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**WHAT IS A COMMUNITY?
GROUP RIGHTS AND THE CONSTITUTION:
THE SPECIAL CASE OF AFRICAN AMERICANS**

TAUNYA LOVELL BANKS*

*"We are born into certain groups, others we choose, and still others choose us. Life[,] not subject to the call of groupness[,] is as difficult for us to imagine as life not subject to the individuating call of personhood or to the sociating call of sociality."*¹

INTRODUCTION

In 1992 after a woman reported that she had been robbed in her home by a young black man, police officers in the predominately white upstate New York town of Oneonta tried to "locate and question" every African American or "black"² man in the town.³ The police lost track of the assailant near the campus of the State University of New York College at Oneonta (SUCO).⁴ The police requested and SUCO provided them with a list of its black male

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1. Ronald R. Garet, *Communitality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1070 (1983).

2. As I have written elsewhere, I consciously use the term "black" throughout this article rather than the more current "African American" because the former's adoption in the 1960s during the black power movement was the result of widespread discussion and consensus, whereas the currently fashionable term, "African American," was the result of powerful media influences upon American society, including black America. Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 U.C.L.A. L. REV. 1705, 1708 n.12 (2000). As historian Armstead Robinson said: "For after all, the term African-American precludes the possibility of a distinctive term for the native African who has become an American citizen." Armstead Robinson, Introduction, in *Afro-American Landmarks in Virginia* (unpublished manuscript, on file with author). The names we call ourselves and are called by others have been a source of tension within the black community. See, e.g., Bettye Collier-Thomas & James Turner, *Race, Class and Color: The African American Discourse on Identity*, 14 J. AM. ETHNIC HIST. 5 (1994) (discussing the history of racial designation of blacks and the connection between color and class in self-identification).

3. *Brown v. City of Oneonta*, 221 F.3d 329, 334 (2d Cir. 2000). For a discussion of this case see, Bob Herbert, *In America: Breathing While Black*, N.Y. TIMES, Nov. 4, 1999, § A, at 29.

4. *Brown*, 221 F.3d at 334.

students.⁵ Finding no suspect, over the next several days the police stopped and questioned more than 200 “‘non-white’ persons on the streets and inspect[ed] their hands for cuts.”⁶ The students on the list provided by SUCO and the persons approached and questioned sued alleging that they were targeted because of their race. They claimed that the police’s actions violated their rights under 42 U.S.C. § 1983, the Fourth Amendment and Equal Protection Clause.⁷ Their attorneys sought class certification for the student plaintiffs and separate certification for the other plaintiffs.⁸ The district court granted certification for the student class, but not the second class. The court reasoned “‘that each individual [in the second class] had experienced a separate and factually distinct encounter with the police.”⁹ Thus, the second group of plaintiffs had to proceed individually with their claims even though they were targeted by the police simply because of their race and gender.¹⁰

The conduct of the police in *Brown v. City of Oneonta* is an extreme example of racial profiling. A more common police practice, nicknamed “‘driving while black,”¹¹ targets black motorists. Studies suggest that black Americans are disproportionately and systematically stopped by police officers while traveling on the highways.¹² The race

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 335.

10. *Id.* Ultimately, the district court dismissed the equal protection and related statutory claims, as well as the Fourth Amendment claim. Plaintiffs appealed and the appellate court affirmed the summary judgment for the defendant on the equal protection claim, but reversed in part the dismissal of the Fourth Amendment claim. *Id.*

11. Elin Schoen Brockman, *Word for Word: Neology; In the Dictionary Game, Yada Yada Yada Is Satisfying to Some, Not Others*, N.Y. TIMES, August 22, 1999, § 4, at 7 (defining “‘DWB,” driving while black).

12. See, e.g., *Study: Police Stopped Blacks Twice as Often as Whites*, THE COURIER-JOURNAL (LOUISVILLE, KY), October 29, 2000, at 1a (noting that black drivers are pulled over by Louisville, Kentucky, police officers at almost twice the rate of white drivers); Kevin Sack and Janet Elder, *Poll Finds Optimistic Outlook But Enduring Racial Division*, N.Y. TIMES, July 11, 2000, at A1 (stating that 42 percent of blacks compared with 3 percent of whites polled believed they have been stopped by police simply because of their race); Todd S. Purdum, *Los Angeles to Work With U.S. on Police*, N.Y. TIMES, May 9, 2000, at A 16 (stating that the Justice Department entered into consent decrees with police departments in Los Angeles, Pittsburgh, Steubenville, Ohio, and the New Jersey State Police for targeting black motorists); Bob Herbert, *In America: Hounding The Innocent*, N.Y. TIMES, June 13, 1999, § 4, at 1 (accusing New York City’s police of targeting black pedestrians); Richard Weizel, *Can The Police Learn To Be Color Blind?*, N.Y. TIMES, May 30, 1999, § 14CN, at 3 (stating that a

of the person detained by the police is frequently the only basis for the action. Courts admit that a proven disparity between the number of white and black motorists stopped by the police suggests a constitutional race-based violation.¹³ Yet too often courts frame these violations as individual rather than group claims.¹⁴ The law does not clearly provide a group-based remedy for race-based constitutional violations. Following western liberal tradition, constitutional rights in the United States are framed as individual rather than group rights. Courts, however, routinely recognized group rights. Corporate entities, which are voluntary communities of shareholders, have rights.¹⁵ Similarly, trade unions, which are voluntary communities of workers, have group-based rights to negotiate with employers on behalf of their members.¹⁶ Likewise, religious and charitable associations have group-based rights.¹⁷ So do Native American communities like the Hopi, Navajos, and Cherokees, who are formally

court-ordered study found that 70 percent of motorist stopped by police in Maryland along Interstate 95 were black).

13. For a discussion of these cases, see Abraham Abramovsky and Jonathan I. Edelstein, *Pretext Stops And Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725 (2000) (stating that courts have held that race cannot be the sole basis for reasonable suspicion in police detentions); Kathryn K. Russell, "Driving While Black": *Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717 (1999) (examining various manifestations of racial profiling); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431-32 (1997) (arguing that race is the defining factor in pretextual traffic stops); David A. Harris, "Driving While Black" and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. CRIMINOLOGY 544 (1997) (discussing police stops of black motorists when there is no reasonable suspicion that the motorists have committed an offense).

14. See, e.g., David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 730-31 (1942) (noting that defamation law in the United States is framed in individualistic terms).

15. *Santa Clara Co. v. South Pacific Railway*, 118 U.S. 394 (1886) (holding corporations are "persons" within the meaning of the Fourteenth Amendment).

16. See *Rugemer v. American National Can Company*, 217 F. 3d 846 (2000) (holding that because union members gave their exclusive bargaining rights to the union, the union had the right to make unilateral decisions).

17. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding the Amish religious community's right to limit their children's public education to preserve community values), but cf. *Reynolds v. U.S.*, 98 U.S. 145 (1879) (rejecting a claim of a religious right to polygamous marriages as essential to the preservation of community values); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (upholding the right of Boy Scouts of America to refuse membership based on sexual orientation under the organization's First Amendment free association rights).

recognized by the federal government and are treated as domestic sovereign entities.¹⁸ Even activist civil rights organizations have group rights.¹⁹ So, perhaps it is misleading to say that American law only protects individual rights.

With the exception of the protection afforded to religious groups under the First Amendment,²⁰ positive group rights are conferred by laws or treaties rather than constitutional mandate. Yet Justice Stone in *United States v. Carolene Products* expressed the once commonly held belief that the Supreme Court can exercise judicial review to protect the rights of “discrete and insular” minority groups from the tyranny of the majority.²¹ In theory, at least, racialized²²

18. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that the tribal right to self-governance precludes review of gender discrimination claim); *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding the Bureau of Indian Affairs’ policy preferring the hiring and promotion of Indians as a political, not racial policy that benefits only members of federally recognized Indian tribes), *but cf.* *Rice v. Cayetano*, 120 S. Ct. 1044 (2000) (holding the exclusion of non-Hawaiians from voting for Office of Hawaiian Affairs trustees was not permissible under cases allowing differential treatment of certain members of Indian tribes). Native Americans who are affiliated with a recognized tribe, like the Navajo or Cherokee, are members of a political entity. Christopher A. Ford, *Administering Identity: The Determination of ‘Race’ in Race-Conscious Law*, 82 CALIF. L. REV. 1231, 1238 (1994). As a result, each tribe constitutes a tightly knit self-governing, culturally homogeneous community.

19. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958) (declaring that a state could not order the NAACP to produce its membership lists because it restrains members’ freedom of association rights). Technically, the NAACP was raising a claim on behalf of its members, acting a representational capacity.

20. U.S. CONST. amend. I. (1791). The relevant portion of the First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” *Id.*

21. 304 U.S. 144, 153 n.4 (1938). Some commentators suggest that more recent Supreme Court decisions, like *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), mark the erosion or decline of *Carolene Products*’ focus on class-based invidious discrimination and the substitution of individualized claims of discrimination. See Garet, *supra* note 1; Darlene C. Goring, *Private Problem, Public Solution: Affirmative Action in the 21st Century*, 33 AKRON L. REV. 209 (2000); Frank S. Ravitch, *Creating Chaos in the Name of Consistency: Affirmative Action and the Odd Legacy of Adarand Constructors, Inc. v. Peña*, 101 DICK. L. REV. 281 (1997); Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. RACE & L. 51 (1996).

22. I consciously chose to use the word “racialized” rather than the more problematic word “race” because, as I have written elsewhere, “the term ‘race’ . . . is not only socially constructed, but laden with such heavy baggage that it should never be used except in quotation marks The notion that race is an objective condition assumes that racial definitions are constant, although periodic adjustments and reclassifications might be necessary. In contrast, the notion that race is subjective, an ideological or social construct, assumes that racial meanings are contextual and fluid. Race is used constantly as a signifier, but racial meanings constantly change. Thus, racial identities are unstable, and race has no

minority groups in the United States, particularly blacks, have a right under the Thirteenth and Fourteenth Amendments to be free from discrimination or stigmatization by the state.²³ Under the Equal Protection Clause, the United States Supreme Court strictly scrutinizes any type of race-based governmental action.²⁴ This protection of discrete and insular racialized minority groups, however, focuses on the individual rights of group members and not the groups themselves.²⁵

In this essay I join others who argue that discrimination against people *raced*²⁶ as black in the United States is group-based

meaning except that ascribed to it. Racial identities are being created and recreated everyday.” Banks, *supra* note 2, at 1707 n. 9.

23. See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) (holding that de jure segregated public schools generated in black children “a feeling of inferiority as to their status in the community” in violation of the Fourteenth Amendment); *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (holding that anti-miscegenation laws stigmatized blacks based on their membership in a racial minority in violation of the Equal Protection Clause of the Fourteenth Amendment); *Civil Rights Cases*, 109 U.S. 3, 20 (1883) (holding that the Thirteenth Amendment gives Congress the power to abolish “all badges and incidents of slavery”).

24. For examples of strict scrutiny applied to invidious discrimination, see *Brown v. Board of Education*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967); and benign discrimination, see *City of Richmond v. J. A. Croson Company*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

25. “If one looks to the normative foundations of equal protection, one can understand why contemporary equal protection theory is not inherently group protective. In fact, the jurisprudence of equal protection actually renders the law incapable of determining when a group’s rights are being violated and when they are not. Like freedom of speech, equal protection jurisprudence rests upon either or both of two foundational values: an individual value and a social value. But the two values here are somewhat different While the individual value behind speech is personhood or autonomy, the individual value behind equal protection is ‘equal respect for persons.’” *Garet, supra* note 1, at 1024. As a result, Professor *Garet* argues, the individual value of equal respect for persons permits an outcome like *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) where Justice Powell, writing for the plurality, explicitly rejects the claim that one has to be a member of a “discrete and insular minority” to qualify for protection under the Equal Protection Clause. 438 U.S. at 288. *Garet* writes: “Powell contrasted the *Bakke* program, which violated the ‘personal rights’ of individuals who were equally members of the protected classification (i.e., race), to a valid program that ‘treats each applicant as an individual in the admissions process.’” *Garet, supra* note 1, at 1026 (citing *Bakke*, 438 U.S. at 289, 317). He concludes that *Cal-Davis’* “preferential admissions policy . . . violated a personal right grounded in the basic value of equal respect for persons because it failed to consider the applicants as individuals, and instead regarded them as group members alone.” *Id.*

26. I use “race” as a verb throughout this essay to remind readers that race in the United States is often imposed on some groups of people.

discrimination.²⁷ Thus, courts should be open to group-based claims and remedies. I caution, however, that any group rights based on African ancestry should only apply in very limited and, perhaps, extraordinary circumstances because the black community is increasingly loose-knit and heterogeneous.

In search for an appropriate standard to determine when legal recognition of black group rights should be triggered, I start with *Beauharnais v. Illinois*. In *Beauharnais*, the United States Supreme Court speculated that blacks as a group might be defamed. Ultimately, the Court backed away from the group defamation language in *Beauharnais* because it runs counter to constitutional jurisprudence grounded in the principle of individual rights. So, I turn to international human rights laws for guidance.

In exploring group-based rights, I ask whether the contemporary black community fits the definitions of protected groups developed internationally. I conclude that in most instances, a claim of group-based rights for people raced as black in the United States seldom fits the types of claims usually assigned group recognition in other countries. The racial profiling of blacks may be one of those exceptional claims. Lastly, I suggest that the loosely knit heterogeneous group labeled as the *black community* should push for legal recognition of limited group-based rights to address these exceptional cases.

I. *BEAUHARNAIS*—A POSSIBILITY OF GROUP RIGHTS?

On one occasion the United States Supreme Court appeared to recognize group rights for black Americans. In 1952, a narrowly divided Court in *Beauharnais v. Illinois* upheld a state law making it unlawful to defame a class of citizens based on race, color, creed, or religion.²⁸ The original defendant in *Beauharnais* published and

27. See Reva B. Seigel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77 (2000) (arguing that color blindness standards do not adequately take into account group discrimination); John A. Powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. J. 99 (1997) (arguing that race-neutral terms such as equal opportunity have overtly racist historical underpinnings that are used to enforce exclusionary practices against minority groups).

28. *Id.*

exhibited lithographed leaflets portraying black Americans as depraved, sexually promiscuous, rapists, robbers, carriers of guns and knives, and users of marijuana.²⁹ The leaflets called on white citizens of Chicago to petition the mayor and city council to maintain residential segregation. Attached to each leaflet was a membership application for the White Circle League of America.³⁰

Beauharnais was arrested for violating a state criminal libel law.³¹ He was convicted and fined \$200. On appeal Beauharnais argued that the state law violated the free speech and press guarantee implicit in the Due Process Clause of the Fourteenth Amendment because it was too vague.³² The Illinois Supreme Court upheld the conviction,³³ and the United States Supreme Court granted certiorari.³⁴

Justice Felix Frankfurter, writing for the five-person majority, reasoned that because it was libelous to characterize an individual as a rapist, robber, carrier of guns and knives, or user of marijuana, it was conceivable that a group, in this case Negroes, also could be defamed.³⁵ According to the majority, if the utterance would “incite violence and breaches of the peace,” the defamatory statement deprived members of the defamed group an equal right to exercise their liberties.³⁶ Thus, the majority concluded that the state law was directed at a defined evil, and drawn from the history and practice of Illinois and other states.³⁷

Despite insufficient evidence at common law that certain groups could be defamed, the majority concluded that a state may prosecute defamatory utterances directed at groups. The majority

29. *Id.* at 252.

30. *Id.* The White Circle League of America described themselves as “[t]he only white voice in America being raised in protest against [N]egro aggressions and infiltration into all white neighborhoods.” *People v. Beauharnais*, 408 Ill. 512, 514, 97 N.E.2d 343, 345 (1951).

31. ILL. REV. STAT., ch. 38, § 47 (1949) (current version at ILL. CONST., Art. 1, § 20 (2000)). The statute forbid publication of material that “portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which ... exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.”

32. *Beauharnais*, 343 U.S. at 251.

33. *People v. Beauharnais*, 408 Ill. 512, 97 N.E.2d 343 (1951).

34. *Id.*, cert. granted, 342 U.S. 809 (1951).

35. *Beauharnais*, 343 U.S. at 258, 263.

36. *Id.* at 261.

37. *Id.* at 253.

determined that the state has an interest in protecting the peace and well-being of the community.³⁸ Thus, the majority reasoned that there was no constitutional violation because all states have well-defined defamation laws restricting speech. These laws reach only a narrow class of speech which has slight social value.³⁹ Analogizing the right of groups not to be defamed to group rights for trade unions, the Court said that legal recognition of group rights need not be restricted to the economic sphere.⁴⁰ The Court hastened to add, however, that group libel claims are limited to situations where the coercive activities of others would “incite violence and breaches of the peace.”⁴¹ Otherwise, members of libeled groups are denied equal liberty rights.

Although four members of the Court dissented, three of them agreed that states have the power to pass group libel laws. Only Justice Hugo Black disagreed, taking his well-known stance that the free speech guarantee is an absolute prohibition on government restraint on speech.⁴² Briefly, the *Beauharnais* case suggested the possibility of group-based rights for racial minorities and outsider groups under the Constitution. Subsequent Court rulings, however, have cast doubt on the continuing vitality of the decision.⁴³

In *Collin v. Smith*, for example, a federal appellate court struck down an ordinance prohibiting the dissemination of material that

38. The Court relied heavily on a past history of racial violence in the area, citing two incidents: the May 28, 1917, riot in East St. Louis which was preceded by a vehemently defamatory speech by a prominent lawyer to a group of unemployed workmen; and the 1919 Chicago race riots which were caused by literature circulated by real estate associations. *Id.* at 258-262.

39. *Id.*

40. *Id.* at 262-3. “[E]conomic rights of an individual may depend for the effectiveness of their enforcement on rights in the group . . . to which he belongs.” *Id.* at 262.

41. *Id.* at 261-62.

42. *Id.* at 268 (Black, J., dissenting). For a discussion of Justice Black’s position on the First Amendment, see RONALD D. ROTUNDA AND JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE, 20.7, 20.32 (3d ed. 1999); Patricia R. Stembridge, *Adjusting Absolutism: First Amendment Protection For The Fringe*, 80 B.U. L. REV. 907, 912 (2000) (arguing that Justice Black was the first and most famous First Amendment absolutist); Mark Oring and S.D. Hampton, *When Rights Collide: Hostile Work Environment vs. First Amendment Free Speech*, 31 U. WEST L.A. L. REV. 135, 157-58 (2000) (stating that Justice Black was the most prominent speech absolutist who was fond of stating no law meant no law).

43. Several commentators and courts have asserted that *Beauharnais* has been implicitly overruled by *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that libelous statements are not immune from First Amendment standards). See, for example, Nadine Strossen, *Hate Speech and Pornography: Do We Have To Choose Between Freedom Of Speech and Equality?*, 46 CASE W. RES. L. REV. 449, 459 n.41 (1996).

would promote and incite hatred toward persons on the basis of their “race, national origin, or religion.”⁴⁴ The City of Skokie, Illinois, argued that the ordinance in Collin was similar to the statute upheld by the Supreme Court in *Beauharnais*.⁴⁵ The appellate court rejected the city’s argument, reasoning that speech which tends to induce breach of the peace traditionally falls outside the First Amendment’s protection.⁴⁶ Thus, according to the appellate court, the Supreme Court’s ruling rested heavily on the “strong tendency of the prohibited utterances to cause violence and disorder,” and Illinois’s history of racial strife.⁴⁷ In addition, the federal appellate court expressed strong doubts about the continuing validity of *Beauharnais* in light of subsequent Supreme Court decisions.⁴⁸

Nine years later, another federal appellate court addressed *Beauharnais*’ continuing validity more directly in *Dworkin v. Hustler Magazine, Inc.*⁴⁹ *Hustler* magazine published a series of sexually explicit cartoons referring to the plaintiff, Andrea Dworkin, a well-known feminist activist, as a lesbian, among other things.⁵⁰ The complaint alleged that Dworkin and other feminist anti-pornography leaders “were afraid to exercise their rights to speak out against pornography because if they did, they risked vile and cruel portrayals

44. 578 F.2d 1197 (7th Cir. 1978). The National Socialist Party, a Nazi political group that wanted to march in front of the city hall in Skokie, Illinois, challenged several ordinances that prohibited their march. *Id.*

45. *Id.* at 1204.

46. *Id.*

47. *Id.*

48. *Id.* at 1205. The court cited *New York Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964) (saying it was not persuaded by prior decisions holding that libel was not protected speech) and *Garrison v. Louisiana*, 379 U.S. 65, 82 (1964). *Id.*

49. 867 F.2d 1188 (9th Cir. 1989).

50. *Id.* at 1190-91. Dworkin’s complaint described the cartoon in the February 1984 issue as “depict[ing] two women engaged in a lesbian act of oral sex with the caption, ‘You remind me so much of Andrea Dworkin, Edna. It’s a dog-eat-dog world.’” The March issue of the magazine contained a 10 page feature with photographs of women engaged in sexual acts including acts of lesbianism or masturbation and staged scenes of sexual violence. In one photograph of a supposedly Jewish male the caption read: “While I’m teaching this little shiksa the joys of Yiddish, the Andrea Dworkin Fan Club begins some really serious suck-n-squat. Ready to give up the holy wafers for matzoh, yet guys.” The December issue included as part of the “Porn from the Past” section a cartoon showing a man performing oral sex on an obese woman while he masturbates. Part of the caption read: “We don’t believe it for a minute, but one of our editors swears that this woman in the throes of ecstasy is the mother of radical feminist Andrea Dworkin.” *Id.*

of themselves such as were levied against Andrea Dworkin and Gloria Steinem.”⁵¹

In *Dworkin*, two of the plaintiffs claimed that *Hustler*'s publication of satirical sexual references to Dworkin and Steinem impaired their associational rights and restrained their political freedom.⁵² The appellate court responded that these allegations amounted to a group libel claim similar to the claim asserted in *Beauharnais*, a case that has been “substantially undercut” by later cases.⁵³ Ultimately, the court decided the issue on another unrelated ground.⁵⁴

More recently, the Court in *R.A.V. v. City of St. Paul Minnesota*,⁵⁵ a hate speech case, indirectly addressed the continuing validity of *Beauharnais*. Members of the Court in *R.A.V.* cited *Beauharnais* several times. First, Justice Scalia, writing for the plurality, cited *Beauharnais* noting that historically, defamation was speech with “such slight social value” that it should not be permitted.⁵⁶ He added, however, that “earlier Courts did not mean their repeated statements that certain categories of expression are ‘not within the area of constitutionally protected speech,’” and again cited *Beauharnais* and several other cases.⁵⁷

51. *Id.* at 1200. Dworkin also argued that “the persistent attacks on [her] and other feminist anti-pornography leaders, . . . intimidated [appellants] and chilled their exercise of their own free speech rights.” *Id.*

52. *Id.* at 1191. “Moree and Fouts claim that publication of the Features: ‘is tantamount to a direct assault upon the rights and interests’ of Moree, Fouts, and the relevant chapters of NOW; ‘has caused actual damages’ to those persons and their associational rights, and causes irreparable harm to those persons; and ‘makes other women afraid to exercise [political freedoms on behalf of women] for fear of an ugly, pornographic representation of them appearing in such a magazine.’” *Id.*

53. *Id.* at 1200. “To the extent that *Beauharnais* can be read as endorsing group libel claims, it has been so weakened by subsequent cases such as *New York Times [v. Sullivan]* that the Seventh Circuit has stated that these cases ‘had so washed away the foundations of *Beauharnais* that it cannot be considered authoritative’ We agree with the Seventh Circuit that the permissibility of group libel claims is highly questionable at best. Accordingly, we share the district court’s skepticism that Moree and Fouts were properly joined in this action.” *Id.*

54. *Id.* The court held that *Hustler Magazine* was not a state actor, and thus the plaintiffs did not state a valid First Amendment claim. *Id.*

55. 505 U.S. 377 (1992) (holding that a statute punishing the display of racial hate symbols constituted content discrimination in violation of the free speech guarantee).

56. *Id.* at 383 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

57. *Id.* In addition to the *Beauharnais* case the Court also cited *Roth v. United States*, 354 U.S. 476, 483 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *Bose Corp. v. Consumers Union of America*, 466 U.S. 485, 504 (1984). *Id.*

Justice White, concurring in the judgment, took issue with Justice Scalia's conclusions. White wrote that the statements in the cases that Scalia cited, including *Beauharnais*, "meant precisely what they said . . . the First Amendment was not intended to protect every utterance."⁵⁸ White added, however, "[w]hile we once declared that libelous utterances [are] not . . . within the area of constitutionality protected speech [citing *Beauharnais*], our rulings in [subsequent cases] have substantially qualified this broad claim."⁵⁹ Because the meaning of these words is unclear, *R.A.V.* does not resolve questions about *Beauharnais*' status.

The Court in *R.A.V.* struck down the state statute because it singled out a certain type of speech for prosecution and thus was not content neutral.⁶⁰ Subsequent decisions, however, have limited the scope of *R.A.V.*⁶¹ Therefore, it is still possible, although highly unlikely, that a group-based claim might withstand the Court's scrutiny. Such a claim would have to be based on a properly drawn statute that does not single out a disfavored subject matter.⁶²

58. *Id.* at 400-01. Joining in Justice White's concurrence were Justices O'Connor, Blackmun, and Stevens.

59. *Id.* at 427-28 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)).

60. *Id.* at 386-87.

61. See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (*R.A.V.* "involved a First Amendment challenge to a municipal ordinance prohibiting the use of 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" *Id.* *National Endowment For The Arts v. Finley*, 524 U.S. 569 (1998). "In *R.A.V.* . . . we invalidated on its face a municipal ordinance that defined as a criminal offense the placement of a symbol on public or private property 'which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender' . . . That provision set forth a clear penalty, proscribed views on particular 'disfavored subjects,' and suppressed 'distinctive ideas, conveyed by a distinctive message.' In contrast, the 'decency and respect' criteria do not silence speakers by expressly 'threatening censorship of ideas.'" *Id.* at 582-83. (Citations omitted.)

62. See Joseph W. Lash, *Wisconsin v. Mitchell & R.A.V. v. St. Paul: Developing a Constitutional Test For Ethnic Intimidation Laws*, 40 WAYNE L. REV. 1653, 1669 (1994) (arguing that ethnic intimidation statutes that are content neutral and punish conduct would survive First Amendment scrutiny); Sarah G. Vincent, Book Note, *The Hate Within Ourselves: Criminal Law's Attempt to Overcome Bias*, 16 HARV. BLACK LETTER J. 229, 242 (2000) (reviewing FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* (1999)) (examining Lawrence's argument that a statute that first reviews the intent of the defendant to commit the crime and then examines the defendant's motivation would pass First Amendment scrutiny because the defendant who solely uses hate speech will

Two commentators point out that the statute upheld in *Beauharnais* was quite different from the statute struck down in *R.A.V.* Although both statutes prohibit certain forms of speech, “the hate speech at issue in *R.A.V.* is opinion and thus, its truth is of no concern to the courts. In contrast, the speech at issue in *Beauharnais* which is declared as fact, is blatantly untrue.”⁶³ These commentators speculate that even after *R.A.V.*, a statute that prohibits “the publication of untruthful propaganda against social, racial or religious groups [and that] gives rise to public ridicule or discrimination” would satisfy *R.A.V.*’s content neutral requirement.⁶⁴

Even if *Beauharnais* has some continuing validity, there are practical problems with using it to support group-based constitutional rights for black Americans. A close reading of the case discloses a decision firmly based on notions of individual rights. The Court links social nature, economic ability, and individual reputation to the individual’s affiliation with any targeted group. In addition, most courts refuse to recognize an individual civil action where the group libeled is large, unless the plaintiff can establish that the libel referred directly to her.⁶⁵ Thus, black Americans may be too large and too diverse a group to fit within the traditional tort group libel framework.

Further, since group libel laws were intended to curb a certain type of expression—hate speech⁶⁶—they have been criticized as

be protected because he lacked the intent to commit the parallel crime).

63. Astrid A.M. Mattijssen and Charlene L. Smith, *Dutch Treats: The Lessons the U.S. Can Learn From How The Netherlands Protects Lesbians and Gays*, 4 AM. U. J. GENDER & L. 303, 320 (1996) (discussing hate speech directed at gays and lesbians).

64. *Id.* The commentators explain as the reason for *Beauharnais*’ demise, that the Illinois statute “was designed to thwart actions capable of inducing violence.” *Id.*

65. See, e.g., *Barger v. Playboy Enterprises, Inc.*, 564 F. Supp. 1151 (N.D.Cal. 1983), *aff’d*, 732 F. 2d 163 (9th Cir.), *cert. denied*, 469 U.S. 853 (1984) (denying recovery to members of a group larger than 25); *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952) (dismissing complaint by 30 of the 382 saleswomen at the department store Neiman-Marcus. Defendants asserted in a book that the stores saleswomen were call girls.); *Noral v. Hearst Publications, Inc.*, 104 P.2d 860 (Cal. App. 1940) (denying claim of one of 162 labor union officers because the plaintiff failed to establish that the libel referred to him). For a discussion of group libel see, Jeffrey S. Bromme, *Group Defamation: Five Guiding Factors*, 64 TEXAS L. REV. 591 (1985).

66. Note, *Group Libel Laws: Abortive Efforts To Combat Hate Propaganda*, 61 YALE L. J. 252, 253 (1952). Without question the 1937 New Jersey statute was enacted in response to the growth of the German-American Bund.” *Id.* at 256. It was subsequently declared unconstitutionally vague in *State v. Klapprott*, 22 A.2d 877 (N.J. Sup. Ct. 1941). The Massachusetts statute, sponsored by the American Jewish Congress, specifically targeted racial and religious hate speech. *Id.* at 255 n.15 (citing Note, 28 MASS. L. Q. 104 (1943)).

constitutionally suspect. Some commentators argue that group libel laws constitute prior restraints on free speech because the laws are inherently vague about what constitutes a prohibited expression.⁶⁷ In addition, there are other non-constitutional problems with these laws.

Group libel laws were enacted to prevent individuals from escaping liability for defamation by targeting groups instead of individuals.⁶⁸ These laws, however, are easily evaded if the statements are proved at least partially true.⁶⁹ Therefore, group libel laws may be an ineffective means of curbing racial hate speech. Even where the speech tends to provoke imminent violence, some prosecutors are reluctant to charge, and some jurors reluctant to convict, hate speech offenders.⁷⁰

Given the constitutional and practical problems with group libel laws, the demise of *Beauharnais* may not be a great loss. Yet, the difficulties inherent in group defamation laws do not necessarily apply to all group-based rights designed to address racial or religious discrimination. As mentioned at the outset, American courts routinely recognize group rights, explicitly or implicitly. Nevertheless, at least one constitutional scholar, Michael Klarman, doubts whether the Court has ever consciously acted to protect minority group rights.

Professor Klarman writes, somewhat cynically, that the Court only “identifies and protects minority rights when a majority or near majority of the community has come to deem those rights worthy of protection.”⁷¹ He argues that the Court only protected the free speech

67. See *id.* at 256 (citing *State v. Klapprott*, 22 A.2d 877 (N.J. Sup. Ct. 1941); *Note, Constitutional Law: Curtailment of Speech Inciting to Race Hatred and Protection of Minorities*, 42 COL. L. REV. 857 (1942)).

68. *Id.* at 253. Between 1935 and 1949 Congress attempted unsuccessfully to enact group libel laws. *Id.* at 255.

69. *Id.* at 262. Although the defendant in *Beauharnais* argued on appeal that he was not permitted to introduce evidence that his statements were true, justified as “fair comment” or privileged, the Supreme Court dismissed these allegations saying that the defendant never proffered such evidence at trial. *Id.* at 264.

70. *Note, Group Libel Laws: Abortive Efforts To Combat Hate Propaganda*, 61 YALE L. J. at 253. Other states besides Illinois permitted criminal prosecution of group libel, but these laws were seldom enforced, and when used met with limited success. *Id.* at 255-56. The *Beauharnais* case was the first conviction under one of these statutes to be upheld by an appellate court. *Id.* at 256.

71. Michael J. Klarman, *Rethinking The Civil Rights and Civil Liberties Revolution*, 82 VA. L. REV. 1, 16 (1996) (arguing that “constitutional adjudication frequently involves the justices’ seizing upon a dominant national consensus and imposing it on resisting local

rights of racial hate groups like the Ku Klux Klan once public resistance to the desegregation mandate of *Brown v. Board of Education*⁷² waned.⁷³ Thus, despite Justice Stone's footnote in *Carolene Products* suggesting that the Court protects the rights of minority groups from the majority's tyranny, this role might have been temporary.⁷⁴ Nevertheless, failing to protect racial minorities usually benefits racial majorities.

II. GROUP RIGHTS IN THE UNITED STATES

Most often American courts have recognized race-based community or group rights in negative rather than positive ways. During the colonial period, for example, Virginia taxed the labor of free black women, but did not tax the labor of free white women.⁷⁵ By burdening the labor of free blacks, whites' property rights were enhanced. Thus, the Virginia law gave free white families a competitive edge over free black families.

During the antebellum era many states prohibited blacks from testifying against whites in courts.⁷⁶ In the latter part of the 19th century, western states imposed similar restrictions on ethnic Chinese.⁷⁷ Laws preventing non-whites from testifying against whites in criminal and civil matters further enhanced the legal rights of whites

outliers"); See also, Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (arguing that the interests of blacks and whites converged and therefore the decision in *Brown* was inevitable).

72. 347 U.S. 483 (1953).

73. Klarman, *supra* note 71, at 36.

74. *Regents of University of California v. Bakke*, 438 U.S. 265, 290-91 (1978).

75. 2 William W. Hening, *The Statutes at Large: Being a Collection of the Laws of Virginia, from the First Session of the Legislature in the Year 1619*, at 267 (1823) (Act of 1668, ch 7). The act of 1642 declared that Negro women were taxable. A 1668 act noted that doubts had arisen as to whether free Negro women were taxable and stated that they were. The Act also declared that "[N]egro women, though permitted to enjoy their freedom yet ought not in all respects to be admitted to a full fruition of the exemptions and impunities of the English." *Id.* In other words, the law imposed economic burdens on free black women not incurred by free white women.

76. *People v. Hall*, 4 Cal. 399 (1854) (holding that a statute prohibiting negroes, mulattoes, and Indians from testifying against whites in criminal proceedings also applied to testimony by ethnic Chinese).

77. THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860* 229 (1996) (stating that the rule prohibiting slaves from testifying against whites in criminal trials remained in force until the end of slavery).

as a group. Throughout the era of de jure race-based discrimination, the Court permitted state and federal governments to enact laws encouraging discrimination based on membership in a legally defined racial group.⁷⁸

The most famous case preserving invidious race-based discrimination, *Plessy v. Ferguson*,⁷⁹ benefited a racialized group—whites. In *Plessy*, Homer Plessy, classified by the Court as black,⁸⁰ was prosecuted for violating the right of Louisiana whites as a group to ride in train cars without black passengers.⁸¹ In contrast, causes of action for violations of modern anti-discrimination laws are framed as individual, not group, rights, even when there is a systematic pattern of discrimination based on group membership.

The Court refuses to acknowledge affirmative group rights for black Americans, yet remains blind to how its actions enhance the rights and privileges of whites as a group. The resulting white rights are transparent and the Court's actions consciously or unconsciously⁸²

78. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that a statute requiring railroads carrying passengers to provide separate but equal accommodations for white or colored races was not unconstitutional); *Wall v. Oyster*, 36 App. D.C. 50 (1910) (holding that Congress, which exercises all the functions of a state legislature in the District of Columbia, has power to provide for the separation of white and colored children in the public schools); *Gong Lum v. Rice*, 139 Miss. 760, *aff'd*, 275 U.S. 78 (1927) (holding that a Chinese American citizen was not denied equal protection of law by requiring attendance at a colored school furnishing equal educational facilities); *Roberts v. City of Boston*, 5 Cush. (Mass) 198 (1849) (holding that a city provision that required African American children to attend a separate school opened exclusively for their use was constitutional); *Pace v. State of Alabama*, 106 U.S. 583 (1883) (holding that a statute that prohibited adultery and fornication between the races is constitutional even though the penalty for that offense is more severe than if the offense was committed by members of the same race); *but c.f.*, *Loving v. Commonwealth*, 388 U.S. 1 (1967) (holding that the miscegenation statutes adopted by Virginia to prevent marriages solely on the basis of race violated the equal protection and due process clauses).

79. *Plessy*, 163 U.S. at 550-51.

80. Although the discussion of race and race relations is a fundamental part of the case, Homer Plessy's race was never listed in the state criminal proceedings. He simply was charged with "going into a coach used by the race to which he did not belong." Only on appeal did Mr. Plessy assert that he was an octoroon in whom "the mixture of colored blood was not discernible." Based on this statement, the Court concluded that Homer Plessy was not white, but a member of the "colored race." CHARLES A. LOFGREN, *THE 'PLESSY' CASE: A LEGAL HISTORICAL INTERPRETATION* 54-55 (1987).

81. *Plessy*, 163 U.S. at 538.

82. Charles Lawrence, *The Id, The Ego And Equal Protection: Reckoning With Unconscious Racism*, 39 STANFORD L. REV. 317, 322, 387 (1987) (arguing that equal protection jurisprudence only addresses intention racism, not the more common unconscious

preserve white racial preferences in almost every walk of life.⁸³ To counter the long history of laws designed to protect whites' property interest in their whiteness,⁸⁴ limited recognition of group rights for racial, religious, and other subordinated groups with a history of legalized discrimination seems warranted. Yet, contemporary constitutional jurisprudence makes these arguments difficult.

Following the Supreme Court's decision in *Brown v. Board of Education*,⁸⁵ Columbia law Professor Herbert Wechsler wrote a controversial article questioning *Brown's* rationale.⁸⁶ In the article Professor Wechsler argued that a stronger basis for the decision is found in the constitutional freedom of association guarantee. Using this theory he argued that racially segregated schools denied African American students the right to associate with whites in a public school setting, but acknowledged that each group also has the right not to associate with other groups.⁸⁷ His argument leaves unanswered how the rights of one group may, in some circumstances, be greater than another group.⁸⁸ Instead, his argument illustrates the tension between

racism).

83. Barbara Flagg calls this phenomenon "white racial transparency." Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

84. See Cheryl I. Harris, *Whiteness as Property*, 100 HARV. L. REV. 1709 (1993) (arguing that whites historically and presently have a property interest in their white skin because it confers certain economic privileges denied to non-whites).

85. 347 U.S. 483 (1954) (holding de jure racially segregated public schools unconstitutional on equal protection grounds).

86. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). In the article Professor Wechsler argues that the Court did not have strong evidence to support the petitioner's claim that racially segregated schools harmed black children; and thus the Court based its decision on the view that "racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved." Wechsler continues that this argument is "untenable" because it required courts to inquire into legislative motive, something courts usually try to avoid. *Id.* at 33.

87. *Id.* at 34.

88. See Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 29 (2000) (arguing that Wechsler saw no way to choose between free association claims of blacks and whites; therefore, any principle that would strike down racial segregation of public schools would also invalidate single-sex bathrooms in state buildings); Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 18 (2000) (pointing to a case where the court allowed a private group sponsoring a parade to exclude a gay group from participating by framing the issue as whether a private group would be required to include marchers who conveyed a message they did not want to convey, thus converting the issue into a First Amendment issue, which trounced the equality claims of the gay group); Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 521

liberty and equality rights under the Constitution, left unresolved by the Court in *Brown*.

Professor Wechsler's argument also reminds us that *Brown* operates as a constraint on community or group rights. The *Brown* rationale calls into question any law that appears to prefer one racial group over another.⁸⁹ Thus, Justice Scalia, concurring in *Adarand*, where the Court invalidated a minority set-aside provision, could write: "In the eyes of government, we are just one race here. It is American."⁹⁰

Recent anti-discrimination laws that seem to be based on membership in a protected group are illusory. For example, Title II of the Civil Rights Act prohibits race discrimination in public accommodations that affect interstate commerce.⁹¹ Title VII of the same act prohibits discrimination in employment based on sex, race, color, religion, or national origin.⁹² Violations of both laws are contingent on discrimination based on membership within one of the protected groups. Yet these anti-discrimination protections, and most recognized group rights stem from individual, not actual, group rights.

Free exercise of religion, for example, is framed in the Constitution as an individual right.⁹³ Nevertheless, court decisions often recast this constitutional guarantee as a group right because of

(1997) (stating that Wechsler does not take into account that in some instances black Americans' rights will have to be considered above others); Geoffrey C. Hazard, Jr., *Rising Above Principle*, 135 U. PA. L. REV. 153 (1986) (arguing that Wechsler's argument that both blacks and whites had the right of free association did not take into account that if whites choose to exercise their rights to the exclusion of blacks, free association could not be made available to both groups); Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 530-31 (1980) (arguing that black children need greater protection from discriminatory practices of school systems, such as higher suspension and expulsion rates, than integration systems can offer).

89. See *Adarand Constructors v. Pena*, 515 U.S. 200 (1995); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991); Andreas Auer, *Public School Desegregation and the Color-Blind Constitution*, 27 SW. L.J. 454, 458-59 (1973) (arguing post-*Brown* per curiam decisions support color blind interpretation of *Brown*).

90. *Adarand Constructors* at 239 (Scalia, J., concurring).

91. The Civil Rights Act of 1964, 42 U.S.C. § 2000a(b)(3) (1994).

92. The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994).

93. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

shared religious beliefs among subsets of the American population.⁹⁴ So perhaps most so-called group rights under the Constitution are illusory.

Therefore, a strategy of protecting group rights through United States constitutional jurisprudence is inherently limited. Thus, it appears impossible for any constitutional regime to guarantee at once a minority group's survival and the most fundamental rights of an individual dissident within that group.⁹⁵ This has led some scholars to look beyond the U.S. Constitution to international human rights law for a means of protecting group rights. In contrast to American laws' focus on individual rights, international human rights laws often are framed in terms of group rights.

III. GROUP RIGHTS UNDER HUMAN RIGHTS LAWS

American law tends to value the right to free expression over the right to equal treatment and the protection of individuals rather than groups. Other countries seem better able to strike a balance between these conflicting interests. For example, in Holland when a gay nurse sued a religious leader for making hateful statements directed against gays and lesbians, the Dutch Supreme Court ruled that a person's right to equal treatment outweighed a defendant's right to freedom of speech.⁹⁶ Holland is better positioned to strike this balance between equal treatment and free speech because communicative

94. For a discussion of recasting individual rights as group rights, see, Michel Rosenfeld, *Can Human Rights Bridge The Gap Between Universalism And Relativism? A Pluralist Assessment Based On The Rights Of Minorities*, 30 COLUM. HUM. RTS. L. REV. 249, 256-57 (1999).

95. *Id.* at 254. Professor Cass Sunstein argues that liberty (free speech) and equality can co-exist and be quite compatible depending on how the terms are defined. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994).

96. Mattijssen & Smith, *supra* note 63 at 307. A leader of a small militant religious group distributed an article in a pamphlet throughout the nation. The article contained hateful, derogatory statements directed at homosexuals. For example: "Now that homosexuality has been legalized, the new death appears. It is the result of sin: AIDS! . . . A consequence of homosexuality is AIDS which, without possibility of appeal, brings about death Being a lesbian is rewarded. AIDS passes by the door of lesbian women. At the moment, anyway. Ten years ago, the homosexuals were rewarded like this. They didn't have AIDS God lets no-one (sic) ridicule him. Those who practice homosexuality incur a blood-guilt comparable to a murderer. He deserves the death penalty." *Id.* at 303.

speech is under the control of the government.⁹⁷ By law, Holland, unlike the United States, can prohibit content-specific speech.⁹⁸ As a result, plaintiffs in Holland may recover for the dignitary harms caused by hate speech.⁹⁹ In contrast, Americans, inherently suspicious of government, are loath to grant government much power to affect the public expression of ideas.¹⁰⁰

Still other countries, like Canada, are more specific in their protection of group rights, even at the expense of individual rights. Section 15 (2)(1) of the Canadian Charter of Rights and Freedoms protects from so-called reverse discrimination actions “any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”¹⁰¹ The Canadian Constitution specifically protects language minorities,¹⁰² religious minorities¹⁰³ and First Nation People (indigenous communities).¹⁰⁴

As with Holland, however, Canada’s relationship with its citizens is fundamentally different than the relationship of the U.S. government to its citizens. “The popular understanding of the social contract between the [U.S.] government and its citizens tends to reinforce the idea that freedom is best promoted by a non-

97. *Id.* at 306.

98. *Id.* at 318-19. Under Dutch law, anyone who in public, orally or through writing or illustration, insults a group of persons on account of their race, religion or belief, or hetero- or homosexual orientation, is subject to one year in prison and a fine. A law of this kind in the United States would presumably contradict the First Amendment. In the United States, statutes may limit the use of fighting words, but must also be content-neutral. *Id.*

99. *Id.* at 331. For an article raising the same argument in the context of American tort law see, Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

100. See Mattijssen & Smith, *supra* note 63, at 308.

101. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(2)(1). The first subsection of § 15 reads: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” *Id.* at § 15(1).

102. The Canadian Constitution officially recognizes two languages (English and French), and cultures (English and French). *Id.* at §§ 16-23.

103. *Id.* at § 15(2)(1).

104. CAN. CONST. (Constitution Act of 1982), pt. II (Rights of the Aboriginal Peoples of Canadian), § 35. See, e.g., Canadian Charter of Rights and Freedoms §§ 1, 23, 25, 27, 28.

interventionist state.”¹⁰⁵ Thus, absent a constitutional amendment, it is unlikely that state or federal government in the United States could enact legislation similar to Holland or Canada without running afoul of the U.S. Constitution.

Even those universal declarations of human rights that might afford some protection for group rights are not effective mechanisms to address racial subordination in the United States. First, international human rights laws typically confer group protection to communities that are subordinated due to conquest or colonialization.¹⁰⁶ But even if black Americans could qualify as a protected group, there are more fundamental obstacles.

The Universal Declaration of Human Rights, although permitting governments to impose restrictions on hate speech in the name of equality,¹⁰⁷ does not displace U.S. constitutional law. The

105. Colleen Sheppard, *Equality Rights And Institutional Change: Insights From Canada and The United States*, 15 ARIZ. J. INT'L & COMP. L. 143, 159 (1998) (citing Owen M. Fiss, *Why the State*, 100 Harv. L. Rev. 781 (1987); CARL LOTUS BECKER, FREEDOM AND RESPONSIBILITY IN THE AMERICAN WAY OF LIFE 7-8 (1945).

106. S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Towards a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309 (1994). Over the last two decades, the international community has established indigenous peoples or populations as special subjects of international concern within its burgeoning human rights program. *Id.* at 336. See S. James Anaya, *Indigenous Rights Norms in Contemporary International Law* 8 ARIZ. J. INT'L & COMP. L. 1 (1991) (discussing the development of indigenous group rights under international law).

107. The Declaration does not contain a specific anti-hate speech provision. The equal protection provision, Article 19, guarantees freedom of expression. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration]. Article 7 of the Universal Declaration of Human Rights contains a limitation on speech that incites any discrimination. Article 29 restricts freedom of expression where needed “to secure recognition and respect for the rights and freedoms of others and to protect the public.” The International Covenant on Civil and Political Rights contains similar provisions. Article 19 of the International Covenant on Civil and Political Rights, U.N.G.A. Res. 2200A (XXI), Dec. 16, 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976 [hereinafter Civil and Political Rights Covenant]. Likewise, Article 19(3) limits free expression in a manner similar to the Universal Declaration. Article 20 provides that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” The American Convention on Human Rights contains a similar provision. Article 13(5) of the American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 1, OEA/Ser. L./V/II.23 Doc. Rev. 2, entered into force July 18, 1978 [hereinafter American Convention] reads:

Any . . . advocacy of national, racial, or religious hatred that constitutes incitement to lawless violence or to any other similar illegal action against any person or group of persons on any ground including those of race,

United States is a signatory to the Universal Declaration of Human Rights, but signed the declaration reserving certain rights.¹⁰⁸ The U.S. agreed to the declaration to the extent that its provisions are not inconsistent with the U.S. Constitution.¹⁰⁹ As a result, human rights

color, religion, language, or national origin shall be considered as offenses punishable by law.

An even more detailed restriction on hate speech appears in Convention on the Elimination of All Forms of Racial Discrimination. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969 [hereinafter CERD Convention] (requiring governments to outlaw “all dissemination of ideas based on racial superiority or hatred” as well as “organizations . . . which promote and incite racial discrimination”). In addition, Article 10 of the European Convention contains a limitation on freedom of expression that has been interpreted to prohibit hate speech. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, entered into force Sept. 3, 1953 [hereinafter European Convention].

108. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948); The Universal Declaration was drafted to be an aspirational non-binding common standard of achievement for all peoples and all nations. Frank E.L. Deale, *The Unhappy History of Economic Rights in the United States and Prospects for Their Creation and Renewal*, 43 HOW. L.J. 281, 313 (2000) (citing Hurst Hannum, *Human Rights, in THE UNITED NATIONS AND INTERNATIONAL LAW* 131, 137 (Christopher C. Joyner ed., 1997)). Subsequently, several binding covenants have been passed to implement the principles of the Universal Declaration. However, the United States has imposed reservations on its ratification of international human rights conventions and as a result has adopted very few. *Id.* at 312-20.

109. Amendments by Senator Bricker in the 1950s sought to make it nearly impossible for the United States to adopt human rights treaties. *Id.* at 318. The Bricker Amendment imposed reservations on the ratification of any human rights treaty that continue to form the basis for opposition to ratification:

Sec. 1: A provision of a treaty that denies or abridges any right enumerated in this Constitution shall not be of any force or effect.

Sec. 2: No treaty shall authorize or permit any foreign power or any international organization to supervise, control, or adjudicate rights of citizens of the United States within the United States enumerated in this Constitution or any other matter essentially within the domestic jurisdiction of the United States.

Sec. 3: A treaty shall become effective as internal law in the United States only through the enactment of appropriate legislation by the Congress.

Sec. 4: All Executive and other agreements between the President and any international organization, foreign power, or official thereof shall be made only in the manner and to the extent prescribed by law. Such agreements shall be subject to the limitations imposed on treaties, or the making of treaties, by this article.

law cannot be used to undermine existing U.S. constitutional law which favors free expression over equal treatment. Thus, international human rights law may be helpful only as guides to the difficult problem of determining group membership.

IV. PROBLEMS DETERMINING GROUP MEMBERSHIP

A. Generally

The foregoing discussion about protecting the individual's freedom of expression while ensuring equality of subordinated communities illustrates the difficulty in reconciling these two often competing interests.¹¹⁰ In addition to this fundamental conflict, there always are definitional problems in determining which communities constitute protected groups. Further, legally defined groups tend to lack the fluidity of real life community affiliations. Communities are created in various ways that law often overlooks. Robin Fields asserts,

In a given society, individuals are often members of a large number of distinct groups. These groups may, and often do, constitute a "minority" in relation to other groups within the larger society. Similarly, a "majority" group is often comprised of a number of individuals who in and of themselves are members of different "minority" groups with particular interests. Despite the apparent fluidity of this broad conception of "group," the classification has been used in many nations as a fixed method of allocating citizenship rights. As such, group membership becomes problematic when individuals, on the basis of something seemingly as

Id. at 319 n.240 (citing Natalie Hevener Kaufman, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION 66, 96-103, 201-3 (1990)).

110. For a discussion of this point see Stephanie Fariior, *Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INTL L. 1, 13 (1996) (arguing that there is a tension between ensuring equality and eliminating discrimination and preventing potential governmental abuse of its power to restrict free expression).

permanent as race, are excluded or denied certain citizenship rights.¹¹¹

One critic of Canada's categorization of discrimination expressed similar concerns. He argues that people who "do not fall neatly into one of the established categories . . . may be excluded from the Charter's promise of 'equal protection and equal benefit of the law.'"¹¹² Thus, it is difficult to develop an accurate, yet fluid definition of community when trying to provide legal protection for racially subordinated groups.

Two groups protected under Canada's Charter, religious minorities and First Nation People, seem similar to the problematic group classifications found in American law. Canada's protection of religious minority groups may simply be a recasting of individual rights of religious freedom into a group-based right. The treatment and status of First Nation groups is analogous to Native American communities in the United States.¹¹³ So, arguably, the same justifications and limitations apply.

Only the protection afforded Canadian language minorities seems remotely similar to racialized communities in the United States. Language minorities, like French-speaking Canadians living in

111. Robin M. Fields, *In Search Of Democracy: Reconciling Majority Rule, Minority Rights, and Group Rights In South Africa and the United States*, 16 B.C. THIRD WORLD L.J. 65, 73 (1996) (citing Cass R. Sunstein, *Voting Rights*, NEW REPUBLIC, Apr. 1994, at 36-7; Bruce E. Cain, *Voting Rights and Democratic Theory: Toward a Color-Blind Society*, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 270-71 (Bernard Grofman & Chandler Davidson eds., 1992); Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 650 (1992); Bronwen Manby, *South Africa: Minority Conflict and the Legacy of Minority Rule*, 19 FLETCHER F. WORLD AFF., Winter/Spring 1995, at 51; DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA?* 23-4, 47 (1991); HERBERT ADAM AND KOGILA MOODLEY, *THE OPENING OF THE APARTHEID MIND: OPTIONS FOR THE NEW SOUTH AFRICA* 2-3 (1993); Charles Lawrence, *Forward Ace, Multiculturalism and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 835 (1995)).

112. Douglas Kropp, 'Categorical Failure': *Canada's Equality Jurisprudence - Changing Notions Of Identity And The Legal Subject*, 23 QUEEN'S L. J. 201, 201 (1997). Professor Kropp writes: "One consequence of categorizing is that characteristics associated with the various categories come to be 'regarded as wholly constitutive of that group's social identity,' thus overlooking and obscuring differences within categories." *Id.* at 208-09. For a similar argument about the problem with a rigid race-based category, see Banks, *supra* note 2.

113. See Matthew S.R. Palmer, *International Law/Intercultural Relations*, 1 CHI. J. INT'L L. 159, 161-63 (2000).

English-speaking Canadian provinces, warrant limited protection based on an easily determined characteristic. French-speaking Canadians see themselves as a culturally different minority. Language is just one indicia of their group membership. Geography also plays a part in defining this community. Quebec Province is linguistically and culturally French. As a result, there has been continuous hostility by English-speaking Canadians toward French-speaking Canadians.

The difficulty inherent in defining community may explain why the international human rights community does not have a consistent definition or standard for determining what constitutes a subordinated group under international law. Several factors seem important: (1) indicia of membership, (2) degree of community organization, and (3) degree of group acceptance by the dominant community. In international human rights law an overriding characteristic of minority communities is their existence in a "disadvantageous situation."¹¹⁴ A disadvantageous situation is described "as those circumstances where persons belonging to a minority group are required to exert greater efforts than those members of the majority to participate in everyday life."¹¹⁵

114. Andras B. Baka, *The European Convention on Human Rights and the Protection of Minorities Under International Law*, 8 CONN. J. INT'L L. 227, 232 (1993). Robin Fields writes:

In addition, other factors that have been cited which could be considered defining characteristics of a minority group include such objective and subjective criterion as: existence of a distinct group, numerical proportion, non-dominance, being a nationality of the state, existence within the state, a sense of community, collective goals and wills, and self-identification. [Citing Malcolm N. Shaw, *The Definition of Minorities in International Law*, in PROTECTION OF MINORITIES 23-30 (Yoram Dinstein & Mala Tobory eds., 1992).] An expressly held belief by the majority that a particular group is inferior to the majority group, which subsequently perpetuates low self-esteem and self-hatred by the subordinated group, is a critical factor to consider when determining the existence of a minority group [citing JAY A. SIGLER, MINORITY RIGHTS: A COMPARATIVE ANALYSIS 5 (1983)]. Although Blacks in South Africa fulfilled much of the criterion for minority group protection, the fact that they constituted a majority within the population required the United Nations regime to create a special category of protection: self-determination for colonized peoples [citing Bronwen Manby, *South Africa: Minority Conflict and the Legacy of Minority Rule*, 19 FLETCHER F. WORLD AFF., Winter/Spring 1995, at 31].

Robin M. Fields, *supra* note 111, at 75 n.43.

115. *Id.* at 75 (citing Baka, *supra* note 114, at 233).

On the surface, the racial profiling of black Americans as a group seems to fit within this definition. Blacks are identified and targeted based on skin tone and phenotypical characteristics. There are established political and social organizations that promote black interests and concerns. The long history of past race-based discrimination and the existence of continuing race-based discrimination by some whites directed at all blacks suggests that blacks still are not fully accepted by the dominant community. But, as the foregoing discussion indicates, minority rights can be constructed as individual rights,¹¹⁶ collective rights, or as some have argued, societal rights.¹¹⁷ Given the ongoing concern in the United States about fully protecting individual rights while simultaneously protecting minority group rights,¹¹⁸ it is essential to closely examine claims of *community* race-based discrimination when conferring group rights.

B. *The Case of Black Americans*

Kesaya Noda, although writing about growing up as a Japanese American in the U.S., aptly describes the dilemma facing black Americans. She writes: "How is one to know and define oneself? From the inside—within a context that is self defined, from a grounding in community and a connection with culture and history that are comfortably accepted? Or from the outside—in terms of messages received from the media and people who often are ignorant?"¹¹⁹

Most black Americans are targeted for race-based discrimination because of highly visible and irrelevant group-based characteristics. Thus, unlike voluntary associations (i.e., corporations, religious groups, and trade unions) black Americans are assigned

116. See discussion of group rights in the United States, *supra* notes 66, 68.

117. Garet, *supra* note 1, at 1001-02.

118. Michael Rosenfeld raises this point in the context of human rights. Michael Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities*, 30 COL. HUM. RTS. REV. 249 (1999) (arguing that international human rights should treat minority group rights from a pluralist perspective).

119. Kesaya E. Noda, *Growing Up Asian in America*, in MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN 243-44 (Asian Women United of Calif., eds. (1989)).

group membership by external sources. These external sources usually are both legal (anti-miscegenation and racial classification laws) and social. In this sense the *black community*, like other subordinated communities, is an involuntary community. Yet many black Americans will argue persuasively that they are voluntary community members. Thus, it may be impossible to determine whether community identification for black Americans is voluntary or externally imposed because there are aspects of both origins in the creation of the community.

The closeness of the community is another factor to consider when conferring group rights. Some communities are loosely knit and very heterogeneous. Often ethnic communities composed of voluntary immigrants fit this description. Its members come from the same country and may share a common language and cultural tradition, depending on the homogeneity of their native country. At the other end of the spectrum are tightly knit homogeneous communities. Some religious groups, notably the Amish community, fit this description.

The black American community fits the former model. It is far more heterogeneous than many people may want to admit. The African ancestors of most black Americans were brought to this country involuntarily, but in many other respects the community today looks much like other ethnic immigrant communities.¹²⁰ A highly heterogeneous community of people descended from Africans was created when the enslaved immigrants were raced as "Negro" during the seventeenth century.¹²¹ As a consequence, a uniquely "African"

120. I am not prepared at this point, however, to argue, as some have, that black Americans should be treated under the law as an ethnic group. See Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African Americans Again*, 81 CAL. L. REV. 1401, 1415 (1993) (discussing the theory that African Americans represent a new ethnic group indigenous to North America similar to the Native Americans but dissimilar because they were forcibly brought here and created here rather than being found and separated from their dominion over the land).

121. Biological anthropologist Fatimah Jackson writes: "African Americans represent a recent yet highly heterogeneous, regionally diverse macro-ethnic group. Most anthropological genetic studies to date have tended to emphasize the admixture aspects of African American biodiversity, focusing on the presence of European marker genes in African American groups. A careful review, however, of the magnitude of heterogeneity among various contemporary indigenous groups of west, central, and southwest Africa suggests that the bulk of African American heterogeneity is rooted in indigenous African variability." Fatimah Jackson, *Concerns and Priorities in Genetic Studies: Insights from Recent African American Biohistory*, 27 SETON HALL L. REV. 951, 958 (1997).

American culture evolved based on the common experiences of slavery and racial subordination in America. Despite the common experience of slavery, which ended at different times in different regions of the country, blacks in the United States are not culturally homogeneous. The experience of being black in the United States creates a tenuous community, some might argue that it is a *reactive community* created primarily by external factors.

Assuming a community based on racial identification alone may be overly simplistic. The *black community* that exists by virtue of the external factor of white racism differs from other communities of black members whose community of interests does not revolve around the experience of racism. Determining the *black community* for legal purposes therefore is problematic. There also are definitional problems. Anyone with known African ancestry is raced as black in the United States.¹²² Yet, not all of people raced as black considered themselves black or identify with the black community. Racial identity, for example, is changeable, even for people raced as black in the United States.¹²³

Ethnicity identification often separates black Americans from each other. The 2000 Democratic Party primary race for New York's 11th congressional district between the incumbent, Major Owens, an "African" American, and Una Clarke, a Caribbean American City Council member, illustrates this point.¹²⁴ Over the past eighteen years, West Indian blacks moved into the district and now account for twenty-five to forty percent of the population.¹²⁵ Some commentators saw the challenge by Una Clarke as more a matter of ethnicity than ideology.¹²⁶ Explaining the ethnic tensions, sociology professor Philip

122. See Banks, *supra* note 2, at 1710-11.

123. See, e.g., G. Reginald Daniel, *Passers and Pluralists: Subverting the Racial Divide*, in RACIALLY MIXED PEOPLE IN AMERICA 91 (Marla Root ed., 1992) (discussing the phenomenon of "passing"; as racially mixed individuals "make a clandestine break with the African American community, temporarily or permanently, in order to enjoy the privileges of the dominant White community"); Christopher A. Ford, *Administering Identity: The Determination of 'Race' in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994) (discussing how government entities are charged with determining the race of a person in order to carry out race-conscious laws).

124. Eleanor Brown, *Brooklyn Dispatch: Black vs. Black*, THE NEW REPUBLIC, Sept.25, 2000, at 18.

125. *Id.*

126. *Id.* During the primary campaign Councilwoman Clarke accused Representative

Kasinitz, author of *Caribbean New York* said: "African-Americans have not translated their gains in the public sector in the way that the Jews or the Italians did, . . . So, when they face the same issues of ethnic succession, in this case by Caribbeans, it seems that there is more to lose. And that contributes to the tension."¹²⁷ What made this ethnically charged race different from others was that "both ethnic groups [were] black."¹²⁸

In addition, sociologist Orlando Patterson predicts that the black community in the United States will become even more diffused in the twenty-first century. He writes that the immigration of Afro-Caribbeans into the United States over the past fifty years, coupled with the increase in out-group marriage by blacks, will create new racial groupings and coalitions.¹²⁹ It is unclear whether members of these new racial groupings and coalitions will see themselves or be seen by the external dominant community as members of a single *black community*.

Today, there is also great variance in socio-economic status within the black community.¹³⁰ Law professor Patricia Williams writes that whites tend to conflate race and class, especially when constructing black stereotypes.¹³¹ According to Professor Williams, "the term *underclass* is a *euphemism* for blackness."¹³² Even black politicians tend to conflate race and class pushing for policies in the name of the *black community* that benefit poor and working class families, only some of whom may be black.¹³³

Owens of being anti-immigrant. Representative Owens countered "accus[ing] Ms. Clarke of trying to turn black Brooklynites against one another by using ethnic chauvinism to get votes. As a result, theirs has not just been a political contest. It has represented a springboard for many to consider anew the relationship between two groups of black New Yorkers who often have their own share of prejudices against one another." Jonathan P. Hicks, *Bitter Primary Contest Hits Ethnic Nerve Among Blacks*, N.Y. TIMES, Aug. 31, 2000, at A1.

127. *Id.*

128. Brown, *supra* note 124. "[W]hile West Indians generally agree with African Americans on the issues, their experience as recent immigrants has fostered a radically different political style." *Id.* Representative Owens won the Democratic primary race. Jonathan P. Hicks, *New York Primary: The Overview: With Few Exceptions, Incumbents Win Handily in Primaries*, N.Y. TIMES, Sept. 13, 2000, at B1.

129. Orlando Patterson, *Race Over*, THE NEW REPUBLIC, Jan. 10, 2000, at 6.

130. See Salim Muwakkil, *Movin' on Apart*, IN THESE TIMES, March 22, 1998, at 11.

131. PATRICIA J. WILLIAMS, SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE 31-45 (1998).

132. *Id.* at 34-35. Similarly, the term "middle-class" operates as a euphemism for whiteness. *Id.*

133. See Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of*

As my foregoing discussion suggests, notions of community, however, are not necessarily static. There may be a consensus within a substantial segment of the so-called *black community* about the evils of racial profiling of African American drivers.¹³⁴ There is not, however, a uni-perspective or worldview among persons of African descent about other issues like school vouchers¹³⁵ or tax cuts.¹³⁶ In the latter case, additional factors like class, education, gender, ethnicity, and geography create different communities of interests.¹³⁷ Thus, individual agency is increasingly likely given the increasing socio-economic and ethnic diversity within and between those Americans raced as black. Therefore, there may be a contemporary black community for some purposes but not for other purposes.¹³⁸

Individualism in the Making of Social Policy, 46 HASTINGS L.J. 1353, 1369, 1442 (1995) (quoting Leonce Gaiter, *The Revolt of the Black Bourgeoisie*, N.Y. TIMES, June 26, 1994, § 6 (Magazine), at 42).

134. See Katheryn K. Russell, "Driving While Black": Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717 (1999); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431-32 (1997); David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).

135. See, e.g., Evan Thomas and Lynette Clemetson, *A New War Over Vouchers*, NEWSWEEK, Nov. 22, 1999, at 46 (discussing division within the civil rights community over the value of school vouchers).

136. See Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647 (1996); Katharine Inglis Butler, *Affirmative Racial Gerrymandering: Rhetoric and Reality*, 26 CUMB. L. REV. 313 (1996).

137. See *id.*; Lisa A. Kelly, *Race and Place: Geographic and Transcendent Community in the Post-Shaw Era*, 29 VAND. L. REV. 227 (1996). "Transcendent community interests should not be confused with a simplistic belief that the African-American community is a monolithic entity in which all people of color live identical lives in every respect, agree with one another, or even like one another. Nevertheless, color is an immutable physiological fact packed with cultural, historical, and sociological significance that shapes the contours of individual daily lives in ways sometimes subtle and sometimes all too brutally clear. Rhetorical devices that label the recognition of transcendent community interests as 'stereotyping' or 'stigmatizing' are often used to silence important discussions of race that need to be had." *Id.* at 235.

138. In addition, *Bakke*, *Hopwood*, *Croson* and *Adarand*, the so-called reverse discrimination cases, illustrate how easily legal categories can be manipulated to the detriment of racially subordinated groups.

V. CONCLUDING REFLECTIONS

Ronald Garet writes:

So long as equal protection jurisprudence is devoted exclusively to individual and social values, group rights will be undefined and left unprotected. Equal protection will actually produce certain group-protective outcomes, but it will also protect groups where protection is not called for by any group value. More importantly, it will fail to protect groups where that protection is called for by group values.¹³⁹

People raced as black in the United States need to acknowledge that race is not the end all and be all for black Americans.¹⁴⁰ Community membership, even increasingly for people raced as black, is temporal and transcendent—limited purpose. Thus, we must be more critical in our assumptions about the existence and nature of the *black community* in the United States. Broad legal recognition of group rights for racially subordinated groups like blacks may be ill advised.

Although questioning the construction of the racial category black or African American as a unitary interest group, I nevertheless urge black Americans to be strategically essentialist on racial matters.¹⁴¹ Racial profiling is a good example of an issue that impacts

139. Garet, *supra* note 1, at 1025.

140. Recently I raised this point in discussing the multi-layered nature of race-based discrimination experienced by people raced as black in the United States. Banks, *supra* note 2 (arguing that dark-skinned blacks often experience a harsher form of race-based discrimination than light-skinned blacks).

141. Leti Volpp writes: “[I]t may be useful to practice a ‘strategic essentialism’—strategic, because it is consciously directed toward a political goal, essentialism because it reinstates some version of the essence of a community, even if only temporarily and for a political purpose. Spivak discusses the description of a particular poor community by elite scholars, who after-the-fact interpret, explain and essentialize the community, taking the effect (the constructed identity) and reading it as a cause (it explains the individuals’ actions). She argues that it may be appropriate for the subaltern Studies Group to, in turn, describe this community in order to combat the dehumanizing description by elite scholars—all the while recognizing that, through this process, the subsequent description also essentializes the community.” Leti Volpp, *(Mis)Identifying Culture: Asian Women and the “Cultural Defense,”* 17 HARV. WOMEN’S L.J. 57, 95 n.162 (1994) (citing Gayatri Spivak, *Subaltern Studies: Deconstructing Historiography*, in *IN OTHER WORLDS* 197, 205 (1988)).

all persons raced as black. In the absence of a group-based remedy, there will be multiple individual legal attacks on racial profiling practices. Where a strong case for a unitary community interest can be made, requiring individuals to litigate separately is both expensive and time consuming. Both plaintiffs and the legal system will suffer and any relief obtained may be insufficient.

Some narrowly tailored recognition of group rights is needed. Otherwise race-based practices, like racial profiling, that affect an entire racialized community will effectively chill freedom of movement for that segment of the citizenry. Groups of citizens, who fear traveling on the highways of this country based solely on their membership in racialized group, are being denied equal protection under the law when they are unable to secure the legal protection of their government.

