Racial Discrimination and Freedom of Expression in the United States

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Introduction

There are lessons to be learned from the American experiment with inserting democratic values into the nation's institutions. Even with imperfections and errors, human rights and individual liberties have been advanced as a result of guarantees built into the Bill of Rights. The thrust of this paper is to assess that part of the American experiment that deals with efforts to end racial discrimination through the use of guarantees in the Bill of Rights. Without the freedom to engage in protest speech, to assemble and associate, to write and publish freely, neither slavery nor its legacy could be effectively challenged. After all, the essence of American slavery and its legacy involved the curtailment of legal, political and social rights of the black minority.

The United States was founded back in 1776 upon principles of democracy and liberty - of fundamental inalienable rights belonging to all persons, secure against majoritarian rule. Yet at the time of its founding, blacks, as a racial minority, were afforded no such rights. Although the language of the Constitution and the Bill of Rights seemed to exclude no one,[1] black Americans were seen as having no rights. The dominant white culture, in fact, denied the very humanity of black Americans.

From that darkest of beginnings, the Constitution now has been transformed to contain the present day guarantees of equal protection and fundamental fairness for all regardless of race. The transformation was tragically slow, taking the better part of two centuries, and was characterized by starts, stops, and even relapses. I would like to discuss that transformation today - how the Constitution, a document that originally tolerated slavery and racial oppression, was expanded to grant equal rights to persons originally left out of its protections.

The transformation was due to people who fought and sometimes died for an end to discrimination. But, as I should like to emphasize today, the success of their efforts depended in part upon the constitutional guarantee of freedom of expression. It has been through the exercise of the freedoms of speech, assembly, and petition that black Americans have been able to consistently challenge the system of segregation and racial inequality that has stained the nation.[2] Black Americans, early in their struggle for equality, realized that the exercise of their First Amendment freedoms through unfettered political and social discourse was essential in their struggle.

I will begin by describing the development of the Constitution and federal civil rights guarantees in the United States, and focus on how freedom of expression has proved to be an indispensable tool for the promotion of racial equality. I will then discuss the problems that arise in dealing with expression that promotes racism. Due to a recent resurgence of racist incidents in the United States, concerned legislature and public institutions have responded

with a variety of regulations designed to arrest racist speech or related activities. These measures have, interestingly, been met with opposition on the grounds that they trample over First Amendment rights. The apparent clash between the mandate for racial equality contained in the Fourteenth Amendment and freedom of expression as enshrined in the First Amendment has caused some to wonder how freedom of expression and the right to be free from discrimination can be reconciled.

A Brief History of the Development of the Constitution and Federal Civil Rights Protections

At the outset, I would like to dwell a bit on the development of the Constitution and federal civil protections. The Constitution of the United States, adopted in 1787, contained no listing of individual freedoms. Soon after it was adopted, it became apparent that it was a serious political mistake to omit reference to fundamental human rights. Thus, four years later, after a lively debate, Article V of the original Constitution was invoked for the purpose of adding the Bill of Rights.

The Bill of Rights has been praised and celebrated. Despite its genius, it offered no solace to black Americans, who were flatly excluded from its protections. As Justice Taney stated in a 1857 Supreme Court case declaring that Congress had no authority to prohibit slavery in states or territories where it did not already exist, blacks were "subordinate and inferior beings" who "had no rights which the White man was bound to respect."[3]

Four years later the Civil War began.

Within six months after the end of the war, the Thirteenth Amendment became part of the Constitution. It abolished slavery and involuntary servitude, finally resolving the contradiction - slavery in the land of liberty - that was long ignored. Soon thereafter, the Fourteenth Amendment, which guaranteed equal protection to all regardless of race,[4] and the Fifteenth Amendment, which granted blacks the vote, were adopted.

In addition to the incredibly important equality provisions of the Fourteenth Amendment, the amendment's Due Process Clause also was of far-reaching importance. Prior to the adoption of the Fourteenth Amendment, the Bill of Rights was held to place limitations only on the federal government. Given that the Bill of Rights did not impose behavioral restrictions on the states, they felt free to limit the rights and freedoms specified in the Bill of Rights, such as freedom of expression, in any manner they saw fit. The ratification of the Fourteenth Amendment changed this. Under its Due Process Clause, the first ten amendments, in time, were held to bind the states as well. Thus, through the Due Process Clause of the Fourteenth Amendment, freedom of expression and all other rights and freedoms granted in the first ten amendments were held to apply to the states. The incorporation of the Bill of Rights into the law of the states through the Due Process Clause is one of the most profound and far reaching developments of American constitutional law.[5] Following the Civil War, the southern states wasted no time in enacting "black codes" to maintain the subjugation of the newly free blacks. Due to the legal segregation in the South, and the absence of laws prohibiting segregation in the North, discrimination and economic subjugation prevailed. The promises of the Civil War amendments remained empty for nearly a century.[6]

As Justice Thurgood Marshall noted on the 1987 bicentennial celebration of the adoption of the Constitution, it was only through suffering, struggle, and sacrifice that these awesome defects in the original document were overcome. He stated that "[t]he government [the framers] devised was defective from the start, requiring several amendments, a civil war and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today."[7]

The social transformation that occurred in the 20th century started long before the famous civil rights "movement" of the 1960s, with its Montgomery bus boycott, the sit-ins, or the 1963 March in Washington with Dr Martin Luther King's moving "I Have a Dream" speech. The National Association for the Advancement of Colored Persons (NAACP), as well as the American Civil Liberties Union (ACLU), of the twenties sought to attain equality, with a new, and very effective, strategy - the use of litigation as a tool for social change. They systematically and carefully constructed legal cases to maximize their potential for meaningful legal victories.

This strategy proved brilliant. Perhaps the culmination of this effort was the case of *Brown v Board of Education,* in which the Supreme Court unanimously ruled that segregated schools were inherently unequal, and therefore a violation of the Fourteenth Amendment. The "separate but equal" doctrine that had been used to justify state-enforced segregation was never to gain validity again. The *Brown* case unleashed the power of the Fourteenth Amendment to break down the legal caste system in the South.

Immediately after the *Brown* decision, there was much resistance to school desegregation, some of it violent and much of it encouraged by public officials.[8] But in addition to resistance by white segregationists, the *Brown* decision instilled hope in black people. Demonstrations, demanding an end to all forms of segregation, became louder and more insistent; the calls for equal treatment under law reached a crescendo all across the states of the old confederacy and beyond. The direct action demonstrations dramatically confronted segregation at its very source, in the streets, on buses, in restaurants, the neighbourhoods, campuses, in city halls, court houses and state houses.[9] These actions reached a moving climax, when 250,000 people - of all races - assembled in 1963 in the nation's capital to demand legislation designed to achieve racial justice.

New legislation was enacted, including the Civil Rights Act of 1964,[10] the 1965 Voting Rights Act,[11] and the 1968 Omnibus Civil Rights Act with its Fair Housing provisions.[12] The very sobering report of a presidential commission in 1968, which described "two increasingly separate Americas" also spurred responsiveness to change.[13] Change did occur. Remedies began to take root. New opportunities opened up. However, negative reactions also began to set in. They were fueled by distortions, buzzwords, and effective use of the media by majority groups to shift the attention away from the historic constitutional transgressions visited upon blacks dating back to the colonial times. The new issues were whether children should be bused to schools, whether affirmative action stigmatizes blacks, whether the remedies benefitted black persons with no direct injury, and whether these remedies resulted in "reverse discrimination" against whites. Ultimately, these race-conscious remedies came under massive political and legal attack by a combination of forces.[14]

Those forces came together with such energy as to prove to be an overpowering political factor. In 1989, the seamless web of civil rights remedies that was spun in the post-*Brown* period began unraveling. The Supreme Court, which had repeatedly approved of affirmative

action in principle as a remedy for discrimination, began to cripple the civil rights enforcement machinery.[15] In addition to these judicial decisions, other factors contributed to the dilution of civil rights progress. Primary among these other factors was that minorities lost the art of shaping public debates. They forfeited to their adversaries the formulation of issues. Furthermore, they permitted them to seize and dominate the instruments of public persuasion once used so effectively by civil rights advocates, notably, the platform, radio, television, and editorial pages. Into that vacuum stepped adversaries fully prepared to recast issues so that victims of historic discrimination appeared to be modern day villains.

Life has now been restored to the civil rights enforcement mechanisms through the enactment of the 1991 Civil Rights Act. The Civil Rights Act of 1991 has a rejuvenating effect on enforcement of federal discrimination laws, including the fair employment provisions of Title VII of the Civil Rights Act of 1964. The new Act encourages victims of discrimination to file lawsuits by heightening the potential for success and by permitting increased monetary awards.[16]

What this says is that rights enshrined in the First Amendment have played a very significant role in advancing the civil rights movement. America has witnessed a revolution in which blacks, as well as women and other minorities, have won the right to equality under the law.

The Significance of the First Amendment in the Struggle for Civil Rights

I now move on to examine, in an historical context, the ways in which the First Amendment aided in bringing about change. The demands for racial equality, as mentioned above, began at the time when the first slaves arrived at Jamestown, Virginia in 1619. Those demands, first by the slaves, then by the abolitionists, and later by the descendants of the slaves themselves, were largely communicated through the spoken or written word.[17] The First Amendment, with its protection of freedom of speech, petition, assembly, association, and the press, played an important role in the struggle for minority rights. Although these guarantees were sometimes denied to persons challenging slavery and discrimination, they nevertheless remained essential to the campaign to rid this nation of this evil of slavery and its vestiges.

The campaign to vindicate rights guaranteed under the Thirteenth, Fourteenth, and Fifteenth Amendments relied intensely on the First Amendment. *Brown* spurred recognition that an essential part of the civil rights strategy was to seek the most effective use of the Fourteenth Amendment. Minorities also recognized that remedial legislation might, according to the circumstances, be required to enforce the guarantees of the Fourteenth Amendment.[18] To compel action to provide remedial legislation, a direct action campaign of non-violence, including boycotts, marches, civil disobedience, and group organization, proved to be the indispensable strategy for the post-*Brown* period. That necessarily required resort to the First Amendment guarantees of assembly, speech and petition.

Relying on the exercise of the freedoms of speech, assembly, and petition, black Americans in the early 1960s challenged the system of segregation and racial inequality that stained the nation. However, just as blacks realized that the exercise of First Amendment rights were essential to effect change, public officials and private groups knew that the most effective way to thwart change was to frustrate blacks as they attempted to exercise these rights. Thus, boycotts, marches, and other forms of nonviolent protest were throttled by injunctions, other legal obstacles, and violence. Clashes over the rights of blacks to express their opposition to

racial discrimination through a variety of nonviolent means soon developed into litigation - in which the legal system once again became a formidable barrier to advancement.

There are several cases dating from the post-*Brown* era that dramatically demonstrate how vigorous protection of free expression served as a necessary catalyst to the social transformation in which blacks gained recognition of their rights. The case of *NAACP v Button* serves as a good example.[19]

In that case, state and local laws banning the "improper solicitation of any legal or professional business' were used to try to stop the NAACP from instituting lawsuits that challenged racial discrimination. Justice Brennan delivered the landmark opinion of the Supreme Court, which held that the activities of the civil rights organization and its legal staff were forms of expression and association protected by the First and Fourteenth Amendments. These activities could not be regulated by a state under the guise of regulating the legal profession. The NAACP, said the Supreme Court, could assert its own right and that of its members and lawyers to associate for the purpose of assisting persons who sought legal redress for the infringement of their constitutionally protected rights. The First Amendment thus protects more than theoretical discussion: it protects the right to assemble and associate for the purpose of advocating for change. The *Button* decision thus illustrates the interrelationship between the First and Fourteenth Amendments.

Here is another. The First Amendment also played an essential role in frustrating the State of Alabama in its repeated attempts to oust the NAACP from the state. In *NAACP v Alabama ex rel Patterson,* the state of Alabama alleged that the NAACP's activities in Alabama were causing irreparable injury to citizens.[20] The state ordered the NAACP to produce its membership list. When the organization refused to comply, the state adjudged the NAACP in contempt and imposed a fine of $100,000. The Supreme Court overturned the latter and ruled that the United States Constitution permitted members of the NAACP to be protected from having their affiliation with the organization disclosed. The opinion states that:

> Immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of its members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have. Accordingly, the judgment of civil contempt and the $100,000 fine which resulted from [the NAACP's] refusal to comply with the production order in this respect must fall.[21]

That decision didn't stop the State of Alabama from trying to stop the NAACP. In fact, the right of the NAACP to operate in Alabama reached the Supreme Court four times. In the fourth case, Alabama had complained that the civil rights organization had continued to carry out its activities in "violation of the Constitution and laws of the state relating to foreign corporations" and that its activities violated "other laws of the state of Alabama . . . and [were] detrimental to the state . . .."[22] A decree was entered enjoining the NAACP from doing "any further business of any description or kind" in Alabama and from attempting to qualify to do business there.

Among the acts charged against the association that were causing "irreparable" injury to the property and civil rights of citizens of Alabama were the following:

1 that it had [paid three black women] to encourage them to enroll as students in the University of Alabama in order to test the legality of its policy against admitting Negroes;

2 that it had furnished legal counsel to represent [one of the three women] in proceedings to obtain admission to the University;

3 that it had "engaged in organizing, supporting and financing an illegal boycott" to compel a bus line in Montgomery, Alabama not to segregate passengers by race;

4 that it had "falsely charged" officials of the State and University of Alabama with acts in violation of state and federal law;

5 that it had "falsely charged" the Attorney General of Alabama and the Alabama courts with "arbitrary, vindictive, and collusive" acts intended to prevent it from contesting its ouster from the State "before an impartial judical forum," and had "falsely charged" the Circuit Court and Supreme Court of the State with deliberately denying it a hearing on the merits of its ouster;

6 that it had "falsely charged" the State and its Attorney-General with filing false contempt proceedings against it, knowing the charges to be false;

7 that it had "willfully violated" the order restraining it from carrying on activities in the state;

8 that it attempted to "pressure" the Mayor of Philadelphia, the Governor of Pennsylvania, and the Penn State football team into "A boycott of the Alabama football team" when the two teams were to play each other in the Liberty Bowl;

9 that it had "encouraged, aided, and abetted the unlawful breach of the peace in many cities in Alabama for the purpose of gaining national notoriety and attention to enable it to raise funds under a false claim that it is for the protection of alleged constitutional rights;"

10 that it had "encouraged, aided, and abetted a course of conduct within the state of Alabama, seeking to deny to the citizens of Alabama the constitutional right to voluntarily segregate;" and

11 that it had carried on its activities in Alabama without complying with state laws requiring foreign corporations to register and perform other acts in order to do business within the State.[23]

The Supreme Court unanimously rejected Alabama's effort to stop the NAACP from operating within the state. As noted above, Alabama had claimed, in part, that the NAACP was engaged in organizing, supporting, and financing an illegal boycott of Montgomery's bus system. Justice John Marshall Harlan, who authored the Court's opinion, described as "doubtful" the "assumption that an organized refusal to ride on Montgomery's buses in protest against a

policy of racial segregation, without more, in some circumstances violates a valid state law."24 The veneer that Alabama had applied to the case was stripped away by Justice Harlan in the following language: "This case, in truth, involves not the privilege of a corporation to do business in a State, but rather the freedom of individuals to associate for the collective advocacy of ideas. Freedoms such as [this] are protected not only against heavy handed frontal attack, but also from being stifled by more subtle governmental interference."[25]

Justice Harlan had earlier outlined his view on the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues. In *NAACP v Alabama ex rel Patterson,* he wrote: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as the court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[26]

The intersection of basic civil rights and the methods of protest was depicted in another major case. In 1966, black citizens residing in and near Port Gibson, Mississippi, presented white officials with a list of nineteen specific demands. They included a call for the desegregation of all public schools and facilities, the hiring of black policemen, public improvements in black residential areas, selection of blacks for jury duty, integration of bus stations so that blacks could use all facilities, and an end to verbal abuse by law enforcement officers. Also included were demands that Negroes be addressed with the courtesy titles of Mr, Miss, or Mrs, rather than by terms such as "boy", "girl", "shine", or other discourteous and demeaning names. The petitioners stated that they hoped to solve the problems in the community "by mutual co-operation and efforts at tolerant understanding," rather than by resort to peaceful demonstrations and boycotts. However, they added that picketing and demonstrations would be inevitable "unless there can be real progress towards giving all citizens their equal rights."

A boycott of white merchants ensued when a satisfactory response was not forthcoming. Its acknowledged purpose was to secure compliance by civic and business leaders with the list of demands for equality and racial justice. It was supported by speeches and non-violent picketing. Participants repeatedly encouraged others to join in the cause.

A number of public officials to whom the petition was presented also owned the businesses that were the objects of the boycott. These merchants sued the NAACP and 146 black citizens alleged to have become culpable by virtue of attending meetings of the NAACP at a local church. The action was filed in a state court, and plaintiffs sought to recover losses caused by the boycott and to enjoin future boycotts. The state court rendered a judgment against the NAACP and the individuals for all business losses that were sustained over a seven-year period. The court further enjoined the NAACP and others from engaging in future boycott activity.

The case ultimately reached the United States Supreme Court,[27] on petition by the NAACP and others - thus confronting the Court with the question of whether the non-violent elements of the boycott were protected by the First Amendment. The Supreme Court made the following points in its opinion reversing the lower court's judgment:

> [T]he non-violent elements of petitioners' activities are entitled to the protection of the First Amendment. [Through exercise of their First Amendment right of speech, assembly, association, and petition, rather than through riot or revolution, petitioners sought to bring about political, social and economic change.]

> While States have broad power to regulate economic activities, there is no comparable right to prohibit peaceful political activity such as that found in the boycott in this case.
>
> [Petitioners are not liable in damages for the consequences of their non-violent protected activity.] While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of non-violent, protected activity; only those losses proximately caused by the unlawful conduct may be recovered.
>
> [Similarly, the First Amendment restricts the ability of the State to impose liability on an individual solely because of his associations with another.] Civil liability may not be imposed merely because an individual belongs to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.[28]

These cases demonstrate the importance of a vigorous protection of the freedom of expression, including the rights to speak, assemble, associate, and petition the government freely, in the struggle for civil rights in America. It is true, without a doubt, that blacks and other minorities, have been beneficiaries of the guarantees of the First Amendment, and that much of the progress in the struggle for civil rights would have been impaired absent the guarantees of the First Amendment.

Speech and Expressive Conduct that Promotes Racism: The Tension Between First Amendment Jurisprudence and the Pursuit of Equality

America has no doubt witnessed great progress in its efforts to attain the constitutional guarantees of equality under the law. Yet to this day, racial discrimination still limits the opportunities and hopes of many black Americans. Many neighbourhoods remain racially divided, though not by any law. Unemployment rates remain disproportionately higher for blacks, and the delivery of medical care is so racially stratified that, in 1991, it was called a racist system by the Journal of the American Medical Association. Moreover, in the last few years, incidents of racism have been increasing. Implicated also in this phase of America's bout with racial discrimination are the values ensconced in the Bill of Rights. Other nations with diverse racial, religious and ethnic elements will also have to come to terms with the tensions resulting from clashes between competing guarantees and human rights values.

The United States Congress has reflected its concern about racist crimes by enacting a Hate Crimes Statistics Act.[29] It has not, however, enacted any laws generally addressing hate speech or crime.[30] To stem the increasing tide of incidents of racially-motivated harassment and violence, local and state legislatures, as well as policy-makers of universities and other public institutions, have turned to regulation. The majority of states in the United States have enacted a variety of anti-hate, anti-discrimination regulations referred to as "hate speech" or "hate cries" acts. These regulations generally fall into several categories: 1) bans on speech or expression with a racist content, 2) penalty enhancements for crimes motivated by bigotry or prejudice, or 3) prohibitions of certain forms of harassment, such as rules against cross-burning or against wearing masks.[31] These regulations are aimed at protecting the right of black Americans to be free from discrimination.

The wisdom as well as the legality of these regulations has been the subject of intense debate.[32] Many of these anti-hate, anti-harassment regulations have been challenged as violating the First Amendment's protection of the freedom to advocate ideas, no matter how offensive. The right to freedom of expression is considered a preeminent right in America. Yet, although the right to free speech is a "preferred right," it has never been an absolute right. Some forms of speech,[33] including defamation, obscenity, "fighting words" (words which by their very utterance incite an immediate breach of the peace), and the advocacy of imminent lawless action fall completely outside the protection of the First Amendment.[34] Even protected speech can be restricted by content-neutral regulations that are narrowly tailored to serve a compelling governmental interest. Perhaps the major premise behind the First Amendment is the concept that the government may not proscribe speech or expressive conduct because of disapproval of the ideas expressed. Designed to guarantee that public debate is uninhibited and open, the First Amendment protects speech we hate as much as speech which we hold dear. Thus, despite the fact that racist expression may cause anger, hurt feelings, or resentment, it is generally protected under the First Amendment unless it falls within the category of fighting words or advocates *imminent* lawless action.

Equality and the right to be free from discrimination are also highly valued principles in American jurisprudence. Constitutional provisions, as well as numerous federal, state, and local statutes, are designed to protect the rights of racial and other minorities to be free from discrimination in education, housing, employment, and many other areas. Racist incidents and other forms of bigotry implicate and may jeopardize the right to equality.[35] Thus, the tension between liberty and equality seems unavoidable in the context of speech or expressive conduct that promotes racism. The dilemma has led some to question whether the constitutional guarantee of freedom of expression found in the First Amendment and the constitutional guarantee of equality found in the Fourteenth (and Thirteenth) Amendment are allies or antagonists.[36] Yet, where racial, ethnic, and religious diversity exists, mechanisms for reconciling the intersection of various interests must be found and protected.[37]

The clash between the First Amendment and anti-discrimination regulations has surfaced in a number of cases. A recent example is the anti-harassment statute enacted by the city of St. Paul in the state of Minnesota. The ordinance made it a misdemeanor to place on private property a burning cross or other symbol which one knows or has reason to know "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender." In 1991, a seventeen year old white youth burned a cross in a black family's yard, and was charged with violating the ordinance.

The state Supreme Court upheld the misdemeanor charges against the white youth, rejecting his claims that the ordinance violated the First Amendment. It concluded that the ordinance was narrowly tailored to fulfil a compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.[38] The United States Supreme Court reversed the state court, holding that the hate crimes ordinance violated the First Amendment.[39]

According to Justice Scalia, who authored the majority opinion, the ordinance fell afoul of the First Amendment as overbroad and as an impermissible content-based regulation. Although recognizing the ability to proscribe "fighting words," the majority objected to the ordinance as selectively picking and choosing among the type of fighting words that were to be proscribed. Specifically, the ordinance proscribed only fighting words containing messages of bias based on race, color, creed, religion, or gender, but did not cover other types of

fighting words, such as those directed against people on the basis of political affiliation or homosexuality. In other words, according to the majority, it selectively silenced only certain types of fighting words, and was therefore impermissibly content-based.[40] Although it agreed the community must confront notions of racial supremacy, the majority concluded that the "manner of confrontation cannot consist of selective limitations upon speech." The majority added that "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."[41]

The four concurring Supreme Court justices agreed that the ordinance was unconstitutionally overbroad in that its proscriptions reached beyond fighting words.[42] The ordinance allowed prosecution for expressive activity which merely inspired anger, resentment, or hurt feelings, rather than being limited to fighting words that were likely to incite an immediate breach of the peace. These justices reiterated that such acts, under prior Supreme Court precedent, fell clearly within the protection of the First Amendment.

Despite their concurrence in striking down the ordinance, the four concurring justices bluntly criticized the majority's rationale. Justice Blackmun labeled the majority's rationale as "folly."[43] In the words of Justic Blackmun:

> I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of St. Paul from specifically punishing the race based fighting words that so prejudice their community.[44]

Thus, if the ordinance were not overbroad, these four justices would have upheld the St. Paul ordinance. In their view, it regulated expressive conduct that is wholly proscribable (fighting words), not on the basis of viewpoint or content, but in recognition of definite harms caused by such activity.[45]

The *RAV* ruling may cause serious confusion about First Amendment jurisprudence and may impair the ability of states and localities to combat racist activity. The rationale of the majority suggests that states and cities could punish racially hateful acts only if every other type of hate-inspired expression or conduct was likewise punished.[46]

At the least, this decision is likely to lead to confusion. In fact, one day after the RAV decision, the highest court in Wisconsin struck down the state's hate crime law that enhanced the penalty against defendants who intentionally selected their victim on the grounds of race.[47] This case arose when a black teenager, Todd Mitchell, after watching the popular and racially charged movie "Mississippi Burning," said to a group of other young black men: "There goes a white boy, go get him." The group beat the white boy, fourteen years old Gregory Riddick, knocking him unconscious and leaving him in a coma for four days. The jury convicted Mitchell of aggravated battery and separately found that he had intentionally selected his victim because of the boy's race. Based on the state statute which created an enhanced penalty for a crime whenever the defendant selected his victim on account or race, the defendant's sentence was increased from two years of imprisonment to four.

The state Supreme Court held that the statute violated the First Amendment directly by punishing what the legislature has deemed to be offensive thought. The court found the law unconstitutional as a restriction on freedom of thought (which is protected as much as speech itself).[48] Additionally, the statute was struck as unconstitutionally overbroad. Based on the

fear that words spoken before or during a crime could result in an enhanced penalty, the statute might have a chilling effect upon every kind of speech.[49]

The Supreme Court, in June of this year, unanimously rejected the decision of the Wisconsin High Court, holding that Mitchell's First Amendment rights were not violated by the application of the penalty enhancing statute in his sentencing.[50] Chief Justic Rehnquist, who authored the decision, noted that judges have always used a wide variety of factors in sentencing, including the defendant's motive. Although motive may be considered, a defendant's abstract beliefs, no matter how offensive, may never be taken into consideration in sentencing.

Litigation has also risen out of racist incidents on university campuses. At the University of Michigan, for example, a group of black women using a campus lounge came across a stack of handbills declaring "open hunting season" on blacks. This and other racially motivated incidents prompted the university to enact a speech code that banned behavior that stigmatizes or victimizes a person based on race or which "creates an intimidating, hostile or demeaning environment." Many leading universities have enacted various forms of regulations against racially motivated speech or harassment. The University of Wisconsin prohibited students from directing racist remarks to particular individuals with the intent to demean them and create a hostile environment. Proponents of these regulations argue that a university has an obligation to ensure that no one will be deprived of the right to equal educational opportunity and to eradicate prejudice and discrimination. Opponents fear that stifling expressions of racial animus would not counter, and could even aggravate, the underlying problem of racism.[51]

Both of the anti-hate speech codes mentioned, from the University of Michigan and from the University of Wisconsin, were invalidated as overbroad and thus in violation of the First Amendment.[52] All remaining reported decisions involving hate speech on campuses have likewise struck down limitations on expression.[53]

As these cases demonstrate, the United States has favored freedom of expression over censorship or restrictions on expression in the interests of racial equality and the elimination of discrimination. This conclusion is all the more apparent in comparison with other nations and with international law. The International Covenant on Civil and Political Rights, which the United States has recently ratified, obligates states parties to enact legislation which prohibits "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."[54] Legislation prohibiting expressions of hatred that "constitute incitement to discrimination, hostility, or violence" pursuant to the Civil and Political Covenant would be invalidated under current Supreme Court jurisprudence.[55]

Conclusion

The campaign for equality in America has changed over the history of the nation. In the words of two scholars:

> The struggle for equality of opportunity has shifted from the effort to win the legal rights of citizenship to the effort to gain fair access to society's resources, particularly to jobs, housing, and education; from the fight against crude and savage forms of racial discrimination to the fight against more subtle forms of racial subordination; from claims based solely on race to claims based on an amalgam of race and poverty,

from the goal of statistical desegregation to the more elusive goal of true cultural and socioeconomic integration.[56]

The struggle for civil rights was aided greatly by vigorous protection of the First Amendment right to free expression, including the rights to free speech, assembly, association, and petition. In the latter phase of the efforts to achieve true social and economic integration and equality, local regulations designed to counter racist incidents and ideology have come under attack as violations of the First Amendment. The nation now faces the challenge of reconciling the Bill of Rights' guarantee of freedom of expression with the interests of equality and the eradication of racial discrimination to which the Constitution commits all citizens.

Endnotes

1. The words "race" or "slavery" do not appear in the original Constitution or the Bill of Rights.

2. The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people to peaceable assembly, and to petition the Government for a redress of grievances."

3. Dred Scott v Sanford 60 US (19 How) 393, 15 LEd 691 (1857).

4. The Fourteenth Amendment provides in relevant part: "[No State shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. It was not until 1969 that all of the guarantees of the Bill of Rights were held applicable to the states. Respect by the states for the Sixth Amendment guarantees of a fair, speedy, and public trial was also essential in the struggle for civil rights.

6. For an excellent written and photographic account of the history of the struggle for civil rights, see Ira Blasser and Bob Adelman, Visions of Liberty: The Bill of Rights for All Americans (New York: Arcade Publishing, 1991), 190-226.

7. Justice Thurgood Marshall, "Reflections of the Bicentennial of the United States Constitution," Address Before the Annual Seminal of the San Francisco Patent and Trademark Law Association, in Maui, Hawaii (6 May 1987), in 101 Harv L Rev 1, 2 (1987).

8. For example, in 1957, the Governor of Arkansas called out the National Guard to prevent black teens from entering a high school in Little Rock.

9. National Advisory Commission on Civil Disorder (Kerner Report), 1968.

10. This civil rights law outlawed racial discrimination in public accommodations such as restaurants and hotels, forbade discrimination in any federally funded program and

authorized the Attorney-General to sue segregated public facilities. In its very important Title VII, it prohibited discrimination in employment by most private employers. 42 USC s. 2000e-2(a)(a).

11. The Voting Rights Act, and its subsequent amendments, outlawed discriminatory voting tests. Also, to offset the ability of Southern officials to create methods of circumventing civil rights laws, the Act required "preclearance" - the requirement that any local change in voting procedures or election laws had to be approved first by the federal government.

12. The Act outlawed racial discrimination in the sale, purchase, rental, or financing of housing.

13. See Kerner Report, supra n 9.

14. Jones, "The Desegregation of Urban Schools Thirty Years After Brown," 55 U Colo L Rev 515 (1984).

15. In these cases, for example, the Supreme Court 1) ruled that a Reconstruction era civil rights statute, now codified as 42 USCA Section 1981, could not be construed as affording a cause of action for discrimination in public employment contracts beyond the initial hiring stage, Patterson v McClean Credit Union 110 S Ct 2363 (1989); 2) held that white employees may challenge a consent decree in a Title VII case on the grounds of "reverse discrimination," Martin v Wilks 109 S Ct 2180 (1989); 3) shifted the burden of production of evidence to the plaintiff in a disparate impact case (which requires proving that an otherwise neutral policy has a discriminatory effect on a minority while it benefits others) and undercut the use of statistical disparities in proving a disparate impact, Wards Cove Packing v Antonio 109 S Ct 2115 (1989).

16. The Civil Rights Act of 1991 allows a person who brings an intentional discrimination claim against an employer under Title VII to request a jury trial and to be awarded compensatory and punitive damages to supplement traditional back-pay remedies.

The Act also negates the effect of the Supreme Court decision in Wards Cove, supra n 15, regarding the burden of proof in disparate impact discrimination cases. The 1991 Act reduces the burden of proof on the plaintiff and imposes a more stringent burden on an employer to justify a challenged practice.

The Act also amends s. 1981 so that it affords a cause of action for discrimination in all stages of employment, including terminations. It thereby negates the Supreme Court's restrictive interpretation of the Act in Patterson, supra n 15.

17. Among the guarantees was freedom of the press. The black press co-founded by John Russworm and Samuel Cornish in 1827 with the publication of Freedom's Journal, triggered a greater use of the written word by blacks to protest slavery. Historians and scholars credit William Monroe Trotter with playing an important role in "re-establishing" the black press as a dominant force in the black protest movement after a period of remission.

18. Section 5 of the Fourteenth Amendment gives Congress the power to "enforce by all appropriate legislation the provisions of the Article."

19. 371 US 415 (1963).

20. 357 US 449 (1958).

21. Id at 466. The right of association, which is not mentioned in the First Amendment, was implied from the rights to free speech and assembly.

22. NAACP v Alabama ex rel Flowers, 377 US 288 (1964).

23. Id at 302-03.

24. Id at 307.

25. Id at 309-10.

26. 357 US 449 at 460.

27. NAACP et al v Clairborne Hardware Co et al, 458 US 886, 889-90 n 26 (1982).

28. Id at 1911-12, 913, 918, 920.

29. Hate Crimes Statistics Acts, Pub L 101-275, 104 Stat 140, 23 April 1990.

30. Although Congress hasn't issued any laws generally addressing hate speech or crime, federal civil rights laws, such as s. 1985, the Religious Vandalism Act, and the Fair Housing Act have been used to prosecute hate crimes. See infra n 46 for one example.

31. The case of Hernandez v Virginia 406 SE 2d 398 (Va 1991), serves as an interesting example of this type of regulation. In Hernandez, a state appellate court held that the wearing of a mask by a member of the Ku Klux Klan was not expression protected by the First Amendment. The court reasoned that the wearing of the mask itself, unlike the wearing of the white robe and hood, did not convey a particular message. "The mask adds nothing, save fear and intimidation, to the symbolic message expressed by the wearing of the robe and hood." Thus, although the right of a Ku Klux Klan member to wear a white robe and hood is protected as expressive conduct, the wearing of a mask is not.

32. Although much has been written on these controversial topics, one outstanding resource is Sandra Coliver ed, Striking a Balance: Hate, Freedom of Expression and Non-discrimination (University of Essex: Article 19, 1992).

33. The term "speech" includes expressive conduct. US v O'Brien 391 US 3667 (1968); US v Eichmann 496 US 313 (1990) (holding that flag burning is expressive conduct and therefore protected under the First Amendment).

34. The fighting words doctrine was articulated in Chaplinsky v New Hampshire in 1942. Fighting words were defined as words which by their very utterance inflict injury or

incite an immediate breach of the peace. The Supreme Court, in subsequent decisions, has carefully scrutinized any decisions under Chaplinsky and appears to only recognize the second prong of the doctrine. See Ronna Greff Schneider, "Hate Speech in the United States: Recent Legal Developments," in Striking a Balance, supra n 32 at 272.

The case of Brandenburg v Ohio 395 US 444 (1969), which governs the restriction upon the advocacy of violence or other illegal conduct, is somewhat parallel to the fighting words doctrine. According to the Brandenburg Court, only speech which is "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action" can be restricted. The mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment.

35. See also Richard Delgado, "Campus Antiracism Rules: Constitutional Narratives in Collison," 85 Northwestern Univ L Rev 343 (1991) (reprinted in Striking a Balance, supra, n 32 at 288).

36. See eg Ronna Greff Schneider, "Hate Speech in the United States," supra, n 34 at 269.

37. Commentators have proposed a variety of approaches for reconciling the conflict between freedom of expression and equality. See eg Burt Neuborne, "Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech," 27 Harv Civil Rights-Civil Liberties Law Rev 371 (1992). Neuborne proposes to reconcile the tension by prohibiting limitations upon expression that causes "bruised emotions, rage and anguish" but allowing limitations on expression that results in a "loss of the ability to derive tangible benefits from a common enterprise." Id at 397.

38. RAV v City of St Paul, Minnesota, 464 NW 2d 507 (Minn 1991).

39. RAV v City of St Paul, 112 SCt 2538 (22 June 1992). Chief Justice Scalia writing the opinion for the majority, was joined by Kennedy, Rehnquist, Souter, and Thomas, JJ.

40. The majority emphasized that the government may not regulate speech based on "hostility - or favoritism - towards the underlying message expressed." Id at 2545.

41. Id at 2548. The majority concluded: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." Id at 2550.

42. Id at 2559 (Justice White was joined in his concurring opinion by Blackmun, O'Connor, and Stevens, JJ.

43. Id at 2561.

44. Id at 2561.

45. Id at 2571.

46. States could use alternative approaches to prosecuting perpetrators of racial harassment. For example, a defendant may be convicted under a federal statute, 18

USC s. 241, which makes it a crime to conspire to injure or intimidate any citizen in the free exercise of federally protected rights. See eg, US v McDermott 822 FSupp 582 (ND Iowa, 1993) (holding that even though cross-burning is a form of expression, an indictment against defendants under this statute for burning a cross in order to threaten and prevent African-Americans from using a park did not violate the First Amendment.)

The tort of intentional infliction of emotional distress may provide another mechanism for responding to hate speech.

47. Wisconsin v Todd Mitchell 169 Wis 2d 153, 163, 485 NW 2d 807, 811 (1992).

48. Id at 815.

49. Id at 815. One of the two dissenting judges described the hate crimes law as "a law against discrimination." In his view, the statute did not target the expression of bigotry, but rather the "act of discriminatory selection plus criminal conduct." Bablitch J, dissenting, at 819.

50. Wisconsin v Todd Mitchell 113 S Ct 2194 (11 June 1993), reported in 61 USLW 4575.

51. See Nadine Strossen, "Balancing the Rights To Freedom of Expression and Equality: A Civil Liberties Approach to Hate Speech on Campus," in Striking a Balance, supra, n 32).

52. Doe v University of Michigan 721 F Supp 852 (E D Mich 1989); UMW Post, Inc v Board of Regents of University of Wisconsin, 774 F Supp 1162 (ED Wis 1991).

53. See Ronna Greff Schneider, supra n 34 at 275. Despite this, universities could employ the rationale of Mitchell to arrest racially motivated incidents through the use of enhanced penalities under campus penal codes for bias motivated incidents.

54. Art 20(2).

55. Such legislation would be invalidated as a violation of the First Amendment for two reasons. First, the expression of offensive ideas (such as advocacy of discrimination and hatred) is protected by the First Amendment unless the expression falls into the categories of fighting words (words that are likely to lead to an immediate breach of the peace) or expression which advocates imminent illegal action. See supra, n 34. Moreover, legislation which punishes only certain types of offensive speech, such as that advocating national, racial or religious hatred, would run afoul of the Supreme Court's most recent decision in the case of RAV v St Paul, supra, p 18-19.

56. Visions of Liberty, supra, n 6 at 226.