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THE RACE CONVENTION AND CIVIL RIGHTS IN THE UNITED STATES

Theodore M. Shaw†

I would like to say a few preliminary things. First, it has been a great honor this academic year to hold the Haywood Burns Chair here at the City University of New York School of Law. Haywood is somebody I never grow tired of talking about, because those of you who knew Haywood, know he was an extraordinary human being and an extraordinary warrior. He was also a great example in terms of melding an academic career with a career as a practitioner and an activist. So Haywood was one of my heroes.

When I was asked to be the second recipient of the Haywood Burns Chair I could not say no, even though I had no business saying yes given everything that was on my plate. The first chair holder of the Haywood Burns Chair was Judge Nathaniel Jones, who is another individual I admire a great deal and who will be with us tomorrow. I thought maybe with Haywood's name and Judge Jones' name somehow connected with my name I might rise up in the world a little bit, and I have.

In the annals of American jurisprudence, *Brown v. Board of Education*¹ stands as a case of singular significance. *Brown* breathed life into the Equal Protection Clause of the Fourteenth Amendment,² which had long served to protect the interests of corporations while its original purpose—to guarantee that African-Americans would be treated by the United States Government as all others without regard to race—was shamelessly frustrated. *Brown* was decided at a moment during American history when several forces converged to create a context in which the Supreme

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¹ 347 U.S. 483 (1954).

² See U.S. CONST. amend. XIV, § 1. The Equal Protection Clause of the Fourteenth Amendment provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* The Court in *Brown* held that segregated schools were inherently unequal and that they deprived African-American students of equal protection of the laws guaranteed by the Fourteenth Amendment. 347 U.S. at 495.

Court's ability to declare an end to the pernicious doctrine of separate but equal, announced in *Plessy v. Ferguson*,³ finally came into being.

The United States emerged victoriously from World War II as a superpower that had fought against Nazi Germany, which had annihilated millions in its quest for racial purity. If there is ever such a thing as a "just war" I suppose we could say World War II was such a thing. Regardless of what one thinks about whether there is such a thing as a "just war," clearly the judgment of history is that America was on the right side. African-Americans fought and died to liberate Europe from the yoke of Nazi oppression and to defeat the Japanese in Asia. Yet at the same time they and their loved ones were denied freedom and equality at home.

The irony and hypocrisy of this contradiction was not lost on most Black people and was also seen by many white Americans. Judge Leon Higgenbotham, who served on the United States Court of Appeals for the Third Circuit, recalled how a young man, John Oak Franklin, who is now heading up the President's race commission or advisory panel, traveled through North Carolina from Greensboro to Durham one day. While he was on the train, he was compelled to stand even though there were ample seats for people to sit in. In the adjacent coach, there were a lot of empty seats and Judge Higgenbotham stood while some white Nazi prisoners of war sat in a car reserved for white people, grinning at his discomfort.

Richard Klueger, in his wonderful book *Simple Justice*,⁴ succinctly observed that "[B]lack Americans did not possess the rights for which they and their nation fought the Second World War, and they knew it."⁵ Black soldiers were among the liberators of the concentration camps where millions of Jews were murdered. They witnessed the horrors of the Holocaust first hand. A few years ago, in 1993, there was a documentary commemorating the role of Black American troops liberating the concentration camps at Buchenwald and Dachau.⁶ This history was recounted at a time when Black-Jewish relationships in the United States were particularly

³ 163 U.S. 537 (1896) (holding that the Fourteenth Amendment was intended to enforce the political equality of the races but was not intended to abolish racial distinctions nor to enforce social equality). Thus, separate but equal facilities for blacks and whites were not in violation of the Fourteenth Amendment. *Id.* at 544.

⁴ RICHARD KLUEGER, *SIMPLE JUSTICE* (1976).

⁵ *Id.* at 226.

⁶ Videotape: *Liberators: Fighting on Two Fronts in World War II* (Mile Educational Film Production, Inc., in association with Thirteen/WNET for the American Experience 1992) (on file with author).

tense. There was a screening of the documentary at the Apollo Theater in Harlem and the New York Times reported that many of the Blacks and Jews in attendance “hugged and passionately agreed that the screening had provided a rare powerful moment—a catharsis in the sometimes tense relations between [B]lacks and Jews in New York City.”⁷ But its accuracy was soon questioned by individuals who claimed that the Black tank battalions were no where near those camps when they were liberated.⁸

Whatever the merits of that controversy, I remember reading a wonderful, very moving memoir by Elie Wiesel in which he said that his war time experience included a memory of liberation of the camp that he was in. I recall him stating: I will never forget the faces of American soldiers and the horror that could be read on them. I will especially remember one Black sergeant, a muscled giant, who wept tears of impotent rage and shame. Shame for the human species when he saw us. He spewed curses that on his lips became holy words.

We know that at home during World War II, the wartime economy lifted America out of the depression. The rising tide had lifted the boats of Black Americans too, and in the post war years the winds of social change began to stir as African-Americans accelerated their struggle against segregation. The NAACP's fledgling legal defense fund was established in 1940 and began litigating the cases that paved the road to *Brown*.

A. Phillip Randolph, the leader of the Brotherhood of Sleeping Car Porters, threatened a march on Washington in 1941 unless President Roosevelt ended discrimination in the defense industry.⁹ Roosevelt responded with Executive Order 8802, The Fair Employment Practices Act,¹⁰ which banned discrimination by defense con-

⁷ Joseph B. Treaster, *WNET Inquiry Finds No Proof Black Unit Freed 2 Nazi Camps*, N.Y. TIMES, Sept. 8, 1993, at B1.

⁸ See Richard Bernstein, *Doubts Mar PBS Film of Black Army Unit*, N.Y. TIMES, Mar. 1, 1993, at B1; Joseph B. Treaster, *Film Halted On Blacks Freeing Jews*, N.Y. TIMES, Feb. 12, 1993, at B3.

⁹ See Lerone Bennett, Jr., *BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA*, 365-66 (1993).

¹⁰ Fair Employment Practices Act, 6 Fed. Reg. 3109 (1941). The executive order, issued on June 25, 1941, provided that “[a]ll departments and agencies of the Government of the United States concerned with vocational and training programs for defense production shall take special measures appropriate to assure that such programs are administered without discrimination because of race, creed, color, or national origin” and that “[a]ll contracting agencies of the Government of the United States shall include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin.” *Id.*

tractors. The prospect of tens of thousands of Americans converging on the Nation's capitol to protest racial discrimination highlighted an awkward dilemma for a nation championing its role in fighting against totalitarianism and oppression abroad.

After the war, in 1945, the foundation for the United Nations was laid in its charter at a San Francisco conference led by the victorious allied forces. By 1950, however, the two surviving superpowers, the United States and the Soviet Union, were locked in a bitter Cold War struggle that defined much of the second half of the twentieth century. Simultaneously the post-World War II years saw the emergence of African and Asian nations from the shadows of colonialism onto a world stage in which the superpowers competed for their allegiance, or at least their control. African-Americans watched the end of the colonial era with the certain knowledge that the winds of change that were shifting and blowing abroad would not stop blowing at the borders of the United States.

The relationship between the struggles against racism here in the United States and colonialism abroad was not newly noted. There is a wonderful book on *Plessy* by Charles Lofgren¹¹ in which he writes that the expansion of nineteenth century imperialism, which lead to colonial rule over nonwhite people abroad, helped to free the white south from whatever restraints national opinion had imposed.¹² He understood that there was a connection even at that time between imperialism and colonialism abroad and racism and segregation in the United States.

So, in a sense, the decision in *Brown* was about moral credibility at home and abroad. Again in *Simple Justice*, Richard Kluger wrote that the Supreme Court's decision in *Brown*,

for all of its economy, represented nothing short of a re consecration of American ideals. At a moment when the [United States] had just begun to sense the magnitude of its global ideological contest with communist authoritarianism and was quick to measure its own worth in terms of megaton power, the opinion of the Court said that the United States still stood for something more than material abundance, still moved to an inner spirit, however deeply it had been submerged by fear and envy and mindless hate. . . . The Court had restored to the American people a measure of humanity that had been drained away in their climb to worldwide supremacy.¹³

¹¹ CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* (1987).

¹² *Id.*

¹³ KLUGER, *supra* note 4, at 710.

Whether Brown actually did all these things as Kluger was stirred to write is debatable, but the fact that the decision had implications for America's global standing is not. The United States could no longer claim to carry a banner of democracy against totalitarianism when it denied millions of its own citizens basic civil and human rights.

Justice Robert Jackson once acknowledged the "profound change" in public opinion that had occurred in recent years as a consequence of American awareness that the racism which generated the Holocaust and "revulsion" against the kind of racial feeling that "lead to the internment of Japanese during World War II would have an affect on the question of race in America."¹⁴ I recall that John Fasset, who clerked for Justice Stanley Reed during the 1953-54 term, attempted to move his Justice from his prosegregation position to a position against segregation by arguing that segregation at home affected America's standing abroad. Fasset's account of Reed's response was to the effect that Reed had heard a lot on that subject and had been giving it considerable thought. So the *Brown* decision was necessary if the United States was to stake a claim of moral high ground in its battle against communism and the Justices of the Supreme Court knew it.

Beyond the Court brimmed the broader Civil Rights Movement that drew inspiration from anti-colonial struggles. Martin Luther King, Jr. readily acknowledged the effect of Mahatma Ghandi's philosophy of non-violent resistance employed during the Montgomery boycott.¹⁵ This philosophy was shared by a minister who is a central figure in a book called *The Children*.¹⁶ The book begins by looking at the sit-in movement in Nashville, and Reverend James Lawson, who is now out in Los Angeles, had a profound impact because he had been in India studying Ghandi and brought it home.¹⁷ Thereafter, he met Dr. King who convinced him to come to work in the South.¹⁸

The African diaspora was rich with cross-fertilization. President Kwamane Kwuma of Ghana was educated at Lincoln University in Pennsylvania. The great W.B. Dubois' ideological sojourn took him from integrationist to socialist to pan-Africanist to ex-

¹⁴ Memorandum from Justice Robert Jackson (Feb. 15, 1954) (on file with author).

¹⁵ See Taylor Branch, PARTING THE WATERS 143-205 (1988) (use of nonviolent Gandhian methods during the Montgomery Bus Boycott).

¹⁶ DAVID HALBERSTAM, *THE CHILDREN* (1998).

¹⁷ See *id.* at 47-49.

¹⁸ See Branch, *supra* note 15, at 205.

patriate. He spent his last days in Ghana. He died there on the eve of the great march on Washington. Thurgood Marshall played a central role in drafting the Constitution of Kenya. Elijah Mohammed and his charismatic lieutenant Malcolm X each visited Arab and African nations on their respective Haj, required by Islam. African-Americans expanded the range of integrationist, separatists, and pan-African ideologies and paid homage to the influence of African liberation struggles. Martin Luther King, Jr. wrote in a 1961 essay that "[t]he liberation struggle in Africa has been the greatest single international influence on American Negro students."¹⁹ He went on to say, "[f]requently I hear them say that if their African brothers can break the bonds of colonialism, surely the American Negro can break Jim Crow."²⁰

Similarly, African nationalists were inspired by African-Americans who struggled against racism. Nelson Mandela has written in his biography *Long Walk to Freedom*²¹ that there was a kinship between black South Africans and African-Americans inspired by such great Americans as W.E.B. Dubois, Marcus Garvey, and Martin Luther King, Jr. As a young man, he said, "I idolized the Brown Bomber Joe Louis, who took on not only his opponents in the ring but racists outside of it."²²

In spite of the United States' concern with its international standing that was part of the context of the *Brown* decision, and in spite of the deep well of international cross-fertilization between freedom fighters throughout the African diaspora, the Civil Rights Movement in the United States has never drawn significantly on international human rights norms. The legal struggle for civil rights in the United States has unfortunately been cramped by its failure to develop a meaningful human rights paradigm based on international covenants, despite the fact that the United States is a signatory. This failure is compounded by the fact that following the demise of the Civil Rights Movement in the late 1960s, the struggle for civil rights has been largely waged in the courts. In the absence of a social-political movement that creates the pressures under which the inherently conservative judiciary will be compelled to move beyond their status quo protection mode, there will be no change.

¹⁹ Martin Luther King, Jr., *The Time For Freedom Has Come*, N.Y. TIMES, Sept. 10, 1961, § 6 (Magazine), at 118.

²⁰ *Id.*

²¹ NELSON MANDELA, *LONG WALK TO FREEDOM* 583 (1995).

²² *Id.*

The federal courts have grown increasingly more conservative since the end of the Warren Court era. In the last decade, the federal courts have rendered numerous decisions that have limited the expansion of opportunities for racial minorities, women, and other people who historically have been dispossessed, disenfranchised, and unprivileged. The Supreme Court's interpretation of the Fourteenth Amendment's Equal Protection Clause has been the point on which this turn of legal fortunes revolved. In addition, the Court's interpretation of civil rights statutes has also had limiting effects on civil rights enforcement.

I would like to talk somewhat briefly about International Convention on the Elimination of All Forms of Racial Discrimination.²³ This document provides an expansive framework for advancing the interests and opportunities of racial minorities and other groups who have historically been marginalized in the United States by American practice, policy, and law. In the process, we should consider possible explanations for the limited nature of attempts on the part of United States civil rights lawyers to utilize international human rights norms. The Race Convention was adopted by a unanimous General Assembly of the United Nations on December 21, 1965. The United States became a signatory on September 28, 1966, and ratified the Convention in June of 1994. It became operative in 1969. The state signatories elected an eighteen member committee of international human rights experts who were charged with the responsibility for monitoring compliance.

Among the considerations that constitute the preamble of the Race Convention is a reference to the Universal Declaration of Human Rights²⁴ and a proclamation that "all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin."²⁵ Several other considerations of the Race Convention merit attention. The Race Convention states that the United Nations has "condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of

²³ International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, [hereinafter *Race Convention*].

²⁴ Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess. Pt. 1, Resolutions at 71 U.N. Doc. A/810 (1948) [hereinafter *UDHR*].

²⁵ *Id.* at 212-14 (citing *UDHR*, *supra* note 24).

Independence to Colonial Countries and Peoples of 14 December 1960, has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end[.]”²⁶

Nineteen sixty was an extraordinary year. In this year, African-American students and others were sitting-in in Greensboro, North Carolina. There were also sit-ins in Nashville, Tennessee and other places around the South, initiating the demonstrations that set fire to the Civil Rights Movement. In that same year, eleven African nations moved from colonialism to independence. There was a movement going on that did not know or respect international borders. These movements, or this consciousness about these movements, and these changes fueled one and the other respectively. Whether intentionally or not, by condemning colonialism and “practices of segregation and discrimination associated therewith in whatever form and where they exist,”²⁷ the General Assembly was underscoring the tension between international norms and practices within the United States. For as we have talked about already, domestic civil rights leaders and activists were keenly aware of and inspired by African liberation struggles. The preamble to the Race Convention further stated that the state party signatories were “[c]onvinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice anywhere[.]”²⁸ Although the United States is a signatory to the Race Convention, this language constitutes a ringing condemnation and rejection of racism which has no parallel in United States law. While the Fourteenth Amendment’s Equal Protection Clause prohibits discrimination on the basis of race, and it has been interpreted to guarantee that governmental actors shall not discriminate, it does not explicitly condemn the doctrine of superiority based on racial differentiation. Nor does any other federal constitutional or statutory provision. In my view, the First Amendment²⁹ would not be an impediment to such a governmental condemnation of the theory of racial superiority or inferiority, for individuals would still be free to believe whatever they wanted to believe and express their views. So there is no impediment constitutionally to such a condemnation, but it does not exist in United States law.

²⁶ Race Convention, *supra* note 23, at 214 (citations omitted).

²⁷ Race Convention, *supra* note 23, at 214.

²⁸ Race Convention, *supra* note 23, at 214 (emphasis added).

²⁹ U.S. CONST. amend. I.

The preamble to the Race Convention also reaffirms "that discrimination between human beings on the grounds of race, colour or ethnic origin i[s] an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State."³⁰ Recent conflicts in Croatia, Serbia, Bosnia, as well as in Rwanda, Burundi and other places around the world certainly bear witness to the tragic truth of that statement.

The paradigm in the United States is the color blind paradigm which arises from the dissent in *Plessy v. Ferguson*. Justice Harlan was praised as being a visionary for this dissent. He wrote that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."³¹ But to fully understand that dissent, which was more progressive of course than the majority opinion, one has to read a few passages before, where Justice Harlan wrote:

The white race deems itself to be the dominate race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in the view of the Constitution, in the eye of law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.³²

Justice Harlan was talking about law, not fact, and clearly his view was consistent with white supremacy. His dissent, though it may have been courageous for its time, nonetheless reflects the fact that his color blind constitution did not repudiate notions of white supremacy.

Article 1 of the Race Convention defines racial discrimination as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.³³

Note that intent is not the sole touchstone for Race Convention purposes, as it is for the United States Constitution. Moreover, the phrase "nullifying, impairing recognition, enjoyment or exercise"

³⁰ Race Convention, *supra* note 23, at 214.

³¹ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

³² *Id.*

³³ Race Convention, *supra* note 23, at 216 (emphasis added).

conveys a broad purpose and the phrase "of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" a broad reach. Of key importance is the interpretation of the ambiguous phrase "public life" which could be interpreted consistently with the United States Constitution, meaning that it generally prohibits racial discrimination, as the Equal Protection Clause does, by government, but not private actors. Alternatively, "public life" could refer to the impersonal spheres of activity in which individuals operate with the expectation that immutable characteristics will be irrelevant. The text of the Race Convention strongly supports the latter interpretation. The United States has voiced reservations about the Race Convention that reflect a difference between United States Constitutional interpretation and the Race Convention. For example, Article 2(1)(a) of the Convention provides:

State parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: . . . to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation[.]³⁴

Under United States law, I suppose the Fourteenth Amendment has a comparable purpose and reach because it has been interpreted to prohibit racial classifications that are unsupported by a compelling state interest and for which a less intrusive, racially neutral alternative is available.³⁵ The Fifteenth Amendment applies in a similar way to the area of voting.³⁶ We also have relevant statutory provisions, including Section 1983,³⁷ which prohibits discrimination by actors acting under color of state law. Thus the Race Convention and United States law each place governmental discrimination beyond the reach of the law. Article 2.1(b) provides that "each [s]tate [p]arty undertakes not to sponsor, defend or support racial discrimination by any persons or organizations."³⁸

³⁴ Race Convention, *supra* note 23, at 218.

³⁵ See *Wygant v. Jackson Bd. of Ed.* (holding that the school board's layoff policy of extending preferential treatment to some employees because of their race or national origin violated the Fourteenth Amendment); see also *Shaw v. Hunt*, 517 U.S. 899, 908 (1996).

³⁶ U.S. CONST. amend. XV, § 1 ("The right of citizens . . . to vote shall not be denied or abridged . . . on account of race").

³⁷ 42 U.S.C. 1983 (1994).

³⁸ Race Convention, *supra* note 23, at 218.

In the United States we have Title VI of the 1964 Civil Rights Act³⁹ that might have a similar reach and purpose. Additionally, Title IX is aimed at prohibiting governmental entanglement with discrimination in reference to gender.⁴⁰ So I suppose that they match in some ways.

United States Supreme Court precedent further buttresses the concept that the federal government ought to aschew any kind of support, however indirect on its part, for privately sponsored racial discrimination.⁴¹ It is clear that nothing in United States law either requires or allows the Federal Government to defend or support racial discrimination. Although the First Amendment protects racist speech and expression, Article 2(1)(b) of the Race Convention addresses discrimination, which arguably is at least one step beyond speech. Thus, the Convention seems to be consistent with United States law on the issue of governmental involvement with, or support for discrimination. Article 2(1)(c) of the Race Convention requires each party to take effective measures to review governmental, national and local policies and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.⁴² This provision can be interpreted to apply to the governmental sphere, however, the phrase "wherever it exists" is open to an expansive interpretation and may suggest a reach beyond governmental action into the private sphere.

The principle of judicial review established in *Marbury v. Madison*⁴³ is relevant. In *Cooper v. Aaron*,⁴⁴ the Supreme Court reaffirmed and expanded its role as the final arbiter and interpreter of the Constitution. Thus, the requirement in Article 2(1)(c) of the

³⁹ 42 U.S.C. 2000d (1994).

⁴⁰ 20 U.S.C. § 1681 (1994).

⁴¹ See *Bob Jones University v. United States*, 461 U.S. 574, 595-96 (1983) (holding that because racial discrimination is contrary to public policy, private schools that discriminate based on race are not conferring a public benefit and therefore they are not entitled to tax exempt status).

⁴² Race Convention, *supra* note 23, at 218.

⁴³ 5 U.S. 137 (1803).

⁴⁴ 358 U.S. 1 (1958). In *Cooper v. Aaron* the Governor and the Legislature of Arkansas argued that state officials were not required to obey federal court orders which rested on the United States Supreme Court's interpretation of the United States Constitution. *Id.* at 4. More specifically, the Governor and Legislature of Arkansas argued they were not bound by the Court's decision in *Brown v. Board of Education*. *Id.* In rejecting this argument, the Court noted that the United States Constitution is the supreme law of the land and that, pursuant to *Marbury v. Madison*, the Court is the final arbiter of the law. *Id.* at 18. Thus the Court's interpretation of the Fourteenth Amendment in *Brown* is binding on the States. *Id.*

Race Convention that signatories review governmental laws, policies, and practices does not at first blush add anything to United States anti-discrimination efforts. But in the area of judicial review, applying post-Civil War amendments requires invalidation of discriminatory governmental laws and regulations on the local, state, and federal levels, again consistent with the Race Convention. But the United States Constitution does not require remedial action for government conduct that has "the effect of creating or perpetuating racial discrimination." Intent is the sole touchstone, and it has been and is being used in a way that makes it particularly difficult to win cases on behalf of people of color in which racial discrimination is alleged.

There is a lot in the Race Convention that is consistent with United States law, but clearly the Race Convention reaches further. The Race Convention's effects test is significantly more liberal in terms of proving intent than the Fourteenth Amendment's Equal Protection Clause has been interpreted.⁴⁵ Additionally, the Race Convention reaches out to prohibit not only discriminatory actions but discriminatory, racist speech.

In the United States, racist speech is protected by the Constitution and the First Amendment is applied vehemently to protect anyone's right to harbor racist beliefs or to engage in such speech. Frankly, a great deal of conduct, including cross burning, is protected under the First Amendment as well.⁴⁶ Under the Race Convention such racist speech would be prohibited. When the Fourteenth Amendment was interpreted to apply to corporations in the *Slaughter House Cases*,⁴⁷ and when the Court decided *Plessy* in 1896, the Fourteenth Amendment held little meaning for African-Americans. This occurred despite the fact it was the plight of Afri-

⁴⁵ See *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

⁴⁶ See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). In *R.A.V.*, the petitioner was charged under the St. Paul Bias-Motivated Crime Ordinance after burning a cross on an African-American family's lawn. *Id.* at 379-80. Petitioner moved to dismiss on First Amendment grounds. *Id.* at 380. The Court held the ordinance was facially unconstitutional because it prohibited speech that would be otherwise permissible if not for the subjects the speech addressed. In writing the opinion, Justice Scalia stated "[St. Paul] has proscribed fighting words of whatever manner that communicates messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid[.]" *Id.* at 393-94.

⁴⁷ 83 U.S. (16 Wall.) 36 (1873).

can-Americans that originally called the Fourteenth Amendment into being.⁴⁸ It has been an odd history, a peculiar history. There has been nothing comparable to international human rights norms and the Race Convention in United States history that would be as meaningful for African-Americans. In fact, if you think about it, United States law is not couched in terms of positive obligations; it is all anti-discrimination principles, not affirmative obligations concerning integration and multiculturalism.

Interestingly enough, when the Supreme Court has spoken about integration and multiculturalism, it has worked against African-Americans and people of color. In *Shaw v. Reno*,⁴⁹ for example, Justice O'Connor, writing for the five-four majority, castigated North Carolina's 53% Black 12th Congressional District which was drawn pursuant to the Voting Rights Act⁵⁰ to remedy a long history of discrimination and racial polarization.⁵¹ In doing so she cited Justice Douglas' dissent in *Wright v. Rockefeller*.⁵² I love this language: Justice O'Connor says that she was concerned that these districts imperil "'the multiracial, multireligious communities that our Constitution seeks to weld together as one.'"⁵³

Interestingly, *Shaw's* resurrection of the notion of welding together multiracial and multicultural communities stands in stark contrast with a long line of Supreme Court cases that have ruled against African-Americans and people of color who sought integration and multiracial communities. For example, in *Keyes v. School District No. 1*,⁵⁴ the United States Supreme Court held that the Constitution does not require a remedy for *de facto* school segregation.⁵⁵ In *Milliken v. Bradley*,⁵⁶ the Court held that interdistrict school desegregation was not available unless almost insurmountable barriers were met.⁵⁷ In *Missouri v. Jenkins*,⁵⁸ the Court struck down a planned order by the district court to voluntarily integrate

⁴⁸ See *id.* at 71-72.

⁴⁹ 509 U.S. 630 (1993).

⁵⁰ Voting Rights Act of 1965, 79 stat. 439, 42 U.S.C. § 1973(c).

⁵¹ See *Shaw*, 509 U.S. at 633.

⁵² 376 U.S. 52 (1964).

⁵³ 509 U.S. at 648 (quoting *Wright v. Rockefeller*, 376 U.S. at 67) (Goldberg, J. dissenting).

⁵⁴ 413 U.S. 189 (1973).

⁵⁵ See *id.* at 208.

⁵⁶ 418 U.S. 717 (1974).

⁵⁷ See *id.* at 744-45 ("it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.").

⁵⁸ 515 U.S. 70 (1995).

the Kansas City School district using suburban schools.⁵⁹ So this notion about an affirmative duty to weld together racial communities has been expressed in cases where African-Americans have come out on the losing end. Yet it has not existed in cases when African-Americans and Latinos have sought those very same remedies. There is at least an inconsistency; some would suggest a hypocrisy.

I would like to talk about what I think is the wellspring of Equal Protection law in the United States. It did not come out of any race discrimination case; it came out of the 1938 decision in *United States v. Carolene Products*.⁶⁰ This case had to do with regulation of the milk industry,⁶¹ but just kind of thrown in there was the famous footnote four written by Justice Stone:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor do we need enquire whether similar considerations may enter into the review of statutes directed at particular religious or national or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.⁶²

Now that is powerful language when you think about it. That is language that says given our history of discrimination the political system does not work for minority group members who are discrete and insular. We have to do something more.

Of course this language has been transformed. Today there is no focus on "discrete and insular minorities." It has been dropped out so that discrimination on the basis of race is found to exist even where governmental action or private actors are aiming at including people as opposed to excluding them. Now that has stood the Fourteenth Amendment Equal Protection Clause on its head. And

⁵⁹ See *id.* at 96-98.

⁶⁰ 304 U.S. 144 (1938).

⁶¹ The issue in *Carolene Products* was whether the Filled Milk Act exceeded Congress' power under the Commerce Clause and whether the Act ran afoul of the Fifth Amendment. *Id.* at 145-46.

⁶² *Id.* at 152-53 n.4 (citations omitted).

that is why today we are engaged in the so called "reverse discrimination" battles.

For sixty years, under *Carolene Products*, the Equal Protection Clause was interpreted to provide special protection for discrete and insular minorities. Now the federal courts have said in a series of cases, starting with *Richmond v. Croson*,⁶³ and again in *Adarand Constructors v. Peña*,⁶⁴ the Fifth Circuit said it in *Hopwood v. Texas*,⁶⁵ and we heard it recently in *Lutheran Church-Missouri Synod v. Federal Communications Commission*,⁶⁶ that there is no difference between attempts to include and attempts to exclude. The courts are now equating race with racism, so the problem is race, not racism, and not white supremacy. Therefore any race consciousness is unconstitutional and unlawful.

This lack of distinction would not occur under the Race Convention because it specifically has two provisions relevant to affirmative action. Article 1(4) accepts "special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals" from the definition of racial discrimination, as long as such measures do not "lead to the maintenance of separate rights for different racial groups and they shall not be continued after the objectives for which they are taken have been achieved."⁶⁷ Similarly, Article 2(2) states:

[p]arties shall, when the circumstances so warrant, take in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.⁶⁸

Both provisions are a clear and unambiguous basis for affirmative

⁶³ 488 U.S. 469, 494 (1989) ("the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.") (citations omitted).

⁶⁴ 515 U.S. 200, 227 (1995).

⁶⁵ 78 F.3d 932, 940 (5th Cir. 1996) ("there is now absolutely no doubt that courts are to employ strict scrutiny when evaluating all racial classifications, including those characterized by their proponents as 'benign' or 'remedial.'") (footnotes omitted).

⁶⁶ 141 F.3d 344, 351 (D.C. Cir. 1998) ("Though the Supreme Court did not initially apply strict scrutiny to federal 'affirmative action' programs, it recently reversed itself to hold that strict scrutiny applies whether or not the Government's motivation to aid minorities can be thought 'benign.'") (citations omitted).

⁶⁷ Race Convention, *supra* note 23, at 216.

⁶⁸ Race Convention, *supra* note 23, at 218.

action that are unlike anything that exists in American law. They are in total contradiction to the United States Supreme Court decisions in *Croson* and in *Adarand*. The United States draws no distinction between race-based affirmative action aimed at including minority group members and invidious racial discrimination aimed at excluding them. This is a fundamental flaw.

I would like to make some observations about the prospects for domestic application of the Race Convention. Civil rights lawyers in the United States have made limited use of the Race Convention and other international human rights norms. I think the *Brown* decision and the campaign that led to it created a paradigm that has held sway over the Civil Rights Movement for a long time. If, as we have seen, international events and human rights norms are the context in which *Brown* was decided, the lawyers who litigated *Brown* understandably believed that domestic law was sufficient to dismantle American apartheid. In any event, their reliance on international law was extremely limited.

In *Colker v. Georgia*,⁶⁹ in which the Supreme Court invalidated the death penalty for rape,⁷⁰ the Legal Defense Fund argued that other nations did not apply capital punishment to rape. The Supreme Court largely ignored that argument. It didn't rule on it, didn't pass on it, just ignored it. Other efforts to link civil rights to international human rights norms have met with tepid results.

I think perhaps the failure of United States lawyers to call upon international human rights norms, such as those in the Race Convention, reflects a combination of factors. First, and ironically given the international scenario which provided the context in which *Brown* was decided, *Brown* was a redemption and a reaffirmation of the United States Constitution. It immediately transformed United States legal culture and created an expectation that through the Constitution it was possible to enforce the rights of racial minorities and indeed women and all Americans to be free from discrimination. Moreover, the *Brown* campaign fostered the perception that it was possible to engage in a long-term struggle for social change while using the law, i.e., United States law could be used as a weapon. Even though it turned out to be effective in *Brown*, given the conservative and reactive nature of the law that belief merits substantial skepticism. While a litigation campaign

⁶⁹ 433 U.S. 584 (1977).

⁷⁰ See *id.* at 592 (holding a sentence of death is grossly disproportionate and excessive punishment for the crime of rape constituting cruel and unusual punishment forbidden by the Eighth Amendment).

may be a necessary and sometimes even a crucial part or element of the battle for social justice, it is not the only front; it cannot be the only front.

While *Brown* was a breakthrough victory it should not obscure other factors that made it possible to bring about social change. These factors included the pressure of international scrutiny after World War II, the Cold War era, and United States hypocrisy. Moreover, the *Brown* decision should not lead to the conclusion that domestic law is sufficient to provide holistic protection of civil and human rights. While *Brown* broke the back of American apartheid, the courts have for the most part been reluctant participants in the struggle for racial justice, or social justice more broadly. Civil rights lawyers and other who believe the *Brown* paradigm would be a model for social change may be unduly optimistic if they ignore the contextual conditions, including international pressure, that made the school desegregation decision possible. This is in no way to diminish the importance of litigation in the struggle for social justice. I would be cutting my own throat if I did that. The point is that the legal struggle is most effective when it is part of a broader struggle, and that in an increasingly global community international covenants and treaties governing human rights should be given force and effect. Additionally, there should be political and social activism to bring that change about.

While civil rights lawyers may have censured international human rights standards from their briefs and arguments after making the essentially correct judgment that the United States courts would be unreceptive, they may have also thereby eschewed the opportunity to build a broader set of expectations for governmental and private behavior. That is to say, they passed up the opportunity to bring human rights discourse into American political discourse. Put differently, in the absence of advocacy, human rights norms such as the Race Convention will have no currency in the United States. Even if courts initially fail to address such arguments, in time their presentation may erode the unspoken assumption that they are wholly irrelevant to our legal system. Lawyers always have to balance the classic dilemma of when to advance an argument that may lose, and therefore create bad precedent, against the consideration of bringing the argument and beginning to build a basis for a change in law. That is a judgment that has to be made on a case by case basis, but it should not lead us to shrink from introducing human rights norms into our litigation.

Domestic civil rights groups in the United States are begin-

ning to awaken to the significance of international human rights norms and covenants such as the Race Convention. And it is not only race. Obviously it is gender, disability, national origin, religion, and all of the covenants that we are talking about here at this Conference.

In a letter to Secretary of State Warren Christopher,⁷¹ the Legal Defense Fund, prodded by other activists, joined two prominent international human rights organizations, the International Human Rights Law Group and Human Rights Watch. The letter expressed concern over the United States ratification package which appeared designed to minimize the treaties impact on United States law and practice, and to insulate our legal system from international legal scrutiny.⁷² The letter noted that the United States ratified the Convention with the declaration that it is "non-self-executing" and urged that it was nonetheless binding on the United States.⁷³ The State Department has yet to issue its report. It is long overdue and this is under an administration that is supposed to have a high degree of consciousness. Of course what we have learned is that when you get your friends in government it is sometimes a mixed blessing. You may not criticize them in a way you criticize the people who are your adversaries when they are in office. But these issues and many others are much too important to let our friends off the hook. We have to press now while they are in office because chances are we will get a better result, I would hope, than when they are not. But also because its the right thing to do.

Efforts like these are perhaps the most productive at changing the expectation about the relevance of international human rights law to the United States. Presently, any expectation that the Federal Judiciary will find the Race Convention or other conventions to be applicable in Courts of the United States is probably unrealistic. We can barely hold on to the positive law that we have established under domestic law without expecting these judges to expand international rights. But without a change in the political discourse which positions the United States as a ratifying signatory state to the convention with attendant obligations, the Race Convention will have little domestic effect. That change, however slowly, will come.

⁷¹ Letter from NAACP Legal Defense Fund, to Secretary of State Warren Christopher (1995) (on file with author).

⁷² *Id.*

⁷³ *Id.*

In a world where national boundaries have been eclipsed by a global economy that requires international and supranational economic pacts, and in a world in which the demographics are changing nations, people are migrating across borders in ways that we never have before, walls erected to keep international human rights norms at bay will become an anomaly. They eventually will shrink in their effectiveness, until they become obsolete. They will be overrun, they will crumble, going the way of all such walls which are erected to keep people from greater freedom. Meanwhile, it is our task to work not only as lawyers, and perhaps not primarily as lawyers, but rather in our roles as activists. This is a different role I think, often it is anyway, to bring about a change in social discourse in the United States.

I started out as a civil rights lawyer focused on race in the United States and quickly found out that I cannot be confined to concern about race, if only because my own self interest would not allow me to be concerned only about race. Because for example, laws made in the area of gender discrimination would also be applicable to race. So, if I was that narrow minded certainly my self interest should move me beyond sole consideration of what appears to apply to me. But also because in time I came to see that it is not enough to be against racism because one happens to be an African-American. It is not enough to be against sexism because one happens to be a woman. It is not enough to be against anti-Semitism because one happens to be a Jew. One has to be opposed to all of these "isms" because they are wrong. And if we are not opposed to them because they are wrong, then we have no moral claim to ask other people to join us in our struggle. And if we cannot ask others to join us in our struggle, we cannot build the coalitions that are necessary to win our struggles. And then when we grow beyond those domestic concerns, which are artificial, we find out that those "isms" are worldwide concerns. And when we travel to other nations and meet other people so that they do not appear to be strange foreigners, viewed only in celluloid clips, but rather they are flesh and blood human beings who share the same goals and aspirations, wants and desires, passions and love and hate as we do, then you find out that there is only one world and that it is utterly insufficient for us to think of ourselves as civil rights lawyers, civil rights activists, as those who are interested only in domestic issues. We have to be concerned about global issues and about justice beyond our immediate persons, our immediate selves, our communities, our families, even our borders.

One of the great opportunities of my life has been the opportunity to travel throughout Europe, Africa, and through some parts of Asia, and to work with other people who share the common spirit of commitment to social and economic justice. It has been one of the most invigorating and inspiring things that I have done. When I was in Japan recently, I was sitting with some folks who were working as activists on employment issues. I could not speak a lick of Japanese. They could speak some English and understand what I was saying. The bottom line was they were my kind of people. In fact, they were my people even though they were different ethnically and physically and they spoke a different language. I recognized them, I related to them, I understood them. And they were different from the other kind of people who I also recognized when I was over there who were committed to economic privilege as their priority. I think that the twenty first century is going to be an exciting time and as we see increased globalization this is going to be the issue. This and economic justice are going to be the issues on which we struggle and fight. We are very fortunate to be part of that struggle.

W.E.B. DuBois wrote a wonderful poem entitled "Credo"⁷⁴ which states, "I believe in the Prince of Peace. I believe that War is Murder. I believe that armies and navies are at bottom the tinsel and braggadocio of oppression and wrong; and I believe that the wicked conquest of weaker and darker nations by nations whiter and stronger but foreshadows the death of that strength."⁷⁵ He wrote that almost a hundred years ago and it is still true. This is our struggle and it is one that we cannot win if we think of ourselves only as Americans.

⁷⁴ W.E.B. DuBois, *Credo*, THE INDEPENDENT, OCT. 6, 1904, at 787, reprinted in W.E.B. DuBois: A READER 105 (David Levering Lewis ed. 1995).

⁷⁵ *Id.* at 105.