

# Diversity Equals Patriotism – From *Brown v. Board of Education*<sup>1</sup> to *Obergefell v. Hodges*<sup>2</sup>

by the Hon. D. Eugene Cheek and Eva N. Juncker with assistance from Rebekah DeHaven



Arguably, the foundation for the American-specific connection between diversity and patriotism is squarely etched into the preamble of our nation's most preeminent founding document. The preamble of the United States Constitution provides that:

*We the People of the United States, in Order to form a more perfect Union establish Justice, ensure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish the Constitution for the United States of America.*<sup>3</sup>

The architects of our nation and its founding principles valued and elevated the ideals of perpetual justice, domestic tranquility, and the advancement of the general welfare and defense of our country. Implicated in that dream are the concepts of diversity and patriotism. Patriotism is the ultimate engine that

supports the needed loyalty and support system for our nation's defense. Further, diversity is the interactive core of our nation's people — a people that must be unified for strength in domestic tranquility and defense. Diversity and patriotism are evolutionary concepts — ideals more abstract than concrete in nature. For that reason, diversity and patriotism are more difficult to define, outline, or list. This article reviews our nation's critical stages of growth and our nation's Supreme Court's struggles with the challenging concept of diversity, explores and discusses the evolving and equally important concept of patriotism, and concludes with a discussion of how those two concepts are uniquely important to one another.

## **DIVERSITY**

Historically, many Americans have struggled to embrace diversity, understand the importance of inclusivity, and accept each other's differences. As a result, Americans too often remain divided and focus more on each other's differences than on the key fact that makes us similar — the fact that despite all of our differences we are all Americans.

Hence, the willingness of Americans to embrace diversity has been a very slow process. Today, the status quo is moving toward the implementation of diversity. Accordingly, the government and many private institutions are working to increase their efforts to embrace diversity. More importantly, the United States Supreme Court uses the U.S. Constitution as guidance to protect the individual rights of all Americans.

The value of diversity has been tested time and time again in America's courts and within its communities. Specifically, the U.S. Supreme Court has acknowledged and implemented diversity regarding beliefs, sex, religion, race, national origin, age, ability, and sexual orientation. In *Texas v. Johnson*,<sup>4</sup> the Supreme Court ruled that burning the United States flag was protected expression under the First Amendment of the U.S. Constitution. Although that holding may seem controversial and unpatriotic, the Supreme Court recognized and supported differences in beliefs.

The U.S. Supreme Court has further ruled on two controversial diversity issues: America's issues regarding race and sexual orientation. In 1896, the United States Supreme Court ruled in *Plessy v. Ferguson*<sup>5</sup> that separate could be equal, and in doing so legitimized Jim Crow laws. Almost sixty years later, in 1954, the Court overturned *Plessy* in *Brown v. Board of Education*<sup>6</sup>, drawing on the Fourteenth Amendment's Equal Protection Clause to find that separation was "inherently unequal." In doing so, the Court initiated a major dismantling of majority rule laws that were discriminatory. A decade later, in 1967, the U.S. Supreme Court ruled in *Loving v. Virginia*<sup>7</sup> that laws barring interracial marriages violated both the Due Process and Equal Protection clauses of our Constitution.

In the mid 1990s, Colorado's state constitution was amended to prohibit any judicial, legislative, or executive action aimed to protect people from discrimination based on their "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships."<sup>8</sup> Again, the U.S. Supreme Court rejected this codified discrimination. Justice Kennedy concluded "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."<sup>9</sup> We cannot protect diversity for some, but not others, because doing so leaves

us all vulnerable and dilutes the meaning of any forward progress.<sup>10</sup> Subsequently, the Court addressed unequal treatment of LGBT Americans in *Obergefell v. Hodges*, and held that the Constitution's Fifth and Fourteenth Amendments preclude laws limiting marriage to only heterosexual couples.

Most recently, in *Masterpiece Cake Shop vs. Colorado Civil Rights Commission*, the Supreme Court has called upon the public to accept religious diversity and as Justice Kennedy wrote, "[t]he outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."<sup>11</sup>

Over the last 64 years, the U.S. Supreme Court has interpreted our foundational constitutional principles to require that we embrace diversity. Americans also repeatedly embrace and reinforce those principles of diversity through patriotic instructions such as in our Pledge of Allegiance which states that we are one nation "indivisible, with liberty and justice for all." Whether one sees America's diversity efforts as happening too quickly, or as being far too slow, embracing our pledge of allegiance can provide perspective. When we focus on our pledge, and focus on being "one nation, indivisible," the need to support unity in our great nation becomes apparent.

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#### **PATRIOTISM**

Since the Civil War, the ideal of American patriotism has been a complex issue. As the authors of this article discussed patriotism in America, we distilled five general archetypes of patriotism: the forced patriot, the shunned patriot, the enthusiastic patriot, the false patriot, and the reluctant patriot. The

forced patriot feels uncomfortable with overt displays of patriotism and with being coerced into participating in same. The shunned patriot loves the United States but does not want to flaunt their love of America, perhaps afraid that doing so will imply agreement with certain ideologies or policies. The enthusiastic patriot incorporates their patriotism in their everyday communication and actions, touting their love of America at every opportunity. The false patriot swears an oath to uphold the laws of this great nation and then fails to do so. The reluctant patriot feels that America has not lived up to its promise and is disillusioned with supporting America's symbols and pageantry. And yet, they are all patriots; each and every one of these Americans has a diverse and deeply held belief about our nation. Let us focus on that commonality in an attempt to reach ideal patriotism.

Resolving intolerance toward diversity is one way to attempt to reach ideal patriotism. The struggle of our culture to address varying opinions on how to best show patriotism starts with people understanding each other. The U.S. Constitution gives everyone broad latitude on how to respect and support their country and how to show dissent. This is an important component of the fabric of our country and speaks to our essential diversity. There are traditional ways of displaying patriotism such as flying the American flag, voting, supporting our military, celebrating patriotic holidays, and wearing the colors of red, white and blue. These actions are not mandatory but help to cultivate a better sense of pride in principles central to what America stands for — justice, liberty, peace, and diversity. Demanding liberty and constitutional rights while taking liberty and constitutional rights for granted is an American privilege. However, celebrating America graciously, with a genuine sense of gratitude and allegiance, goes a long way toward making America stronger.

When we sing the national anthem and recite the Pledge of Allegiance, we remember that we are one nation, one Republic, “indivisible, with liberty and justice for all,” and if we are not living up to that ideal, let our display of patriotism be our rallying cry to do better instead of allowing discrimination to lurk behind our flag.

In many ways, patriotism is like a team sport. Working together is the only way we will succeed as a nation. For this reason, those

who choose to exercise their right to civil disobedience and protest must be intelligent in exercising that right, so that they may smartly welcome allies into the cause and therefore enhance the diversity and movement's potential.<sup>12</sup> Patriotism is not about unquestioning loyalty, but about intelligent and strategic questioning and protest to better our nation. Fighting oppression with forethought and planning was a gift of civil rights icons and members of the Virginia State Bar, Oliver Hill<sup>13</sup> and Samuel Tucker,<sup>14</sup> who used their training and vision to carefully plan protests, civil disobedience, and legal challenges that would move the issue of racial equality forward, gaining support and allies along the way. To those who love diversity, they must also appreciate and protect patriotism, and to those who love patriotism, they must also appreciate and respect diversity. In the words of the esteemed Oliver Hill, “face the dawn and not the setting sun.”<sup>15</sup>

To achieve the values and mandates of the preamble to the Constitution, Americans must put forth a continuous effort to pursue a “more perfect union”. To attain a more perfect union, both diversity and patriotism must be prioritized. The test of what Americans ought to be lies in Americans' commitment to diversity and patriotism, the primary tools that make America a strong and unified nation.

We, the diverse and patriotic authors of this article, encourage you to celebrate the diversity of America and to be patriotic in that process, for in doing both, we continue to build one great nation, indivisible, with liberty and justice for all.

#### Endnotes:

- 1 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
- 2 *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).
- 3 United States Constitution, pmbl.
- 4 *Texas v. Johnson*, 491 U.S. 397 (1989).
- 5 *Plessy v. Ferguson*, 163 U.S. 537 (1896).
- 6 *Brown v. Board of Education of Topeka*, at 495.
- 7 *Loving v. Virginia*, 388 U.S. 1 (1967).
- 8 *Romer v. Evans*, 517 U.S. 620 (1996).
- 9 *Id.* at 634, citing *Department of Agriculture v. Moreno*, 413 U.S. 528, (1973).
- 10 In 2003 the U.S. Supreme Court ruled in *Lawrence v. Texas* that a Texas law criminalizing private sexual conduct between people of the same sex, when the same conduct was legal between people of different sexes, violated their right to liberty under the Due Process Clause of the Constitution. “Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government,” wrote Justice

Kennedy. “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual,” continued Justice Kennedy. This decision overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986).

11 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_ slip op. at 18, (2018),

12 In this regard, patriotism sometimes clashes with the First Amendment to the U.S. Constitution. As part of a political protest, Gary Lee Johnson burned an American flag and was convicted under a Texas law for that action. The United States Supreme Court, in *Texas v. Johnson*, 481 U.S. 397 (1989) held that his conviction violated his First Amendment right. By my measure, Johnson’s behavior was unquestionably protected by the Constitution, but it was not patriotic, nor was it a productive way to address his political concerns or have them heard. Rather, his action created division and focus on Johnson and his tactics, rather than the message he was trying to convey.

13 Oliver W. Hill was an attorney and activist in Virginia, and a lead attorney for the NAACP in Virginia. He was one of the leading attorneys in *Davis v. County School Board of Prince Edward*, one of the five cases that became *Brown v. Board of Education*. For more on Oliver Hill, see: [https://www.encyclopediavirginia.org/Hill\\_Oliver\\_W\\_1907-2007](https://www.encyclopediavirginia.org/Hill_Oliver_W_1907-2007).

14 Samuel Tucker was an attorney and activist in Virginia, and a lead attorney for the NAACP in Virginia and worked tirelessly in defense of “The Martinsville Seven.” For more on Samuel Tucker see: <https://www.alexandriava.gov/historic/blackhistory/default.aspx?id=73256>.

15 Said by Oliver Hill on November 15, 1954 to the Gray Commission, a group appointed by Virginia’s governor to recommend a state response to *Brown v. Board of Education*. See: [https://www.encyclopedia.virginia.org/Hill\\_Oliver\\_W\\_1907-2007#start\\_entry](https://www.encyclopedia.virginia.org/Hill_Oliver_W_1907-2007#start_entry).



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