Dear Faculty:


“Taking Affirmative Action around the World” is chapter two of the book as well as sections of the book’s introduction and epilogue. I have adapted this unpublished piece from the manuscript so that you can read it as a self-contained article. I look forward to your feedback.

Best,
Tim
Taking Affirmative Action around the World

H. Timothy Lovelace, Jr.
Professor of Law, Indiana University
John Hope Franklin Visiting Professor of American Legal History, Duke University

In late 1963, the United States Department of State prepared for renewed international criticism of the Jim Crow South. During the early 1960s, as newly independent nations joined the United Nations and as the U.S. civil rights movement escalated, many U.N. delegates questioned the U.S.’s ability to lead a racially diverse world. Few U.N. organs caused State Department officials more consternation than the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Sub-Commission). The Sub-Commission was a fourteen member body comprised of racial experts from across the world. Given the Sub-Commission’s racial mission, the Sub-Commission often transformed into a forum where foreign officials shamed the body’s U.S. members for proclaiming the U.S.’s commitment to democracy abroad while denying African-Americans democracy at home.1

But federal officials had devised a plan to help rebrand the image of U.S. democracy. The State Department selected lawyer Morris Abram, known for “the leadership that he is taking in the field of civil rights in the South,” as the next U.S. member on the Sub-Commission. Abram was no ordinary civil rights lawyer.2 In the early 1960s, Abram was an attorney for movement’s most recognizable figure, Dr. Martin Luther King, Jr.3 Abram, like King, was an Atlanta resident, served as a trustee at King’s alma mater, Morehouse College, and had personal ties to movement giants, like Roy Wilkins, Benjamin Mays, and Whitney Young.4 According to the New York Times, the University of Chicago-trained lawyer had built a national reputation “as an attorney in crucial cases dealing with major civil rights and civil liberties issues.”5 Abram was founding member of the Lawyers’ Committee for Civil Rights and had waged a protracted battle for black voting rights in the South, which culminated with a landmark U.S. Supreme Court decision recognizing the “one person, one vote” principle.6 Abram chaired the board of the American Jewish Committee and later served the organization’s national president.7 State Department officials were very pleased with their choice for the Sub-Commission. In Abram,

2 Letter from Harlan Cleveland to Phillip Halpern (Mar. 31, 1962) (on file with National Archives, College Park, Md., Central Foreign Policy Files, Record Group 59, Box 550, Folder 341.0707/5-1860) [hereinafter Central Foreign Policy Files].
3 Real Drama Followed the Kennedy Call in the King Case, NORFOLK JOURNAL AND GUIDE, Dec. 31, 1960 at 8.
4 W. Young to Talk on Race, N.Y. AMSTERDAM, Sept. 21, 1963, at 22.
5 Jewish Unit Picks National Leader, N.Y. TIMES, Feb. 16, 1964, at 73.
7 Morris Abram is Named Chairman of Jewish Body, ATL. DAILY WORLD, May 8, 1962, at 3; Jewish Unit Picks National Leader, supra note 5, at 73.
they had found a “trouble shooter” both “familiar with civil rights developments here” and “willing to undertake the United Nations assignment.”

State Department officials then named Clyde Ferguson, an African-American attorney who was widely considered “one of the best civil rights legal brains in the country,” as Morris Abram’s alternate to the Sub-Commission.9 Ferguson’s credentials were virtually unrivaled. He was an honors graduate of Harvard Law School, taught on the Harvard general and Rutgers Law faculties, and served as a board member of the NAACP Legal Defense Fund.10 In 1962, Ferguson was appointed General Counsel of the U.S. Commission on Civil Rights. Black America reveled in Ferguson’s singular feat. Writers across the country heralded him for being “the first member of his race to serve as chief legal officer for a federal agency.”11 And in the fall of 1963, Ferguson was named Dean of the Howard University School of Law—the civil rights citadel that had produced Thurgood Marshall.12 In his capacity on the Sub-Commission, Ferguson would negotiate with U.N. working parties, assist with drafting international legislation, and surrogate as the U.S. member in Abram’s absence.13 The State Department had selected one of the premier representatives of the race.14

The State Department’s personnel decisions were groundbreaking. Both Abram and Ferguson were immensely talented, but they offered much more to the U.S. delegation to the Sub-Commission than their intellectual abilities. State Department officials recognized that civil and human rights were not simply moral issues; they were also foreign policy issues.15 The State Department had tapped two high-profile, civil rights lawyers to champion U.S. constitutional values. Ferguson was the first African-American to serve on the Sub-Commission, and Abram was only the second Jew. Both men were natives of the South, the region of the country so fiercely criticized at the U.N., and their personal and professional backgrounds lent immediate credibility to the U.S. position.16 The U.S. delegation literally embodied the nation’s commitment to racial progress.

The State Department made one final move in preparation for the Sub-Commission’s upcoming session. During its 18th session, the U.N. General Assembly gave “absolute priority

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10 C.C. Ferguson on Harvard Staff, BALT. AFRO-AMERICAN, May 19, 1951, at 7.
12 Clarence Ferguson Appointed Howard University Law Dean, BALT. AFRO-AMERICAN, Aug. 10, 1963, at 1, 3.
13 Letter from Morris Abram to Berl Bernhard (Jan. 2, 1963) (on file with the Stuart A. Rose Manuscript, Archives, and Rare Book Library (MARBL), Emory University, Morris Abram Papers, Box 94, Folder Sub-Commission on Prevention of Discrimination, Etc., 1963) [hereinafter Abram Papers].
16 See infra Part II.A.
to the preparation of a draft international convention on the elimination of all forms of racial discrimination.”17 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD or Convention) would become the world’s most comprehensive treaty on race, and the General Assembly tasked the Sub-Commission with preparing the U.N.’s first draft.18 State Department officials seized the moment. They charged Morris Abram and Clyde Ferguson to develop a U.S. draft of the Convention that might be used as the basis for the Sub-Commission’s debates. The State Department’s drafting instructions to Abram and Ferguson were clear. “On the development of text,” the State Department’s guidance paper read, “the approach should be along the lines of the ‘equal protection’ concept in our 14th Amendment.”19 State Department officials reasoned that if international human rights law mirrored U.S. constitutional law, then U.S. officials could persuasively argue that the U.S. was at the vanguard of racial progress. The State Department lobbied the Sub-Commission’s chairman, and the U.S. was subsequently named as the primary drafter of the Convention. When Abram and Ferguson were presented with the unique opportunity to mold the world’s most comprehensive treaty on race, they exported U.S. constitutional law and values, like equal protection, into the U.N. Race Convention.20

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Despite the rich exchanges between the Sub-Commission, the State Department, and the civil rights community, the relationship between the U.S. civil rights movement and the Convention’s legislative history remains under-explored. In fact, one prominent human rights scholar, David Forsythe, has gone as far to claim that “the United States, despite its dominant power, has not been a major shaper of community standards or international regimes on human rights.”21 Taking Affirmative Action around the World contributes to a growing historiography and corrects this common misperception.22 Most notably, two of America’s foremost civil rights lawyers took center stage during the Convention debates. Likewise, the State Department acknowledged there was still race work to do in the U.S. but maintained that the federal

21 David Forsythe, Human Rights in U.S. Foreign Policy: Retrospect and Prospect, 105 POL. SCI. QUARTERLY 435 (1990). It’s critical to note that the terms “civil rights” and “human rights” were hotly contested in the early and mid-1960s. During the Convention debates, Clyde Ferguson conceded, “I know that internationally what constitutes human rights is still quite difficult of definition, quite difficult of articulation. Domestically what constitutes the civil rights which we use almost daily in our dialogue is equally difficult of statement or articulation or even in some cases, of analysis.” See Clarence Clyde Ferguson, The Nature and Dimensions of Human Rights in the United States, 11 HOWARD L.J. 452, 456-457 (1965). These definitional problems were present even at the founding of the U.N. See infra note 101. For the sake of readability, this article uses the term “civil rights” to refer to the protections then offered under the U.S. Constitution and the term “human rights” to refer to the protections offered under the Universal Declaration of Human Rights.
government had become an important ally in the fight against racism. State Department officials sought to persuade newly independent countries and the Sub-Commission to embrace U.S. constitutional values by showcasing the widespread transformations in U.S. law, policy, and society. Much of the Cold War civil rights scholarship has demonstrated how U.S. interest in winning the hearts and minds of the Third World spurred these domestic civil rights reforms. The history of the Convention demonstrates that international affairs not only helped to shape the U.S. civil rights movement but that the U.S. civil rights movement also helped to shape international human rights law.

Before Malcolm X boldly challenged those in the movement to “expand the civil rights struggle to the level of human rights” and “take the case of the black man in this country before the nations in the U.N.,” Morris Abram and Clyde Ferguson were at the U.N. drafting the Convention. This watershed moment in Malcolm’s political consciousness has typically functioned as a metaphor for the shift in the political agendas of the movement. Decentering Malcolm from the story of black internationalism in the 1960s uncovers the rich varieties of U.S. human rights advocacy during this period. Cold War liberals, including Morris Abram and Clyde Ferguson, were similarly interested in developments at the U.N. Abram and Ferguson, like Malcolm X, were attempting to use international law to transform domestic law and politics. Yet, unlike Malcolm, the State Department’s appointees to the Sub-Commission sought to protect the U.S.’s international reputation and foreign policy interests in the process. This untold story of racial diplomacy—the collaboration between the State Department, Abram, and Ferguson—illustrates how racial liberals became key components of U.S. statecraft during the Cold War, exposes great tensions within the global freedom struggle, and reveals the diversity of strategies race men used to end Jim Crow.

Such an exploration also sheds new light on the international impact of mid-century movement lawyering. Some foreign leaders were deeply impressed by the hard earned victories of U.S. civil rights lawyers. These officials drew extensively from movement lawyers’ experiences and insights to remake constitutions across the globe. The Kenyan government, for example, commissioned Thurgood Marshall, to help draft the country’s independence constitution. Abram and Ferguson were part of this elite network of civil rights lawyers conducting international diplomacy in the early and mid-1960s. Abram and Ferguson’s diplomacy at the U.N., however, has had an even more far-reaching effect on world race

25 See e.g. Manning Marable, Malcolm X: A Life of Reinvention (2011).

relations than Marshall’s work for the Kenyan government. There are now 178 parties to the
Convention, scores of countries have domesticated the Convention, intergovernmental
organizations have developed new human rights mechanisms to assist with the implementation
of the Convention, and individuals throughout the world use the Convention to seek legal redress
in national and international courts. Abram and Ferguson’s approach to the Convention debates
was so powerful that it still guides the U.S. State Department’s approach to the Convention
today. And as this article demonstrates, it might also be used to a guide to contemporary
affirmative action jurisprudence.

Today, the term “affirmative action” for many has a single meaning, but this was not
always so. In the early 1960s, affirmative action’s meaning was elastic at first—and
intentionally so. Hobart Taylor, the Kennedy administration lawyer credited with placing the
expression into Executive Order 10925, described affirmative action’s modest origins. “I was
searching for something that would give a sense of positiveness to performance under that
executive order, and I was torn between the words ‘positive action’ and the words ‘affirmative
action.’ I took ‘affirmative’ because it was alliterative,” Taylor revealed. “I wanted to carry out
the idea that people should do something,” he underscored, “but mostly I had in mind that it
would come to be interpreted and come to have conceptual meaning with the passage of time.”
For Taylor, affirmative action should provide the impetus and the right “teeth” to add to broad
calls for equal opportunity. The precise content of an affirmative action plan should be left to the
plan’s drafter, who would be better positioned to determine the needs in that specific context.
Morris Abram and Clyde Ferguson were on the frontier of clothing the term “affirmative action”
with meaning. Ferguson, in particular, devoted great energy in the early 1960s to promoting
remedial plans as General Counsel to the Civil Rights Commission, and he and Abram, as the
U.S. experts on the Sub-Commission, began to use the terms “affirmative action,” “special
concrete measures,” or simply “special measures” interchangeably in their human rights
advocacy. Affirmative action became central to the experts’ diplomatic mission, as they sought
to transplant innovative and constitutionally permissible ideas of equality into the Convention.
Affirmative action showed the world that America had more than rhetoric to deal with race
problems; it also had the tools to perfect the American idea. Conversely, affirmative action
illustrated to U.S. policymakers that they did not have shy away from international human rights

27 See e.g. A Tribute to the Memory of Clarence Clyde Ferguson, Jr., 19 HARV. C.R.-C.L L. REV. ii (1984). Despite
the proliferation of civil rights scholarship, the movement’s most charismatic personalities—men like Thurgood
Marshall—dominate the literature on civil rights lawyering. See generally WI L HAYGOOD, SHOWDOWN: THURGOOD
MARSHALL AND THE SUPREME COURT NOMINATION THAT CHANGED AMERICA (2016); CHARLES ZELDEN,
THURGOOD MARSHALL: RACE, RIGHTS, AND THE STRUGGLE FOR A MORE PERFECT UNION (2013); GILBERT KING,
DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA (2012);
LARRY GIBSON, YOUNG THURGOOD: THE MAKING OF A SUPREME COURT JUSTICE (2012); THURGOOD
MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 471 (Mark Tushnet ed., 2001);
JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (1998); MARK TUSHNET, MAKING
CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991 (1997); MARK TUSHNET,
28 See PATRICK THORNBERRY, THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL
29 For insights on this approach, see e.g. Government of the United States of America, Periodic Report to the United
Nation Committee on the Elimination of Racial Discrimination (June 12, 2013), http://www.ushnetwork.org/sites/
lawmaking. Obviously, the nation had race troubles, but it possessed the legal authority and means to remedy past and present discrimination. But more so than anything else, together, these men told a remarkable story of how America’s ongoing social transformation could serve as a model for the world.30 Their journey is a biography of affirmative action’s early years.

Finally, this article reconsiders the role of the U.S. South in the evolution of global governance. Most international legal histories do not treat the U.S. South or Southerners as important to the epistemological production of international human rights law.31 The U.S. South is conventionally depicted as an insular region—anything but a space critical to the production of international law. This article instead offers fresh understandings of how the U.S. South and Southerners played pivotal roles in the Convention’s legislative history.

Part I of the article offers background on the Convention’s origins and explains why the U.S. needed to revisit its diplomatic strategy for the Convention debates. Part II details that strategy. Part III examines how Abram and Ferguson looked to developments in U.S. constitutional law and policy to frame the U.S. draft Convention. Part IV is an internalist account of the Sub-Commission’s debates on special measures. Part V examines the results of the partnership between the State Department and civil rights leadership. The article concludes with reflections on the current implications of Abram and Ferguson’s diplomacy.

I. A Brief History of the Convention and the U.S.’s Interest in the Convention Debates

The Convention was born from an outbreak of anti-Semitism in Europe and the rise of decolonization. U.N. officials proposed drafting a far-reaching human rights treaty in late 1962, one that addressed “all manifestations and practices of racial, religious and national hatred.” Members of the bourgeoning Afro-Asian bloc had other plans. The bloc moved to make one treaty into two: the first treaty on racial discrimination and a second treaty on religious intolerance. The Afro-Asian delegates argued that, given the familiar ideological fissures at the U.N., incorporating a ban on religious intolerance in the proposed treaty would delay the treaty’s adoption. And they were right. The Soviet Union eschewed any U.N. examination of its continuing anti-Semitic practices. Its U.N. delegates routinely refused to even acknowledge Soviet anti-Semitism. Many Third World representatives agreed that due to the Soviet Union’s egregious record on religious tolerance a broad treaty on discrimination would likely be sidelined. The U.N.’s efforts to end racial discrimination would become collateral damage under

30 Interview with Hobart Taylor (Jan. 6, 1969), Oral History Collection (on file with the Lyndon Baines Johnson Presidential Library). Taylor gave an example of affirmative action’s evolution. “So affirmative action now means, for instance, that you don’t sit there and have your employment door open—it means that you have to go out and use appropriate means to find minority people to employ.” He added that “without a word like ‘affirmative’ there, or without some other [similar] word …you couldn’t get that done.”

31 See STEVEN JENSEN, THE MAKING OF INTERNATIONAL HUMAN RIGHTS: THE 1960s, DECOLONIZATION, AND THE RECONSTRUCTION OF GLOBAL VALUES (2016); see also NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1980). Movement scholars have generally looked favorably upon civil rights lawyers and activists’ efforts to step past national borders and forge transnational connections. In the larger project, I offer a more nuanced and deeply critical view of these attempts to extend the movement’s geopolitical reach. While Abram and Ferguson left an indelible imprint on the Convention, their advocacy also demonstrates the limitations of transplanting U.S. conceptions of equal protection into foreign and international law. For my assessments on the efficacy of a U.S.-centered, international race treaty, see chapters 3 and 9 and the conclusion in the book.
a more inclusive treaty. The U.N. General Assembly ultimately ceded to the Afro-Asian bloc’s request and placed race and religion into separate human rights instruments.\textsuperscript{32}

The U.N. General Assembly tasked the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities with drafting the primary language for the human rights instruments on race and religious discrimination, respectively. The Sub-Commission authored declarations—non-binding expressions that declared the ideal standards for all countries to follow—on each topic. Once the Sub-Commission completed each aspirational document and the General Assembly ratified a particular declaration, the Sub-Commission could begin drafting the corresponding convention, relying on the ratified declaration as a guide. Each convention, as a treaty, would then create binding legal obligations on its state parties.\textsuperscript{33}

Under U.N. protocol, the Sub-Commission was an apolitical body and therefore ideal to draft of the proposed human rights instruments. U.N. rules stated that the Sub-Commission’s members were racial “experts” who operated as individuals, not as representatives of their home states. The Sub-Commission was designed to advance the idea that human rights were to be “above politics,” “neutral,” and “universal” in application. U.N. rules also prohibited the Sub-Commission from discussing specific developments in any country.\textsuperscript{34} Nonetheless, the Sub-Commission’s recognition of personal autonomy was often a legal fiction. The Sub-Commission was composed of racial “experts” who were appointed by their respective national governments and who typically operated as state agents. The U.N.’s fraught conception of racial “expertise” privileged state assessments of pressing issues of discrimination and masked the ways in which the Sub-Commission’s structure gave states a viable way to pursue their national interests under the guise of human rights promotion. To be sure, at times during the Sub-Commission’s deliberations, the body evinced real concern for the world’s minority populations during its deliberations. Yet, at other times during its deliberations, racial politics were simply power politics. Nations used this forum to discredit their ideological enemies, gain allies, rehabilitate their foreign reputations, and spread their visions for race relations abroad. And in many instances, these diverse motivations for human rights work dovetailed in the Convention debates.\textsuperscript{35}

The U.S. had been badly embarrassed before the human rights community during the debates on the U.N. Declaration on the Elimination of All Forms of Racial Discrimination (Declaration), the precursor to the Convention. The Declaration proclaimed, “No State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on

\begin{footnotesize}
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  \item \textsuperscript{33} \textit{Id.} at 376. After the Sub-Commission completed each draft, the draft then went to the Commission on Human Rights, the Third Committee, and ultimately the General Assembly for additional debate. \textit{See} Lerner, \textit{supra} note 29, at 4-6.
  \item \textsuperscript{34} Humphrey, \textit{supra} note 1, at 869-70.
  \item \textsuperscript{35} MORRIS ABRAM, \textit{THE DAY IS SHORT} 151-154 (1982).
\end{itemize}
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the grounds of race, colour or ethnic origin.”

This provision ran afoul of the fourteenth amendment to the U.S. Constitution. Despite U.S. rhetoric, its constitution could not reach all forms of racial discrimination under the Declaration. The Declaration passed unanimously, but the U.S. abstained from the vote given “the constitutional difficulties” the article presented.

State Department officials recognized that the Convention debates offered new opportunities for the U.S. to counter the Eastern bloc’s advances on the Sub-Commission. The Convention, unlike the Declaration, would be legally binding upon state parties. Now with an opening to redefine racial discrimination, the State Department embarked upon a strategy to translate its vision of racial equality into a binding treaty.

II. A U.S. Plan for the World

The U.S. strategy for the Convention debates offered a lesson in managing a racial revolution. The State Department developed a “civil rights as human rights” approach to the negotiations. It first required that the U.S. declare that it was committed to serving as the world’s leader in the struggle for equal protection under law. “It can be pointed out that our Constitution is consistent with the Universal Declaration [of Human Rights], which has been generally accepted as an international norm,” the State Department’s instructions for the Convention negotiations read. State Department officials averred that it was not American values that had been the source of the nation’s race problems but was lapses in the commitment to those values that had caused race problems. In late 1963, America then had a civil rights bill before Congress, a President sympathetic to the movement, and the Warren Court deeply dedicated to protecting the rights of racial minorities. There now seemed to be a robust federal commitment to honoring the U.S. Constitution, a model human rights document. The State Department hoped that its strategy would counter foreign criticism of U.S. race relations, enlarge the U.S.’s sphere of influence at the U.N., and reposition the nation in discussions of global racial progress—all without offending the U.S. Constitution.

A. South of Freedom

However, 1963, in many ways, appeared to be the wrong year for the State Department to act so brazenly. Birmingham’s high-pressured fire hoses, snarling police dogs, and dead children haunted America’s conscience. More than 200,000 citizens marched on Washington to remind the world that now 100 years after the Emancipation Proclamation “the Negro lives on a lonely

37 Clarence Clyde Ferguson, Jr., General Counsel to Mrs. Rachel Nason (Sept. 18, 1963) (on file with National Archives, College Park, Md., Record Group 84, Office of Economic and Social Affairs, Dev. Econ. Am. Reds to Discrim., Box 86, Folder Discrimination: Race—1960-63).
39 Guidance Paper, supra note 19, at 4-5.
40 PETER LEVY, CIVIL WAR ON RACE STREET: THE CIVIL RIGHTS MOVEMENT IN CAMBRIDGE, MARYLAND (2003);
island of poverty in the midst of a vast ocean of material prosperity.”

African diplomats repeatedly complained to the State Department and their home governments after they were Jim Crowed out of housing in the District of Columbia. These diplomats faced additional humiliation on the drive from the nation’s capital to U.N. headquarters. They were frequently harassed and denied access to public accommodations on Maryland’s infamous Route 40. America’s race problems appeared to be greater than temporary lapses in democratic governance. In fact, racial domination seemed to be a defining feature of U.S. democracy.

The question quickly became: why should a government that had failed to stamp out racism within its own borders be charged with directing the world’s march against bigotry? State Department officials reasoned that outright denial, scapegoating, or dismissing the significance of the American dilemma would undermine U.S. credibility during the Convention debates. An America perceived as lukewarm or even hostile to civil rights progress would struggle to endear the human rights community to its interests and values. If civil rights were truly synonymous with human rights, the U.S. had to powerfully convey the moral possibilities of U.S. constitutionalism.

The State Department’s strategy demanded new levels of transparency, seriousness, and visible leadership on the race question. Nothing demonstrated this portion of their plan more than Ambassador Adlai Stevenson’s address to the U.N. General Assembly’s Social, Cultural, and Humanitarian Committee in late 1963. The U.S. delegate assigned to the committee was scheduled to address the group of representatives from all 107 U.N. delegations, but Stevenson, the senior U.S. representative to the U.N., usurped the scheduled delegate’s slot. Ambassador Stevenson announced that he was making the speech himself given the Convention’s significance. “Mr. Chairman,” the seasoned diplomat began, “I trust that the appearance of the head of the United States Delegation here today will be rightly taken as evidence of the importance which my country places the work of this committee in the field of racial justice. The United States government—indeed a broad cross-section of our whole society—is at this moment preoccupied with the painful but compelling task of rooting out racial discrimination from our own national life.” Stevenson conceded to the U.N. audience that “the names of many of our cities have been made known—and at times been made notorious—throughout the world: Jackson, Little Rock, Albany, Cambridge, and Birmingham, for example.” Stevenson went further. “The recent murder of four innocent Negro children in a church has shocked and sickened us all.” Indeed, only weeks earlier, a time-delayed, dynamite blast rocked Birmingham’s Sixteenth Street Baptist Church killing Addie Mae Collins, Denise McNair, Carole Robertson, and Cynthia Wesley. In a region where many citizens prized religiosity, the

41 I Have a Dream (Aug. 27, 1963), in A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 78 (Clayborne Carson and Kris Shepard eds., 2001).
Klan’s callous attack on a civil rights sanctuary after the morning’s Sunday School lesson epitomized America’s deep hypocrisies.45 “Such a crime impairs human freedom not only here,” Stevenson lamented, “but throughout the world.”46

Many reporters and U.N. delegations were astonished by the ambassador’s frank and painfully honest commentary. The New York Times described Stevenson’s remarks as “an uncommonly candid recital of the racial struggle in the United States. Rarely in the United Nations do member states talk about their internal problems, and even more rarely do they do so with such open self-criticism.”47 But Stevenson’s candor was strategic. Newswires crisscrossed the globe, circulating sensational portraits of racial strife in the U.S. America’s difficulty in protecting the human rights of its black citizens, Stevenson readily admitted, “is evident to all.” The ambassador then reconceptualized the nation’s racial struggles. Rather than assume a purely defensive posture, Stevenson asserted that the “troubles we have today are the result of progress made yesterday. This is real significance of Little Rock, Birmingham, Albany, Cambridge, and Jackson.” His reframing of the American dilemma attempted to capture the emotionalism of the moment, meet the demands for increased U.S. transparency, and communicate his firm belief in the redemptive power of U.S. values. “It is an unhappy fact that ignorance is stubborn and prejudice dies hard. But we are moving—swiftly now and surely—in the direction of equal rights for all in the last corner of the land.”48

The State Department’s approach to race required U.S. diplomats to explain away the nation’s race problems through American exceptionalism. According to this progressive narrative, the U.S. had been trailblazers in the world’s struggle for liberty for nearly two hundred years. The civil rights movement was the last phase in America’s march toward human rights for all. “In my own country, we are even now living through our third revolution in the name of freedom. Each has been accompanied by anguish,” Ambassador Stevenson acknowledged. “These three revolutions of freedom in my own land illustrate the phases involved in the evolution of the conception of human rights—phases often erratic and uncertain in detail but steady in the basic purpose of assuring wider liberties to all.” The first revolution was a battle “for freedom from colonial dependence,” Stevenson explained, and “our second revolution for freedom” was the Civil War. Unlike the first two revolutions, “[o]ur third and current revolution for freedom has been essentially peaceful; and nearly all Americans, Negro as well as white, are determined to keep it that way,” the ambassador claimed. “Thus do we keep revising and broadening our conception of human rights in my country. Let us look at the record of my nation’s fight to live up a bit better to its heritage.” He concluded, “We therefore would not risk leaving the impression that we place anything but the highest priority on the fight against discrimination everywhere.”49 Stevenson’s evolutionary logic was standard fare for U.S. Cold Warriors interested in race reform and fit neatly within the Convention debates.

46 Stevenson, supra note 45, at 5.
48 Stevenson, supra note 45, at 5.
49 Id.
The State Department’s strategy also borrowed from the trope of Southern exceptionalism. This myth regionalized U.S. racism, making America’s race problem, at its core, a Southern problem. The U.S. ambassador’s list of “notorious[ly]” racist cities—“Little Rock, Birmingham, Albany, Cambridge, and Jackson”—were all below the Mason-Dixon Line. This representation of U.S. race relations conveniently sidestepped the national realities of white supremacy and ignored the fierce and growing movement activism in cities like Detroit, Chicago, and Los Angeles. The trope of Southern exceptionalism also purported to explain federalism’s relationship to racial justice. Racial subordination occurred in the U.S., because many Southern state governments invoked states’ rights to impede racial progress. It was federal officials, pursuant to this binary line of reasoning, who brought racial modernity to their backward brethren.

During Adlai Stevenson’s speech to the Social, Cultural, and Humanitarian Committee, the ambassador invoked this familiar binary. “And if anyone is disposed to doubt the resolve of my government to enforce the Supreme Court decision on equal rights in education, I would remind him that a short time ago, thousands of Federal troops supported the right of a single individual to sit in the classrooms of the University of Mississippi.” In Stevenson’s flat assessment of the standoff in Oxford, there was no room for federal ineptitude, complicity, or cowardice in the campus desegregation story. The federal government was James Meredith’s, and by extension, the race’s savior. Stevenson emphasized, “[T]he machinery of the national government has been mobilized to support an irrevocable commitment—to destroy racial discrimination in this society forever.” Southern governments were largely the problem. The federal government had the region’s solutions. “The mature reaction of world opinion to recent events in the American South shows that people around the world recognize the difference between a country which is having racial trouble because it is unwilling to make progress and a country which is having racial trouble because it is making progress,” the ambassador asserted. “My government” is committed to the “speedy elimination of racial discrimination in all its forms” [and] we are doing a great deal about it.

B. Morris Abram and Clyde Ferguson: The Changing Faces of U.S. Racial Diplomacy

Ambassador Stevenson enlisted Morris Abram and Clyde Ferguson—men who represented the promise of a new South—as key allies in the State Department’s treaty negotiations. The race leaders possessed cosmopolitan worldviews, but they ultimately believed that the U.S. federal government could and should be the world’s engine for racial progress. Abram and Ferguson regularly demonstrated the ability to close the gaps between the American ideals and the practices and had built their reputations on excelling in these crisis situations.

50 Id.
52 For more on Southern exceptionalism, see generally THE MYTH OF SOUTHERN EXCEPTIONALISM (Matthew Lassiter and Joseph Crespino, eds. 2010).
53 Stevenson, supra note 45, at 4-5.
54 See JAMES MEREDITH, THREE YEARS IN MISSISSIPPI (1966).
55 Stevenson, supra note 45, at 4-5.
State Department widely distributed Abram and Ferguson’s federal staff directories to other delegations as part of U.N. protocol, but their compelling personal narratives, which the experts were not shy about sharing, offered the U.S. a much greater public relations tool.  

Morris Abram was born in Fitzgerald, Georgia to a Jewish immigrant from Romania. Abram “trace[d] his interest in human rights back to his boyhood in the tiny town,” a Baptist hamlet in Georgia’s black belt feared for its local klavern. As a young man, he left rural America for Oxford, England on a Rhodes Scholarship. During the Second World War, he joined the Army Air Forces, quickly rising to the rank of major and earning the Legion of Merit for his “exceptionally meritorious conduct” in war. At the close of hostilities, Abram moved to Germany and joined U.S. Supreme Court Justice Robert Jackson’s legal staff in Nuremberg. There, the decorated, World War II veteran prosecuted Nazis—including Adolf Hitler’s designated successor, Hermann Goering—at the International Military Tribunal. When Abram returned to his home state, he again braved battles with racists and anti-Semites. He collaborated with lawyers from the Anti-Defamation League to draft legislation aimed at breaking the Klan’s stranglehold on the South. The statute, which criminalized public mask wearing, was enacted in five states and fifty southern cities, including Atlanta. Abram later occupied the liberal edge of the New Frontier as a key human rights voice in the Kennedy White House. In 1961, for example, President Kennedy dispatched Abram to represent the U.S. at Tanganyika’s independence celebration and appointed him to be the first general counsel of the Peace Corps. State Department officials recognized that Abram’s identity and insights would allow him to speak authoritatively on the most pressing, legal issues facing the Sub-Commission: the creation of a treaty on racial discrimination and a declaration on religious intolerance. Given the “crisis character of human rights issues” on the U.N.’s agenda, the State Department identified an impressive slate of progressive candidates “equipped to give leadership” and “handle emergencies” during the Sub-Commission’s session. One stood out. “As you know, our first choice,” the State Department memo’s disclosed, “is Morris Abram.”

Clyde Ferguson was born in Wilmington, North Carolina to a prominent Methodist preacher, who, as part of the Great Migration, took his family north to escape Jim Crow. Ferguson graduated Phi Beta Kappa from Ohio State, and he, too, earned a Rhodes nomination. And like Abram, Ferguson joined the war effort in the 1940s and shined in battle. The native North Carolinian won a Bronze Star for his heroism in the European and Southwest Pacific theatres. In the 1950s, the Harvard Law honors graduate gained a wealth of experience in international human rights law and politics. He studied at the Academia Inter-Americano de Derecho in Havana and represented the U.S. at the Western Hemisphere United Nations

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56 See Biography of Morris Berthold Abram (n.d) (on file with MARBL, Abram Papers, Box 94, Folder 8); Biographical Summary of Clarence Clyde Ferguson, Jr. (n.d.) (on file with MARBL, Abram Papers, Box 94, Folder 8).
57 Lawyer, Educator, Civil Rights Activist, Jewish Community Leader, Educator, Diplomat, Morris Abram (n.d.) (on file with MARBL, Abram Papers, Box 94, Folder 12).
59 Memorandum from Nathaniel McKitterick to Harlan Cleveland, supra note 8, at 1.
In the fall of 1963, Adlai Stevenson selected the civil rights lawyer to serve as the mission’s special adviser to the U.N. General Assembly. State Department officials were clear about why they named Ferguson to the post. “The racial disturbances in this country … will undoubtedly provide ammunition for the Soviet bloc and the extremists among the Afro-Asians to use against us in debate and may affect adversely our influence with the more moderate African delegations,” one State Department memorandum read. “We must emphasize our own determination to end racial discrimination in this country and if the Soviet Union tries to capitalize on the situation here and have no hesitation in reversing the attack in this area where the Soviet bloc is vulnerable.” As Stevenson’s speech to the U.N. conceded, the iconic images from the Birmingham movement invited unparalleled criticisms. Only weeks after Martin Luther King’s “Letter from the Birmingham Jail,” King published a hard-hitting editorial, where he described Birmingham as “the last stop before Johannesburg, South Africa.”

The analogies between “petty apartheid” and “grand apartheid” were gaining traction, Adlai Stevenson’s staffers stressed. “We need a special adviser on human rights on our Delegation to the 18th General Assembly to keep the Delegation straight on race developments in the U.S. and on apartheid in South Africa—both can come up in any committee at any time, or in plenary.” Ferguson was selected. The dean’s racial background and experience as an adviser to Stevenson proved to be significant in his appointment as Abram’s alternate during the Convention debates. “Our preference is Clyde Ferguson,” State Department officials revealed in their discussion of potential alternates. After rattling off Ferguson’s personal accomplishments, they turned to two other, primary considerations. “He is a Negro,” the selections memorandum underscored, “and someone already familiar with the U.N.”

Abram and Ferguson were strong institutional fits for the State Department’s plan, because both men personified the marriage between Cold War politics and the era’s “responsible” race leadership. The U.S. racial experts, like State Department officials, contended that the U.S. could lead the world’s pursuit of freedom given the trajectory of American history and the moral superiority of U.S. constitutional values. They believed that American race relations were not where they needed to be, but the men were quick to assert that the nation was a far cry from the shadows of its gloomy past. The U.S.’s racial tensions were simply growing pains in the evolution of democratic governance. “We are in the midst of a revolution. I sometimes call it the third American revolution,” Ferguson wrote, echoing Adlai Stevenson. “In short, I think a revolution may be used affirmatively … and this revolution presents the grand opportunity to seize the flux of change for the purpose of finally resolving our problem.”

Abram and Ferguson had devoted their adulthoods to creating a world that embraced the very best U.S. ideals—or what they perceived as such. In fact, they had risked their lives for these ideals at home and abroad.

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60 Biographical Summary of Clarence Clyde Ferguson, Jr., supra note 55, at 1.
61 Memorandum from Nathaniel McKitterick to Harlan Cleveland (July 16, 1963) (on file with John F. Kennedy Library, Harlan Cleveland Papers, Box 114, Folder U.N. Human Rights).
62 Martin Luther King, Jr., Birmingham, U.S.A.: How It All Began, N.Y. AMSTERDAM, June 8, 1963 at. 10.
63 Memorandum from Nathaniel McKitterick to Harlan Cleveland, supra note 60, at 1.
64 See Bell, supra note 15; Mary Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61 (1988).
65 Ferguson, supra note 21, at 460-62.
Abram and Ferguson were also well-suited to execute the State Department’s plan, because they did not blush at the idea that international human rights lawmaking, traditionally viewed as an apolitical process, could be a powerful tool in fighting the Cold War. Indeed men, like Abram, reveled in it. “If the United States is to fulfill its expected role as a leader of international moral conscience—and it should,” he proclaimed, “it will have to act forcefully on issues of international human rights.” There were real reputational costs for the U.S. if the nation did not lead the Convention’s drafting and eventually ratify the treaty. Americans’ distaste for U.N. affairs, which exploded during the Eisenhower years, was now self-defeating and outmoded. “Over the past decade, more than 50 new nations have joined the United Nations,” Ferguson declared during the treaty debates. “These nations are, with few exceptions, non-white.” The explosion of Third World countries at the U.N. had radically shifted the direction of U.N. affairs and remade the Cold War. “[T]hese non-white nations have taken the lead in making both colonialism and its vestiges in the forms of racial discrimination critical issues in world politics,” Ferguson added. His experience during the Declaration debates had been instructive. “The major focus in the last (18th) session of the United Nations was on racial discrimination as such, and as an attribute of colonialism. In both plenary sessions and the meetings of committees of the assembly, the non-white nations, now in a majority, have mounted through various devices sustained attacks on racial discrimination and systems of segregation—particularly apartheid.” The Convention was the era’s most anticipated human rights instrument. Abram and Ferguson knew that if the U.S. truly desired to limit the Soviet sphere of influence at the U.N., the U.S. delegation would need to take more aggressive stances on human rights issues.

Abram and Ferguson truly believed that newly independent countries could find a clear path to modernity by adopting the constitutional values in the U.S. draft of the Convention. The U.S. Constitution, they argued, provided the human rights protections necessary to ensure an inclusive multiracial and multiethnic democracy. Ensuring diverse populations equality before law was indeed challenging, but the U.S. experts preached democracy’s unqualified application to all people. “One fact to which I was fond of alluding was undeniable,” Abram maintained, was that after American occupation, former totalitarian states such as Germany, Italy, and Japan became functioning democracies. Soviet occupation never birthed a democratic regime, and in the case of Czechoslovakia, strangled one that was full-grown. Further, the Convention strategy allowed the civil rights lawyers to plant their ideas for law and policy into constitutions abroad. “Indeed, it is quite likely that this item relating to racial discrimination,” Ferguson declared in the midst of the Convention debates, “will demonstrate more so than ever, the truism

66 United States Policy (n.d) (on file with MARBL, Abram Papers, Box 94, Folder 8).
68 For example, Morris Abram played a pivotal role in cultivating Atlanta’s image as “the city too busy to hate.” Abram was so convinced that his vision of democratic governance could produce racial progress across the world that he flew the Sub-Commission to Atlanta in 1964 to study race relations in the city. Abram hoped that Sub-Commission’s visit to the Southern capital would “educate foreigners on the United States and what we regarded as a model city” and would limit Soviet influence during the Convention’s debates. See H. Timothy Lovelace, Jr., Making the World in Atlanta’s Image: The Student Non-Violent Coordinating Committee, Morris Abram, and the Legislative History of the United Nations Race Convention, 32 LAW & HIST. REV. 385 (2014).
69 Abram, supra note 34, at 151-152.
that foreign policy is simply the logical extension of domestic policy.” Countries experiencing social upheavals, wrestling with constitutional chaos, or tasting independence for the first time frequently borrowed from international instruments like the Universal Declaration of Human Rights to establish the rule of law. Abram and Ferguson recognized that if the U.S. did not adequately participate in the Convention debates, the laws of politically fragile societies that domesticated the treaty might resemble the Soviet Constitution. This would render the U.S. as an outlier in global race relations.

The State Department had obvious foreign policy incentives to send an interracial and interfaith delegation to the Sub-Commission for the Convention debates, but these motivations were particularly important given the Sub-Commission’s protocol. With Abram and Ferguson as U.S. experts, the U.S. did not need to violate Sub-Commission’s rules by publicly discussing the nation’s commitment to social progress. Abram and Ferguson provided the Kennedy administration with two highly visible and tangible indicators of that progress. The composition of the delegation would speak for itself. The human rights community knew of the State Department’s thin record of appointing Jewish attorneys to the Commission on Human Rights and its subsidiary organ and the utter absence of such a record for blacks. The appointments of Abram and Ferguson caused no sea change in U.S. race relations, yet the symbolism of their selections mattered. The State Department appeared to be making a sincere and conscious effort to live up to its calls for equality.

Equally important, Abram and Ferguson were engaged in the kind of desegregationist project at the U.N. that they had engaged in domestically. They lived their politics on U.S. soil and aspired be at the forefront of an international movement to safeguard minority rights. Abram’s advocacy on behalf of Soviet Jews exemplified how the U.S. experts’ service on the Sub-Commission transformed into an opportunity to promulgate their own visions for global equality. “[W]hile the Russian representative [on the Sub-Commission] expostulated on the vitality of civil rights in the Soviet Union,” Abram remembered, the Soviets “embarked on anti-Semitic programs, directly and by proxy, on a scale instituted by no great power since World War II.” Abram ripped the Soviet Constitution for being a sham, and he was able to use his new platform to pass international legislation targeting religious and ethnic persecution. “At the United Nations, my voice, however frustrated by circumstances, was being heard,” Abram declared. Partnering with the State Department afforded the U.S. racial experts the ability to harness the federal power in ways that gave the U.S. lawyers and their causes greater global prominence.

Finally, the U.S. racial experts were not only seeking to export U.S. civil rights law to foreign lands for the good of humankind; they also hoped to aid the U.S. movement by importing a greater appreciation for global politics. This was especially important for Clyde Ferguson. Ferguson hypothesized that racial progress would stagnate in the U.S. unless judges and policymakers recognized the impact of domestic race relations on U.S. foreign policy. When these key stakeholders acknowledged Jim Crow’s reputational costs, he put forward, they would be more likely to support domestic civil rights reforms. Scholars of U.S. constitutional law—

71 Abram, supra note 34, at 151-154.
even in the 1950s—often used the Supreme Court’s ruling in *Brown v. Board of Education* to explain how the Cold War could benefit the U.S. civil rights movement. In Ferguson’s first book, *Desegregation and the Law*, the pioneering race scholar asserted, “It is inconceivable that the international discord between East and West had no effect upon the nine men who were to determine a national discord between North and South.”

The Harvard Law graduate was a student of legal realism. Ferguson pulled directly from case filings to reveal the “foreign-domestic tapestry …apparent in the very arguments made to the Supreme Court in *Brown v. Board of Education*.” In the book, which won strong reviews from Morris Ernst, Jackie Robinson, and Thurgood Marshall, Ferguson pointed to the fact that “[f]oreign policy entered the briefs submitted by counsel to the Court.” He continued, “The lawyers for the NAACP wrote: ‘Survival of our country in the present international situation is inevitably tied to resolution of this domestic issue.’” Ferguson also noted that the Justice Department, backed by the State Department, filed a brief on behalf of the NAACP in *Brown*, urging the Warren Court to view *Brown* within the “context of the present world struggle between freedom and tyranny …[for] discrimination against minority groups in the United States has an adverse effect upon our relations with other countries.” The Justice Department’s brief pressed that “[r]acial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.” The Justice Department’s brief quoted Secretary of State Dean Acheson. “The segregation of school children on a racial basis is one of the practices in the United States that has been singled out for hostile foreign comment in the United Nations and elsewhere. Other peoples cannot understand how such a practice can exist in a country which professes to be a staunch supporter of freedom, justice, and democracy.”

73 Desegregation and the Law was favorably reviewed in major U.S. newspapers. See Tribune Reviewers’ Choices, CHI. TRIBUNE, Dec. 1, 1957, at 1; Significant and Timely, N.Y. HERALD TRIBUNE, Oct. 27, 1957 at E2; Reflections of American Ideas and Ideals, N.Y. TIMES, Nov. 17, 1957 at BR124; George Schuyler, This Week’s Books, PITT. COURIER, Nov. 23, 1957, at B2. Reviewers of Desegregation and the Law often situated the book and the racial desegregation within a Cold War framework. Philip Kurland, for example, a former Supreme Court clerk to Justice Felix Frankfurter and a constitutional law scholar at the University of Chicago, began his review of *Desegregation and the Law* in international and, perhaps, hyperbolic terms. “Not even Sputnik or the ICBM presents so vital a problem to the people of the United States as does the issue of enforcement of the Supreme Court’s desegregation decree.” Philip Kurland, The Desegregation Decree and the Courts, CHI. TRIBUNE, Nov. 24, 1957, at C9.
74 Blaustein and Ferguson, supra note 71, at 12.
75 See Brief for the United States as Amicus Curiae at 6-8, 1952 WL 82045 (1952). Many everyday Americans also appreciated the global significance of the Court’s decision. In *Desegregation and the Law*, Ferguson sampled from the era’s popular periodicals for evidence:

…*Time*, in typical *Time* style, observed: “The international effect may be scarcely less important. In many countries, where U.S. prestige and leadership have been damaged by the fact of U.S. segregation, it will come as a timely reassertion of the basic American principle that ‘all men are created.’” *Time*’s companion publication, *Life*, supported this position with the assertion that the Supreme Court “at one stroke immeasurably raised the respect of other nations for the U.S.” …More dramatic was the summary in the tenth anniversary issue of the Negro magazine, *Ebony*: “Negro America fashioned a chain of political, social and economic victories that were discussed in Europe, applauded in Asia and imitated in Africa …the [legal] advances strengthened the cause of freedom everywhere. Blaustein and Ferguson, supra note 71, at 12-13.
What was so remarkable about this particular moment was the movement lawyers’ strategy. Abram and Ferguson were actively using the treaty-making process to advance civil rights law and bolster the U.S.’s international image. The U.S. experts posited that federal officials would have new incentives to support domestic civil rights reform if world leadership rested, in part, on race leadership during the Convention debates. Put differently, Abram and Ferguson joined the State Department’s Convention diplomacy, because they had wagered that active U.S. involvement might encourage the U.S. commit more strongly to practicing at home what it preached abroad. In 1964, an upbeat Clyde Ferguson proclaimed, “The proposed United Nations Convention against Racial Discrimination is likely to have not only a profound impact in the United Nations, but also a rather substantial impact on the United States policy in both the domestic and foreign fields.” The U.S. government and the civil rights movement could reap great fruit from a joint, human rights venture. While the federal officials and movement leaders might separately and self-interestedly pursue racial reform at the U.N., the State Department and the civil rights lawyers recognized that their cooperation could yield a more plentiful bounty for their respective constituencies.76

Trust radiated from this unprecedented collaboration. The State Department was dispatching two of America’s leading civil rights lawyers, technically in their individual capacities, to one of the most sensitive U.N. organs to compose the world’s preeminent treaty on race. They would serve as both goodwill ambassadors and racial critics—with no ostensible legal consequences for going rogue. There had been serious skeptics of the State Department’s audacious move, and arguably for good reason. Blacks working outside the auspices of the State Department had flooded the Commission on Human Rights and the Sub-Commission with human rights complaints since its inception. Their pleas, however, met with devastating results. Shortly after the creation of the U.N., W.E.B. Du Bois, the towering intellectual, NAACP founder, and Pan-Africanist, petitioned the U.N., charging the U.S. with violating African-Americans’ human rights.77 Eleanor Roosevelt, then Commission on Human Rights Chair and an NAACP board member, fumed that Du Bois’s attempts to tarnish America’s image had given credence to the Communists’ claims about the inadequacies of U.S. constitutional law and policy. U.N. officials claimed they lacked jurisdiction to recognize Du Bois’s appeal, and the civil rights group dismissed Du Bois from the NAACP, the very organization he helped to found four decades earlier.78 William Patterson, attorney and national secretary of the Civil Rights Congress, charged the U.S. with genocide in a 1951 U.N. petition. He was soon stripped of his passport and publicly scorned for allegedly aiding the Soviet cause. Paul Robeson signed the petition, and he, too, found himself on the political margins. The prominent civil rights leader, award-winning entertainer, and darling of black America was summoned before the House Un-American Committee, lost his passport, and was blasted by the press and the liberal establishment for his reported ties to the Reds.79

Abram and Ferguson’s brand of racial diplomacy was a sharp rebuke of their predecessors’ approach to international human rights law. There was no need to shame the U.S.

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76 Ferguson, supra note 66, at 64.
78 Anderson, supra note 23, at 130-54.
at the U.N. or look to “foreign” legal standards to improve the lived experiences of African-Americans. These were hapless and hopeless lines of attack, the racial experts scoffed.

Ferguson recognized how an older generation of civil rights lawyers and activists, both radicals and liberals, had sparked a firestorm when they used international human rights law to illustrate the shortcomings of U.S. constitutionalism. Their human rights strategies suggested that subversive forces controlled the civil rights movement and “gave rise to …the Bricker episode.”

These confrontational tactics also threatened to alienate would-be allies in the State Department—the same constituency that proved essential to the victory in Brown and that was proving valuable in the push towards the Civil Rights Act of 1964. Collaborating with the State Department had the potential to advance the U.S. civil rights movement without causing the racial backlash prior efforts had produced. In fact, this strategy would give the movement new legitimacy. After all, what blacks really wanted was in the nation’s best interests, Abram and Ferguson maintained. They were simply asking for the blessings of democracy, the same rights and privileges bestowed to other citizens.

State Department officials had a final reason to feel confident that Abram and Ferguson posed no real risk to U.S. foreign policy interests: they were political appointees. Abram, for example, had strong ties to John F. Kennedy from the earliest days of his Presidential run. During the 1960 race, the Democratic stalwart stumped for Kennedy in Georgia and masterfully converted registered black Atlantans into Kennedy voters. The thoroughly vetted delegates cringed at the thought of embarrassing their President or their nation while at the U.N. They worked closely with the Kennedy and later Johnson administrations during the treaty negotiations and welcomed their status as de facto agents of the State Department.

There were no questions about the experts’ fidelity to their country. They had the guidance papers and security clearances to prove it.

This experiment in diplomacy was rooted in an abiding faith in America’s future. The State Department and the U.S. experts possessed a gritty determination to make democracy work. Such a model for global race reform fostered great cooperation where there had been deep suspicion and reflected serious study of social movement lawyering. The partnership was, for some, a testament of hope.

**III. ICERD: Made in America**

Abram and Ferguson developed eight substantive articles before formally meeting with U.S. officials about their draft. They recognized that “the [U.N. General Assembly] expected the Declaration against Racial Discrimination would be used as the basis” for the Convention, and

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80 Human Rights Lecture (n.d.), (on file with Harvard Law School Library, Clarence Clyde Ferguson Papers, Box 6, Folder 1).
81 Abram, supra note 34, at 132.
82 Morris Abram and Clyde Ferguson occupied even greater roles in formulating the U.S. civil and human rights policy. In 1965, for example, Johnson appointed Abram the U.S. delegate to the U.N. Commission on Human Rights and Ferguson the full-time U.S. member of the Sub-Commission, and both men also played instrumental roles in planning and executing the 1966 White House Conference on Civil Rights. See Biography of Morris Berthold Abram, supra note 55, at 1-3; Biographic Sketch of Clarence Clyde Ferguson (on file with the Harvard Law, Clarence Clyde Ferguson Papers, Box 12, Folder 8).
they used this template to shape their proposal. The U.S. experts then adapted the Declaration’s language to accord with “‘equal protection’ concept in [the] 14th amendment.”

A. The Experts’ First Draft

Article 1 of the U.S. draft Convention defined racial discrimination. It read, “For the purpose of this convention, racial discrimination includes any distinction, exclusion or preference made on the basis of race, colour, national or ethnic origin.” The remainder of the U.S. draft outlined the specific racial obligations, pursuant to the equal protection clause, that each state would undertake as a party to the Convention. These provisions were fresh and progressive, reflecting the emerging constitutional values shaping the contours of U.S. civil rights law and policy in the mid-1960s.

Article 2 of the U.S. draft reiterated Article 1’s prohibition against racial preferences but made one notable exception: affirmative action. Ferguson, in particular, had been an early proponent of affirmative action. In 1957, Ferguson delivered a keynote address during the National Bar Association’s annual conference urging the federal government to expand the concept of non-discrimination by providing blacks racial preferences in hiring. In the early 1960s, as General Counsel of the U.S. Civil Rights Commission, Ferguson and Commission members defended Executive Orders 10925 and 11114, Kennedy Administration initiatives aimed at diversifying federal employment and contracting. And as Dean of Howard Law School, Ferguson penned several articles praising the shift in “emphasis in civil rights …from prohibitory negative measures such as prohibitions against acting out racially discriminatory attitudes, to positive measures requiring affirmative actions designed to assure full opportunity in the society we now know.” Article 2 authorized states to “take special concrete measures” to remedy past and present discrimination.

Article 3 of the draft was similarly bold. It mandated that states “end without delay governmental and other public policies of racial segregation and especially policies of apartheid.” U.N. delegations, regardless of political alliances, often held apartheid out as the world’s most savage form of racism, and Abram and Ferguson’s article reflected the human rights consensus around South African race relations.

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83 Guidance Paper, supra note 19, at 4.
85 Id. at 2-3.
86 Ferguson, supra note 21, at 459-60.
89 Suggested Draft, supra note 84, at 3.
Article 4 emanated directly from the U.S. sit-in movement. It had found its way into the draft Convention through skillful usages of media and the spirited congressional debates that eventually led to the enactment of Titles II and III of the Civil Rights Act of 1964. The provision required states to “take effective measures, including the adoption of legislation …to assure equal access to any place or facility intended for use by the general public.”

The remainder of the draft tracked provisions in the Declaration but most of the areas were already covered by earlier articles in the draft. This was the U.S. experts’ attempts to demonstrate that they had truly integrated the Declaration into the U.S.’s position. Article 5 reiterated that states must prevent governmental discrimination “in the enjoyment of political and citizenship rights.” Articles 6 and 7 guaranteed all persons “equal justice under the law.” Under these provisions, states were ordered to provide “effective rem[ed]ies” against racial discrimination and “competent” tribunals to recognize those rights. Article 8 required states to take “immediate steps through educational and other means …to promote understanding, tolerance, and friendship among all nations and all peoples.” This article reflected the longstanding position at the U.N. and in the U.S. that education was essential to healing the world’s racial divisions.91

B. Negotiating Freedom

Morris Abram and Clyde Ferguson met with the Interdepartmental Committee on Foreign Policy Relating to Human Rights for several weeks in late 1963 to finalize the language for the U.S. draft of the Convention. The interagency group featured representatives from the State Department’s Bureau of International Organizations, Office of the Assistant Legal Adviser for U.N. Affairs, the U.S. Mission to the U.N., the Justice Department’s Office of Legal Counsel, and the U.S. Civil Rights Commission. At times, Abram and Ferguson “met with considerable opposition from certain quarters in the State Department and Justice Department on the very issue of a U.N. Convention dealing with race,” Ferguson recalled with wounds still open, but the Interdepartmental Committee was able to agree on eight substantive articles in time for the Sub-Commission’s January 1964 session.92

There were undoubtedly sharp clashes on each topic, but one topic was far more explosive than the others: special measures. The issue of affirmative action divided the Interdepartmental Committee. It threatened to undermine the entire diplomatic mission.

Clyde Ferguson had developed Article 2 to confront what he believed were the two dimensions of racial equality. “The first is that of removing discriminatory practices and patterns,” Ferguson disclosed. For Ferguson, it was not enough for states to urge non-discrimination. The federal government had to, in Hobart Taylor’s words, “do something” to make the constitutional promise of non-discrimination real. Ferguson’s constructed Article 2

91 Suggested Draft, supra note 84, at 3-5.
with the intention that a state party to the Convention would steadily and regularly wield its legal authority to remedy purposeful acts of racial discrimination. “The second dimension” in the struggle for racial equality, Ferguson explained, “is that of affirmatively taking steps to remove the disabilities created by past deprivation of opportunity.”

This was the Howard Law dean’s conception of reparative justice.

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Ferguson’s approach to the first problem—enforcing non-discrimination—was derived from the Powell amendment. In 1961, the Student Nonviolent Coordinating Committee (SNCC), the shock troops of the movement, started its Mississippi project, a campaign centered on teaching citizenship skills and registering black voters. Whites’ reprisals for civil rights activity were nothing new in Mississippi, but when SNCC moved into the Mississippi Delta in 1962, the level and frequency of the retaliations skyrocketed. The most devastating moment during this period occurred when several Delta hamlets, including Leflore County—the county that gained international notoriety after Emmett Till’s lynching—stopped distributing federal food subsidies to poor blacks, primarily sharecroppers, to stamp out the Mississippi Project. The goal of the food blockade was obvious: starve local blacks out of activism.

The Delta was hell. Fannie Lou Hamer said that it felt like she had “walked through the shadows of death.” Bob Moses and Diane Nash fired off letters and cables to the Kennedy administration but to little avail. SNCC organizers took to the streets, but they were attacked by German Shepherds, battered by policemen, and jailed. When local officials learned that college students, Ivanhoe Donaldson and Ben Taylor, were trucking in food and medical supplies donated by Northern sympathizers, they too were arrested, beaten, and jailed—this time for trafficking narcotics across state lines. U.S. Congressman Charles Diggs traveled to the Delta to study the situation firsthand, but a Molotov cocktail crashed and torched the home where he was staying. News of the firebomb attack on circled the world.

Clyde Ferguson and the members on U.S. Commission on Civil Rights were alarmed by the quickly deteriorating situation. They proposed to conduct public hearings in Jackson in mid-1963 to focus national attention on the breakdown of law and order in the state. The Kennedy administration demurred. In the wake of James Meredith’s tumultuous admission to the University of Mississippi, the U.S. Department of Justice, wary of additional bloodshed in the state, blocked the Civil Rights Commission’s proposed hearings. Justice officials feared that the

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95 Greenwood Mayor Hits Outside Agitators for City’s Troubles, DELTA DEMOCRAT-TIMES, April 16, 1963 at 2; SNCC Staff Jailed as Greenwood Negroes Register in ‘First Breakthrough’ in Miss.,” THE STUDENT VOICE, Apr. 1963 at 1; Foreign News in Brief, TIMES OF INDIA, Apr. 1963, at 4.
Commission’s hearings would inflame local racial passions, alienate potential Democratic voters, and jeopardize the Department of Justice’s pending litigation in the state.96

With the Department of Justice and the Civil Rights Commission at loggerheads, the Commission decided that it would instead issue an unprecedented, interim report on race relations in Mississippi. The Commission’s April 1963 report scolded the state of Mississippi for its failure to protect the constitutional rights of black Mississippians. The Commission recommended that Congress and the President use their abilities to withhold federal funds from the county programs that denied poor blacks their food subsidies. This prescription was the Powell amendment, legislation the Harlem Congressman had introduced several years earlier. For Ferguson, the Powell amendment was affirmative action. The federal government had been too sheepish in the fight for non-discrimination in the administration of federal funds. They could not simply request that Mississippi segregationists adhere to a policy of non-discrimination; federal officials needed to take positive steps to end the county programs’ racist distribution.97

Clyde Ferguson and members of the Commission jointly testified before the House Judiciary Committee on the withdrawal of federal funds from discriminatory programs. The Civil Rights Commission’s proposal injected the Powell amendment into the policy mainstream. More significantly, it helped to create the political context for passing what became Title VI of the 1964 Civil Rights Act.98

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Ferguson dreamed even bigger dreams for Article 2. Special measures did not only mean that government must end present discrimination; it also meant governments should provide reparative justice. Under the U.S. members’ Article 2 proposal, state parties to the Convention had the authority to affirmative steps to redress past discrimination.

Ferguson was uniquely positioned to discuss reparative justice. He was the dean of the Howard University School of Law, the civil rights citadel formed from the “Great Reconstruction Act.” His university’s namesake and third president was General Oliver Otis Howard, commissioner of the Department of War’s Bureau of Refugees, Freedmen, and Abandoned Lands (the Freedmen’s Bureau). The founding dean of the university’s legal department was John Mercer Langston, the Bureau’s inspector general of schools. The university boasted trustees, like Frederick Douglass, a man who emerged from slavery to become his century’s preeminent race leader. America had used special measures to bridge slave to free, black to white, and in the process established Howard University—an institution where recently

98 Bernhard, supra note 96.
enslaved men and women had been trained to become lawyers. Ferguson believed that Article 2, a proposal to address “the hang-over of the system of slavery,” was quintessentially American and easily constitutional. He also asserted that special measures could bolster America’s claims to its moral authority. The dean preached that slavery had been “a perversion of Christianity,” and that reparative justice was part atonement for the nation’s original sin. Special measures had transformed America into its better self. Now a century after slavery’s demise, special measures could do the same for the nation and even for a world in need of healing.

This vision for special measures had already found favor with other Second Reconstruction’s leaders. Ferguson floated in a cosmopolitan circle of movement thinkers eager to place their claims for reparative justice in a broader, comparative context. Dr. Martin Luther King, Jr., fresh from his much-anticipated trip to the land of Gandhi, had made the moral case for state-sanctioned, minority preferences. “A recent visit to India,” King wrote in a 1961 article published in the Nation, “revealed to me the vast opportunities open to a government determined to end discrimination. When it was confronted the problem of centuries-old discrimination against the ‘untouchables,’ India began its thinking at a point that we have not yet reached.” The Georgia-born minister had regularly looked beyond U.S. borders and transplanted ideas and strategies from foreign social movements into the black freedom struggle. King’s Indian pilgrimage had been particularly generative. It had demonstrated to him the necessity of using special measures in both societies. “Probing its moral responsibilities,” King continued, India “concluded that the country must atone for the immense injustices imposed upon the untouchables. Thus, millions of rupees are set aside each year to provide scholarships, financial grants and special employment opportunities for the untouchables.” Mere calls for equality were not enough. The federal government had a “moral obligation” to provide “special treatment” for the “victims of discrimination.” And Dr. King and Dean Ferguson were clear to their critics; special measures were not reverse discrimination. “To the argument that this is a new form of discrimination inflicted upon the majority population,” King proclaimed, “the Indian people respond by saying that this is their way of atoning for injustices and indignities heaped in the past upon their seventy million touchable brothers.”

Ferguson’s ideas resonated with the most “responsible” leadership. Only months before the Sub-Commission’s U.S. members drafted Article 2, Whitney Young, executive director of the National Urban League and a moderating force within the movement’s “Big Six,” demanded a “domestic Marshall Plan for the Negro.” The implications of Young’s internationalist approach to U.S. equality was unmistakable: be willing to show the Negro a fraction of the “generosity” America had shown to foreigners, including America’s deadliest enemies. Young offered a vast blueprint for racial repair. He urged the nation to broaden and deepen its definition “equal opportunity” and create a “broad-scale, crash program of special effort”—what he termed

100 Ferguson, supra note 21, at 454-55.
“affirmative action”—in employment, education, housing, social services, and political appointments. Such “immediate and massive active action,” Young predicted, would “close the economic, educational and social gap presently existing between conditions of Negro and white citizen.” And like Ferguson and King, Whitney Young told the race and the world that “special measures” were neither unconstitutional nor immoral. The *Chicago Defender* reported, “Although such special effort to provide preferential attention to the problems of Negro citizens might appear to some ‘in conflict with the principle of equal treatment for all,’ [Young] emphasized the proposed action is ‘imperative to overcoming the damaging effects and explosive potentials of 300 years of deprivation and denial on the Negro community of America.’”

Back in Washington, Morris Abram and Clyde Ferguson sold the idea of special measures to State and Justice Department officials. The pair argued that special measures were consistent with U.S. constitutional law. They offered a straight-laced, legal analysis of what would become Title VI. “Under Article 2 of the Constitution,” Ferguson explained, “the President has the duty and authority to take care that the laws be faithfully executed. These laws certainly include not only Acts of Congress, but the Constitution, which under Article VI is the ‘supreme law of the land.’” The U.S. members reasoned that “when the Fifth or the Fourteenth Amendments to the Constitution are being violated, the President has the authority to take appropriate action to prevent or remedy the violation.” The members’ analysis of reparative justice was even more concise. “The concept is within the original understanding of the fourteenth amendment.”

For the U.S. members, most of the concerns about Article 2 were not truly about the provision’s constitutionality but more about America’s political will. Their task was to demonstrate to the Interdepartmental Committee that Article 2 was merely an extension of domestic policy. The case for special measures’ first underpinning was relatively easy. In the 1961, shortly after entering office, President Kennedy had issued Executive Order 10925, which established the President’s Committee on Equal Employment Opportunity (PCCEO), the predecessor of Equal Employment Opportunity Commission. Executive Order 10925 additionally required federal contractors to “take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin.” In 1963, the President issued Executive Order 11114, which extended the authority of the PCCEO. Three days earlier, the Kennedy administration had finally adopted the Powell Amendment and the Civil Rights Commission’s recommendation as part of its civil rights package. The President had made a special plea to Congress to help quench the “‘fires of frustration and discord’ that burn hotter than ever before.” It “was time to pass a single comprehensive provision making it clear that the federal government is not required, under any statute, to furnish any kind of financial assistance,” the President implored, “to any program or activity in which racial discrimination occurs.”

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103 U.S. Commission on Civil Rights Memorandum, Civil Rights during the Kennedy Administration, Part 1, Reel 8: 857.
104 Suggested Draft, supra note 84.
105 *Id.* President John F. Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities, June 19, 1963.
Minority preferences were a tougher sell. On the heels of Executive Order 10925, Kennedy instituted “Plans for Progress,” a special project of the PCEEO. Under the program, major federal contractors voluntarily pledged to promote equal employment opportunity within their operations. President Kennedy hailed these cooperative “agreements for continuous, systematic, and vigorous action to open new job opportunities to members of minority groups.” Robert Troutman, Jr., a racially moderate Atlanta attorney, confidant of Morris Abram, and Kennedy insider had conceived the idea. Troutman was reluctant to compel either government or federal contractors to engage in minority hiring preferences, much to chagrin of Ferguson and to a lesser extent Abram’s. Moral persuasion might achieve the same result without the rancor or litigation enforcement might produce. Nonetheless, Plans for Progress proved to be extremely ineffective; voluntary compliance was the program’s undoing. The Civil Rights Commission had extensively studied the Plans for Progress during Ferguson’s tenure, and “the Commission’s hearings showed that these pledges have not significantly increased nonwhite employment opportunities.” The program’s well-publicized problems helped Abram and Ferguson to make their point on Article 2 to the Interdepartmental Committee. Strong special measures were often necessary to remedy past discrimination. The existence of Plans for Progress simultaneously facilitated the U.S. members’ argument that it was now the U.S. government’s policy to work actively to erase the vestiges of past discrimination.  

Strident philosophical criticisms of Article 2 followed. The objections were predictable—calls for colorblindness, charges of “discrimination in the reverse,” questions on the timetable for special measures, and more questions on merit and “Negro responsibility.” For the naysayers within the interagency group, special measures, and especially the emphasis on reparative justice, seemed to go too far, too fast, and with too many demands, all at the same time. Raising these questions to this diplomatic team was rich with irony.  

The challenge that Ferguson took most seriously was the theoretical divide between group rights and individual rights. Ferguson admitted that special measures arguably produced “a theoretical inconsistency which demands concern for the individual and for the individual’s protection from having his skin color or race used as a basis for disparate treatment.” Article 2 exemplified this tension. He noted that the provision “states that if one is a member of a group which has been subject to racial discrimination in the past, the government is obligated to take special measures in order to make reparation for that damage. This clause is a group characteristic. For Ferguson, this concern, while perhaps important, denied a reality where racism denied still restricted blacks’ abilities to compete in society. Treating whites as a group might appear to run afoul of basic considerations of fairness, Ferguson conceded. “Whites seem to be deprive of a legitimate expectation” when governments employed special measures. “But, that expectation is in fact based upon prior discrimination,” he argued in a stinging rebuttal. “And, to employ equitable doctrine, it is not inequitable to destroy an expectation based upon wrongful treatment of Negro competitors in the past.”  

108 Clarence Clyde Ferguson, Jr., Meeting Record (on file with Harvard Law School Library, Clarence Clyde Ferguson Papers, Box 9, Folder 12).
The last substantial hurdle for the U.S. members was the ever-present issue of racial teleology. Some in the conference room had already written Jim Crow’s obituary. Racism was dying, they claimed, at home and abroad. There was no need to redress past discrimination. Simply move forward. America and indeed people across many lands had made great strides in a blink of history, and truer freedom was near—simply be patient. Moreover, America had recently emerged from the Bricker era. U.S. leadership on the proposed race treaty and demands for reparative justice might trigger another, significant red scare or simply produce racial bitterness. In either case, race relations might move backwards.109

The U.S. members reversed the skeptics’ logic. Both men, like most racial liberals during the era, read racial progress teleologically as well. Morris Abram was certain that racial discrimination would become “a political dinosaur.”110 Clyde Ferguson, more sober in expression but just as optimistic in outlook, told a U.S. audience of human rights watchers that through “the affirmative use of this particular revolution we have a grand opportunity for telescoping time.” Arguing that world racism would end all by itself was immoral and would be a diplomatic mistake. The Convention was the U.N.’s chief priority for its upcoming session, and the country did not want to duplicate its poor showing during the Declaration debates. More significantly, because special measures closed gaps in development, the U.S. could assert that special measures would accelerate the global march to freedom. In turn, the U.S. could improve its standing in the human rights community.111

Much of mid-century human rights diplomacy rested on advancing a compelling vision of the modern state. For many U.N. delegates, special measures were expressions of racial modernity. There might be specific, locally appropriate articulations of special measures, but special measures in any mature society required statecraft sophisticated enough to transform power relationships through the rule of law and moral enough to shed itself of dated racial practices. Special measures, according to this midcentury evolutionary logic, served as tools of emancipation and supplied mechanisms to achieve full human development.

The U.S. members situated their proposal within emergent international norms that had been quickly and widely embraced. The International Labor Organization (ILO), the U.N. agency charged with setting international labor standards, had recently put into force the Convention concerning Discrimination in Respect of Employment. Article 5(1) of that treaty permitted “special measures of protection or assistance.” Article 5(1) additionally stated that all special measures “provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.” Dozens of countries, primarily in the global South, had already ratified the treaty. In their preparatory files, the U.S. members underscored that “the texts of the ILO Convention on discrimination in employment” served as their “background documentation.” And of course, there was a fact that

109 Ferguson, supra note 80.
110 Abram, supra note 34, at 104.
111 Ferguson, supra note at 460.
no one in the contentious Interdepartmental Committee meetings could deny: Article 2 of the Declaration. Nearly 100 countries had voted for the provision.\textsuperscript{112}

Militant calls for special measures were now echoing throughout the globe. For example, just weeks after Morris Abram represented the Kennedy administration at Tanganyika’s independence ceremonies, Africanization programs bolted to the nation’s political forefront. On the eve of independence, there were 299 civil service administrative officers in the Tanganyika’s most elite ranks. Only 7 were black Tanganyikans in a country more than 98 percent black. Weeks after the birth of the new nation, competing visions of African nationalism ignited disputes over the racial composition of Tanganyika’s civil service. A European member of the National Assembly declared that a policy of Africanization should simply mean employing local people regardless of race. An African National Congress (ANC) press release offered a powerful rejoinder, capturing the revolutionary demands for development after Uhuru. “Africans cannot progress unless special privileges and protections are given to them so as to enable them to catch up with the progress of non-Africans,” the ANC countered. “Advanced and backwards people cannot be treated equally because to do so would mean the continuance of the already existing inequality between them. Unequals cannot be treated equally.” Abram, Ferguson, and the world bore witness to the radical potential of special measures. Scores of African civil servants, from the clerical ranks to the professional classes, replaced non-Africans seemingly overnight, all under the banner of breaking with Tanganyika’s colonial past.\textsuperscript{113}

Even the Soviets championed and employed a wide range of special measures. They were proud that they had done so for decades. Article 123 of the Stalin Constitution stated, “Equality of rights of citizens of the U.S.S.R., irrespective of their nationality or race, in all spheres of economic, state, cultural, social and political life, is an indefeasible law.” Article 123’s protections covered both public and private forms of discrimination, easily outpacing the America’s equal protection clause’s state action requirement. The U.S. racial experts had greater troubles. Article 123 also criminalized any manifestation of discrimination. Under Article 123, all acts of discrimination, including “any advocacy of racial or national exclusiveness or hatred and contempt,” were punishable by law. The Stalin Constitution offered an active model of governance, one that guaranteed equality under law and took affirmative steps to remedy violations. And so while Congress was still debating whether the federal government could withhold its own funds from bigots, the Stalin Constitution sent bigots to the gulag.\textsuperscript{114} The Soviets’ human rights record was, without doubt, abysmal. The regime committed grave atrocities, and this fact is indisputable.\textsuperscript{115} But the express protections and enforcement powers under Article 123 dwarfed the rights afforded by the U.S. Constitution. There was no question about the Soviets’ ability to mobilize government in service of equality, at least on paper.

\textsuperscript{112} Suggested Draft, supra note 84, at 2; Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Convention concerning Discrimination in Respect of Employment and Occupation, Art. 5.
\textsuperscript{114} Konstitutsiia SSSR (1936) [Konst. SSSR] art. 123 [USSR Constitution].
\textsuperscript{115} See e.g. Moesh Decter, The Status of Jews in the Soviet Union, 41 FOREIGN AFF. 420 (1963). For more on the rampant anti-Semitism in the Soviet Union, see chapter 9 of the book.
The Soviets argued that they were the world’s experts in using special measures to develop “backwards” populations. As early as the 1920s, the Soviets erected modern states by designing extensive policies for underprivileged, national minorities. Such an appreciation for minority group development and culture, some claimed, had been key to managing the massive and incredibly diverse population.\(^{116}\) By the 1960s, the Soviets were providing thousands of state-backed scholarships to poor university students from Asia, Africa, and Latin America, to redress what they described as the colonialists’ underdevelopment of the Third World. The Soviets employed redistributive and compensatory efforts that extended well past their country’s borders and reached into the depths of nations that were at least as “backwards” as parts of the Soviet Union had once been. In February 1960, as mounting student sit-ins gripped the U.S., Premier Nikita Khrushchev announced that the Soviets would open Peoples’ Friendship University, a racially and ethnically integrated university designed to train doctors, engineers, scientists and the like.\(^{117}\) “It is particularly important for those countries which for a long time were subjected to hard colonial yoke and through the fault of colonialists are lagging in the economic and cultural fields and have no national cadres of specialists,” Khrushchev pressed. And for Moscow, like Washington, special measures were not merely moral measures; they were also foreign policy tools. “Of course we shall not impose our views, our ideology, on any of the students because world outlooks are a purely voluntary affair,” Khrushchev said tongue in cheek. “If, however, you want to know my political convictions I will not conceal from you the fact that I am a communist and am profoundly convinced that the Marxist-Leninist ideology is the most advanced ideology.” Applause rang throughout the crowd. “Therefore, I repeat that should anyone become infected with this ‘disease of modern times’—communism—I hope that we shall not get blamed for it.” Laughter and more applause filled the icy Moscow air.\(^{118}\) In 1961, the country renamed the institution the Patrice Lumumba University to honor the recently martyred Congolese Prime Minister and to make new claims about Soviets’ commitment to bridging the divides between privileged and underprivileged peoples. If reparative justice could be part of an “empire of liberty,” it could definitely be part of an “empire of justice.” It was a reality that members on the Interdepartmental Committee had to seriously weigh, despite their personal feelings about the Soviets. Abram and Ferguson needed new and effective policy proposals if they were going to be able to advance U.S. interests during the Convention debates.

The Convention was going to happen whether uneasy U.S. bureaucrats wanted it or not. The U.N. had charged the Sub-Commission to draft a Convention based on the principles in the Declaration. The Declaration contained a popular article on special measures. It was very likely that special measures would be featured in the Convention would as well. The logic was rudimentary for Abram and Ferguson. The decolonizing world was not going to wait on Foggy Bottom’s approval to push forward. The Soviets were not going to wait either. The U.S. needed to act. It already had what it needed to participate actively in the debates.


\(^{117}\) Peoples University, Foreign Broadcast Information Service, Moscow, Feb. 23, 1960, at BB24.

\(^{118}\) Khrushchev Opens Friendship University, USSR International Affairs, Foreign Broadcast Information Service, Moscow, Nov. 17, 1960, at BB17.
The stalemate between the U.S. members and the Interdepartmental Committee was eventually broken, and the Committee decided to retain Article 2 in the U.S. draft of the Convention. Committee members resigned that the diplomatic costs of ignoring or rejecting an article on special measures were too high. Such an omission would be fodder America’s hard-bitten critics. The brokered text read:

A State Party may take special concrete measures in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups with object of ensuring the full enjoyment such individuals of human rights and fundamental freedoms. These measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups.119

The major drafting change in the proposal was the substitution of the word “may” for “shall” in the article’s first sentence. The U.S. members’ text, a duplication of the Declaration’s text, was already flexible. Member states were only required to take positive action “in appropriate circumstances.” This first draft of Article 2 obviously afforded state parties to the Convention great discretion when to implement special measures. The Interdepartmental Committee’s amendment doubled down on the permissive nature of special measures. The amendment was perhaps unnecessary given the open interpretation of “appropriate circumstances.” Yet, for Article 2 of the Declaration and the U.S.’s Declaration abstention, Abram and Ferguson could count the revised text as a decisive victory.

The second sentence of the U.S. draft afforded some relief to the Interdepartmental Committee’s most discomfited members. Article 2 contained the Declaration’s sunset provision. The nimble principles of redress in the draft’s second sentence allowed the provision to serve multiple masters. It balanced the pair’s diplomatic mandate, their desires to address discrimination old and new, and a psychic need to forecast a brighter tomorrow. Article 2 was a calculated gamble on American success at the U.N. and in the future. Abram and Ferguson had persuaded U.S. policymakers that special measures would help America eventually overcome its past and appeal to the yearnings of the Third World. Simultaneously, the lawyers had retained the flexible legal framework that would give their country and other state parties the grace to adjust to racial evolutions.

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The U.S. draft won international acclaim. The Atlanta Daily World, the largest African-American newspaper in the South, called the U.S. proposal a “sweeping eight-point international treaty.” News writers highlighted Abram’s hometown roots and congratulated the “brilliant attorney” for spearheading the global push to end racial discrimination. The New York Times emphasized that the U.S. draft “offered a number of wide-ranging ideas for barring discrimination on the basis of race, color or ethnic origin through legislation, regulations and special machinery.” The Times characterized the U.S. draft as an innovative effort that could “test sentiment at home and abroad on a treaty attempting to ban racial bias.”120 In cities, like

119 Guidance Paper, supra note 19.
Lagos, Santiago, and Addis Ababa, global media outlets covered the leading role that the Sub-Commission’s U.S. members played in the Convention debates, certainly to the delight of State Department officials. When Mohammed Mudawi, the Sub-Commission’s racial expert from the Sudan, learned that the U.S. draft would serve as the primary text for the Convention debates, he declared that Convention should mandate that state parties to the treaty adopt a constitutional amendment prohibiting racial discrimination. “If a general provision akin to the fourteenth amendment of the United States Constitution were included in the constitution of a country,” Mudawi explained, “it would be difficult to amend or delete it.” One of Mr. Mudawi’s colleagues soon reminded him of the organ’s protocol.

The U.S. drafters wanted to be on the right side of human rights history. “I venture to say that the Sub-Commission has never had so interesting and important an agenda as submitted by the Secretary General for this, the 16th session,” Morris Abram told U.N. watchers. Abram called the task of drafting the body’s most comprehensive treaty on race “literally epochal.” He was right. The Sub-Commission had never been charged with such an awesome responsibility. For some in the international community, the Sub-Commission simply studied obvious racial phenomena, composed ineffectual reports for other U.N. organs, and functioned as a political battleground where rivals traded thinly-veiled attacks. The Sub-Commission’s 16th session promised to produce an altogether different result. Drafting the Race Convention was the U.N.’s “absolute priority” for the entire year. Abram brimmed with expectation, pledging to produce a document “not only for the people of the United States” but for the “monumental benefit to every man, woman, and child on this planet.” He would be at the helm of an unprecedented, human rights endeavor.

Clyde Ferguson, too, was caught up in the racial zeitgeist of the 1960s. “Today, in 1964, two grand tides in the affairs of mankind sweep the world,” Ferguson wrote in an academic article published during the Convention debates. “One is the drive against colonialism,” he asserted, “and the second is the drive against racial discrimination.” Ferguson was part of a black internationalist tradition that placed African-American activism in global terms. “The Afro-Asian drive for independence from colonialism and the Afro-American drive against racial discrimination are not unrelated,” he maintained. In fact, the “international forces arrayed

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125 Ferguson, supra note 65, at 75.

against ‘white colonialism’ and political systems based upon racial discriminations have merged in the promotion of the United Nations Convention on the Elimination of All Forms of Racial Discrimination.” Ferguson considered himself to be an intellectual and political heir of a young W.E.B. Du Bois, reading the blowing winds of racial change in a way the eminent scholar had done two generations earlier—that the problem of the twentieth century was that of the color-line. “Indeed, so strong and intense have been these movements for freedom and equality that we might easily conclude that the unleashing of these social forces are far more characteristic of this century than is the release of the energy of the atom,” Ferguson continued. “What we are now witnessing is the release of the energy of ideals.” And with this hope, Morris Abram and Clyde Ferguson traveled to the United Nations.

IV. Affirmative Action at the United Nations

When the Sub-Commission began its debates in January 1964, it had three drafts of the Convention before it. The first was from Abram and Ferguson. It would soon become the Sub-Commission’s primary text. The second draft was from the Sub-Commission’s Soviet and Polish experts, Boris Ivanov and Wojciech Ketrzynski. The jointly authored text lacked the craftsmanship of the U.S. draft and in certain places deviated from the structure of the Declaration, but the rich ideas contained in the text were morally defensible and politically viable. The third draft was from the Sub-Commission’s British and Italian experts, Peter Calvocoressi and Francesco Capotorti. This submission was uninspiring and announced just enough legal obligations to be considered a proposed treaty.

What was so striking about this moment in the Convention debates was how similar the U.S. and the Eastern bloc’s drafts on special measures was. Certainly the U.S. might have retained the word “shall” to strengthen its text, but the Eastern bloc did not offer any criticisms of the U.S. proposal. Both the U.S. and the Eastern bloc had relied on the Declaration as the bases for their drafts. Abram and Ferguson’s calculated risk had been worth it.

Peter Calvocoressi, on the other hand, apologized that “he had not attempted to deal [with special measures] in his text although he would be open to suggestions on the point.” Privately, London cringed over special measures, and for that matter, the very notion of a comprehensive race treaty. The British Foreign Office archives are replete with defeatist

127 Ferguson, supra note 65, at 75.
128 W.E.B. DU BOIS, SOULS OF BLACK FOLK (1903). Ferguson additionally claimed that “[s]eparate but equal … was the attempt, an attempt principally attributable to a Negro, Booker T. Washington, to work out some social theory for the purposes of dealing with a new social organization based on something other than human slavery.” Washington’s effort was “not only totally unsuccessful but also positively damaging to the very drive for human rights or civil rights within the country.” Howard Law School, according to Dean Ferguson, “created the alternative to the articulations of Booker T. Washington—working within the constitutional system, as we know it, a scheme was devised for real equality . . . .” Ferguson, supra note 21, at 456.
129 Ferguson, supra note 65, at 75.
memoranda admitting that the empire would be unable to immediately cease or remedy nearly all manifestations of racial discrimination. “Pressure may be put on H.M.G. (Her Majesty’s Government) to take concrete measures in some of the colonies,” one memo to Calvocoressi warned. “In that case we should have to argue that the circumstances were not appropriate or that the provision did not apply.”\(^{132}\) The problem was that the circumstances for implementing special measures in the empire were entirely appropriate. There was no hiding that racism was endemic to British rule. In parts of the South Atlantic, Indian, and Pacific, the crumbling empire still clutched tightly to some its remaining colonial territories while abdicating legal responsibility for colonial restrictions on formal rights, widespread poverty, and ruthless crackdowns on popular uprisings in indirectly ruled lands. In the North Atlantic, post-war immigrants in Britain found discrimination in employment, education, public accommodations, and housing in abundance. The British government underwrote racial discrimination throughout the world. The U.N. had adopted Article 2 of the Declaration to force men like Calvocoressi openly and honestly confront the complex and devastating forms of racism his country perpetuated.

Given the similarities between the U.S. and the Soviet-Polish drafts and the absence of a British-Italian proposal on special measures, this portion of the Convention debates was more focused and substantive than the debates on several other draft articles. In turn, the Chairman’s decision to select the U.S. draft as the basis for discussion became far less controversial than it might have otherwise been. The Sub-Commission’s experts began to pore over Abram and Ferguson’s work.\(^{133}\)

A. Defining Racial Discrimination

There are consecutive articles expressly protecting special measures in the Convention. None of the drafters would have anticipated that Articles 1 and 2 would contain language so closely related. Article 1 in each of the drafts then before the Sub-Commission defined racial discrimination. These drafts did nothing more. Articles 2 of the U.S. and Soviet-Polish drafts focused on special measures.

Yet, as the Sub-Commission prepared to transition from Article 1’s discussion to Article 2’s, Mohammed Mudawi, the often animated expert from Sudan, interjected. “In some African countries small backward groups were given preferential treatment by legislation,” Mudawi observed, breaking the momentum of the debate. He recommended that “the article in which racial discrimination was defined should also include a statement to the effect that preferences designed to assist backward groups within a country did not constitute racial discrimination.”

Mudawi’s concerns about the problem of reverse discrimination claims were legitimate. He had seen how European disdain for Africanization programs was tearing at new nations’ cultural fabric. Mohammed Awad, the expert from the United Arab Republic, voiced similar concerns. He “was grateful to Mr. Mudawi for raising the problem of groups which the State

\(^{132}\) Draft Convention on Elimination of All Forms of Racial Discrimination (1964) (on file with National Archives, Kew, United Kingdom, Population and Discrimination: Sub-Commission on Discrimination, FO 371/178331).

had to favour in order to ensure their integration into the life of the country.” Charges of reverse
discrimination were indeed serious, and “[t]he Sub-Commission must be very careful, however,
to phrase any provision on that point in such a way to leave no opportunity for abuse.”134 Other
Sub-Commission members followed. Francesco Cuevas Cancino of Mexico, Vieno Vitto Saario
of Finland, and Morris Abram all saw no problems with Mudawi’s suggestion.135

Boris Ivanov joined the fray. The Eastern bloc’s draft was not the Sub-Commission’s
primary text; nevertheless, Ivanov found reason to “point out that the text which he and Mr.
Ketrzynski had suggested contained at the end of the article 1, paragraph 1, an essential element
in the definition of discrimination.” Ivanov then read the Sub-Commission his draft article,
reciting it word for word. He had pulled from the Declaration and could have easily referenced
the Declaration itself. He might have also cited the U.S. who had used similar language. He
could have said nothing, because his draft was not the primary text. Yet, Ivanov spoke at length
about his draft. “As such measures were usually designed to place such groups on an equal
footing with other sectors of the population which might be more advanced from educational or
other points of view,” Ivanov plodded through his argument, “the formula he had quoted should
have the effect of ensuring that such measure could not but be in accordance with the
convention.”136 The former political science professor’s analysis might have been compelling to
certain experts, but his self-righteousness blunted his ability to contribute meaningfully to the
debate. It was this quality that further distanced him from his peers. None of the other experts
even replied to his suggestion.

With a major legislative change proposed by Mohammed Mudawi, the Sub-Commission
shoved the debate into a working group. The Sub-Commission’s working groups met outside of
the Sub-Commission’s formal sessions. Members could avoid the U.N. formal rules for the Sub-
Commission and hash out their real differences. These conversations were deeply ideological,
often indecorous, and perhaps, most important, off the public record. Moreover, many of the
Sub-Commission’s racial experts took themselves and their U.N.-designated titles quite
seriously. Ivanov was an exemplar. Constituting a working party, the State Department noted in
a letter to Abram and Ferguson, was an efficient strategy to make headway in the Sub-
Commission’s ambitious agenda, because working parties “avoid[ed] at least a part of the usual
oratorical …argumentation characteristic of plenary meetings.”137

During the working group’s meeting, a flurry of amendments were produced, but
essentially, the working group reconfigured the Abram’s text to stress Mudawi’s point. There
was one final change. Abram accepted a friendly amendment from Arcot Krishnaswami, the
expert from India. Krishnaswami requested that Abram include the word “shall” in the revised
text, because the stronger language would place clearer limits on reverse discrimination claims.
Abram happily accepted the amendment.

134 U.N. ESCOR, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 16th Sess.,
135 Id.
136 U.N. ESCOR, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 16th Sess.,
137 Guidance Paper, supra note 20, at 3; Letter from Rachel Nason to Morris Abram (Dec. 20, 1963) (on file with
MARBL, Abram Papers, Box 94, Folder 9).
The revised text read:

Measures giving preference to certain racial groups for the sole purpose of securing adequate development or protection of individuals belonging to them shall not be deemed racial discrimination, provided however that such measures do not, as a consequence, lead to maintenance of unequal or separate rights for different racial groups.\textsuperscript{138}

**B. Special Measures, Act 2**

For the Convention’s debates on Article 2, the Sub-Commission returned to Article 2 of the U.S. draft.\textsuperscript{139} During this meeting, Clyde Ferguson stepped in for Morris Abram, who had left the session for a court appearance.\textsuperscript{140} Three major themes dominated the negotiations: the obligation to engage in special measures, reverse discrimination, and the development discourse itself.

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Francesco Capotorti and Peter Calvocoressi occupied one end of the ideological spectrum. The Italian racial expert assured his peers that he believed in non-discrimination; however, he resisted the entire idea of this article. “Such protection could be achieved,” he bid, “without special concrete measures taken for that purpose.”\textsuperscript{141} He surely recognized that his position was widely unpopular on the Sub-Commission. He thus went on the record, resigning that if the Sub-Commission were to include special measures in the Convention, the special measures should be “permissive” at most. His close colleague, Peter Calvocoressi too “felt that the paragraph on special measures should be permissive rather than mandatory.” Yet, Calvocoressi offered a more disturbing proposal: “the proper place for [special measures] …was in the preamble.”\textsuperscript{142} If the article on special measures were tucked away in the preamble, the provision would not have any binding effect when the Convention was ratified. Special measures would be ornamental. It was the type of proposal that undoubtedly had contributed to the Britain’s sordid reputation in the human rights world.

Arcot Krishnaswami was repulsed. The former member of Parliament and lawyer from Madras had spent much of his life watching human rights battles. His father was one of the architects of the U.N. Charter. He confronted colonialism that day all over again. “Where

special measures were concerned,” Krishnaswami slammed, “it was not enough to define them in article 1 of the draft convention.” He wanted more. “A definite provision should also be included calling on states to eliminate social injustices and redress the errors of the past by aiding underprivileged groups.”143

Krishnaswami thanked Ferguson and Abram for producing a “highly desirable” draft, a text with perspectives he “much preferred” over Mr. Capotorti and Mr. Calvocoressi’s. He was enthusiastic about the flexibility in the text which permitted the usage of special measures in “appropriate circumstances.”144 He had just one request for Ferguson: amend the U.S. draft of Article 2 to replace the word “may” to “shall” in the first sentence of their article. It was similar to the request Krishnaswami made to Abram during the Article 1 debates.

Mohammed Mudawi “strongly supported Mr. Krishnaswami’s proposal.” He agreed that the amendment to the U.S.’s article would strengthen the Sub-Commission’s draft Convention. It would at the same time the amendment would call attention to the necessity of special measures to address past and continuing discrimination. “Such a clause would have the effect of reminding the colonialists that they should help the colonial peoples not only in order to reduce the gap separating them,” Mudawi publicly shamed Capotorti and Calvocoressi, “but also in order to prevent such imbalance from being perpetuated in the world.”145

Clyde Ferguson, like Morris Abram, accepted the friendly amendment. He declared that his goal had always been “to put an end to the injustices committed in the past against particular groups.” He thanked his colleagues, and the amendment returned the U.S. draft to the original language in the Declaration.146

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The Sub-Commission revisited the issue of “reverse discrimination” through the lens of South African politics. While the Sub-Commission’s strictures prohibited discussing issues within a specific country, South Africa was the clear exception. In fact, Article 3 of the draft Convention explicitly addressed apartheid. The Sub-Commission’s experts tended to single out apartheid as the ultimate form of racism. Focusing on apartheid allowed Sub-Commission members to insulate their countries from more thorough inspections of their continuing problems with racism—inspections which might lead to international embarrassment. South African politics also served as a litmus test for the morality and efficacy of a racial proposal.

This problem of South Africa entered when Francesco Cuevas Cancino proposed that the U.S. drop the second sentence in its draft. The sentence read, “These measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups.” Clyde Ferguson and Mohammed Mudawi immediately opposed the amendment.

144 Id.
145 Id.
The second sentence’s purpose, Mudawi properly noted, “was to prevent states from oppressing certain racial groups under the pretext of protecting them and consequently from maintaining unequal rights for different racial groups. That was the attitude adopted by the Government of the Republic of South Africa.” Ferguson coupled his comments with Mudawi’s. The U.S. member reasoned that the article’s second sentence “was also designed to prevent a state from taking only half-measures for the development of the groups concerned which would actually be a return to the former discriminatory practice.” Krishnaswami wholeheartedly agreed with the previous speakers. “A government could continue to keep certain racial groups separate from the rest of society under the pretext protecting them,” the Indian expert stated. “For example, it was known that the educational measures which the South African government had taken with regard to the Bantu had the result of separating them more sharply from their fellow countrymen.”

While discussion on this amendment soon ended and the U.S. draft was unchanged, something else was changing: the image of America on the Sub-Commission. The U.S. had been reviled during last year’s Sub-Commission session. Yet, just one year later, the U.S.’s motives for a particular draft were not at issue, and the U.S. led debates were incredibly swift. America could not be like South Africa, at least the logic appeared to be in the Article 2 debates, because America had integrated the principles of the Declaration into its diplomacy. Once U.S. officials realized how expansive the concept of affirmative action was and how the ideas percolating from the civil rights movement were in conversation with the cutting-edge ideas in the “developing” world, U.S. was able to leverage the ingenuity of the movement and the goodwill the Declaration had already generated to advance U.S. interests.

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Lastly, the Sub-Commission wrestled with the very notions of “backwardness” and “underdevelopment.” This concern for the stigmatic effects the developmental discourse came from an expert some on the Sub-Commission would not have guessed: Arcot Krishnaswami. The Indian Constitution classified historically disadvantaged groups as “backwards” and provided “backwards” classes with reservations. The member from Madras had a different view of the terms “backwards” and “underdeveloped.” Both, for Krishnaswami, were “epithets.”

It was an incredible exercise of Krishnaswami’s independence as expert. His home government had nominated him, like his peers, to the Sub-Commission. He was now shaming his home government’s constitution on the world stage. Indian officials later defended the usage of the terms “backwards” and “underdeveloped.” They argued that their terminology reflected the Indian government’s recognition that caste discrimination had not allowed disadvantaged groups to reach their highest potential and that their language was in line with current U.N. practice.

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148 Id. See i.e. INDIAN. CONST. art. 15(4) (protecting “any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes”); INDIAN. CONST. art. 16(4) (protecting “any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State”).
Krishnaswami’s concerns were pushed to the side, and the Sub-Commission retained the
article’s developmental framework. José Inglés, the expert from the Philippines, the Sub-
Commission’s Chairman Hernan Santa Cruz, and Francesco Capotorti all highlighted that the
demonstrated the limitations of the U.S. strategy. As the U.S. was attempting to eradicate
racism, it perpetuated a troubling paradigm of development through its reliance on the
Declaration.

The Sub-Commission’s text read:

A State Party shall take special concrete measures in appropriate circumstances in
order to secure adequate development or protection of individuals belonging to
underdeveloped racial groups with the object of ensuring the full enjoyment by
such individuals of human rights and fundamental freedoms. These measures
shall in no circumstances have as a consequence the maintenance of unequal or

Article 2 was adopted. Abram and Ferguson felt vindicated. Rather than replicate many
of the diplomatic sins of the past and bow to the cynics on the Interdepartmental Committee, the
U.S. experts’ willingness to embrace the Declaration changed the tenor the Sub-Commission’s
debates. It shielded the U.S. from greater criticisms, and the U.S. was able to develop alliances
with the most vocal experts from the Third World. Furthermore, the special measures provision
in the Declaration had been duplicated, which was the expected result, but the Americans,
and not Soviets, were steering the Sub-Commission’s discussions. It was a drafting coup.

V. We Shall Overcome

On January 30, 1964, Clyde Ferguson submitted a memorandum to the State Department
on behalf of both U.S. experts, analyzing each article in the proposed treaty. Abram and
Ferguson were pleased to report that “there is now a substantial legislative history regarding the
meaning and scope of several of the more critical terms used in the prohibitory sections.”\footnote{Comments by Dean Clyde Ferguson, Jr. (Morris Abram concurring) on Sub-Commission Draft Convention on the Elimination of All Forms of Racial Discrimination (Jan. 30, 1963) (on file with MARBL, Abram Papers, Folder 94, Box 9).}

Article 1 “sets forth the definition of racial discrimination,” Ferguson relayed back to
Washington. “In addition, it especially excludes preferential treatment of an underdeveloped
minority group from the definition of racial discrimination to the extent that special remedial
and protective measures are taken in the interests of such racial, ethnic or national groups.” This had
been one of Abram and Ferguson’s primary goals. If they wished to advance affirmative action
at home, they needed to ensure that affirmative action was not considered “discrimination in the
reverse” abroad.\footnote{Id.}
Ferguson subsequently examined the sunset provisions in Articles 1 and 2 in the memorandum. “It should be noted … that such special measures having as a purpose the securing of adequate development and protection of the minority, must not, as a consequence, lead to the maintenance of ‘unequal or separate rights for different racial groups.’” The issue of when a government should terminate special measures was nothing new. This issue had been identified in the tense, Interdepartmental Committee meetings. The challenge was determining when racial disparities had actually disappeared. “The definition does not address the problem of the criteria to be employed,” Ferguson remarked, “in determining when such measures would constitute ‘maintenance of unequal or separate rights.’”\(^{153}\)

Ferguson underscored that others in the U.S. and others, well before world leaders conceived the U.N., had confronted a similar question. He turned to U.S. constitutional law to make a subtle but incisive point. “The difficulty inherent in formulating such criteria is patent, for example, in the language of Mr. Justice Bradley in the \textit{Civil Rights Cases}.\(^{154}\)

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.\(^{154}\)

Less than two decades after ratification of the Thirteenth and Fourteenth Amendments and only eight years after the passage of the \textit{Civil Rights Act} of 1875, Justice Joseph Bradley had asserted that “[i]t would be running the slavery argument into the ground to make [the \textit{Civil Rights Act}] apply to every act of discrimination” in public accommodations. Ferguson’s reference to the \textit{Civil Rights Cases} intimated that the opponents of special measures were Justice Bradley’s political descendants. Most officials in the State Department would have not aligned themselves with the Redemption and Jim Crow-era Court. They believed that history would not look favorably upon that moment in the American history, and Ferguson’s shrewd analysis surely had to prick the consciences of some of his white counterparts. “In the international context the problem of determining when ‘protection’ becomes ‘favoritism’ is even more acute for the United States,” Ferguson opined. “Consequently, it is not at all clear as to who would be able to make an authoritative construction of the definition as regards the United States.”\(^{155}\) For Abram and Ferguson, the clauses on temporality in the Convention were tremendous successes. The Sub-Commission had retained special measures in its draft, and both texts encouraged societies to regularly re-evaluate the opportunities and outcomes for their various racial groups.

The U.S. experts’ strategy in the Sub-Commission became the blueprint for U.S. delegates who continued the Convention negotiations in the Commission on Human Rights, Third Committee, and General Assembly. In the guidance papers issued to U.S. representatives at each level of the treaty negotiations, there were no revisions or extensive comments on the

\(^{153}\) \textit{Id.}\(^{154}\) \textit{Id.}\(^{155}\) \textit{Id.}
special measures provisions. The State Department wanted the same result that Abram and Ferguson had desired. In the Department’s guidance papers, when the special measures provisions were being considered, officials simply wrote: “U.S. Supports.” 

The State Department congratulated Abram and Ferguson for effectively advancing U.S. interests during the Convention debates. They had faced an uphill battle given the nation’s racial turmoil in 1963, but “Morris Abram with Clyde Ferguson of Howard University as his alternate achieved remarkable success on all issues,” a Bureau of International Organizations memorandum beamed. The U.N. General Assembly soon adopted both articles on special measures in the Sub-Commission’s draft following extensive debates. The provisions became Articles 1(4) and 2(2), respectively, in the Convention, and the treaty was ultimately ratified with record speed.

After the Convention debates, Morris Abram gained greater prominence within the Johnson White House working on expansive civil rights programs, including affirmative action. “I have always supported affirmative action as an effort designed to seek out, to train, and to educate (often by remedial means) disadvantaged persons who would not otherwise acquire the qualifications necessary to make equality of opportunity a reality,” Abram remembered nearly two decades after his service on the Sub-Commission. “This was the clear purpose of the Civil Rights Act of 1964 and the EEOC when President Johnson offered me its first chairmanship.” Abram politely declined the President’s entreaty and remained in private law practice. Abram, nonetheless, continued to collaborate with the administration for the next several years, expanding the scope of affirmative action within the public and private sectors.

Clyde Ferguson cherished his advocacy on special measures for the rest of his unexpectedly short life. Several years before his death, he identified what he felt were his three most significant contributions to law. The first contribution he listed was “being one of the ‘founding fathers’ of the concept of affirmative action.” Ferguson had been able to help translate the pains, spiritual weariness, and aspirations of Fannie Lou Hamer and Diane Nash and Bob Moses into legislation which transformed both domestic and international law. None of the Sub-Commission’s delegates had ever been to the Mississippi Delta. Few had been to Congress. However, Ferguson, in his own way, had been able to bring small, yet meaningful pieces of the struggles behind America’s cotton curtain and in the halls of Washington to the U.N.’s often isolated drafting rooms. Making these connections, which spanned ideologies, law forms, geographies, and time, proved to be a remarkable feat.

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156 Position Paper, Commission on Human Rights (Mar. 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9); U.S. Positions on Articles (May 12, 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9); Agenda for Cleveland-Abram Consultation (Feb. 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9).
157 Memorandum from Joseph Sisco to William Stibravy (n.d.) (on file with MARBL, Abram Papers, Box 94, Folder 9).
158 Abram, supra note 35, at 257. Abram interestingly became a conservative in response to the development of the black power movement. He began to oppose many of the affirmative action policies and philosophies of remediation he had championed just a decade or two before. Id.
159 Clarence Clyde Ferguson, Jr. Biography, Confidential N.B. (on file with Harvard Law School Library, Clarence Clyde Ferguson Papers, Box 9, Folder 12).
Ferguson later elaborated on the chain of connections that made the transplants possible. “[T]here appears to be a very close relationship between the Convention and Civil Rights Act of 1964,” he wrote in an article on the Convention’s history. “This relationship is not wholly accidental; to a large degree, it represents the effect of U.S. participation as well as an international acceptance of the norms embodied in the Civil Rights Act.” He flagged several provisions in the Convention that “emanated from the U.S. civil rights experience.” He revealed that “two provisions in the Convention—Article 1(4) and Article 2(2)—derive directly from an opinion of the general counsel of the Civil Rights Commission in April 1963, which concerned the withholding of federal funds from certain states that were using those funds to aid discrimination in some sense.” Both articles stipulate that “state parties will engage in affirmative action when a determination is made that such action is warranted.”

Ferguson also pointed to the influence of race men, like Whitney Young, on his efforts to extend affirmative action’s reach. In a speech given during the Convention debates, Ferguson asserted that “we all know that the government has gotten to the point of accepting the principle that there is a responsibility, a governmental responsibility, that it will not use its governmental power to further segregation or discrimination.” Ferguson then went beyond the logic undergirding the Powell Amendment. “I would suppose that we will certainly see the expansion of the concept of the governmental responsibility for dealing with not only the negatives of removing those surviving attributes of color discrimination but also the positive. We are dealing now with the results of 300 years of deprivation and there is a positive obligation to make sure that that deprivation does not continue,” Ferguson virtually quoting Young, “what is quite clearly needed is a reverse Marshall Plan here in the to deal with this unfinished business …now for 300 years.”

Making that plan become a reality drove Ferguson for the remainder of his life. However, his accomplishments during the movement’s crescendo remained dear. After Congress passed the Civil Rights Act, the Sub-Commission’s 1964 session closed, and Articles 1(4) and 2(2) of the Convention were adopted, he was certain that he had changed the world forever.

One year later, Dean Ferguson sat in sunny breezes at Howard University’s commencement ceremony. Nearly 14,000 crowded the grassy quadrangle anchored by Frederick Douglass Memorial Hall and Founders Library—the site where a star-studded group of social engineers perfected the legal strategy which led to Brown. The university was approaching its centenary, and the day’s graduating class was the largest in the life of the storied institution. University president and NAACP attorney, James Nabrit, conferred honorary doctorates of law on three movement icons: Roy Wilkins, executive director of the NAACP; Charles Gomillion, dean of Tuskegee Institute and the lead plaintiff in the landmark case, Gomillion v. Lightfoot; and most notably, commencement speaker and U.S. President Lyndon B. Johnson. President Johnson seized the moment, delivering a powerful graduation address that has helped to define

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160 The former Howard Law Dean has been occasionally referred to as the “founding father of affirmative action” but his work in framing Articles 1(4) and 2(2) have not been recognized in the extant scholarship. See e.g. Jordan Paust, Race-Based Affirmative Action and International Law, 18 MICH. J. INT’L L. 659 (1997).
161 Ferguson, supra note 21, at 460-61.
the university’s history and the President’s legacy. As one graduate remembered, “It was the perfect backdrop for the President’s policy speech.” \(^{162}\)

Johnson declared, “This graduating class at Howard University is witness to the indomitable determination of the Negro American to win his way in American life.” And he was right. These students had come of age during the sit in movement that swept college campuses across America and had forced the nation to confront an inconvenient truth. “Our enemies may occasionally seize the day of change, but it is the banner of our revolution they take. And our own future is linked to this process of swift and turbulent change in many lands in the world,” the President submitted. “But nothing in any country touches us more profoundly, and nothing is more freighted with meaning for our own destiny than the revolution of the Negro American.” The President reminded the Civil Rights Acts of 1957, 1960, and 1964 and the pending Voting Rights Act of 1965 as evidence of America’s racial progress. This “long series of victories” illustrated that “the barriers to that freedom are tumbling down.” \(^{163}\)

“But freedom is not enough.” Johnson’s proclamation would ring for generations to come. “You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.” Johnson, cribbing from Dr. Martin Luther King, Jr. in *Why We Can’t Wait*, declared, “You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.” Johnson had been born in small town Texas at the turn of the century, but his commencement address at Howard, much like his legislative accomplishments, made the already larger-than-life President seem much bigger than his Southern background might suggest. \(^{164}\)

“There is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates,” Johnson continued. “This is the next and the more profound stage of the battle for civil rights.” “We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.” \(^{165}\)

Clyde Ferguson sat two seats behind President Johnson. For Ferguson, the President’s speech represented the rising tide of hope. His bright, silent smile, nodding head, and emphatic

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\(^{164}\) *Id.* Martin Luther King, Jr., *WHY WE CAN’T WAIT* (1964). King stated:

> Whenever this issue of compensatory or preferential treatment for the Negro is raised, some of our friends recoil in horror. The Negro should be granted equality, they agree; but he should ask for nothing more. On the surface, this appears reasonable, but it is not realistic. For it is obvious that if a man is entering the starting line in a race 300 years after another man, the first would have to perform some impossible feat in order to catch up with his fellow runner.

\(^{165}\) Johnson, *supra* note 162, at 635-40.
claps testified to this sentiment. It was a presidential address like none before in Ferguson’s lifetime and precisely the moment he and millions more had longed to witness.

President Johnson continued, “Therefore, I want to announce [today] that this fall I intend to call a White House conference of scholars, and experts, and outstanding …men of both races—and officials of Government at every level. This White House conference’s theme and title will be ‘To Fulfill These Rights.’” And when President Johnson announced the roster for “To Fulfill These Rights,” the President stacked the conference with civil rights celebrities, including Roy Wilkins, Charles Gomillion, Martin King, A. Philip Randolph, John Lewis, and Thurgood Marshall. Never before had so many race men had access to the White House.¹⁶⁶

But lost in the human rights historiography, President Johnson, following up on his Howard address, named two chairmen to execute the White House Conference: one white, one black. Morris Abram was selected as the white co-chairman. Clyde Ferguson climbed to Johnson’s short list as the black co-chairman but was edged out only after much deliberation.¹⁶⁷ “The auguries were encouraging,” Abram remembered. “The conference had been promised by Johnson, always aware of the moving finger of history.” During the conference, the movement’s leading figures issued a series of resolutions. One of the resolutions read: “The Senate should ratify the Convention on All Forms of Racial Discrimination.”¹⁶⁸ The U.S. signed the treaty in 1966 and ratified it in 1994.¹⁶⁹

Streaming rows of graduates, cloaked in black gowns and tassled caps, and their proud loved ones dressed in their Sunday best stood to their feet that day and applauded President Johnson for his moral courage. After the President ended his historic speech and shook the hands of Nabrit, Ferguson, and other nearby platform guests, the Howard University choir softly sang “We Shall Overcome.” It was one of the movement’s finest hours.¹⁷⁰

Conclusion

In 2003, Justice Ruth Bader Ginsburg, joined by Justice Stephen Breyer, authored a controversial concurring opinion in Grutter v. Bollinger. In the opinion, the Justices argued that the Convention provided persuasive authority for upholding the University of Michigan Law School’s affirmative action policies. Ginsburg wrote:

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¹⁶⁶ Id.
¹⁶⁷ Summary of Resolutions Presented during the Conference, Civil Rights during the Johnson Administration, 1963-1969, Part 4, Papers of the White House Conference on Civil Rights.
¹⁶⁸ Id.; Abram, supra note 35, at 154.
¹⁶⁹ When a state signs a treaty, the state’s signature indicates that it will consider and pursue ratification. U.S. human rights policies were changing under President Johnson, but crossing some frontiers were unfathomable. Lingering concerns over the Brickerism kept President Johnson from going further. The U.S. signed the treaty to showcase the its interest in advancing human rights and keep Soviet advances at bay while equipping the Johnson Administration, increasingly opposed by motley crews of isolationists and human rights skeptics, with the argument that a signed Convention was not actually U.S. federal law. See Racial Discrimination Convention (Sept. 22, 1966) (on file with Lyndon Baines Johnson Library and Museum, Box 14, Folder IT 47-26 12/16/65 – 1/20/67).
The Court’s observation that race-conscious programs ‘must have a logical end point,” …accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994 …endorses “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.” …But such measures, the Convention instructs, “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.”171

The backlash to the Justices’ Grutter concurrence was fierce. Then-Senator Jeff Sessions rebuked Justice Ginsburg for citing a “foreign” source to interpret the U.S. Constitution. “This is contrary to our American legal system,” Sessions fumed during the confirmation hearing for Supreme Court nominee, Judge Samuel Alito. “A judge’s duty is to apply the plain meaning of the words, if there is some dispute about it, to look to the legislative history or maybe the background of the bill from an American perspective.” Sessions somehow transformed Alito’s confirmation hearing into a series of ad hominem attacks on Justice Ginsburg and a far-reaching lecture on the error of using international law in constitutional interpretation. “In Grutter v. Bollinger in 2003,” the Selma native’s slow drawl seemed to thicken, “Justice Ginsburg looked outside the Constitution to make her decision, noting with approval that the International Convention on the Elimination of All Forms of Racial Discrimination allowed for such discriminatory practices or ‘maintenance of unequal or separate rights for different racial groups.’”172

“This is a question under our Constitution which says that every American, whether they are of minority or majority ancestry or background, is entitled to equal protection of the law. That raises some questions about quotas and matters of that nature,” Sessions contended, flush with indignation and refusing to acknowledge the Court’s actual holding in the case. The senator then posed two rhetorical questions. “So in her decision, did Justice Ginsburg look at our Constitution, which guarantees every citizen, regardless of their race, equal protection of the law? What did she look at?” His answer? “She considered the International Convention on the Elimination of All Forms of Racial Discrimination.” Sessions concluded, “That is not a basis for an American Justice to lay an opinion.”173

172 Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary, 109th Cong. 370 (2006).
The House Judiciary Committee conducted a hearing on the “appropriate role of foreign judgments in the interpretation of American law” shortly after the *Grutter* decision. During a session marked by testy exchanges, Congressman Jim Ryun of Kansas, characterized Justice Ginsburg’s concurrence in *Grutter* as a “threat to the oldest democracy in the world.” Ryun’s line of attack mirrored Sessions’. “The disturbing trend of the Judicial Branch utilizing foreign and international laws in deciding legal cases must come to an end. I firmly hold that this practice is dangerous and undemocratic,” the congressman shot. “The Court’s usage of international law and opinions in decisions is completely incompatible with our democratic values and the proper role of the courts in our constitutional system. The American people have had no opportunity to vote on any of these laws, and, in fact, many international laws are often developed by United Nations bureaucrats, without any democratic input.” Ryun went further. “International law has no more place in our courts,” the Republican representative proclaimed, “than foreign countries have in our elections.”

The Justices, however, often found passionate defenders of their concurrence in *Grutter*. Some scholars ripped the Justices’ cynics for being unduly alarmist and admonished the so-called sovereigntists to reread Articles II and VI of the U.S. Constitution. Others extolled the virtues of considering international law in U.S. constitutional adjudication, highlighted America’s racialized history of resistance to international law, and carved out jurisprudential theories to justify the controversial *Grutter* citation.

But while commentators traded barbs over the propriety of citing the Convention, the Justices’ critics and supporters missed a crucial point. Americans had led the treaty’s drafting. The Convention wasn’t so foreign after all. The international provisions the Justices’ cited in *Grutter* were deeply American and products of the nation’s push to modernize domestic and international race relations. Nearly a half century after the Sub-Commission’s Convention debates, Justices Ginsburg and Breyer were giving life to many of Abram and Ferguson’s dreams of freedom.

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