

RACIAL DISCRIMINATION IN THE LEGAL PROFESSION

Response to the Periodic Report of the United States of June 12, 2013, accompanied by the
Common Core Document and Annex submitted on December 30, 2011, to the United Nations
Committee on the Elimination of Racial Discrimination

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¹ For more than forty years, the Society of American Law Teachers (SALT) has been one of the United States' largest membership organizations for teachers of law. SALT has a three-part mission: 1) creating and maintaining a community of progressive and caring law professors dedicated to making a difference through the power of law; 2) promoting the use of many forms and innovative styles of teaching to make our classrooms more inclusive; and 3) challenging faculty and students to develop legal institutions with greater equality, justice, and excellence. We appreciate the invaluable research assistance provided by Haley Etchison, Jesse Medina, Matthew Talley, Aradhana Tiwan, and Niyah Walters.

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I. Summary of the Issue

1. Notwithstanding the election of an African-American as President of the United States, federal, state, and local level hurdles of a public and private nature to the elimination of all forms of racial discrimination² have been relentlessly erected or enhanced, and at an accelerating pace. Since our February 2008 Human Rights Network response on Racial Discrimination in the Legal Profession to the Second Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination, these increasing hurdles continue to slow and erode the meaningful participation of racial minorities in all aspects of United States life.

² SALT is well aware of issues of inter-sectionality/multi-dimensionality with regard to combinations of race, gender, disabilities, national origin, and sexual orientation and other status that may further exacerbate the experience of racial discrimination in the context of the legal profession. It is sometimes difficult to tease out whether a particular form of discrimination is primarily of a racial nature or capture the experience of a combination of discrimination along different vectors but oppressing a single person. To the extent the CERD can show some sensitivity in its review of the United States to these types of what might be called multi-vector racial discrimination that may overlap with concerns under other human rights treaties or customary international law, it assures a comprehension of the plenitude of the oppression confronted by racial minorities.

Although ICERD focuses on the prevention, prohibition, and elimination of all forms of racial discrimination and xenophobia, both the CERD and U.S. legal scholars have recognized the significance of multiple forms of discrimination. For example, CERD has recognized compound discrimination on the basis of race and gender (General Recommendation 25, Gender Related Dimensions of Racial Discrimination (Fifty-sixth session, 2000), U.N. Doc. A/55/18, annex V at 152 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 214 (2003).) and has clarified that the treaty does not permit racial discrimination and other violations of human rights against non-citizens (General Recommendation 30, Discrimination against Non-citizens (Sixty-fourth session, 2004), U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004). African-American lawyer and diplomat Gay McDougall, a former member of the CERD, took the lead in elaborating on the implications of complex racial identities. Language in the most recently adopted core international human rights treaty, the Convention on the Rights of Persons with Disabilities, explicitly recognized, and rejects the severe effects compound discrimination can have on individuals and groups. The drafters of the CERD were motivated in part by the desire to end compound discrimination:

"p. Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status,..." (Preamble, paragraph p.) <http://www.un.org/disabilities/default.asp?id=199>

Legal education and the broader community benefit from other forms of diversity among people of color, such as class differences, gender, sexual orientation, language, ethnicity, disability, and religious differences. Law students and legal educators of color are also men, women, transgender persons, persons with disabilities, and come from both working-class and elite backgrounds. The diversity of backgrounds and experiences and perspectives among law students and law teachers of color enriches legal scholarship and training and contributes to broader efforts to end racial discrimination. Unfortunately, however, others see the multidimensionality among people of color as reason to further compound discrimination and exclusion. (See, e.g., *Presumed Incompetent: The Intersections of Race and Class for Women in Academia*, Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. González, Angela P. Harris, Eds., (University of Utah Press, 2013) ((perspectives of women of color in higher education)). There is a significant need for further study in this area, since disaggregated data is often unavailable. It could be difficult to distinguish, for example, the extent to which a Latina law professor who has a visible disability experiences discrimination on the basis of her ethnicity, gender, disability, or all three.

2. In the United States, racial minorities confront explicit and implicit bias amounting to race discrimination in education and in employment, and lack of equality before the law, and in the administration of justice. Such discrimination undermines the effectiveness of legal education and the legal profession in their broader roles in promoting social justice community-wide.

3. Whether through purposive indifference, open hostility, or the combined actions of public and private actors – and notwithstanding the efforts of many individuals and organizations to work to advance racial justice – on the whole, since our last report, the meaningful inclusion of racial minorities in the United States legal profession has become less attainable as the United States accelerates its retreat from racial justice.

4. The under-representation of racial and ethnic minorities in U.S. legal education, the federal government's misuse of its accreditation power, the U.S. Supreme Court's dramatic retreat from the effort to address racial discrimination through its decisions eroding race-conscious affirmative action while enshrining majority rule through its decisions in favor of states' rights in our federal governmental structure³ (burdening both minority voting rights and meaningful minority participation in their governance through letting stand a state ban of race-conscious affirmative action), the state and local government perpetuating of structural disparities of a public and private nature that inure to the detriment of racial minorities implicate the several provisions of the ICERD as described in detail below.

5. The ongoing under-representation raises concerns about the rights of racial minorities to education and training under Article 5(e)(v). It also implicates Article 5(a), as the exclusion of minorities from the legal profession negatively impacts the equal treatment of the under-represented communities before tribunals and other justice organs. The problem of under-representation similarly jeopardizes the United States' compliance with the Article 6 right to effective protection and remedies. Because a legal education is an important entry route into political office, minority under-representation also affects Article 5(c) political rights.

6. As described below, the United States government's use/misuse of its law school accreditation power is worsening the situation. The government's actions implicate a cluster of Convention protections requiring that ratifying states address situations of *de facto* discrimination and inadequate development, including: 1) the Article 1(4) requirement of special measures for "adequate advancement" to ensure equal enjoyment of human rights and fundamental freedoms; 2) the Article 2(1) requirement that the government condemn and eliminate discrimination and to promote understanding; 3) the Article 2(2) mandate of special concrete measures to ensure adequate development and protection of certain racial groups or individuals belonging to them; and 4) Committee Recommendation XIV calling for an end to practices and legislation that are discriminatory in effect, if not in purpose.

7. With regard to racial minorities in the legal profession, the consequence of this deteriorating situation is to place the United States in material breach of its obligations under the International Convention on the Elimination of all Forms of Racial Discrimination.

³ In Annex A we provide a short primer on U.S. federalism and the ICERD prepared at the request of the U.S. Human Rights Network.

8. While we welcome the United States' periodic report of June 12, 2013 and Common Core Document and Annex submitted on December 30, 2011, our primary concern with it is structural. The report provides in detail specific activities related to particular aspects of compliance by the federal, state, and local levels with the ICERD. It lacks a more systemic vision that takes into account what the Executive, Legislative and Judiciary are doing at the federal and state level to ensure compliance with these treaty obligations. It does not provide the history that directly impacts the state of U.S. compliance with these international obligations. As a consequence, the CERD runs the risk of having a piecemeal understanding of the complexities of compliance with the ICERD in the United States. Through our lens of Racial Discrimination in the Legal Profession, we hope to provide the CERD a more holistic understanding of the interplay of discrete aspects of the U.S. domestic experience with the diversity of the legal profession. It is the interwoven nature of discrete policies that might on their face appear neutral that will help the CERD better understand how serious is the situation in the United States.

II. Legacy of U.S. Apartheid⁴

9. The serious under-representation of racial minorities in the legal profession arises from a significant negative national legacy of slavery and apartheid coupled with continuing adverse developments on education prior to legal education, legal education and entrance into the legal profession, and experiences of racial minority lawyers.⁵ The following section lays out the pernicious economic and social consequences for racial and ethnic minorities during the era of U.S. slavery and post-slavery apartheid, which had a devastating impact on educational opportunities for racial minorities.

10. The crimes committed by the United States government against African-Americans did not terminate with the end of slavery in 1865, but rather were continued and perpetuated by a legal system of apartheid instituted in over 16 U.S. states by law. This system of apartheid extended to such basic functions of society as schools,⁶ transportation,⁷ housing,⁸ use of public

⁴ Although this term originated in a country-specific context to refer to the systematic racial segregation policies of South Africa and Rhodesia, it has also developed into a more broadly used term, as seen by its use in the UN World Conference Against Racism Declaration and the UN Convention Against Apartheid.

⁵ This holistic approach, starting with pre-kindergarten, to examine the legal profession is consistent with the approach of the American Bar Association Council for Racial and Ethnic Diversity in the Educational Pipeline. See American Bar Association Council for Racial and Ethnic Diversity in the Educational Pipeline, *Achieving Diversity in the Legal Profession through the Educational Pipeline*, 35 (August 2013), available at http://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/rev_diversity_in_educational_pipeline_slides_oct2013.authcheckdam.pdf [hereafter "Achieving Diversity"].

⁶ See Roy L. Brooks, *Integration or Separation: A strategy for Racial Equality*, 9 (1996); see also *Cummings v. Bd. of Educ. of Richmond Cnty.*, 175 U.S. 528, 537 (1899). In the early 1950s, the following seventeen states required racial segregation in public schools: Alabama, Arkansas, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. See National Park Service, last accessed on Aug. 5, 2012, available at <http://www.nps.gov/nr/twhp/wwwlps/lessons/121brown/121locate1.htm> (citing Kluger, Richard, *Simple Justice* (New York Vintage Books, 1977), 327. Four other states, Arizona, Kansas, New Mexico, and Wyoming permitted segregation in public schools if local communities wanted it. See National Park Service, last accessed on Aug. 5, 2012, available at <http://www.nps.gov/nr/twhp/wwwlps/lessons/121brown/121locate1.htm> (citing Jeffrey A. Raffel, *Historical Dictionary of School Segregation and Desegregation: The American Experience*, 86 (Westport, CT: Greenwood Press, 1998)).

⁷ *Plessy v. Ferguson*, 163, U.S. 537, 545 (1896) (talking about the purposes of public transportation).

spaces,⁹ the workplace,¹⁰ movement within a jurisdiction,¹¹ marriage,¹² politics,¹³ simple recreational activities such as boating,¹⁴ dining,¹⁵ intimate relations,¹⁶ libraries,¹⁷ prisons,¹⁸ circuses, ticket booths,¹⁹ blind wards,²⁰ and almost every other kind of public or private

⁸ John Yinger, *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination*, 109 (1995) (“Black and Hispanic households are far more likely than white households to live in overcrowded conditions, to live in housing with severe or moderate structural problems, or to devote an excessive share of their income toward housing). See also The Seattle Open Housing Campaign, 1959-1968, available at <https://www.seattle.gov/CityArchives/Exhibits/Housing/> (explaining that until 1968, it was legal to discriminate against minorities in Seattle when renting apartments or selling real estate). Measures that were used to prevent black families from living in white neighborhoods was the enforcement of restrictive covenants in addition to realtors unofficially agreeing not to show houses in white neighborhoods to blacks. One restrictive covenant provided, “4. No person or persons of Asiatic, African or Negro blood, lineage or extraction, shall be permitted to occupy a portion of said property, or any building thereon; except domestic servant or servants may be actually and in good faith employed by white occupants of such premises.” Deeds, Vol. 1450, page 348, April 1, 1929. King County Recorder’s Office.

⁹ See, e.g., <http://miami.cbslocal.com/2011/07/04/ft-lauderdale-remembers-wade-ins-which-ended-beach-segregation/> (Jul. 4, 2011) (“Ft. Lauderdale officials will celebrate this Fourth of July holiday by marking the 50th anniversary of an event which led to the desegregation of the city’s beach.”)

¹⁰ See *Washington v. Davis*, 426 U.S. 229 (1976) (holding that a law is not unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose when unsuccessful black applicants for employment as police officers by the District of Columbia brought suit claiming that the police department’s recruiting procedures, including a written personnel test which was racially discriminatory); see generally Tricia McTague et al., *Organizational Approach to Understanding Sex and Race Segregation in U.S. Workplaces*, 87 SOC. F. 1499 (2008-2009) (doing thorough analysis of race segregation and its institutionalization in private sector workplace in the post-Civil Rights Act era based on data collected by the U.S. Equal Employment Opportunity Commission from 1966 through 2000).

¹¹ Code, City of Miami Beach, Florida, Ordinance No. 2012-3775, available at <http://library.municode.com/index.aspx?clientId=13097>.

¹² *Loving v. Virginia*, 388 U.S. 1, 2-5 (1967); *Loving v. Com.*, 206 Va. 924, 927 (1965), reversed by *Loving v. Virginia*, 388 U.S. 1 (“[A] state is empowered to forbid marriages between persons of African descent and persons of other races or descents . . . there is an overriding state interest in institution of marriage.”).

¹³ See Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law from 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207, 237-40 (2006) (reviewing development in the different states of black men’s political rights since the 18th century and until the Voting Rights Act of 1965 as well as describing the pervasive and recurrent abridgment of such rights during that period); see also Gabriel J. Chin, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L.L. REV. 65 (2008) (positing that although African-Americans were a minority nationally, they constituted majorities in the some states but, as a result of unconstitutional acts carried out by conservative minorities, they were deprived of their democratic rights).

¹⁴ See, e.g., <http://www.ferris.edu/jimcrow/what.htm>. (“In 1935, Oklahoma prohibited blacks and whites from boating together because it would imply social equality.”)

¹⁵ *U.S. v. Boyd*, 327 F.Supp. 998, 999-102 (S.D. Ga. 1970) (requiring a barbeque restaurant in Georgia utilize front dining for all patrons, including white and black customers).

¹⁶ Martin Luther King, Jr. National Historic Site, available at http://www.nps.gov/malu/forteachers/jim_crow_laws.htm.

¹⁷ See, e.g., <http://www.ferris.edu/jimcrow/what.htm>; Martin Luther King, Jr. National Historic Site, http://www.nps.gov/malu/forteachers/jim_crow_laws.htm.

¹⁸ See, e.g., <http://www.ferris.edu/jimcrow/what.htm>; Martin Luther King, Jr. National Historic Site, http://www.nps.gov/malu/forteachers/jim_crow_laws.htm.

¹⁹ Martin Luther King, Jr. National Historic Site, available at http://www.nps.gov/malu/forteachers/jim_crow_laws.htm.

²⁰ See, e.g., <http://www.ferris.edu/jimcrow/what.htm>; Martin Luther King, Jr. National Historic Site, http://www.nps.gov/malu/forteachers/jim_crow_laws.htm

accommodation.²¹ In Alabama, it was even illegal for whites and blacks to play dominoes or checkers together.²²

11. The pervasiveness of apartheid in the educational context is illustrated by a North Carolina law that prohibited schools from using books used by the other race.²³ Thus, African-Americans were prohibited from obtaining used, presumably inferior, schoolbooks discarded by the better-financed white school districts. This all-encompassing system of legalized separation of the races occurred with the legal approval and/or acquiescence of the federal judicial and political system.

12. Over two hundred years of slavery had deprived African-Americans of the resources, familial economic legacies, and education to compete effectively against a hostile majority of European origin. However, the effects of slavery were left unsettled and exacerbated by apartheid through the systematic denial of equal protection in education.

13. During the United States' apartheid era, government actions deprived African-Americans of the little they possessed following 200 years of enslavement. State officials and private individuals used both legal and illegal means to deprive African-American farmers of land.²⁴ Those farmers were removed from their property and were forced to turn to sharecropping, where they remained in servitude to white plantation owners.²⁵ Some towns prohibited African Americans from purchasing farming tools or agreed only to sell them farming tools at usurious interest rates that consequently forced many African American farmers to sell their entire harvest to whites.²⁶

14. In this context, sharecropping arrangements between white landowners and dispossessed or landless freedmen gained momentum.²⁷ Illiterate freedmen would contract with plantation

²¹ Rachel F. Moran, *Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2368 (2003) (explaining that even in 1990, judges consistently set higher bail for nonwhite defendants than for comparable white defendants) (citing Ian Ayres, *Pervasive Prejudice?: Unconventional Evidence of Race and Gender Discrimination*, 239-40, 263-73 (2003)).

²² See, e.g., <http://www.ferris.edu/jimcrow/what.htm>. Martin Luther King, Jr. National Historic Site, http://www.nps.gov/malu/forteachers/jim_crow_laws.htm.

²³ National Park Service, Martin Luther King Jr. National Historic Site, "Jim Crow Laws" n.d. ("Books shall not be interchangeable between the white and colored schools, but shall continue to be used by the race first using them."). Available at http://www.nps.gov/malu/forteachers/jim_crow_laws.htm. Last accessed on June 25, 2014.

²⁴ See Gerene L. Freeman, *What about my 40 Acres and a Mule?*, Yale-New Haven Teachers Institute, available at <http://www.yale.edu/ynhti/curriculum/units/1994/4/94.04.01.x.html>. On February 5, 1866, the Freeman's Bureau Act was defeated by Congress by a vote of 126 to 36. Lands which had been distributed to freedmen were reclaimed and returned to previous owners. (citing Martin Luther King, *Why We Can't Wait*, New York, NY: Harper & Row Publishers, 1963). See also Martin Luther King, Jr. National Historic Site, *supra* note 17. The victorious Northern states' interests played a significant role in the failure of the federal government to effectively provide land for freedmen. After the Civil War, the industrial Northern states expected to expand the cotton industry and regain prominence in the international market. Freed slaves viewed cotton culture as a "badge of slavery" and thus, many of them were not willing to cultivate cotton, preferring cash agricultural products they could directly sell in the domestic market. *Id.*

²⁵ See Charles J. Ogletree Jr., *From Brown to Tulsa: Defining Our Own Future*, 47 HOW. L.J. 499, 502.

²⁶ *Id.*

²⁷ Jennifer T. Manion, *Cultivating Farmworker Injustice: The Resurgence of Sharecropping*, 62 OHIO ST. L.J. 1665, 1668 (2001).

owners to use a tract of land for agricultural purposes, giving to the owners a percentage of the crops cultivated in exchange.²⁸ Freed slaves, without capital to purchase land or agricultural tools, would end up agreeing to unfair terms that indebted them to the land owners, thus falling into a bond of servitude not substantially different from slavery.²⁹

15. Southern states enacted Black Codes and engaged in the practice of “convict leasing,” creating yet another economic disadvantage for blacks.³⁰ For example, states enacted vagrancy laws between 1893 and 1909 that permitted the authorities to arrest blacks for minor crimes such as “idleness” or “immorality.”³¹ Following their arrest, the authorities would allow white farmers to pay the arrestees’ fines and court costs in exchange for working off their fines at a menial wage.³² In addition to requiring blacks to work off their fines and costs, the white farmers would charge the arrested blacks numerous fees for food and lodging. It was nearly impossible for the arrested blacks to pay off their costs, continuing a seemingly endless state of servitude.³³ Though often overlooked, the system of convict leasing continued well into the twentieth century.³⁴ In some cases, similar practices continue *today* in certain Southern states. In Georgia, for example, some local governments have “outsourced” supervision of misdemeanor and traffic violations, resulting in continuing indebtedness as fines that multiply over time, payable to private companies with local government connections.³⁵

While discrimination against African Americans was rampant throughout the southern states, the northern states were not immune to the process.³⁶ In the northern states, African Americans faced “substantial discrimination in employment, housing, and access to credit.”³⁷ For instance, newly arrived European immigrants were given preference for employment over blacks.³⁸ Restrictive

²⁸ *Id.* at 1667.

²⁹ *Id.* at 1671.

³⁰ See Douglas L. Colbert, *Challenging the Challenge: Thirteen Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 39–43 (1990).

³¹ William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 31, 47, 53 (1976).

³² *Id.* at 45.

³³ *Id.* at 47, 51, 53.

³⁴ *Id.* at 53.

³⁵ See, e.g., <http://www.motherjones.com/politics/2008/07/probation-profiteers>. (“Middle Georgia Community Probation Services is one of 37 companies to whom local governments have outsourced the supervision of misdemeanor and traffic offenders. It's been billed as a way to save millions of dollars for Georgia and at least nine other states where private probation is used. But to its critics, the system looks more like a way to milk scarce dollars from the poorest of the poor. Here's how it works: If you have enough money to pay your fine the day you go to court for, say, a speeding ticket, you can usually avoid probation. But those who can't scrape up a few hundred dollars—and nearly 28 percent of America's residents live below the poverty line—must pay their fine, as well as at least \$35 in monthly supervision fees to a private company, in weekly or biweekly installments over a period of three months to a year. By the time their term is over, they may have paid more than twice what the judge ordered.”) See also <http://www.cnn.com/2003/US/Southwest/10/29/chain.gang.reut/>. (“Sheriff Runs Female Chain Gang” where female inmates, subject to harsh jail conditions may volunteer for chain gang duty to get out of lock-down. Four prisoners are shut in a cell 8 by 12 square feet 23 hours a day. If they spend 30 days on the chain gang, picking up trash, weeding or burying bodies, they can get out of the punishment cells and back to the tents under the blazing Arizona sun in temperatures which sometimes exceeded 120 degrees.)

³⁶ Roy Beck, *The Case Against Immigration: On the Backs of Black Americans: The Past*, MINNESOTANS FOR SUSTAINABILITY (1996), available at http://www.mnforsustain.org/immg_beck_r_case_against_immigration_chp8.htm.

³⁷ Waterhouse, *supra* note 13, at 245 (citing Joe R. Feagin, *Racist America: Roots, Current Realities and Future Reparations* (2000)).

³⁸ Beck, *supra* note 36.

covenants prohibiting the sale of homes to blacks were found to be constitutional and were routinely upheld by courts³⁹ until the 1948 decision in *Shelley v. Kraemer*.⁴⁰

16. The federal government was an active participant in the economic subordination of African Americans through the organization of federal programs and employment policies.⁴¹ For instance, President Wilson lawfully instituted policies of segregation in federal employment in 1913 and perpetuated the discriminatory policies of the military that prevented decorated black soldiers from moving up the ranks.⁴² Blatant discrimination against African Americans continued in employment, housing, and federal funding.⁴³ While much of the country was receiving governmental assistance during difficult economic times though federally funded New Deal programs, African Americans were excluded from important assistance.⁴⁴ For example, special financial assistance was provided to farmers and business owners during the Great Depression, but denied to African-American farmers.⁴⁵ The Federal Housing Administration openly discriminated against blacks in obtaining housing subsidies and supported racist restrictive covenants that prevented African-Americans from purchasing homes.⁴⁶

17. As a part of this system, *de jure* segregated schools in large portions of the United States and *de facto* segregated schools in much of the rest of the United States created the possibility of targeting schools for differential funding and resources based on their racial demographics. The state implementation of apartheid in the educational context was complete in former slave states and pervasive in the rest of the country.⁴⁷ Oklahoma state law even criminalized White American teachers educating African Americans.⁴⁸ As noted earlier, North Carolina law prohibited the use of schoolbooks by one race that were previously used by another race.

III. Discrimination Today in U.S. Elementary, Secondary and College-Level Education

A. Elementary and Secondary Education

³⁹ Waterhouse, *supra* note 13, at 245.

⁴⁰ 334 U.S. 1 (1948) (holding that state court enforcement of restrictive covenants which has as their purpose the exclusion of persons of designated race or color from ownership or occupancy of real property could not be justified on ground that there were no denial of equal protection of law because state courts stand ready to enforce restrictive covenants excluding white persons from ownership or occupancy of property covered by such agreements.).

⁴¹ See generally Feagin, *supra* note 35, at 179–85.

⁴² See PHILIP RUBIO, A HISTORY OF AFFIRMATIVE ACTION: 1619-2000, 82 (2001).

⁴³ Feagin, *supra* note 37, at 181–82; John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, 32 LAW & SOC. INQUIRY 399, 400 (2007).

⁴⁴ See DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001).

⁴⁵ Feagin, *supra* note 37, at 181–82.

⁴⁶ *Id.*; see also Leland Ware, *Charters, Choice, and Resegregation*, 11 DEL. L. REV. 1, 15 (2009).

⁴⁷ Jim Crow Laws, NATIONAL PARK SERVICE, available at http://www.nps.gov/malu/forteachers/jim_crow_laws.htm (citing various state laws prohibiting intermarriage between White and Black Americans in states including, *inter alia* Arizona, Florida, Georgia, Maryland, Mississippi, Missouri, Wyoming, providing separate education for White Americans and Black Americans in Texas, New Mexico, Mississippi, and Florida).

⁴⁸ *Id.*

18. The United States offers significantly lower quality elementary and secondary education to poor people, including, disproportionately, racial minorities. The following negative experiences characterize the treatment of racial and ethnic minority children starting as early as age three in the elementary schools and continuing through high school: (1) unreasonably harsh disciplinary practices,⁴⁹ (2) housing racial segregation putting particularly Indigenous, black and Hispanic students in modestly funded public schools in poorer districts with weaker teachers,⁵⁰ (3) diversion of public funds to privately run schools (“the charter school experiment in public education”) as part of a consistent national effort to weaken the political power of public sector unions,⁵¹ and (4) even in integrated schools, the tracking of racial minority students into classes and coursework that are not college preparatory. These are just some of the direct ways in which racial minorities are underprepared for college level work and, beyond that, admission to legal education.

⁴⁹ Some of the key findings with respect to race were: (1) Black students represent 18% of preschool enrollment but 42% of students suspended once, and 48% of the students suspended more than once. (2) Access to advanced courses. Eighty-one percent (81%) of Asian-American high school students and 71% of white high school students attend high schools where the full range of math and science courses are offered (Algebra I, geometry, Algebra II, calculus, biology, chemistry, physics). However, less than half of Indigenous high school students have access to the full range of math and science courses in their high school. Black students (57%), Latino students (67%), students with disabilities (63%), and English language learner students (65%) also have less access to the full range of courses. (3) The 2011-2012 release shows that access to preschool programs is not a reality for much of the country. In addition, students of color are suspended more often than white students, and black and Latino students are significantly more likely to have teachers with less experience who aren't paid as much as their colleagues in other schools. *Expansive Survey of America's Public Schools Reveals Troubling Racial Disparities*, March 21, 2014, U.S. Department of Education Office of Civil Rights Press Release available at <http://www.ed.gov/news/press-releases/expansive-survey-americas-public-schools-reveals-troubling-racial-disparities>

⁵⁰ “Put simply, the market penalizes integration: The higher the percentage of blacks in the neighborhood, the less the home is worth, even when researchers control for age, social class, household structure, and geography.” Dorothy Brown, *How Home Ownership Keeps Blacks Poorer than Whites*, *Forbes.com*, December 10, 2012, available at <http://www.forbes.com/sites/forbesleadershipforum/2012/12/10/how-home-ownership-keeps-blacks-poorer-than-whites/>.

⁵¹ “There are estimated to be over 6,000 charter schools serving about 2.3 million students in the 2012-2013 school year. This represents an 80 percent increase in the number of students enrolled in charter schools since..2009,” *National Charter School Study 2013*, Center for Research on Education Outcomes, Stanford University. “(o)n the update of the 2009 16 state analysis) Black charter students, meanwhile, had lower learning gains than their TPS (traditional public school) counterparts in 2009 but similar learning gains to TPS by 2013. Learning gains for Hispanic students were slightly improved in 2013 for both reading and math. However, learning gains for Hispanic students are still lower at charters in the 16 states than at TPS.” *Id.* at 44. (On the expanded 27 state analysis) “Based on our analyses, we found 25 percent of charter schools had significantly stronger growth than their TPS counterparts in reading, 56 percent were not significantly different and 19 percent of charter schools had weaker growth. In math, the results show that 29 percent of charter schools had stronger growth than their TPS counterparts, 40 percent had growth that was not significantly different, and 31 percent had weaker growth. These results are an improvement over those in the 2009 report, where we found that only 17 percent of charters outperformed their TPS market in math while 37 percent performed worse.” *Id.* at 56. Moreover, the true intent behind these movements is of great concern to minority communities. See, Valerie Strauss, *Ed school dean: Urban school reform is really about land development (not kids)*, *The Washington Post*, May 28, 2013, available at <http://m.washingtonpost.com/blogs/answer-sheet/wp/2013/05/28/ed-school-dean-urban-school-reform-is-really-about-land-development-not-kids/>; Further weakening of the financial power of public sector unions occurred on June 30, 2014 when the Supreme Court in a 5-4 decision on First Amendment constitutional grounds limited the power of public sector unions to collect agency fees from non-union member partial public employees for the costs for the union of representing said employees in collective bargaining negotiations with the state. See *Harris v. Quinn*, 573 U. S. ____ (Slip Opinion 2014) available at http://www.supremecourt.gov/opinions/13pdf/11-681_j426.pdf

19. The United States' property-tax-based system of public school financing encourages and exacerbates these disparities. In this system, higher income localities are able to provide significantly more resources to their local schools and students than are lower income localities, with schools that are overwhelmingly made up of segregated racial minorities. In a period of budgetary challenges for state educational funding as well as budgetary challenges for federal assistance to primary and secondary education, these locality-based disparities are made more vivid. Their effect is to decrease the probability that these racial and ethnic minority students housed in essentially poorer segregated neighborhoods and poorer schools will have access to the resources to assure their educational preparation relative to their peers at the elementary and secondary school levels. They are therefore less likely to be prepared for college, and consequently less competitive at the law school level.

i. The Impact of Residential Resegregation, Racially Polarized Voting and Redistricting, and "Second-Generation" Bars to Voting by Racial Minorities on Educational Funding

20. This Report has also discussed the impact of elementary education on higher education, including law school. This section of SALT's Report examines the impact of recent legal developments on educational funding impacting racial and ethnic minorities.

21. Those consequences, however, have only been aggravated by recent developments in United States jurisprudence and state legislation. As noted in Section III.B. of this Shadow Report, U.S. Supreme Court decisions and some state laws have prevented efforts to affirmatively remedy the effects of U.S. apartheid on the educational opportunities of U.S. racial and ethnic minorities.⁵² This section will discuss how residential Resegregation, and the increase in racially polarized voting and redistricting, and the growth of "second-generation" bars to voting by racial and ethnic minorities have impacted educational funding for these groups.

ii. De Facto Educational and Housing Resegregation and its Impact on Education

⁵² **Article 1**

1. In this Convention, the term "racial discrimination" shall mean 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.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

22. After the end of *de jure* segregation in both schools and housing, and a relatively short period of desegregation, both housing and education became *de facto* re-segregated to an extent that targeting schools for differential funding and resources based on their racial makeup became both possible and prevalent,⁵³ violating, inter alia, ICERD, art. 5.⁵⁴ The majority of school districts' revenue is generated through local property taxes. Therefore, residential segregation directly translates into differential revenue for districts that are composed of predominately racial and ethnic minority residents to the extent that these minorities generally generate lower property tax revenue.⁵⁵ This issue specifically arose in *San Antonio Independent School District v. Rodriguez*,⁵⁶ in which the Supreme Court ruled that substantially different expenditures on education among school districts that were closely correlated with the racial and ethnic makeup of the school district did not violate the Equal Protection Clause. In doing so, the Supreme Court overruled the district court that had found such differing educational funding levels violated the Equal Protection Clause.⁵⁷ The rule established in *San Antonio v. Rodriguez* continues to this day.

23. *San Antonio v. Rodriguez* illustrates the connection between residential and educational segregation and educational funding. A more recent Supreme Court case illustrates that even when jurisdictions attempt to voluntarily remedy the resegregation of their schools through nominally race-conscious measures, such efforts will now be held unconstitutional. In the case *Parents Involved in Community Schools v. Seattle School District No. 1*,⁵⁸ two school districts that had been previously *de jure* segregated⁵⁹ were prohibited from taking the very same measures to desegregate that would have been previously constitutionally required by the Supreme Court in *Brown v. Board of Education*. As Justice Breyer's dissent in *Seattle* noted, "*de*

⁵³ See George Farkas, *Racial Disparities and Discrimination in Education: What Do We know, How Do We Know It, and What Do We Need to Know?* 105 TEACHER'S COLLEGE RECORD 1119, 1119-1146 (2003).

⁵⁴ Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(e) Economic, social and cultural rights, in particular:

(v) The right to education and training;

⁵⁵ See Farkas, *supra* note 53, at 1134. ("School districts with relatively high concentrations of Latino and African American families tend also to be districts with relatively weak tax bases and lower educational expenditures per pupil.").

⁵⁶ 411 US 1 (1973).

⁵⁷ *Id.* at 16 ("Substantial inter-district disparities in school expenditures found by the District Court to prevail in San Antonio and in varying degrees throughout the State still exist. And it was these disparities, largely attributable to differences in the amounts of money collected through local property taxation, that led the District Court to conclude that Texas' dual system of public school financing violated the Equal Protection Clause.")

⁵⁸ 551 U.S. 701 (2007).

⁵⁹ The two districts involved in the case, the Seattle, Washington school district and the Louisville, Kentucky school district, had both been previously *de jure* segregated, with Louisville under a court order to desegregate and Seattle under threat of a court order. In Seattle, segregation was effectuated through school board policies and actions, *Id.* (Breyer, J., dissenting), at 812, whereas in Louisville segregation was effectuated through state law. *Id.* at 814.

facto resegregation is on the rise.... It is reasonable to conclude that such resegregation can create serious educational, social, and civic problems.”⁶⁰ Justice Breyer concluded by noting that the Supreme Court was turning its back on its most famous desegregation opinion:

[T]he very school districts that once spurned integration now strive for it. The long history of their efforts reveals the complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.

The plurality is wrong to do so. The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality’s position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.⁶¹

24. In addition to resegregation of existing public schools, predominately white private schools proliferated in response to integrated schools,⁶² and the percentage of the public school population that was minority increased substantially.⁶³ Thus, *de facto* segregation increased not only within the public school system, but also as a result of the growing development of primarily white private education and increasingly minority public education. As the next section illustrates, this educational segregation has been accompanied by racially polarized voting, redistricting,⁶⁴ and membership in the respective political parties.⁶⁵ With Republican

⁶⁰ *Id.* at 861-62.

⁶¹ *Id.* at 868.

⁶² See Erica Frankenberg, Genevieve Siegel-Hawley, & Jia Wang, *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards*, UCLA CIVIL RIGHTS PROJECT, 31 (Jan. 2010), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenbergs-choices-without-equity-2010.pdf> (“Charter schools in some of the most diverse states may be as [sic] a less diverse alternative for white students.”); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 283 (1999); See also Danielle Holley-Walker, *A New Era for Desegregation*, 28 GA. ST. U. L. REV. 423, 451 (“Some suburban opponents [of private school voucher programs] fear that vouchers will allow minority and poor children to enter their schools. Due to their limited adoption and use, school vouchers will not likely promote increased racial integration of the public schools and will likely not be seen as a desegregative tool.”) (footnotes omitted); Harvard Law Review Association, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 Harv. L. Rev. 1072, 1082 (1991) (“[C]oncerned parents often have availed themselves of a substitute good for the noncollective benefit, such as schools in costlier suburbs or private schools, thereby further diminishing the possibility for collective action.”).

⁶³ Ryan, *supra*, at 282-83 (“Cities that have undergone city-only desegregation plans generally have also experienced greater degrees of white flight than have cities involved in a metropolitan-wide desegregation plan. Although the evidence concerning the precise degree of comparative white flight varies, one study indicates that city school districts lose up to twice the number of white students that countywide districts lose when desegregation plans are implemented.”) (footnotes omitted).

⁶⁴ *Shelby County, Ala. v. Holder*, 133 S.Ct. 2612, 2634-35 (2013) (hereinafter *Shelby County*) (Ginsburg, J., dissenting).

⁶⁵ Gallup Politics, *U.S. Whites More Solidly Republican in Recent Years*, (Mar. 24, 2014), <http://www.gallup.com/poll/168059/whites-solidly-republican-recent-years.aspx>.

representatives representing largely white districts, their incentive to support public school funding at either the state or local level diminished as their own constituencies increasingly abandoned the public school system. On a local level, the increasing racial polarization has aggravated the already severe problems of unequal educational funding identified in *San Antonio v. Rodriguez*.

25. In addition to the public funds allocation decisions, private ordering exacerbates these problems of both income and racial segregation. Market-based private ordering in the United States appears to demonstrate that as more racial minorities are present in a given neighborhood, the valuation premium for a house in a given neighborhood declines.⁶⁶ Put another way, the market systematically provides a higher valuation to neighborhoods with lower black presence (estimated as under 10 percent). Through the property-tax-based school financing scheme common across the United States, higher valuation neighborhoods are in turn more able to provide resources for the funding of elementary and primary education. The market's message is clear: if racial minorities are discouraged from living in a neighborhood, each homeowner is better able to preserve the value of his or her house – a principal asset of many people in the United States. The obvious result is that racial minorities are concentrated – whatever their wealth level – in housing patterns that preserve valuations of essentially majority-only localities.

26. Even when majority persons seek bargain housing by moving into minority-concentrated neighborhoods through a process described as gentrification, at key tipping points racial minorities are both 1) priced out of neighborhoods through housing and rent price increases where majority persons enter, and also are 2) discouraged from accessing housing as a result of the wealth effect incentive that the market provides for low minority presence in majority neighborhoods.

⁶⁶ See Brown, *supra* note 50, on how the market penalizes integration. As an example of how these public and private resegregation processes work to the detriment of the education of minority children, see Trymaine Lee, *White school district sends black kids back to failed schools*, MSNBC, June 25, 2014, (“Hundreds of mostly poor minority students who used a controversial Missouri law to transfer out of failing schools will be sent back to their home districts next school year, following a tense battle in the legislature and a slew of politically charged decisions by the department of education. The reversal puts the academic fate of some of the state’s most needy and disadvantaged students at risk. Last summer, the Missouri Supreme Court upheld an earlier ruling that allowed students from unaccredited school districts to transfer to better schools. Thousands of students from the African-American suburbs of St. Louis streamed across the border to much wealthier, white districts and better-performing schools closer to home. But the exodus triggered a number of unexpected consequences. The failing districts were financially responsible for paying all transfer-related expenses, including tuition and transportation costs. As a result, the transfers nearly crippled one school district in particular, the Normandy schools, which has paid about \$10.4 million to a dozen different school districts. The costs for the Normandy district, which is about 97% black and whose student body is deeply impoverished, forced the legislature to appropriate supplemental funding to keep it afloat. Attempts by the legislature to tweak the law to alleviate some of the burdens placed on schools by the transfer law were stymied when Gov. Jay Nixon, a Democrat, threatened to veto a proposed bill. The legislature’s intransigence forced the issue back to the state board of education. The board recently voted to replace the Normandy School District with a new district, the Normandy Schools Collaborative, effective July 1. The new district includes the same boundaries and schools as the old district, but by changing its name, the district is now no longer unaccredited and therefore eligible under the transfer law. The decision to rebrand the district has offered a legal loophole to the districts that had reluctantly and begrudgingly accepted the minority transfers in the first place.”) available at <http://thegrio.com/2014/06/25/white-school-district-sends-black-kids-back-to-failed-schools/>

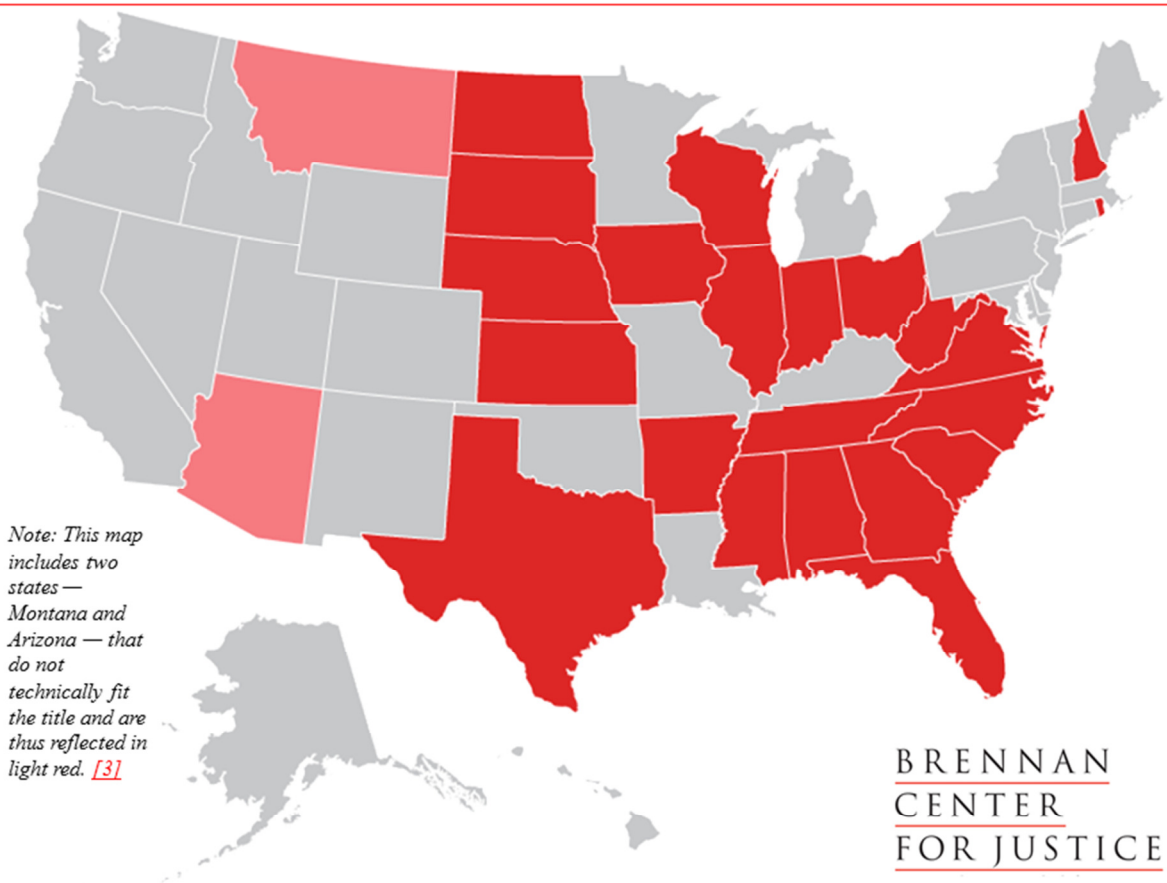
27. The combination of these public and private actions contributes to the erosion of the position of racial minorities in the educational system. Although one could imagine that minority-voting patterns might seek to alter the allocation of resources through public funding, there are further forces at work. There is a concerted ideological effort in the name of “voter integrity” that attempts in state law to erect or increase hurdles to the voting process in local, state, and federal elections.⁶⁷

28. Voting restrictions have been implemented in a wide number of states since 2010, as is demonstrated in the map below.⁶⁸

⁶⁷ *Voting Laws Roundup in 2013*, December 19, 2013, Brennan Center for Social Justice, New York University School of Law, available at <http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup>. The racial animus behind these efforts has been highlighted. For public actor bias, see Mendez, Matthew S. and Grose, Christian R., *Revealing Discriminatory Intent: Legislator Preferences, Voter Identification, and Responsiveness Bias* (May 1, 2014). USC CLASS Research Paper No. 14-17 Available at SSRN: <http://ssrn.com/abstract=2422596> and Christopher Ingraham, “Study finds strong evidence for discriminatory intent behind voter ID laws,” *Washington Post* (June 3, 2014), available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/03/study-finds-strong-evidence-for-discriminatory-intent-behind-voter-id-laws/>; For a recent 56-year-old African-American experience in Ohio of the public and private actor bias and violence see, Benjamin G. Davis, *Addressing Federalism and Separation of Powers Social Violence: The Ordinary Citizen Beyond Shelby County, North Carolina and Ohio and Voting Rights*, MISS C. L. LAW REVIEW (Forthcoming 2014), May 1, 2014 draft version available at SSRN: <http://ssrn.com/abstract=2451287> (“At the height of the lead up to the 2012 Presidential election, I was subjected to a type of non-physical violence – private social violence for want of a better term. It started at an August 25, 2012 True the Vote “Voter Integrity” Meeting at a Holiday Inn in Worthington, Ohio at which I was essentially the only person of color in the audience and subsequently continued over a few days. At the event, the sheer quantity of criticism of black leaders under the “race hustlers” meme by an African-American woman speaker was oppressive. Being threatened with removal and having security called on me after asking questions at the Q and A part of the event was intimidating. Finding out later that, due to the threat of hostile private individuals with guns in the room, some persons of good will in the audience felt impelled to call the police out of fear for my safety was disturbing. Being called a “coon” [Note for the CERD: an extremely old racial slur in the United States dating back to the pre-Civil War] and “faggot” [Note for the CERD: an extremely old sexual orientation slur used in an intersectional way] in front of my son was shocking. All was not bad, and in fact several persons were genuinely welcoming. I learned at the True the Vote meeting of the “voter integrity” methods being used by the group through statistical voter roll purging, private poll observers challenging voters at the polls, the bringing of lawsuits to purge rolls, and the encouragement of law changes such as voter ID that increase the burdens on ordinary citizens seeking to vote. All of these actions appeared to be perfectly permissible by private citizens. But, overall, various messages of unwelcome were directed at me over the day leaving my son and me exhausted by the end. The harassment continued over the next days as a blog post excoriated me and private citizens took it upon themselves to communicate to the Dean of my Law School their displeasure with me notwithstanding that I had been at the True the Vote meeting in my private capacity. Discussion of me even rose to the level of the margins of the state university where I am employed Board of Directors meeting demonstrating at least to me the virulence of the animosity toward me of some in that True the Vote meeting room. All of these persons were of course ordinary citizens and none of them actually inflicted any physical violence on me. However, the experience of spiritual violence was persistent, aggressive, debilitating and, as a result, deeply troubling.”)

⁶⁸ Wendy R. Weiser and, Erik Opsal, *The State of Voting 2014*, Brennan Center for Justice, June 17, 2014, available at <http://www.brennancenter.org/analysis/state-voting-2014>

States With New Voting Restrictions Since 2010 Election



“The new laws range from photo ID requirements to early voting cutbacks to voter registration restrictions. Partisanship and race were key factors in this movement. Most restrictions passed through GOP-controlled (Note to the CERD: “Grand Old Party” colloquial name for the Republican predominantly white political party of the two major political parties in the U.S.) legislatures and in states with increases in minority turnout.

- In 15 states, 2014 will be the first major federal election with these new restrictions in place. Ongoing court cases could affect laws in six of these states.

- The courts will play a crucial role in 2014, with ongoing suits challenging laws in seven states. Voting advocates have filed suits in both federal and state courts challenging new restrictions, and those suits are ongoing in seven states — Arizona, Arkansas, Kansas, North Carolina, Ohio, Texas, and Wisconsin. There is also an ongoing case in Iowa over administrative action that could

restrict voting. More cases are possible as we get closer to the election.”⁶⁹

29. The racial component of these voting restrictions is borne out in the analysis of the patterns of where these restrictions have been put in place.

Race was also a significant factor. Of the 11 states with the highest African-American turnout in 2008, 7 have new restrictions in place. Of the 12 states with the largest Hispanic population growth between 2000 and 2010, 9 passed laws making it harder to vote. And nearly two-thirds of states — or 9 out of 15 — previously covered in whole or in part by Section 5 of the Voting Rights Act because of a history of race discrimination in voting have new restrictions since the 2010 election.[7] Social science studies bear this out. According to the University of Massachusetts Boston study, states with higher minority turnout were more likely to pass restrictive voting laws. A University of California study suggests that legislative support for voter ID laws was motivated by racial bias.⁷⁰

iii. Recent developments in US Constitutional and State law have legally legitimated and aggravated racially polarized voting patterns, violating, inter alia, CERD, articles 2⁷¹ and 6⁷²

30. After the end of most absolute bars to voting by racial minorities, a new wave of efforts by white legislators to diminish the right to vote emerged. As the dissent in *Shelby County, Ala. v. Holder* noted:

Although the [Voting Rights Act] wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of

⁶⁹ Id.

⁷⁰ Id. (Footnotes omitted)

⁷¹ **Article 2**

1. States 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: (a) Each State Party undertakes 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;

(c) Each State Party shall 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;

* * *

⁷² **Article 6**

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

discrimination against the exercise of the franchise by minority citizens. Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated. . . . Congress also found that as "registration and voting of minority citizens increas[ed], other measures may be resorted to which would dilute increasing minority voting strength." . . . See also *Shaw v. Reno*, 509 U. S. 630, 640 (1993) ("[I]t soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices" such as voting dilution). Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as "second-generation barriers" to minority voting.

Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an "effort to segregate the races for purposes of voting." Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the minority's votes. . . . A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits, thereby decreasing the effect of [Voting Rights Act]-occasioned increases in black voting. . . . See also H. R. Rep. No. 109-478, p. 6 (2006) (although "[d]iscrimination today is more subtle than the visible methods used in 1965," "the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates").⁷³

31. This pattern has been aggravated by the increasingly racial polarization within the two major U.S. political parties. This pattern has been documented by Gallup polling data⁷⁴ that demonstrates that "over the course of time, whites as a whole have gotten more Republican, and more reliably so."⁷⁵ As the Gallup analysis notes:

⁷³ *Shelby County*, *supra* note 64, at 2634-35 (2013) (Ginsburg, J., dissenting).

⁷⁴ Noah Millman, *Is Racial Polarization In Voting Increasing Or Decreasing?*, THE AMERICAN CONSERVATIVE (Apr. 2, 2014), <http://www.theamericanconservative.com/millman/is-racial-polarization-in-voting-increasing-or-decreasing/>.

⁷⁵ *Id.* As noted in a June 26, 2014 PEW Research Center study, American attitudes on special measures (affirmative action) overall are favorable ("Broad Support for Affirmative Action Programs: Percent who say affirmative action programs to increase black and minority students on college campuses are a good thing 63 percent vs. a bad thing 30 percent (page 51).") But, the polarization on this issue is along political party leanings (Democrat or Republican) as well as race. ("The Democratically-oriented groups are largely in agreement, however, when it comes to the practice of affirmative action in college admissions. Majorities say it's a good thing to have affirmative action programs "designed to increase number of black and minority students on college campuses." A vast majority of Solid Liberals believe in the merits of college affirmative action (87%), as do at least seven-in-ten of those in the three Democratic-leaning groups. The Young Outsiders also are mostly supportive of campus affirmative action: 62% say it's a good thing and just 33% say it's a bad thing. Steadfast Conservatives and Business Conservatives (Note to the CERD: 85 to 87 percent white and 84 to 86 percent are Republican or lean Republican (page 101 (Business Conservatives) and page 99 (Steadfast Conservatives) respectively)), meanwhile, think these programs are a bad thing by a two-to-one margin (60%-31% and 60%-30%, respectively).") *Beyond Red vs. Blue: The Political Typology, Fragmented Center Poses Election Challenges for Both Parties* 51, 99, and 101, Pew Research Center, (June 2014) available at <http://www.people-press.org/files/2014/06/6-26-14-Political-Typology-release.pdf>

In recent years, party preferences have been more polarized than was the case in the 1990s and most of the 2000s. For example, in 2010, nonwhites' net party identification and leanings showed a 49-point Democratic advantage, and whites were 12 percentage points more Republican than Democratic. The resulting 61-point racial and ethnic gap in party preferences is the largest Gallup has measured in the last 20 years. Since 2008, the racial gaps in party preferences have been 55 points or higher each year; prior to 2008, the gaps reached as high as 55 points only in 1997 and 2000.⁷⁶

32. Gallup also notes: "Over the last two decades, whites have tended to favor the Republican Party and nonwhites have overwhelmingly favored the Democratic Party. During the last few years, those racial and ethnic divisions have grown, mostly because whites have drifted more toward the GOP."⁷⁷

33. The result of these convergent developments is that, because voting districts at the state and federal level are overwhelmingly drawn on the basis of party affiliation, the constituency of individual state and federal representatives has become increasingly racially polarized as the parties themselves have become racially polarized. These developments have served to radically decrease the incentive of white legislators at the state and federal level to represent the interests of minority voters, including their interest in educational opportunity.

34. In June 2013, the US Supreme Court invalidated Section 5 of the US Voting Rights Act that required preclearance for changes to voting procedures in parts of the country that had historically impeded racial minorities from voting. The federal statute in question had been most recently re-authorized by an almost unprecedented majority of the United Congress. The re-authorization was passed by the U.S. House of Representatives by a vote of 390 to 33,⁷⁸ and passed the Senate by a vote of 98 to 0.⁷⁹ It should be noted that all of the votes in the House of Representatives against renewal came from states with long histories of discrimination, reflecting the increasingly racially polarized pattern of voting, particularly at the Congressional level.⁸⁰ Moreover, all of the votes in the House of Representatives against renewal of the act were Republican, reflecting the increasingly racially polarized nature of the two major US political parties.⁸¹

35. In finding that Alabama overcame Congress's power to enforce racial minorities' voting rights, the *Shelby County* decision invoked the theory of states' "equal sovereignty" — the unwritten principle that underpinned the Court's infamous ruling in *Dred Scott v. Sandford*.⁸² The *Dred Scott* Court held that black persons could not be U.S. citizens because citizenship confers the rights in the Privileges and Immunities Clause,⁸³ which could include the right to

⁷⁶ Gallup Politics, *supra* note 65.

⁷⁷ *Id.*

⁷⁸ 152 Cong. Rec. H5207 (daily ed. July 13, 2006).

⁷⁹ 52 Cong. Rec. S8012 (daily ed. July 20, 2006).

⁸⁰ David Stout, *House Votes to Renew Voting Rights Act*, N.Y. Times, July 13, 2006, <http://www.nytimes.com/2006/07/13/washington/13cnd-vote.html>.

⁸¹ *See id.*

⁸² 60 U.S. 393 (1857).

⁸³ U.S. CONST. art. IV, § 2.

vote, and slaveholding states refused to acknowledge black persons' voting rights. *Shelby County* marked the first time since *Dred Scott* that the Supreme Court invoked equal sovereignty in a voting rights case.⁸⁴

36. These burdens fall particularly harshly on low-income racial minorities. Such efforts to decrease or dilute the racial minority vote for partisan ends through thinly veiled "neutral" legislation were the subject of many court challenges in the 2012 election cycle. However, in the wake of a retreat of the U.S. Supreme Court from the vindication of voting rights of racial minorities in its recent jurisprudence that reinvigorated a pre-Civil War "tradition" of "equal sovereignty" for the states,⁸⁵ the efforts of those seeking to dilute racial minority voting power have redoubled.⁸⁶ The consequence for education is to discourage local, state and federal funding for the most vulnerable students in the poorer districts made up significantly of racial minorities. Coupled with these purposive actions are the felon disenfranchisement laws of several states that dilute the meaningful participation of significant portions of the racial minority communities in governance because of the well-documented racial disparities in the administration of the criminal justice system.⁸⁷ The resulting lack of representation leads to the election of

⁸⁴ James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote: Shelby County v. Holder*, 8 HARV. L. & POL'Y REV. 40, 40 (2014).

⁸⁵ *Shelby County*, *supra* note 64. The Supreme Court majority's reinvigoration of the pre-Civil War "equal sovereignty" for states "tradition" to the detriment of minority voting rights harkens back to its ante-bellum and discredited jurisprudence in the *Dred Scott* case – disenfranchising blacks at that time. See generally James Uriah Blacksher & Lani Guinier, *supra*.

⁸⁶ A poignant description of the oppression being visited on racial minorities is described by a former US Secretary of Labor, Robert Reich, "Voting in Mississippi, 2014 and 1964", Robert Reich's blog ((June 7, 2014), available at <http://readersupportednews.org/opinion2/277-75/24104-voting-in-mississippi-2014-and-1964>. This oppression is the direct result of the *Shelby County* decision.

⁸⁷ The school to prison pipeline by which racial minorities are subject to higher rates of discipline, investigation, arrest, prosecution and conviction and punishment at each step of the criminal justice process than equivalent majority counterparts is a structural concern. See generally, Michelle Alexander, *The New Jim Crow, Mass Incarceration in the Age of Color Blindness* 153-156 (The New Press 2010); and *America's Cradle to Prison Pipeline, A Report of the Children's Defense Fund*, (October 2007) available at <http://www.childrensdefense.org/child-research-data-publications/data/cradle-prison-pipeline-report-2007-full-lowres.pdf> ("A Black boy born in 2001 has a 1 in 3 chance of going to prison in his lifetime; a Black girl has a 1 in 17 chance. A Latino boy born in 2001 has a 1 in 6 chance of going to prison in his lifetime; a Latino girl has a 1 in 45 chance.") Black juveniles are about four times as likely as their White peers to be incarcerated. Black youths are almost five times as likely to be incarcerated as White youths for drug offenses." Of the 1.5 million children with an incarcerated parent in 1999, Black children were nearly nine times as likely to have an incarcerated parent as White children; Latino children were three times as likely as White children to have an incarcerated parent.") *Id.* at 16-17. Contrast these direct and collateral consequences, with the solicitude given to vastly more significant criminality such as that of banks and their officers. See Gregory M. Gilchrist, *The Special Problem of Banks and Crime*, 85 COL. L. REV. 1, 4-5 (Winter 2014) ("This Article contends that the recent non-prosecutions of banks and bankers in the face of serious criminal violations may be justified, but that it still represents a problem for the criminal justice system." noting the deterrence and expressive failures in these non-prosecutions). Just like the silencing through collateral consequences on voting rights of felons in some states, other systemic concern merit reflection. Current Attorney General, "[Holder] has argued that, 'with an outsized, unnecessarily large prison population, we need to ensure that incarceration is used to punish, deter, and rehabilitate—not merely to warehouse and forget,'" cited in Jelani Jefferson Exum, *Forget Sentencing Equality: Moving From The "Cracked" Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 96, 123 (2014). For the purposes of this discussion of racial discrimination in the legal profession, the effect is to extract these persons from the college population through collateral consequences such as ineligibility for student loans because of the conviction, and raise burdens for their

representatives who do not adequately protect minority elementary and secondary schools through fairer resource allocation at the local, state, or federal level.⁸⁸

37. Perversely, efforts to enhance standards on what elementary and secondary students are supposed to have mastered in order to be competitive in a globalizing world are not accompanied by the associated resources for these students in resource-poor neighborhoods where significant numbers of racial minorities live. Thus, the advantages of the more affluent districts are structurally enshrined and made more significant as the standards for success are raised for all students even though the means to reach that success are unevenly distributed across the student population to the detriment of students in poor neighborhoods where racial minorities are concentrated.⁸⁹ Even where resources are provided, they are focused on test taking success rather than learning – further reducing the educational benefit of these standards enhancing efforts.

B. College Education

38. At the college level, further structural perversions are at work. Federal student aid in the form of grants (Pell grants) have been allowed to fall in value as tuition has escalated at the college level.⁹⁰ State governments have diminished their commitment to public higher education

admission to law school and entry in the legal profession. Similar to what happened during slavery and American apartheid, the intersection has recently been noted between academia, the private prison industry, governance of education, and financial strategies of premier American institutions in what has been termed a “youth control complex” in five links: 1. Investing in private prisons, 2. College applications, 3. Boards of Trustees, 4. Campus Security, and 5. Funding University Research. See Hannah K. Gold, *5 Links Between Higher Education and the Prison Industry: The worlds of academia and incarceration are closer than you may think*, Rolling Stone, June 18, 2014, available at <http://www.rollingstone.com/politics/news/5-links-between-higher-education-and-the-prison-industry-20140618#ixzz35wXkUko5>

⁸⁸ Michelle Alexander, *The New Jim Crow, Mass Incarceration in the Age of Color Blindness*, 153-56 (The New Press 2010).

⁸⁹ Some encouraging progress in the improvement in graduation rates was recently noted in ROBERT BALFANZ, JOHN M. BRIDGELAND, MARY BRUCE, AND JOANNA HORNIG FOX, *BUILDING A GRAD NATION: PROGRESS AND CHALLENGE IN ENDING THE HIGH SCHOOL DROPOUT EPIDEMIC: 2013 ANNUAL UPDATE 5* (2013), available at http://www.civicerprises.net/MediaLibrary/Docs/Building-A-Grad-Nation-Report-2013_Full_v1.pdf. Yet in noting that progress, the authors go on to say “While progress is encouraging, a deeper look at the data reveals that gains in graduation rates and declines in dropout factory high schools occurred unevenly across states and subgroups of students (e.g., economically disadvantaged, African American, Hispanic, students with disabilities, and students with limited English proficiency). As a result, large “graduation gaps” remain in many states among students of different races, ethnicities, family incomes, disabilities and limited English proficiencies.” *Id.* at 5. Even with higher graduation rates, the problem of differential quality of schools dependent on differential local financing remains. The consequence of housing segregation and voter suppression of minorities is the relative inferiority of the college preparedness of those minorities in poorer neighborhoods – and thus their ultimate preparedness for legal education and the legal profession.

⁹⁰ Suzanne Mettler, *Degrees of Inequality: How the Politics of Higher Education Sabotaged the American Dream*, 10 (Basic Books 2014) (“Mettler”). Changes to the Pell grant program have particularly hurt historically black college and universities (HBCU’s) that play a key role in providing post-secondary education for minorities. See Ry Rivard, *Fighting for Survival*, Inside Higher Education, June 24, 2014, (“Other obstacles are wholly new. In 2011, the federal government limited the ability of students to use Pell Grants to a total of 12 semesters. Before, Pell had covered up to 18 semesters of college. The change was significant for HBCU students, who take longer on average to finish, and, in turn, HBCUs themselves, which lost tuition revenue because the students couldn’t afford to keep attending. About 85 percent of HBCU students receive Pell Grants, and only about a third of HBCU students graduate within six years, said Marybeth Gasman, a professor of higher education at the University of Pennsylvania who studies colleges that educate minorities. The federal government has also tightened eligibility for Parent PLUS

by an average of 26% in real terms in the period 1990-1991 to 2009-2010 – even as operating costs increased.⁹¹ Finally, lawmakers have permitted the for-profit education industry to capture a huge portion of federal student aid funds with minimal regulation despite their poor record in serving students.⁹² The shift from need based financial packages to so-called merit based financial packages together with the expansion of student loans as opposed to grants as a means of funding higher education means that the burden of higher education costs falls more significantly on the racial minority student coming from a poorer district. Moreover, in an effort to enhance competitiveness, public state schools are steering funding to natural science and math education (the so-called STEM programs for Science, Technology, Engineering and Mathematics) over the humanities and social sciences– a steering of resources precisely to the kinds of courses for which the resources are sorely lacking at the high school level to provide competitive preparation in poorer racial minority districts. In private colleges these same pressures are at work in private not for profit colleges. But, the additional development of private for-profit colleges essentially financed through student loans that are being investigated as to whether they may be preying on minorities (and veterans) by failing to provide meaningful programs thus leaving students without degrees and with high student loan debt, forms a further detrimental structural development for racial minority students seeking a college education. The result is the burden on students of financing their education through family means or private and federally subsidized loans has risen making college education even less attainable for those who have managed to overcome the elementary and secondary hurdles described in the previous section, particularly for lower income students from racial minorities. Recent efforts in the U.S. Senate to provide some loan relief for this crushing student debt have been defeated.⁹³ Yet this matter of accumulated college and law school student debt remains a significant preoccupation of the legal profession as evidenced in the recent work of the American Bar Association, which noted that:

“The Financing of Legal Education

1. Loan Repayment. Students in J.D. programs who do not receive substantial scholarships (through differential pricing or otherwise) generally pay for their education through loans. Loan repayment requirements can be a major burden, particularly in the early part of a career when earnings may be low.

Although loan forgiveness programs and income-based repayment programs have been beneficial, loan repayment obligations can still affect job or career choices and the totality of these choices

loans, which were used by many HBCU students' families to pay for college. HBCU leaders have called the changes, also made in 2011, a “crisis” that limits students' access to higher education. Other accountability measures by states and the federal government could punish HBCUs that have low graduation rates or have students who do poorly after they graduate. While it may be too soon to tell, HBCU watchers warn the effects could be disastrous.”)

available at <http://www.insidehighered.com/news/2014/06/24/public-hbcus-facing-tests-many-fronts-fight-survival#sthash.0qPdvN8S.dpbs>

⁹¹ Mettler, *supra* note 90 at 11.

⁹² *Id.* at 12.

⁹³ Danielle Douglas, *Elizabeth Warren's bill to refinance student loans dies in the Senate. Now what?* Washington Post, June 11, 2014, available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/11/elizabeth-warrens-bill-to-refinance-student-loans-dies-in-senate-now-what/>.

can affect the distribution of legal services throughout society. For example, loan repayment obligations may decrease the ability of law school graduates to enter certain forms of lower-paying public service, or decrease the ability of graduates to enter practice in communities or geographic areas where income potential is not sufficient in light of loan obligations. A recent report by the Illinois State Bar Association has described this development in compelling terms and offered several recommendations that the Task Force has embraced.⁹⁴

39. People of goodwill have attempted to counter these structural forces and vindicate in their own manner the United States obligations under the ICERD at the local, state and federal level through public and private means.⁹⁵ However, the domestic internal legal landscape has consistently moved in a direction that is unfavorable to the aspirations of racial minorities and United States compliance with its obligations.

40. Coupled with the unwillingness of the U.S. Supreme Court to view education as a fundamental right (thus enshrining the property tax based system of public elementary and secondary educational financing),⁹⁶ the accelerated retreat of the U.S. Supreme Court from the U.S. form of special measures (affirmative action) has had the effect of reducing the number of racial minority matriculants at the flagship institutions that usually form the source of students for legal education.⁹⁷

41. To help understand the history and the nature of that retreat, it is useful to have a sense of the range of race-conscious and color-blind approaches the United States Supreme Court has used over the years to address the endemic U.S. problem of racism through remedial and aspirational efforts towards formal equality and substantive equality ends. The resulting legal

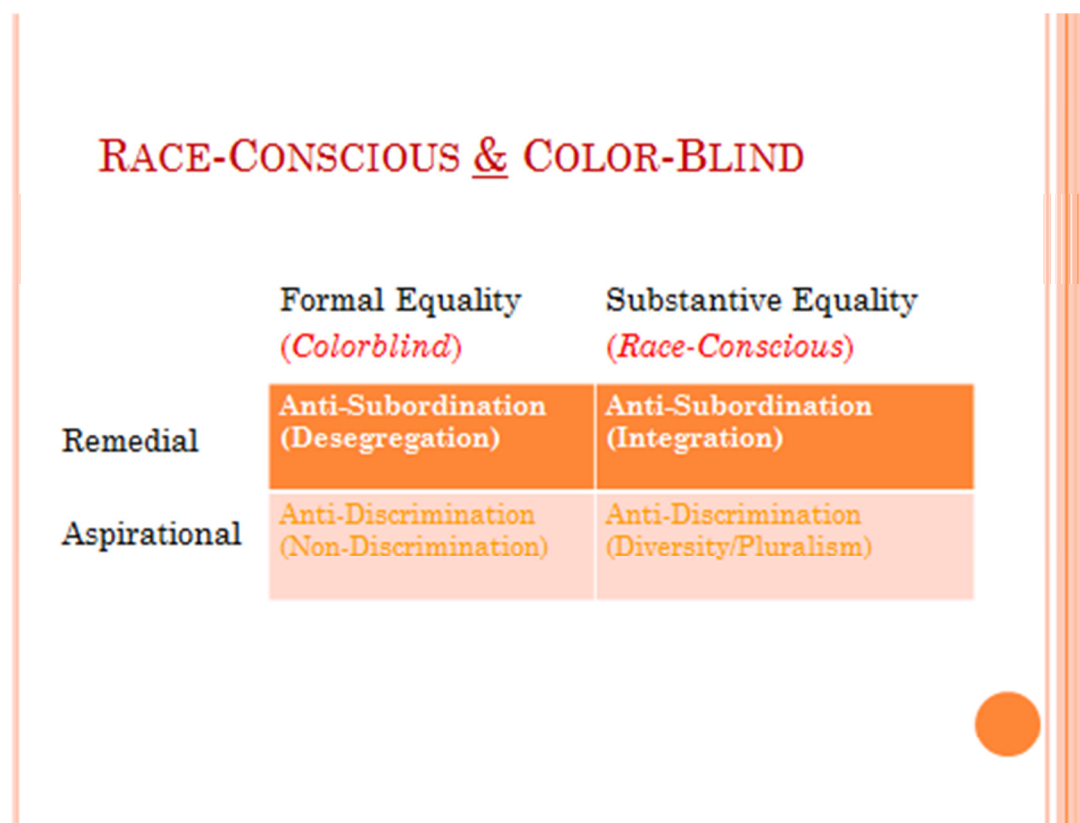
⁹⁴ Report and Recommendations American Bar Association Task Force on the Future of Legal Education, 12 (Jan. 2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf.

⁹⁵ Of course there are the diversity efforts in high schools, colleges, universities and law schools whether public or private. See, e.g., Society of American Law Teachers, BA to JD Pipeline available at <http://www.saltlaw.org/salt-at-work/ba-to-jd-pipeline-resources/>; American Bar Association Center for Racial and Ethnic Diversity, <http://www.americanbar.org/groups/diversity.html>. The American Bar Association has set as one of its goals: to “Eliminate Bias and Enhance Diversity,” to achieve which it aims to: “1. Promote full and equal participation in the association, our profession, and the justice system by all persons” and “2. Eliminate bias in the legal profession and the justice system.” See ABA Mission and Goals, available at http://www.americanbar.org/about_the_aba/aba-mission-goals.html (focused on expanding the presence and inclusion of lawyers who are women, minorities, LGBTQ diverse sexual orientation, and with disabilities). The national bars of color also work in this area. See, e.g., AMERICAN BAR ASSOCIATION COMMISSION ON HISPANIC LEGAL RIGHTS AND RESPONSIBILITIES, REPORT ON LATINOS IN THE UNITED STATES: OVERCOMING LEGAL OBSTACLES, ENGAGING IN CIVIC LIFE (2013), available at <http://www.americanbar.org/content/dam/aba/images/commissiononhispaniclegalrightsresponsibilities/hispanicreportnew.pdf> (detailing the challenges the Latino community face in employment, housing, education, health status and access to quality health care, criminal justice, voting rights, media and Latino Images, underrepresentation in the legal profession, and workplaces tainted by bias and stereotype).

⁹⁶ See *San Antonio Independent School District et al. v. Rodriguez et al.*, 411 U.S. 1 (1973).

⁹⁷ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); *Fisher v. University of Texas*, 570 U.S. __ (Slip Op. June 24, 2013); *Schuetz v. Coalition to Defend Affirmative Action* 572 U.S. __ (Slip Op. April 22, 2014).

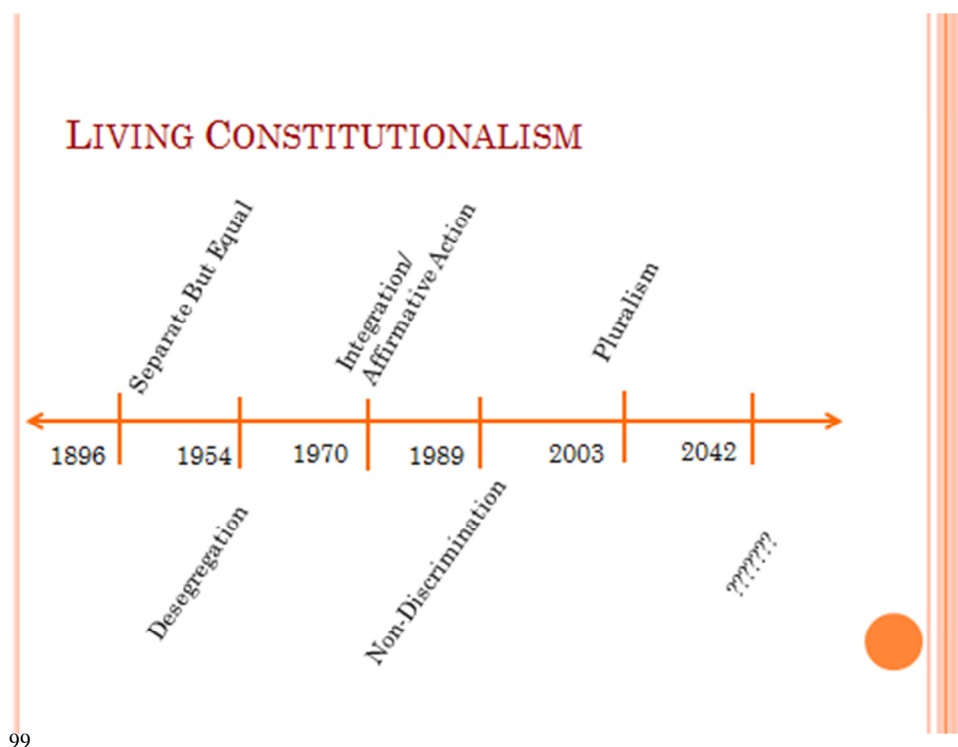
rules in place have resulted from the intersection of these four visions of the nature of equal opportunity as shown in the next picture.



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42. As presented in the next picture below, since the late nineteenth century one might understand the U.S. Supreme Court's jurisprudence on equal opportunity as migrating through the theories of separate but equal, desegregation, integration, affirmative action, and non-discrimination (diversity and pluralism):

⁹⁸ Stacy Hawkins, Diversity, Democracy & Pluralism: Confronting the Reality of Our Inequality (October 7, 2013) Mercer L. Rev (forthcoming 2014), available at SSRN: <http://ssrn.com/abstract=2336994> or <http://dx.doi.org/10.2139/ssrn.2336994> (PowerPoint on file with the Society of American Law Teachers).



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43. In what is viewed as a setback, through a series of recent decisions (most recently in *Fisher* last term, and *Schuette* this past month), the United States Supreme Court has discouraged race-based affirmative action admissions policies in schools of higher public education and law schools by raising the burdens on those colleges and graduate schools that seek to use affirmative action. In *Fisher*, decided in 2013, the studied ambiguity of the Supreme Court as to what would be a race-based policy that would pass muster with the Court has the effect of causing great uncertainty for schools as to the constitutional validity of *any* race-conscious admissions policies to enhance diversity. In *Schuette*, the Court's view that it has no federal Constitutional authority to override the state constitutional ban on affirmative action put in place through a referendum by majority vote supported by two-thirds of whites that was opposed by 90 per cent of the blacks in the state of Michigan exercising the franchise¹⁰⁰ sends a clear message that racial minorities should not look now to the highest U.S. court for support.¹⁰¹ This troubling state of affairs is

⁹⁹ *Id.*

¹⁰⁰ Oral argument of Shanta Driver on behalf of Respondent, *Schuette v. BAMN*, October 15, 2013, full transcript available at http://www.oyez.org/cases/2010-2019/2013/2013_12_682.

¹⁰¹ In her dissent to *Schuette*, Justice Sotomayor eloquently described the long history of political machinations with the goal of disenfranchising minority voters. *Schuette v. BAMN*, 572 U.S. —, 1-16 (2014) (Sotomayor, J., dissenting). In her dissents in *Shelby County v. Holder* and *Fisher v. University of Texas*, Justice Ginsburg eloquently describes the long history and devastating wrong-headedness of those decisions for racial justice. *Shelby County*, *supra* note 64, at 1-37 (Ginsburg, J., Breyer, J., & Kagan, J., dissenting) (Slip Opinion pages 1-37); *Fisher*, *supra* note 97, at 1-4 (Ginsburg, J., dissenting).

notwithstanding the fact that the ICERD imposes obligations on state parties to take appropriate measures to prevent and eliminate racial discrimination, whatever the level (federal, state or local) of the domestic structure of governance.¹⁰²

44. In fact, a recent study of the current Supreme Court (the Court under Chief Justice Roberts over the period October 2005 to January 2014) has found that when issues of unequal treatment based on race have been before the Court, this highest Court has systematically favored white claimants over minority claimants. Source: Vincent Bonventre, (*Part 3--White Wins vs Minority Wins*) *The Supremes' Record in Racial Discrimination Cases: Decisional & Voting Figures for the Roberts Court*, The New York Court Watcher, February 17, 2014, available at <http://www.newyorkcourtwatcher.com/2014/02/part-3-white-wins-vs-minority-wins.html>; Vincent Bonventre, (*Part 2--Protecting Racial Minorities?*) *The Supremes' Record in Racial Discrimination Cases: Decisional & Voting Figures for the Roberts Court*, New York Court Watcher, February 17, 2014, available at <http://www.newyorkcourtwatcher.com/2014/02/part-2-protecting-racial-minorities.html>

45. Coupled with the federalism block to progress in domestic law as evidenced by *Shelby County* and *Schuette*, a further federalism block to the implementation of human rights treaties is prefigured in the Court jurisprudence in the *Bond v. United States* case decided June 2, 2014. In that case, the Court used federalism grounds to limit the effect of a non-self-executing treaty with Congressional implementing legislation. The *Bond* decision wrongly suggests that treaties are primarily about intercourse between States, and not of relevance to the human dignity of citizens within those States.¹⁰³

¹⁰² The historical links between U.S. civil rights struggles on the federal, state and local levels are extensive. It should be noted that the late C. Clyde Ferguson, Jr. - a former Dean of Howard Law School second African-American tenured law professor at Harvard Law School, and a former President of the American Society of International Law - helped draft key provisions of the ICERD in his capacity as a diplomat. See Howard University, *About Clarence Clyde Ferguson Jr.* <http://www.law.howard.edu/1184>; Harvard University Library, *Ferguson, Clarence Clyde. Photographs, 1949-1984: Finding Aid*, available at <http://oasis.lib.harvard.edu/oasis/deliver/~law00062>; Clarence Clyde Ferguson, Jr., *Civil Rights Legislation 1964: A Study of Constitutional Resources*, 24 FED. B.J. 102, 104-105 (1964).

¹⁰³ *Bond v. United States*, 572 U. S. ____ (June 2, 2014). See Benjamin G. Davis, *Bond Thoughts: Federalism Aggression on Human Rights*, SALTLAW/BLOG (June 2, 2014) available at <http://www.blog.saltlaw.org/bond-thoughts-federalism-aggression-on-human-rights/>. An example of the negative attitude toward human rights treaties of scholars is presented in Julian Ku & John Yoo, *The Supreme Court Misses Its Chance To Limit The Treaty Power*, Forbes.com (June 12, 2014) available at <http://www.forbes.com/sites/realspin/2014/06/12/the-supreme-court-misses-its-chance-to-limit-the-treaty-power/>. This negative attitude is not limited to scholars as we note in our "A short primer on U.S. federalism and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) prepared at the request of the US Human Rights Network" attached as Annex A. Even in the 1970's the direct presence of human rights in our constitutional structure, let alone based on treaty, was noted.) See Jordan Paust., *Human Rights and the Ninth Amendment: A New Form of Guarantee* (1975). 60 CORNELL L. REV. 231 (1975); U of Houston Law Center No. 2014-A-34. Available at SSRN: <http://ssrn.com/abstract=2448447> ("The new form of human value guarantee considered here is not really new at all. It has suffered, however, as to its nature and purpose. The alternative basis for the protection of fundamental human values is the ninth amendment-one of the shortest, but perhaps one of the most important, declarations in the United States Constitution. It states that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." Its utility lies not in asking how internationally recognized rights can be "implemented" into our domestic law through new legislative acts, but in recognizing that basic human rights are already a viable part of the constitutionally guaranteed rights of Americans." Id. at 234)

46. At the same time as the judiciary takes this approach, welcoming such challenges by white claimants, private groups of substantial means who are opposed to any special measures (affirmative action) actively recruit potential plaintiffs to bring court challenges to any race-conscious admission policies – further causing institutions of higher education to hesitate.¹⁰⁴ The result is to place great pressure on alternative forms of special measures (affirmative action) in order to enhance diversity at these schools through non-race conscious means such as programs that accept the top ten percent of the graduating classes of public high schools. The irony in these approaches is twofold 1) whatever the level, because racial minorities are minorities the principal beneficiaries are more likely to be majority students, thus reducing the presence of minorities in these schools,¹⁰⁵ 2) second, these programs perversely rely on housing segregation being maintained (and enshrine it) in order for the public schools to reach their goal of racial diversity in the classroom.¹⁰⁶

47. If fully embraced by universities, the current diversity rationale for race-based affirmative action might still lead to increased access to education of minorities.¹⁰⁷ However, the recent *Schuette* decision threatens this possibility. In *Schuette*, the Court upheld a state ban on the use of race-based affirmative action in admissions in Michigan, giving short shrift to the interests of racial minorities opposing said ban. With this case, the way is clear for more state legislatures to join with the seven states¹⁰⁸ that have passed measures against race-conscious special measures of affirmative action for admissions, further limiting the path to the college and graduate level for U.S. minorities.

¹⁰⁴ Julianne Hing, *Wanted: Disgruntled Asian-Americans to Attack Affirmative Action*, Color Lines (Apr. 25, 2014) available at http://colorlines.com/archives/2014/04/wanted_disgruntled_asain_americans_to_attack_affirmative_action.html.

¹⁰⁵ “While African Americans and Hispanics are overrepresented among the poor, whites still constitute the majority of families” Accordingly, low-income minority students still would have to be chosen disproportionately from the pool of low socioeconomic status students in order to achieve a critical mass” Amicus Brief of SALT to the Supreme Court in *Schuette v. Coalition to Defend Affirmative Action*, 22 (citing Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions* 153, in *America’s Untapped Resource: Low-Income Students in Higher Education* (Richard D. Kahlenberg ed., 2004), available at <http://tcf.org/assets/downloads/tcf-carnrose.pdf>; Nikole Hannah-Jones, *A Challenge to the Idea That Income Can Integrate America’s Campuses*, The Atlantic Wire, June 24, 2013, <http://www.theatlanticwire.com/politics/2013/06/supreme-court-affirmative-action-class-income/66541/> (“[C]olleges would have to recruit seven to eight poor white students to get one black or Latino student.”).

¹⁰⁶ A point precisely made by Justice Ginsburg. See *Fisher v. University of Texas* 570 U.S. ___, 1-4 (Slip Op. June 25, 2013) (Ginsburg, J., dissenting).

¹⁰⁷ Professor Vinay Harpalani makes a strong case for how universities can use the diversity rationale to defend their race-conscious admissions policies by “1. Emphasizing the educational benefits of diversity within racial groups and intragroup support among minority students; and 2. Highlighting the educational benefits of diversity that occur within race-conscious campus spaces, such as ethnic studies departments, cultural centers, and residence halls devoted to African American experiences, in addition to benefits of classroom diversity. More broadly, this Article calls upon universities to embrace race-consciousness — not only in their admissions policies but also in their educational missions. By doing so, universities can more readily illustrate how race-conscious policies and programs are tangibly related to the educational benefits of diversity.” Vinay Harpalani, *See Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions after Fisher*, 45 Seton Hall L. Rev. ___, (forthcoming 2014), available at SSRN: <http://ssrn.com/abstract=2416838>.

¹⁰⁸ Affirmative Action: State Action April 2014, National Conference of State Legislatures, available at <http://www.ncsl.org/research/education/affirmative-action-state-action.aspx>.

47a. Moreover, the recent *Burwell v. Hobby Lobby, Inc.*, 573 U.S. ____ (2014) decision of the Supreme Court of June 30, 2014 prefigures a further erosion (and possibly) reversal of efforts to address racial discrimination through special measures such as affirmative action in the U.S.. These restrictions would occur under the guise of recognizing statutory religious freedom rights of for profit corporations and other commercial enterprises under the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. Section 2000bb *et seq.*. The impact of *Hobby Lobby* on efforts to address racial discrimination was specifically referred to in the majority opinion with the majority seeking to be reassuring by stating:

“The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal. (Majority Decision, Page 46)”

47b. Of course, cloaking of racial discrimination as religious practice has a long and dark history to justify the oppression of blacks in particular in the long period of American slavery and apartheid to the present. The arguments are often based on religious justification for slavery. Religion-based arguments for segregation to which the majority in *Hobby Lobby* refers were noted in the dissent. For example, in the *Newman v. Piggie Park Enterprises, Inc.* 256 F. Supp. 941, 945 (SC 1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs), 377 F. 2d. 433 (CA4 1967), *aff’d* and modified on other grounds, 390 U.S. 400 (1968) (pages 32-33, Dissent of Justice Ginsburg joined by Justice Sotomayor, Justice Breyer and Justice Kagan), the Defendant contended only two years after its passage, that the Civil Rights Act of 1964, 42 U.S.C. Section 2000a – a fundamental act to address racial discrimination – “violates his freedom of religion under the First Amendment “since his religious beliefs compel him to oppose any integration of the races whatever.” 256 F. Supp 941, 945 (SC 1966).

47c. Rather than through a First Amendment constitutional challenge as in *Newman*, one can easily imagine sincere religious belief (no matter the detriment to minorities) statutory challenges to key Civil Rights Act under the Religious Freedom Restoration Act requirement that prohibits the “Government [from] substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application of the burden to the person – (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest.” 42 U.S.C. Sections 2000bb-1(a),(b). (Majority Opinion at page 5). After the Supreme Court decision in *Hobby Lobby*, such claims are recognized as properly being asserted by significant for profit corporations raising the specter of further substantial resources being put into having religious freedom rights legislation trump civil rights legislation and jurisprudence so as to further dismantle special measures such as affirmative action against racial discrimination. It is unfortunate that neither the majority nor the dissent saw fit to address the ICERD obligations of the United States as part of their analysis.

48. Also disturbing is the insufficient reference to the ICERD or other international treaties in the Court's reasoning in recent *Parents, Fisher, Shelby County, Schuette* and *Bond* decisions. In this jurisprudence, the Court erects false federalism and other barriers to the domestic implementation in the states of federal law such as special measures of affirmative action. International law does not prohibit affirmative action. At the time that the ICERD was submitted to the U.S. Senate for ratification in 1994, the Legal Adviser noted, "Article 1(4) explicitly exempts 'special measures' taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection. As a result, the Convention leaves undisturbed existing U.S. law regarding affirmative action programs."¹⁰⁹

49. Second, whether viewed as non-self-executing or self-executing, the ICERD trumps inconsistent state law. One author has noted that:

"As U.S. treaty law, the ICCPR and the [ICERD] are supreme law of the land and set important federal policy with respect to federal preemption of state laws. As such, they will trump inconsistent state law. Though the instruments of ratification for each treaty contain declarations that they are "non-self-executing," these declarations function as reservations that are fundamentally inconsistent with the objects and purposes of the treaties and are thus void *ab initio*. Even if "non-self-executing," the treaties should still trump inconsistent state law under the Supremacy Clause of the U.S. Constitution and the doctrine of federal preemption. As the Supreme Court emphasized in *United States v. Pink*, "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty... [and] must give way before the superior Federal policy evidenced by a treaty."¹¹⁰

"If the states do not proceed, the United States is bound by Article 2 of the treaty to take action (i.e. there is no gap in the U.S. duty under Article 2 because neither the states nor federal government have yet proceeded to adopt special measures)."¹¹¹

¹⁰⁹ See Jordan Paust, *Race Based Affirmative Action and International Law*, 18 MICH. J. OF INT'L L. 659, 665 (Summer 1997). This article provides an excellent overview of the interaction between Articles 1(4), 2(2) and 5 as well as the U.S. Reservations, Understandings, and Declarations regarding the ICERD, the International Covenant on Civil and Political Rights, and the U.S. Constitutional structure. See Gay J. McDougall, *Racial Discrimination as a Violation of International Law: International Standards and Mechanisms*, Beyond Racism 439-40 (Charles V. Hamilton, et al., Eds., 2001).

¹¹⁰ Paust, *supra* note 109, at 671 (emphasis added and footnotes omitted).

¹¹¹ *Id.* at 673

“Indeed the federal clauses require that the treaties “shall be implemented...otherwise by the state and local governments,” thus making duties under the treaties concurrent.¹¹²

“Although treaties cannot prevail in the case of an unavoidable clash with the U.S. Constitution, treaties can be used as aids for the interpretation and enhancement of constitutional rights, duties and powers. Thus, the treaty-based permissibility of affirmative action and related duties can be used to condition the meaning of relevant constitutional norms...”¹¹³

50. Third, through friend of the court briefs (*amicus curiae* briefs), concerned scholars and other members of civil society have highlighted to the Court: the relevance of international and comparative foreign law to the Supreme Court’s consideration of constitutional questions, the consistency of considerations of race with the U.S. international human rights commitments, and the need to affirm the use of special measures such as race-conscious approaches to promote equality and non-discrimination.¹¹⁴ After all, as was noted in one of the amicus briefs:

“International law and opinion have informed the law of the United States since the adoption of the Declaration of Independence. The Founders were greatly influenced by international legal and social thought, and throughout the history of the United States, courts have referred to international standards when considering the constitutionality of certain practices.”¹¹⁵

51. The views of the CERD that special measures should include laws, policies, or practices that can affect areas such as housing, access to education including *de facto* discrimination in schools, employment, and general participation in public life have been brought to the attention of the Supreme Court.¹¹⁶ Similar concerns of the Human Rights Committee under the International Covenant on Civil and Political Rights, other UN organizations, the European Court of Justice, national courts of justice in Brazil, South Africa, India, Canada, New Zealand and Australia have also been brought to the attention of the Supreme Court.¹¹⁷

¹¹² *Id.*

¹¹³ *Id.* at 674. The author goes on to examine words from the Constitution such as “equal” and “protection” in light of these treaties in a manner that is completely absent from the Supreme Court analysis. *Id.* at 675.

¹¹⁴ See, e.g., Brief of Amici Curiae Human Rights Advocates, et al., in Support of Respondents, *Fisher v. Texas*, August 10, 2012; Brief of Amicus Curiae the Society of American Law Teachers, August 13, 2012; <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-345.htm>; Brief of Amicus Curiae the Society of American Law Teachers in Support of Respondents dated August 30, 2013, available at <http://www.saltlaw.org/wp-content/uploads/2013/09/12-682-bsac-THE-SOCIETY-OF-AMERICAN-LAW-TEACHERS1.pdf>

¹¹⁵ Brief of Amici Curiae Human Rights Advocates, et al., in Support of Respondents, *Fisher v. Texas*, August 10, 2012, *supra* note 114, at 2.

¹¹⁶ *Id.* at 9-14.

¹¹⁷ *Id.* at 14-23.

52. The point we make here is not whether or not the Supreme Court as the principal expression of the U.S. jurisdiction to adjudicate would agree or not with these analyses. Our point is that the insufficient analysis of the international treaty implications in the current Supreme Court's approach to issues of affirmative action and voting rights severely undermines the U.S. domestic compliance with its treaty obligations. This blind spot or willful turning away from human rights treaties by the Supreme Court forms a central reason for our view that the U.S. is currently in material breach of its obligations under the ICERD.

IV. Legal Education and Entrance to the Legal Profession

53. Even for those racial minorities who make their way through the gauntlet of public and private burdens described in sections II and III above, the admission to law school process creates further hurdles.

A. Market-Based Burdens

54. Part of the manner in which law schools compete for an increasing scarce number of students is by enhanced ranking in what is a private rating entity called the U.S. News and World Report. The criteria for the ranking focus on Law School Admissions Test (LSAT) scores, Undergraduate Grade Point Average (GPA), and deemphasize factors that account for the successful practice of law.¹¹⁸ As a consequence, in order to maintain a top ranking in this system, schools seek to recruit students with top scores for their classes through mechanisms such as the so-called merit-based versus need-based financial packages. As those schools fill up, students with lower LSATs and GPAs are accepted with less extensive financial aid packages. This dynamic continues at the next lower ranked schools down through a cascade of the rankings of these schools. The cutoffs for rankings appear to be at around the level where significant numbers of racial minorities score for the LSAT and GPA. The result is that for Hispanics and blacks, their rate of rejection from all law schools to which they apply (the "shut out rate")¹¹⁹ is much higher than that for their white counterparts, and for Asian-Americans with comparable average LSAT scores to whites, the shut out rate is significantly higher than for whites.

¹¹⁸ Marjorie M. Shultz & Sheldon Zedeck, *Development and Validation of Predictors for Successful Lawyering*, 2009 (identifying twenty-six factors for effective lawyers and testing tools that supplement the LSAT and are race neutral); *Achieving Diversity*, *supra* note 5.

¹¹⁹ John Nussbaumer & E. Christopher Johnson, *The Door to Law School*, in INSTITUTE FOR INCLUSION IN THE LEGAL PROFESSION, IILP REVIEW 2012: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 46, 47 (2012), available at <http://www.theiilp.com/Resources/Documents/IILPReview2012.pdf>.

Table 1 – LSAT Scores and Shut-Out Rates by Applicant Group		
Applicant Group	Average Mean LSAT Score	Shut-Out
Caucasian	153	31%
Asian American	152	37%
Native American	148	42%
Mexican American	148	43%
Hispanic	146	45%
Puerto Rican	139	52%
African American	142	60%

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55. As noted above, for those members of racial minorities who are accepted to law schools, the merit-based vs. need-based financial packages tend to make the financing of legal education more burdensome due to the fact that minority wealth such as that of blacks is one twentieth of the wealth of whites.¹²¹

56. As the principal ranking mechanisms of this principal private rating entity do not take into account any criteria that reflect diversity, the pressure on all the law schools is to seek out the more higher scoring students, who tend to be from the majority as opposed to racial minorities. The effect is to depress the actual number of students from racial minorities entering law schools.

57. Individual law schools do, as a matter of institutional conscience, factor minority, sexual orientation and gender minority status into admissions and financial aid decisions. U.S. News and World Report creates a diversity ranking for law schools, but does not factor that ranking into the overall institutional rankings, creating perverse institutional incentives. Thus individual law school efforts are overshadowed, and the end result is law school demographics that show a systematic underrepresentation (as a percentage of the population) of blacks, Hispanics and indigenous people. Asian-Americans experience a higher shut-out rate as compared with whites, even while overrepresented.

Law School Demographics
(see ABA /LSAC Guidebook)

Group	2011	Census 2010
American Indian/Alaska Native	0.8%	0.9%
Asian	7.1%	4.8%
Black/African America	7.1%	12.6%
Caucasian/White	75.5%	56.1%

¹²⁰ *Id.*

¹²¹ Brown, *supra* note 50.

Hispanic/Latino	7.5%	16.3%
Native Hawaiian/Other Pacific Islander	0.3%	0.2%
Two or more Races/Ethnicities	1.7%	2.9%

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58. As a consequence, and ineluctably, the number of racial minority students who are available to enter the legal profession is depressed.

B. Licensing and Accreditation Burdens

59. Licenses to practice law are primarily granted at the state level, with each state's highest court typically controlling admissions practices in the state. The federal government oversees licensing, however, in that the federal government, through the Department of Education, controls accreditation of law schools. In most states, only graduates of accredited law schools are eligible to become licensed to practice law. Since the mid-twentieth century, the Department of Education has approved the Council of Legal Education and Admissions to the Bar of the American Bar Association (the Council) as the recognized national agency for the accreditation of law schools. Thus the federal government grants the Council accrediting authority, and the states use the Council's accreditation process to establish standards of legal education to prepare for the practice of law.

C. Admission to Law School is Increasingly Determined by Scores on the Law School Admissions Test (LSAT), A Standardized Test with Established Disparate Impact on Racial Minorities

60. Many scholars have linked the decreasing enrollment of African American students to over-reliance in law school admissions on the LSAT, a three-hour test on which white students receive higher scores than members of other racial groups. To achieve accreditation by the Council, a law school is required to use a "valid and reliable" admissions test, and the LSAT is the only one presumptively approved. In 2005 the Council rejected proposed revisions to the accreditation standards that would have prohibited the use of discriminatory admissions tests. Rather than questioning this refusal to address the discriminatory impact of its admissions standards, the United States Department of Education took the opposite tack in its review of the Council as the accrediting agency for U.S. law schools, challenging the Council's standard requiring law schools to take concrete actions toward diversity.

D. Admission to the Practice of Law is Determined by Standardized Tests That Have Never Been Correlated With Successful Practice of Law, But Which Result in Dramatic Racial Disparities

¹²² Achieving Diversity, *supra* note 5.

61. The examinations used by most states for licensing to practice law have dramatic racial disparities in passage rates. The only national study of bar passage rates established that, for first time test takers, Whites passed at 91.93%, Asian Americans at 80.76%, Mexican Americans at 75.88%, Puerto Ricans at 69.53%, American Indians at 66.36%, and Blacks at 61.40%. More recent data from New York shows continuing strong patterns of racial disparities. The first time passage rates for the July 2005 New York bar exam were 86.8% for Whites, 80.1% for Asians/Pacific Islanders, 69.6% for Hispanics/Latinos, and 54.0% for Blacks/African Americans. These figures are especially egregious in light of the limited relationship of bar exams to the skills necessary for the practice of law. Instead of using its oversight authority to address the problem that bar exams as currently administered operate as a significant bar to the profession for racial minorities, the Department of Education in the 2008 period took the opposite tack, pressuring the Council to revise its accreditation standards to give greater emphasis to bar passage rates.

E. Instead of Addressing These Serious Racial Disparities in the Legal Profession,
the United States Is Trying to Reduce the Obligations of Law Schools to Improve
Racial Diversity in Legal Education and in the Profession of Law

62. The United States should be using its oversight authority to address the serious issues of under-representation of racial minorities in the legal profession and in law schools. Instead, in early 2007, the Department of Education challenged the Council's standard for accreditation that requires law schools to "demonstrate by concrete action ... a commitment to having a diverse student body." The Council was threatened with loss of its accreditation authority unless it weakened its diversity standard related to admissions and increased the relevance of the discriminatory bar passage rates in law school accreditation. In addition, the United States Commission on Civil Rights, which also should be addressing the lack of students and attorneys of color, instead intervened in the accreditation question for the purpose of challenging affirmative action in law school admissions.

63. Since a new administration has been in place in 2009, private actors in the accreditation structure have taken up the efforts that were undertaken directly through the Department of Education in the prior Administration. At the initiative of the Council, pressure continued to increase required bar passage rates and further to eliminate requirements for tenure and security of position for law professors. The combined effect would be both a reduction of racial minorities in law school classrooms and a reduction of the presence of professors from racial minorities in the law school classroom. A concerted effort by a number of private organizations such as the Society of American Law Teachers and the Clinical Legal Education Association as well as the individual efforts of a diverse group of 635 law professors¹²³ to strenuously object to these changes has for now slowed these efforts, but the final determination on any changes awaits the August 2014 meeting of the American Bar Association House of Delegates – the policymaking body above the Council.

¹²³ Letter of 635 Law Professors to the ABA Section on Legal Education and Admissions to the Bar dated October 8, 2013, *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20131009_comment_ch_4_law_professors.aut_hcheckdam.pdf.

64. At a minimum, and in the context of the abandonment of the highest court of our jurisdiction to adjudicate of its commitment to affirmative action, these types of efforts to hamper efforts at integration will continue in some manner at the public and private level for the foreseeable future. Thus, even in the accreditation process, the Department of Education and the Council in one or another Administration will be sources of pressure on law schools with the effect to reduce the admission of students of color even further, making a very serious problem even worse.

V. Racial Minorities Surviving in a Legal Profession that is Overwhelmingly White

65. Using United States census data from 2000, the American Bar Association (ABA) has recognized that “minority representation in the legal profession is significantly lower than in most other professions.” Specifically, the ABA reports that minority representation among lawyers is about 9.7 percent, “compared to 20.8 percent among accountants and auditors, 24.6 percent among physicians and surgeons, and 18.2 percent among college and university teachers.”¹²⁴ Although minority participation in the legal profession increased dramatically between 1970 and 2000, minority entry into the profession has slowed to an alarming extent since then. The African American law school admissions figures increased in 2006, but in 2005 African American enrollment in law school had dropped more than 10% from the previous year. In fact, African American enrollment in 2005 was at its lowest point since 1990 – a fifteen-year low. Mexican American enrollment in law school dropped over 9% in 2005, standing at its lowest point since 1993. In fact, although a larger number of law schools and larger classes created an increase of approximately 4,000 more entering law students in 2005 than in 1992, there were actually fewer African American and Mexican American first year law students in the Fall 2005 class (3595 combined) than existed in Fall 1992 (3937).¹²⁵

66. The direct effect of these alarming numbers is the underrepresentation of racial minorities in the legal profession as shown for lawyers and the judiciary as in 2011 as compared to the 2010 Census.

Impact of the Pipeline on the Legal Profession
Source: ABA Lawyer Demographics¹²⁶

Group	Lawyer Data % (Source: ABA)	Population (2010 Census)
White	88.1%	56.1%
Asian	3.4%	4.8%
Black	4.8%	12.6%
Hispanic	3.7%	16.3%
Pacific Islander	No data	0.2%
Native American	No data	0.9%

¹²⁴ American Bar Association Commission on Racial and Ethnic Diversity in the Profession, *Miles to Go 2000: Progress of Minorities in the Legal Profession* (2005).

¹²⁵ See <http://www2.law.columbia.edu/civilrights/> (using data from the Law School Admissions Council).

¹²⁶ *Achieving Diversity*, *supra* note 5.

Other Minorities	No data	6.2%
Two or More Races	No data	2.9%

Impact of the Pipeline on the Judiciary
Source: ABA Lawyer Demographics¹²⁷

Group	Lawyer Data % (Source: ABA)	Population (2010 Census)
White	87.8%	56.1%
Asian/Pacific Islander	1.3%	5.0%
Black	6.5%	12.6%
Hispanic	3.5%	16.3%
Native American	0.11%	0.9%
Other Minorities	0.77%	9.1%
Totals	100%	100%

67. Moreover, as lawyers occupy critical leadership positions and engage in policymaking impacting all communities (lawyers represent 100 % of judges, 58% of U.S. Senators, 37% of U.S. Representatives, 40% of Governors of States, 50% of Presidents, and 11% of Chief Executive Officers of major corporations), the underrepresentation of racial minorities in this pathway to these types of positions undermines meaningful participation of racial minorities in governance.¹²⁸ A recent study has shown a dearth of minorities in the 50 state judiciaries whatever the level, part of which may be the result of many state judges being subject to the voting concerns (described above) in those states that elect as opposed to appoint.¹²⁹ A similar dearth of minority judges is noted in the federal judiciary in which the federal judicial nomination process is a contentious process, particularly for minority and women candidates.¹³⁰ Even confirmation in an Executive Department Civil Rights position is fraught with animus against a nominee with a strong civil rights background.¹³¹ As to legal academia, a recent study shows the dearth of minorities in U.S. legal academia generally.¹³²

¹²⁷ *Id.*

¹²⁸ *Id.* at 6 (data current as of 2012).

¹²⁹ For state judges see, Diversity of the Bench, State Judges, American Judicature Society (2009) available at http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm?state=;

¹³⁰ For federal judges see, Table 1, Composition of the Judiciary, The Changing Face of the Federal Judiciary, Brookings Institution (August 2009) available at http://www.brookings.edu/~media/research/files/papers/2009/8/federal%20judiciary%20wheeler/08_federal_judiciary_wheeler.pdf.

¹³¹ See Letter of the National Lawyers Guild, SALT and other legal and human rights organizations to Senator Coons with regard to the Senate vote against Mr. Debo Adegbile's confirmation as Assistant Attorney General for Civil Rights (March 13, 2014) available at <http://www.saltlaw.org/wp-content/uploads/2013/07/ADEGBILE-FINAL-Letter-MAR-2014.pdf>.

¹³² This dearth is particularly severe in the field of international law where the American Society of International Law is examining how to increase the inclusion of minorities in international law and scholarship by minorities in the American Journal of International Law.

Law Faculty, by Race, AALS 2008-2009 (N=10,965)¹³³

	Am.Ind. or Alask. Nat.	Asian or Pacific Islander	Black/African American	Hispanic/Latino	White	Other race	More than one race	Race/ethnicity is not identified	To
Number	51	270	753	337	7831	101	120	1502	10 5
%	.5%	2.5%	6.9%	3.1%	71.4%	.9%	1.1%	13.7%	10 0%
US perc (2010 Census)	0.9%	5.0%	12.6%	16.3%	56.1%	9.1% *	*	*	10 0%

*9.1 % may include other race, more than one race, and some of the race/ethnic not identified

68. Recent studies have attempted to go beyond the type of overt or explicit racial discrimination traditionally addressed by equality laws to better understand what has been termed implicit bias and stereotype threat. Drawn from work in neuroscience, these studies attempt to identify implicit social cognitions that tend to mirror the social hierarchies leading to more negative stereotyping of racial minorities. These studies also attempt to understand how negative expectations are communicated and internalized by racial minorities in manners that result in lower performance.¹³⁴

69. One study that brought out negative stereotypes and confirmation of bias among law partners provided an identical research memorandum for review by partners with the only difference in the identification of the author as being African-American or White. The exact same memorandum averaged a 3.2/5.0 rating under the hypothetical “African American” and a 4.1/5.0 rating under the hypothetical “Caucasian.”¹³⁵

70. Another broader study attempted to capture these types of implicit bias against women and racial minorities, as little is known as to how such bias varies within and between organizations or how it manifests before individuals formally apply to organizations. The authors addressed this knowledge gap through an audit study in academia of over 6,500 professors at top U.S. universities drawn from 89 disciplines and 259 institutions. The authors hypothesized that

¹³³ Meera E. Deo, Looking Forward to Diversity in Legal Academia (June 12, 2014). Berkeley Journal of Gender, Law & Justice, Vol. 29, No. 2, p. 352, 2014; Thomas Jefferson School of Law Research Paper No. 2449850. Available at SSRN: <http://ssrn.com/abstract=2449850>; *Achieving Diversity*, *supra* note 5.. The particular burdens of women of color in academia at the intersection of race, gender and class are presented in Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. González, Angela P. Harris, ed., *Presumed Incompetent: The Intersections of Race and Class for Women in Academia* (Utah State University Press 2012).

¹³⁴ See generally <http://reducingstereotypethreat.org/definition.html>.

¹³⁵ Yellow Paper Series, Written in Black & White Exploring Confirmation Bias in Racialized Perceptions of Writing Skills, Nextion, 2014 0404, available at http://www.nextions.com/wpcontent/files_mf/13972237592014040114WritteninBlackandWhiteYPS.pdf.

discrimination would appear at the informal “pathway” preceding entry to academia and would vary by discipline and university as a function of faculty representation and pay. In their experiment, professors were contacted by fictional prospective students seeking to discuss research opportunities prior to applying to a doctoral program. Names of students were randomly assigned to signal gender and race (Caucasian, Black, Hispanic, Indian, Chinese), but messages were otherwise identical. The authors found that faculty ignored requests from women and minorities at a higher rate than requests from White males, particularly in higher-paying disciplines and private institutions. Counter-intuitively, there was no correlations between the gender or race of the faculty member and her or his response to the request, suggesting that greater representation cannot be assumed to reduce bias. This research highlights the importance of studying what happens before formal entry points into organizations and reveals that discrimination is not evenly distributed within and between organizations.¹³⁶

71. In addition, recent analysis of civil racial discrimination claims in employment suggests that the ostensibly neutral rules of standing under recent Supreme Court jurisprudence have had a particularly devastating impact on civil claims of racial discrimination progressing beyond the initial stages in the judicial system.¹³⁷ Put another way, our modest civil remedial mechanisms¹³⁸ for racial discrimination in the workplace are weakened by procedural burdens, including arbitration.¹³⁹ The need for legal representation and remedial measures remains strong.¹⁴⁰

¹³⁶ Katherine L. Milkman, Modupe Akinola & Dolly Chugh, *What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway into Organizations* (April 23, 2014), available at <http://ssrn.com/abstract=2063742> or <http://dx.doi.org/10.2139/ssrn.2063742>.

¹³⁷ Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 IRVINE L. REV. 187 (2013) (“Over time, critical race empiricists may reframe the debate, shifting onto those who laud *Iqbal* the burden to justify the existence of a legal rule that opens the courthouse door to implicit bias while closing the courthouse door to stereotyped-group members harmed by modern prejudice.”); Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011). (“Scholars warned that *Twombly* and *Iqbal* would move the pivotal point at which courts screen cases earlier in time from summary judgment to the motion to dismiss, and that this move would be pronounced in employment discrimination cases. The motion to dismiss would, in effect, become the new summary judgment motion. The present research demonstrates that these concerns are well founded. For Black plaintiffs' claims of race discrimination, many courts are rigorously applying *Iqbal* as if the Court called for a heightened pleading bar. *Iqbal* has resulted in elastic pleading standards that are difficult to apply consistently. In short, *Iqbal* has created legal uncertainty, which is especially pronounced when adjudicating claims of race discrimination in the workplace.”) *Id.* at 43.

¹³⁸ Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUDIES 2, 175 (2010) (“Our analysis suggests that employment discrimination litigation maintains law’s jurisdiction over claims of workplace discrimination while not providing a significant remedy or an authoritative resolution in most cases.”); See also Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663.

¹³⁹ Domestic arbitration of racial discrimination claims or other claims in employment is a pervasive aspect of the civil justice system of the United States. Issues of the absence of diversity in the practitioners and arbitrators in this arena remain understudied. A recent study – granted for international arbitration in the US – and the experience of the ABA Section of Dispute Resolution suggest that underrepresentation remains a significant concern in the Alternative Dispute Resolution community as well as the judiciary. See Benjamin G. Davis, *American Diversity in International Arbitration 2003-2013*, ____ AM. REV. INT’L ARB. ____ (forthcoming 2014), available in pre-publication draft (December 13, 2013), at <http://ssrn.com/abstract=2364967> or <http://dx.doi.org/10.2139/ssrn.2364967>

¹⁴⁰ The transcripts of the hearings of the ABA Commission on Hispanic Legal Rights and Responsibilities (as one example) are replete with the kinds of difficulties this one of the several racial minorities confront in America. Transcripts available at Archives:

72. As continuing explicit expressions of bias¹⁴¹ coupled with the above examples demonstrate, it is patently clear that 60 years after the decision in *Brown vs. Board of Education* outlawed separate but equal, the United States remains a society deeply riven by race and racial discrimination. Thus the United States' accelerating retreat from addressing that racial discrimination in the legal profession places it in material breach of its obligations under the ICERD.

VI. The United States Government Bears Responsibility for the Lack of Racial Diversity in the Legal Profession on the Federal (Executive, Legislative, and Judiciary), State (Executive, Legislative and Judiciary), Local (Executive, Legislative, and Judiciary), and Private Levels

A. Violations of Convention Obligations

73. The United States is in material breach of the following obligations.

http://www.americanbar.org/groups/diversity/commission_on_hispanic_legal_rights_responsibilities/HearingArchives.html (For example, "On the demand side, Hispanics experience conditions that make them unusually vulnerable to discrimination and exploitation; while on the supply side, Latinos and others with the linguistic and cultural expertise often required to effectively represent these vulnerable populations are extremely limited," Statement of Janet Murguia, Commissioner and President and CEO of the National Council of La Raza, Transcript of the Midwest Regional Hearing, November 12, 2010 at page 21 available at

http://www.americanbar.org/content/dam/aba/images/commission_on_hispanic_legal_rights_responsibilities/chicago.pdf.) For an example of the indignities Hispanics confront in daily life, see *Judge dismisses part of DOJ case, sets the rest for trial*, The Times News, Burlington, North Carolina, June 21, 2014, ("The U.S. Justice Department accused [Sheriff] Johnson of violating the constitutional rights of citizens and legal residents by detaining and arresting Latinos without probable cause. Among the government's claims is that Johnson ordered special roadblocks in neighborhoods where Latinos live, during which those with brown skin were stopped while whites were waved through.") available at <http://m.thetimesnews.com/news/top-news/judge-dismisses-part-of-doj-case-sets-the-rest-for-trial-1.336372> For an example of the horrific attacks on the human dignity of Hispanics in death that the public-private interaction can lead to is this case of Hispanic migrants not being treated with minimal dignity in death in being buried in mass graves. See Mark Collette, *Mass Graves of Migrants Found in Texas*, ABC15 Arizona, June 19, 2014, ("FALFURRIAS, TX - Unidentified migrants who died entering the United States were buried in mass graves in a South Texas cemetery, with remains found in trash bags, shopping bags, body bags, or no containers at all, researchers discovered.") available at

<http://www.abc15.com/news/national/mass-graves-of-migrants-found-in-texas>.

These types of cases are inconsistent with CERD Gen. Rec. No. XXX (Rights of Non-Citizens) which clarifies that non-citizens are due all the same basic human rights despite the state's ability to control sovereign borders. This CERD General Recommendation clarifies that all states have the responsibility to treat all persons within their jurisdiction in accordance with human rights and fundamental freedoms even though they regulate cross-border migration. On the rights of non-citizens in the U.S., see, e.g., *The Boston Principles on Economic, Social, and Cultural Rights of Non-Citizens*, available for download at:

<http://www.northeastern.edu/law/academics/institutes/phrge/publications/boston-principles.html> and Lewis, Hope and Rosenbloom, Rachel E., *The Boston principles: an introduction* (2011). School of Law Faculty Publications. Paper 26.<http://hdl.handle.net/2047/d20001183>. Latina/o and Asian-American law teachers and scholars have had significant influence in trying to move US immigration law and policy forward despite the racially-marked legacy of that law and policy. Lack of diversity in legal and other academia we discuss will mean a significant disservice to growing segments of the US population."

¹⁴¹ Cliven Bundy: Are Black People "Better Off As Slaves" Than "Under Government Subsidy?" April 24, 2014, Huffington Post, http://www.huffingtonpost.com/2014/04/24/cliven-bundy-racist_n_5204821.html; *Clippers Owner Donald Sterling to Girlfriend: Don't Bring Black People to My Games* <http://youtu.be/YhT6d5fMhZl>.

74. Article 1

1. In this Convention, the term "racial discrimination" shall mean 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.

75. **Comment: As described in Sections II-V above, numerous material breaches amounting to "racial discrimination" as here defined have been demonstrated by the United States federal, state and local authorities through public and private means with 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.**

76. Article 1

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

77. **Comment: The categorical retreat from special measures such as race-conscious affirmative action by the United States Supreme Court in its decisions in the past 7 years in the *Parents*, *Fisher*, and *Schuette* cases, the restrictions by several states of race-conscious affirmative action prior to any of the objectives of such race-conscious affirmative action being achieved, and property-tax based local financing that enshrines market based discrimination in property values are clear material breaches of the United States obligations.**

78. Article 2

1. States 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: (a) Each State Party undertakes 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;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall 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;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties 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.

79. **Comment: Even in our system of separation of powers and federalism, this obligation falls upon the entire United States. For the reasons described in Section II-V above, the purposive and effective results of federal, state and local public and private actions by the United States are to place the United States in material breach of these obligations.**

80. Article 3

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

81. **Comment: Through the preservation of a property-tax-based system of financing of education that enshrines a market-based system of private discrimination through increased valuation of housing based on absence of minorities, , the United States federal, state and local authorities are encouraging racial segregation and apartheid. Through the gathering of racial minorities into segregated and poorer schools with weaker teachers, the United States is perpetuating academic racial segregation and academic apartheid. Through the tracking of racial minority students into non-college preparatory coursework at these inferior schools, the United States is perpetuating academic racial segregation and academic apartheid. Through its countenancing of for profit schools, whether through charter schools, or at the college level, that siphon precious public funding, the United States is perpetuating racial segregation and apartheid. Through its abandonment of special measures to combat these disparities, the United States is perpetuating racial segregation and apartheid across America.**

82. Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

83. **Comment: Through the barriers to the legal profession for racial minorities described above that diminish the ability of racial minorities to participate in the legal system as judges, lawyers and political figures, the United States is in breach of this obligation.**

84. (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

85. **Comment: Through the abandonment of voting rights in the *Shelby County* decision and the enshrining of state level racial minority disenfranchisement through legislative restrictions on voting and referenda based banning of race-conscious affirmative action, the United States is in material breach of this obligation.**

86. (d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

87. **Comment: Through the countenancing of property tax based financing of education together with the enshrining of a market based system of premium valuations tied to the absence of racial minorities, the United States is in material breach of this obligation.**

88. (v) The right to own property alone as well as in association with others;

89. **Comment: Through the countenancing of property tax based financing of education together with the enshrining of a market based system of premium valuations tied to the absence of racial minorities, the United States is in material breach of this obligation.**

90. (vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

91. **Comment: Through the concerted effort to eradicate public sector unions through the formation of charter schools funded by public funds that are worse or only equal to traditional public schools in terms of the quality of education provided to racial minorities, the United States is in material breach of this obligation.**

92. (iii) The right to housing;

93. **Comment: Through the countenancing of property tax based financing of education together with the enshrining of a market based system of premium valuations tied to the absence of racial minorities, the United States is in material breach of this obligation.**

94. (iv) The right to public health, medical care, social security and social services;

95. (v) The right to education and training;

96. **Comment: Through the countenancing of property tax-based-financing of education together with the enshrining of a market based system of premium valuations tied to the absence of racial minorities, the United States is in material breach of this obligation. As seen in regional human rights jurisprudence, legal regimes that have the effect of disproportionately impacting racial minority participation in primary education violate the right to education and protection from non-discrimination.¹⁴²**

97. Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental

¹⁴² See, e.g., *Case of Orsus and Others v. Croatia*, (no. 15766/03, 16 March 2010), at point 193 (misuse of remedial curriculum in Roma-only classes); *Case of D.H. and Others v. The Czech Republic* (no. 57325/00, 13 Nov. 2007) at point 210 (mental health misdiagnosis of Roma children in making educational placements); *Case of Horváth and Kiss v. Hungary*, (no. 11146/11, 29 Jan. 2013) at point 135 (refusal to admit Roma youth into vocational programs); *The Yean and Bosico Children v. Dominican Republic*, Judgment of September 8, 2005, Inter-Am Ct. H.R., (Ser. C) No. 130 (2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_%20ing.pdf (refusal to issue identity documents to children of Haitian descent).

freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

98. **Comment: Through the abandoning of voting rights protections and race-conscious affirmative action, the United States is in material breach of its obligation to provide effective protection and remedies.**

99. Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

100. **Comment: Through the licensing and accreditation structure of public and private authority over law schools and the acquiescence of law schools to market based criteria for competition that do not take sufficiently into account the requirements for diversity in legal education and the educational pipeline that proceeds legal education, the United States is in material breach of its obligations.**

B. Violations of Obligations undertaken in the U.S. Reservations Understandings and Declarations

101. Upon signature:

"The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America."

102. **Comment: As was recently noted in another setting by the US Department of State Legal Advisor:**

"Most famously, the Supreme Court has long held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). In the area of treaty interpretation, the Supreme Court has long noted that it is "bound to observe [treaties] with the most scrupulous good faith." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 68 (1821); see also *Chew Heong v. United States*, 112 U.S. 536, 540 (1884) ("Treaties of every kind ... are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith.") (internal quotation marks omitted). The

Court has also repeatedly reaffirmed that it gives "considerable weight" in interpreting treaties to the "opinions of our sister signatories." *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010). In the area of treaty interpretation, the Supreme Court has long noted that it is "bound to observe [treaties] with the most scrupulous good faith." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 68 (1821); see also *Chew Heong v. United States*, 112 U.S. 536, 540 (1884) ("Treaties of every kind ... are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith.") (internal quotation marks omitted). The Court has also repeatedly reaffirmed that it gives "considerable weight" in interpreting treaties to the "opinions of our sister signatories." *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010).¹⁴³

103. Yet, the U.S. Supreme Court, in its most recent decisions in *Parents, Fisher, Schuette* and *Shelby County* pronouncing its retreat from the obligations of the International Convention on the Elimination of All Forms of Racial Discrimination, did not deign to meaningfully analyze the implications of its reasoning in the context of its own treaty decisional law. Its insufficient decision-making without meaningful consideration for the ICERD obligations is at a minimum inconsistent with its decisional law espousing respect for treaties and sister signatories whatever the nature of the treaty and whatever the reservations, understandings, and declarations stated by the United States. In a matter of such seriousness as elimination of all forms of racial discrimination addressing some of the highest norms of the international system, this glaring lack of reasoning raises the question of whether this apex of the jurisdiction to adjudicate as the highest source of the Judicial Power under our Constitution failed to address these obligations in accordance with the United States international obligation to perform its treaty obligations in good faith.

104. Upon ratification:

I. The Senate's advice and consent is subject to the following reservations:

- (1) That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.
- (2) That the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in article 1 to fields of 'public life' reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres

¹⁴³ Pg. 11, Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict, January 21, 2013.

of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of article 2, subparagraphs (1) (c) and (d) of article 2, article 3 and article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.

105. **Comment: Similar to the analysis above, the insufficient analysis, if at all, in the stated cases by the U.S. Supreme Court of the treaty implications of the public acts (or private acts countenanced by public private acts) with the purpose or effect of perpetuating racial discrimination in its recent jurisprudence retreating from the clear obligations of the ICERD demonstrates indifference to the international implications of its domestic jurisprudence in the arena of the elimination of all forms of racial discrimination. This deformity in the manner of reasoning of the U.S. Supreme Court is of great concern as it suggests that ordinary U.S. citizens and most particularly those racial minorities most vulnerable to oppression cannot be assured of a Supreme Court that takes seriously the United States' obligations freely entered into in our Constitutional system.**

106. (3) That with reference to article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

II. The Senate's advice and consent is subject to the following understanding, which shall apply to the obligations of the United States under this Convention:

That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfilment of this Convention.

107. **Comment: Similar to the analysis above, under the separation of the powers of the Federal Government, the insufficient analysis, if at all, in the stated cases by the U.S. Supreme Court of the treaty implications of the public acts (or public acts that countenance private acts) with the purpose or effect of perpetuating racial discrimination in its recent jurisprudence retreating from the clear obligations of the ICERD demonstrates indifference to the international obligations undertaken by the Senate in ratifying and depositing the above understanding. The obligation undertaken by the Federal Government to implement the treaty to the extent that it exercises jurisdiction over the matters and to take appropriate measures to ensure the fulfillment of this Convention to the extent that state and local governments exercise jurisdiction over such matters are in no manner fully fleshed out in the recent United States Supreme Court decisional law of retreat from the obligations under the ICERD. This deformity in the manner of reasoning of the U.S. Supreme Court is of great concern as it suggests that ordinary U.S. citizens and most particularly those racial minorities most vulnerable to the oppression of racial**

discrimination cannot be assured of a Supreme Court that takes seriously the United States' obligations freely entered into in our Constitutional system nor the obligations freely accepted by the Federal Government through the ratification by the Senate.

108. III. The Senate's advice and consent is subject to the following declaration:

That the United States declares that the provisions of the Convention are not self-executing.

109. **Comment: Similar to the analysis above, that the United States Supreme Court as the judicial arm of the Federal Government, in its retreat from the ICERD obligations in its most recent jurisprudence insufficiently, if at all, addressed these international obligations declared non-self-executing in a manner at least as clear as it was in *Medellin* is of great concern. This deformity in the manner of reasoning of the U.S. Supreme Court is of great concern as it suggests that ordinary U.S. citizens and most particularly those racial minorities most vulnerable to oppression cannot be assured of a Supreme Court that takes seriously the United States' obligations freely entered into in our Constitutional system nor the obligations freely accepted by the Federal Government through the ratification by the Senate.**

110. For the above reasons, whether in terms of the treaty obligations as written and even when made subject to the U.S. reservations, understandings and declarations, our concern is with the inability of all levels of U.S. federal power (Executive, Legislative and Judiciary) and through federalism (Executive, Legislative and Judiciary at the state level) to meaningfully assure progress in elimination of all forms of racial discrimination. On the contrary, the impression by federal, state and local actors of a public and private nature in the United States is we are on a path to a new form of separate but equal in a post-Brown period that might be described as equal but separate in a U.S. form of apartheid.

VII. Conclusion

111. The under-representation of racial and ethnic minorities in U.S. legal education, the federal government's misuse of its accreditation power, the U.S. Supreme Court's dramatic retreat from the effort to address racial discrimination through its decisions eroding race-conscious affirmative action while enshrining majority rule through its decisions in favor of states' rights in our federalism (burdening both minority voting rights and meaningful minority participation in their governance through letting stand a state ban of race-conscious affirmative action), the state and local government perpetuating of structural disparities of a public and private nature that inure to the detriment of racial minorities implicate the several provisions of the ICERD as described in detail above.

112. The ongoing under-representation raises concerns about the rights of racial minorities to education and training under Article 5(e)(v). It also implicates Article 5(a), as the exclusion of minorities from the legal profession negatively impacts the equal treatment of the under-

represented communities before tribunals and other justice organs. The problem of under-representation similarly jeopardizes the United States' compliance with the Article 6 right to effective protection and remedies. Because a legal education is an important entry route into political office, minority under-representation also affects Article 5(c) political rights.

113. As described above, the United States government's use/misuse of its law school accreditation power is worsening the situation. The government's actions implicate a cluster of Convention protections requiring that ratifying states address situations of *de facto* discrimination and inadequate development, including: 1) the Article 1(4) requirement of special measures for "adequate advancement" to ensure equal enjoyment of human rights and fundamental freedoms; 2) the Article 2(1) requirement that the government condemn and eliminate discrimination and to promote understanding; 3) the Article 2(2) mandate of special concrete measures to ensure adequate development and protection of certain racial groups or individuals belonging to them; and 4) Committee Recommendation XIV calling for an end to practices and legislation that are discriminatory in effect, if not in purpose.

VIII. List of Recommendations

114. The United States, through the Department of Education and state accreditation authorities, should use its accreditation oversight responsibility to insist that all accredited law schools admit a racially and ethnically diverse student body, specifically forbidding the use of any admissions practice that disadvantages racial minorities and that has not been validated as an accurate predictor of competent law practice.

115. The United States, through the oversight authority of the Department of Education, the enforcement authority of the Equal Employment Opportunity Commission, and that of the state accreditation authorities, should forbid the use of any attorney licensing test that disadvantages racial minorities unless it can be shown that use of such a test is necessary for valid measurement of minimum competence to practice law.

116. The United States, through programs enacted by Congress and state legislatures, should remedy the longstanding racial discrimination denying access to the legal profession by offering means for low-income minority students to enable them to attend law school.

117. The United States should direct all federal agencies, as well as the Commission on Civil Rights, and state and local authorities to develop and aggressively promote affirmative action programs designed to increase the diversity of the bench and bar. In this regard, the United States should take advantage of the diversity rationale in its jurisprudence, acknowledge that racial preferences designed to assist groups that have been historically discriminated against are not the equivalent of racial preferences designed to subjugate, and therefore must not be considered to be race discrimination.

118. The United States at the federal level and state level should make clear in its submissions to federal or state courts on matters relevant to the elimination of all forms of racial discrimination the implications of such positions on the United States international obligations under ICERD.

119. The United States should encourage all branches of federal and state governments, including federal and state courts to explicitly examine the implications of their decisions on the compliance of the United States in its own territory with its treaty obligations.

Annex A

A short primer on U.S. federalism and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) prepared at the request of the US Human Rights Network

by the Society of American Law Teachers¹⁴⁴

General

From the perspective of international law, the United States, like any other State, is bound as a nation when it ratifies treaties, and is subject to customary international law and “general principles of law recognized by civilized nations.”¹⁴⁵

These international law obligations bind the United States, whatever its internal governing structure.¹⁴⁶ However, the United States has repeatedly asserted, both on the international plane as a political-legal position and as a matter of domestic law, that these international obligations are subsidiary to other United States law (that is, federal law, and at least by some state authorities, state law). Moreover, frequently these international obligations are effectively ignored entirely, even when the U.S. concedes that it is violating international law in doing so. The U.S. approach to international law might be termed the “United States foreign relations law vision.” This vision is in sharp contrast to the positions of the vast majority of developed democracies with respect to the legal force of international law on their countries and their domestic legal systems.

This U.S. foreign relations law vision permeates the United States statements to the United Nations Committee on the Elimination of Racial Discrimination (CERD) and about the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The difference between most countries’ view of the legal effect of international law and the U.S. foreign relations law vision affects the dialogue of the CERD with the United States, and should inform both understanding of the U.S. presentation, and, in turn, analysis of the United States compliance with its international law obligations.

Federalism in the United States

A further complexity is that the assignment of what international law would term the jurisdiction to prescribe, enforce and adjudicate inherent in any State is done in the United States through a constitutional structure of federalism (a federal government that is sovereign, and state governments of 50 states that are also sovereign) and separation of powers (a federal government made up of the branches of the Presidency, Congress, and the Judiciary and each of the structures

¹⁴⁴ For more than forty years, the Society of American Law Teachers (SALT) has been one of the United States’ largest membership organizations for teachers of law. SALT has a three-part mission: 1) creating and maintaining a community of progressive and caring law professors dedicated to making a difference through the power of law; 2) promoting the use of many forms and innovative styles of teaching to make our classrooms more inclusive; and 3) challenging faculty and students to develop legal institutions with greater equality, justice, and excellence.

¹⁴⁵ Article 38 Statute of the International Court of Justice definition of international law.

¹⁴⁶ Section 111 and Comment (a), Restatement of the Law Third, the Foreign Relations Law of the United States (American Law Institute May 14, 1986).

of government of the 50 states). The idea behind this constitutional structure was to provide a double security to the rights of the people. As was described by one of the key framers of the Constitution:

“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”¹⁴⁷

International Law in the United States

International law is incorporated in U.S. domestic law in complex ways. International treaties and, traditionally, customary international law and general principles as U.S. federal law are supreme over the law of the states.¹⁴⁸ For treaties, the Constitution makes it crystal clear that they are part of the “supreme law” of the land, although a Supreme Court opinion early in the U.S. history created the doctrine of “non-self-executing” treaties,¹⁴⁹ which requires Congressional action in order for “non-self-executing treaties” to become law. A self-executing treaty is a treaty that becomes enforceable in U.S. courts upon ratification. This contrasts with a non-self-executing treaty, which becomes enforceable in U.S. courts through the implementation of legislation following ratification. Thus, the U.S. evolved from a system where international law was part and parcel of domestic U.S. law (that is, what is termed a “monist” system) into a “hybrid” system, which incorporates elements of a monist and a dualist system (that is, a dualist system means international law is incorporated into domestic law through domestic implementing legislation). This being said, the U.S. government has progressively leaned toward the “dualist” system, and the U.S. now much more resembles the British form of a dualist approach to international law than the original monist approach provided in the text of the Constitution. There exists considerable uncertainty whether a particular treaty is “self-executing” or not, with almost no human rights treaties considered “self-executing.” There is significant uncertainty as to whether any given treaty is or is not self-executing, until the Supreme Court determines the status of the treaty on a case-by-case basis.¹⁵⁰ If a treaty is considered non-self-executing, domestic implementation is the task of Congress.¹⁵¹ The United States frequently argues, often opportunistically, as it has with the ICERD, that the treaty is both non-self-executing and that there is no need for implementing legislation because the Constitution, the laws of the United States, and possibly the 50 states sufficiently implement the treaty obligation. Similarly, in the case of the International Covenant on Civil and Political Rights, this U.S. position has simply been a reason for avoiding domestic implementation of the treaty

¹⁴⁷ Wednesday, February 6, 1788, James Madison, Federalist Paper 51 available at <http://www.constitution.org/fed/federa51.htm>.

¹⁴⁸ Section 111(1), Restatement of the Law Third, the Foreign Relations Law of the United States, (American Law Institute 1986) (“International law and international agreements of the United States are law of the United States and supreme over the law of the several states.”). Some scholars argue that customary international law and general principles are state law. Jack L. Goldsmith & Curtis Bradley, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

¹⁴⁹ *Foster & Elam v. Neilson*, 27 U.S. 253 (1829).

¹⁵⁰ *Medellin v. Texas*, 552 U.S. 491 (2008), has increased the uncertainty.

¹⁵¹ *Id.*

obligations. The place of customary international law and general principles in U.S. domestic law depends to some extent on whether there is a treaty or a controlling executive or legislative act or judicial decision that contravenes the customary international norm or general principle of international law.¹⁵² If a treaty or other international obligation conflicts with substantive rights expressed in the Bill of Rights of the U.S. Constitution, that international obligation will be given no effect as a matter of U.S. domestic law.¹⁵³

Inconsistency of International Law or Agreement and Domestic Law: Law of the United States

As detailed in the 3rd Restatement of Foreign Relations Law at Section 115, the U.S. approach to inconsistency of international law or agreement and domestic law is:

- (1)(a) An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.
- (b) That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation.
- (2) A provision of a treaty of the United States that becomes effective as law of the United States supersedes as domestic law any inconsistent preexisting provision of a law or treaty of the United States.

¹⁵² *The Paquete Habana*, 175 U.S. 677 (1900).

¹⁵³ *Cf. Missouri v. Holland*, 252 U.S. 416 (1920); *Reid v. Covert*, 354 U.S. 1 (1957). This year, a majority of the Supreme Court somewhat skirted the issue of whether structural grants of power between the U.S. federal and state governments act as limits on the treaty making power and legislative power of the federal government. This case involved the interpretation of the effect of the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. S. Treaty Doc. No. 103-21, 1974 U. N. T. S. 317. The Court held this treaty is a non-self-executing treaty with (unlike the ICERD) implementing legislation through the Chemical Weapons Convention Implementation Act. See 112 Stat. 2681-856. Under the principle that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case, the Court concluded that the relevant section of the implementing legislation which tracks the treaty language should be read narrowly. Absent a clear statement of that purpose, the Court stated it would not presume Congress to have authorized reaching the conduct of the individual in question. A majority of the Court would view such reach of an implementing statute as a stark intrusion by the federal government into traditional state police power authority. The Court noted that if the statute reached the conduct in question, it would mark a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States. *Bond*, *supra* note 103. This line of reasoning trims the force of *Missouri v. Holland* by raising structural federalism concerns about the reach of implementing legislation that tracks language of a treaty entered into under the authority of the United States. Of even greater concern, three justices who concurred in the result of the majority expressed views that the federal treaty power did not reach “internal domestic matters” of the kind that are at the heart of human rights treaties such as the ICERD, a conclusion that is at odds with prevailing interpretation of constitutional treaty-making power. See *Bond*, *supra* note 103 (Scalia, J., concurring). The implication could not be clearer. This recent decision indicates a further destabilizing of U.S. domestic implementation of international law to avoid treaty obligations. In addition to existing federalism challenges to implementing legislation of non-self-executing treaties and to rare self-executing treaties, the *Bond* decision threatens a narrowing vision of the treaty power of the federal government that excludes undertaking treaties concerning internal domestic matters (including human rights treaties). It is therefore evident that a destabilizing of the domestic consequences of U.S. ratification of human rights treaties is ongoing.

(3) A rule of international law or a provision of an international agreement of the United States will not be given effect as law in the United States if it is inconsistent with the United States Constitution.¹⁵⁴

This particular United States foreign relations law vision is all the more perplexing since the Supreme Court had decided, early in the country's history, that domestic courts should make every possible effort to reconcile domestic and international law. As recently noted by the U.S. Department of State Legal Advisor:

"Most famously, the Supreme Court has long held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (the "Charming Betsy doctrine"). In the area of treaty interpretation, the Supreme Court has long noted that it is "bound to observe [treaties] with the most scrupulous good faith." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 68 (1821); see also *Chew Heong v. United States*, 112 U.S. 536, 540 (1884) ("Treaties of every kind ... are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith.") (internal quotation marks omitted). The Court has also repeatedly reaffirmed that it gives "considerable weight" in interpreting treaties to the "opinions of our sister signatories." *Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010).¹⁵⁵

Nonetheless, this binding precedent is insufficiently invoked by U.S. domestic courts.

International Law in Domestic law: Federalism.

As noted in the U.S. reservations, understandings and declarations to the ICERD, in addition to stating the treaty being non-self-executing (with implications in internal law described above) the United States states:

"[T]he United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfilment of this Convention."¹⁵⁶

The federal government is a government of limited jurisdiction with federal law (the Constitution, federal laws and treaties and, traditionally, customary international law and general principles¹⁵⁷) being the supreme law of the land, while each of the states is considered a

¹⁵⁴ Section 115, Restatement of the Law Third, the Foreign Relations Law of the United States (American Law Institute 1986).

¹⁵⁵ Harold Hongju Koh, Memorandum on Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict 11 (January 21, 2013), available at <http://justsecurity.org/wp-content/uploads/2014/03/state-department-cat-memo.pdf>.

¹⁵⁶ Section II, United States Reservations, Understandings and Declarations to the ICERD, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec

¹⁵⁷ Customary international law and general principles are sometimes argued in academic circles to be state law.

government of general jurisdiction. U.S. state responses to international law can best be described as divergent, with some state courts taking non-self-executing treaties into account out of an abundance of caution, and pursuant to the *Charming Betsy* doctrine discussed *supra*, as they are obligations dictated by the Constitution's Supremacy Clause.¹⁵⁸ Other states do not consider themselves bound by non-self-executing treaties or International Court of Justice decisions in the absence of implementing legislation.¹⁵⁹ Some states have attempted to ban the application of international law (viewed as foreign law) in their courts, finding such actions (incorrectly) to be irrelevant to interpretation of U.S. law.¹⁶⁰

Conclusion

The United States has undertaken obligations in international law in the form of treaties, customary international law, and general principles. How those international law obligations become part of U.S. domestic law is complex. Divergent reactions to international law by U.S. courts as a result of the particular U.S. foreign relations law vision are rampant at the state and federal level. The current political climate has made U.S. respect for international law even more contested. Whereas there is no doubt that the United States remains subject to specific international law obligations such as the ICERD, its willingness, or ability, to implement those obligations remains uncertain.

¹⁵⁸ Oklahoma, See Concurrence of Judge Charles S. Chapel, *Torres v. Oklahoma* No. PCD-04-442 (Okla. Crim. App. May 13, 2004).

¹⁵⁹ See *Medellin v. Texas* 552 U.S. 491 (2008); Virginia Governor's statement of April 14, 1998 (in the Angel Breard case subsequent to *Breard v. Greene*, *The Republic of Paraguay v. Gilmore*, 523 U.S. 371 (1998)).

¹⁶⁰ Ryan H. Boyer, Student Note, "*Unveiling*" *Kansas's Ban on Application of Foreign Law*, 61 KANSAS L. REV. 1061 (2013).