nongenealogical descent among a certain group of people. The use of descent as a focal point of cultural interpretation and solidarity arises from the universal tendency of humans to select in favor of their kin. Such recognition of shared descent, while inherently a biological concept, is predicated upon the cultural interpretation of what characteristics indicate that others belong to the same people as oneself. Ethnicity implicates the shared mutable and immutable qualities given at birth such as race, national origin, ancestry, mother language, religion, shared history, traditions, values, and symbols, all of which contribute to a sense of distinctiveness both for members of the group and for outsiders.

and internal stimuli).

39. THOMSPSON ET AL., supra note 33, at 4.
40. See id.
41. Illustrated below. Infra notes 76-83 and accompanying text discuss ethnic evolution in the face of colonial manipulation and intervention.
42. See Charles F. Keyes, The Dialectics of Ethnic Change, ETHNIC CHANGE 4, 4 (Charles F. Keyes ed., 1981) [hereinafter ETHNIC CHANGE] (observing that theories on the nature of ethnicity fall into two major camps: one "conceives of ethnicity primarily as implying a cultural heritage shared by a group" and a competing view frames ethnicity as "a form of social organization that functions to achieve certain common ends of a group of people.").
43. See, e.g., id. at 5.
44. See id.
45. See id. ("Thus, while ethnicity may rest on a universal predilection of humans to select positively in favor of their own kinsmen, it also is variable because of the diverse cultural meanings that people in different historical circumstances have drawn upon in interpreting and in action upon this predilection."). Id.
46. See id. ("[P]rimordial attachments between people [stem from biological and social
Another view of ethnicity constructs "ethnicity" as purely a "social vessel" in the "struggle for material goods and status." 47 In this view, an "ethnic group" is primarily a social organization in which the participants make use of certain cultural traits from their past, a past which may or may not be verifiable. 48 Accordingly, "it is sufficient that a social border be drawn between itself and similar groups by means of a few cultural emblems and values that make it different in its own eyes and in the eyes of others." 49 Indeed, certain physical or cultural traits, 50 no matter how slightly different or superficial from similar characteristics possessed by other groups, become rallying points for group affinity. This affinity is then employed as a common cause to press for the group's demands. 51 In sum, "ethnicity" denotes not a fixed unchangeable characteristic but a manipulation of cultural tradition for politicoeconomic ends. 52

The two views regarding the nature of ethnicity may not be logically inconsistent—they may actually complement each other. 53 While ethnicity can be conceived as initially built around bonds derived from biological phenomenon subject to cultural elaboration [which include] sex, locality and time of birth, physiological features that are recognized as marks of biological inheritance, and social descent or links with forebears. Ethnicity . . . derives from a cultural interpretation of descent." 54 Id. With regard to group history, such history does not necessarily have to be historically "accurate." History's purpose, in the "primordial" ethnic sense, is to serve as a reference for ethnic pride and source of identity. See id. ("What cultural characteristics are marked as emblematic of ethnic identity depends upon the interpretations of the experiences and actions of mythical ancestors and/or historical forebears. These interpretations are often presented in the form of myths or legends in which historical events have been accorded symbolic significance."). Id. 47. EUGENE E. ROOSENS, CREATING ETHNICITY: THE PROCESS OF ETHNOGENESIS 13 (1989) ("E)thnic self-affirmation or the ignoring or minimization of ethic identity is always related in one way or another way to the defense of social or economic interests. Many people change their ethnic identity only if they can profit by doing so."). See also Reed Coughlan & S.W.R. de A. Samarasinghe, INTRODUCTION, ECONOMIC DIMENSIONS OF ETHNIC CONFLICT 3-13 (S.W.R. de A. Samarasinghe & Reed Coughlan eds., 1991) (discussing an economic explanation for ethnic group antagonism).

48. According to this view, "[t]he ethnic 'past' is always a subjective reconstruction." See EUGENE E. ROOSENS, supra note 47, at 17.

49. Id. at 12.

50. According to Roosens, "the term 'ethnic identity' can refer to origin, uniqueness, passing on of life, 'blood,' solidarity, unity, security, personal integrity, independence, recognition, equality, cultural uniqueness, respect, equal economic rights, territorial integrity, and so on, and these in all possible combinations, degrees of emotional content, and forms of social organization." Id. at 19.

51. "Any aspect or cultural trait, no matter how superficial, can serve as a starting point for the familiar tendency to monopolistic closure. . . . Almost any kind of similarity or contrast of physical type and of habits can induce the belief that a tribal affinity or disaffinity exists between groups that attract or repel each other." Max Weber, ETHNIC GROUPS, in THEORIES OF SOCIETY VOL. 1 (Talcott Parsons, et al. eds., 1961), cited in Martin E. Marty, CULTURAL FOUNDATIONS OF ETHNONATIONALISM, in GLOBAL CONVULSIONS 115-16 (Winston Van Horn ed., 1997).

52. See Abner Cohen, VARIABLES IN ETHNICITY, in ETHNIC CHANGE, supra note 43, at 309.

53. Charles F. Keyes' framework of 'ethnic dialectics' track the overlap of "primordialist" and "social vessel" schools of thought. See Keyes, supra note 42, at 4.
descend, the attitudes and myths surrounding these biological truths and
physical similarities are often colored and shaped by the insular cultural
group's external social, political and material concerns. Hence, group
conceptions about shared similarities in the form of group mythology and
self-conception are prone to historic change, manipulations and interven­
tions.54 As anthropologist Stuart Hall observes:

Cultural identities come from somewhere, have histories. But,
like everything which is historical, they undergo constant trans­
formation. Far from being eternally fixed in some essentialized
past, they are subject to the continuous “play” of history, culture,
and power. Far from being grounded in a mere “recovery” of the
past, which is waiting to be found, and which, when found, will
secure our sense of ourselves into eternity, identities are the names
we give to the different ways we are positioned by, and position
ourselves within, the narratives of the past.55

Given this “call and response” relationship with external factors, eth­
nic identity is often created, modified and destroyed. It is created through
intergroup rivalry,56 state resource competition,57 or state policies.58
Moreover, shared historical experiences serve to modify formerly distinct
and established ethnic identities59 or encourage rallying around ethnic
identities for political purposes.60 Conversely, ethnicity can be destroyed

54. See Porter, supra note 5, at 109.

Some of the beliefs an [ethnic group] holds about itself may be derived more
from myth than reality: the idea of the Founder of the People, a Father Abra­
ham or an Aeneas, or the claim, made for the Romans, and for the medieval
Celtic British, of descent from fugitives from Troy. Myth, in fact, not only
plays an essential part in group identity, but is continuously created to pre­
serve and enhance that identity . . . the ongoing mythologizing of history can
produce a psychological unity of fearsome potency. (Emphasis added).

55. Hall, supra note 38, at 222, (emphasis added), as cited in Volpp, supra note 38, at 72.

56. Ethnic conflict and rivalry are “bound to sharpen the cultural differences between
groups and to develop corporate organization in each in order to conduct the struggle effec­
tively.” Cohen, supra note 52, at 317-18 (“When we talk of ethnic groups, we are by defini­
tion talking about groups in interaction with other groups . . . .”).

57. See Coughlan & Samarasinghe, supra note 47, at 3.

58. Often, the “context in which ethnicity and ethnic identity is located is one of conflict
or tension with the state.” Martin Diskin, Revolution and Ethnic Identity, in CONFLICT,
MIGRATION AND THE EXPRESSION OF ETHNICITY 26 (Nancie L. Gonzales & Carolyn S.
McCommon eds., 1989). This political tension provides the motivation for the constant
definition of group identity. Id.

“Acadian” identity was forged from earlier Scottish, French and English identities due to
their shared collective experience of exile from Acadia (modern Nova Scotia)).

60. The pursuit of political agendas leads to the manipulation of cultural difference to
enhance ethnic divergence as witnessed by the U.S. funding of Miskito Indians’ independ­
ence struggle in Central America to further U.S. geopolitical strategies against Nicaraguan
Sandinista influence. See Diskin, supra note 58, at 15.
through genocide and acculturation/assimilation. "Ethnicity can be old, or quite young. Rather, it is timeless, or of all times."

C. Intraethnic Cultural Fission: The Birth of Nations

Just as ethnic groups evolve through interaction with other distinct ethnicities, ethnic groups also change because of internal cultural sub-groupings. In a sense, ethnicity serves as the forum in which cultural dialectics interact, not merely between the ethnic group and outsiders, but also within the group itself.

Intraethnic culture is not homogenous. There are many differences to

61. The latest example being in Bosnia-Herzegovina. Although the roots of Moslem-Christian and Serbo-Croatian animosity date back centuries, much of the current attempts at genocide—"ethnic cleansing"—can be traced to the 1940s when the Nazi-controlled Croatian government attempted to destroy its Serb population. See Thomas M. Franck, Clan and Superclan: Loyalty, Identity and Community in Law and Practice, 90 A. J. I. L. 359, 368 (1996).

62. This goes to the core of the distinction of the group. A group’s shared sense of history, symbols, beliefs and expression form the glue that binds the group identity into a cohesive whole. Their wholesale relinquishment and replacement with a differing set of cultural values effectively destroys the core “difference” inherent in that ethnic group. The American government, for a time, embarked on a policy of systematic destruction of Native American culture through assimilation as witnessed through its statutes and policies. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 242-43 (1983). One of the more nefarious schemes involved the government’s dispensing of alcohol to Native Americans who could “prove” assimilation. See Robert J. Miller & Maril Hazlett, The “Drunken Indian”: Myth Distilled into Reality Through Federal Indian Alcohol Policy, 28 ARIZ. ST. L.J. 223, 258 (1996) (“In line with the assimilation logic of destroying native cultural identities, some states allowed Indians to drink alcohol if their tribal/ward relationship with the guardian/federal government had ceased, and the Indian could prove that he or she was ‘civilized.’”). Nor was the systemic pursuit of the destruction of existing ethnic identity through assimilation confined to the United States. For an example of European colonialism’s effect on African economic development see Theophilus Fuseini Maranga, The Colonial Legacy and the African Common Market: Problems and Challenges Facing the African Economic Community, 10 HARV. BLACKLETTER J. 105, 115 (1993) (“In French Africa, the policy of ‘assimilation’ was meant to transform the ‘natives’ so that the language, culture and social values of the French would be imbibed by these ‘natives.’ There was a deliberate policy to transform the Africans from their ‘barbaric’ ways of life into a more ‘civilized’ French culture.”). For an example of contemporary Chinese attempts at cultural annihilation, see Michele L. Radin, The Right to Development as a Mechanism for Group Autonomy: Protection of Tibetan Cultural Rights, 68 WASH. L. REV. 695, 711-12 (1993) (“[The Tibetans] have resisted China’s express policies of assimilation and cultural destruction, most notably by retaining a strong Buddhist culture.”). It has been suggested that current Chinese attempts at assimilating Tibetan culture mirrors earlier Chinese cultural policies with outlying Inner Asian steppe “barbaric” peoples who invaded and ruled China. “As these people (steppe nomads) were ethnically different from the Chinese they were progressively submerged in Chinese culture and this ideology of cultural imperialism became part of Chinese national identity.” TIBETAN YOUNG BUDDHISTS ASSOCIATION, TIBET: THE FACTS 218, 218 (1984).

63. ROOSENS, supra note 47, at 117.

64. See, e.g., Keyes, supra note 42, at 7 (“A culturally homogenous group of people that is isolated from other groups can be internally divided into descent groups. . . .”). See also Cutler, supra note 19, at 1164 (Focusing mostly on the differing levels of cultural assimilation within ethnic groupings as the primary measure of ‘cultural heterogeneity’).
which the individual "Selfs," "in group," can attach. 65 Differing dress, histories, 66 differing clans, 67 tribes, dialects, 68 geographic origins within the same "homeland," sensibilities, cultural predisposition and values 69 may be "markers" upon which internal divisions can be based. Thus, individuals may receive different treatment because they possess perceptible traits or qualities that set them apart from those evaluating them despite the fact that they are both from the same geographic region, race or ethnic group.

Intra-ethnic discrimination arises when arbitrary differential values are imposed on a sub-group's perceptible (or readily discoverable) traits. 70

65. For the mechanism inherent in discrimination both the interethnic and intraethnic context, see Hesburgh, Foreword, in PREJUDICE USA i, vi (C. Glock & E. Siegelman eds., 1969) ("Prejudice begins because of a perception of difference—difference of color, language, religion, social or economic situation, physical appearance, even sex. We follow this perception of difference with an evaluation and a comparison: What we have or are is the best, so anything different must be inferior.") (Emphasis added).

66. A particular intraethic cultural "pecking order" may be the product of a recapitulation and reconstruction of the colonial hierarchies back in the home country. European colonial powers often pitted one ethnic subgroup against another to maintain control. For military and economic control to take hold there must be internal controls due to the inadequacy of colonial police/military force. Hence, a process of cultural internalization of colonial-imposed notions of Western supremacy. See Cohen, supra note 52, at 310-15 (exploring the historic transformation of Sierra Leone's Creoles from an intraethnic "status" group to self-consciously distinct ethnic group). For a generalized example, see James Fallows, A Damaged Culture, THE ATLANTIC, November 1987 (detailing the impact of colonialism on Filipino notions of "nationhood" and cultural identity). See generally KWAME NKRUNAH, NEO-COLONIALISM, THE LAST STAGE OF IMPERIALISM (1966) (examining the impact of historic British domination of African economies and education systems and the use of these systems to pursue imperial goals).

67. A clan is an extended identity based on kinship ties. For a Native American examples see EDWARD P. DOZIER, THE PUEBLO INDIANS OF NORTH AMERICA 213 (1970) ("[C]lan is defined as a unilineal descent group . . . , traced through the mother's side"), and FRED EGGAN, SOCIAL ORGANIZATION OF THE WESTERN PUEBLOS 300-01 (1950) (detailing clan organization).


By its very nature language is the quintessential symbol . . . . [I]n the process of symbolizing it tends also to become valued in itself. . . . Language is the recorder of paternity, the expresser of patrimony and the carrier of phenomenology. Any vehicle carrying such precious freight, indeed, as precious in and of itself. . . . Anything can become symbolic of ethnicity . . . but since language is the prime symbol system to begin with and since it is commonly relied upon so heavily (even if not exclusively) to enact, celebrate and 'call forth' all ethnic activity, the likelihood that it will be recognized and singled out as symbolic of ethnicity is great indeed. Id.

69. The repertoire of identity symbols and signifiers, "cultural dialectica," include "language, religion, rituals, dress style, or dietary preferences that members look for and exhibit to show identity—and the underlying values, codes of ethics, or standards of morality shared by group members." JANET T. LANDA, TRUST, ETHNICITY, AND IDENTITY: BEYOND THE NEW INSTITUTIONAL ECONOMICS OF ETHNIC TRADING NETWORKS, CONTRACT LAW, AND GIFT-EXCHANGE 16-17 (1994).

70. Thus, intraethnic groupings might separate themselves from each other based on perceived differences that ethnic groups use to set up ethnic boundaries. See Fishman, supra note 68, at 15, 25 (anything can become symbolic of ethnicity—whether food, dress, shelter,
These differences are assigned cultural meanings that correlate to such conditions as economic subordination, power and social status. These boundaries and cultural delineations are most palpable in the specific national contexts in which they are practiced.

Intraethnic cultural divisions can easily form the bedrock for cultural fissures and ethnic conflict which result in the birth of new ethnic groups. European colonial policies provide stark examples of how intraethnic cultural differences were exploited or generated to promote land tenure, artifacts, work, patterns of worship).

71. A dramatic example of this stereotype ascription process involves the tragic history of the Hutus and the Tutsis. Although both groups historically were within the same cultural grouping, colonial exacerbation ossified formerly flexible status lines. The “Hutu” status, during pre-colonial times, involved agricultural and manual labor whereas the “Tutsi” status meant warrior class membership. These status lines were, up to pre-colonial times, permeable and varies according to an individual’s fortunes. However, the Belgian imperialists fixed status differences based on stature and appearance. Belgian colonialism stereotyped tallness as being a mark of Tutsi ethnic origin. A whole panoply of colonially imposed values accompanied this physical division: “tall” meant “Tutsi” which meant “superior” with the opposite applying to the supposedly shorter “Hutu.” See Alain Destexhe, The Third Genocide: Rwanda, FOREIGN POL’Y No. 97, December 22, 1994, at 3.

All Rwandans speak one language and share a single culture as well as obeying the same ruler. The line between Hutu and Tutsi is flexible: rich Hutu can become Tutsi, Tutsi who lose power and wealth become Hutu. Mistakenly believing the Tutsi to be different from and superior to the Hutu, the Belgians reserve higher education and positions of power for this elite. They establish a system of population registration that sets apart those defined as Tutsi . . . from the mass of Hutu.

Alison Des Forges, Chronology, in THE SILENCE 1. See also, ROOSENS, supra note 47, at 13 “[T]he isolated, culturally homogenous tribe or ethnic unit was often the creation of . . . ethnographers or ethnologists who wanted to situate the “tribes” of a region conveniently on a map.” Id.

72. Accordingly, notions of Hindu caste identity and separation are strongest in India. Notions of Filipino provincial differences are strongest in the Philippines.

73. “One attempt to count the ‘ethnic/cultural fatalities’ in such clashes between 1945 and 1967 listed thirty-four ‘major’ bloodletting and hundreds of lesser collisions and came up with an estimated total of 7,480,000 deaths.” H. ISAACS, IDOLS OF THE TRIBE: GROUP IDENTITY AND POLITICAL CHANGE 3 (1975). Regarding ethnic genesis, two products of cultural differentiation borne from intraethnic schisms are Americans and Cajuns. Americans were viewed as “new” men uniquely born of the American experiment which eradicated differences of religion, custom and manners to achieve a relatively homogenous society. See ST. JOHN DE CREVECOEUR, LETTERS FROM AN AMERICAN FARMER 49, 54-59 (1968). Perhaps this assessment pertained only to white ethnic Americans. Americans of color historically had to survive segregation, lynching, immigration exclusions, and systemic discrimination to become “new persons” in the multicultural discourse which is of recent vintage yet already under excruciating attack. Cajuns originally consisted of French nationals residing in French Acadia, Spanish and Anglo-Saxon antecedents. The shared historical experience of mass exile from Acadia forged these prior differing ethnic and cultural groups into a new cultural body. See, e.g., Roach v. Dresser, 494 F. Supp. 215, 217 (W.D. La. 1980).

74. A stark example of this “divide and conquer” strategy can be found in the words of Miguel Lopez de Legazpi, the Spanish expeditionary leader who succeeded in colonizing the Philippines:

I believe that the natives could be easily subdued by good treatment and the
duce distinct ethnic groupings thereafter locked in rivalry and ethnocide.\footnote{75} In the Kasai region of Zaire, recently renamed the Congo, an ethnic differentiation between the Luba and Luluwa tribes was created through Belgian colonial allocation of colonial administrative positions and economic policies.\footnote{76} Prior to the Belgians' arrival, there was no hard and fast distinction between a "Luba" and a "Luluwa" since each group saw itself as related to the other or as sharing a political lord-vassal relationship.\footnote{77} Indeed, both groups considered themselves "Luba" albeit of differing clans.\footnote{78} Yet the Belgian colonial scheme favored Lubas with regards to colonial administration; thus, Lubas occupied the most advanced colonial administrative posts as compared to other cultural groups in Zaire.\footnote{79} As a result of this colonial experience, Lubas formed the educated and cosmopolitan elite of Zaire.\footnote{80} While conceptualized as a socioeconomic status label, "Luba" status hardened into an ethnic identity recognized by both Luba and non-Luba. Lubas are stereotyped as hard workers and as a forward-looking, progressive people.\footnote{81}

Therefore, status as a member of the Lubas originated as a clan differentiation, became a socioeconomic status label, and eventually evolved into an ethnic identity that was recognized by both Lubas and non-Lubas. Proof of the change of "Luba" status into a distinct ethnic identity can be seen in the political rivalry between the two groups culminating in the display of kindness, for they have no leaders, and are so divided among themselves and have so little dealing with one another—never assembling to gain strength, or rendering obedience to one another. If some of them refuse at first to make peace with us, afterwards, on seeing how well we treat those who have already accepted our friendship, they are induced to do the same. But if we undertake to subdue them by force of arms, and make war on them, they will perish . . . .

Legazpi, quoted in Miguel Bernad: Tradition & Discontinuity: Essays on Philippine History and Culture 45-46 (1983). Because of this fragmentation, the people of one region could be pitted against those of another. Early colonization of the Philippines by Spaniards was achieved through the aid of native warriors from other regions of the country. Indeed, insurrections in one region were routinely put down with Military sources from other regions. This fragmentation arose from the fact that "each [Filipino] village was separate, independent . . . [Filipino] society was structured into a large kingdom with extensive territories, like Majapahit or Angkor or the Chinese Empire." \textit{Id.}

75. It has been argued that whole ethnic groupings, at least in sub-Saharan Africa, are the product not so much of primitive or ancient identities but of European missionaries. \textit{See} Roosens, \textit{supra} note 47, at 117.
76. \textit{See id.} at 117-18.
77. \textit{See id.} at 117.
78. \textit{See id.} at 122.
79. \textit{See id.} at 118.
80. \textit{See id.} at 118.
81. \textit{See id.} at 122 (in a study of cultural stereotypes shared by both Lubas and of others' perception of the Lubas, the Luba ethnic group is described as inventive, creative, idealistic, seekers, scholars, organizers, politicians, all-knowing, persevering, hard working, clever, athletic, productive, dynamic and rich).
wholesale massacre and expulsion of Luba by the Luluwas in 1959.\textsuperscript{82} Luba ethnic distinction finally crystallized when, in the face of expulsion and massacres, Luba leaders prepared for a mass exodus to an agreed Luba home territory within Zaire.\textsuperscript{83}

The tendency of colonialism to transform status identities into crucial ethnic distinctions also had effect in other places, such as Rwanda/Burundi\textsuperscript{84} and Sierra Leone.\textsuperscript{85} Exile is also a powerful tool used to create ethnic distinctions—exile and the generally hostile reception afforded Palestinian refugees in Lebanon has resulted in a growing definition of “Palestinian” as a cultural ethnicity rather than as a mere “nationalist ideological framework.”\textsuperscript{86} Similarly, resource competition and struggle for control over resource exploitation and export from post-Soviet Russia produced the Talysh-Mugan Autonomous Republic comprised of the Farsi-speaking Talysh minority of Azerbaijan—a group once thought to have been completely assimilated by the Azerbaijanis.\textsuperscript{87}

In sum, the reality of intraethnic cultural segmentation defies categorization and isolation based on geographic location—people might occupy the same \textit{geographic} space and be members of the “same” ethnicity but not occupy the same \textit{cultural} space. Cultural space can be delineated by, such markers as: differing clan membership, historic occupation,\textsuperscript{88} or group

\begin{itemize}
\item \textsuperscript{82} See id. at 120.
\item \textsuperscript{83} See id. at 120-21.
\item \textsuperscript{84} See Destexhe, supra note 71.
\item \textsuperscript{85} The Sierra Leonean Creole ethnic group originated as a status category of “non-natives”—ex-slaves from Jamaica, intercepted former captives who were formerly bound for the slave trade, and remnants of black poor relocated from England. This heterogeneous immigrant population metamorphosed into a status group because of their prominence in the British colonial administration of Sierra Leone. Creoles occupied colonial bureaucratic positions in far greater number than other Sierra Leonean groups. The final transition from a shared historical Creole status to full-blown ethnic identity occurred when Creole political organization and maneuvering in the 1970s resulted in Creole domination of the Sierra Leonean bureaucracy. Cohen, supra note 52, at 312-25.
\item \textsuperscript{86} See Cheryl Rubenberg, \textit{Lebanon’s Protracted Conflict: Causes and Consequences, in Conflict, Migration and the Expression of Ethnicity} 120-21 (Nancie L. Gonzalez & Carolyn S. McCommon eds., 1989). Much of the local Lebanese hostility to Palestinians arises from the utilization of the Palestinians as “the cheapest possible source of labor” which held down wages for poor Lebanese.
\item \textsuperscript{87} See Mark R. Beissinger, \textit{The Relentless Pursuit of the National State, in Global Convulsions}, supra note 5, at 242.
\item \textsuperscript{88} The Japanese Burakumin and the Indian “Untouchable” “classes” exemplify the process of political, economic and cultural stigmatization engendered by cultural biases regarding a group’s historical occupation.
\end{itemize}

The first fairly well-documented origins of caste in Japan can be traced to the development of occupational specialization in the ninth and tenth centuries. . . . Japanese culture, under the influence of Buddhism brought in from China, depended on plant rather than animal foods and abhorred the ritual impurity of blood and death. . . . The growing popularity of Buddhism, with its strictures against taking life, helped to produce an outcast segment in the society composed of those communities specializing in such occupations as
histories. This dynamic was illustrated in Africa and Europe, for example, where various ethnicities shared the same political space accorded by trans-national political empires such as European imperial colonialism, the Ottoman Empire, or the Soviet Union. As history has shown, once the unifying political hegemony of colonial or imperial control is lifted—ethnic identities burst forth from seemingly unitary lines. For example, post-French Burundi/Rwanda left in its wake the current Hutu/Tutsi conflict. Also, the disintegration of the Ottoman Empire and Yugoslavia revealed the ethnocidal Serbo-Croatian-Bosnian Muslim struggles, and the end of the Soviet Union divided its people into several competing ethnic republics—each in turn threatened with secession by their own ethnic minorities. Similarly, pre-existing cultural heterogeneity is masked by the broad label of “ethnicity” which might engender a false sense of cultural unity. Since culture is a contested plane of economic, political and social concerns, ethnic elaborations on it likewise vary.

II. TITLE VII’S “NATIONAL ORIGIN” CLASSIFICATION: GEOGRAPHY AND THE ILLUSORY MONOLITH OF CULTURE

Unlike the “race” and “sex” protective categories of Title VII, the “national origin” category possesses scant legislative history and has experienced relatively little litigation. According to Professor Juan Perea, the term “national origin” appears to be an anti-discrimination “boilerplate” category imported into Title VII from earlier Executive Orders and immigration statutes. Nevertheless, Title VII has evolved from its original conception as merely protecting against discrimination based on national origin to encompassing a broad range of anti-discrimination considerations. 

slaughtering and processing of animal products. 

GEORGE DE VOS & HIROSHI WAGATSUMA, JAPAN’S INVISIBLE RACE: CASTE IN CULTURE AND PERSONALITY 14 (1966). Similarly, in India, the notion of “untouchability” may have its roots in Buddhism’s birth in the subcontinent. The Buddhist principle of vegetarianism and non-killing engendered the ostracism of non-vegetarians and those engaged in occupations involving killing, slaughter and meat processing. See R.K. KSHIRSAGAR,UNTOUCHABILITY IN INDIA 35-37 (1986). “Ideas of purity, whether occupational or ceremonial, which are found to have been a factor in the genesis of [the Hindu caste system] are the very soul of the idea and practice of untouchability.” G.S. GHURYE, CASTE, CLASS AND OCCUPATION 214 (1961).

89. See generally Robin Alison Remington, Ethnonationalism and the Disintegration of Yugoslavia, in GLOBAL CONVULSIONS, supra note 5, at 262.

The overarching problem is that both Croats and Serbs developed their national identities as non-state nations in the womb of competing empires. . . . [After centuries of separation, these former Yugoslav states] emerged from imperial domination divided by history, religion, arbitrary boundaries, . . . and incompatible expectations in relation to their shared futures. 

Id.

90. See, e.g., Beissinger, supra note 87, at 227-46 (outlining possible explanations for the post-Soviet tendency of ethnic-based state fragmentation and autonomy movements).

91. Indeed, the United States Supreme Court has reviewed only one case centered on “national origin” discrimination. Espinoza v. Farah Manufacturing Co., 414 U.S. 86, 86 (1973).

92. Perea, supra note 18, at 810.
on the country of one’s birth. It has been extended to protecting against
discrimination based on the geographic origin of one’s “ancestry.”
Moreover, current EEOC interpretive guidelines protect against discrimi-
nation arising from the physical, cultural, or linguistic characteristics or
traits of national origin. In light of its evolution, “national origin” is
based on an interpretive framework which predicates its protection against
ethnic discrimination on geographic and monocultural assumptions.

A. The Problematic Definition of “Nation”: The Geographic Model

According to its legislative history, “national origin” can have either of
two narrow meanings: the individual’s nation of birth or the nation(s) of
birth of an individual’s ancestors.

As Congressperson James Roosevelt of California noted on the rec-
ord: “[m]ay I just make very clear that ‘national origin’ means national. It
means the country from which your forbears came from. You may come
from Poland, Czechoslovakia, England, France, or any other country.” This statement points to defining “nation” as the geographic location a
person comes from or an origin from a sovereign source. Indeed, early
litigation regarding the meaning of the term “nation” in construing national
origin protection arose over whether “nation” had a political statehood or
sovereignty requirement. The courts have affirmatively ruled that there
are no sovereignty requirements to the term “national origin.” Nevertheless, in rejecting principles of political nationhood or sovereignty in defining
“nation,” the courts retain a fixation on geographic origins.

In Janko v. Illinois State Toll Highway Authority, the court noted that
Gypsies have ancestral ties to “earlier nomadic minority tribal peoples in

93. 29 C.F.R. § 1606 (1993). The EEOC guidelines provide for a wide array of physical
and linguistic characteristics that may be protected under Title VII because the employment
selection based on these characteristics may evince national origin discrimination. See id. at
§§ 1606.6(a)(2) (height and weight as potentially protected national origin characteristics if
requirements based on these characteristics disproportionately impact certain ethnic groups).
See also id. at §§ 1606.7(a) (language and ethnic accent may be protectible characteristics if
impacted by impermissibly motivated English fluency requirements).
95. 110 Cong. Rec. 2549 (1964) (emphasis added).
96. See Pejic v. Hughes Helicopters, Inc., 840 F.2d 667, 672-73 (9th Cir. 1988)
(defendant argued that Serbian plaintiff failed to state a claim because Serbia did not consti-
tute a “nation” under Title VII purposes because it did not have political sovereignty at time
argued that Acadians were not a protected “national origin” group since there was never a
historic Acadian state).
97. Indeed, as the court in Roach noted, “distinctions between citizens solely because of
their ancestors are odious to a free people whose institutions are founded upon the doctrine
of equality, and [thus] we decline to accept the argument that litigation of this sort should be
governed by the principles of sovereignty.” Roach, 494 F. Supp. at 218.
the Caucasias. This geographic link satisfied the “nation” component of national origin, despite the fact that Gypsies do not merely come from any one particular country but have ties to an ancestral home range “stretching from India to the northeastern, eastern, and southeastern boundaries of the Mediterranean.” This case suggests that the component of “nation” in “national origin” is not limited to the singular and heretofore standard definition of “the country where one is from or one’s ancestry is from.” Despite this innovation, Janko still requires some sort of geographic tie in according national origin protection.

A similar geographic analysis is manifest in Roach v. Dresser where the court found that Acadians are protected under Title VII’s national origin protective category. In Roach, Defendant argued that since Acadia “is not and never was a country, plaintiff has no standing under Title VII to claim national origin discrimination.

The court concluded that since Acadians historically came from the former French colony of “Acadia,” today’s Nova Scotia, this geographic link is enough regardless of whether such territory ever possessed political sovereignty. The court presented an in-depth historical elaboration on the Acadians’ origin and forced exile from Acadia. That analysis served to establish the link between Acadians and a fixed geographic “homeland” so as to meet Title VII’s requirement of a “country of origin.”

Nevertheless, protecting against culture-based discrimination (e.g., discriminating against someone based on their ethnicity) with a geography-based model produces readily apparent problems. For example, as noted by Stephen Cutler, Title VII’s national origin category, by narrowly focusing on a person’s geographic place of origin, fails to recognize the cultural differences among people who share the same geographic origin and/or ancestry. People from a specific country or ancestry may have differing

99. Id. at 1532.
100. Id. at 1531-32, citing WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed. 1951).
103. Popularly known as “Cajuns.” Id. at 216.
104. Id.
105. Id. at 216-17.
106. However, Roach also applied a culture-based approach in affording protection against discrimination based on Acadian identity. See infra notes 122-30 and accompanying text.
107. See Cutler, supra note 19, at 1164 (“Courts should consider the heterogeneity that exists within a single national origin group in their treatment of national origin cases under Title VII. Such an approach better achieves Title VII’s goal of individual protection and eliminates the denigration of cultural identity implicit in today’s enforcement of the statute.”) While Cutler’s focus regarding cultural heterogeneity revolves mostly around the question of intraethnic levels of acculturation to mainstream American culture, this Note frames cultural heterogeneity deeper. Title VII should recognize the fluid nature of culture within ethnicity. Ethnicities, being larger vehicles of cultural elaboration, fragment under the influence of external political, social and economic pressures. Only by recognizing this
levels of assimilation to the majority mainstream Anglo-American culture. For example, recent arrivals may often exhibit more pronounced cultural traits from their native culture than those who share the same national origin or ancestry but have been in the United States much longer and thus are more acculturated and assimilated. This higher visibility makes the less assimilated individuals more susceptible to discrimination than their more assimilated counterparts. Thus, within a national origin group, two members may share the same geographic origin but may occupy different cultural space—both within their estimation and in the estimation of the employers. In this situation, the purely geographic/ancestry-based anti-discrimination protective scheme fails—it does not protect the less assimilated individuals if the employer, in trying to mask its discriminatory intent, hires the more assimilated members of that national origin group. Hence, geographic location cannot be used as a shorthand or substitute for cultural location.

Moreover, the judiciary’s propensity to isolate geographic entities and ascribe cultural origins to these locations tends to confuse geographic space with cultural space. This confusion, possibly based on traditional views of “nationhood,” equates one geographic and political entity (“the nation”) with shared assumed homogenous characteristics such as, most notably, culture. Indeed, the fixed notion of culture as equivalent to nationhood is still salient in cultural debate in the United States. Yet, fa-
cially solid geo-political lines may conceal serious ethnic animosity under its illusory veil of solidarity. The current Title VII geo-centered approach seems to confuse political nationhood with ethnic or cultural nationhood.

B. Beyond National Origin: Beyond the Implication of Cultural Monolithism

Title VII is also ineffective because it is oblivious to the existence of different cultures within a geopolitical grouping. I label this tendency to equate one culture with one common country of origin as “cultural monolithism.” As Stephen Cutler notes, Title VII’s geographic orientation implicitly assumes cultural unity among individuals sharing the same country of origin or ancestry and ignores cultural differences between individuals who share the same geographic origin. Hence, an individual employer can escape claims of anti-Filipino bias by hiring a Filipino-American descended from an earlier wave of Filipino immigrants as opposed to another Filipino who recently immigrated to the United States. By allowing an employer to do this, Title VII equates geographic/ancestral commonality with cultural commonality.

Even if Title VII were to include statutory language explicitly protecting against ethnic discrimination, this alone may not be sufficient to overcome the cultural monolithism inherent in Title VII’s current geographic orientation. In this structure, just as Title VII equates one culture to one geographic space, it may just as automatically ascribe one culture to one ethnic group—in complete disregard to the cultural heterogeneity that may be present within. For example, in De Vold v. Bailar, the Fifth Circuit summarily dismissed a Mexican-American’s claim of national origin discrimination where the Civil Service promotion she sought went to another Mexican American employee. “Whatever motives the Civil Service Commission may have had in choosing between two people of the same ethnic origin,” the court concluded, “discrimination cannot have been among them.”

113. See, e.g., Beissinger, supra note 87, at 227-46 (outlining the dynamics of resource competition among ethnic groups as a driving force in the breakup of the Soviet Union into ethnic republics).
114. The difference between these two conceptions of “nation” is profound. See, e.g., Porter, supra note 5, at 103-12.
115. See Cutler, supra note 19, at 1165 (arguing that mere commonality of place of origin does not protect individuals from discrimination based on how closely one retains an ethnic identity as manifested by perceptible ethnic traits).
118. Id. at 1164.
and heterogeneity in the Mexican-American ethnic community, the court stated, "any unfairness in the choice between the plaintiff and (the promotion recipient) cannot have had its source in discrimination based on national origin, this being so, there is no Title VII action."119

The current system allows an employer who is not of the same ethnicity as the applicant to evade a claim of national origin discrimination by hiring someone from the rejected applicant's ethnic group. Additionally, the employer can discriminate on intraethnic grounds by looking at the distinctions within an ethnic group and making a value judgment as to who possesses traits that are more "American"120 or stereotyped as more desirable (i.e., in consonance with American values).121 Most importantly, the employer, if privy to the internal cultural stereotypes of a particular ethnic group, can use these stereotypes in assessing fitness for employment between seemingly similar members of a particular ethnic group. Hence, an employer can refuse to hire an applicant because the latter does not fit the employer's stereotype of the applicant's ethnic group or belongs to a subgroup within the same ethnic group which is stereotyped with lower status.122 Under both scenarios, Title VII's flawed assumptions regarding the power and nature of "culture" allow employers to "fly under the radar" of Title VII protection.123 Furthermore, the current inadequacy in the construction of "national origin" protection leaves Title VII's purpose and policy unfulfilled.124

119. Id.
120. See Cutler, supra note 19, at 1165.
   Even the employer whose animus is directed at ancestral origin per se might rely upon national origin-linked characteristics to give effects to his feelings. . . . An employer prejudiced against an ancestral origin per se who is forced to choose among applicants of that origin may well rely on distinctively foreign characteristics in more than an administrative way. Given a choice between two equally qualified Americans of Mexican ancestry, the employer would probably favor (perhaps consciously and perhaps not) the one who was more assimilated.

121. Id.
122. Id. This situation is similar to Reeb v. Marshall, 626 F.2d 43 (8th Cir. 1980), a sexual discrimination case where a female employee was terminated because of her failure to conform to her supervisor's stereotype of a professional woman. However, in that context, the court held that the employee's failure to live up to an employer's gender stereotype gives rise to a sex discrimination action under Title VII. Id.
123. This situation is analogous to Stephen Cutler's observations of "trait-based" discrimination: the intentional discrimination by an employer among applicants of the same ethnic group as to who is "more acculturated." Cutler, supra note 19, at 1165 (observing that this practice is often apparent if an employer offers the hiring of a member of a specific national group to rebut or preclude an inference of discriminatory motive with respect to a failure to hire another applicant from the same national origin group as the successful applicant). Such a selection process results in "forced invisibility" of those who do not fit the employer's preference for "more American."
124. Indeed, the very idea of anti-discrimination laws is to prevent discrimination of individuals based on improper selective criteria. These criteria are often developed from
III. TOWARDS A CULTURE-BASED "NATIONAL ORIGIN" JURISPRUDENCE: MOVING BEYOND THE CONFINES OF GEOGRAPHY AND CULTURAL MONOLITHIC MYOPIA

In accordance with both Stephen Cutler and Professor Juan Perea's arguments, current EEOC interpretive guidelines should explicitly allow a plaintiff to file a Title VII cause of action even if an employer chooses an applicant of the same national origin as a rejected applicant. Similarly, if Title VII is amended to include "ethnicity" and/or "ethnic traits," the EEOC interpretive guidelines should provide that a cause of action still lies even if the applicants share the same ethnicity. This Note proposes that the analysis required to effectuate such protection can be gleaned from Roach v. Dresser.

Although Roach involved an analysis of the historical formation of the "Acadian" or "Cajun" ethnicity, it still provides a viable framework for establishing the existence, and thereby protection, of an intraethnic cultural group for Title VII purposes. Roach focused on objective historical evidence that fell within two general headings: political history and cultural history. Under its political analysis, Roach chronicled the original French migration to the region that later became "Acadia" and traced the subsequent changing political fortunes of these people and their descendants. This objective frame of reference focused on historical pressures, such as military occupation, exile and war, attendant to both the formation and fragmentation of culture.

stereotypes of the group. The presence of others of same ethnicity and group at the employer's establishment is only one factor in determining if there was illegal discrimination. 110 Cong. Rec. 7213 (1964).
125. See supra notes 100-02 and accompanying text.
127. See id. at 217. The court relates that the original French colonization of Acadia is subsequently marked by a political contest between the British and the French. As a result, the colonial territory of Acadia shifted back and forth between France and England resulting in French exile for many Acadians. Upon Spanish invitation, many of the exiled Acadians who fled to France returned to Spain's North American colony of Louisiana in 1764.
128. For example, the Babylonian exile, far from destroying Judaic culture and identity, distilled and encouraged cultural retention.

The unwilling emigrants had accordingly retained their ethnic, their linguistic, and their religious identity . . . To comfort themselves for the loss of their country, they began to study this rich literature [Mosaic law and Davidic poetry] with increased affection, sifting it, arranging it, copying it, and perhaps reading aloud when they came together. Worship . . . took the place of sacrifice, and prayer-meetings, at which the ancient literature was read and discussed.

Cecil Roth, A Short History of the Jewish People 52 (3d. ed. 1948).
129. See Volpp, supra note 16, at 1586. In this case, cultural formation arises from the interaction between the differing cultural forces inherent behind the political clash over Acadia. As Acadia switched hands between the French and the English, Scots and English settlers entered the region. However, "[A]n Irishman or Scot who moved to the colony of Nova Scotia [originally Acadia] would, after several years, take on the identity of the
Roach’s cultural analysis focuses on the historical point at which self-identification and cultural genesis emerge: “[a]lthough they spoke French, they had developed new customs, and by 1700 the descendants of the first settlers of Acadia considered themselves to be a new people—the Acadians.”

Moreover, the court looked at the Acadians’ internal notions of determining group membership—“[t]hey considered themselves to be Acadians as long as they had been born and raised in that colony.”

Although cultural self-identification can be a purely subjective realization, the court appears to produce an objective verification of this realization through its use of a historical time frame.

The perception of the Acadians by the British, cultural outsiders, was another key element to Roach’s cultural analysis. The political and colonial relationship between the two peoples colored British perceptions of the Acadians. The latter were looked on with distrust because they refused to bear arms against France in 1720 and 1726. British anxiety over the Acadians’ refusal to sign an unconditional oath of allegiance to England generated British reprisals resulting in the confiscation of all Acadian property, followed by deportation. The court verifies the British view of the Acadians as cultural “Others” through documented historical events manifesting this perception.

Roach’s methodology is of particular relevance in the intraethnic context because it isolates the historical/political/economic pressures that produce cultural schisms within a seemingly “unitary” ethnic group. This method also clearly lays out the kind of objective historical requirements for proving cultural schisms. Interpretive guidelines that seek to reorient Title VII to protect against intraethnic discrimination should focus on three conjunctive factors: subjective group self-perception, historical corroboration and objective group perception.

Due to judicial efficiency and economy concerns, the courts should require historical material from which they can determine group identification. The plaintiff claiming intraethnic group discrimination must be

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130. Id. (Emphasis added).
131. Id.
132. See id.
133. See id.
134. Although Roach is one of the clearest in employing the historical analysis approach to determining cultural divisions, other court decisions employ a similar historical model in establishing ethnic “national origin groups.” See, e.g., Pejic v. Hughes Helicopters, Inc., 840 F.2d 667, 672-73 (9th Cir. 1988) (tracing the history of Serbo-Croatian animosity and the changing historic and political fortunes of the Serbian people).
135. This requirement is in acknowledgment of the conservative nature of law which demands predictive values for its objects. See Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457 (1897), in THE ESSENTIAL HOLMES 160 (Richard Posner ed., 1992) (“The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”).
able to point to verifiable historical facts that would support intraethnic distinction due to cultural fissures within the "single ethnicity" she shares with the employee selected for employment over her.\textsuperscript{136}

To prevail in a disparate treatment claim once the plaintiff has established her intraethnic group identity, she must establish that the employer based her discriminatory action on intraethnic difference. It is irrelevant whether the employer's perception of the plaintiff's intraethnic difference is accurate.\textsuperscript{137} The court's analysis must recognize that it is the perception of "differentness" which leads to the ascription of stereotypes regardless of its accuracy. Likewise, for the employer to assert that she misidentified the plaintiff's actual intraethnic grouping is not an acceptable defense in an analysis of intraethnic discrimination.\textsuperscript{138}

IV. POLICY RATIONALES BEHIND A NEW INTERPRETIVE GUIDELINE

The guiding philosophy behind Title VII protection is to prevent the denial of employment benefits to an individual because of arbitrary reasons—such as race, national origin, color, gender, or religion—that are not correlated to an individual's particular value as an employee.\textsuperscript{139} Indeed, it has been argued that arbitrary and selective decision-making based on these grounds is immoral.\textsuperscript{140} Moreover, Title VII's policy of rooting out

\textsuperscript{136} For example, historical records of animosity by the majority intraethnic group against the minority is of great help in determining the existence of protectible cultural divisions. However, this should not be read as requiring a record of actual intraethnic warfare. A historic record establishing an outside perception of the claimed intraethnic group as "different" is enough. Requiring actual ethnic warfare or conflict to "corroborate" cultural differences may be unrealistic and unavailing since cultural differences and antagonism might not have ripened enough to full-blown physical violence. Intraethnic differences should be all that is needed because it is on these differences, perceived by the cultural groups themselves, that the whole complex of traits of in-group and out-group cultural dynamics are ascribed.

\textsuperscript{137} See, e.g., Perkins v. Lake County Dept of Utilities, 860 F. Supp. 1262, 1277 (N.D. Ohio 1994) (In a case where employer perceived African-American plaintiff as a Native American and discriminated against the plaintiff on this basis, the court determined that the plaintiff established his membership in a racial protective category not by "verifying" his "actual" race, but by exploring the employer's perceptions of the claimant. The court held that it is the employer's reasonable belief that a given employee is a member of a protected class that controls the issue of whether the plaintiff is indeed a member of that protected class.).

\textsuperscript{138} See id.

\textsuperscript{139} "Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." 110 CONG. REC. 7247 (1964). See also Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("[Title VII seeks the] removal of artificial and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of . . . impermissible classifications."); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (Congress' intent was to prohibit all practices which create inequality in employment due to race, religion, sex, or national origin classifications).

\textsuperscript{140} See Larry Alexander, What Makes Wrongful Discrimination Wrong: Biases, Preferences, Stereotypes, and Proxies, 141 U. PA. L. REV. 149, 159 (1992) (arguing that "when a
arbitrary and invidious standards must not be defeated by the mere fact that the biases in forming this discrimination stem from a panoply of social meanings and symbols imported from another country.141 Perhaps it is because of the "foreignness" of these social meanings and boundaries that intraethnic discrimination is by and large imperceptible to the American mainstream culture. Yet while intraethnic discrimination may seem invisible, its hidden nature does not lessen the pain, humiliation and deprivation of its victims.142

It would be a perverse irony if Title VII were to be read to allow the same proscribed discrimination if it is inflicted between members of the same ethnic group or if Anglo employers were to discriminate within an ethnic group but escape punishment.143

person is judged incorrectly to be of lesser moral worth and is treated accordingly, that treatment is morally wrong regardless of the gravity of its effects. It represents a failure to show the moral respect due the recipient a failure which is by itself sufficient to be judged immoral").

141. Political and cultural control flows from the intraethnic "superior" group's monopolization of cultural portrayal of subject group. Indeed, the ability of one group to impose its cultural portrayals onto another is a testament to this cultural hegemony. This process can be analogized to the European colonial experience which involved constructing a primitive "other" which allowed the "West" to define a contrasting identity as "progressive," which was then used to justify colonialism and imperialism. See generally EDWARD W. SAID, ORIENTALISM (1978) (explaining how the creation of "the Orient" in European discourse and imagination supported European imperialist domination).


143. Just as anomalous gaps in Title VII's national origin protection scheme leaves space for employers to discriminate "under cover of law" a disparate impact analysis under the current national origin scheme allows for a perverse evasion of the law. Since intraethnic subgroups are not accorded national origin protection, the discriminating employer can always evade disparate impact liability by hiring members of the ethnic group without the undesired traits. For example: an employer versed in the cultural stereotypes among regional ethnic subgroups in the Philippines decides to hire only Cebuanos. An Ilocano denied employment cannot file a claim under disparate impact because this claim is restricted to disparate impact against Filipinos. The employer will just count the Cebuanos he hired and assuming that it matches the 80% EEOC parity guidelines for disparate impact, escape liability. The law looks only as to how many Filipinos, in which Cebuanos and Ilokano are intraethnic subgroups, under the current national origin jurisprudence. This interpretive scheme works an injustice to and commits violence on the purposes underlying Title VII.

Although current national origin jurisprudence has never recognized the disparate impact claim of an intraethnic group, the Supreme Court's reasoning in Connecticut v. Teal, 457 U.S. 440 (1982) implicitly supports such a claim. The Court denied Connecticut's assertion that the "bottom line" numbers of its selection process—the proportional representation of blacks among promotion recipients—immunized it from liability for the adverse impact of a particular promotion criterion. The Court held that the overall proportionality of Connecticut's selection process could not vindicate the use of non-job-related test which eliminated a subgroup of black individuals from the promotion competition. As Stephen Cutler notes, "[a] proportional outcome should not be allowed to mask the discriminatory impact of even one selection criterion upon a subgroup of individuals defined by their possession of group linked characteristics." Cutler, supra note 19, at 1772 (emphasis added). Although Cutler's article deals mostly with discrimination based on "ethnicity-linked" traits
Intraethnic discrimination produces the same harms that arise from ethnic and racial discrimination: stigmatization, forced assimilation and denial of cultural expression. The process of stigmatization refers to the injury a group and its individual members sustain when an individual’s conduct implicitly renders a group as inferior.\textsuperscript{144} The stigmatization of being a cultural “other,” even within one’s own ethnic and/or national origin grouping, results in an individual’s loss of status that often follows a self-perpetuating pattern. Just because the perpetrator of the “invidious” and “arbitrary barrier” of employment discrimination and his victim share the same ethnicity does not compel an abandonment of Title VII’s command for equality of opportunity.

Moreover, intraethnic discrimination forces intraethnic group members to assimilate either into American culture or into their ethnic group’s majority culture. Ignoring intraethnic discrimination involves the same dynamics as that of imposing an illusory sense of cultural unity between cultural groups that are at the point of division and fission. The current framework for national origin protection encourages an illusory impression of ethnic and cultural unity within one sovereign border.\textsuperscript{145} The same problem is inherent in looking at a seemingly unified ethnic group and falsely assuming ethnic unity. By forcing members of intraethnic groups into subscribing to the “official” or “accepted” cultural traits of their own group current Title VII national origin jurisprudence is forcing individuals such as level of assimilation and English proficiency, his analysis has special relevance regarding disparate impact analysis for intraethnic discrimination. The Cutler article dealt solely with differing traits within an ethnic group rather than differing cultural subgroups of a singularly regarded ethnic group.

\textsuperscript{144} Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (stating that that a statute prohibiting blacks from serving on juries was “practically a brand upon them[,] ... an assertion of their inferiority ... ”).

\textsuperscript{145} A seminal example is Pejic v. Hughes Helicopters, Inc., 840 F.2d 667, 673 (9th Cir. 1988), which involved the defendant’s claim that since the plaintiff’s claimed national origin, Serbian, is incorporated within what was Yugoslavia plaintiff has not stated a cause of action. Although the court resolved this issue by ruling that since Serbia once possessed sovereignty, the fact that its borders were completely absorbed by Yugoslavia does not constitute a failure to state a national origin claim (“Given world history, Title VII cannot be read to limit ‘countries’ to those with modern boundaries, or to require their existence for a certain time length before it will prohibit discrimination. Animus based on national origin can persist long after new political structures and boundaries are established.”). In the intraethnic discrimination context, an individual cannot point to cultural divisions which are roughly mirrored by differing political or national boundaries from other ethnic groups. In the intraethnic discrimination context, the individual is left with pointing to a unified sovereign border and convincing an incredulous judge that there are cultural divisions within that unified sovereign facade that threatens to erupt. It is ominous that in Pejic, the plaintiff’s claim of Serbian instead of Yugoslavian national origin membership portended and reflected the interethnic strife and fissure within Yugoslavia that culminated in its destruction as a unified political entity in 1991. Chuck Sudetic, \textit{Yugoslavia Breakup Gains Momentum}, N.Y. TIMES, Dec. 21, 1991, at 3. See also Marshall Tyler, \textit{Dirty, Stubborn War}, DES MOINES REGISTER, Dec. 11, 1994, at 1.
to hide their cultural differences. Moreover, by condoning the discriminatory employment practice of hiring more “acculturated” individuals within the same ethnic group, Title VII allows forced assimilation into the “American melting-pot.” However, as observed by Justice Douglas, “[t]he melting pot is not designed to homogenize people, making them uniform in consistency. . . . [Rather, it] depicts the wide diversities tolerated . . . under one flag.” Extending Title VII national origin protection to remedy intraethnic discrimination will serve this important value: cultural pluralism and tolerance.

146. This process goes against the dynamic of culture as “contested” terrain.