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Multiculturalism and the Bill of Rights

Arthur Schlesinger Jr.

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FRANK M. COFFIN LECTURE ON LAW AND PUBLIC SERVICE

Editor's Note:
The Second Annual Frank M. Coffin Lecture on Law and Public Service was held on October 7, 1993. Professor Arthur M. Schlesinger, jr. presented “Multiculturalism and the Bill of Rights.” Following the presentation, faculty and friends adjourned to honor Professor Schlesinger and Judge Coffin. Dean Zillman's words of thanks were followed by Judge Coffin's poetic tribute to the Second Coffin Lecturer.

ODE TO AN HISTORIAN

Frank M. Coffin*

Dear Clio, the Muse of History,
Has kindly prepared this list for me
Of classical pundits great and small
Who now for ages have held in thrall
All who wish to learn from the past
In hopes this trouble-filled world would last.

To begin with a Greek, a bit odd to us,
The Father of History, old Herodotus,
Whose writing lacked the pellucidities
Of that politic-minded admiral, Thucydides.

Then Xenophon and the younger Cyrus
On whom he lavished much papyrus.

And out of the post-Hellenic dark
The fabulous parallel Lives of Plutarch.

Then last, as the Greeks pack up to leave us,
I have to mention the Jew, Josephus.

Now come the Romans, with plenty of ballast,
First of all, the quotable Sallust

And one to whom state secrets were privy,
The ever agreeable, sieve-like Livy.

Then, standing firm but never whiny,
The stoical, elegant Elder Pliny.

* Senior Circuit Judge, United States Court of Appeals for the First Circuit.
But who could bend the Tower of Pisa?
With plenty of Gaul, ambitious Caesar.

The Caesars, of course, appeared euphonious
Through the limpid pen of old Suetonius.

If these are not enough to last us,
We wind up with the lively Tacitus.

This is enough of a Call of the Roll.
I could extend this celebrity poll,

But enough is enough
For a history buff.

So I rise to toast
One from whom we learn -
. Not a mutant turtle ninja,

But one so cool he’d never roast,
Attempt to burn,
Or, much less, singe ya—

Our guest of honor
Arthur Schlesinger.
MULTICULTURALISM AND THE BILL OF RIGHTS

Arthur Schlesinger, jr.

It is a high honor to be invited to deliver the second Frank M. Coffin Lecture on Law and Public Service—all the more so because I follow in the footsteps of the two Americans who have done most in our lifetime to sustain the Bill of Rights: the brave and wise Justice William Brennan and that great-hearted advocate of individual freedom and equal opportunity who died a year ago, Joseph L. Rauh, Jr.

It is a high honor, but it is also a considerable intimidation. Who can possibly meet the standards so recklessly set in the first Frank Coffin lecture? Moreover, I am not a lawyer, and before a law school audience especially I must plead forbearance for the simplicities and solecisms to come. Historians have their uses, but most of my profession drift helplessly when plunged into the Sargasso Sea of legal technicality.

Still I am comforted by the thought that this lecture is in the name of Frank Coffin, who is one of the most humane and tolerant as well as one of the most sagacious men I have ever known. Frank and I go back a long way together. We first met nearly forty years ago when Democrats were a beleaguered minority downeast, and Frank and Ed Muskie revived and reconstructed the Maine party. I knew him when he served so ably in the House of Representatives, and we worked together in those exhilarating days when John Kennedy was President of the Republic. In the years since I have watched his distinguished career on the bench with the greatest admiration. His book The Ways of a Judge seems to me the most subtle, just, and illuminating exercise in judicial self-analysis since the great Cardozo's The Nature of the Judicial Process. I am glad to report that Judge Coffin's fine new book On Appeal is soon to appear.

As a judge, Frank Coffin has been notable for his understanding of the impact on public law of pressures of social change, especially, as he has written, "the pressures of limits to resources, energy, space, privilege, opportunity, wealth, travel, education, and many other necessities and amenities to which we are only now being introduced, after two centuries of faith in infinite growth, resources, and opportunities."

This is much the situation foreseen a century ago by Woodrow Wilson. "America," Wilson wrote in 1889 in a review of Bryce's The American Commonwealth,

is now sauntering through her resources and through the mazes of

her politics with easy nonchalance; but presently there will come a
time when she will be surprised to find herself grown old,—a coun-
try crowded, strained, perplexed,—when she will be obliged . . . to
pull herself together, adopt a new regimen of life, husband her re-
sources, concentrate her strength, steady her methods, sober her
views, restrict her vagaries, trust her best, not her average, mem-
bers. That will be the time of change.2

Wilson's time of change is rushing upon us. And Frank Coffin has
observed of judges in the maelstrom, "Their most elusive mission is
that of safeguarding individual rights in a majoritarian society with
due regard to the legitimate interests of that society"—a quest that,
if pursued broadly and sensitively by citizens in addition to judges,
can go far, he hopes, "toward making tolerable the coiled-spring ten-
sion under which we have been chartered to live."3

Of the many changes that have overtaken America since Frank
Coffin and I were young, one of the most striking is summed up in
that relatively new word "multiculturalism." In a way, it is odd that
this concept should be so new, since the United States has been
from birth a multiethnic society. But through most of the history of
the republic multiculturalism has been seen as a stage in the absorp-
tion of newcomers into a common American nationality and culture.

In recent years, however, multiculturalism has developed an ideol-
ogy and mystique of its own. In its militant form, it becomes a chal-
lenge to, even a hold-out against, the historic process of absorption
and the idea of a common nationality. It is in this sense that the
word has suddenly invaded everyone's radar screen, that it has ex-
cited such spirited, often angry, debate and that it leads some today
to advocate the reinterpretation and curtailment of the Bill of
Rights of the Constitution.

The first point I would make about the contemporary debate is
that multiculturalism is by no means a uniquely American issue. To
understand its true significance, we must think about multicultural-
ism against the global backdrop and in the terms of the transition
the whole world is making from one grand historical epoch to the
next.

The twentieth century may well appear in retrospect as an era
defined above all by the warfare of ideologies. It was a time when
the liberal democratic idea was under siege by two mortal foes, two
variations on the totalitarian idea: the challenge of fascism in the
first half of the century; the challenge of communism in the second.
Democratic society finally succeeded in defeating both totalitarian
creeds: fascism perishing with a bang, communism with a whimper.
For the moment, democracy has won the ideological war.

2. Woodrow Wilson, Bryce's American Commonwealth, Political Science Qua-
3. Coffin, supra note 1, at 249.
But the fading away of the ideological conflict does not mean, as some sages optimistically forecast, the "end of history." One set of hatreds replaces another. Lifting the iron lid of ideological repression in Eastern Europe and what used to be the Soviet Union releases pent-up ethnic, national, religious, linguistic antagonisms deeply rooted in history and in memory. The evaporation of the Cold War removes superpower restraints on national and tribal conflicts in the Third World.

As the warfare of ideologies subsides, the world thus enters—or, more precisely, re-enters—a possibly more dangerous era of ethnic and racial warfare. If the twentieth century was the century of the warfare of ideologies, the twenty-first century promises to begin as the century of the warfare of ethnicities—and this, it should be noted, is a much older, profounder, and more unyielding form of warfare, one whose roots go back forever in time. In the words of Klaus Kinkel, the German foreign minister, "As if buried beneath a sheet of ice . . . ethnic conflicts were in a state of suspended animation under communist rule. Now that this sheet has cracked, these conflicts are surfacing violently." 4

The tragedy of Yugoslavia is only the most murderous portent of a darkening future. A Yugoslav political scientist, Simon Petrovic, put it well the other day: "Minorities are going to be an acid test for all post-communist societies. With communism all but disappearing tribal instincts are coming back." 5 And the hostility of one tribe for another is among the most ancient and most instinctive of human reactions.

Yet the history of our planet has been in great part the history of the mixing of peoples, and never more so than today. As our twentieth century staggers to a close, many factors—not alone the evaporation of the Cold War but, more endurably, the development of swifter modes of communication and transport, population growth, the breakdown of traditional social structures, the flight from chaos, from tyranny, from poverty, from famine, from ecological disaster, the dream of a better life somewhere else—drive people in mass migrations across national frontiers. According to the United Nations report on the world’s refugees presented by the United Nations High Commissioner in November 1993, the number of refugees fleeing their homelands has grown from 2.5 million in 1970 to nearly 20 million today; another 24 million have been forced into exile within their own countries. In short, more than one in every 130 inhabitants of the globe is today a refugee. 6

The planet shrinks, and its population is more intermingled than ever before. At the same time, the world is torn in opposite directions, whipsawed between intense pressures toward globalization on the one hand, toward fragmentation on the other. The world market, electronic technologies, instantaneous communications, fax machines, CNN—all these undermine the nation-state and lead toward a world without frontiers. Yet these very internationalizing processes drive people to seek refuge from global currents they feel to be beyond their control and understanding. The more people see themselves as cast adrift in a vast impersonal, uncontrollable world, the more desperate they become to bury themselves in some familiar, intelligible, comprehensible human unit, the more they crave a politics of identity. So the more the world globalizes, the more it fragments.

What happens when people of different ethnic origins, speaking different languages and professing different religions, settle in the same geographical locality and live under the same political sovereignty? Unless a common purpose binds them together, tribal resentments and enmities will drive them apart. No one in the nineteenth century thought more carefully about problems of representative government than John Stuart Mill. The two elements that defined nationality, as Mill saw it, were the desire to be governed together and the “common sympathy” created by shared history, values, and language. He wrote,

Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist . . . . [I]t is in general a necessary condition of free institutions, that the boundaries of government should coincide in the main with those of nationalities.  

In the modern world those boundaries coincide less and less. Nationhood is at best difficult both to achieve and to sustain. Events every day demonstrate the fragility of national cohesion; and no one can doubt that ethnic, racial, religious warfare is replacing the warfare of ideologies as the explosive issue of our age. On every side today, ethnic and religious fanaticism is the cause of the breaking of nations.

The Soviet Union, Yugoslavia, Czechoslovakia have already broken up. India, Lebanon, South Africa, Ireland, Israel are all in ethnic or religious turmoil. One form or another of ethnic or religious cleansing divides Sri Lanka, Burma, Indonesia, Afghanistan, Iraq, Turkey, Ethiopia, Somalia, Nigeria, Liberia, Angola, Sudan, Zaire, Guyana, Trinidad—you name it. Even nations as stable and civilized

as Britain, France and Germany, Belgium, Spain and Austria, face rising ethnic, racial, and religious troubles. "[T]he virus of tribalism," says the Economist, "risks becoming the AIDS of international politics—lying dormant for years, then flaring up to destroy countries."

Take the case of America's neighbor to the north. Canada has long been considered among the most sensible and sedate of nations. "Rich, peaceful and, by the standards of almost anywhere else, enviably successful," the Economist comments: yet today "on the brink of bust-up." Michael Ignatieff (the English-resident son of a Russian-born Canadian diplomat and thus an example of the contemporary mixing of peoples) writes of Canada, "Here we have one of the five richest nations on earth, a country so uniquely blessed with space and opportunity that the world's poor are beating at the door to get in, and it is tearing itself apart . . . . If one of the top five developed nations on earth can't make a federal, multiethnic state work, who else can?"

The answer to that increasingly urgent question has been, at least until recently, the United States.

Now how have Americans succeeded in pulling off this almost unprecedented trick? Other countries break up because they fail to give ethnically diverse peoples compelling reasons to see themselves as part of the same nation. As Chinua Achebe, the Nigerian novelist, writes of his own country, one of the richest in Africa but now on the verge of chaos, "This is the Nigerians' greatest weakness—their inability to face grave threats as one people instead of as competing religious and ethnic interests." The United States has thus far offered diverse cultures reasons to face grave threats as one people. What is it then that, in the absence of a common ethnic origin, has bound Americans together over two turbulent centuries?

For America has been a multiethnic country from the start. Hector St. John de Crèvecoeur emigrated from France to the American colonies in 1759, married an American woman, settled on a farm in Orange County, New York, and published his Letters from an American Farmer during the American Revolution. This 18th century French American marveled at the astonishing diversity of the other settlers—"a mixture of English, Scotch, Irish, French, Dutch, Germans, and Swedes . . . ." a "strange mixture of blood" that you

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could find in no other country.12 “From this promiscuous breed,” he wrote, “that race now called Americans have arisen.”13 (The word race as used in the eighteenth century meant what we mean by nationality today; thus people spoke of “the English race,” “the German race,” and so on.) What, Crèvecoeur mused, were the characteristics of this newly emergent American race? In the *Letters from an American Farmer* he propounded a now famous question: “What then is the American, this new man?”14 (We must overlook eighteenth century male obliviousness to the existence of women.)

Crèvecoeur gave his own question its classic answer:

*He* is an American, who leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds. . . . The American is a new man, who acts upon new principles . . . .

. . . .

*Here individuals of all nations are melted into a new race of men.*15

The first great American historian soon reinforced Crèvecoeur’s point. “Annihilate the past of any one leading nation of the world,” George Bancroft wrote,

and our destiny would have been changed. Italy and Spain, in the persons of Columbus and Isabella, joined together for the great discovery that opened America to emigration and commerce; France contributed to its independence; the search for the origin of the language we speak carries us to India; our religion is from Palestine; of the hymns sung in our churches, some were first heard in Italy, some in the deserts of Arabia, some on the banks of the Euphrates; our arts come from Greece; our jurisprudence from Rome; our maritime code from Russia; England taught us the system of Representative Government; the noble Republic of the United Provinces bequeathed to us, in the world of thought, the great idea of the toleration of all opinions; in the world of action, the prolific principle of federal union. Our country stands, therefore, more than any other, as the realisation of the unity of the race.16

*E pluribus unum:* one out of many. The United States had a brilliant solution for the inherent fragility, the inherent combustibility, of a multiethnic society: the creation of a brand-new national identity by individuals who, in forsaking old loyalties and joining to make new lives, melted away ethnic differences—a national identity

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13. Id.
14. Id. at 49.
15. Id. at 49-50. (emphasis added in the last sentence).
that absorbs and transcends the diverse ethnicities that come to our shore, ethnicities that enrich and reshape the common culture in the very act of entering into it. The goals of those who came to America were escape, deliverance, assimilation. They saw America as a transforming nation, banishing dismal memories and developing a unique national character based not on common ethnic origins, but on common political ideals and experiences. The point of America was not to preserve old cultures, but to establish a new American culture. Americans have never, until very recently, believed in ancestor worship.

From the Revolution on, Americans have had a vigorous sense of national identity, forged in the War for Independence, articulated in the Declaration of 1776 and the Constitution of 1787, deepened by the subsequent experience of self-government. George Washington affirmed the national creed when he invited “the oppressed and persecuted of all Nations and Religions” to come to America, but not, he suggested, in clannish groups, sticking to themselves; rather to come as individuals prepared for “intermixture with our people” so that they could be “assimilated to our customs, measures and laws: in a word, soon become one people.” 17 John Quincy Adams as Secretary of State advised prospective immigrants to “cast off the European skin, never to resume it. They must look forward to their posterity rather than backward to their ancestors.” 18 America has its own identity, derived from its own experience and its own ideals. From the start, citizenship was defined, at least for white America, not by bloodlines but by political principle—not by jus sanguinus but by an adaptation of jus soli.

When Alexis de Tocqueville came to America half a century after the adoption of the Constitution, he wondered how this miscellaneous American society, “formed of all the nations of the world . . . people having different languages, beliefs, opinions: in a word, a society without roots, without memories,” could turn into a single nation. 19 The answer, Tocqueville decided, was that nations could be based on adherence to an idea. The American secret, he concluded, was the national commitment embodied in the Constitution to democracy, self-government, individual freedom and equality before the law. It was this common purpose that would enable Americans—at least white Americans—to forge a single culture and a single nation from people of bewilderingly diverse racial, religious, eth-

17. 34 The Writings of George Washington from the Original Manuscript 23 (John C. Fitzpatrick, ed., 1940).
nic, and linguistic origins. The rights of citizenship, the experience of political participation, the development of a civic culture—these would dissolve ethnic and religious differences and become the great national unifier.

National unification had its brutal limits, as we shall soon note. Yet half a century after Tocqueville another great foreign observer of the American commonwealth, the Britisher James Bryce, was similarly struck by "the amazing solvent power which American institutions, habits, and ideas exercise upon new-comers . . . quickly dissolving and assimilating the foreign bodies that are poured into her mass."20 Half a century after Bryce, a third perceptive foreign observer, Gunnar Myrdal of Sweden, in his great study of race relations, An American Dilemma, found the essence of the "solvent power" in what he called the American Creed and showed why that Creed held out hope even for those most cruelly excluded by the dominant white majority, the Creed acting as the spur forever goading white Americans to live up to their proclaimed principles.21

This vigorous sense of national identity accounts for America's relative success in converting Crèvecoeur's "promiscuous breed" into Washington's "one people." Of course it remains a vital part of America for people to cherish their own traditions, observances, parades, rituals, creeds, customs, cuisines. It is these strands of particularity that bring richness and texture to our society. Ethnicity has always had pretty free cultural expression, while the power of political principle and civic experience as instruments of assimilation has enabled the mixture of ethnicities to coalesce into a single nation.

This is not to say that the United States has lived up to its own best ideals. New waves of immigration brought in peoples who fitted awkwardly into a society that was inescapably English in language, ideas, and institutions. For a long time Anglo-Americans dominated American culture and politics. The melting process did not easily melt immigrants from Ireland, from Germany, from southern and eastern Europe. Still even those snubbed and spurned by the Anglo-Americans were enabled by the exercise of democratic rights to enter into, join and remold the American culture.

As for the non-white peoples—those already in America whom the European newcomers overran and massacred, or those others hauled in against their will from Africa and Asia—deeply bred racism put them all, red Americans, black Americans, yellow Americans, brown Americans, well outside the pale. We must face the shameful fact: historically America has been a racist nation. After all, white Americans started out as a people so confident in our own racial superiority that we felt licensed to kill red people, to enslave black people,

21. GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944).
and to import yellow and brown people for peon labor. We white Americans have been racist in our laws, in our institutions, in our customs, in our conditioned reflexes, in our souls. The curse of racism has been the great failure of the American experiment, the glaring contradiction of American ideals and the still crippling disease of American life.

Yet even non-white Americans, miserably treated as they were, contributed to the formation of the national identity. They became members, if third-class members, of American society and helped give the common culture new form and flavor. Like white Americans, black Americans did not cling to their past but rather helped change the present and the future. The infusion of non-Anglo stocks steadily reconfigured the British legacy and made the United States, as we all know, a very different country today from Britain.

This vision of America as possessing a national identity of its own, superseding and absorbing the diverse ethnicities of those who came here, prevailed through most of the two centuries of the history of the United States. But recent years have brought forth a new and opposing vision. In a nation marked by an even stranger mixture of blood than Crèvecoeur had known, his question—"What then is the American, this new man?"—is asked once more, with new intensity—and with new answers. Today many Americans disavow the historic purpose of "a new race of men." The escape from origins has given way to the search for roots.

In place of a distinctive American nationality, there has arisen a cult of ethnicity. This cult began among non-Anglo white minorities. Michael Novak's book of 1971, The Rise of the Unmeltable Ethnics, was, as its title suggests, a direct challenge to theorists of the melting pot. "The new ethnic politics," Novak wrote, "asserts that groups can structure the rules and goals and procedures of American life." This view was rapidly taken up by non-white minorities—all joining to denounce the ideas of assimilation, integration, the melting pot, and to protect, promote, and perpetuate separate ethnic and racial communities. This is the multicultural challenge to the traditional concept of American nationhood.

The eruption of ethnicity has had some healthy consequences. It has forced the American culture at last to acknowledge the inexcusable persistence of group inequalities and to give shamefully overdue recognition to the achievements of minorities subordinated and ignored during the high noon of Anglo dominance. American education has begun at last to reflect on the existence and significance of the great swirling world beyond Europe. All this is to the good. The balance between unum and pluribus had tilted too far toward unum at the expense of pluribus, and the multicultural challenge has

helped valuably to restore the balance.

But, pressed too hard, the cult of ethnicity has disturbing consequences, too. It tilts the balance too far in the other direction—toward *pluribus* at the expense of *unum*. The ethnic gospel in its militant form rejects the unifying concept of a unique American identity. It rejects the vision of individuals from all nations melted into a new race. It rejects the ideals of assimilation and integration. It rejects the common culture. Its underlying philosophy is that America is not a nation of individuals at all but a nation of groups, that ethnicity is the defining experience for Americans, that ethnicities are permanent and indelible, that Americans must be primarily classified according to ethnic and racial criteria and that division into ethnic communities establishes the basic structure of American society and the basic meaning of American history.

While the ethnic interpretation of American history, like the economic interpretation, is valid and illuminating up to a point, it is fatally misleading and wrong when presented as the whole picture. The ethnic interpretation, moreover, repudiates the historic theory of America—the theory of Americans as “one people,” the theory that has thus far managed to keep American society whole.

Instead of a transformative nation with a unifying national identity, America in this new revelation is seen as preservative of diverse alien identities. Instead of a nation composed of individuals making their own unhampered choices, America is seen as a collection of ethnic and racial tribes, each more or less ineradicable in its commitments and loyalties. This latter-day exaltation of ethnic and racial separatism abandons historic American purposes, replacing assimilation by fragmentation, integration by *apartheid*, a single nation founded on an idea by a multiple nation formed on separate ethnic communities. It reverses the national motto: making it *ex unius plurimum*—many out of one.

“The one absolutely certain way of bringing this nation to ruin,” Theodore Roosevelt once said, “of preventing all possibility of its continuing to be a nation at all, would be to permit it to become a tangle of squabbling nationalities, an intricate knot of German-Americans, Irish-Americans, English-Americans, French-Americans, Scandinavian-Americans, or Italian-Americans, each preserving its separate nationality.”

Three quarters of a century later we must add a few more nationalities to TR’s brew. But what was a nightmare for TR is the dream of radical multiculturalists today. If that dream were fulfilled, if each of our manifold ethnic and racial groups were huddled in its own enclave, holding itself apart from the rest in the sacred name of

diversity, would this really lead to a more equitable, happy, peaceful, strong, unified country?

Yet this remains the project of the ideologues of militant multiculturalism. In the interests of this project, they reject not only America as a common culture but the First Amendment in its contemporary understanding.

Our modern civil liberties doctrine, it is true, took time to evolve. The First Amendment only forbade Congress to pass laws in restraint of the freedoms of speech, press, and worship. The founding fathers did not believe that the Bill of Rights outlawed state prosecutions for seditious libel or for blasphemy. The sainted Jefferson himself, exasperated by belligerent Federalist editors, told the governor of Pennsylvania, "I have therefore long thought that a few prosecutions of the most prominent offenders would have a wholesome effect." But the Fourteenth Amendment and subsequent exercises in judicial incorporation created the contemporary American understanding of civil liberties.

That understanding can be summed up in familiar phrases uttered largely by justices in dissent but eventually pronounced by court majorities the law of the land. However familiar these phrases may be, they bear repetition. "The question in every case," said Justice Holmes, "is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." "No danger flowing from speech," said Justice Brandeis,

\[\text{can be deemed clear and present, unless the incidence of evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by processes of education, the remedy to be applied is more speech, not enforced silence.} \]

Freedom, Justice Holmes emphasized, means not just "free thought for those who agree with us"—what great virtue resides in that?—"but freedom for the thought that we hate." Freedom for the thought that we hate: this is the proposition that now falls under attack from a multicultural perspective. Through most of this century, the thought that we hated had been totalitarian political thought: fascism, Nazism, communism. That was the age of the warfare of ideologies. Many argued that free speech should not be used to undermine free speech; that the privileges of

\[\begin{align*}
24. & \text{Letter to Governor Thomas McKean (Feb. 19, 1803), in } \text{LEONARD W. LEVY,} \\
& \text{JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 59 (1963).} \\
25. & \text{Schenck v. United States, 249 U.S. 47, 52 (1919).} \\
26. & \text{Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).} \\
27. & \text{United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).}
\end{align*}\]
liberty should not be available to those who would employ these privileges to destroy liberty. Under pressure, first of hot war and then of cold war, the Supreme Court gave ground from time to time in construing First Amendment protection of hateful ideological utterance. But in the main the Bill of Rights survived hot and cold wars intact.

Thus in the midst of the Second World War, at a time of the highest patriotic fervor with the life of the nation truly at risk, the Court threw out as a violation of the First Amendment a West Virginia statute requiring school children to salute and pledge allegiance to the American flag.28 "If there is any fixed star in our constitutional constellation," wrote Justice Jackson, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."29 This decision against compulsory flag salutes and pledges of allegiance was handed down when young Americans were fighting and dying on many fronts for flag and country. But the American people in 1943, far from denouncing the Court, applauded the decision as a pretty good statement of what we were fighting for.

In the later years of the Cold War, the Court, in Brandenburg v. Ohio,30 reaffirmed and reformulated Holmes's clear and present danger test. In the Skokie case,31 the Court upheld the right of neo-Nazis to march down the streets of an Illinois town inhabited by Holocaust survivors and their families. Hurt feelings were not considered enough to justify a reduction of constitutional protection. As Justice Brennan wrote in Texas v. Johnson,32: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."33

In defending the First Amendment, the Court in nearly all these cases was repelling attacks from the right. In those days conservatives and hyperpatriots were the militant advocates of repression and censorship. But in a bizarre switch of roles, attacks on the First Amendment and the demand to suppress the thought that we hate come these days from the left. Even more ironically, that demand is centered in our colleges and universities—exactly the places above all others where unlimited freedom of expression had previously been deemed sacred. And those who lead the assault on the Holmes-Brandeis-Jackson-Brennan conception of the Bill of Rights do so in the name of the multicultural society.

29. Id. at 642.
33. Id. at 414.
The traditional understanding of the Constitution has been that it is a document written for a nation composed of individuals and that the purpose of the Bill of Rights is to protect rights for individuals. The multicultural ideologues approach the Constitution from a different perspective. They regard the Constitution as a document written for a nation composed of groups and therefore would curtail the traditional understanding in order to protect rights for groups. Thus, Professor Kathryn Abrams of the Cornell Law School deplores “the constitutional habit of considering rights-bearers as unaffiliated individuals.” She argues that “expression is overprotected” in the United States and that “we need limits on free expression in intellectual life” in order to enhance “respect for and recognition of politically marginalized groups.”

This theory of the Constitution as the bulwark not of individual but of group rights undermines our current civil liberties doctrine. But that theory has behind it potent emotions—the emotions of Holocaust survivors at Skokie, the emotions of women long subjected to discrimination, harassment and abuse, the emotions of all oppressed and harried minorities.

As Henry Louis Gates, Jr., the W.E.B. DuBois Professor of the Humanities at Harvard, has recently written: “Civil liberties are regarded by many as a chief obstacle to civil rights. . . . The byword among many black activists and black intellectuals is no longer the political imperative to protect free speech; it is the moral imperative to suppress ‘hate speech.’”

The very phrase “hate speech” is new. It does not appear as a concept or even as an index entry in Leonard Levy’s invaluable Encyclopedia of the American Constitution published in 1986, or in Kermit E. Hall’s Oxford Companion to the Supreme Court published in 1992. Nor does the related phrase “political correctness” make it as a concept or as an index entry in either of these useful works. According to a New York Times computer search, there were 103 newspaper references to “political correctness” in 1988; 10,000 in 1993.

We must not be too quick to dismiss the case for suppression of hate speech. As the warfare of ideologies emphasized for many the vulnerability of free society to fascist and communist propaganda and led to demands that society protect itself, so the warfare of

35. Id.
ethnicities emphasizes the vulnerability of free society to racist division and conflict and leads to comparable demands for self-protection. Democratic governments, with memories of the Holocaust and apprehensions about growing ethnic hostilities, are naturally and honorably concerned to arrest the spread of tribal and racial hatreds.

The United Nations has been in the forefront of the drive to declare, in the words of the International Convention on the Elimination of All Forms of Racial Discrimination, “as an offence punishable by law all dissemination of ideas based on racial superiority or hatred . . . .” The United States has signed this document, but the Senate has thus far refused to ratify it on the ground that it is not compatible with the First Amendment.

One can understand why Germany, in the light of its own experience, would ban neo-Nazi groups as a clear and present danger to society. But western democracies with secure democratic traditions have passed laws punishing—to use the language of the British Racial Relations Act of 1965—the circulation of materials aimed at fomenting “hatred against any section of the public in Great Britain distinguished by color, race, ethnic or national origins,” including the use of “threatening, abusive, or insulting” words. Section 319 of Canada’s Criminal Code is similarly designed to prohibit hate propaganda against racial and religious minorities.

The adoption of such laws in other democracies strengthens the case of those who would censor hate speech in the United States. Nor is there any mystery why the agitation for censorship finds a special location in our universities. The problem of hate speech acquires peculiar poignancy in educational settings.

It is no fun running a university these days. White students can often be cruel in the exclusion of minorities, their wanton harassment, their heavy-handed pranks, their vile and wounding cracks. Minority students, for the most understandable reasons, are often vulnerable and frightened. Racial jokes, slurs, epithets hurled by majority bullies pose difficult questions for educational administrators. Consider how a shy and scared black student at the University of Michigan must have felt when posters appeared around the campus parodying the slogan of the United Negro College Fund: A MIND IS A TERRIBLE THING TO WASTE—ESPECIALLY ON A NIGGER. Or consider how Jewish and other white students at Kean College in New Jersey must have felt when a Nation of Islam speaker said that Jews had only themselves to blame for the Holocaust and that blacks, when they acquire power in South Africa, should give whites twenty-four hours to depart the country and then

kill all who remain:

We kill the women. We kill the babies, we kill the blind. We kill the cripples. We kill them all. We kill the faggot. We kill the lesbian . . . . When you get through killing them all, go to the goddamn graveyard and dig up the grave and kill them a-goddamn-gain because they didn’t die hard enough.⁴⁰

After a while, university administrators begin to ask themselves: which is more important—protecting hate speech or stopping racial persecution? Does not the tolerance of racism prevent minority students from joining the life of the university on equal terms? Does not the Bill of Rights protect equality as well as liberty? Does not hate speech destroy equality and thereby nullify the very premises of education? “[T]he right of free expression,” says the Stanford University Discriminatory Harassment Provision, “can conflict with the right to be free of invidious discrimination”—so it is proper to ban words “commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.”⁴¹ Nor is there any loss thereby, because the opinions banned are in their nature without redeeming social value.

One has a certain sympathy for beleaguered administrators who, doing their best to keep the peace and give minority students an equal chance, try to crack down on bigoted speech. More than three hundred institutions, according to the First Amendment Center of the Freedom Forum in Nashville, have speech codes. Those adopted by the University of Michigan and the University of Wisconsin have been invalidated by the courts as manifestly unconstitutional.⁴² Others, more narrowly drawn, make ingenious claims to constitutionality—some resting on the argument that the purpose of the First Amendment is to insure worthwhile public debate and on a “two-tier” distinction between high-value and low-value speech;⁴³ some on the proposition that the constitutional guarantees of liberty and equality are on a collision course and liberty should not be furthered at the expense of equality; the First Amendment right to speak should not be preferred to the Fourteenth Amendment right to obtain an equal education. Some proponents like Catharine MacKinnon even argue that the state has a constitutional duty to

prohibit expression that promotes inequality; still others invoke the "fighting words" doctrine in *Chaplinsky v. New Hampshire*, though the Supreme Court has found little sustenance in that doctrine when employed as anything more than a restatement of clear and present danger.

As a non-lawyer, I am not rash enough to pass on the constitutional merits of the various arguments for the abridgment of the First Amendment. Free speech is not an absolute; no judgment can escape the balancing of competing values. We regulate speech every day through statutes punishing libel, slander, false advertising, perjury, criminal solicitation, and so on. But in a free democracy the presumption must always lie in favor of free speech unless an overwhelming practical case can be made for regulation and censorship. And as a historian, I may perhaps be permitted comment on the practical impact of racist speech and of anti-racist legislation—an impact that some regard as sufficiently powerful to justify repression, though censorship of racist expression could well create precedents for future censorship of other sorts of expression.

It is even suggested that the creation of such precedents does not matter since free speech is no help to minorities anyway. "African-Americans and other people of color," Professor Charles Lawrence of the Stanford Law School tells us, "are skeptical about the argument that even the most injurious speech must remain unregulated because, in an unregulated marketplace of ideas, the best ones will rise to the top and gain acceptance. Experience tells quite the opposite. People of color have seen too many demagogues elected by appealing to America's racism."46

One wonders where Professor Lawrence has been over the last half century. For experience tells us on the contrary that, in the unregulated marketplace of ideas, the idea of white supremacy has vanished and the idea of racial equality has been accepted in principle if not, alas, in practice. There are few stronger arguments for the unregulated marketplace of ideas than the transformation of race relations over the half century. Read Gunnar Myrdal's *An American Dilemma*, and compare it to the situation today. When I was young, senators and congressmen would orate about the necessity of "white supremacy"; but in the last forty years has anyone heard the phrase on Capitol Hill? I would never have believed it half a century ago if someone told me that within my lifetime, with black Americans only 12 percent of the population, a black general would be

45. 315 U.S. 568 (1942).
chairman of the Joint Chiefs of Staff, black justices would sit on the Supreme Court, there would be a black governor of Virginia and black mayors in Atlanta, Birmingham, New Orleans, and other southern cities as well as in New York, Chicago, Philadelphia, Los Angeles, Kansas City, Detroit, Seattle. It was precisely the First Amendment, Professor Gates reminds us, that “licensed the protests, the rallies, the organization and the agitation that galvanized the nation.”

The struggle for racial justice is far from over; there are still miles to go before we sleep; but changes have been made. One doubts that these changes would have come faster if we had followed Professor Lawrence and prohibited racist speech. What that would have done is to elevate neo-Confederates into great champions of the Bill of Rights.

No one needs an untrammeled First Amendment more than those who seek to change the status quo. Radicals are always in the minority, and minorities gain most from the protections of the Bill of Rights. Free speech may often be offensive, odious, repulsive, an instrument of domination and oppression; but historically it has been far more significant as a means—no, the means—of liberation. As Norman Corwin, whom the more venerable will remember as the author half a century ago of that once celebrated radio program on the Bill of Rights called “We Hold These Truths,” put it: “The Bill of Rights doesn’t offer freedom from speech. To silence an idea because it might offend a minority doesn’t protect that minority. It deprives it of the tool it needs most—the right to talk back.”

A more positive argument for censorship is that educational institutions must take a stand against bigotry. But surely there are many ways short of censorship that educational leadership can discourage and condemn bigotry. Censorship breeds its own evils. In some institutions radical professors and students lay down a party line, denounce deviationists as politically incorrect and even drive them from the lecture platform. The rise of left-wing thought police reminds one of the right-wing students who in Joe McCarthy’s day used to haunt the classrooms of liberal professors (like me) hoping to catch and report whiffs of Marxism emanating from the podium. Of all institutions, universities surely should have least truck with censorship.

But thought police are everywhere these days—and once again in the Federal Bureau of Investigation. Of course the FBI has always shown excessive interest in people’s opinions. In the old days of the warfare of ideologies, G-men asked whether people under consideration for federal appointment had uttered radical political senti-

ments. Today FBI agents ask whether they have uttered words suggesting potential ethnic or racial bias. Jeremy J. Stone, president of the Federation of American Scientists, the liberal scientific lobby in Washington, and son of the radical journalist I.F. Stone, reports that the FBI recently asked friends of a congressional staffer whether he ever told racist jokes or said anything that indicated prejudice.50 “The FBI,” Stone writes, “is not just looking into racist discriminatory actions but eliciting and exploring comments . . . . Anyone who has ever uttered a statement that could be construed as ‘insensitive’ to any one of America’s minority groups could now be disqualified from a growing number of federal positions.”51 The opportunity for rumor and malice and the chilling effect on private speech are obvious. Stone wonders, “Will we become a society, as in Soviet Russia, where certain things cannot be conveyed even to one’s closest friends?”52

This obsession with “insensitivity”—saying something that might hurt somebody’s feelings—reinforces the assault on the First Amendment. Multicultural ideologues emphasize the harm that uncensored speech is believed to do to defenseless individuals. Unquestionably racial slurs and insults can be injurious, but is the injury words inflict on sensibilities sufficiently weighty and enduring to justify so drastic a remedy as limitations on freedom of speech? If we start down that road, we will end endorsing Ayatollah Khomeini and his crusade against The Satanic Verses. Does the fact that The Satanic Verses hurts the feelings of devout Muslims really justify the murder of Salman Rushdie? Let us not forget Bernard Shaw’s reminder: “All great truths begin as blasphemies.”

And how practically effective have those statutes been that are designed to stop the dissemination of racist ideas? Germany because of its special experience may well require special measures; but in neither Britain nor Canada has legislation diminished racism nor discouraged the merchants of hate; indeed, both countries, despite their legislation,53 have seen a dismaying increase in racial incidents. The Millwall ward in the East London borough of Tower Hamlets recently elected a councilman representing the neo-fascist British National Party; and the British Commission for Racial Equality reports that “increasing number of people” say they have “experienced racism—either directly, when they have been on the receiving end of verbal abuse, or more subtly, when they have been turned down for a job.”54 In Canada feminists, wielding the legal theories of

51. Id.
52. Id.
53. See supra notes 39-40.
Catherine McKinnon, rejoiced when the Canadian Supreme Court in Regina v. Butler55 affirmed the power of the state to ban literary or visual expression that "degrades" and "dehumanizes" women. But the main consequence has been the seizure by Canadian customs of books ordered by feminist bookstores.56 Neither the British nor the Canadian experience demonstrates that laws mandating repression and censorship are more effective than free discussion in bringing about a tolerant and harmonious society. Driving thoughts underground may only cause them to explode later.

When hate speech leads on to physical assault and violence, that is another matter and one requiring prompt and sharp counteraction. But there are plenty of statutes to deal with violent crime, and it may well be a good idea to provide for the enhancement of punishment when hate is demonstrably the motive.

Since the advocacy of censorship in the name of multiculturalism is couched in the vocabulary of "power" and "hegemony" and assumes that all views and actions are designed to enable one group to dominate another, one may be permitted to subject multicultural advocacy itself to the same analysis. Obviously, "political correctness" is a strategy of intimidation in the struggle for intellectual and educational power. As Professor Linda S. Greene of the University of Wisconsin Law School candidly confesses, the object is to talk "about what speech we want to empower people to engage in . . . about what we want people to be able to say at the university."57 But the First Amendment denies that anyone should have the power to decide what people are to be permitted to say.

In the long run there is surely no more self-defeating position for reformers and radicals than the endorsement of arguments and creation of precedents for the curtailment of debate and expression. "It is by the enjoyment of a dangerous freedom," as Tocqueville wrote a century and a half ago, "that the Americans learn the art of rendering the dangers of freedom less formidable."58

In the short run the idea of bringing harmony to the American multicultural society through censorship is an evasion of the real problem. Speech reflects social inequities and disparities; it does not cause them. If we are serious about bringing minorities into full membership in our society, our society must provide jobs, schools, health care and housing; it must provide equal opportunity in employment and education. The answer lies along these lines. It does not lie in the amputation of the Bill of Rights.

And, above all, the members of the white majority must open their minds and hearts. The burden to unify the country does not fall primarily on the minorities. Those who want to join America must be received and welcomed by those who think they own America. Assimilation and integration constitute a two-way street. Instead of slamming doors against minorities and burning crosses on their lawns, thereby driving them into defensive and defiant separatism, the majority must begin treating them as they would their own. Racism is the problem: the assault on the Bill of Rights is only a misdirected response.

The American population is more heterogeneous than ever. But this very heterogeneity makes the quest for unifying ideals and a common culture all the more urgent. Racial harmony is not an impossible dream. America, as Scott Fitzgerald said, is "a willingness of the heart." We have it within our power to make this a fair and a just land for all our people.

May I recall some words of Mahatma Gandhi—words that used to be inscribed on public posters throughout India, a country far more fiercely divided than our own by ethnic and racial and religious and linguistic antagonisms. "We must cease," Gandhi said, "to be exclusive Hindus or Muslims or Sikhs, Parsis, Christians or Jews. Whilst we may staunchly adhere to our respective faiths, we must be Indians first and Indians last." It is because India has abandoned these teachings of Gandhi that it is so violently and tragically divided today.

But in the spirit of Gandhi, while we heterogeneous Americans may staunchly adhere to our diverse traditions, let us never forget that in the end we are members one of another—Americans first and Americans last. In a world savagely rent by ethnic and racial fanaticism it is all the more essential that the United States continue as an example of how a highly differentiated society holds itself together and preserves its liberties.

60. Quoted in E.W. Desmond, Storm Over India, N.Y. REV. OF BOOKS, May 14, 1992, at 37.