Equal Rights in America: An International Perspective

By Hon. James Hopkins

As chair of the Federal Magistrate Judges Association International Committee I have led American judges to other countries to meet with judges there, to study their rule of law, and to compare their justice systems to ours. When we went to Jerusalem last year we met with the chief justice of the Israeli Supreme Court and discussed some of the difficult challenges facing Israel, particularly regarding how they deal with Palestinian rights in a democracy and the intersection of that democracy with the Jewish religious state.

Also on that trip last year, in Athens, Greece, we met with the Supreme Administrative Court chief justice, who gave me a medal as a token of his appreciation for our visit. Afterward, passing through airport security in Crete, a security officer asked what it was and upon being told, said he was glad the court gave me that, but it was too bad the courts don't give Greeks justice. He was likely referring to the fact that in Greece, like in most countries that embrace the civil law system, the average case takes 11 years for resolution. Justice delayed is justice denied.

In preparation for our trip to Germany in 2015, I read *Hitler's Justice* by Ingo Muller and discovered that the judges, lawyers, and lawmakers of the Weimar Republic, a civilized, democratic state, not only succumbed to a lawless regime, but were also complicit in its antidemocratic measures and perversion of justice.

It is impossible to think about issues that pervade other countries' justice systems without applying the insights gained from their experiences to our own. In comparing Germany's rule of law history during the Third Reich to ours, I have found that many similar antidemocratic, perversion-of-justice measures have been employed here.

However, there is one big difference—Germany faced up to the horrors of the Holocaust, while we here in the United States have not fully come to terms with the perversions and atrocities of black subjugation.

In Europe it is common for schoolchildren to be taught about the Holocaust and the horrors of World War II in year-long courses. German schoolchildren are required to visit concentration camps. In American schools, there is at best a superficial treatment of the details of black suppression. Also forgotten are the millions killed during slavery[1] and during the primary lynching period, which lasted from the end of Reconstruction (when federal troops were withdrawn from the South in 1877) and into the 1960s. The last U.S. lynching took place in 1981 when Michael Donald was killed by members of the Ku Klux Klan in Mobile, Ala. While there are many efforts to memorialize the accounts of Holocaust survivors, how many of us have been exposed to actual accounts of black lynchings? I realized how powerful those stories can be after I learned from a close friend that his great uncle had been lynched in Alabama.

Unfortunately, the disparity extends beyond the schools. In Europe there are over 57,000 Holocaust museums and memorials while in the U.S. there are only 30 civil rights museums (mainly at black universities), and some 38 African-American heritage sites. Meanwhile, a 2016 analysis by the Southern Law Center identified more than 1,500 publicly sponsored Confederate symbols and place names across the country. Seven states—Alabama, Arkansas, Florida, Georgia, Mississippi, North Carolina, and Tennessee—have Confederate imagery in their state flags. Confederate Memorial Day is a state holiday in Alabama, Florida, Georgia, South Carolina, North Carolina, and Texas (where it's called Confederate Heroes' Day). Five states—Florida, Mississippi, Alabama, Arkansas, and Georgia—celebrate Robert E. Lee Day on Lee's birthday, which is Jan. 19. Three states—Alabama, Mississippi, and Arkansas—celebrate Lee's birthday on the same day as Martin Luther King Jr. Day (King was born on Jan. 15).

In researching the history of how American laws have been used to deny human rights to blacks, I found that the words of Thurgood Marshall, who successfully argued *Brown v. Board of Education* before going on to become our first African-American Supreme Court justice, to be enlightening. In his dissent in *Regents of the University of California v. Bakke*, the 1978 plurality decision upholding affirmative action in school admissions programs but disallowing racial quotas to make up for past discrimination, he chronicled our history of discrimination. Below are excerpts of his dissent.[2]

> Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.
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> The denial of human rights was etched into the American Colonies' first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the king and proclaiming as "self-evident" that "all men are created equal" and are endowed "with

certain unalienable rights," including those to "life, liberty and the pursuit of happiness." The self-evident truths and the unalienable rights were intended, however, to apply only to white men. An early draft of the Declaration of Independence, submitted by Thomas Jefferson to the Continental Congress, had included among the charges against the king that: "He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither."

The Southern delegation insisted that the charge be deleted; the colonists themselves were implicated in the slave trade, and inclusion of this claim might have made it more difficult to justify the continuation of slavery once the ties to England were severed. Thus, even as the colonists embarked on a course to secure their own freedom and equality, they ensured perpetuation of the system that deprived a whole race of those rights.

The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution, which treated a slave as being equivalent to three-fifths of a person for purposes of apportioning representatives and taxes among the states. The Constitution also contained a clause ensuring that the "migration or importation" of slaves into the existing states would be legal until at least 1808, and a fugitive slave clause requiring that when a slave escaped to another state, he must be returned on the claim of the master. In their declaration of the principles that were to provide the cornerstone of the new nation, therefore, the framers made it plain that "we the people," for whose protection the Constitution was designed, did not include those whose skins were the wrong color….

The individual states likewise established the machinery to protect the system of slavery through the promulgation of the Slave Codes, which were designed primarily to defend the property interest of the owner in his slave. The position of the Negro slave as mere property was confirmed by this Court in *Dred Scott v. Sandford*, holding that the Missouri Compromise—which prohibited slavery in the portion of the Louisiana Purchase Territory north of Missouri—was unconstitutional because it deprived slave owners of their property without due process. The Court declared that under the Constitution a slave was property, and "the right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States…." The Court further concluded that Negroes were not intended to be included as citizens under the Constitution but were "regarded as beings of an inferior order … altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect…."

The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those amendments were supposed to secure. The combined actions and inactions of the state and federal governments maintained Negroes in a position of legal inferiority for another century after the Civil War.


James M. Hopkins giving his speech.

The Southern states took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary.

Congress responded to the legal disabilities being imposed in the Southern states by passing the Reconstruction Acts and the Civil Rights Acts. Congress also responded to the needs of the Negroes at the end of the Civil War by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedmen's Bureau, to supply food, hospitals, land, and education to the newly freed slaves. Thus, for a time it seemed as if the Negro might be protected from the continued denial of his civil rights and might be relieved of the

disabilities that prevented him from taking his place as a free and equal citizen.

That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann Woodward: "By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights."

The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections. Then in the notorious Civil Rights Cases, the Court strangled Congress' efforts to use its power to promote racial equality. In those cases the Court invalidated sections of the Civil Rights Act of 1875 that made it a crime to deny equal access to "inns, public conveyances, theatres and other places of public amusement." According to the Court, the Fourteenth Amendment gave Congress the power to proscribe only discriminatory action by the state. The Court ruled that the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that. "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state," the Court concluded, "there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws." As Mr. Justice Harlan noted in dissent, however, the Civil War Amendments and Civil Rights Acts did not make the Negroes the "special favorite" of the laws but instead "sought to accomplish in reference to that race … what had already been done in every state of the union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more."

The Court's ultimate blow to the Civil War Amendments and to the equality of Negroes came in *Plessy v. Ferguson*. In upholding a Louisiana law that required railway companies to provide "equal but separate" accommodations for whites and Negroes, the Court held that the Fourteenth Amendment was not intended "to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." Ignoring totally the realities of the positions of the two races, the Court remarked: We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

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In the wake of *Plessy*, many states expanded their Jim Crow laws which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts.

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Nor were the laws restricting the rights of Negroes limited solely to the Southern states. In many of the Northern states, the Negro was denied the right to vote, prevented from serving on juries, and excluded from theaters, restaurants, hotels, and inns. Under President [Woodrow] Wilson, the federal government began to require segregation in government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. President Wilson responded that segregation was "not humiliating but a benefit" and that he was "rendering [the Negroes] more safe in their possession of office and less likely to be discriminated against."

The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President [Harry S.] Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools—and thereby denied the opportunity to become doctors, lawyers, engineers, and the like—is also well established.

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A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. The Negro child's mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60 percent that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male who has only a high school diploma. Although Negroes represent 11.5 percent of the population, they are only 1.2 percent of the lawyers and judges, 2 percent of the physicians, 2.3 percent of the dentists, 1.1 percent of the engineers and 2.6 percent of the college and university professors.

> The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.
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> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

Since Justice Marshall wrote his *Bakke* dissent in 1978, the Courts have continued to struggle with the same issues critical to racial equality, namely voter suppression and equal education opportunity. Voter suppression was used in most Southern states in response to the Fifteenth Amendment granting black men the right to vote. Traditional voter suppression tactics included the institution of poll taxes and literacy tests. These tactics had been allowed by the post-Reconstruction Supreme Court.[3]

Congress passed the Voting Rights Act in 1965 to stop several Southern states from denying blacks their constitutional right to vote. The law initially required six states—Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia—to get federal approval for their election laws and any contemplated changes. The original act expired after five years, but Congress renewed the landmark civil rights law repeatedly and, in 2006, extended it another 25 years.

However, in 2013, the Supreme Court, in a 5-4 decision, overruled Congress' 25-year extension and determined that it was no longer necessary to keep the covered states and municipalities under federal oversight.[4] Chief Justice John Roberts, writing for the majority, called the "extraordinary and unprecedented" requirements of the Voting Rights Act outdated and unfair.[5] Roberts constructed a chart to compare voter registration rates for whites and blacks from 1965 to 2004 in the six Southern states subject to special oversight.[6] The chart was assembled from data in congressional reports produced when lawmakers last renewed the act.

The data demonstrated that registration gaps between blacks and whites had shrunk dramatically. The chart suggested that rates of registration for blacks in 2004 matched or even exceeded those for whites. But according to independent, nonprofit ProPublica, the chart used numbers that counted Hispanics as white, including many Hispanics who weren't U.S. citizens and could not register to vote. This had the effect of inaccurately lowering the rate for white registration. The rate of registration for whites in Georgia, for instance, actually exceeded that of blacks by 4 percent, rather than slightly trailing it. Similarly, in Virginia the chart should have reflected that the rate of registration for whites was 14.2 percent higher than the rate for blacks, instead of a 10 percent disparity.

A form of voter suppression that continues to the present day is felony disenfranchisement. The United States is the only democracy in the world that regularly bans large numbers of felons from voting after they have discharged their sentences. Many countries—including Canada, Denmark, France, Germany, Israel, Japan, Kenya, Norway, Peru, Sweden, and Zimbabwe—allow prisoners to vote (unless convicted of crimes against the electoral system). Some countries, notably the United Kingdom, disenfranchise people for only as long as they are in prison (however, this has been challenged by the European Court of Human Rights).

Florida disenfranchises almost 1.5 million of its citizens, more than 11 states' populations and roughly a quarter of the more than 6 million Americans who are unable to vote because of a criminal record. The only way around Florida's lifetime ban—as in the other three states with such a ban, Kentucky, Iowa, and Virginia—is a direct, personal appeal to the governor. These laws, especially in the South, are inextricable from their racist origins. Florida's law was enacted in 1868 with the intent to prevent newly freed black people from voting. Those effects persist since 1 in 5 black adults in Florida today are disenfranchised because of a criminal record.

The Constitution was engineered to permit the perpetuation of slavery by giving disproportionate representation to the Southern states via crediting them with three-fifths of their slave population. Racial gerrymandering is similarly used today as a means to deny minority voters equal rights. The practice is allowed due to a fundamental flaw in our election process, which it is administered by politicians.

Gerrymandering is most common in countries where elected politicians are responsible for defining constituency boundaries. Australia, Canada, the United Kingdom, and most European countries authorize nonpartisan or bipartisan organizations to set constituency boundaries in an attempt to prevent gerrymandering.[7] An alternative to the partisan gerrymandering inherent in redistricting done by the party in control of the state exists in California, where after incumbent parties retained every single state assembly, senate, and congressional seat in the 2004 election, voters passed California Proposition 11 (2008). The proposition created a Citizens Redistricting Commission to draw state legislative districts. California Proposition 20 (2010) expanded the commission's power to include drawing congressional districts.

Finally, equal education opportunity remains an ongoing challenge in the struggle for racial equality. In *Brown v. Board of Education*, the Supreme Court observed that "education is perhaps the most important function of state and local governments" and held that it was a public service that "must be made available to all on equal terms."[8] The tortured history of the implementation of *Brown* has been well documented, infamously with the National Guard being dispatched by President Dwight D. Eisenhower in Little Rock Arkansas in 1957 to enforce the Supreme Court decision.

While *Brown* attempted to remove one obvious barrier to equal educational opportunities, it left in place another: the obstacle faced by poor school districts that wish to provide an education to their students "on equal terms" relative to the education offered by wealthier school districts within a state.

The United States has a long history of resisting equal education opportunities for minorities by relegating education funding to local communities. In most countries, education funding is not predominately local. Local funding results in wealthy, predominately white districts having many times the per-pupil budgets of poor, predominately minority districts. In 1973, the Supreme Court addressed that issue in a 5-4 decision allowing these widely disproportionate funding schemes, ruling that education was not a fundamental right entitled to strict scrutiny.[9]

By contrast, in 2016 a Connecticut state court ruled that under the Connecticut Constitution there was a fundamental right to adequate elementary and secondary education and the state must have a rational plan for education spending according to local need.[10] The Court mandated that the state needed to rally more forcefully around troubled schools.

The promise of desegregated schools offered by *Brown* has not been fulfilled.[11] Recent studies have disturbingly shown that the number of segregated schools with acute disparities in academic offerings and outcomes is increasing. A 2016 report from UCLA's Civil Rights Project shows that the percentage of "intensely nonwhite schools"—that is, those where fewer than 1 in 10 students is white—is on the rise. The Civil Rights Project report, "Brown at 62: School Segregation by Race, Poverty and State," says that intensely segregated nonwhite schools tripled between 1991 and 2007. They found a "striking rise in double segregation by race and poverty for African-American and Latino students who are concentrated in schools that rarely attain the successful outcomes typical of middle class schools with largely white and Asian student populations."

A 2016 Government Accounting Office report[12] found that:

> More than 60 years after the *Brown* decision, our work shows that disparities in education persist and are particularly acute among schools with the highest concentrations of minority and poor students. Further, black and Hispanic students are increasingly attending high-poverty schools where they face multiple disparities, including less access to academic offerings. Research has shown a clear link between a school's poverty level and student academic outcomes, with higher poverty associated with worse educational outcomes.[13]
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> The [Government Accounting Office]'s analysis of education data also found that compared with other schools, these schools offered disproportionately fewer math, science, and college preparatory courses and had disproportionately higher rates of students who were held back in ninth grade, suspended, or expelled.[14]

My conclusion from this analysis is that justice for blacks has been delayed, and thus denied, for over 350 years. Given our sordid history, it is unconscionable that we still have not addressed the dual demons of educational and economic segregation. Fundamental changes are well overdue to break the poor education, poor employment, poor economic opportunities cycle. Let us take inspiration from Germany and face up to our shameful legacy, for starters, by making it easier (not harder) for more citizens to participate in our democracy and by abolishing local funding for education so that minority students are not deprived of the quality education needed to succeed and assimilate. The alternative is the same dilemma Israel is facing in contemplating a one state solution: impingement of the rights of some of its citizens and erosion of democratic values. As President Warren G. Harding told the white members of the segregated audience in Birmingham, Ala., in October 1921, if you don't embrace equal rights for blacks, "our democracy is a lie." ⊙

Endnotes

[1]Between 1619 and 1860, at least 4 million Africans died before even reaching the United States in the largest migration in world history. This number does not include the African-Americans killed when killing slaves—who were mere property—was not considered a crime.

[2]*Regents of the Univ. of Calif. v. Bakke,* 438 U.S. 265, 388-401 (1978) (citations omitted).

[3]*See Williams v. State of Miss.,* 170 U.S. 213 (1898) (allowing poll taxes since they didn't discriminate against blacks *per se*, merely against their characteristics, namely poverty and illiteracy).

[4]*See Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 133 S.Ct. 2612 (2013).

[5]*Id*. at 2626.

[6]*Id.*

[7]In addition, while the majority of the world's democracies use independent agents to manage elections, 33 of 50 state election directors in the United States are elected partisans. Those party affiliations can create conflicts of interest, or at least the appearance of such, when directing elections.

[8]*Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan*., 347 U.S. 483, 493 (1954).

[9]*See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973).

[10]*See Connecticut Coal. for Justice in Educ. Inc. v. Rell*, 2016 WL 4922730 (Conn. Super. Ct. Sept. 7, 2016).

[11]*See Cowan v. Bolivar Cty. Bd. of Educ*., 186 F. Supp. 3d 564 (N.D. Miss. 2016) (court found that the schools in this west Mississippi town of 12,000 are still divided between black and white students).

[12]*See* U.S. Gov't Accountability Office, GAO 11-345, *K-12 Education: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination* (Apr. 2016).

[13]*Id.* at 42.

[14]*Id*. at Highlights.